Cross-examination Made Simple (Part II)

IMPEACHMENT BY INCONSISTENT STATEMENT (& OMISSION)

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PREPARATION

- Preparation for cross-examination largely consists of generating “paper” with which to cross-examine.
- By “paper,” I am referring to the statements, affidavits, or transcribed testimony of the witness *himself*.
- Once the paper has been generated, a safe cross may be conducted.

PREPARATION

- Why paper?
- First, there is no form of control more impenetrable than the statements, affidavits, or transcribed testimony of the witness *himself*.
- Second, to the extent that you want the jury to believe the truth of the earlier statement, "paper" demonstrates *lack of credibility*.

PREPARATION

- The earlier statement is both the compass and the safety net. Whenever the witness strays from the paper by denying the exact words of his earlier statement, he may be *impeached*.
- You must be ready, at all times, to “back up” the exact words of the earlier statement with the paper itself.

PREPARATION

- You should no more tolerate a recalcitrant witness staying from the written statement than you would tolerate your teenage son or daughter breaking curfew.

PREPARATION

- How do you “back up” the exact words of the earlier statement with the paper itself?
- I construct a chart for every witness that testifies based on the witness’s *earlier* statement.
- If the witness is a lay witness, then the “paper” is likely to be a formal typed-written statement. If the witness is a police officer or detective, then the “paper” is likely to be a police report or the grand jury transcript of that officer’s sworn testimony.

PREPARATION

- My chart consists of three columns: (1) Point, (2) Source, and (3) Supporting Facts.
- The “Point” column reduces to one sentence each point that is favorable to my client and that I want the jury to accept as true.
- The “Source” column describes the “paper” where the facts supporting this point can be found (i.e., Grand Jury transcript, police report, Typed Statement).

PREPARATION

- The “Supporting Facts” column marshals all the facts, inferences, interpretations, explanations, details, etc., that support this point and references the page number on which it can be found.

PREPARATION

- The following is a sample chart. It originates from a self-defense case. The theory of defense is that the defendant, while minding his own business, was “sucker punched” by the victim and viciously assaulted. Had he not pulled out a knife from inside his pocket, he would have been left for dead in a pool of blood.

PREPARATION

- The witness is a twenty three year-old woman who was present in the barbershop at the time the defendant was attacked. Detectives interviewed her shortly after the incident and she gave a formal statement that was typed by a stenographer.

PREPARATION

POINT	Source	SUPPORTING FACTS
ynn had a bird's eye view of e fight	Formal Typed Statement	• While waiting for defendan Lynn sat in her car eating h food (p. 2) • Lynn's car was parked directly in front of the door (p. 3) • Lynn's car was parked in front of the "big [barbersho window" (p. 2) • It was just getting dark (p. 3 • Lights were on in the barbershop (p. 3) • Lynn never took her eyes o of defendant (p. 3); she was "looking at him the whole time" (p. 2)

PREPARATION

		• Lynn's car was parked directly in front of the door (p. 3) • Lynn's car was parked in front of the "big [barbershop] window" (p. 2) • It was just getting dark (p. 3) • Lights were on in the barbershop (p. 3) • Lynn never took her eyes off of defendant (p. 3); she was "looking at him the whole time" (p. 2)
Defendant had merely gone to the barbershop to get a haircut. He wasn't looking for any trouble	Formal Typed Statement	• We pulled up there just so defendant could get his face cut at the barbershop (p. 2) • "He [defendant] said that it was only going to take a minute" (p. 2)

PREPARATION

- This is extremely tedious. As one of my mentors stated, “It is pick and shovel work.”
- However, it is an essential part of preparing for impeachment. Once the paper has been produced, a safe cross is just a heartbeat away.

The Three Steps

- Below are the three steps involved for impeachment:
  - Step 1: **Re-commit**: Remind the witness and the jury exactly what the witness said on direct that you intend to contradict. This is called, “re-committing.”



The Three Steps

- Step 2: **Accredit**: This is the part where you set the scene for the earlier statement. If you want the jury to consider the earlier statement as being true, the more you do to explain the reasons that the witness had for being complete and honest at that time; the more the jury will believe that he probably was. I like to refer to this step as closing off every conceivable escape route so as to “trap” the witness. While this might sound devious, it is permissible under the rules of evidence and is the hallmark of a successful impeachment.

The Three Steps

- Step 3: **Confront**. Let the jury know exactly what the witness said before.

Example

- An officer testifies on direct examination to a fact that is inconsistent to what he wrote in his police report. You want the jury to consider the earlier statement (i.e., the one made in the police report) as being true because it is more favorable to your client.

Example

- Practically speaking, here's how it works:
  - Step 1: "On direct examination, you said that you *saw John throw a bag of drugs onto the ground*?"
  - Step 2:
    - "I'd like to show you a copy of your police report?"
    - "Is this your report?"
    - "This is the report that you wrote following the arrest?"
    - "One of your responsibilities as a police officer is to write police reports?"
    - "Following an arrest, you file a report of that arrest?"
    - "Your reports are received by others involved in the investigation?"

Example

- They rely on the information in those reports
- Your superiors rely on your reports when deciding what action to take
- You want to assist others who are involved in the investigation
- So, of course, you are thorough, accurate, and complete when writing your reports
- A police report must include *all* of the details
- Because you are only human
- And you might forget things if you don't write them down when they're fresh in your mind
- If there was something that you forgot to include in your police report, you could file a supplemental report
- You didn't file a supplemental report in this case

Example

- Step 3:
  - Q: “I’d like to show you a copy of your police report?”
  - Q: “Take a look at the first sentence of the third paragraph?”
  - Q: “It says, ‘*I did not observe anything in Mr. Smith’s hands*.’”

Example

- Notice something subtle. In this technique, there is *no* fourth step: *Beat the witness over the head with the contradiction*.
- Resisting the temptation to go to number four is easier said than done. Why is it omitted? You already have all the ammunition you need to beat the witness “over the head” with the contradiction and attack his credibility during summation.

Example

- Nothing good can happen by pushing the witness *beyond* the exact words of his earlier statement during cross-examination. Unfortunately, Murphy's law is such that any attempt at doing so will backfire: the witness will attempt to *explain* the inconsistency.
- In addition, the risk that the confrontation stage will be undermined by additional questions is substantial.

Example

- This is why I recommend *concluding* the impeachment after step three. In other words, let the reading of the statement be the finale!

Slight Variation to Example

- Let's tweak this example slightly.
- The officer's earlier statement remains the same: "*I did not observe anything in Mr. Smith's hands*."
- However, suppose the source of the statement is not the officer's police report but instead his *testimony at the grand jury hearing*. If a glimmer comes to your face, you already know where this is heading.

Slight Variation to Example

- What, if any step(s) of the impeachment changes?

Slight Variation to Example

- If you said, “The accreditation step and the confrontation step,” you’ve guessed correctly.

Slight Variation to Example

- Here's how "Step Two" looks when the "paper" is the *grand jury transcript*:

Slight Variation to Example

- "This isn't your first time testifying in this case?"
- "You testified at a grand jury hearing?"
- "Back on February 1st?"
- "In this very courtroom?"
- "You sat on the same witness stand that you're sitting on today?"
- "In the jury box sat the grand jury?"
- "Before the prosecutor could ask you any questions, there was something that you had to do?"
- "You had to take an *oath*."

Slight Variation to Example

- “You know what an oath is?”
- “A sacred promise?”
- “In front of you sat a Bible?”
- “You put your left hand on that Bible?”
- “And held your right hand in the air?”
- “You promised to tell the truth?”
- “The whole truth?”
- “And nothing but the truth?”



Slight Variation to Example

Step Three: Confront!



Slight Variation to Example

- "I'd like to show you a copy of the grand jury transcript from that hearing?"
- "Specifically, page 3, line 5?"
- "The prosecutor asked you, 'Did you observe anything in Mr. Smith's hands?'"
- "Answer, your answer, '*I did not observe anything in Mr. Smith's hands*.'"
- "You looked that grand jury in the eye and that's what you told them?"



Slight Variation to Example

- You can see how infinitely more powerful impeachment by grand jury transcript is than impeachment by a police report.
- This gives life to a new rule: “When impeaching a law enforcement officer, if the earlier statement that you wish the jury to believe as true has been testified to at a hearing where the officer has taken an oath, the transcript from that hearing should be used as the ‘paper’ to impeach the officer instead of the officer’s report.”



Pitfalls to Avoid

POINT I: Remember the purpose of re-direct!

Pitfalls to Avoid

- Consider what you do when it is your witness who you expect to be on the receiving end of an impeachment by *inconsistent statement*. I'm not referring here to impeachment of your client by *prior convictions*, which I am a staunch advocate of eliciting on direct examination. The damage caused by a bombshell this large being dropped by the prosecutor on cross-examination would be nothing short of devastating. You would be perceived by the jury as "sneaky" and someone who cannot be trusted.



Pitfalls to Avoid

- In the words of the great Gerry Spence, “a concession coming from your mouth is not nearly as hurtful as an exposure coming from your opponent’s.”

Pitfalls to Avoid

- Returning to impeachment by inconsistent statement when it's your witness, you discuss it thoroughly with the witness. You learn the reason for the change in the story. You decide whether or not to reveal the inconsistency on direct examination.
- You plan the re-direct.
- Usually, the re-direct will be something like: "Opposing counsel seems to think your testimony today is different from what you said earlier. Is it?"

Pitfalls to Avoid

- In other words, it is the witness who has been attacked and it is the witness who should explain.

- Any form of re-direct which involves the lawyer leading the witness in the explanation may be fatal to the lawyer's credibility, not to mention unethical.

Pitfalls to Avoid

- POINT II: Opening the door to re-direct on cross-examination.

Pitfalls to Avoid

- Re-direct is the other side's attempt to "explain away" the inconsistency.
- It is for this reason that I like to refer to it as, "the uninvited guest."

Pitfalls to Avoid

- Conventional wisdom teaches us that it is not a matter of if but when the witness is going to explain the inconsistency and this usually happens on re-direct.
- So one might argue, “Why does it matter if the witness goes on a slight digression to explain the inconsistency on cross?”

Pitfalls to Avoid

- If the same explanation is given during cross-examination, the information is far more damaging than if it's given on re-direct.
- Why?

Pitfalls to Avoid

- Because *you* elicited it. And because you elicited it, it's as if you are *endorsing* it, however tacit it might seem.
- My personal rule is to never allow my client to suffer any harm while I am standing up. This is like a solemn oath that I take.

Pitfalls to Avoid

- The least I owe my client is to have no harm befall him while I am in control of the proceedings. He's like an infant that I am cradling in my arms.
- When I sit down and it is my adversary's turn, bad things will happen, but I should not be the one who invites it.



Pitfalls to Avoid

- The lawyer who can eliminate a stealthy ambush on re-direct by setting up the cross in such a way that re-direct is utterly meaningless should be awarded the Medal of Honor.

Pitfalls to Avoid

- What can you do to avoid running afoul of hearing a petulant explanation during cross?
- Below are a couple of questions that have been known to welcome in “the uninvited guest.”

Pitfalls to Avoid

- Q1: “Were you lying then; or are you lying now?”
- Q2: “That’s a far cry from what you told us here today, right?”
- Q3: “Was your memory better then or now?”

Pitfalls to Avoid

- Criticism
  - The first and second questions motivate the witness to explain. A “yes or no” answer is inadequate, not to mention unresponsive to either question. The judge will routinely permit an explanation. Both questions walk straight into re-direct. In the words of the great sage Homer, “D’oh!”

Pitfalls to Avoid

- The third question doesn't fair any better. It encourages the witness to explain. Additionally, it has no value whatsoever. Everyone knows that memories tend to fade over time.
- If you have already established that the prior statement was made close in time to the event and that it is now one year later, what can possibly be gained by asking this question? The witness is merely affirming that which we all know: memories fade with time.

Pitfalls to Avoid

- There is far more to be lost than to be gained. For example, the witness may claim that the stress associated with as traumatic an event as having a gun waived in her face during a robbery prevented her from giving a thorough and complete statement shortly after the robbery. But after having time to reflect, her mind is as clear as a bell. In other words, reflection has allowed a superior recall and the opportunity to provide a *more accurate description*.

Pitfalls to Avoid

- There is a lesson to be learned in all of this. When anything can be lost – no matter how trivial – and there is little or nothing to be gained, take the safe path and do not ask the question!

Belated Clarification

- A less obvious form of inviting the same harm as a result of the above questions is allowing the witness to *clarify* the contradiction after the earlier statement has been revealed.

Belated Clarification

- In French, there is an expression that captures the emotion behind the phrase, “Be careful!” It’s called “Faites Attention!”

Belated Clarification

- Once a light has been shined on the contradiction, human nature teaches us that a person's motivation to explain is at its peak.
- What this means for the cross-examiner is that you can expect the witness to be chomping at the bit to offer an explanation and that any additional questions will be viewed as an open invitation for the "games to begin" (i.e., for the witness to "set the record straight").



Pitfalls to Avoid

- POINT III: The impeachment not being clear to the jury. I've made this mistake more times than I care to admit and I've identified two culprits.

Pitfalls to Avoid

- First, the recommit phrase is *not* firmly established. The solution is simple. Be sure to state it *clearly* at the beginning.
- Returning to our example, “On direct examination, you said that you saw John throw a bag of drugs onto the ground?”

Pitfalls to Avoid

- Second, the current testimony contradicts the earlier statement by *inference* only.
- Solution: Express the *current* testimony in the same terms as it exists in the prior statement.

Pitfalls to Avoid

- Example
  - Prior statement of witness: “It was dark under the underpass.”
  - Current testimony: “The lights were on under the underpass.”
  - Recast the current testimony in the same terms as it exists in the prior statement. Here’s how that might look.

Pitfalls to Avoid

- Q: “On direct examination, you said that the lights were on.”
- Q: “They were glowing.”
- Q: “Lighting up the darkness.”

Pitfalls to Avoid

- From this example, an important lesson can be learned. There may be times when it is appropriate to add *translation* to the recommit stage of impeachment.

Pitfalls to Avoid

- POINT IV: Avoid inserting a “memory stage.”
- The “confront” stage, where the jury must be told exactly what the witness said *before*, can sabotage the entire impeachment if it is introduced in the form of a question where the witness is asked, “Do you *remember* making the statement?”

Pitfalls to Avoid

- The “confrontation” stage, where the jury must be told exactly what the witness said *before*, can sabotage the entire impeachment if it is executed improperly. For example, if the cross-examiner asks the witness, “Do you *remember* making this statement?”

Pitfalls to Avoid

- Example: In the earlier example, the "confrontation" stage consisted of the following phrase: "In your police report, you wrote that you did not observe anything in Mr. Smith's hands."
- Here's what I mean by inserting a memory stage. "Do you *remember* writing in your police report that you did not observe anything in Mr. Smith's hands?"

Pitfalls to Avoid

- Criticism
  - First, if the officer answers, “no,” you’re up a creek without a paddle. You cannot disprove the denial of the witness’s *own* memory.
  - Second, it suggests an escape route which the witness would not otherwise have resorted to without the suggestion.

Pitfalls to Avoid

- Make it easy on yourself and simply have the witness *affirm* the earlier statement that he made.

Exception to “Recommit”

- There may be times when you only want the earlier statement to be believed and you could care less whether or not the witness is discredited.
- If this is your goal, then simply eliminate the recommit stage. How does this help?

Exception to “Recommit”

- Let’s face it. Recommitting the witness to the direct examination version can be exhausting. Why? The witness might know what’s coming and doesn’t want to “look bad.” In that case, he might be less willing to admit the truth of the earlier statement.
- You’ll be amazed at how freely the witness agrees with the earlier version without reminding him of the inconsistent statement he made on direct examination.

Exception to “Recommit”

- But even if he suffers from “convenient amnesia” and refuses to admit the truth of the earlier statement, you can still conduct an effective impeachment without sacrificing any drama.
- How so? Go through the *exact* words of the earlier statement breaking them down fact by fact, and then ask each question one fact at a time.

Who Reads the Earlier Statement?

- There is considerable debate over *who* should read the impeaching statement. Some argue that it should be the attorney. Others argue that it should be the witness.

Who Reads the Earlier Statement?

- Personally, I think that it is better, not to mention safer, for the attorney to do the reading. Why?
- Two reasons.

Who Reads the Earlier Statement?

- First, the statement can be accompanied by inflections and facial expressions that emphasize its meaning. The witness, on the other hand, will wring all of the meaning out of it.

Who Reads the Earlier Statement?

- Second, while the witness has “the floor,” he will take the opportunity to explain the contradiction.

Who Reads the Earlier Statement?

- Those in favor of allowing the witness to do the reading argue that when the witness reads it, “he impeaches himself from his *own* mouth” and there can be nothing more satisfying then self-sabotage.

Who Reads the Earlier Statement?

- There is one time when I depart from the rule of having the attorney read the statement and that is when I am using *omission* as a form of impeachment.

Impeachment by Omission

- Tips for Impeachment By Omission
  - The circumstances must be such that the *absence* of a statement is itself a statement;
  - Difficult to understand in the abstract.

Impeachment by Omission

- Rule: When a witness makes a statement in which he should have mentioned “Y”, the fact that “Y” is missing from the statement is *inconsistent* with the current testimony which includes “Y”.
- The witness’s silence about the fact at a time when all of the circumstances make it likely that he would have said it if it were true is damning! It is of such great magnitude that the very absence of it constitutes an admission by the witness that the *fact does not exist*.

Impeachment by Omission

- Example: The defendant, Mr. Doe, was interrogated shortly after his arrest. Strangely enough, it was not video recorded. Despite being incriminating, the only evidence that it was made (aside from the detective's testimony) is a one paragraph summary that paraphrasing it in the detective's police report.

Impeachment by Omission

– On direct examination, Detective Smith claims that he told Mr. Doe that he was going to video record the statement but that Mr. Doe refused to make a statement if it was going to be recorded. Detective Smith claims that Mr. Doe *refused to put his denial to be recorded on video* despite being asked to. Nor is there any written document memorializing his refusal to be recorded.

Impeachment by Omission

- Detective Smith's testimony on direct: "Mr. Doe said that he would not agree to put his refusal to be video recorded on video."

Impeachment by Omission

- Step 1: Recommit: “You said on direct examination that Mr. Doe would not agree to put his refusal to be video recorded on video?”

Impeachment by Omission

- Step 2: Accredit:
  - As a detective, one of your duties is to fill out police reports
  - There are courses at the Academy that stress the importance of filling out reports accurately
  - You know that your reports are received by others involved in the investigation
  - Such as other members of law enforcement
  - And prosecutors
  - You know that they will rely on your reports
  - Especially if they were not at the scene

Impeachment by Omission

- Those who were not present will only know what happened by referring to your report
- You want to assist others who are involved in your investigation
- So of course you strive to be thorough, accurate, and complete when you write your reports
- Another reason that you write reports is that in the course of a year, you may have hundreds of cases
- You want to keep accurate records of what happened in each case

Impeachment by Omission

- You want to keep accurate records of what happened b/c it would be unrealistic to think that you can memorize all of the important facts of all of your cases
- When you prepared your report for this case, you wanted to prepare an accurate report detailing the important facts
- If you left something out of your report, you could always write a supplemental report
- You didn’t write a supplemental report

Impeachment by Omission

- Step 3: Confront: While handing the detective his report I ask, “I’d like you to point out in your report where you wrote that Mr. Doe would not agree to put his refusal to be videotaped on video?”

Impeachment by Omission

- Detective Smith has been handed his report and asked to read the part of it which contains the omitted fact. Since there is nothing for him to read, he doesn’t get to say anything. The silence in the courtroom speaks louder than any words and will be nothing short of spectacular.

Exposing the Liar, the Fool, & the Pig

- In acting, characters have objectives. The objective is what the character wants in the scene. Without an objective, a character is passive and uninteresting.
- Good actors phrase the objective as a question. The idea behind phrasing the objective as a question is that it creates an *active* need for that question to be answered.
- The “driving question” usually begins with, “How can I …?” The actor refers to himself in the first person.

Exposing the Liar, the Fool, & the Pig

- The driving question is posed to the other character in the second person. Instead of, “How can I force *him* to hear me?” the actor asks, “How can I force *you* to hear me?”
- Stating the question in the second person keeps the actor personally engaged with the other actor. It removes the invisible “pane of glass.”
- Staying active and present makes the driving question potent and real.

Exposing the Liar, the Fool, & the Pig

- The driving question should sound like the character and come from their “emotional core.” The core is the emotional center, the main motor that propels a character.
- There are eight emotional cores: control, love, power, security, freedom, passion, respect, and truth.

Exposing the Liar, the Fool, & the Pig

- Suppose you are playing a scene in which you are a teacher working with a problem student. Here are some examples of driving questions reflecting different choices of cores for the character of the teacher:

Exposing the Liar, the Fool, & the Pig

- If the core is *truth*: “How can I get you to understand that these aren’t just words? This is real.”
- If the core is *power*: “How can I force this jerk to learn this crap?”
- If the core is *passion*: “How can I get you to embrace this amazing stuff?”

Exposing the Liar, the Fool, & the Pig

- Secret inner actions are the path to achieving your driving question. They are secret because the character may not want the other character to know what her real objective is.
- Actions are always active verbs that are physical. Actions always begin with “to …”
- For example, if your driving question is, “How can I crush you?” your secret inner actions could be: to bait you, to hook you, to reel you in. The inner actions must lead to the driving question, or they are wrong.

Exposing the Liar, the Fool, & the Pig

- If the secret inner action is what you're doing, the outer tactic is the "how." Specifically, it's how the actor reveals or conceals his inner action.
- The outer tactic is also an active verb, but ends in "ing."
- This dance between what you want (secret inner action) and how you go after it (outer tactic) is what many people unconsciously do in life. When it comes to acting, actors have to figure it out ahead of time.

Exposing the Liar, the Fool, & the Pig

- Example: Can you remember back to the time when you were in middle school and you asked that pretty girl or cute guy out on a date?
- Driving Question: “How can I get you to go out with me on a date?”
- Inner actions: to charm, to captivate, to seduce, to sweep off your feet

Exposing the Liar, the Fool, & the Pig

- You've chosen the inner action, "to seduce." Okay, but how specifically do you seduce? There are a myriad of different ways. These are what's called your "outer tactics."
- Examples: Befriending, flirting, coochi-cooing, tickling, boasting, complimenting.
- Each of these choices has a different energy.



Exposing the Liar, the Fool, & the Pig

- Outer tactics are like having an artist's palette, and the actor gets to choose from many different colors. The actor is the artist.

Exposing the Liar, the Fool, & the Pig

- Combinations of inner actions and outer tactics create tension and dimension, especially if the actions and tactics don't match.
- Example: If a person is insincere in complimenting you, the inner action might be to "cut you down" by "honeying."

Exposing the Liar, the Fool, & the Pig

- How does this apply in the courtroom?
- Consider the following example. It comes from the creative genius of Dana Cole.
- You represent Jake, who is accused of selling drugs. The prosecution's chief witness is Meghan Connolly, who now admits to being Jake's partner in the drug trade. When first arrested, Meghan denies knowing Jake, much less being his partner in a criminal enterprise.

Exposing the Liar, the Fool, & the Pig

- On direct examination, she says that she lied to the police “to keep from going to jail.” She is a single mother of two daughters, ages five and three.
- The penalty for selling drugs is twenty years. Ms. Connolly agrees to testify against Jake in exchange for the prosecutor’s recommendation to dismiss the drug distribution charge and to charge her with possession only. In addition, the prosecutor has agreed to recommend a three-year suspended sentence. Meghan was convicted of possession of a controlled dangerous substance eight years ago and was sentenced to one year in prison.

Exposing the Liar, the Fool, & the Pig

- Q1: Driving question: “How can I expose you as a lying snitch who has falsely accused my client of something he didn’t do?”
- Q2: Inner action: to explore, to uncover, to reveal
- Q3: Outer tactics (the external mask for what the character is doing): revealing
- Note: Because my emotional core is “truth,” my inner actions and outer tactics are *identical*.

Exposing the Liar, the Fool, & the Pig

- This insight might lead to the following cross-examination:
  - Q: Ms. Connolly, I understand you have small children?
  - A: Yes.
  - Q: Daughters?
  - A: Yes.
  - Q: Could you please tell the jury their names and ages?
  - A: Sure. Sarah is five and Taylor is three.
  - Q: Do you have any help raising your children?
  - A: No.
  - Q: Their father does not help you?
  - A: No, we haven’t seen him in quite some time.

Exposing the Liar, the Fool, & the Pig

- Q: If you go to prison for twenty years, who would look after your little girls?
- A: I don’t know.
- Q: That must worry you quite a bit.
- A: Yes, it does.
- Q: How old will Taylor be in twenty years?
- A: Twenty-three, I guess.
- Q: She will be a grown woman?
- A: Yes.
- Q: What about Sarah?
- A: She’ll be twenty-five.

Exposing the Liar, the Fool, & the Pig

- Q: If you go to prison for twenty years, your children will grow up without you?
- A: Yes.
- Q: That must be frightening for a young mother?
- A: (No response.)
- Q: You will not take them to school?
- A: No.
- Q: You will not see them in school plays?
- A: No.
- Q: You will not read to them at night or tuck them into bed?
- A: No.

Exposing the Liar, the Fool, & the Pig

- Q: You will not see them off to the high school prom, or attend their high school graduations?
- A: No.
- Q: You will not be there to take care of them when they are sick?
- A: Not if I'm in prison, no.
- Q: You would like to be there for them, right?
- A: Of course I would.

Exposing the Liar, the Fool, & the Pig

- Q: You have been to prison before?
- A: Yes.
- Q: You know what it is like there?
- A: Yes.
- Q: You were scared while you were there?
- A: Sometimes.
- Q: Scared of the other inmates?
- A: Some of them.

Exposing the Liar, the Fool, & the Pig

- Q: There is no privacy in prison?
- A: Not much.
- Q: You sleep in the same room with other inmates?
- A: Yes.
- Q: Shower with other inmates?
- A: Yes.
- Q: The guards tell you when you can eat?
- A: Yes.
- Q: When you can sleep?
- A: Yes.
- Q: When to take a shower?
- A: Yes.

Exposing the Liar, the Fool, & the Pig

- Q: You can only have visitors on specified days?
- A: Yes.
- Q: And for specified times?
- A: Yes.
- Q: In a large and noisy room?
- A: Yes.
- Q: Sometimes nobody comes to visit?
- A: (No response.)
- Q: You count the days until you can go home?
- A: Yes, if you know how long it will be.

Exposing the Liar, the Fool, & the Pig

- Q: You don't want to go back there, isn't that true?
- A: Yes.
- Q: Not for twenty years?
- A: (No response.)
- Q: There is a way you can avoid that?
- A: Yes.
- Q: You understand that if you testify for the prosecutor in this case, the prosecutor will charge you with simple possession and not dealing in drugs?
- A: That's what he said.
- Q: And you believe him?
- A: Yes.

Exposing the Liar, the Fool, & the Pig

- Q: He will recommend a three-year suspended sentence?
- A: Yes.
- Q: That means that you may not have to go to prison at all, isn't that true?
- A: Yes.
- Q: And you can go home to Sarah and Taylor?
- A: Yes.
- Q: That would mean the world to you?
- A: Yes.
- Q: To have your life back?
- A: Yes.
- Q: And so you accepted the deal?
- A: Yes.

Exposing the Liar, the Fool, & the Pig

- While at first blush this might appear to be a “soft cross,” it accomplishes the goal of discrediting Meghan. First, not only are the facts presented, but how they were emotionally experienced by Meghan has been revealed.

- The jurors can empathize with Meghan while concluding that she cannot be believed. Simply put, she has too much to lose to be credible.

Exposing the Liar, the Fool, & the Pig

- Doing a simple role-reversal with Meghan allows Jake's attorney to evaluate the situation from Meghan's perspective and experience what it must be like to be *her* – a young mother who was paralyzed by the fear of being separated from her small children during the most formidable years of their lives.
- Nothing can be more powerful than a technique that pulls back the curtain and reveals a witness's true motive for testifying.

Exposing the Liar, the Fool, & the Pig

- NOTE: Had Jake's attorney's emotional core been "power" or "control," this cross-examination would have taken on a very different tone.
- Very simply, Meghan would have been treated as an enemy combatant who had to be destroyed. The outer tactics would have been to pillage and plunder. With questions such as "You're a liar!" it would not take long for the atmosphere to become so tense that you could cut it with a knife.

Example of a Complex Character Impeachment

- The following is a more complex example of the need to divide a matter into individual chapters.

Example of a Complex Character Impeachment

STATE V. WATTS

- Facts: You represent **Jacob Watts**. Watts has been charged with murder in the first degree of a police officer and is on trial in *federal court*. The government alleges that in Newark on October 15 of last year, Watts shot an on-duty police officer in the head, killing him instantly.

Example of a Complex Character Impeachment

- **Walter Smith** is a witness for the state. On *direct examination*, he testified that on the evening of October 15, at about 9:00 p.m., he and **Watts** walked up to a marked police car parked on the east side of Third Street, just south of Main Street.

Example of a Complex Character Impeachment

- Pursuant to their plan, **Smith** opened the passenger door of the police car and **Watts** pulled out a handgun from his jacket pocket and shot the police officer in the head.
- **Smith** was arrested for an armed robbery of a liquor store on October 29. He was apprehended running out of the store with a gun in his hand.

Example of a Complex Character Impeachment

- On December 15, the day his armed robbery charge was set for trial in *state court*, **Smith** agreed to become a witness for the *U.S. government* in its *federal* case against **Watts**.

- **Smith** gave a statement to the police on October 29 following his arrest and testified concerning the **Watts** case before the federal grand jury on December 2. His statement and a transcript of his grand jury testimony follow.

Example of a Complex Character Impeachment

- STATEMENT OF Walter Smith TAKEN ON October 29, (last year) AT CARSON AVENUE POLICE STATION
- QUESTIONS ASKED BY OFFICER George Cameron:
  - Q. What is your name?
  - A. Walter Smith.
  - Q. How old are you?
  - A. Twenty-five.

Example of a Complex Character Impeachment

- Q. I am going to ask you some questions about the killing of a police officer on the corner of Third and Main Streets on October 15 of this year.
- A. I don't know anything about that.
- Q. Were you anywhere near that corner on October 15th of this year at about nine o'clock?
- A. No. I think I was at a movie on the South Side with my girlfriend.
- Q. Do you have any information at all about the killing of a police officer on that night?
- A. I didn't even know a police officer was killed until you told me about it a few minutes ago.

Example of a Complex Character Impeachment

- Q. Do you have anything to add?
- A. No. I have told you the absolute truth.

Example of a Complex Character Impeachment

- Grand Jury TRANSCRIPT OF TESTIMONY TAKEN DECEMBER 2, (last year)
- PRESENT: Mr. Robert Armstrong, Assistant State's Attorney
- Reported by Mary Jones, stenographer
- WITNESS: Walter Smith

Example of a Complex Character Impeachment

- Walter Smith, having been first duly sworn and examined, testified as follows:
- By Mr. Armstrong:
  - Q. What is your name?
  - A. Walter Smith.
  - Q. I call your attention to October 15, at around 9:00 p.m. Where were you at that time?
  - A. I spent the entire evening on the South Side of Newark. I think I went to a movie with my girlfriend.

Example of a Complex Character Impeachment

- Q. Were you anywhere near Main and Third Streets on that date?
- A. No, sir. I was nowhere near that neighborhood any time that day.
- Q. Do you have any information about the killing of a police officer at Main and Third Streets on October 15, or any other day?
- A. No. I don't know anything about it.

Example of a Complex Character Impeachment

- Q. Have you heard anything about the killing of a police officer on October 15, around Main and Third Streets?
- A. The first I heard of that was when the policeman told me on the day I was arrested.
- Q. Is there anything you wish to add?
- A. No. I have told you the honest-to-God truth.

Example of a Complex Character Impeachment

- Statement Made To Police Officer (Chapter 1)
  - Recommit
    - Q: On direct examination, you said that you decided to start telling the truth on December 15, 2007?
    - Q: That before 12/15/07, you hadn't had that moment where you decided to come clean?
    - Q: You hadn't had that moment where you decided to be candid?
    - Q: You hadn't had that moment where you thought you'd just get this off your chest?
  - Accredit
    - Q: On October 29, 2007, you were caught fleeing the scene of an armed robbery?
    - Q: You weren't a full block from the store when the police caught you?

Example of a Complex Character Impeachment

- Q: You dropped your weapon?
- Q: You were arrested?
- Q: In one hand your gun, your trusty friend?
- Q: In the other hand, a bag of money?
- Q: Someone else's money?
- Q: You were cuffed and taken to the police station on Carson Avenue?

Example of a Complex Character Impeachment

- Q: You were booked?
- Q: Printed?
- Q: Had your photo taken?
- Q: While cuffed, you were led down a hall?
- Q: To a room?
- Q: An interview room?
- Q: You sat there cuffed wondering what was going to happen?
- Q: Wondering whether you were going to get out from under this any way?

Example of a Complex Character Impeachment

- Q: After a while, a detective came in?
- Q: He uncuffed you?
- Q: He looked you in the eye?
- Q: He told you that he had important questions for you?
- Q: He told you that he had important questions about a police officer who was killed in the line of duty?
- Q: He told you that he had important questions about a police officer killed in the line of duty on October 15, 2007?
- Q: Two weeks before this armed robbery?

Example of a Complex Character Impeachment

- Q: At this point, you didn't say, "Boy officer, thanks for asking but I have a Fifth Amendment right to protect myself from incrimination so I will not be speaking to you today?"
- Q: You didn't say, "I have some information. Let me get together with my lawyer. Maybe he can work something out?"
- Q: You didn't say that either?
- Q: You didn't say, "I got real good stuff. Watts did it! Watts killed that cop in cold blood." You didn't say that did you?

Example of a Complex Character Impeachment

- Confront
  - Q: Let's talk about what you did say in that room?
  - Q: You've seen a copy of your transcript from this interview?
  - Q: The prosecutor went over it with you this morning and yesterday and last week when you met with him, too?
  - Q: The officer said to you, "I'm going to ask you some questions about the killing of the police officer on the corner of Third and Main St. on October 15?"

Example of a Complex Character Impeachment

- Q: You said, “I don’t know anything about it?”
- Q: He said, “Were you anywhere near that corner on October 15?”
- Q: You said, “No, I was at the movie on the south side?”
- Q: Do you have any information at all that can help us in this case?
- Q: And you said, “I didn’t even know that an officer had been killed until you told me a few minutes ago?”

Example of a Complex Character Impeachment

- Q: You looked him in the eye and that's what you told that officer?
- Q: He asked if you had anything else to add and you said, "No. I've told you the absolute truth."
- Q: Absolute truth – your words right?
- Q: On Oct. 29, 2007, the absolute truth was that you didn't know anything about the killing of a police officer?

Example of a Complex Character Impeachment

- Q: How was that officer who was trying to solve the homicide of a fellow officer supposed to have known that you were lying on Oct. 29 when you looked him in the eye and told him the absolute truth that you didn’t know anything about it?

Example of a Complex Character Impeachment

- Grand Jury Testimony (Chapter 2)
  - Recommit
    - Q: On direct examination, you said that you decided to start telling the truth on December 15, 2007?
    - Q: That before 12/15/07, you hadn't had that moment where you decided to come clean?
    - Q: You hadn't had that moment where you decided to be candid?
    - Q: You hadn't had that moment where you thought you'd just get this off your chest?

Example of a Complex Character Impeachment

- Accredit
  - Q: I want to talk to you about Dec. 2, 2007?
  - Q: On that day, you were taken to the grand jury room?
  - Q: You came over to the courthouse on the early bus?
  - Q: You got to that courthouse in your fine suit and were brought to the third floor?
  - Q: In that grand jury room was Mr. Armstrong, the prosecutor in this very case?
  - Q: Mr. Armstrong had questions for you?

Example of a Complex Character Impeachment

- Q: Before he started asking you any questions, he did something?
- Q: He put you in that witness chair and put you under oath?
- Q: You know what an oath is?
- Q: It’s a promise?
- Q: A sacred promise?
- Q: On the Bible. To tell the truth?
- Q: Not the convenient truth?
- Q: The honest to God truth?

Example of a Complex Character Impeachment

- Q: On that day, the jury box looked a little different than it does today because there weren't just twelve people?
- Q: There were 23 people?
- Q: You got in that jury box and you took your oath and you made eye contact with those 23 people and you talked to them?
- Q: You talked to them not about your life story but about Oct. 15, 2007?
- Q: You didn't say, "Lades and gentlemen of the grand jury, I got some really important information. Bobby killed that police officer and I can put him there." You didn't say that?

Example of a Complex Character Impeachment

- Confront
  - Q: Let's talk about what you did say?
  - Q: You reviewed this transcript with the prosecutor this morning, right?
  - Q: And yesterday and last week?
  - Q: And you talked about how you were going to explain how your answers under oath today were different than your answers a year ago?
  - Q: You had a conversation with Mr. Armstrong about that?

Example of a Complex Character Impeachment

- Q: Mr. Armstrong asked you, “On Oct. 29 at 9:15 PM, where were you at that time?” Your answer was, “I was on the south side of Carson city. I think I went to a movie?”
- Q: That’s what you told him?
- Q: He said, “Were you anywhere near Main and Third?”
- Q: Answer, “No sir?”
- Q: He said, “Do you have any information at all relating to the killing of the police officer in the line of duty on Oct. 15?”
- Q: Your answer was, “No I don’t have any information about that?”

Example of a Complex Character Impeachment

- Q: “Have you heard anything about the killing of this police officer? I didn’t hear anything about the killing of this officer until I was arrested on Oct. 29 and the police told me they were looking for the person who killed the police officer.”
- Q: That was your answer?
- Q: “Is there anything you wish to add?”
- Q: Your answer was, “No, I have told you the honest to God truth?”

Cross-Examination as a Performance

Michael DeBlis III, Esq.

Your Voice

- Use your voice!
  - Breathe and relax
  - Vary volume, pitch, tone, pace, inflection, cadence, silence, and emphasis (especially during impeachment)
  - Tone conveys emotion
  - Use these devices to signal the completion of a chapter and/or the beginning of a new one

Use Your Body & The Space to Persuade

- Be aware of your facial expressions;
- Your arms and your hands are attached to your body – use them with purpose!
- Focus your attention on the witness;
- Use the space. Move with purpose.

Closing Remarks

- Your voice and body should radiate a sense of confidence and belief in your client and your case
- Knock it out of the park!

Parting Words

- A colleague of mine once said, “Never shoot a mouse in the ass with a cannon.”
- A contradiction on a minor point may be corrected better by using a prior statement to “refresh” the witness’s memory than to do a full-blown impeachment.

Connect With Me!



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