SOUTH CAROLINA CRIMINAL TRIAL TECHNIQUES HANDBOOK

By

Hon. Ralph King Anderson, Jr.
Amie L. Clifford
Danny R. Collins
Prof. Vance L. Cowden
Manton M. Grier
Hon. Donald V. Myers
Hon. M. Duane Shuler
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C. Rauch Wise

PUBLISHED BY THE SOUTH CAROLINA BAR
CONTINUING LEGAL EDUCATION DIVISION

SOUTH CAROLINA CRIMINAL TRIAL TECHNIQUES HANDBOOK

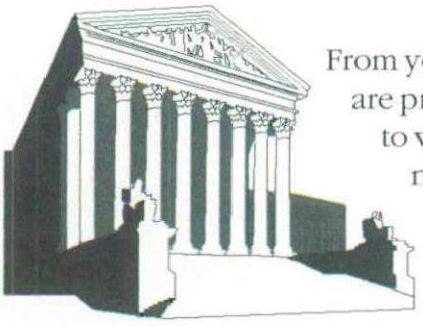
"Cross Examination Techniques"

Author: Jack Swerling

Page: 166

SOUTH CAROLINA CRIMINAL TRIAL TECHNIQUES HANDBOOK

Winning.



From your first client interview; from the first time you open the case file, you are preparing yourself to win. You went to law school to win. You research to win. You conduct discovery to win. You file motions to win. You write memoranda and briefs to win. You spend hundreds of hours preparing, using every tool at your disposal to get every advantage possible in every case. Justice is at stake. Lives are at stake. Winning is at stake.

Now there is a new tool, a new and unique advantage, which will help you win at every stage of the criminal litigation process and especially where winning is often most difficult and least predictable — in front of the jury.

The South Carolina Bar-CLE Division is proud to announce the publication of **South Carolina Criminal Trial Techniques Handbook.** This important handbook, an unique collaborative effort of some of South Carolina's most experienced and talented criminal trial practitioners and judges, is the advantage you need to prepare and win in General Sessions Court, whether you represent the State or the defendant.

South Carolina Criminal Trial Techniques Handbook is a comprehensive resource for the entire criminal litigation process. Practical, thorough, and scholarly, this 550+ page book covers the criminal trial process from beginning to end with an uniquely South Carolina-specific treatment of every subject. No other resource anywhere gives you so much substantive excellence in one place. With over 250 years of combined experience in criminal law practice, these talented authors provide a scholarly foundation for each subject that goes beyond legal analysis to teach practical trial techniques and strategy which will help you win your case. Judge Ralph King Anderson, Jr. on "Experts"; Donnie Myers on "Witnesses" and "Exhibits"; Jack Swerling on "Cross Examination" and "Closing Arguments"; Judge Joe Wilson on "Opening Statements"; Amie Clifford on "Plea Bargains" and "Motions"; Rauch Wise on "Pre-trial Practice"; Vance Cowden on "Direct Examination"; Danny Collins on "Objections'; Judge Duane Shuler on "Jury Selection"; Susan Taylor Wall and Manton Grier on "Litigation Ethics". This book represents all their years of experience, their talent, and their success.

If you want to win, you need the best resources. If you want to win, you need **SOUTH CAROLINA CRIMINAL TRIAL TECHNIQUES HANDBOOK.**

South Carolina Criminal Trial Techniques Handbook

Summary of Contents

E. STATEMENTS REGARDING MEDICAL TREATMENT

A physician's testimony as to a victim-patient's history sho include only those statements by the patient upon which physician relied in reaching medical conclusions. McCormic Evidence, §§ 277, 278 (4th Ed.). The defendant's identi rarely, if ever, a factor upon which a doctor relies in diagnosi treating a victim. Moreover, the doctor's testimony should nev be used to prove facts properly proved by other witnesses. *State v. P* 2d 816 (1985).

Sta tient to a doctor are not adr the stated. Also, when reque should give an instruction on the limited use of this kind of testimony. *State v. Brown, supra*; *Gentry v. Watkins-Carolina Trucking Co.*, 249 S.C. 316, 154 S.E.2d 112 (1967). Gentry also provides a good discussion on whether the patient consulted a doctor for treatment, or for the

IV. PREPARATION FOR ENTERING A GUI

There are a number of matters which must be taker the parties appear in court for the purpose of enteri

A. DEFENSE COUNSEL'S RESPONSIBI

Guilty pleas are invalid unless they are volunt an understanding of the nature and and the plea. *Boykin v. Alabam n v. State*, 317 S.C. 506, 455 S.E.2d e that a defendant voluntarily a defense counsel must satisfy requirements.

**Defense counsel must be familiar with the evi has collected in the case. Witnesses, both unfavorable to the defense, should be interview evidence examined. This information, and coun about the merits of the evidence, should be s defendant.

**Controlling law, statutory or case, should h ensure that the state's evidence meets the eleme and to allow defense counsel to familiariz

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uilty Pleas
Chapter II

LTY PLEA

ross Examination
hapter VII

South Carolina
Criminal Trial Techniques Handbook

B. DISCOVERY

Gathering information is the key to outlining a cross-examination. The advocate needs everything available and even things not readily available to develop the cross-examination.

1. Interview All Witnesses

In order to prepare an effective cross-examination of your opponent's witnesses, you must learn every ing there is to know about your own client and witnesses. A nse lawyer must interview the defendant, his friends and fami . He must learn everything he can about his cl client's strengths and weaknesses shortcomings. He must learn wh lives, how he thinks, and most im discover what has been said to hi law enforcement. He must know relationship with the victim.

THOROUGH & PRACTICAL TRIAL STRATEGY ADVICE

Objections
Chapter IX

Criminal T

EASY-TO-USE EXAMPLES WITH BUILT-IN CASE AND RULES CITATIONS

17. Questions that Pit the Witnesses

a. Objection

Objection, your honor, counsel is pitting the witnesses against each other.

b. Definition

Questions that pit the veracity of one witness against that of another witness are improper. *State v. Brown*, 297 S.C. 27, 374 S.E.2d 669 (1988). *State v. Sapps*, 295 S.C. 484, 369 S.E.2d 145 (1988). Such questions generally ask a witness whether another witness told the truth or whether the witness believes the other witness.

18. Questions that Interject the Attorney's Personal Opinion

a. Objection

Objection, your honor, that's counsel's personal opinion.

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SOUTH CAROLINA LAW FOR SOUTH CAROLINA LAWYERS

CHAPTER VII
CROSS EXAMINATION
Jack B. Swerling, Esquire

I. INTRODUCTION

In the trial of a case, there is perhaps nothing more spellbinding to watch, nor exhilarating to perform, as an effective cross-examination. It is the trial lawyer's surgical tool whereby the adversary's position is weakened or the advocate's case is advanced.

It has been said that cross-examination is the true vehicle for searching for the truth in a trial. It is not enough that the witness may accuse, conclude, or describe. The witness must be subjected to the skill of the cross-examiner to test the credibility of the witness, the witness's perception and recollection, and the consistency of the witness's statements. It is only by going through this time honored process that the jury may have sufficient information to believe in whole or in part, or reject in whole or in part, what the witness relates.

The skill of cross-examination is not something one is born with -- it is a learned process. A truly skillful cross-examination can only be accomplished after painstaking preparation of a case and actually engaging in the trial of cases.

That does not mean that everyone can become a Clarence Darrow, an Edward Bennett Williams, or a Percy Foreman. The outstanding trial lawyers, the true masters of cross-examination, combine their learned skills with their natural abilities and excel at the trial of a case in much the same way as the great artists or the great athletes do in their respective endeavors. All artists are not Picasso. All athletes are not Michael Jordan. All lawyers are not F. Lee Bailey. His cross-examination of investigator Mark Fuhrman was a classic cross-examination of a witness. Bailey was criticized by many, even many of the great legal pundits, for not having scored a "knock out punch," but Bailey planted the seeds that were later to grow into a major issue of the case -- Fuhrman's credibility in light of his racial attitudes. Although reading this chapter will probably not make you a master at the art of cross-examination, and you may not develop the skill of an F. Lee Bailey, perhaps you will avoid the fate of Christopher Darden, Bailey's adversary, who will undoubtedly be remembered as the lawyer who asked O. J. Simpson to try on the glove that did not fit.

II. RULES OF CROSS-EXAMINATION

Every lawyer or professor who has written about the subject of cross-examination has developed a set of so-called rules -- some are original thought, but most have been adopted in one form or another from predecessors. While I have my own set of rules, I also have ideas on how to apply the various rules that others have been humble enough to call their own.

When I graduated from law school in 1973, a friend that I grew up with, who was utterly amazed at my becoming a lawyer, presented me with what many regard as the Bible of cross-examination -- The Art of Cross-Examination by Francis Wellman. It is a book worth reading, not once, but often during your career, as a guide for cross-examination. I have read it a number of times and on each occasion find something useful that I had not appreciated before. Wellman outlines the rules of cross-examination originally authored by David Paul Brown, a well-known Philadelphia trial lawyer at the turn of the nineteenth century. The rules are timeless and are set out here in full with a brief commentary of my interpretation.

RULE 1

EXCEPT IN INDIFFERENT MATTERS, NEVER TAKE YOUR EYE FROM THAT OF THE WITNESS; THAT IS A CHANNEL OF COMMUNICATION FROM MIND TO MIND, THE LOSS OF WHICH NOTHING CAN COMPENSATE.

COMMENT

By not taking the eyes off the witness, the lawyer remains in control. The witness is aware that every movement, every word is being assessed by the lawyer in developing the cross-examination. There is a sense of "no where to go" to escape. The lawyer can view every movement in the witness's eyes, body, and the ease of response. Is the witness looking at the examiner, the jury, the courtroom, or the floor? Is the witness fidgety, comfortable or hopefully getting uncomfortable as the theme is developed? The eyes reveal many secrets and conceal very little.

RULE 2

BE NOT REGARDLESS, EITHER, OF THE VOICE OF THE WITNESS; NEXT TO THE EYE THIS IS PERHAPS THE BEST INTERPRETER OF HIS MIND. THE VERY DESIGN TO SCREEN CONSCIENCE FROM CRIME -- THE MENTAL RESERVATION OF THE WITNESS -- IS OFTEN MANIFESTED IN THE TONE OF ACCENT OR EMPHASIS OF THE VOICE.

COMMENT

Listening to the voice of the witness and the words by which he answers is the second most important factor in maintaining control of the witness and the flow and direction of cross-examination. Is the witness's voice expressing nervousness, evasiveness or lack of candor? Does the answer given answer the question asked? Most importantly, the answer given should direct the examiner to the next question -- not from some predetermined script. The answer given may contain a lead never thought of, hoped for, or anticipated. Seize the opportunity. Listen!

RULE 3

BE MILD WITH THE MILD; SHREWD WITH THE CRAFTY; CONFIDING WITH THE HONEST; MERCIFUL TO THE YOUNG, THE FRAIL, OR THE FEARFUL; ROUGH TO THE RUFFIAN, AND A THUNDERBOLT TO THE LIAR. BUT IN ALL THIS, NEVER BE UNMINDFUL OF YOUR OWN DIGNITY. BRING TO BEAR ALL THE POWERS OF YOUR MIND, NOT THAT YOU MAY SHINE, BUT THAT VIRTUE MAY TRIUMPH, AND YOUR CAUSE MAY PROSPER.

COMMENT

Once you have determined the type of witness on the stand, adopt your personality and style to the character at hand. An effective cross-examiner must know people and it is for that reason that one personality and style will not work for every witness. The actor must act, the lawyer must react. Many a case has been lost because the lawyer needlessly savaged a witness with whom the jury sympathized, when the day could have been carried by a gentle, but probing examination.

RULE 4

IN A CRIMINAL CASE, ESPECIALLY IN A CAPITAL CASE, SO LONG AS YOUR CAUSE STANDS WELL, ASK BUT FEW QUESTIONS, AND BE CERTAIN NEVER TO ASK ANY THE ANSWER TO WHICH, IF AGAINST YOU, MAY DESTROY YOUR CLIENT, UNLESS YOU KNOW THE WITNESS PERFECTLY WELL, AND KNOW THAT HIS ANSWER WILL BE FAVORABLE EQUALLY WELL; OR UNLESS YOU BE PREPARED WITH TESTIMONY TO DESTROY HIM, IF HE PLAY TRAITOR TO THE TRUTH AND YOUR EXPECTATIONS.

COMMENT

This is perhaps the most misunderstood maxim, and the most abused maxim all in one. Cross-examination must have a purpose, and the purpose should be intertwined with the whole theory of the case. No lawyer can expect to know the answer to every question asked, but every lawyer should know why the question was asked, how it fits into the overall theory of the case, and can a damaging answer be softened or minimized by further questioning or by another witness, an exhibit or argument. It is not the lawyer who asks the most questions on cross-examination that wins; it is the lawyer who gets the answers needed to advance his case.

RULE 5

AN EQUIVOCAL QUESTION IS ALMOST AS MUCH TO BE AVOIDED AND CONDEMNED AS AN EQUIVOCAL ANSWER; AND IT ALWAYS LEADS TO, OR EXCUSES, AN EQUIVOCAL ANSWER. SINGLENESS OF PURPOSE, CLEARLY EXPRESSED, IS THE BEST TRAIT IN THE EXAMINATION OF WITNESSES, WHETHER THEY BE HONEST OR THE REVERSE. FALSEHOOD IS NOT DETECTED BY CUNNING, BUT BY THE LIGHT OF TRUTH, OR IF BY CUNNING, IT IS THE CUNNING OF THE WITNESS, AND NOT OF THE COUNSEL.

COMMENT

The question asked must leave no room for various interpretation by the witness, the court or the jury. Questions should be sharp, clear and require an equally

sharp and clear answer that damages the other party or advances your case. If the questions are not subject to vague interpretations, the jury will know whether the witness is being responsive or not.

RULE 6

IF THE WITNESS DETERMINES TO BE WITTY OR REFRACTORY WITH YOU, YOU HAD BETTER SETTLE THAT ACCOUNT WITH HIM AT FIRST, OR ITS ITEMS WILL INCREASE WITH THE EXAMINATION. LET HIM HAVE AN OPPORTUNITY OF SATISFYING HIMSELF EITHER THAT HE HAS MISTAKEN YOUR POWER, OR HIS OWN. BUT IN ANY RESULT, BE CAREFUL THAT YOU DID NOT LOSE YOUR TEMPER; ANGER IS ALWAYS EITHER THE PRECURSOR OR EVIDENCE OF ASSURED DEFEAT IN EVERY INTELLECTUAL CONFLICT.

COMMENT

The lawyer must control the witness. After a series of questions, the examiner will know the attitude, demeanor, and ability of the witness. Like any good chess or card player, the lawyer must finesse the witness. If the witness is witty, sarcastic, or argumentative, use that against the witness to bring the witness under control. Show the witness that you are the examiner and he is the witness and your questions will require serious, concise, and straightforward answers. Let him know that any other answer or any other manner of response will not be accepted by you or the jury. This must be done with no show of anger or frustration on the part of the examiner because that surely indicates a lack of control. Control and a dogged pursuit are the earmarks of an effective cross-examination.

RULE 7

LIKE A SKILLFUL CHESS PLAYER, IN EVERY MOVE, FIX YOUR MIND UPON THE COMBINATIONS AND RELATIONS OF THE GAME -- PARTIAL AND TEMPORARY SUCCESS MAY OTHERWISE END IN TOTAL AND REMEDILESS DEFEAT.

COMMENT

Cross-examination is no less a game of skill than chess. The chess player must have an overall strategy to win the event. Each move is designed to eventually bring about a desired result. Along the way, the chess player must sacrifice here and there to further the overall strategy and corner his adversary into check-mate. The great chess players always view the overall plan, not the single move. So it is with the cross-examiner. A temporary success, even an apparent temporary defeat are of no consequence if the overall plan is sound and in place. Questions must be designed to build on each other to bring about the desired result. Victory will be determined at the end of the cross-examination, i.e., have you weakened your adversary's case, advanced your own, or have you accomplished both.

RULE 8

NEVER UNDERVALUE YOUR ADVERSARY, BUT STAND STEADILY UPON YOUR GUARD; A RANDOM BLOW MAY BE JUST AS FATAL AS THOUGH IT WERE DIRECTED BY THE MOST CONSUMMATE SKILL; THE NEGLIGENCE OF ONE OFTEN CURES, AND SOMETIMES RENDERS EFFECTIVE, THE BLUNDERS OF ANOTHER.

COMMENT

No matter what the endeavor, underestimating the opponent is a major factor in defeat. Many a contest has been lost because one side was overconfident due to a perception of a lack of skill or experience of the adversary. A trial is the ultimate contest of preparation, skill, experience and the ability to deliver effectively, but any adversary is capable of delivering a fatal blow with one question or series of questions. Stay tuned, stay sharp, and stay on top. Don't take the adversary for granted.

RULE 9

BE RESPECTFUL TO THE COURT AND TO THE JURY; KIND TO YOUR COLLEAGUE; CIVIL TO YOUR ANTAGONIST; BUT NEVER SACRIFICE THE SLIGHTEST PRINCIPLE OF DUTY TO AN OVERWEENING DEFERENCE TOWARD EITHER.

COMMENT

During a trial, the lawyer becomes the focus of the jury's attention. Jurors come into the courtroom with expectations of what lawyers do and how they do it. While jurors may differ as to the means and methods employed -- they generally agree on one thing -- the courtroom is an important institution and deserving of great respect, especially from those who participate in the process. The trial lawyer, and in particular the lawyer on cross-examination, is expected to be an advocate and is expected to advocate his position forcefully, but at the same time the jurors expect deference to the Court and civility between counsel.

RULE 10

Wellman concludes his rules by acknowledging Lord Cox, who was an outstanding advocate at the English Bar. In The Advocate, His Training, Practice, Rights, and Duties, written by Cox and published in England, there is an excellent chapter on cross-examination. Cox closes his chapter with this final admonition to his students, to whom his book was addressed:

> In concluding these remarks on cross-examination, the rarest, the most useful, and the most difficult to be acquired of the accomplishments of the advocate, we would again urge upon your attention the importance of calm discretion. In addressing a jury you may sometimes talk without having anything to say, and no harm will come of it. But in cross-examination every question that does not advance your cause injures it. If you have not a definite object to attain, dismiss the witness without a word. There are no harmless questions here; the most apparently unimportant may bring destruction or victory. If the summit of the orator's art has been rightly defined to consist in knowing when to sit down, that of an advocate may be described as knowing when to keep his seat. Very little experience in our courts will teach you this lesson, for every day will show to your observant eye instances of self-destruction brought about by imprudent cross-examination. Fear not that your discreet reserve may be mistaken for carelessness or want of self-reliance. The true motive will soon be seen and approved. Your critics are lawyers, who know well the value of discretion in an advocate and how

indiscretion in cross-examination cannot be compensated by any amount of ability in other duties. The attorneys are sure to discover the prudence that governs your tongue. Even if the wisdom of your abstinence be not apparent at the moment, it will be recognized in the result. Your fame may be of slower growth than that of the talker, but it will be larger and more enduring.

COMMENT:

What a great summary of the scope, purpose, and impact of cross-examination. While cross-examination may be the advocate's greatest weapon, it may also be his greatest source of self destruction. Discretion! What to ask. When to ask it. When to keep your seat. These are important points for the advocate to always remember before asking even the first question. Know where you are going and plan the best and most effective way to get there. The points best made are the ones that the jury takes with them into the jury room when they retire to deliberate.

While my rules will not survive the test of time like Wellman's, they have worked for me and I will pass them on, as Judge Frank Epps has been heard to say, "for whatever it's worth."

1. Have an overall objective in mind as to how the case should go and how to get there.

2. Prepare! Prepare! Prepare!

3. Be flexible in strategy and tactics. Don't be rigid.

4. Be a lawyer - an advocate - not some courtroom bull.

5. Know who to ask, what to ask, and when to ask it.

6. While it would be wonderful to know the answer before you ask the question, we often don't have that luxury. Do know what you would like the answer to be and how to develop it. Don't ask what you don't want to know.

7. Listen to the witness' answer -- cross-examination evolves, it does not come from your note pad.

8. Always be conscious of your demeanor.

9. Control the witness.

10. Stop at the right time.

Now let us explore how to apply these rules.

III. CASE INTEGRATION

A. DEVELOP A THEORY, A GOAL, AND A STRATEGY

One cannot look at cross-examination in a vacuum. Effective cross-examination must be a part of the entire case development and not isolated from it. The overall strategy must drive the cross-examination and likewise the cross-examination must further the overall strategy.

Before you have a strategy, there must be a theory. Identify the best theory for your case. In a homicide case, the theory may be self-defense. Now identify a goal. An acquittal may be an option as a goal, but under a given set of facts, not likely. A conviction for manslaughter may not be what you want, but is acceptable under the circumstances. Thus, the theory is self-defense, and at best, the defendant gains an acquittal and at worst, hopefully, no more than a conviction for manslaughter. Of course, in prosecuting any criminal case, the prosecution must also identify a theory and a goal.

Now that the theory and goal have been identified, develop a strategy. Develop a list of what you would like to accomplish at each stage of the trial to support the theory and accomplish the goal. Even with a good overall strategy be flexible, have alternate plans, contingent plans, and just good old common sense.

Preparation is the essential component to achieving the goal and developing the strategy. Preparation must be persistent and never ending. In the

preparation of a case, develop the defendant's case-in-chief to further the theory, but prepare the cross-examination not only to further the theory, but also to undermine the state's theory.

B. THE OPENING STATEMENT

During the opening statement set out the major theory that you have developed, but not all of it. Don't make promises that may not be possible to keep e.g., "the defendant will testify" unless you know for sure that he must and will. Lay out the theory and what you know you can show in your case-in-chief. Plant the seeds for your cross-examination now and tease the jury. If there is an accomplice or a co-defendant who is testifying for some consideration, prepare the jury for your cross-examination as to motive, interest, and bias. If the victim was less than pleasant, prepare the jury for cross-examination as to reputation, prior difficulties, or threats. Lastly, use the opening statement to set the stage for your overall direct and cross-examination strategy and theory.

C. THE OPPONENT'S CASE-IN-CHIEF

During your opponent's case, the cross-examination must be designed:

1. to further your theory;
2. to discredit your opponent's theory; or
3. to plant seeds that will grow in your case or come together in the closing argument.

D. YOUR CASE-IN-CHIEF

During your case, enlarge on the points made in cross-examination. If the issues included prior difficulties between the parties, call witnesses to corroborate. If the issues presented included prior threats by the victim, call the witness who heard them. The key is not only to present the case you have prepared, but to corroborate the issues raised in cross-examination.

E. THE CLOSING ARGUMENT

If everything has gone as planned, you have set up the case to be tied together and driven home in closing argument. This is the time to bring together the theory of your case. Point out your opponent's failure to live up to promises made in the opening, and highlight the issues you said would be important. Attack your opponent's case-in-chief with the high points of the cross-examination and weave them together with the strengths of your case. If you planted a seed that was not obvious, now is the time to highlight it, e.g., a subtle inconsistency or error that crushes your opponent's theory. Since the evidence is now closed, the problem cannot be corrected.

F. JURY INSTRUCTIONS

Last but not least, develop the jury instructions to follow the theory of the case. Request appropriate charges on impeachment, prior inconsistent statements, credibility and accomplice testimony.

The one thread that runs from the beginning of a case to the final instructions is the cross-examination. In order to have an effective cross-examination and a favorable outcome, the case must be integrated.

IV. PREPARATION FOR CROSS-EXAMINATION -- PRE-TRIAL

A. PREPARATION

Now that you know where you want to go, how do you get there? Every advocate will say that the secret to an effective cross-examination is preparation. While the word may be overused, it cannot be overemphasized. A lawyer may get lucky from time to time on cross-examination, but that lawyer is no advocate. The advocate knows the hard work and pain that goes into the preparation of a case -- especially an effective attack on the adversary's case-in-chief.

B. DISCOVERY

Gathering information is the key to outlining a cross-examination. The advocate needs everything available and even things not readily available to develop the cross-examination.

1. Interview All Witnesses

In order to prepare an effective cross-examination of your opponent's witnesses, you must learn everything there is to know about your own client and witnesses. A defense lawyer must interview the defendant, his friends and family. He must learn everything he can about his client. He must know his client's strengths and weaknesses, his positive traits and his shortcomings. He must learn what his client does, how he lives, how he thinks, and most importantly -- why. He must discover what has been said to his client by witnesses or by law enforcement. He must know everything about his relationship with the victim.

Discover and interview witnesses favorable to your case. Favorable witnesses are not only those that enhance your case but that hurt the opposition. If these witnesses get called by your opponent you will have them on cross-examination. There is no better or more effective way to drive home a point than to bring it out on cross-examination.

Interview the unfavorable witnesses. This will enable you to know what questions to ask and what questions to avoid. The only time I do not have the witnesses from the other side interviewed is when I don't want to educate the witness or the opposition of my theory or strategy, or when I know it would be unkind or fruitless, e.g., a homicide victim's family.

2. Obtain Pleadings and Depositions from Corresponding Civil Trials

If there is a corresponding civil case, obtain the pleadings and depositions. A verified pleading can be a great source of prior

inconsistent statements. Depositions and prior trial transcripts are a wonderful source of impeachment material. Rare is the occasion that a person will be entirely consistent every time he tells the story. A minor variation can become a major issue.

3. Investigate Every Aspect of the Case

Interview the police officers, the emergency medical personnel, the hospital personnel, and especially any eye witnesses.

A defense lawyer should obtain from the prosecution all investigative reports, investigative notes and statements of witnesses. Read them, highlight them, outline them and categorize them. Start thinking of how one report or statement supports or contradicts another.

Obtain from the prosecution all forensic reports and interview the expert. What are the strengths and weaknesses of the findings? What will be fertile for cross-examination and what should you stay away from?

A defense lawyer should not stop with what the prosecution is required to give. It is possible to find valuable information for cross-examination in school records, highway department records, employment records, courthouse records, tax returns, business records, bank records, phone records, pager records, medical records, newspapers, military records, rap sheets, prison records -- the list goes on and on.

4. Examine The Physical Evidence

View photographs and the scene. Inevitably there will be some jewel spotted that will assist in the cross-examination, e.g., blood stains or tears or lack thereof on clothing; weapons, cuts, bruises or wounds, or the lack thereof, evidenced in photographs; and distances, structures, or terrain at the scene. How could a lawyer cross-examine someone about the scene of a homicide without knowing whether there was something unique to the area, or cross-examine a forensic

expert without knowing the condition of clothes or the location of wounds?

In a homicide case, obtain the autopsy and interview the pathologist. He will be a state's witness. Know what he will say and why. Go over the cause of death, toxicology, angles, stripling, powder burns, offensive and defensive wounds, positions of the victim and assailant, which were not fatal or disabling. Review what the alcohol or drug levels were and the effects, e.g., impaired judgement, aggression.

5. Never Waive a Hearing

Never waive a hearing whether it is a preliminary hearing or a motions hearing. Anytime you can get someone under oath, there is fertile ground for later impeachment. Pin down the good points and the bad points, but most of all look to the future for impeachment opportunities. Have every hearing recorded and obtain transcripts. Also, prepare transcripts of any other relevant hearings, motions, pleas, sentencing, trials, depositions, interviews, or tape recordings.

The key to cross-examination is information and the ability to use it effectively. The information is out there -- most of the time it's free -- just issue a subpoena. There are few better feelings in a trial, than to actually know what's coming from the witness stand that will be favorable. There is an equally good feeling in knowing what pitfalls to avoid.

V. PREPARATION OF CROSS-EXAMINATION -- TRIAL

A. ORGANIZATION OF NOTES AND DOCUMENTS

You now have a theory, a strategy, and a wealth of information. Unless the information is organized efficiently and is readily accessible, it cannot be used effectively.

There are any number of approaches to organizing the information, and in many situations a combination of two or more is practical.

1. The Working File

As I gather information, I find the following very helpful in tracking and organizing information:

a. The Topical Method

The topical method allows you to have at your disposal all the information on a certain subject. For example, break the file down into the important issues. Among these could be forensics, reputation, prior difficulties, prior threats, other acts, impeachment, the day of the event, the day before, or the day after. Obviously for each case the topics would vary in number and type. The idea is to have at your disposal all the information on a particular issue funneled into one part of the file.

b. Date and Events

Many cases, such as white collar crime or drug cases, involve a number of dates or events. I find it very helpful to keep track of dates and events separately, not only for easy access, but also to have complete information on these issues in one place. For example, if February 10, 1993, is an important date in the case, all relevant information for that date should be indexed and kept together. What each witness says and what each document reveals about the date or event, if kept together, gives you one location to access that information for your cross-examination. Inevitably, there will be conflicting information, and this is a great source of cross-examination material.

c. Witnesses

Have a separate folder for each witness (or each count of an indictment). Put everything related to that one witness in that folder -- statements, incident reports, lab reports, rap sheets,

biographical information, etc. Also it is important to include any cross-reference in a statement regarding witness by another witness in the case.

d. Documents

There must be a file for important documents, e.g., statements that will have to be referred to during examination or introduced into evidence. Having one location for these documents (even if copies are in other folders) is very important. It allows greater accessibility.

Obviously there will be a great deal of duplication by utilizing these methods. What you need will be where you can find it and in fact will be located in several places.

2. The Trial File

We have now seen how to assemble information over a period of time, from the beginning of the case to pre-trial investigation, to document gathering and to pre-trial preparation. Now, how does one go about organizing the material for the actual trial. There is no one approach, which works for everybody. The object is to condense your working file into a trial file that is comfortable and usable.

a. Notebook with Topical Index

My favorite method is to use a notebook with a topically numbered index (e.g., 1-50). Each numbered section of the notebook is devoted to a witness (John Doe), an issue (reputation), a subject (forensics) or a date (February 13, 1993). Under each section of the notebook, put everything related to the subject in an organized fashion, e.g., in chronological order, and create a sub-index under that tab (e.g., A, B, C, D), so that when you turn to that tab from the main index, you will have another index showing what is contained under that tab and in what order. Documents can

be put under more than one tab, e.g. a SLED report can be under forensics and under the name of the lab expert, or an investigative report can be under the name of the investigator, the witness, or an issue.

b. File Folders

Another method is to use file folders. The organization of the trial file will be much the same as the notebook with appropriate indexes and sub-indexes.

Even if the notebook is used, I suggest a series of file folders separately marked, with documents ready for use in cross-examination, e.g., statements, transcripts, depositions, records. Each document should be a clean copy, ready for cross-examination or admissibility into evidence.

3. Structure For Cross-Examination

Now let's explore how to set up notes or an outline for the cross-examination. Hopefully, you now have lots of information, several statements of a witness, some physical evidence, and a few witnesses or documents standing in reserve for impeachment. Let's put it all together. I suggest notebook paper or index cards.

a. Line By Line Method

One method is to dissect a written statement, investigative report, or transcript line-by-line. Adequate space should be left between lines to insert notes from other statements, hand written thoughts, or notes from direct examination on the same issue. Each line should be designated with the appropriate source, e.g., "Statement of February 13, 1996" or "Grand Jury testimony May 6, 1996" (prepare and have handy a legend - ST of 2/13/96 or GJ 5/6/96 for brevity). Here is an example with one statement and Grand Jury testimony containing conflicting information:

Al Jones

Stmt. of 2/13/96 - "On July 3, 1996, George delivered to me a kilo of cocaine."

G.J. of 5/16/96 - "On July 10, 1996, Richard brought 1/4 kilo of cocaine and left it with Allan for me."

When cross-examining the witness Al Jones, easy reference can be had to the contradictory statements.

b. Paragraph Method

Another method is to utilize a paragraph form instead of the single sentence. Just make sure that you have one issue, one paragraph. Don't get lost in the information.

c. Issue Method

Another method is the issue method. Break up the information available on a witness and catalogue it according to the issue on separate pages or cards, e.g.:

Al Jones

1. Plea bargain
2. Exposure to sentence
3. Prior record
4. Events of July 12, 1995
   Events of February 6, 1996
   Events of April 7, 1996
5. Relationship with Paul
   Relationship with Sarah
6. New York
   San Francisco

Here is an example: at top of page put

Al Jones

•

"July 12, 1996"

Stmt. of 2/13/96 "On July 12, 1995, I was in San Francisco"

G.J. of 5/6/96 "On July 12, 1995, I was in New York."

Again the idea is to have at your disposal everything the witness has said about a particular issue and be ready to examine him with it.

d. Column Method

Another method I have utilized is the column method. Here, at the top of the page, put the document referred to and in the left-hand portion, the issue, e.g., as to witness Al Jones:

WITNESS - AL JONES

ISSUE	STMT. OF 2/13/96	GJ OF 5/6/96	STMT. OF 8/17/96
San Francisco	There on 7/12/96	There on 6/10/96	Never went there
John Doe	Bought cocaine from him	Sold cocaine to him	Don't know him
Jack Swerling	Who	Who	Who

e. Separate Page Method

Another variation of a and b above is to divide up the various statements line by line, and leave space between the lines, but have each statement on a separate page rather than integrated with each other.

B. USE AT TRIAL

1. Reference to Notes and Statements

Now that you have chosen a method of organizing the cross-examination materials, there needs to be an appropriate and easy method to correlate the statements and documents to the notes. No matter what method is used, have a number in the statement and a number on the notes match each other for quick reference.

In the line-by-line method or paragraph method, number and highlight each line or paragraph in the statement and have that number indicated in the notes with the appropriate page references. If the subject of the delivery of cocaine in January, 1996 was the fifteenth line or paragraph in the statement of May 1996, indicate it in the notes this way:

JANUARY 3, 1996

1. Stmt. of 5/13/96 "on January 3, 1996, George delivered to me a kilo of cocaine. Line (or Paragraph) 15, page 2.

Add subsequent statements as follows:

2. GJ of 9/6/96 "On January 3, 1996, Richard brought me a kilo of cocaine and left it with Allan for me. Page 15, l. 6.

3. Stmt. of 11/17/96 "I never got any cocaine. paragraph 6, p. 4.

Use the same type of identifiers in the column method:

AL JONES

ISSUE	STMT. OF 2/13/96	GJ OF 5/6/96	STMT. OF 8/17/96
San Francisco	There on 7/12/96 Par. 15, p. 2	There on 6/10/96 p. 15, l. 4	Never went there Par. 9, p. 1
John Doe	Bought cocaine from him Par. 80, p. 9	Sold cocaine to him Page 22, l. 6	Don't know him Par. 4, p. 2
Jack Swerling	Who Par. 90, p. 12	Page 18, l. 9	Who Par. 11, P. 4

In the event that there are other documents relevant to the cross-examination, do an appropriate reference to the document or exhibit in the notes.

Now, during cross-examination, you will be able to refer a witness to a particular statement, hand the witness a clean copy (from your file folder) and refer the witness to the statement and paragraphs, page or line, to either refresh the witness's memory or to impeach the witness, e.g., "Mr. Witness, isn't it true that on February 13, 1996, you gave a statement that you were in San Francisco on July 12, 1995. I refer you to that statement on Page Two, midway down the page" (you know it to be Paragraph 15, page 2).

One word of caution! Try to keep it simple and never lose sight of the overall picture or the most efficient way of achieving it. In a recent case, I had so much material and was so well organized, that I lost sight for a time of delivering it effectively. Over a period of three hours I efficiently hammered home a number of inconsistencies that went to the very heart of the case, but I got bogged down in detail

and I was not being effective. In the last hour or so, I loosened up and attacked in less detail and scored many hits. Sometimes we can be over-prepared.

VI. THE PURPOSE OF CROSS-EXAMINATION

While the subject matter may change from case to case, the purposes for cross-examination never do. Cross-examination must have a purpose and if it does not, keep your seat. Many a case has been lost or hurt by a misguided or unnecessary cross-examination. What are the purposes of cross-examination?

1. To discredit the witness
2. To impeach the witness
3. To undermine damaging testimony of the witness or another adverse witness by cross reference
4. To elicit favorable testimony
5. To draw or create favorable inferences with other testimony
6. To corroborate favorable testimony
7. To damage your adversary's case
8. To advance your case
9. To inject or enhance your theme
10. To tie down an important issue or unanswered question

VII. ASSESSING WHETHER TO CROSS-EXAMINE

During your opponent's direct examination, you must constantly assess whether and how to cross-examine. Consider:

A. SHOULD THE WITNESS BE CROSS-EXAMINED AT ALL?

If the witness was unimportant, did not hurt your case, did not help the opponent, and cannot help your case, why cross-examine at all?

B. SHOULD YOU DISCREDIT THE TESTIMONY OR THE WITNESS?

An assessment must be made as to whether the witness or the testimony should be attacked. Did the witness or the testimony hurt or help? Is it something that can be built on to create a favorable set of facts or inferences? Will discrediting the information or the witness advance your position or set it back? In other words, by pointing out the problems with a witness or the testimony, will you elicit sympathy for the witness, e.g., a child?

C. CAN THE WITNESS BE DISCREDITED?

Make an assessment as to whether you can discredit the witness. There are many potential issues here:

a. Rewards for testimony
b. Prior record
c. Character
d. Demeanor

D. CAN THE TESTIMONY BE DISCREDITED?

Obviously if the testimony of the witness can be attacked, then the witness is also discredited. Some of the things to consider in evaluating whether the testimony can be attacked are:

a. Prior inconsistent statements
b. Testimony differs from physical evidence
c. Testimony differs from scientific evidence
d. Testimony differs from expert opinions
e. Testimony differs from testimony of other witnesses

E. CAN YOU ELICIT FAVORABLE OR UNFAVORABLE FACTS?

Cross-examination does not have to be utilized solely to attack the opposition -- it may be very useful to bring out favorable facts. The eyewitness to a homicide can be asked if he heard the victim make a threat, or did he see an unfriendly gesture, or does he have knowledge about the victim's reputation for turbulence and violence?

F. CAN YOU ELICIT FAVORABLE OR UNFAVORABLE INFERENCES?

In a trial we not only look for facts, but we rely on inferences -- issues to argue about which support our case. Counsel should consider exploring with a witness what hasn't been testified about, what hasn't been shown, what hasn't been done, or who hasn't been called. An example may be to have the witness testify that a blood alcohol test was not done on the victim and the favorable inferences that can be drawn from that in view of another witness's testimony that the victim appeared to be under the influence of alcohol.

VIII. OUTLINE OF A CROSS-EXAMINATION

There is no one organizational chart for a cross-examination. While a set form is a good working tool, the attorney must be flexible enough to adapt to particular situations. At one time or another, however, the following outline should be covered or at least considered.

1. Reinforce the favorable facts from direct -- Be careful, however, that you do not give the witness an opportunity to change testimony or correct some mistake.

2. Reinforce and bring out favorable information which blends with other facts or other witnesses to impeach what should be impeached, and to strengthen what should be strengthened. The one exception to this suggestion would be where you do not wish to make the issue obvious and save it for closing argument at which time it cannot be refuted, e.g., a key document, phone number, date, test result, description, etc.

3. Reinforce and elicit facts that are consistent with and assist your theory.

4. Have the witness admit what is obvious and undeniable.

5. Discredit the witness:

   a. Motive
   b. Bias
   c. Interest
   d. Prejudice
   e. Credibility
   f. Negative inferences
   g. Prior record
   h. Promises made to the witness

6. Discredit the witness's testimony through cross-examination

   a. On perception
   b. On physical limitations
   c. On environmental limitations
   d. On memory/recall
   e. On knowledge of events
   f. On prior inconsistent statements
   g. On negative inferences
   h. On inconsistent conduct
   i. On inconsistencies with other witnesses
   j. On inconsistencies with the opposition's theory

7. Elicit how statements and testimony have changed to conform to other testimony or physical facts to show lack of truthfulness.

IX. THE LAWYER

Over the years I have watched lawyers in the courtroom and have tried, abandoned and developed a number of techniques myself. The key is to find and develop what works for you, what you feel comfortable with and what will convey to the jury your message. I am sure that every lawyer could add to or subtract from the list that follows and that is as it should be. With a hundred lawyers you will find a hundred styles.

A. POSITION AND MOVEMENT

Position yourself during the cross-examination so that you and the jury can maintain some eye contact so that you may see their reaction. You will also want to examine the witness so that he has to look at you and by doing so has to look at the jury. Jurors pick up on body language. Is the witness looking at them or away from them? Is he looking down or up? Is he hesitant or is he sure and confident? While conducting an examination, move around. Use gestures -- hands, arms, face. Don't be rigid, but don't move around just for the sake of it -- move with a purpose. Use movement to catch the jury's attention. If they are drifting, inattentive, or saturated - move. Like a good fencer or boxer, move in and out. Go to the witness, make the point and move back out. The witness may become intimidated after a while knowing that you are moving in to make a point and the jury will eventually anticipate the meaning of your movements too.

B. METHODS OF QUESTIONING AND USE OF VOICE

Develop different methods of questioning. At times be probing, at times be inquisitive, at times be demanding, at times be accusatory, and at times be indignant. Communicate to the witness and to the jury through your particular method of examination. Also, use a mixture of voice inflection. Combine a range of emotion and a range of voice inflection -- from confidence to indignation, from belief to non-belief to disbelief, from satisfaction to non-satisfaction, and from demanding to passiveness. Again, the point is to communicate with the jury. Your voice and the tone applied can help send the message to the jury that you want them to receive. Through your voice and style of questioning, you can also send a message to the

witness. The message you want to send is control. The witness will understand and so will the jury.

C. CONTROL THE WITNESS

The lawyer must control the witness. Your voice and the style of examination will go a long way to establishing that control. Let the witness know when she is not responsive. Let the witness know that you will not let her "off the hook" until she answers a question. Let the witness know that you know when she has gotten hooked and that she is not getting free. Let the witness know that unnecessary and unwanted answers will not be tolerated -- complain to the judge, eye the jury. Let the witness get away with nothing that undermines your control. She is in the witness chair and you are asking the questions.

During the examination never take your eyes off the witness. Your eyes will see things that others in the courtroom will not -- a sense of doubt, hesitancy, lack of confidence, a lie. Let the witness know that your eyes will never leave him, never give him an opportunity to relax or time to conceal. Listen! Listen to every answer and the manner in which it is delivered. After a number of examinations you will know how comfortable a witness feels about an answer simply by listening to him. Was the witness sure? Was he confident? Is he hiding something? Is he afraid of the next question?

As part of your effort to control the witness and the direction of cross-examination, don't argue. Be forceful, persuasive, but courteous. Be relentless. A failure to answer your question should be met with, "so the answer to my question is yes or no" (or whatever the issue may be) or "let me repeat my question in a different way." Put the witness in a position of having to eventually answer the question or face the risk of the jury's awareness that he has not, or will not.

D. MAINTAIN CREDIBILITY

The lawyer must maintain credibility with the witness and the jury. When you stake out a witness on an issue, for example a prior inconsistent statement or a fact in evidence, make sure you are right. Nothing will lose a

jury faster, or cause a witness to develop a dangerous degree of confidence, than the lawyer's being wrong about what has been stated.

E. LISTEN TO THE WITNESS

Not only must you listen to the manner in which a witness answers, but also to what he has said. Too many lawyers don't listen to the answers. They are following a script or thinking about the next question. You must hear what the witness said -- a word, a phrase or the way it was delivered may prove to be the most important opening in the cross-examination. Remember instinct! If you listen, you may find that one area that undermines the credibility of the witness or the facts themselves.

X. CROSS-EXAMINATION TECHNIQUES

A. INTRODUCTION

There are as many techniques as there are lawyers. In this section, we will explore some tried and true techniques.

The most important aspect of developing or exploring various techniques in cross-examination is to have a plan. In other words, know where you are going, and what you want to achieve.

It is very important to orchestrate the cross-examination. Plan the cross-examination as you would script a play. At the outset, grab the witness's attention or the jury's attention.

This may be accomplished, for example, by impeaching the witness. Take the witness off the high ground.

Somewhere during the middle of the cross-examination, plan to raise other important issues that will grab attention. Rarely will you always be able to keep the jury riveted to the edge of their seats. Periodically you will have to alert them. You may need to examine the witness to point out differences between his testimony and the testimony of other witnesses or the physical evidence.

You must end on a high note -- a climax. For example, a series of questions that hurts the witness's credibility before the jury. Another example is pursue prior inconsistent statements. They will be remembered. The point is, plan your cross-examination so that the effect of what is being brought out is maximized.

B. NOTES

Preparation and a good outline are essential to a well-developed and effective cross-examination. But just as an actor uses a script for rehearsal and then abandons it for the real performance, the lawyer must learn the outline, know where the information is for reference, but not rely on it totally for cross-examination. There are several problems with notes. The first is that many lawyers who refer to notes are thinking about the next question rather than listening to the answer. The answer is far more important than the next question because it may contain the key to the door you are seeking to open. The second important factor about notes is that without them you are far better able to control the witness by bearing down, asking question after question, and penetrating the foundation of the witness's story. By constantly referring to notes you lose rhythm and momentum. Rhythm and momentum are hard to beat and once gone, hard to regain.

C. RHYTHM AND MOMENTUM

This refers to the pace and tone of the back and forth exchange between you and the witness. By asking questions and getting the answers expected or wanted, a certain cadence becomes established. You become more effective, more probing, more penetrating. The witness becomes less sure, more ill at ease, and easier to catch off guard. You know where you are heading. The witness may not know where you are heading, but even if he does, he can't stop it. The most important factor -- the jury knows what's happening, senses it, and it captures their attention.

D. JABBING AND PUNCHING

Watch a prize fighter. He bobs and weaves, jabs and punches. In the courtroom, a lawyer can do the same thing. Move around with themes or

areas of questions. Develop an idea, ask the questions, and move on. Come back to the idea in a new way at maybe an unexpected time. Remember that if the other side did their homework, the witness is prepared. Try to catch her off guard by asking the expected in an unexpected way or at an unexpected time. Try and catch her off guard, then move in. Attack, withdraw, and attack again.

E. FOUNDATION BUILDING

A good cross-examination requires constant foundation building. If you ask "was the light green," you will get an answer. It may or may not be what you wanted, but it certainly is not very dramatic. Build up to it for effect. "Where were you?" "Where were the other vehicles?" "How long had you been there?" "Did the car move?" "Did you see the light change?" "So you actually saw the car move before you saw the color of the light?" "Therefore, you don't know if the light had turned green or the car had moved before the light turned green?" "It was an assumption on your part!" This is a rather simple example, but hopefully gets the point across. Establish first why or how the person knows or does not know something, then move in. It will have more effect.

F. THE BOX

The witness has testified that your client shot John Doe down in cold blood. He is fairly convincing and fairly unmovable. If you ask, "Wasn't my client really in fear of his life?" the witness will answer, "No!" Put the witness in a box by a series of questions designed to box in the witness with no escape, despite what he says. "John Doe had a knife!" "John had threatened using the knife." "John had used the knife before and you saw it." "The defendant was backing up." "John was yelling at the defendant." "John is 6' 2" and the defendant is 5' 9"." John is 240 pounds, the defendant is 180 pounds." "People were yelling."

By making a series of statements or questions, the witness is boxed in. It doesn't make any difference what he says. The point you are making is clear.

G. LEADING QUESTIONS

The single most important tool for the cross-examiner is the ability to ask leading questions or questions that suggest an answer. You should design questions that direct the course of a cross-examination to obtain desired answers to important questions. Leading questions make a statement. You are really at an advantage here because if you get the desired answer, you've scored a point. If you don't get the desired answer, you have created an issue which you should be able to tie together in another way by asking "Isn't it true that John did not hold his liquor very well?" "Isn't it true that John would get aggressive and loud when he drank liquor?" "Isn't it true that John was drinking heavily the night he was killed?"

Use leading questions because they control the direction of the examination and help control the witness. Use leading questions because they are closed-ended. The witness should not have the opportunity to speculate, elaborate, or give opinions. The witness has to answer the question propounded. Never use open-ended questions unless the answer can't hurt you, as in building a foundation. Never ask a witness "why" -- you may find out.

H. FAVORABLE FACTS

Determine from your investigation and the direct examination every favorable fact possible. With the use of leading questions nail down these facts at some point during the examination. Don't be pre-occupied with cross-examination solely for the purpose of attacking the opposition. Use it to enhance your own case.

When pursuing favorable facts, structure them so that the witness will have to agree with you frequently. By getting the witness to agree with you, it has a positive influence -- you appear to be winning even if you are not. "Mr. Jones was not argumentative was he?" "Mr. Jones was not boisterous was he?" "Mr. Jones was not aggressive was he?" "Mr. Jones cooperated, didn't he?"

I. OMISSIONS

Devote a lot of the cross-examination to the omissions -- what wasn't done, what wasn't said. Rather than re-emphasize negative information, probe for the favorable. In a driving under the influence case, I love to ask about all the observations not testified to which would indicate my client was not under the influence. If the officer says he had alcohol on his breath, he had bloodshot eyes, he stumbled and he had slurred speech, all of which caused him to conclude he was under the influence, examine what was not observed which would indicate he was not under the influence, e.g., he stopped the car quickly, he got out of the car on his own, he did not brace himself on the car, he produced his license and registration, he understood the questions, he walked on his own, etc. You can think of a hundred things your client did or did not do that create an arguable inference that he was not under the influence.

J. CONTRAST

Through your questions, develop a contrast in the way the witness deals with you and the opposition, not only in the method of communication, but also in the substance. If the witness is rude or confrontational, play on it. Make the rudeness or hostility evident -- it goes toward credibility. If the witness does not want to answer or is reluctant to answer, keep pursuing. Get the witness to say "I don't know, I don't remember" -- again this goes to credibility by showing the contrast.

K. THE HOOK AND NET

Witnesses do not want to give unfavorable testimony to their side or favorable testimony to your side on cross-examination. They will do everything possible not to answer directly or to avoid the issue completely. Don't let them. Develop phrases and body language that don't let the witness off the hook or out of the net.

"Mr. Jones, the answer was No? (yes?)"

"Mr. Jones, was that a yes or a no answer?"

"Mr. Jones, the answer was therefore that the light was green."

"Mr. Jones, I did not understand your answer."

"Mr. Jones, let me see if I understand your answer, it was that the light was green."

Stay with the witness. Let her know that you will keep coming back or give your own interpretation to an evasive answer. Also use body language the same way. When a witness is evasive or answers every question with some long explanation, try to cut her off, have her admonished, and if all else fails, walk around bored and convey to the jury that the witness is not answering the question, is being hostile, or is simply trying to be argumentative or evasive. Your body and your looks can convey the message.

L. COMFORT

If the witness is too comfortable in the witness chair having a dialogue with you, get him out of it. These are unfamiliar surroundings for him, not for you. Have him come down from the chair to demonstrate or draw or point on a picture or chart. Make the witness uncomfortable, then put him back in the chair. Repeat as necessary and send the message -- he's on your home court.

M. CLOSING

Know when to stop, and stop on a high note, but before you do, set the stage. Pause, walk to your table, wait a few moments. This is what is referred as the "pregnant pause." Let everyone think you are finished, let them get comfortable, or let them anticipate. Whatever the reaction, the result will be the same -- attention. Then close in for the one final conclusive question or series of questions. "Mr. Jones, I forgot to ask you . . . ."

XI. PRIOR STATEMENTS OF WITNESSES

A. INTRODUCTION

Perhaps the most effective tool for the impeachment of a witness is the existence of a statement that was made before trial which is inconsistent with the trial testimony. No single issue that a lawyer can raise is more important to credibility.

Counsel must use imagination to find the inconsistent statements. These statements need not be in the form of sworn testimony. Search for these statements in:

a. Investigative reports
b. Investigative notes
c. Statements of other witnesses
d. Documents, official or otherwise
e. Business records or financial records
f. Sworn statements
g. Oral statements
h. Prior sworn testimony
i. Pleadings
j. Casual conversation of the witness
k. Plea proceedings

Prior inconsistent statements may take the form of an affirmative statement which is inconsistent with the trial testimony, or the absence of a statement completely. In other words, the failure of a witness to state a fact is just as important as the statement of a fact that is inconsistent.

Inconsistent statements are also useful in exploring not only how a witness's prior statements differ from trial testimony, but also how the prior inconsistent statement or the trial statement is inconsistent with the testimony of other witnesses, exhibits, known facts, or forensic results. Any time the lawyer can explore some inconsistency by way of affirmative statements or omissions, the opportunity should be seized on and pursued.

In the case of several inconsistent statements or omissions, they should be catalogued and brought out either in chronological fashion or in a manner which maximizes their effectiveness. It is not effective to simply bring out the fact that there were inconsistent statements. You must show how the inconsistencies were developed or how the omissions were filled in over a period of time, and most importantly, why. This can only be done by clearly showing the evolution of the statements against a backdrop of the events.

In order to accomplish this, your note cards or witness statement charts must be carefully organized. Identify on the card, notebook paper or legal pad the issues that are most important to cover. In a case you may have uncovered dozens of potential inconsistencies or omissions. You could do a textbook cross-examination bringing out every single inconsistency or omission, but if you do you may not be able to retain the attention of the jury and more importantly, the jury may not be able to distinguish what is important from the "fluff." I have been trying cases a long time, but I will tell you that recently in a case, I got so bogged down in inconsistencies and omissions, that the cross-examination was less than effective, until I put aside the "fluff" and went for the heart of the issue. In that case there were at least six separate pre-trial statements (oral, written, and statements to third parties). Each was inconsistent with the others and inconsistent with the trial testimony in a number of areas. What quickly became apparent was I could stay on the inconsistencies all day, but I was losing the jury. Don't lose the forest for the trees. Keep in mind the overall picture, not the minutiae.

In developing prior inconsistent statements and omissions always keep in mind that not only do you want to bring out the prior statements or omissions, but you also want to do it against a backdrop of how and why a statement was changed.

B. PRE-ARREST

The witness should be examined with a view toward showing that at the time of the statement or omission, the witness was not under charges and was not responding or failing to respond because of charges or the threat of charges. Also bring out to whom and where the statement or omission occurred.

C. POST-ARREST

Explore the circumstances under which the statement was made. What were the charges, and was there any threat of other charges? What information did the police give the witness as opposed to what information did the witness give the police? What facts were known to the witness or were divulged to the witness? How many interviews were conducted? What were the dates, the length of time between statements, and the various changes in the statements? Were there any deals made or suggested?

D. PROFFERS/POST PLEA AGREEMENT

Obviously statements made at this stage should be fully explored because the chances of conforming testimony becomes more of a motive in the witness's exploration of a deal or after the deal has been made. What was offered? Did the witness accept the first offer? What was the witness's exposure? What are the terms of the agreement? What was the prosecuting authority giving up, not pursuing or compromising? In other words, what was the full benefit to the witness. Also explore what information was made known to the witness before a statement was made either in the form of tests, physical facts, or statements of other witnesses, e.g., did the witness see the Government's discovery?

E. WHERE WITNESS IS NOT A CO-DEFENDANT OR ACCOMPLICE

Most witnesses are not going to be a "cooperating witness." When examining these witnesses it is difficult if not impossible to show that their prior inconsistent statement was the result of some fear, reward, or hope of reward. If you have a prior inconsistent statement from a witness such as this, you must develop the circumstances under which the statement was made or the omission occurred. Was the statement made under the emotion of an event or clear reflection? Was it casual conversation or an interview? Was information given to the witness that was previously unknown to the witness? Did the witness change versions and why? Did the witness speak with other witnesses or prepare for trial with a law enforcement official or prosecutor?

How long after the event were various statements made? Of course, also explore motives, bias, prejudice, and relationships.

F. CONCLUSION

With respect to all of these situations keep in mind two things. First, in seeking to explore the circumstances of a prior inconsistent statement (omission), determine which version of the events you want the jury to believe. Your examination must lend credibility to what facts you want the jury to believe and what facts you wish to impeach. Secondly, use one witness against another. While you may not get all the information wanted or needed from the witness sought to be impeached, you may obtain the information from another witness as to the facts and circumstances surrounding a particular statement, e.g., examine the person to whom the statement was made as to the circumstances surrounding the statement.

XII. SOUTH CAROLINA RULES OF EVIDENCE AND CROSS-EXAMINATION

A. RULE 404(a)(2)

This Rule allows evidence of a character trait of a victim, e.g., in a homicide case the victim's character trait for peacefulness, turbulence or violence. This type of information will enable a jury to weigh who may have been the aggressor. This Rule essentially adopted the existing law in South Carolina and does not change either existing law or procedure.

If the investigation has been thorough and the State's witnesses have been interviewed, the most effective method of developing these issues is to bring the information out through cross-examination. To have a state witness on the stand testifying that the victim was a violent or turbulent person is effective because it is an adverse witness, not your own. You must be sure of the answer before asking such a question, and that can only be accomplished by interviewing the witness beforehand.

B. RULE 405

Rule 405(a) allows the lawyer to pursue on direct or cross-examination, evidence of character or a trait of character by examining the witness as to reputation or in the form of an opinion. The law in South Carolina previously had been to allow such testimony only through reputation. In a recent murder case, I was able to bring out on the cross-examination of the investigating officer the fact that the victim was well known to the police as a violent individual. Also under the Rule and prior case law, South Carolina permits cross-examination as to specific instances of conduct regarding evidence of character or a trait of character.

Rule 405(b) permits the lawyer to go into specific instances of a person's conduct where character or a trait of character of a person is an essential element of a charge, claim or defense. The Rule does not limit the inquiry to proof in the case-in-chief, so inquiry can and should be made by cross-examination.

C. RULE 406

This is the Rule regarding habit or routine practice. Evidence regarding habit of a person, or of the routine practice of an organization is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. Consider utilizing this Rule in cross-examination.

D. RULE 607

This rule refers to the impeachment of a witness and is very important to the rules regarding cross-examination. This rule changes the law dramatically in South Carolina. Previously, when a party called a witness, the party vouched for the credibility of the witness. The witness could not be impeached unless the witness was declared hostile, after a showing of surprise and harm. Under the rule, the party calling the witness may now attack the credibility of the witness, e.g., as to a prior inconsistent statement. In effect, as to credibility, you may cross-examine your own witness. The Rule does not establish any specific procedure to follow, and it would appear that the witness can be

cross-examined as to credibility without any special showing as long as the other Rules of Evidence are complied with. This Rule can be utilized very effectively in the calling of a hostile or unfavorable witness if such witness possesses information necessary to the defense, and the witness was not called by the State.

E. RULE 608

Under Rule 608, a witness's credibility may be attacked (or supported) by evidence in the form of opinion or reputation, subject to two limitations: (1) "The evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked." The Rule changed the law in South Carolina by allowing evidence by way of opinion.

Rule 608 (b) does not permit proof of extrinsic evidence of specific instances of conduct for the purpose of attacking (or supporting) a witness's credibility. On cross-examination however the Rule allows inquiry "concerning the witness's character for truthfulness or untruthfulness or concerning the character for truthfulness of another witness as to which character the witness being cross-examined has testified."

There are no South Carolina cases which interpret the type of conduct that would affect a witness's credibility. The "crimes of moral turpitude" standard has been abandoned under Rule 609. The federal courts have limited such inquiries for specific instances of misconduct to those instances which are "clearly probative of truthfulness or untruthfulness such as forgery, bribery, false pretenses, and embezzlement." See Weinstein's Evidence, § 608[05] (1994). In other words the crime itself should have lack of honesty as an element. A crime, even a crime of moral turpitude, is not necessarily admissible without an issue of truthfulness or untruthfulness, e.g., sexual assault or drug violations.

Rule 608(c) allows cross-examination of bias, prejudice or motive to misrepresent through examination of the witness or by other evidence.

F. RULE 609

This Rule changes the limits of cross-examination of a witness as to prior criminal record. If the witness is one other than the accused, the witness may be impeached by a crime punishable by death or imprisonment in excess of one year, and if the crime involves dishonesty or false statements (e.g., fraud), it may be inquired into regardless of the punishment. If the witness is the accused, he may be impeached by such a crime only if the Court determines that the probative value outweighs the prejudicial effect.

The Rule also establishes a ten year limitation and the conviction may not be inquired into if more than ten years has elapsed since the date of the conviction or release from confinement, whichever is later. The Rule may be relaxed if the Court finds that the probative value of a conviction older than ten years substantially outweighs its prejudicial effect. Under these circumstances, you must give notice to the other side of the intention to use such a conviction so the adverse party may have the opportunity to contest. Do not forget to meet this requirement in the haste of preparation for trial.

G. RULE 611

Under South Carolina law a witness may be cross-examined as to any relevant matter. The Rule rejected the narrow approach of the federal rule limiting the cross-examination to matters brought out on direct. If the adverse party calls the witness, he is fair game.

Rule 611(c) permits leading questions on cross-examination where necessary to develop a witness is testimony, or when a party calls a hostile witness, an adverse party or a witness identified with an adverse party.

H. RULE 612

When a witness uses a writing to refresh his memory while testifying or before testifying (if the Court determines it is necessary in the interests of justice), an adverse party is entitled to examine the writing, inspect it, cross-examine on it, and introduce into evidence relevant portions. On a claim that the writing contains matters not related, the Court may excise those portions

and deliver the edited version. If there is an objection, the portion deleted must be preserved for appeal.

In a criminal case, if the writing is not produced, the Court may strike the testimony or declare a mistrial. A standard question should be whether the witness has reviewed or is reviewing a writing to refresh memory. In that writing may be devastating information, not only for the purpose of cross-examination, but also for introduction into evidence.

The writing should be identified, the date of its making, who wrote it, and when was it used to refresh the memory. Any deviations from the witness's testimony and the writing should be emphasized through cross-examination and then, if possible, through introduction into evidence.

I. RULE 613

This is perhaps the single most effective method of cross-examining a witness. The prior inconsistent statement questions the credibility, motive, bias or prejudice of a witness and the factual foundation of the testimony.

Examining a witness about a statement is subject to the provisions of S.C. Code Ann. §§ 19-1-80 to 19-1-100 regarding written statements made to public employees. Section 19-1-80 requires that prior to any examination a showing be made that at the time of making the statement the witness was given an exact copy of the statement and before the cross-examination he was given a reasonable time to read it.

If the witness has made a prior inconsistent statement, and does not admit that he made the prior inconsistent statement, extrinsic evidence of the statement is admissible provided the witness is advised of:

1. The substance of the statement and it need not be under oath - Rule 801(d)(1)(A);
2. The time and place the statement was made; and
3. The person to whom it was made, and finally
4. The witness is given the opportunity to explain or deny the statement.

If the witness admits making the prior inconsistent statement, extrinsic evidence is not admissible since the witness has been impeached. This provision does not apply to the admission of a party-opponent as defined in Rule 801(d)(2).

When seeking to impeach by a prior inconsistent statement, first reaffirm the present testimony so that the witness cannot later claim a lack of understanding or confusion.

The following is an example:

> Mr. Jones you have testified that John Hill did not have a pistol.
>
> > Mr. Jones did you give a statement on July 9, 1996, at the Columbia Police Department to Sergeant Smith? (You may show the statement to the witness.)
> >
> > Did you tell Sergeant Smith at that time that John Hill had a pistol? (Read excerpt verbatim or have the witness read it.)
> >
> > Do you deny making the statement?

If the prior inconsistent statement is admitted, that ends the inquiry. If the prior inconsistent statement is denied, you may seek to introduce the relevant part of the statement, the entire statement, or the testimony of the person to whom the statement was made.

Several caveats are important here. You may "open the door" for other relevant portions of the witness's statement to come into evidence or the adverse party may attempt to offer evidence of a prior consistent statement. As with everything done in a case, you must balance the risk, go ahead if the risk is worth taking, and try to keep out any attempt to offer other portions of the statement or prior consistent statements.

J. RULE 803

A thorough knowledge of this Rule is absolutely essential to effective cross-examination. There are twenty-two (22) areas of inquiry covered under the Rule that are not excluded by the hearsay rule, even though the declarant is available as a witness.

When preparing cross-examination and when actually conducting a cross-examination, consider questioning witnesses as to:

1. Present sense impressions of a declarant. Rule 803(1).

2. Excited utterances of a declarant. Rule 803(2).

3. The declarant's mental, emotional or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health. Rule 803(3).

4. The declarant's statements for purposes of medical diagnosis or treatment. Rule 803(4).

5. Recorded recollection as to a memorandum or records. Rule 803(5).

6. Records of regularly conducted activity and the absence of an entry in those records. Rules 803(6) and (7).

7. Public records and reports. Rule 803(8).

8. Various records relating to vital statistics, family, property and commercial publications. Rule 803(9) - (17).

9. An expert witness as to statements in learned treatises. Rule 803(18).

10. Reputation. Rule 803(19) - (21).

11. Judgments such as prior convictions or proof of family or general history if provable by general reputation. Rule 803(22) and (23).

In all such cases, attempt the cross-examination. If questioned, refer the Court to the appropriate Rule, and if permission is denied, make a proffer of the evidence for the appellate record.

K. RULE 804

Rule 804 is especially important for cross-examination in the case of an unavailable witness. The former testimony of an unavailable witness may be admissible, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Rule 804(b)(3) allows statements against a declarant's interest to be admissible if the statement subjected the declarant to criminal liability and a reasonable person in the declarant's position would not have made the statement unless he believed it to be true. Any statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

This Rule is important because an unavailable witness is defined in part as one who "is exempted by ruling of the Court on the ground of privilege from testifying concerning the subject matter of the declarant's statement." Rule 804(a)(1). If a declarant has made a favorable statement, but now asserts the Fifth Amendment, consider utilizing the Rule in the cross-examination of a person to whom the statement was made. The Court will of course require a showing of unavailability (perhaps calling the witness to assert the privilege) and the other requirements of the Rule as to corroboration (e.g., physical evidence or known facts, or even the testimony of another.)

L. RULE 806

This Rule is also very important with regard to hearsay and cross-examination. This rule is a departure from prior South Carolina practice. If a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D) or (E) has been admitted into evidence, the credibility of the declarant may be attacked by any evidence admissible for those purposes just as if the declarant

had testified as a witness. Any evidence that the declarant at a previous time made a statement or displayed conduct inconsistent with the hearsay statement is admissible, and not subject to Rule 613 that the declarant may have been afforded an opportunity to deny or explain.

Significantly, if a hearsay statement has been admitted against your client, you may call the declarant and examine the declarant under cross-examination.

M. RULES 901 AND 902

Rule 901 governs authentication or identification. The Rule is just as important to the cross-examiner as it is to the direct examiner. During cross-examination authentication is a condition precedent to admissibility. Review the Rule and its illustrations as a guide.

Rule 902 sets forth ten categories for which extrinsic evidence is not required as a condition precedent for admissibility.

N. RULE 1007

During cross-examination, keep in mind that under Rule 1007 the contents of writings, recordings, or photographs may be proved by testimony "of the party against whom offered or by that party's written admission, without accounting for the non-production of the original." This can be very important especially when you do not have the original document but need to use the document for cross-examination.

XIII. PARTICULAR WITNESSES

A. EXPERTS

Before cross-examining an expert witness, you should have a command of the subject matter, but remember that you will never have the expertise in the area that the witness has and you must respect that knowledge or face the possible devastating consequences as a result of the cross-examination.

In preparing for the expert witness, read as much as you can about the subject from a broad perspective. Study the witness's area of expertise so that you will have a good working knowledge and can formulate meaningful and pointed questions.

Study the expert's report. Hire an expert of your own, not necessarily to testify, but to have a skilled person study the report and advise you about possible flaws. For example, in every homicide case I've ever tried, if I come across an issue not previously encountered, I will consult with a forensic pathologist to help me prepare for the cross-examination. This is not solely for the purpose of undermining the expert's ultimate conclusion, but for the purpose of asking the witness questions under cross-examination that will bring out favorable facts, e.g., the effects of the victim's blood alcohol content.

Research whether the expert has ever published on her specific area of testimony. You will be amazed at how people have changed positions over the years on a particular subject.

Interview the expert if available. Don't give away key questions so the witness can get prepared, but size up the witness as to knowledge, experience, confidence, appearance, and delivery. After the interview, review the findings with your expert. An interview may also be fertile ground for cross-examining with regard to prior inconsistent statements.

At trial, carefully consider whether to *voir dire* a witness that is obviously qualified. *Voir dire* may enhance the witness's image. Stipulate to expertise if it is obvious the witness will be qualified by the Court. Remember that the witness may be qualified in one area, but not necessarily in the area proposed. While you may stipulate to a broad area, e.g., general medicine, you would want to object to qualification in emergency room medicine if that is the real issue.

In the cross-examination of an expert, try to attack the foundation upon which the witness relies. The goal here is to call into question the conclusion by pointing to important issues either the witness ignored or was not told about.

The more information not considered, the better the reasonable doubt argument, even if the witness stands firm on the conclusion.

If the expert relied on facts that are incorrect, emphasize the importance of those facts. Again, even if the witness does not budge, the strength of the opinion is undermined.

During the cross-examination, emphasize those facts which, even if considered by the expert, favorably support another possible conclusion.

A favorite technique in the cross-examination of an expert is to question the witness concerning facts which support another more favorable opinion. For example in a homicide case, if evidence supports the witness's conclusion that the wound was caused by a relatively close gunshot and that is damaging, point out that the close gunshot wound, taken together with the angle of entry, supports what later will be developed as the defendant's version of self-defense. In other words you must keep searching for facts which undermine the conclusion, question the conclusion, or support another conclusion.

When an expert testifies to an issue that involves multiple components, explore how those components also support another theory. For example, when a psychiatrist testifies about the seven criteria that support a particular mental diagnosis, examine the witness with a view to demonstrating that those traits, plus or minus one, may support a more favorable diagnosis.

The process employed by the expert should also be carefully explored. Was the best test done? Were other tests done? Were controls suitable? What amount of time was spent in testing or conducting the interviews? What was the witness told which may be correct, somewhat correct, or totally incorrect?

Experts can be cross-examined just like any other witness as to motive, interest, bias, or prejudice. Who pays the witness? Is the witness on the State payroll? Who normally utilizes the witness? Has the witness ever testified for your side? Has the witness had a life experience which creates the bias, e.g., was the expert or someone close to the witness the victim of similar conduct?

Does the witness have religious or moral beliefs that would taint the conclusion?

B. LAW ENFORCEMENT WITNESSES

Don't ever forget that the investigator or other law enforcement official has an interest in the case. No one in law enforcement wants to work a case, present it in court, and lose. While the prosecutor must ethically seek justice, the law enforcement witness seeks victory.

Law enforcement witnesses can be dangerous. Not only are they advocates of their position, they have also testified many times before.

In preparation for examining a law enforcement official, catalogue every writing, note, or statement made by the witness. Examine the witness about inconsistencies and omissions in the documents. Examine the witness about inconsistencies between the documents and other known facts. Question the witness about the failure to follow leads, develop leads, or abandonment of leads. Question observations and conclusions. Point out what was done, what was not done, and what should have been done.

Explore motives, interests, bias, and prejudice. This will, of course, require a thorough knowledge of the witness. Talk to other lawyers who have confronted the witness and who may have information about the witness and information about the witness's style. Does the witness have a background that creates bias? Has the witness been investigated, reprimanded, or disciplined?

When cross-examining a law enforcement witness, keep with that witness's folder or notebook tab every statement made to that witness. When the witness is offered for cross-examination, extract from the witness contradictions or prior inconsistent statements of a witness he may have interviewed. Never make it an easy ride for the opposition. Bring out something favorable from every witness.

Law enforcement officers must be sequestered for an effective cross-examination. While the State is probably entitled to the case agent, move to

exclude the rest (the case agent too, if possible). Explore and note every inconsistency between the agents or officers -- what was said, what was seen, and what was done. While they all may be telling the truth, variances are still fertile ground for creating a reasonable doubt.

C. THE ACCOMPLICE

The defense cross-examiner must try to show that the accomplice is lying. Other witnesses may have an opinion or reach a conclusion which may not be correct, but the accomplice is placing culpability on the defendant, and according to the defense position, cannot be telling the truth.

The cross-examination of the accomplice or informant must be planned in advance but great attention must also be paid to the actual testimony. Obtain every statement and every note concerning what the witness has previously said. Interview other witnesses to find out what the accomplice said, when he said it, what he changed, and what he left out. Develop the examination to get the maximum effect out of every inconsistency, error, or omission. Point out in cross-examination what this witness has said and show how this contradicts what another witness has said or is not supported by the physical or forensic evidence.

Find out what benefit the witness is getting from the testimony, when he got it, and what discussions led up to it. What is the witness's understanding of the deal? Explore the timing and the exact form of any concession to show the motive of the witness in testifying.

Explore the witness's prior record of convictions and prior experience with making deals. These issues impact on the witness's credibility and believability.

Question the accomplice about the lengthy hours of preparation spent with the law enforcement officials or with the prosecutor. How long did they spend together? What discovery did he have access to? What else did he read? How did his story develop -- on his own or with assistance? Was he ever told his story did not support another witness's testimony or that another witness contradicted him? How was he prepared to testify?

Very few accomplices appear in court the way they looked when they were arrested. Try to secure a picture of the witness as he was at his arrest. While the prosecution may want to make the witness more attractive, your goal is to make him less attractive -- and less believable. While the prosecutor calls him Richard, you call him Mr. Smith. Always remember to convey to the jury that if the witness was not on that witness stand as a government witness, he would be sitting at the defense table with you and your client, and the prosecutor would be pointing at him, telling the jury that he also is guilty and not worthy of belief.

D. THE LAY WITNESS

Preparation for the lay witness is no different than any other. Gather all the information you can about the witness such as records, statements, background and other vital information. Evaluate the witness in advance of trial as to how the witness can hurt and how the witness can help. You might try to interview the witness if it will not give away a strategy or take away the element of surprise while the witness is on the stand.

Just as you would with any other witness, explore issues that relate to bias, motive, or prejudice, such as relationship to the parties or a stake in the outcome. Pursue areas of impeachment such as prior inconsistent statements and criminal convictions. Point out what the witness did, said, or observed and what the witness did not do, say, or observe, e.g., did not call the police, did not give a statement, or did not observe what you would expect someone to observe at a particular time.

Illustrate how the witness's testimony either supports your witnesses or your theory and how the witness may contradict the other prosecution witnesses and theory. Point out every issue which is not consistent with the testimony of another witness or the physical and scientific facts. Be divisive and create "ordered chaos." Make the prosecution pay for every inch of territory -- the goal is reasonable doubt.

E. CAVEATS

Before you cross-examine, decide whether you should cross-examine at all. Was the point you want to make made on direct? Is the issue part of the trial record which can be developed later through another witness or during final argument. In a case I tried, one of the witnesses testified that my client, a deputy sheriff, drove up to an area where he allegedly took a pay-off in his marked patrol car. In fact, the patrol car had been logged in for the night several hours before at the Sheriff's office. Rather than cross-examine on a related issue that would tip my hand, I stayed completely away from it on cross-examination. It was only during closing argument that I pointed out the serious and fatal flaw. The defendant was acquitted.

Remember that not everyone should be cross-examined. The witness may not have hurt the defense. The witness may have planted a seed that can be helpful later. The witness or the direct examiner may have forgotten an important point. The witness or the other lawyer may have laid a trap by intentionally not asking a question for you to fall into. A similar situation was presented in the O. J. Simpson case. The defendant's statement to the police and the famous car chase were intentionally held back by the prosecution in the case in chief. There was devastating evidence in the statement and in the car, but the State was laying a trap for the defendant if he testified. He didn't! The evidence became useless!

If a witness is particularly effective and cross-examination would appear difficult, consider whether all you may accomplish will be to further solidify the damaging testimony. Also consider whether what you want to accomplish could best be handled through another witness. It is far better to have one witness played off against another than to give that witness a further platform from which to hurt your cause.

XIV. RELEVANT CASE LAW

A. CONFRONTATION

The right to confrontation means more than being allowed to confront witnesses physically; the primary interest secured is the right to cross

examine. *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed2d 347 (1974). The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. The right to cross-examine a prosecuting witness is of constitutional dimensions, being essential to a fair trial as guaranteed by the Sixth Amendment and the due process clause of the Fourteenth Amendment.

The Confrontation Clause guarantees a defendant the opportunity to cross-examine a witness concerning bias. Considerable latitude is allowed in the cross-examination of an adverse witness for the purpose of testing bias. *State v. Brown*, 303 S.C. 169, 399 S.E.2d 593 (1991). The supreme court will not normally disturb a trial court's ruling concerning the scope of cross-examination absent a manifest abuse of discretion. The trial judge retains discretion to impose limits on the scope of cross examination. However, the right to meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accuser. "Before a defendant can be prohibited from attempting to demonstrate bias on the part of a witness, the record must clearly show that the cross-examination is somehow inappropriate. Where there is nothing to indicate that the attempted cross examination was improper, the defendant's Sixth Amendment rights were violated. A defendant demonstrates a Confrontation Clause violation where he is prohibited from 'engaging in otherwise appropriate cross examination designed to show a prototypical form of bias.'" *State v. Graham*, 314 S.C. 383, 444 S.E.2d 525 (1994), quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431 (1986). (The defendant in *Graham* argued that his Sixth Amendment right of confrontation was violated when he was prohibited from impeaching the State's witness by bringing to the jury's attention the witness's eight year sentence for his involvement in the murder. The Supreme Court agreed and found reversible error).

See also State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1996) - Trial court erred in refusing to allow defendant to impeach a prosecution witness with the witness's prior conviction for violation of "Peeping Tom" statute, but error was harmless;

State v. Clark, 315 S.C. 478, 445 S.E.2d 633 (1994) - Clark moved for permission to cross-examine the State's witness regarding a murder indictment pending against him. Clark contended that the witness was likely to be biased toward the State in the hope of favorable treatment on his pending charges. The Solicitor responded that the witness was testifying under subpoena and that there was no agreement regarding the pending charge. The trial judge ruled that Appellant could not cross-examine about the pending murder charge. The cross-examination was improperly precluded, but the error was harmless;

State v. Elijah Smith, 315 S.C. 547, 446 S.E.2d 411(1994) - Smith attempted to impeach the State's witness with pending charges of possession with intent to distribute crack cocaine and possession with intent to distribute within a half mile of a school despite the fact that the judge had previously denied the admission of this evidence. The trial judge instructed the jury to disregard counsel's question and informed the jury that there were no charges pending against the witness. Although the trial court erred in denying Smith the opportunity to cross-examine regarding the pending charges, the error was harmless beyond a reasonable doubt;

State v. Cooper, 312 S.C. 90, 439 S.E.2d 276 (1994) - Cooper argued that the trial judge erred in refusing to permit him to cross-examine the State's witness regarding his involvement in a conspiracy to smuggle drugs. The Court agreed that the judge's ruling was error but found that the error was harmless. "Error in excluding evidence of a witness's prior bad act is harmless where the witness is thoroughly impeached by admission of numerous previous convictions and acknowledges his testimony is given in exchange for favorable treatment on pending charges.";

State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991) - The defendant was precluded from cross-examining the State's witness regarding her plea agreement. The court found that the fact that the State's witness was permitted to avoid a mandatory prison term of more than three times the duration she would face on her plea was critical evidence of potential bias which appellant should have been permitted to present to the jury.

B. HARMLESS ERROR ANALYSIS

An appellate court will not disturb a trial judge's ruling concerning the scope of cross-examination of a witness to test his credibility, to show possible bias or self-interest in testifying, absent a manifest abuse of discretion. *State v. Sprouse*, ___ S.C. ___, 478 S.E.2d 871 (Ct. App.1996); *State v. Smith*, 315 S.C. 547, 446 S.E.2d 411 (1994).

A violation of the right to confrontation is not *per se* reversible error. Whether such an error is harmless in a particular case depends upon a "host of factors" including the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on the material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. *State v. Graham*, 314 S.C. 383, 444 S.E.2d 527 (1994), citing *Delaware v. Van Arsdall, supra.*

While the error ruling in *Van Arsdall* dealt specifically with witness bias, the *Van Arsdall* factors apply with equal force in determining a harmless error violation relating to any issue of witness credibility. *State v. Holmes*, 320 S.C. 259, 464 S.E.2d 334 (1996); *State v. Gadsden*, 314 S.C. 229, 442 S.E.2d 594 (1994).

C. SCOPE OF CROSS-EXAMINATION

The trial court has broad discretion in determining the general range and extent of cross-examination. *State v. Tyner*, 273 S.C. 646, 258 S.E.2d 559 (1980). More latitude is allowed on cross-examination than on direct examination and the scope of cross-examination is largely discretionary. *State v. Plath*, 277 S.C. 126, 284 S.E.2d 221 (1981). This latitude in the area of credibility extends to cross-examination testing the accuracy of a witness's memory, bias, prejudice, or interest. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. Rule 611, SCRE.

On cross-examination, a witness may be asked questions in reference to irrelevant matter, in reference to prior statements contradictory of testimony, or in reference to statements concerning relevant matter not contradictory of testimony. *State v. Jenkins*, 322 S.C. 360, 471 S.E.2d 760 (Ct. App. 1996).

A trial judge may impose reasonable limits on cross-examination to prevent harassment, prejudice, confusion of the issues, threats to witness safety, irrelevance, and repetitive inquiries. *State v. Graham, supra.*

Evidence of prior bad acts which are not the subject of a conviction, but which go to the witness's credibility, are subject to cross-examination. However, the cross-examiner must take the witness's answer and the prior bad acts may not be proved by extrinsic evidence. *State v. Cooper*, 312 S.C. 90, 439 S.E.2d 276 (1994).

D. ACCUSED AS WITNESS

When an accused takes the witness stand, he becomes subject to impeachment like any other witness. Regardless of whether the accused offers evidence of his good character, an accused who takes the stand may be cross-examined about past transactions tending to affect his credibility.

The accused may be asked about prior bad acts, not the subject of conviction, which go to his credibility. If the accused denies the prior misconduct, the State must accept the answer. *State v. Major*, 301 S.C. 181, 391 S.E.2d 235 (1990); *State v. China*, 312 S.C. 335, 440 S.E.2d 382 (1993). Where the defendant has admitted prior convictions and the prosecutor seeks additional information regarding the convictions, the cross-examination should be restricted to the fact of such convictions and the details should not be explored. *United States v. Smith*, 353 F.2d 166 (4th Cir. 1965). *But see*: Rule 608(b), SCRE. (Specific instances of the conduct of a witness may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.)

Evidence of prior transactions is admissible only when necessary to prove a fact in issue. *State v. Bright*, ___ S.C. ___, 473 S.E.2d 851 (Ct. App. 1996).

When a defendant chooses not to exercise his right to remain silent and gives a statement before trial and then testifies to a different version of his involvement in the offense at trial, he may be cross-examined regarding the inconsistency. Inconsistent descriptions of events may be said to involve "silence" insofar as they omit facts included in other statements. Cross examination at that point does not make unfair use of silence, but merely inquires into prior inconsistent statements occasioned by the defendant not remaining silent. *State v. Kimsey*, 320 S.C. 344, 465 S.E.2d 128 (Ct. App. 1995)(accused properly asked on cross-examination why he did not tell authorities about certain details of his trial testimony when he gave pre-trial statements to the police.)

E. OTHER WITNESSES

Defendant's character witness could properly be cross-examined as to whether he associated with several known drug dealers; evidence was offered to test the witness's assessment of the defendant's character. *State v. Barroso*, 320 S.C. 1, 462 S.E.2d 862 (Ct. App. 1995).

Where a witness has been impeached by evidence that he made a prior inconsistent statement, proof that the witness made a prior consistent statement is allowed, provided that the prior consistent statement was made before the witness's relation to the cause. *Jolly v. State*, 314 S.C. 17, 443 S.E.2d 566 (1994).

Defense witness could be cross-examined with regard to her failure to come forward with information that would allegedly have exculpated the defendant. The question went to the witness's credibility. *State v. Nathari*, 303 S.C. 188, 399 S.E.2d 597 (Ct. App. 1990).

A defendant has a right to cross-examine a co-defendant only if the co-defendant's testimony was incriminatory. The Confrontation Clause provides the defendant with a right "to be confronted with the witnesses against him."

United States v. Crockett, 813 F.2d 1310 (4th Cir. 1987), *cert. denied* 484 U.S. 834.

Evidence of prior false accusations by a victim may be probative on the issue of credibility. In deciding the admissibility of evidence of a victim's prior accusation, the trial judge should first determine whether such accusation was false. If the prior allegation was false, the next consideration becomes remoteness in time. Finally, the court shall consider the factual similarity between the prior and present allegations to determine relevancy. *State v. Boiter*, 302 S.C. 38, 396 S.E.2d 364 (1990); *State v. Sprouse*, ___ S.C. ___, 478 S.E.2d 871 (Ct. App. 1996)(Where there was no evidence that the victim ever made a prior false allegation of sexual abuse, the judge properly ruled that the defense could not pursue that line of questioning.)

F. PITTING

It is improper for the Solicitor to cross-examine a witness in such a manner as to force him to attack the veracity of another witness. This error is reversible if the accused is unfairly prejudiced thereby. Where improper questioning pitted an officer's testimony against the defendant's and where credibility was critical because Appellant and the officer were the only witnesses present during the incident, the defendant was unfairly prejudiced by the improper cross-examination. *State v. Bryant*, ___ S.C. ___, 447 S.E.2d 852 (1994); *Thrift v. State*, 302 S.C. 535, 397 S.E.2d 523 (1990); *State v. Sapps*, 295 S.C. 484, 369 S.E.2d 145 (1988).

XV. CONCLUSION

Cross-examination can be very helpful, but it can also be very devastating. Cross-examination can be very fulfilling, but can also be very stressful. It is important to know how to cross-examine, but it is just as important to know when not to cross-examine. It is universally agreed by all trial lawyers that once the point has been made -- stop. The key to investing in the stock market is not necessarily when to buy; it's when to sell. The key to a successful cross-examination is when to sit down. My favorite example of this was discussed in law school many years ago, but still classically illustrates the point:

Q. And so Mr. Smith, you did not see the fight or see my client bite off the ear of Mr. Jones. Isn't that true?

A. That is correct.

Q. So, Mr. Smith, if you did not see the fight and did not see my client bite off the ear of Mr. Jones, how can you tell this jury that my client bit off Mr. Jones' ear?

A. Because I saw your client spit the ear out!

Don't lose your case on cross-examination!