Cross-examination Made Simple (Part III)

IMPEACHMENT BY INCONSISTENT STATEMENT (& OMISSION)

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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.

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