CROSS EXAMINATION OF DEFENDANT AND DEFENDANT'S EXPERT

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I. INTRODUCTION

Wouldn't it be great if we could just yell "liar, liar, pants on fire" whenever we successfully impeached a witness on cross-examination? Well, we can't. But if we successfully impeach a witness through the use of appropriate and effective cross-examination techniques, the jury will think these words without our ever having to say them. Proving that an adverse witness is a liar does more than merely affect the credibility of the impeached witness. A lying witness hurts the credibility of both the party by whom he is called, and the lawyer who wanted the jury to rely on him.

This paper will not specifically focus on the *Blackmon v. Norfolk Southern* case tried by my firm in February of this year, but instead will focus on cross-examination with a few examples from the *Blackmon* trial inserted throughout. While this paper focuses on the use of cross-examination to impeach witnesses, it must be kept in mind that without direct examination to prove the case and to lay the factual foundation upon which most impeachment by cross-examination rests, the cross-examination is meaningless. This is because, although cross-examination is important, it is just one aspect of a multi-part trial. Generally, the important parts of a trial include jury selection, opening statements, evidence, closing arguments and the jury charge. Of these, the most important is the evidence. Evidence is where the truth about the case will be found. Evidence must come in through witnesses. The primary complicating factor in

the search for the truth in a jury trial is the use of these witnesses. Lawyers have complete and total control over the opening and the closing arguments, some control over jury selection and the jury charges, but, at best, can only control half of the process of presenting evidence at trial through witnesses. All lawyers can do is ask questions. Unfortunately, we often have to rely on nervous, amateur, confused, and inarticulate witnesses to answer these questions and provide the facts that constitute evidence. How we go about getting the facts from the psyches of the witnesses to be effectively understood by the fact finders - jurors who are also nervous and confused - determines whether success or failure will be achieved.

This testimony which constitutes the evidence must be obtained from witnesses through the use of direct examination of our own witnesses and cross-examination of opposing, often hostile, witnesses. This questioning of witnesses, whether on direct or cross-examination, is an art that can only be mastered through a combination of preparation, practice, and good luck. "Direct examination disdained by text writers and ignored by students, is the orphan of trial strategy. Cross-examination, celebrated and glorified, is the favorite of trial seminars. The cross-examination is the art of destruction, direct is the art of construction." (Henry G. Miller of the New York Bar).

II. CROSS-EXAMINATION

Before focusing on impeachment techniques, a brief overview of cross-examination in general is in order. Cross-examination is sometimes exciting, fast, and fun to do - and watch. On other occasions, it is tedious and seemingly plodding. With proper preparation, a carefully laid plan, and some good luck, the right technique will be chosen to accomplish the goal of the examination. However, as noted above, cross-examination is not as important as direct examination, and the advocate who expects to score big points during cross-examination instead of direct will be lucky to survive directed verdict. Effective cross-examination, like effective direct examination, is 10% inspiration and 90% perspiration.

A. PREPARATION

The most important part of preparing for cross-examination is to be ready to "just say no" to cross-examination. If nothing can be gained, let the jury know that the witness is nothing important - not even worth questioning. On the other hand, if the witness can be *hurt* by a successful attack on his credibility, or the case *helped* by the agreement of the witness with certain aspects of the case, or if additional helpful evidence can come in through the witness, then cross-examination is called for. In determining whether or not to cross-examine, ask yourself these four questions, one of which must be answered in the affirmative if cross-examination is to be attempted.

(A) HURT - Has the witness really hurt you in a way that you can fix?

(B) IMPEACHABLE - Is the witness impeachable in a way that will hurt the opponent's case or help your case?

(C) HELPFUL - Can helpful information be obtained from the witness that will help your case?

(E) OTHER - Is there some other *very important* reason for cross-examining the witness?

If the answer to each of these questions is no, then the witness has not hurt you, and cannot help you, therefore, do not cross-examine him. The Honorable Marion T. Pope once wrote that "no matter how many books you read, seminars you attend, or cases you try, you will never be an effective practitioner of the art of cross-examination until you learn to cross-examine with a purpose." No rule of cross-examination could be more true. A cross-examination without a purpose causes three bad things to occur - (1) it wastes the jury's time; (2) it presents the possibility for the witness to inflict additional damage; and (3) it allows the opponent who may have forgotten to ask some crucial question, an opportunity to do so on re-direct. So how do you prepare to conduct a cross-examination with a purpose?

i. Know the case

There is no substitute for knowing the case inside and out. Witnesses, even experts, rarely know the entire case - they just know their part. As a result, the attorney who knows the

entire case and what every witness knows, or should know, has a real edge in cross-examination. Equally important to knowing the facts of the case is to know the witnesses and what they can or cannot do for your case. Prior to trial, read everything in the file - even old notes and correspondences. Read all of the depositions and witness statements. Given the tremendous amount of resources available to the defense and plaintiff's bar, there is no reason not to have multiple depositions of an expert. Read all of the notes taken during depositions. Read the jury charges, the pleadings, discovery responses and the pretrial order. Know the purpose of the witness from the other side's point of view and know whether, and how, the witness fits in with your own case.

ii. Know the witness

You must be familiar with witnesses who are going to be cross-examined. Discover how they will react to cross-examination and what their strengths and weaknesses are. This can be accomplished in a variety of ways. Certainly there are formal depositions, but there are also other ways such as interviews, the use of deposition libraries and data bases, and old fashioned calling around to other attorneys and experts who may have retained, deposed, or testified against them.

If you depose a witness, think about what you are doing before you so thoroughly tip your hand that there is little surprise left for cross-examination. Instead, focus on what they know, their sources of information, and if they are an expert, their methods of formulating their opinions. Additionally, particularly in cases involving expert scientific testimony, determine the methodology used by the expert in the formulation of their opinion because if all experts agree on the methodology, then regardless of the difference of opinions reached, you can use this agreement as to methodology to ensure that your expert will at least meet the threshold requirements to testify. Impeaching an expert during their deposition will certainly take away any possibility for surprise at trial.

It is usually impossible, and certainly not practical or advisable, to depose every witness in a case. A simple interview is often preferred. Do not hesitate to interview a witness when it is

ethical to do so. It is amazing how lawyers believe that the only way to talk to a witness after a case starts is by deposition. This is ridiculous! The use of a deposition to interview a witness guarantees that the other side will be there and learn what the noticing party learns. Instead, consider having the witness come to your office and take a detailed statement, before a court reporter, without even inviting the other side. Additionally, while you must be concerned about contacting a witness represented by counsel, you should also know that just because a witness used to work for the defendant does not mean the defendant has the only access to the witness. In fact, a lawyer may interview former employees of a represented corporate opponent so long as the former employee consents after the lawyer fully explains the lawyer's purpose.[1]

> DR 7-104(A)(1) and Proposed Rule 4.2 are not intended to protect a corporate party from the revelation of prejudicial facts but rather to preclude interviewing those corporate employees who have the authority to bind the corporation. [Instead, the] clear purpose is to foster and protect the attorney-client relationship and not to provide protection to a party in civil litigation nor to place a limit on discoverable material. The comment language[2] . . . allows for communications with an agent or employee who has his/her own attorney without notice to the organization, corporate entity, or its attorney. This language defeats the purpose advanced by defendant . . . .[3]

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[1] Formal Advisory Opinion Board of the State Bar of Georgia, 94-3; Opinion 87-6; Standard 47; Rule 4-102; ABA Rule 4.2 (9/9/94).

[2] The comment language referred to is the official comment to Proposed Rule 4.2. That language is as follows: "If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule." This comment was quoted in the State Bar of Georgia Formal Advisory Opinion No. 87-6 (870R2).

[3] *DiOssi v. Edison*, 583 A,2d 1343, 1345, 1346 (Del. 1990) (footnote added).

This interpretation is consistent with State Bar of Georgia Formal Advisory Opinion No. 87-6 (87-R2) which interprets Georgia's rules of conduct. "The Code of Professional Responsibility, like a statute, should be construed so as to carry into effect the intent of the governing body which enacted it. The construction given should be in harmony with the policy of the law and must square with common sense and sound reasoning."[4]

State Bar of Georgia Formal Advisory Opinion No. 87-6 (87-R2) cites with approval ABA Informal Opinion 1410 (1978). That opinion answers the question of whether a plaintiff can interview employees of a corporate defendant to see what facts they know which would shed light on the plaintiff's claims. The opinion provides that:

> ***[g]enerally*** *a lawyer may properly interview witnesses or prospective witnesses for opposing sides in any civil . . . action* ***without the prior consent of opposing counsel*** *- unless such person is a party . . .* [and] no communication with an officer or employee of a corporation with the power to commit the corporation in the particular situation may be made by opposing counsel unless he has prior consent . . . .

(emphasis added). Thus, the general rule is one allowing communications with the employees of a corporate defendant. It is acceptable to interview the ex-employees of a corporate defendant.[5]

DR 7-104(A)(1) and Proposed Rule 4.2 only prohibit an attorney from interviewing employees of a corporate opponent, when the corporate opponent is represented by counsel, *if* the persons sought to be contacted are members of one of the following two groups:

(1) an officer, director, or other employee with authority to bind the corporation; or

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4 *In the Matter of Dowdy*, 247 Ga. 487, 492 (1981) (citations omitted).

5 The Formal Advisory Opinion Board of the State Bar of Georgia has opined at 94-3 9/9/94 that a lawyer may interview former employees of a represented corporate opponent so long as the former employee consents after the lawyer fully explains the lawyer's purpose. Opinion 87-6; Standard 47; Rule 4-102; ABA Rule 4.2.

(2) an employee whose acts or omissions may be imputed to the corporation in relation to the subject matter of the case. For a person to be bound by the tortious conduct of his agents and servants, there must be tortious conduct by them.[6] If the servant or employee is not responsible for any tortious conduct, neither will be the principal unless it has independent tortious acts.[7]

An interview can even be conducted in the hallway of the courthouse. If there are two lawyers representing the plaintiff, while one is in the courtroom, there is nothing to stop the other from going out into the hallway and interviewing the defendant's next witness. If you do not have co-counsel available, have a paralegal informally interview witnesses as they wait to testify.

iii. Know the law that governs cross-examination

Cross-examination differs depending on the jurisdiction. Know the legal limits. Not only is it necessary to know the legal limits, but each court seems to have its own rules on how aggressive a lawyer can be and how much testifying he can disguise as a leading question. If unfamiliar with the court, go and watch a portion of a trial to get a feel for the judge's demeanor. Just as rhythm and pace are essential for direct examination, rhythm and pace are similarly important to a successful cross-examination. If the court and opponent both interrupt the cross-examination with objections, there is no hope for a smooth rhythm, a steady pace, and an effective effort.

a. Georgia Law.

The right to a thorough and sifting cross-examination shall belong to every party as to witnesses called against him.[8] This right is considered a substantive right and extends to all

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6 *See*, O.C.G.A. §51-2-2.

7 *E.g., Townsend v. Brantley*, 163 Ga. App. 899 (1982).

8 O.C.G.A. §24-9-64.

matters within the knowledge of the witness.[9] Of course, the subject of the cross-examination must be relevant.[10]

When conducting a cross-examination of a witness, it is not a waiver of any objection made during the direct examination of that witness if the objected to subject is covered. Georgia law provides that "if on direct examination of a witness objection is made to the admissibility of evidence, neither cross-examination of the witness on the same subject matter doing the introduction of the evidence on the same subject matter shall constitute a waiver of the objection made on direct examination."[11] However, this does not mean that a line of questioning that was not objected to can be initiated on cross-examination without having waived the objections to admissibility of the testimony.

b. Federal Law.

Whereas in state courts there is a guarantee of a thorough and sifting cross-examination, in federal courts "cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination."[12] Because the scope is within the discretion of the judge, it is often a good idea to get a ruling, at the bench, before going into a topic not covered on direct to avoid having the flow of the cross-examination broken by sustained objections. On the other hand, it is sometimes best to just jump right into the new subject and hope for the best. Keep in mind that there is nothing to prevent you from calling the witness in rebuttal for purposes of cross-examination if the court seeks to limit the scope of your examination.

iv. Listen to the answers

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9 *The News Printing Co. v. Butler,* 95 Ga. 559, 22 S.E. 282 (1894).

10 *Palmer v. Taylor*, 215 Ga. App. 546, 451 S.E. 2d 486 (1994).

11 O.C.G.A. §24-9-70.

12 Fed. R. Evid. 611(b).

To conduct a proper cross-examination, you must be a good listener. First, one must carefully listen to the direct examination. Second, care must be taken to listen to the answers to your own questions. Listening to the answers of a cross-examination is not the same as actually caring what the answers are. As noted, in cross-examination, though it is important to know what the answer will be, that does not mean that the answer is always more important than the question.

a. Answers to Direct Questions.

The answers to the opponent's direct examination questions must be carefully considered. Take notes and mark the areas that need to be followed up on in cross-examination. Before beginning cross-examination, number the marked topics so that the cross-examination will have the most force and impact. Insert these topics into any pre-prepared outline prepared for that witness. This also serves to put together several related topics which were separated during direct examination. Don't hesitate to the have the court reporter read back portions of the direct.

b. Answers to Cross-Examination.

Cross-examination, like direct, is not conducted in a vacuum. There are two primary participants - the lawyer and the witness. While the answer is not always as important as the question, it must be heard, understood, and reacted to. Often witnesses begin moving in the direction of the questions and more open-ended questions can be used if the examiner is conscious of the witness's response. Conversely, there are witnesses who are so hostile that they will disagree with everything on cross-examination - even if that means recanting portions of their own testimony!

Similarly, lawyers must not allow a witness to avoid answering the question. The witness will obfuscate, vacillate, and complicate, but they will not answer. If the question calls for a yes or no, insist on the yes or no before allowing the witness to explain. Do not hesitate to write a question on the board to ensure that the witness and jury know the question that you want answered. Often it is a good idea to elicit a simple agreement from the evasive witness: "Mr. Witness, before we proceed any further can we agree that if an answer calls for a yes or no that

you will first answer yes or no before explaining? If that sounds as fair to you as it does to me, lets see how it works."

B. DECIDE ON GOALS

There must be a purpose for every cross-examination. If counsel is prepared, they will pretty much know what they can hope to get from the other side's witnesses before they testify.

i. Know your goals

There are several goals that are relevant to cross-examination and lists of cross-examination goals are legion. However, when all is said and done, there are only two basic goals in cross examination - (1) to impeach the witness or; (2) have the witness help your case. If the witness is unimpeachable and cannot help your case, do not cross-examine him. **HIHO, HIHO**, be brave and just say no! Of these, impeachment is the most important and the only one discussed in this paper.

a. Impeachment.

Cross-examination for purposes of impeachment is the most important reason for cross-examining a witness. After all, if the witness can be shown to be biased, or incompetent, or to have simply made up his testimony, you not only hurt that witness but the entire case of your opposition.

The late professor Erving Younger described nine possible ways to impeach a witness on cross-examination. He divided these into three groups. The first group relates to competence. Within this group, he includes the following subsets: (1) oath; (2) perception; (3) memory; and (4) communication. Oath and communication are rarely successful impeachment tools. It is the rare witness indeed who will testify that they did not understand their oath or who cannot communicate. However, perception and memory can be effective impeachment topics, but only if the examiner does not ask too many questions. If too many questions are asked, there is a likelihood that the witnesses' recollection will be refreshed by the very act of the questions. The use of prior depositions and statements are used to impeach memory as well as the simple passage of time. When relying on the passage of time as a tool to show memory problems, point

out details that the witness does not remember. If notes such as a police report or investigation report were created at the time of the event, confirm that the purpose of the notes was to memorialize the event to aid in memory and that if it was important, it would be included in the witness' notes. Ask the witness to recall the day before or the day after or other similarly recorded events. However, before asking any question, make sure you already know the answer the witness will give.

The famous cross-examination of the witness to a car wreck who was one mile away cannot be forgotten. After the witness testified that he was one mile away but was certain the light was unquestionably red, the cross-examiner, hoping to attack the witness' perception, asked this fatal question "If you were one mile away, you couldn't possibly tell that the light was red, could you?" To which the witness replied "Of course I could. I was in the telescope store looking through the 5000X telescope they have set up there when I saw the whole thing. I was marveling to my wife how I could even read your client's license plate numbers."

The second group of impeachment techniques described by Professor Younger includes (1) bias/prejudice/interest/corruption, (2) conviction of a crime, (3) prior bad acts, (4) prior inconsistent statements. This group is similar to the prior group except that care must be taken to ensure that it does not look like you are beating up the witness. This is especially true when using crimes and bad acts as impeachment techniques. It is one thing to use criminal conduct to impeach a thug, it is another thing altogether to use an old conviction to impeach someone who has clearly turned his or her life around.

When cross examining the defendant's company officials, a good start is often to confirm right away that they are company officials and that if the event complained of occurred as you allege, it would reflect badly on them. This establishes a bias toward protecting themselves and their company.

Prior inconsistent statements can be found in depositions in the case being tried and in prior cases. Call around town and get copies of as many prior depositions as possible. Searching for this information can sometimes take a lot of time, but is worth the effort. For example, in a

toxic tort case, after reviewing more than five thousand pages of testimony, a quote was found in which the defendant's in-house toxicologist claimed the chemical at issue was as safe as milk. This ridiculous testimony contrasted greatly with his subsequent testimony that the chemical should be handled with great care. The most common method of impeachment is with depositions. Know how to lay a foundation as to time, place, person, and circumstances before attempting to cross-examine with a deposition.[13]

Professor Younger's last group consists of a single method which is to call another witness who testifies that the witness who is sought to be impeached is not credible. However, it is rarely workable; that is, that the testimony is inconsistent with their present trial testimony.

The great trial lawyer and teacher, Howard Nations, succinctly writes about impeachment as follows:

> If the witness, confronted with your question "Have you ever testified any differently?" answers "no," the stage is set for the most interesting and dramatic aspect of the trial: the verbal jousting between you and the witness as you attempt to impeach the witness. However, unless you handle the situation properly, the witness may escape impeachment and leave you looking foolish in the eyes of the jury, thereby damaging your client's case. Your absolute control over the questioning is essential to impeachment. The complete avoidance of open-ended questions is crucial. In the ideal scenario, you will control the witness through a series of carefully crafted questions that, as the jury watches, lead inescapably to the lie emerging from the witness's lips.

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[13] This foundation work is necessary in state court pursuant to O.C.G.A. §24-9-83. It is not

When the witness responds "no" to the inquiry as to whether he has ever testified any differently, you must meet the predicate for impeachment by identifying the time, place, and circumstances of the prior inconsistent statement. At this point, you should approach the witness and stand next to the witness box so as to cause the witness to turn and directly face the jury. Then inquire, "Mr. Jones, on this previous sworn testimony I asked you the following question, `what color was the light as you entered the intersection'? Please read to the jury your answer under oath at that time." Hold the deposition in front of the witness so that the witness is looking down to read the answer, and the jury has the opportunity to look directly into the witness's eyes as he repeats the prior sworn inconsistent testimony. You must retain control at this point by allowing the witness to read only the specific answer from the deposition and not give any further explanation. If this is done properly, the jury is now fully aware that the witness has given prior inconsistent sworn testimony, and the witness is successfully impeached. At this point, counsel asking one too many open-ended questions or an attempt to reiterate the impeachment material, either of which may allow the witness to explain the inconsistencies and nullify the impeachment, loses many impeachments.

One impeachment, on a major point, is all that is needed to destroy the witness's credibility in the eyes of the jury. After the witness has read the impeaching material from the deposition, you should remove the

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necessary, at least before the impeachment is accomplished, in federal court. Fed. R. Evid. 613.

deposition, leaving the impeached witness directly facing the jury. You should pause and look further at the deposition as if reviewing the material; leave the witness for as long as possible after the impeachment with the jury looking directly into the witness's eyes. Afterwards, return slowly to counsel table and retrieve other materials for questioning, taking as long as possible before the next question, possibly inquiring of the court, "May I have a moment, your Honor"? Judges resent witnesses who lie under oath in their courts and will generally be very cooperative at this point. This leaves the impeached witness on the hot seat under the intense scrutiny of the judge and jury with no place to hide.

The entire courtroom is now focused for your next question of this impeached witness. The pause after impeachment, in addition to allowing the jurors to fully appreciate the significance of what they have observed, piques their interest as to the next line of inquiry. It is absolutely essential, in order to maintain control of the witness and to protect the impeachment that has occurred, to have two things occur in the next line of questioning: (1) you should move completely away from the topic on which the witness was just impeached, and (2) you should maximize the witness's loss of credibility before the jury by cross-examining the witness on the most important outcome-determinative issues in the case. The reason for moving away from the subject of impeachment is so that the witness has absolutely no opportunity in subsequent questions to regroup and explain away the basis of the impeachment. The reason for moving to the most

> outcome-determinative issues in the case on which this witness is able to testify, is that the jury's interest is at a peak and the witness's credibility is in a valley. Therefore, you should be able to maximize the effect of impeachment by controlling the further examination of the impeached witness and eliciting favorable testimony on the outcome-determinative disputes. The witness may testify more favorably on the outcome-determinative issues for fear of being impeached again. If the witness refuses to cooperate with you and shades the testimony in favor of your opponent, the jury will not accept the testimony since the witness was just impeached.
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> Be aware that total impeachment of a witness is rare. Therefore, the lesser goals of discrediting the witness, highlighting confusion, and showing bias or the inability of the witness to testify accurately may be the small victories that cumulatively weaken the jury's faith in the witness's testimony. While total impeachment is desirable, you should not overlook the importance of the cumulative effect of numerous small disparities, as long as they are directly relevant to material issues in the case.

With all due respect to Professor Younger, nine means of impeachment is just too many and too hard to memorize. Mr. Nations comes a lot closer to a useable guideline for impeachment when he writes of the most important impeachment method - prior inconsistent testimony and the use of it in the courtroom.

WORDS, ACTIONS, MEMORY, BIAS, ATTITUDE, and **MANNER**- Each of these topics is an important method of impeachment. If impeachment is the goal, these topics will serve as an outline in accomplishing that goal.

WORDS – In deciding whether a witness can be impeached with words, consider his own prior words, including testimony at depositions and trials, his writings and publications, the records he created, his conversations with others about the subject, any statement that he gave to an investigator, and the very words he used during his direct testimony. Also consider the writings of others, i.e., learned treatises. Using testimony from depositions and trials, involves the exact same kind of set up described by Mr. Nations above. It's important that the witness be provided a copy of his deposition and be directed to the page and line so the questioning can be done smoothly. Often, a blow-up of the particular page in the deposition can be used so that the questioner and the witness can read along together. Again, the set up is important because without the set up the jury is not made aware of the oath given during the prior deposition or trial and, thus, will not be prepared for the questions "were you lying then or are you lying now" or "which oath have you decided to ignore."

If the witness to be impeached is an expert witness, he has generally written on the subject and these writings must be obtained, read, analyzed, and used against him if at all possible. The set up is the same. The witness must be provided with a copy of his book and asked whether or not when he wrote it he intended it to represent his true feelings about the subject. A good set up for this is to get him to agree that his own writings are authoritative. Often, business and medical records can be used to impeach a witness if he created them. Similarly, these documents must be identified and his desire to make truthful entries in them at the time of their creation established.

If the witness gave a statement or had oral conversations with other people that contradicts his testimony, he should be reminded of the conversation to establish that it took place. Even though asking him about the contents of the conversation is not always advised, because he is going to deny the words he spoke, getting him to agree that the conversation took place is an important set up for when the impeaching witness is called.

Impeachment by the use of books and writings of others is often successful. Find out what books are used by the expert when he teaches, what books he considers reliable, and what books are in his library. Using his own books against him is very effective.

In our *Blackmon* trial, Mr. Blackmon was a track inspector who was injured when his vehicle, known as a hi-rail, was riding on the track and struck a train that was parked in an unusual place. The defense called an expert, Brian Heikkila, to testify as to Mr. Blackmon's duties immediately before the wreck. Mr. Heikkila, however, had no particular expertise in Mr. Blackmon's job duties and had never been to the scene. The initial part of the cross-examination went as follows:

Q: Mr. Heikkila, am I correct that this is your resume?
A: Yes, sir.
Q: Is it accurate and complete?
A: Well, let me see the document you have, sir. It appears to be the format I'm accustomed to. (Witness reviews document.) I believe it is, sir; yes.
Q: I want to show you something. This right here is a authorization; it's a certification out of his wallet. It certifies him to inspect track.
Do you have a certification listed on there as one of your credentials?
A: As far as being a track inspector?
Q: Yes, sir.
A. No, sir. I'm not a track inspector.
Q: You seem to have a great deal of experience in the transportation department; would that be fair for me to assume?
A: Yes.
Q: You've been a locomotive engineer?
A: Yes.
Q: Well, the locomotive engineer in this case was 4,750 feet from the point of impact.

Did he have anything to do with this other than the selection of where the train stopped?

A: He was operating the train, which was stopped at the time of the accident.
Q: Do you have anything here that lists that you have a high-rail license?
A: I'm aware of no license, sir, other than the company policies with regard to being a qualified operator; and I was a qualified high-rail vehicle operator.
Q: Now, do you think you operated a high-rail as much as Mr. Blackmon, Mr. Valdez, Mr. Quattlebaum, Mr. Williamson and Mr. Reddick?
A: No. In the amount of absolute distance, I'm sure that I have not. I've been in high-rail vehicles for thousands of miles, but these gentlemen have been operating them and riding in them, as I understand it, for at least six years together and for considerably longer period than that.
Q: Now, we've talked a little bit about the focus of your experience has been transportation. That would be fair to say, the vast majority of your experience has been taking care of transportation crews; is that fair?
A: Well, sir, I would say that a majority of it, but also a significant period as a director of safety for all three line departments and also the mechanical department.
Q: In fact, when you were director of safety for all three line departments you usually brought somebody in special for the track department; is that correct?
A: Specifically for the subject matter training, yes. As far as track inspection per se, B&B type work, welding, those types of craft-specific duties, yes, we had subject matter experts to provide that training and/or vendors, correct.
Q: And that subject matter expert was not you?
A: That is correct.

Immediately, this witness's credibility was impeached before getting into his opinions.

ACTIONS – When using actions to impeach a witness we are referring to his investigation and the work that he has performed on the particular case. This aspect of impeachment is used against expert witnesses who have not fully investigated the case. For example, an accident reconstruction expert who did not go to the scene of the event, or who did not look at the vehicles involved, or who took photographs and did his sight line studies from a car driver's eye-level when in fact a tractor-trailer driver's eye-level is the relevant inquiry. Also, an expert who has not spent enough time on the file, or who has spent too much time in the file, can be impeached through his own actions. His action in accepting thousands of dollars for his opinion can impeach his credibility. This type of impeachment is not quite as dramatic as

using his words against him, but it nevertheless lays the foundation for the jury questioning whether or not he can be relied upon as a credible witness given the actions he took in forming his opinion.

It is in this area of cross-examination that the expert's methodology is attacked. Under the federal rules of civil procedure as interpreted by *Daubert v. Merrell Dow Pharmaceuticals, Inc*. 509 U.S. 579, 113 S. Ct. 2786 (1993) and *General Electric v. Joiner*, 522 U.S. 136, 118 S. Ct. 512 (1997), proper methodology must be established, and if the methodology can be attacked then there is a possibility that the court might strike the witness's opinion in its entirety or at least in part. Additionally, if the methodology can be shown to be flawed, regardless of whether the opinion is excluded or not, the witness' opinion has been impeached.

The Actions is also relevant to the impeachment of lay witnesses in determining whether or not they were able to perceive the facts upon which they based their testimony. For example, if a witness was 1,000 yards away, the *action* of him being there might have made it difficult for him to see or hear the event about which he testified. The witness's actions in turning towards the event, or what the witness was doing at the time of the event that might have distracted him from having the perception that he now claims to have, is quite important. Again, one must know the answers to these questions before asking them.

In *Blackmon*, once again Mr. Heikkila's credibility was attacked as he had never even visited the scene to investigate, did not bring his entire file to court, and used different numbers than Norfolk Southern's prior accident reconstruction. The relevant testimony is as follows:

> Q: Okay. Now, you told us earlier today that you are charging to be here. You charged us $950 to take your deposition, which only lasted about an hour or two. I'm curious.
> How much have you charged the railroad to date?

A: Well, sir, again, my time is billed by my employer. That is not my personal charge to either you or the Norfolk Southern. But the time is billed on an hourly basis.
Q: How much?
A: And the – again, in total for the case?
Q: Yeah.
A: I would estimate in the area of $5,000 since being retained back in the fall of 2000.
Q: For $5,000, and you haven't even been to the location, yourself, personally; have you?
A: No, sir; I have not been to the site. I sent an associate, Mr. Newton, out to do the stop distance tests at my direction.
Q: For $5,000 you come here to testify, and you haven't even seen a tree yourself, or touched a leaf, or looked at the rail in this location, within a mile in either direction; have you?
A: No, sir. We were contacted in this case in November of 2000, which was significantly after the accident time. We did arrange a site inspection of the location and the stop distance tests, as previously testified
Q: Your man did take a video out there, didn't he?
A: No.
Q: He did not take a video out there?
A: No. He took photographs.
Q: Okay. He took photographs. How many videos have you seen?
A: I believe I have seen a total of three videos.
Q: How many are on your desk there?
A: None. I've got one of two binders, and the videos are not here.
Q: You didn't bring the videos to the courthouse?
A: No, sir. They're part of the file. I would assume they would be here if you wanted to show them.
Q: What other parts of your file didn't you bring to the courthouse?
A: Actually, I've got, as you have, a copy of the table of contents of my file. I did not bring book two of two, which includes three depositions and the entire text of the operating rules.
Q: Do ya'll have the trouble in your office of not having big enough briefcases?
A: No, sir. I was not – I checked with Counsel and asked him if he wanted me to bring the entire file into the court, and I was told to bring what I felt would be necessary for today. And I did that.

As is apparent, Mr. Heikkila's failure to even visit the scene or bring his file into court were used to raise questions as to his methodology and whether or not he was hiding something.

MEMORY – Impeachment for lack of memory is applicable to every witness. As time go on the witness's memory usually fails. It is often helpful to establish that a witness's memory

of the event, which did not change his life as much as it did the plaintiff's or the defendant's, would not be expected to be as strong as the party's memory. The use of early statements and reports (words) is often helpful in showing lack of memory.

BIAS – Bias includes prejudice, interest, friendship, business relationships, financial relationships, and other aspects of the witness's history that can be used to explain to a jury why this witness's testimony should not be trusted. The concept is really one of filters. Everyone has a bias and prejudice about certain things in life. We all want to remember those aspects of an event that are either positive or negative depending on our bias and prejudice about that event and the people involved. Therefore, with careful questioning, it is sometimes possible to establish that a witness's bias is making them more or less credible. For example, it is often helpful to ask a witness that if, indeed, he agrees with a particular side's position, then he is agreeing that he did not do his job. Every one understands that a witness has a bias in establishing that he did, in fact, do his job properly.

Once again, in *Blackmon*, letting the jury know that neither he nor his boss had ever testified against a railroad before impeached Mr. Heikkila's company and himself.

Q: Well, you what? How about with you? Every single time that you've stepped foot in a courtroom testifying in a railroad case, you've never been able to find that the railroad made a mistake that contributed to the cause of the event, either; you have you?

A: Well, sir, I will say this: That in context of my deposition and courtroom testimony, that is correct.

ATTITUDE and MANNER – Impeachment based on a witness's attitude and manner is a little more amorphous than the methods discussed above. Some witnesses are so disagreeable that cross-examination should be attempted just to ensure that the jury hates them. Sometimes, while a witness cannot be impeached on the facts, by taking advantage of his attitude that is

really a sub-set of his bias, a question about his veracity can be raised. Hostile witnesses, witnesses with an agenda, and witnesses who are flippant, careless, demeaning, and otherwise unsavory, should often be cross-examined just to prove this aspect of their character. Jurors expect a courtroom demeanor to be appropriate and a witness with an "attitude" is not going to be credible.

C. COURTROOM PRESENTATION

i. Physical location when asking questions on cross-examination

Now is the time for the lawyer to be the star. Stand in center stage and take the witness' thunder with questions that say it all. Look at the jury when asking a particularly important question to let the jurors know that this point is a killer for this witness. If, on the other hand, you are confident that the answer will be the key, then move to the location where direct is done so the spotlight is on the witness.

ii. Organization of questions

Cross-examination should start off strong. The jury is expecting Perry Mason-like results and wants these results right away. Accordingly, focus on the first five questions to satisfy the jury's need for primacy. Also focus on the last couple of questions, as this will satisfy the jury's need for closure. As noted above, during the witness' direct examination, it is essential to listen carefully and take notes. As the notes are taken, put a blank next to the portions which need to be covered in cross examination and before beginning the cross examination, number the blanks in an appropriate sequence to keep the examination tight and focused.

Always try to maintain an appearance of fairness in cross-examination. A very complex toxic tort case comes to mind in which there were multiple experts on both sides. One of the lawyers for a defendant violated this rule and was punished for doing so by the jury. This lawyer had a habit of writing down what he believed to be the key points of his cross-examination in response to the witness's answers. Unfortunately for him, he wrote down the key points in a manner which was different from that testified to by the witness. The jury thought this unfair

and did not trust him at all after this, although his case was certainly a strong one. The lesson to be learned is, don't polish the apple too much or you'll bruise it.

One of the most famous axioms of cross-examination is to never ask one question too many times. All of us can learn from the time worn story of the lawyer defending the man accused of biting off another man's ear in a bar fight. After the witness had testified on direct examination that the defendant had bitten the victim's ear off, the unfortunate defense lawyer asked two questions, one of which was one too many. The first question was "Did you see my client bite off the victim's ear?" to which the witness said "no." The question which violated the maxim was "How then do you know my client bit off the victim's ear?" to which the witness said, "I saw him spit it out."

a. Use an Outline.

Writing out specific questions makes more sense for cross-examination than it does for direct. However, if cross-examination is to have rhythm and pace, the examiner must be able to move rapidly and specific written questions usually tie the examiner to his notes instead of to the particular focus of his attack on the opponent's witness. Nevertheless, there are some questions that really should be written out, complete with cites to pages in depositions or documents, to ensure that the question is effective.

b. Use the Trial Theme and Jury Charge.

An effective trial theme will be used throughout the trial. This includes the voir dire, the opening argument, the direct, and yes, the cross-examination of the opponent's witnesses. Having the opponent's witnesses describe the scene in the words used in the trial theme is incredibly effective. Incorporate the theme into the questions and get the witnesses to agree to its relevance. The theme can be considered the mantra of your trial. It should be repeated, referenced, illustrated, and expanded upon at every turn. This continually repeated theme will, if

used throughout the trial, including in cross-examination, be like an effective advertising jingle, which will "echo in the Jury's mind when they retire" to decide your client's fate.[14]

When possible, ask the witness questions that incorporate buzzwords contained in your anticipated jury charges. This will make another connection for the jury when they deliberate the witnesses' testimony as it relates to the jury charges.

iii. Control the witness

Do not allow the witness to take control of the courtroom. In direct, the witness is the star. In cross-examination, the lawyer must control the courtroom - both by physical presence and mastery of the witness. Insist on answers. Do not allow speeches. While it is important to control the witness and keep him focused on the question, do not be bullying and do not be rude. Instead, gently remind the witness that the process is one of questions and answers and that the lawyers are required to ask the questions and the witnesses to give the answers. Speeches are not part of the process. Think about your body language - don't hang your head, or show surprise, or anger - maintain an aura of control and confidence.

iv. Pace and rhythm

Cross-examination must be kept moving or the jury will believe that the witness is winning. It must be quick and well paced. It cannot be allowed to drag. In the face of an answer that is devastating, ask the next question so fast that the harmful answer will have no time to float like a battleship. It must be sunk immediately with a flurry of quick questions with known answers. At the same time, when cross-examining a witness, always look for a good place to stop. This is consistent with one of the cardinal rules of cross-examination that is to keep it short and effective. Stop on a high note. In fact, it is sometimes better to eliminate an entire line of questioning if the answer to a question presents a particularly high point for stopping.

D. CONCLUSION

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[14] Lake Rumsey, *Master Advocates' Handbook*, p.4.

There is no substitute for preparation. Both direct and cross-examination can be practiced during depositions. This is particularly true of direct examination. Awareness of the courtroom and the jury can only be obtained by trying cases. Knowledge of the rules can only be learned by study.