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Impeachment of Witnesses in Civil Litigation: Strategies for Discrediting Adverse Witnesses

Using Depositions, Testimony and Correspondence to Impeach
With Prior Inconsistent Statements, Contradictory Facts and More

TUESDAY, NOVEMBER 17, 2015

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Today's faculty features:

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BASIC PRINCIPLES OF CROSS-EXAMINATION

By: Claire F. Rush[1]

I. PREPARATION FOR CROSS-EXAMINATION

A. KNOW YOUR FILE

Much has been written through the years about the art of cross-examination. A dedicated trial lawyer can master the basics of cross-examination through preparation and practice. The success of any cross-examination ultimately rests upon a complete and thorough knowledge of your file and the law applicable to your case. No matter how talented a lawyer you are, if you do not know your file and have not read and digested each and every report, witness statement, medical record and deposition, you cannot and will not do a good job. In a similar vein a trial attorney should always go to the accident scene and seek to physically examine the instrumentality that allegedly caused the accident. Stories are legion among seasoned trial lawyers about how a visit to the accident situs revealed a fact that could not be appreciated in photographs alone. The take away is clear, cross-examination, like so much of the practice of law, is 99% preparation and 1% inspiration.

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B. KNOW THE LAW

Once you have digested the case in full, you are in a position to rationally predict the law the trial court is likely to invoke when charging your jury. Your themes, arguments and defenses at trial will all be driven by the anticipated jury charge. It is imperative that you study the pattern jury charges in your jurisdiction and identify those elements of the case that either plaintiff will have difficultly proving or that will provide you with a defense. These are the areas that you must address on cross-examination.

C. PREPARE AN OUTLINE

Armed with a comprehensive knowledge of your file and the applicable law, you are now in a position to outline your defense. Each element of the plaintiff's prima facie case should be committed to paper. Deposition transcripts, witness statements, business records and medical records should be reviewed and annotated so as to identify each piece of evidence you anticipate the plaintiff will introduce to support his or her case in chief. Trial counsel must assess which pieces of evidence are realistically subject to impeachment and plan the cross examination accordingly.

In a similar manner, a defense attorney preparing for cross examination must identify his or her client's major themes and contentions. A minimum of three independent pieces of evidence should support every theme and contention that defense counsel hopes to advance during cross-examination.

II. THE GOALS OF CROSS-EXAMINATION

The goals of cross-examination can be summarized as follows:

1. Obtain admissions and concessions;

2. Introduce additional evidence that advances your theory of the case;

3. Impeach the witness' perception, knowledge, memory and/or credibility.

When preparing for cross-examination, an attorney should review his or her case outline and identify those facts that a witness can reasonably be expected to concede on cross examination. Thereafter questions should be constructed that demonstrate the adverse witness' testimony is wrong, unreliable or unbelievable. Finally, counsel should outline all possible areas of impeachment and be prepared to proceed with a vigorous impeachment.

III. GENERAL PRINCIPALS OF CROSS-EXAMINATION

A. OWN THE COURTROOM

Trial lawyers want to own the courtroom when they try a case. Projecting your power and competency begins by controlling the "well". When cross-examining a witness you should, if your jurisdiction permits, stand directly in front of the jury in the center of the jury box. Try to stand between the jury box and plaintiff's counsel. When asking questions of the plaintiff or an interested witness, do not be afraid to express to the jury through your body language, your disdain for their testimony. Face the jury as you ask your impeachment questions. Where you

have established that the plaintiff has lied about a material fact and has been caught, do not look at the plaintiff, rather look with indignation at the jury.

B KNOW WHEN TO SIT DOWN

A lawyer conducting cross-examination should remember the principle "keep it simple stupid." Not every witness should be cross-examined. This is especially true with independent witnesses whose testimony merely sets the stage for, but does not establish your client's liability. If a witness has not hurt you and cannot add anything to your case, let the witness go.

In the same vein, no witness should be subjected to any more examination than is absolutely necessary. Your demeanor should generally be courteous, professional and firm. Avoid arguing with or baiting the truly "independent" lay witness.

C CONTROL THE WITNESS

Some "independent" witnesses, however, have their own agenda. These witnesses are often times difficult and attempt to control the cross-examination. It is easier to keep control of this type of witness from the beginning of cross than to attempt to regain control in the middle of your examination. Control is maintained by the use of leading questions. These questions generally start out: "Don't you agree . . . ?" or "Isn't it a fact . . . ?" or "Isn't it true that . . . ?" Once you have the witness under your control, you can vary your questions by simply posing statements to the witness that require a yes or no answer. Varying the form of questioning sends a message to the jurors and witness that you are in control of the examination.

When a witness tries to take control, a jury will watch to see how you conduct yourself. If the witness' answers are unresponsive, repeat the question verbatim with a prefatory phrase such as: Perhaps you did not hear my question. "What I asked you was . . ." or "Perhaps you did

not understand my question." "What I asked you was . . ." or "I'm sorry, perhaps my question was unclear. I asked you . . . ? Could you please answer my question?" If the witness persists in refusing to give you a straight answer, ask the judge to direct the witness to answer the question. Such a motion serves to underscore the evasiveness of the witness' testimony and further detracts from the witness' credibility.

D. AVOID USING A SCRIPT

Young lawyers should avoid reliance on written scripts when actually conducting a cross examination. It is imperative that the young lawyer learn to listen carefully to a witness' responses. That being said a new trial lawyer should nonetheless write out his or her cross-examination questions for each witness. The proposed questions should be vetted by a seasoned colleague and then reviewed frequently. Finally an outline of the major areas of cross should be created to aid your memory if you become stuck during the actual cross-examination.

E. ADDITIONAL CONSIDERATIONS

When crafting the questions you will pose on cross-examination use clear simple language. Break down compound questions into simple declaratives. Avoid legalese at all costs! Questions should be understandable by a fifth grader.

Where the witness will be forced to concede important points, highlight and emphasize these concessions by incorporating the concessions into subsequent questions. This technique sometimes referred to as "looping" is very effective when you want a jury to remember an important concession or admission made by a witness.

When planning your cross-examination try to begin and end on a high note. With respect to lay witnesses, my preference is to secure important concessions from these witnesses

at the beginning of my examination. Should the witness prove to be a shill for the plaintiff I will begin my examination with a strong line of impeachment questions and will attempt to conclude the cross-examination with a line of questioning which casts serious doubt on the witness' credibility.

When cross-examining a party, I first look to see what sort of witness the party will make. If the party will make a somewhat sympathetic witness on his or her behalf (generally children and /or senior citizens), I generally construct my cross-examination as I would for an adverse "disinterested" witness. Where, however, I believe the plaintiff will make an unsympathetic witness and where I further believe that I can establish that the plaintiff has lied about a material point, I will begin my cross-examination with a vigorous impeachment.

Remember, jurors want to be entertained. Be passionate. Be professional. Be prepared.

IV. PRINCIPLES OF IMPEACHMENT

The credibility of an adverse witness, whether a lay witness or expert, can generally be impeached by demonstrating that:

1. The witness has committed an immoral, vicious or criminal act which affects the witness' character and tends to show the witness to be unworthy of belief;

2. The witness has been convicted of a crime;

3. The witness was under the influence of drugs or alcohol or was mentally ill, either at the time of the event to which the witness is testifying or at the time of giving testimony;

4. The witness is biased for or against one of the parties;

5. The witness has made statements on other occasions, which are inconsistent with the witnesses' present testimony.

6. The information upon which the witness bases his or her opinion was not complete and accurate.

A. SPECIFIC ACTS OF MISCONDUCT

A witness may be cross-examined about any prior immoral, vicious or criminal act which reflect negatively on the witness' character and tends to show that the witness is unworthy of belief. The decision as to whether or not to permit cross-examination as to prior bad acts is traditionally left to the trial judge's discretion. In many jurisdictions, cross-examination as to prior bad acts is generally limited to prior acts involving dishonesty or deceit. The examiner must demonstrate that the questions have a reasonable basis in fact and are being asked in good faith. If the witness denies the prior bad acts, the cross-examiner cannot refute the denial by the production of extrinsic evidence. The cross-examiner is permitted, subject to the discretion of the trial court, to continue the cross-examination on the chance that the witness may change his answer.

B. PRIOR CRIMINAL CONVICTIONS

In many jurisdictions, a witness' credibility may be impeached by admitting evidence of prior convictions for felonies or misdemeanor crimes involving an element of deceit, falsification or untruthfulness. *See e.g.,* FRE 609. This practice rests largely on the assumption that prior criminal activity, if felonious or related to veracity, furnishes the finder of fact with reliable and probative information with which to evaluate a witness' testimony. In still other jurisdictions like

New York, a witness who has been convicted of any crime, whether a felony or misdemeanor, may be impeached by evidence of conviction. *See e.g.,* CPLR §4513.

This type of impeachment can be accomplished either by cross-examination or by submission of a certified copy of the conviction. In practice the best way of pursuing this type of cross examination is to question the witness about the conviction in cross examination and then offer the certified copies of the conviction into evidence. Do not accept an advesary's offer to stipulate to the fact of the conviction. Make the witness and his or her attorney squirm.

New attorneys should not ask witnesses if he or she has ever been arrested or indicted. The fact that a witness was arrested or indicted has no probative value, as everyone if presumed innocent until proven guilty. Subject to the court's discretion, a cross-examiner may inquire into the facts leading to an arrest and/or indictment on the theory that they constitute prior bad acts.

In a similar vein, disbarment or suspension from the practice of law is not a crime and thus cannot be elicited from a witness during cross examination. The facts underlying the witness' disbarment or suspension are fair game on cross-examination under the prior bad act method of impeachment.

Finally, a party in a civil case may not be impeached by evidence that he or she committed a violation or has been adjudicated a juvenile delinquent or a person in need of supervision. Pursuant to the prior bad act rule a witness may be cross-examined as to the circumstances underlying such an adjudication.

C. IMPEACHMENT BY SHOWING BIAS, HOSTILITY OR INTEREST

A witness' "interest" in the events surrounding a lawsuit, friendship with or relationship to a party, are all facts that clearly have a bearing upon a person's credibility and thus are

properly the subject of cross-examination. Those witnesses who have a lien or other financial interest in the outcome of the case must be exposed to a jury. Similarly in every non catastrophic injury case the plaintiff should be forced to acknowledge before the jury that at the end of the day he or she seeks a monetary award. Where appropriate consider confronting the plaintiff with the ad damnum clause to his or her Complaint.

Bias of a witness in favor of the party calling that witness should be shown to the jury. Evidence of social, business or close familial relationships should be elicited on cross examination. Defense counsel should scour the record for all prior acts or declarations that demonstrate such a bias and confront the witness with these facts on cross examination.

A witness' settlement of an action with a party for whom he or she testifies may be brought out on cross-examination in many jurisdictions. In New York such evidence is admitted solely for the purpose of permitting the jury to assess the witness' credibility. Jurors in New York are specifically instructed that such testimony must not be considered on the issue of liability. A witness in New York may not be asked on direct examination if he or she has entered into a settlement agreement.

D. IMPEACHMENT BY SHOWING INTOXICATION OR MENTAL ILLNESS

An attack upon a witness' credibility based upon a defect in testimonial capacity speaks to the very heart of the witness' capacity to proceed, recall and narrate accurately. Accordingly, it may be shown on cross-examination or by extrinsic evidence that at the time of the occurrence, or at the time of trial, the witness was under the influence of alcohol or drugs, or was mentally ill.

Needless to say where the witness is the plaintiff, he or she will usually deny intoxication or mental illness at the time of the subject incident. This is a situation where careful review of the medical records is of paramount importance. Defense counsel must meet such denials with admissible proof that the plaintiff was in fact incapacitated by reason of intoxication or mental illness at the time of the subject accident. In most jurisdictions proof of intoxication will require either a positive lab test or testimony by a medical professional that the witness exhibited or engaged in behaviors that lead the health care provider to conclude to a reasonable degree of medical certainty that the witness was under the influence.

With respect to intoxication, counsel should carefully inspect the medical records for toxicology reports. Armed with a positive blood alcohol and/or drug finding, defense counsel should retain an expert toxicologist to testify as to the significance of the laboratory findings. On cross-examination, defense counsel should confront plaintiff with the results of any alcohol/ drug screening as well as with any statements or actions attributed to the witness by emergency health care providers. Should the plaintiff deny intoxication, you will be well-positioned to argue to the jury in summation that the witness has willfully testified falsely as to a material fact. Counsel for the defendant will then invoke the principle of *falsus in uno* and urge the jury to completely disregard the witness' entire testimony on the theory that one who testifies falsely about one material fact is likely to testify falsely about everything.

A witness or party who suffers from a mental illness, even an adjudicated incompetent, may testify so long as the trial court finds that the witness understands the nature and obligation of the oath and has the capacity to give an accurate account of the facts at issue. Thus, where the plaintiff suffers from a medically diagnosed psychosis, defense counsel should be prepared to

confront the plaintiff and the plaintiff's witnesses with the ways in which this condition, and the medications utilized to treat this condition, can preclude a person from being able to accurately perceive and recall facts.

E. PRIOR INCONSISTENT STATEMENTS

The most commonly utilized method of impeachment is to show that a witness has said different things at different times. Evidence of inconsistent statements can be found in police reports, medical records, correspondence, pleadings and depositions. Trial lawyers utilize these inconsistencies to suggest to juries that a witness is being less than honest. The more dramatic the inconsistency, the farther the trial lawyer can go in suggesting to a jury that the witness' entire testimony should be discredited.

A prior inconsistent statement by a party is an admission and may therefore be received as primary evidence against that party. Thus, a party may be cross-examined as to a plea of guilty to a traffic offense, a confession, or an admission to a health care professional regarding the cause of an accident. Similarly, statements contained in pleadings verified by a party or the party's attorney are considered formal judicial admissions and can be effectively used on cross-examination. Statements made by a party at a deposition may likewise be used against that party for any purpose by an adversary as may answers to interrogatories.

The testimony of an adverse non-party witness may also be impeached by reference to prior inconsistent statements provided an appropriate foundation is laid. New York for instance permits a party to introduce proof that a witness made a prior statement inconsistent with the witness' testimony at trial if the statement was made (1) under oath or (2) in a writing subscribed by the witness. *See e.g.,* CPLR §4514.

Evidence of testimony given under oath at a prior trial or quasi-judicial proceeding is thus admissible if inconsistent with the witness' testimony at trial. Before questioning a witness about a prior oral inconsistent statement, the cross-examiner must lay an appropriate foundation. The attorney must ask the witness whether the statement was made, specifying the time, place and persons to whom the statement was made and the language used.

Where an attorney wishes to impeach a witness by reference to a prior inconsistent written statement, the attorney must have the document marked for identification and show it to the witness. The witness must then be asked if he or she wrote it or signed it. In New York, if the witness admits to having made the prior inconsistent statement, the written statement may be admitted into evidence to attack the witness' credibility. Under certain circumstances in some jurisdictions, the proponent of such hearsay evidence may offer the prior inconsistent testimony as evidence in chief.

F. TESTIMONY IS BASED ON FLAWED ASSUMPTIONS/ INCOMPLETE FACTS

Many times a witness will testify to a fact or opinion which has no basis in reality. Defense counsel's job in these circumstances is to demonstrate the error in the witness' testimony. With respect to lay witnesses this will generally be accomplished by attacking the witness' memory and perception. In the case of expert witnesses, the attorney's job is to get the expert to concede that his or her conclusions are only as reliable as the information he or she relied upon in formulating the opinion. Most medical experts for instance will end their narrative reports with a statement such as "assuming the history related is true, I believe …." Defense counsel should jump on this type of statement and make the expert concede that he or she did not

request and review all of the plaintiff's medical records but only those reports furnished by the plaintiff and his or her attorney.

V. CROSS EXAMINATION OF LAY WITNESSES

Cross examination of lay witnesses should be approached very carefully. It should be pursued only if the witness damages your case. In the case of eye witness testimony you must attack the witness' ability to perceive the events as they unfolded. When cross examining an adverse eye witness, establish that he or she was not expecting an accident to occur and was otherwise self-absorbed at the time of the occurrence. Force the witness to recite for the jury all of the salient facts that he or she cannot recall.

Once you have rattled the witness, proceed to examine the witness as to where he or she was and what he or she was doing just prior to the accident. Use your knowledge of the accident situs to keep the witness honest. Question the witness about lighting conditions, sight obstructions, sources of noise and any other matter that could conceivably prevent the witness from accurately perceiving that which he or she testified to. In the case of a vehicle accident, question the witness relentlessly with respect to speed, distance and times. These are very difficult questions for most witnesses to field and stay consistent on.

Conclude your cross examination by suggesting that the witness' recollection and testimony is clearly flawed or has been tainted by his or her relationship with the plaintiff or contacts with the plaintiff's attorney. Question the witness at length about all contacts he or she had with plaintiff's attorney's office. Make the witness go through each contact

and determine where the contact took place and who was present. Sometimes you will get lucky and learn that the plaintiff or other witnesses were present during these preparation sessions. If this is the case go for the jugular and suggest to the jury that the witness and the party were synchronizing their stories. Ask the witness if he or she is being paid or is being guaranteed some other form of compensation for his or her testimony.

VI. CROSS EXAMINATION OF FIRST RESPONDERS

Police officers are witnesses commonly encountered by trial attorneys who try personal injury cases. When cross examining these witnesses you must remember that they generally despise lawyers and will do everything they can to make your life miserable. Try to maintain a courteous demeanor at all times.

If the police officer will not speak to you, ask the Court for an opportunity to review the officer's memo book before beginning your cross examination. Have the officer tell the jury how many years he or she has been a police officer and how many accidents he or she has responded to. Establish that the officer does not have an independent recollection of the event and that his or her testimony is based solely upon the accuracy of his or her report and memo book.

Be prepared to highlight discrepancies between the officer's accident report and memo book. If the police report is unfavorable to your client and if there are any mistakes on the report, take the officer through the extensive training he received regarding responding to accident scenes. Force the officer to concede that he or she was trained to be thorough, complete and accurate when preparing reports. Show the jury that

the report at issue was not accurate, thorough and complete. If the officer fights you on this point make the officer look foolish. Loop back to the number of accidents and incidents the officer has responded to over the course of his or her career and demonstrate his or her inability to recall salient facts about any accident, let alone the accident in question. If the officer continues to maintain that his or her report is accurate ask if he or she has ever made a mistake. Opposing counsel will surely jump up and move to strike this as argumentative. Withdraw the question immediately, advise the Court you have no further questions and sit down. The officer's credibility will have been undermined.

When cross examining an EMT or firefighter you generally want to take a very deferential approach. These people are generally perceived by jurors as being heroic individuals whose overriding interest is in saving lives. This should be the focus of any cross examination conducted of these witnesses. Force these witnesses to concede that their primary concern was about rendering medical care for and not preparing reports. Firefighters for instance do not typically prepare reports and if they do, the report is not contemporaneously created. Reports that are not prepared at or about the time of the occurrence are always subject to an effective low key cross examination based upon the passage of time and waning of memory.

VII. CROSS-EXAMINATION OF MEDICAL EXPERTS

The goals of cross-examination of a medical witness are the same as those of the cross-examination of a lay witness. Favorable admissions on the issues of liability, injury and damage should be obtained and the witness' competency, credibility, experience and integrity should be

attacked where appropriate. The cross-examination of a medical witness must be carefully thought out before trial. All of the plaintiff's medical records must be obtained and thoroughly reviewed. Ambulance reports, emergency room records and prior treatment notes are a fertile source for cross-examination, particularly where the records indicate inconsistencies with respect to history, complaints, physical findings, impressions and diagnoses.

A verdict search should be conducted on every expert medical witness to determine the testimonial history of that witness. The witness' history of testifying should be analyzed to determine whether or not the witness testifies mostly for one side or another. In connection therewith defense counsel should determine if there is a long standing relationship between the doctor and the lawyer. Inquiry should be made as to how often the witness testifies, what percentage of the witness' practice is devoted to medico-legal examinations, how much money the expert makes each year from his medico-legal practice, how the plaintiff came to the expert's practice, how much money the expert has billed to date for the plaintiff's care and how much the expert anticipates to receive for his or her testimony. Defense counsel should also ask whether or not the physician has any present financial interest in the subject lawsuit, i.e. a lien.

Effort should also be made to determine whether or not the witness has been the subject of any criminal or medical disciplinary proceedings. Defense counsel should also check prior writings by the doctor to determine whether or not he or she has ever published any papers on the subject matter on which he or she is testifying. If the witness has published in the area, these materials should be obtained. If your review of the witness' Curriculum Vitae indicates that he or she has not published, you can bring that out on cross-examination to prove that the expert is not the authority he or she claims to be in the field.

Defense counsel should generally cross examine a medical witness with respect to the issue of secondary gains. The doctor should be asked to define what secondary gains are. Secondary gains, for the uninitiated, are the benefits people get from not overcoming a problem. For instance, if a plaintiff's condition allows him or her to miss work, obtain drugs or receive financial compensation through a lawsuit, these would be examples of secondary gains. If a person is deliberately exaggerating symptoms for personal gain, then he or she is malingering. Secondary gains may, however, simply be an unconscious psychological component of symptoms and other personalities. The point of a cross examination with respect to secondary gains is to demonstrate that this is a medically recognized phenomena that they should consider in evaluating the credibility of the plaintiff's case.

Transcripts of the adverse expert medical witness' testimony in prior cases in general and in matters involving similar injuries in particular should be obtained. These transcripts should be gone over with a fine-tooth comb for statements the witness has made which are favorable to your contentions at trial. The witness can then be confronted with this testimony in the course of your cross-examination.

Where the expert witness is a non-treating one-time examiner of the plaintiff, you should impeach the witness' credibility by establishing that the examination was conducted solely for litigation purposes and not to render treatment. Once you establish that the witness is not a treating physician, you can go on to impeach the witness by establishing that the person who would be in the best position to testify about the plaintiff's conditions is the treating physician who has had the opportunity to observe the plaintiff over a substantial period of time. Attempt to get the doctor to concede that it is only through a series of visits over a period of time that a

doctor can form a full, fair and accurate opinion of a patient's condition. Most experts will deny that the treating doctor has any advantage in offering an opinion to the nature and prognosis of the plaintiff's condition. This denial should cast serious doubt in the jurors' minds about the expert's credibility.

Given the fact that most physicians who offer such "expert" testimony are frequent testifiers and lack extensive academic qualifications, you can further your attack by cross-examining the witness with respect to his or her frequency of testifying and lack of academic qualifications. Inconsistencies between the expert's findings and the treating records must then be demonstrated to the jury.

Another fertile area for cross examination of the medical expert is to inquire as to what records and history the physician considered in coming to his or her opinion. Confront the expert with every fact contained in the medical records that supports the defense's contention that plaintiff's complaints were not caused by the subject incident. Thus you might ask the expert if he or she took into account that plaintiff made no complaints of injury at the scene, returned to work, never sought emergency care in a hospital setting, never consulted with the plaintiff's trusted primary care physician, etc. Through these types of questions try to get the plaintiff's expert to concede that in the realm of soft tissue orthopedic injuries, people with certain degenerative conditions often make physical complaints similar to those voiced by the plaintiff.

The cross-examination of a medical witness can be destroyed by one question too many. Don't give the expert an opportunity to hurt you. Limit yourself to leading questions, the answers to which you are confident of. Begin on a high note, end on a high note, and never look fazed.

COLLECTING, PRESERVING AND AUTHENTICATING SOCIAL MEDIA EVIDENCE

by: Claire F. Rush, Rush & Sabbatino, PLLC

Congratulations! You've found the smoking gun: the Tweet, the Facebook posting, the YouTube video or the digital photograph on a web site that irrefutably establishes that your adversary has been less than truthful. Now what? This article explores the efficacy of various methodologies for obtaining and preserving electronically stored information and provides concrete suggestions for how to get social media postings admitted into evidence.

I. Strategies for Collecting and Preserving Social Media

The collection and preservation of social media evidence should optimally start in the claims stage of all litigation. How such evidence is collected and preserved is critically important and will oftentimes determine whether or not this evidence is ultimately admissible at trial. As a general rule social media postings are obtained in one of four ways: (1) by trolling public social networking sites; (2) authorization and subpoena; (3) Court Order or; (4) expert assistance.

Self-Collection

Most lawyers collect social media postings by "surfing" the public portions of a party's social networking groups and then simply "cutting and pasting" the desired postings. Information gleaned from such sites while extraordinarily valuable may nonetheless be difficult, if not impossible, to authenticate at trial. Given the ease with which electronic information can be manipulated and distorted, courts are highly skeptical of the integrity of this type of collection process and will subject evidence collected in this manner to a high degree of judicial scrutiny.

Authorization & Subpoena

A much more expensive and equally ineffective method for gathering and preserving social media postings is via authorization and subpoena. Social networking providers like Facebook, MySpace and LinkedIn uniformly refuse to produce records containing the content of electronic communications based upon the Stored Communications Act (hereinafter referred to as the "SCA"), 18 USC §§ 2700 et seq. This statute provides in pertinent part that an "entity providing an electronic communication to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service." 18 USC § 2702(a) (1). Courts throughout the country have held that under the SCA electronic communication providers and /or holders may not disclose the content of their users' profiles in response to a "naked" civil subpoena. See, *Bower v. Bower*, 2011 U.S. Dist. LEXIS 36677 (D. Mass 2011); *In re Subpoena Duces Tecum to AOL,LLC*, 550 F. Supp.2d 606 (Va. 2008); *Theofel v. Farey-Jones*, 359 F.3d 1066(Cal.2004).

While the SCA does provide that upon presentation of a valid authorization, social networking websites may release a user's private postings, the reality is that these providers are loathe to divulge user content. Attorneys for social network providers will throw up every conceivable objection to avoid complying with an authorization and/or subpoena. Facebook, for instance, will only respond to a subpoena served in California. In addition it charges a nonrefundable processing fee of $500. Avoid the subpoena/ authorization method if at all possible.

Court Order

Obtaining and preserving social media postings via a Court Order is a much more cost effective way of collecting social media. Once you can establish a good faith basis for

suspecting that your adversary is hiding relevant social media, you should move for an Order to obtain your adversary's social network postings, *Romano v. Steelcase Inc.*, 30 Misc3d 426 (NY Sup.Ct. Suffolk Co. 2010) or compel the disclosure of his or her user name and/or password, *Zimmerman v. Weis Markets Inc.*, 2011 Pa. Dist. & Cnty. Dec. LEXIS 187 (Pa. County Ct. May 19, 2011); *McMillen v. Hummingbird Speedway Inc.*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270 (Jefferson Co. Com. Pl. 2010).

Courts have ordered such discovery where publicly accessible portions of a social networking site contain photographs and other information relevant to a party's claims and other areas are shielded by the party's privacy settings. Under these circumstances Courts have ordered plaintiffs to provide defendants with all passwords, user names and log-in names for any and all social networking accounts. The *McMillen* Court in directing the disclosure of user names and passwords noted that matters posted in the non-public sections of social websites are not protected by any privilege. The Court went on to observe that modern trends in discovery favor liberal disclosure and that the pursuit of truth is the paramount and ultimate legal objective. Once social media evidence is produced in discovery an argument can be made that a presumption of authenticity attaches and that the disclosing party cannot thereafter challenge the authenticity of the documents so produced. See, *Indianapolis Minority Contractors, Ass'n v. Wiley,* 187 F.3d 743 (7th Cir. 1999).

Expert Assistance

The final method for collecting and preserving social media content is to engage an e-discovery company that specializes in the collection and preservation of social media postings. Such firms, while expensive, will collect all of the metadata associated with the social networking profile and be able to establish an iron clad chain of custody. Metadata, for the

uninitiated, is data that describes a document's or photograph's content. Metadata for a photograph may include data that describes how large the picture is, the color depth, the image resolution and when the image was created. A text document's metadata may contain information about how long the document is, who the author is and when the document was written.

With respect to social media postings, each social media network will have its own specific metadata. Important information to reference when trying to establish an item's authenticity include the application used to post the item (i.e. a cell phone, I pad or computer), the unique id and display name of the poster/author, the unique id and display name of the user, the time when a post or message was created or updated, the unique identifier of a message thread and the unique id and display name of the user to whom a post is directed.

For lawyers, one of the most important metadata values to be familiar with is the hash value. A hash value is a unique numerical identifier that can be assigned to a file, a group of files, or a portion of a file, based on a standard mathematical algorithm that is used to check data integrity. The most commonly used algorithms, known as MD5 and SHA, will generate numerical values so distinctive that the chance that any two data sets will have the same hash value, no matter how similar they appear, is less than one in one billion. 'Hashing' is used to guarantee the authenticity of an original data set and can be used as a digital equivalent of the Bates stamp used in paper document production.

Although none of the major social networking groups presently generate their own hash values, attorneys utilizing the services of an e-discovery service should insist that hash values be generated for each social media item collected. By calculating this value you should be able to establish the integrity of your evidence and defeat any future claims of fraudulent alteration of the data you rely on.

II. How to Admit Evidence from Social Networking Sites at Trial

In order to successfully proffer evidence from a social networking site you must follow the same rules you would in getting any tangible object or document into evidence. First you must show that the evidence is relevant. Next you must establish that the evidence is authentic and that you have produced an original writing. Finally you must demonstrate that the evidence is otherwise admissible as an exception to the hearsay rule or for a non hearsay purpose and that the probative value of the proffered evidence outweighs its prejudicial effect. The rub in getting electronically stored information into evidence, as will be seen below, is authentication.

Relevancy

In order to be admissible social media must be relevant; that is the proffered evidence must have a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Facts that tend to prove essential elements of a cause of action and/or affirmative defense are "of consequence to the litigation," as are facts that tend to undermine or rehabilitate the credibility of the witnesses who will testify. A post by a plaintiff to his Facebook or MySpace account showing him engaging in activities that are inconsistent with his claim of being totally disabled are clearly relevant as an admission or a declaration against interest. Claims of bias can similarly be demonstrated by proof that a witness is a "friend" of a party.

Authentication

General Considerations

Real evidence is authenticated by proof that it is genuine and that it has not been tampered with. An attorney who seeks to admit social media evidence must establish to the court's initial satisfaction that the evidence is what she purports it to be, i.e. a Tweet, a Facebook posting or a digital photograph or video, from or by a specific person. Once the court is satisfied that there is a rational basis for concluding that the evidence is what it purports to be, the court will permit the evidence to be presented to the jury which will then in turn decide what weight, if any, to give the evidence.

Electronically stored information is by its very nature difficult to authenticate. For one thing it can be easily corrupted in the course of discovery by improper search and retrieval techniques, data conversion or plain mishandling. Moreover, on line identities can be easily hacked or coopted. Finally, as the Manti Te'o hoax readily demonstrated, many people conduct their social media networking under pseudonyms making it difficult, if not impossible, to accurately identify the author of a particular post.

In light of the forgoing it should come as no surprise that Courts are often times skeptical when asked to pass on the authenticity of social network postings and communications. Thus for example, courts have refused to authenticate an email that on its face bears a particular email address since it is easy to set up a phony email account from a publically available email service such as gmail.com. *Commonwealth v. Koch* , 39 A3d 996 (Pa 2011). So too the mere fact that certain messages appear to come from a purported sender's Facebook account will not be sufficient to support a finding of authenticity. *State v. Eleck*, 23 A.3d818 (Conn. 2011).

Likewise, profile pages from a social networking site that contain only general information about a witness, such as a witness' birthday, location, nickname and photograph are routinely deemed to lack sufficient distinctive characteristics to allow authentication. *Griffin v. State*, 19 A.3d 415 (Md. 2011). Finally, courts will give special scrutiny to website postings where the proponent of the postings is a known skilled computer user who fails to offer any independent proof that the postings were made by the groups she claimed as opposed to being slipped on to the group's websites by the defendant herself. *United States v. Jackson* , 208 F.3d 633 (7th Cir. 2000).

Lawyers should take heed of these cases and not take authentication for granted. An authenticating witness must be produced to provide factual specificity about the process by which the proffered electronically stored information was created, acquired, maintained, and preserved. Testimony must be adduced that the data was never altered or changed. Counsel who seek to introduce social media postings and fail to methodically lay out their proof of authentication do so at their own peril and risk being precluded from offering their smoking gun.

Methods for Authenticating Social Media Evidence

Trial attorneys who proffer social media evidence should follow the federal court guidelines for authentication of electronically stored information set forth by Judge Paul Grimm in *Lorraine v. Markel Am. Ins.*, 241 F.R.D. 534 (D.Md. 2007). Judge Grimm therein articulated a framework for analyzing these issues in which he differentiated between electronically stored information that is self –authenticating (i.e. official publications, newspapers and periodicals, trade inscriptions and the like) and that which must be extrinsically authenticated, like social media. Social media in Judge Grimm's view can be authenticated by: (1) testimony of a person with knowledge; (2) circumstantial evidence of distinctive characteristics, (3) comparison with a previously authenticated exemplar; or; (4) by evidence of an accurate process or system.

1) Testimony by a Witness with Personal Knowledge

This is the most straight forward method of authentication. Under this scenario the witness will identify his or her social networking profile and testify that he or she posted the communication at issue. Life, however, is rarely this easy. As social media evidence becomes more common it is likely that litigants will increasingly refuse to acknowledge the authenticity of their posts.

2) Circumstantial Evidence of Distinctive Characteristics

Courts will also admit social media evidence where the posting itself is so distinctive with respect to its appearance, content, substance and/ or internal patterns, that it could only have been created by one particular individual. Distinctive content and context are key to the admission of evidence under this authentication method. Thus for instance in *People v. Goins,* 2010 WL 199602 (Mich. Ct. App. Jan. 21, 2010) the Michigan Court of Appeals held that information pertaining to the details of an assault that appeared on a site that purported to be the victims MySpace page was so specific as to constitute "distinctive content", sufficient to permit authentication of the profile.

Texas' highest criminal court reached a similar conclusion in a matter entitled *Tienda v. State*, 2012 WL385381 (Tex. Crim. App. Feb. 8, 2012). The criminal defendant in Tienda argued that the State did not prove that he was responsible for creating and maintaining the content of certain MySpace pages by merely presenting the photos and quotes from the web site that tended to relate to him. The Court noted that in addition to containing the defendant's name, nicknames, city and numerous photographs, the MySpace profile at issue contained specific references to the crime, arrest and ensuing electronic monitoring, the sum of which indicated that the MySpace

profile at issue belonged to the defendant. The Court held that under these circumstances the proffered evidence was sufficiently linked to the defendant so as to justify its submission to the jury.

In *People v. Clevenstine*, 68 AD3d 1448 (3rd Dept 2009), an intermediate appellate court in New York State accepted a prosecutor's distinctive characteristics argument to admit certain electronic communications that occurred between a criminal defendant and his victims in a sexual assault case. In *Clevenstine* both victims testified that they had engaged in instant messaging about sexual activities with the defendant through MySpace. In addition, an investigator from the computer crime unit of the State Police related that he had retrieved such conversations from the hard drive of the computer used by the victims. A legal compliance officer for MySpace thereafter testified that the messages on the computer disk had been exchanged by users of accounts created by defendant and the victims. Finally, the defendant's wife recalled that she had observed sexually explicit conversations on the defendant's MySpace account while on their computer. The Court held that this testimony provided ample authentication for admission of this evidence and stated that the defense was free to argue to the jury that that someone else accessed the defendant's MySpace account and sent messages under his user name. The Court noted that this argument raised a classic fact issue that should be submitted to a jury for resolution.

In still other cases, Courts have admitted emails, internet chats and instant messages where the proponent has adduced testimony from an internet provider that a message originated with the purported sender's personal computer or cell phone and circumstances exist which indicate circumstantially that the sender was in fact the author. See generally, *United States v. Gagliardi*, 506 F3d 140(2nd Cir 2007) (emails and internet chat conversations sufficiently

authenticated where defendant showed up at a meeting place arranged during the course of exchange of electronic messages); *In the Interest of F. P., a Minor*, 878 A2d 91 (Pa. 2005) (instant messages purportedly sent by the defendant that referenced him by name as sender, and threats made and events discussed therein mirrored animosity defendant had displayed toward recipient sufficient to authenticate instant messages); *United States v. Tank*, 200 F.3d 627 (9th Cir 2000) (comments posted in internet chat room were admissible where defendant admitted screen name used was his and when the person who used that screen name showed up for a meeting it was the defendant who showed up).

3) Comparison with a Previously Authenticated Exemplar

Where a party disputes authorship of a posting on a social network, authentication of the posting may be accomplished by permitting either an expert or lay witness to compare the disputed posting to a previously authenticated exemplar. This method of authentication was used in *United States v. Safavian*, 435 F.Supp.2d 36 (D.D.C. 2006), rev'd on other grounds, 528 F.3d 957 (D.C. Cir. 2008). *Safavian* arose out of the political corruption prosecution of the General Services Administration's deputy chief of staff for his improper relationship with the lobbyist Jack Abramoff. The government first authenticated a number of emails utilizing the distinctive content and context method. Other e-mails were then authenticated under FRE 901(b) (3), which allows a trier of fact to compare the proffered evidence with evidence that has already been independently authenticated.

4) Evidence of an Accurate Process or System

Provision is made in the federal courts for authentication by proof of the existence of an accurate process or system. See, FRE 901(b) (9). In the context of social media postings this

methodology requires evidence that a specific process or system was used to collect, preserve and test the integrity of the posting and that the result achieved was in fact accurate. The proponent of such evidence should establish via expert testimony that the processes used are supported by research that has been replicated in the scientific community. This rule is typically invoked to authenticate computer readouts, *United States v. Washington*, 498 F.3d 224 (4th Cir 2007) and computer simulations, *Silong v. United States*, 2007 WL 2535126 (E. D. Cal. Aug.31, 2007). When relying on this method of authentication be prepared for a *Frye* or *Daubert* challenge.

Best Evidence Rule

Pursuant to the Best Evidence Rule, whenever a party seeks to prove the contents of a writing, that party must produce the original writing or satisfactorily account for its absence. In the federal courts and most state courts, if data is stored on a computer, any printout and/or duplicate copies thereof, shown to accurately reflect the data are deemed originals. Screen displays on a computer are thus deemed originals as are copies made of that screen display, via the "cut and paste" method.

As a practical matter, the best evidence foundation can be established by simply eliciting testimony that the witness typed in the URL associated with the specific social media web site, that the witness logged on to the site, reviewed what was there and that the witness thereafter downloaded the text, photograph or video therefrom and that the proffered exhibit is a fair and accurate depiction of what appeared on the witness' computer screen.

Hearsay

To be admissible, the content contained in every website posting must satisfy either a hearsay exception or a hearsay exemption. Postings made by a party on a web site or in the context of a chat room conversation or tweet constitute admissions. In a similar manner, social media postings that are proffered for the purpose of showing that a relationship exists between two parties do not offend the rule against hearsay. Statements appearing on social media sites may be independently admissible as a present sense impression, excited utterance or proof of state of mind.

Unfair Prejudice

The final hurdle an attorney must clear when offering social media evidence is the claim of unfair prejudice. When all other objections have failed you can rest assured that your adversary will get up and state with great conviction: "Your Honor the exhibit should be excluded because its prejudicial effect outweighs its probative value." The way to respond to this type of objection is to focus on the fact that the evidence is highly probative because it contains evidence of the party's own unguarded statements and or activities. What could be more relevant in our ongoing search for the truth?

..... Rule 30(e): ..... What You Don't Know Could Hurt You

Richard G. Stuhan and Sean P. Costello

Beware the sham errata sheet—or any other errata sheet!

YOU HAVE JUST TAKEN the perfect deposition in an important civil case. The witness answered "yes" and "no" to all the critical questions, and did so without elaboration or qualification. Every admission you needed to win your case on summary judgment, you got. Opposing counsel barely objected. Indeed, about the only thing she said during the entire deposition was that her client would like to review and sign the deposition after it is transcribed. The partners are impressed, and the client is thrilled with your play-by-play account of what transpired. You're a hero.

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The transcript arrives a couple of weeks after the deposition. For once, the transcript actually bears out your rosy description of the deposition. You settle in for a few days with copious amounts of coffee and set about drafting the motion for summary judgment. You finish the draft. The partners and client are pleased. Everyone thinks you have a slam dunk because of your killer deposition.

A few weeks later, you get the witness's deposition errata sheet in the mail. You expect the usual—corrected typos, spelling corrections, minor date changes, that kind of thing. But that is not at all what confronts you when you open the envelope. What you see is a complete rewrite of the witness's testimony. Virtually every critical "yes" is now a "no" and vice versa. The succinct, unqualified answers are accompanied by lengthy explanations that resemble "lawyered" responses to interrogatories. Your slam dunk summary judgment motion is now an airball. You consider a motion to strike the errata sheet and even for sanctions, or at least a strongly worded letter to opposing counsel.

KNOW YOUR JURISDICTION (OR YOUR JUDGE) • Before you spend the client's money writing that letter or preparing that motion, you had better get a handle on the law of your specific jurisdiction when it comes to the changes that can be made to deposition testimony via errata sheets. Depending on your jurisdiction, your opponent's conduct may be perfectly acceptable, and if you file that motion, you—not your opponent—may be the one facing sanctions or suffering professional embarrassment.

Since most of us would not think of using an errata sheet to rewrite or contradict sworn deposition testimony, this might come as a surprise—even to those lawyers who have been practicing for some time. Many readers are probably thinking to themselves that a rule allowing a witness to contradict deposition testimony via an errata sheet is impossible to reconcile with the well-settled prohibition against contradicting deposition testimony with a later-served affidavit in opposition to a summary judgment motion. (The Second Circuit is credited with originating the "sham affidavit" rule in *Perma Research & Development Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969). Since then, virtually every circuit has adopted some version of the "sham affidavit" rule.) The bottom line is that, although some jurisdictions (or judges) do not permit such conduct, many—probably the majority—allow witnesses to change the substance of their deposition testimony, even contradict that testimony, through the use of an errata sheet. *See Pepsi-Cola Bottling Company of Pittsburgh, Inc. v. Pepsico, Inc.*, No. CIV.A.01-2009-KHV, 2002 WL 511506, *2 (D. Kan. April 3, 2002) ("The majority approach is that Rule 30(e) does not limit the types of changes a deponent may make to his or her deposition transcript").

A NOT-SO-HYPOTHETICAL HORRIBLE • Could it happen to you? Sure, and maybe it already has. It happened to one of us recently. One of the authors was on the receiving end of an errata sheet very much like the one in our hypothetical. It happened in the course of a products liability case in a New Hampshire state court. The plaintiffs brought a wrongful death action against a cigarette manufacturer, alleging that smoking cigarettes manufactured by the defendant gave the decedent cancer and caused his death. Clearly, the decedent's awareness of the alleged dangers of smoking was an important issue in the case. Although the decedent's mother testified that there was no doubt in her mind that her son had long been aware of the health risks of smoking, her errata sheet sought to negate those admissions:

Q. "Is there any doubt in your mind that [the decedent] was aware that smoking was bad for his health?"

A. "I think yes, he knew." (Amended answer: "No.")

Q. "He knew that smoking was bad for him?"

A. "Yes, I think so."

Q. "And that's true in the 1990s for sure, right?"

A. "Right." (Amended answer: "No.")

Q. "And that's true for the 1980s as well, isn't it?"

A. "Yes." (Amended answer: "No.")

The errata sheets also reflect an effort to blunt the impact of the mother's testimony that her husband (the decedent's father) discussed the health risks of smoking with the decedent. That testimony was altered as follows:

Q. "You don't know whether health concerns played any role in your husband's advice to his children about smoking?"

A. "Oh, yes."

Q. "And one of the reasons he gave his children that advice was because he was concerned about their health, isn't that right?"

A. "Yes." (Amended answer: "Yes, in recent years though.")

Q. "And he communicated that to his children, didn't he?"

A. "Yes." (Amended answer: "Yes, to some maybe.")

Q. "Including Harry, right?"

A. "Yes." (Amended answer: "I don't know.")

Q. "And would it be fair to say that your husband discussed cigarette smoking with [the decedent] as far back as the 1960's after he was married to [the plaintiff] and after [your husband] had quit?"

A. "Yes, I think so." (Amended answer: "No.")

Q. "Would it be fair to say that your husband also discussed smoking with [the decedent] during the 1970s and 1980s as well?

A. "Yes." (Amended answer: "No.")

Although the mother made it clear at her deposition that the health risks of smoking played an important role in her and her husband's efforts to encourage their children not to smoke, that testimony, too, would be invalidated by the proposed errata sheets:

Q. "And you had a rule against smoking by the kids, is that right?"

A. "Right." (Amended answer: "Right, because of fire risk.")

Q. "And do you recall the reasons why [your husband] stopped using cigars altogether?"

A. "For the same reason that he thought that he should quit the cigarettes."

Q. "And that was that they weren't good for his health, is that right?"

A. "Right." (Amended answer: "No, it was the smell and the mess.")

Q. "And as I understand it, you and your husband had a rule against the children smoking when they were growing up, is that right?"

A. "Yes." (Amended answer: "Yes, due to ashes.")

Plaintiff's counsel submitted similar "corrections" to the deposition testimony of the plaintiff, decedent's widow. For example, recognizing that the plaintiff's admission that cigarette advertising played no role in her husband's smoking decisions would be fatal to many of plaintiff's theories, counsel made the following alterations in the errata sheets:

Q. "Did [the decedent] ever tell you that advertising had anything to do with his decision to take that first puff?"

A. "No." (Amended answer: "No, but we both saw TV ads that made smoking attractive to us.")

Q. "My question is do you remember seeing any advertising which communicated to you that a particular cigarette was safe or safer or healthy?"

A. "I don't recall." (Amended answer: "I don't recall specifics off the top of my head but that was the message we got.)

The quoted testimony above was taken in *King v. Philip Morris, Inc.*, No. 99-C-856 (Hillsborough, NH Super. Ct.). Deposition of Jean King, July 12, 2001, at pages 29, 39-41, 44, 70, and 162-63. Deposition of Donna King, June 7, 2001, at pages 51, 89.

There are many more examples, but you get the point: This stuff happens in real life, and you need to be prepared for it. (In the above case, we filed a motion to strike the changes, but Judge Larry M. Smukler denied the motion. More on that below.)

Know Thy Jurisdiction

Lesson number one, therefore, is to know your jurisdiction. Indeed, it may be a good idea to learn the rules and how they have been interpreted before you take that first deposition, because knowing the rules ahead of time may help you decide how you want to approach the deposition and may even help you formulate your questions. There will be more on the differences among jurisdictions and the conflicting approaches that have emerged later in this article. First, however, we need to take a look at the underlying rules.

FEDERAL RULE OF CIVIL PROCEDURE 30(E) • The text of the federal rule is straightforward enough:

"If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them."

The majority of states have adopted rules identical to, or virtually identical to, Rule 30(e). A handful have not. Since a general survey of the state deposition rules is beyond the scope of this article, we will settle for an example. One state that has adopted a rule different than Federal Rule 30(e) is New Hampshire, the site of the case discussed above. N.H. Super. Ct. Rule 41 provides: "No deposition, as transcribed, shall be changed or altered, but any alleged errors may be set forth in a separate document attached to the original and copies." On its face, New Hampshire's rule appears more restrictive than the federal rule. It prohibits changes and allows only an identification of errors in transcription.

Since Rule 30(e) governs in all federal courts and in the majority of state courts, Rule 30(e) will be the focus of this article. Nonetheless, you should not assume that Rule 30(e) will control in the jurisdiction of your deposition, and you should learn the language of the rule before hopping on a flight or jumping in your car if you are taking the deposition in a jurisdiction other than the one in which you normally practice (whose rules you presumably already know).

Rule 30(e) makes clear that the ability to review and make changes to a deposition transcript is not automatic. If a witness wants to make changes, he must request the opportunity to do so, and he must make the request "before completion of the deposition." Moreover, he must make any changes within 30 days after being notified that the transcript is available. Aside from minor disputes over when a witness was "notified" that the transcript is available, this part of the rule does not generally lead to controversy.

Changes In Substance

When it comes to Federal Rule 30(e) (and state rules that have adopted its language), the

Witness Control

The Uses, Abuses, and Ethics of Phantom Impeachment

By John Zen Jackson

A skillful attorney may be able to force a witness to tell the truth by making apparent use of a deposition transcript or other document even though the deposition or document did not contain any testimony or information on the point in issue.

Witness control is central to an effective cross-examination. Among the essential tools, of course, are leading questions and especially short questions. The ability to impeach a witness is another key component.

More than 20 years ago Herbert J. Stern—New Jersey's "Tiger in the Court," a moniker memorialized in a book about him with that title regarding his days as a federal prosecutor—was regularly conducting trial advocacy courses. Judge Stern had a story illustrating the witness control that flowed from the ability to impeach.

A traveling carnival had an act challenging spectators to coax an elephant down onto his knees and thereby win $500. After several burly adults had tried but failed to achieve the goal, a lanky, skinny kid came up to accept the imposing dare. He first stared the elephant in the eye and then went behind it and kicked hard. The elephant collapsed to his knees. Although protesting that this was not permitted, the carney with his small hands and smelling of cabbage handed over the money.

The following year the carnival returned to that small town. The rules for the act had been changed. Now to win the $500, the object was to make the elephant to move his head up and down and then from side to side—without touching him. The same skinny kid, a bit taller now, showed up. The carney forcefully explained the rules to him. The kid shrugged and went up to the elephant. Once again looking the elephant in the eye, the skinny kid said, "Do you remember me?" The elephant nodded yes. The kid then said, "Do you want me to do it again?" And the elephant vigorously shook his head from side to side.

There are a number of approaches to impeaching a witness to discredit his or her testimony. These include impeachment by contradiction to disprove the facts testified to by one witness with contrary evidence from another witness or another evidentiary source. *See generally* K.S. Broun, *McCormick on Evidence* §45 (7th ed. 2013). The contradiction may be differing perceptions and reports of an event or even demonstrated with a prior inconsistent statement to challenge the witness' credibility.

The focus here will be on the technique of phantom impeachment, during which an opposing witness answers questions posed by an examining attorney truthfully, and the witness contradicts the prior

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testimony without any actual impeaching proofs being presented.

When and How Does Phantom Impeachment Work?

The tactic works when an examining attorney convinces a witness at trial that as a cross-examiner he or she has absolute mastery of a deposition or other documents.

Nonetheless, phantom impeachment has been upheld in the case law.

After a number of successful impeachments, a witness becomes less willing to contest the testimonial position advanced by this cross-examiner as he or she picks up questioning lines from the deposition transcript or other sources. Indeed, a skillful attorney may be able to force a witness to tell the truth by making apparent use of a deposition transcript or other document even though the deposition or document did not contain any testimony or information on the point in issue. It is at that moment that the phantom flits through the courtroom. *See generally* D.M. Malone, P.T. Hoffman & A.J. Bocchino, *The Effective Deposition* 288–89 (rev. 3d ed. 2007). These authors compare this phenomenon to the long-standing observation of others that a witness effectively confronted on cross-examination may "forget himself and speak the truth" as had been noted in classic works on cross-examination. *See* Francis Wellman, *The Art of Cross-Examination* at 135 (4th ed. 1962).

Phantom impeachment is not always done in an elegant fashion or effectively, except perhaps in television, movies, and legal thrillers. Perry Mason in particular had a recurring bluff during cross-examination of "Suppose I should tell you…." *See, e.g.,* Erle Stanley Gardner, *The Case of the Fan Dancer's Horse* 154 (1947). Nonetheless, phantom impeachment has been upheld in the case law. *See, e.g., Warner v. General Motors,* 357 N.W.2d 689, 695–96 (Mich. App. 1984). But there indeed appear to be some limits to its use.

When Will Courts Generally View the Tactic as Proper?

In the recent decision *Manata v. Pereira,* 436 N.J. Super. 330, 93 A.3d 74 (N.J. Super. Ct. App. Div. 2014), the court reversed a verdict for a plaintiff, finding that the plaintiff's counsel had "engaged in improper cross-examination when he confronted defendant with a police report that counsel did not offer in evidence, but whose substance he communicated to the jury." The opinion purported to "chart limits on the use of impeachment by omission when a cross-examiner references a third-party report to discredit a witness, without seeking to introduce the report into evidence."

These are the pertinent facts. The defendant's car hit the plaintiff as she was crossing the street. The plaintiff claimed that she was a pedestrian in the crosswalk on the one-way street and that the defendant apologized at the scene, indicating that he had not been able to see her because of sun glare. In his defense, the driver asserted that the plaintiff was attempting to cross the street in the middle of the block and had darted out between two buses. The plaintiff's main effort to discredit the defense version was based on a police report that was neither marked for identification nor introduced into evidence. Nonetheless, the plaintiff's counsel made extensive use of the document during the trial. It was later made part of the record on appeal by consent.

The police did not respond to the scene of the accident, and the defendant went to the police station later that day where he provided his version of events. The defendant testified that he believed that he spoke with the officer who prepared the accident report. The final report was undated and did not include the defendant's version of events. The defendant maintained that after he received a copy of the report, he asked the police to correct it to include his version, but it was not done. A crash diagram in the report showed the defendant's car at the head of a line of cars in the street touching the crosswalk and with a stick figure in the crosswalk. The report did not explicitly indicate that the officer and defendant had spoken.

Questions about the police report formed the major part of the cross-examination of the defendant by the plaintiff's counsel, which was directed at showing that the defendant had fabricated that plaintiff had darted out. The plaintiff's counsel capitalized on the absence of the defendant's version in the report and did not admit the police report as evidence or present the investigating officer as a witness. Questioning the defendant, who previous testified that he talked to the plaintiff in Portuguese, established "the absence of any language barrier with the officer" and elicited a denial by the defendant that he told the officer that the pedestrian was in the crosswalk when struck as well as a denial that he said that he had stopped at the red light rather than in the middle of the block. In response to a defense objection that the report was hearsay, the plaintiff's counsel indicated that he would not offer the report. The police report was not even marked for identification as a potential exhibit, but the plaintiff's counsel still used it liberally during the cross-examination. The plaintiff's counsel questioned the defendant about the contents of the report and that it did not mention anybody darting out. The court sustained an objection to a question as to whether the police officer was "wrong" in not mentioning that the plaintiff had darted out into the street. The plaintiff's counsel also questioned the witness on the diagram in the report, which placed the plaintiff in the crosswalk.

During his summation, the plaintiff's counsel emphasized that the police report did not include that the plaintiff had darted out and that this assertion emerged only in defense of the litigation. In his testimony, the defendant had acknowledged that there was sun glare. But he denied that this caused the accident. The plaintiff's counsel took the fact of the accident and the admitted sun glare and suggested to the jury that members ought to think about why the defense changed the reason for the accident to the dart out, why it not been in the police report, why the police officer was left with the impression that the plaintiff was in crosswalk, and ultimately whether the defendant's explanation was credible. In the course of deliberations, the jury asked to see the police report but the defense counsel objected on the ground that it was not admitted into evidence.

On the appeal, the court noted that impeachment by omission was a well-established basis for challenging witness

credibility and that such omission might be considered a prior inconsistent statement. But it concluded that in this case it was an "improper attempt to impeach by omission" and the summation built upon it was capable of producing an unjust result. *Id.* at 334, 93 A.3d at 777. The appellate court reversed the judgment and remanded the matter for a new trial.

The plaintiff's argument that the omission of defendant's version of the accident in the police report demonstrated that it was a fabrication was manifestly accepted by the jury. But the argument was missing the predicate evidence. The appellate court noted that the defendant persisted in his testimonial position that he had told the police about the pedestrian darting out and that plaintiff's counsel could have attempted to offer the extrinsic evidence of the omitted version by offering the police report as evidence. It was admissible as a hearsay exception either as a business record or a public record: "A police report may be admissible to prove the fact that certain statements were made to an officer, but, absent another hearsay exception, not the truth of those statements." *Id*. at 345, 93 A.3d at 784. In this case, it could have been offered to prove that the defendant made the "dart out" statement, but not that the plaintiff did in fact dart out. However, the appellate court underscored the trial judge's discretion to control the admissibility of such evidence under to N.J.R.E. 803(c)(6) and 803(c)(7) if "the sources or information or the method, purpose or circumstances of preparation indicate that it is not trustworthy" or "circumstances indicate that the inference of nonoccurrence or nonexistence is not trustworthy." The appellate court also noted that the circumstances raised questions about the preparation of the report and its characterization as a business record and "the inference that [the] defendant omitted his trial version of the accident [was] trustworthy." *Id*. at 347, 93 A.3d at 785.

Emphasizing that the plaintiff made no attempt to introduce the police report into evidence, the appellate court criticized the plaintiff's counsel for engaging in "a form of 'phantom impeachment.'" *Id.* Although acknowledging that cross-examination relating to credibility need not be based on evidence presented at trial, the questioning becomes improper when the examiner does not have the ability to show the factual basis for the questions: "[T]he question of the cross-examiner is not evidence and yet suggests the existence of evidence… which is not properly before the jury." *Id.* at 348, 93 A.3d at 786 (quoting *State v. Spencer,* 319 N.J. Super. 284, 305, 725 A.2d 106, 117 (N.J. Super. Ct. App. Div. 1999)).

How Can an Attorney Surmount the Technique's Challenges?

In criticizing the plaintiff's counsel for engaging "in a form of 'phantom impeachment,'" the court in *Manata* referred to a 1991 *ABA Journal* article by James McElhaney entitled "Phantom Impeachment." 77 A.B.A. J. 82 (Nov. 1991). This article also appears in the book *McElhaney's Litigation* (1995), which is a compilation of many of his monthly columns. Both in "Phantom Impeachment" and a 1994 article entitled "Blind Cross-Examination," McElhaney describes the problems associated with the technique but also how to do it. He presents the circumstance of having an oral statement that contradicts the witness but which was made by a person who will not testify. Referring to "phantom impeachment," McElhaney notes that the attack on a witness typically ended by asking if some other person had testified to the contrary would that other person be lying. He wrote that this is "speculative, argumentative, and doesn't work very well." McElhaney, *McElhaney's Litigation, supra,* at 173. His recommendation is to develop the fact that other witnesses saw what happened to suggest that they might disagree with the witness on the stand and stop there.

The analysis was more fully developed in the 1991 piece. McElhaney points out that the use of phantom impeachment includes predicting what a witness would say if the witness were there, even though the witness is not. This approach rests on facts that have not been introduced as evidence and asks the cross-examined witness to assume things that have not been and may never be established. It also involves a hearsay component in that the examining lawyer does some testifying in presenting the contradicting statement. Furthermore, framing the question with the "would that person be lying" tagline calls on a witness to speculate about the mental process of another person, which does not meet the fundamental personal knowledge that Federal Rule of Evidence 602 requires. McElhaney articulates one more problem with phantom impeachment:

> The real purpose of the question was not to get information about Sergeant Robertson's thinking—or any information at all, for that matter. It was argumentative. It was saying to the jury in the middle of the trial, "This witness is lying like a dog. Remember Sergeant Robertson? He said the light was red and he obviously had no motive to lie"—which the lawyer is welcome to say in final argument, but not now.

McElhaney, *McElhaney's Litigation, supra,* at 157.

McElhaney advocates doing it "the right way in the first place." His approach requires proving the contradiction through the other person's actual testimony and then in cross-examination reminding the to-be-impeached witness of the earlier testimony and it having taken place right in front of the witness. The ultimate question that a cross-examiner would put to a witness would call on the witness to agree to the truth of the proposition and change his previous testimony. McElhaney rebuffs the suggestion that this is improperly argumentative: "The question invites the witness to change his testimony, and gives him a good reason for doing it. There is nothing in the evidence rules that says you cannot hope." *Id*. at 158.

Does Phantom Impeachment Involve Ethical Ambiguities?

The evidentiary concerns associated with phantom impeachment also have an ethical component. When counsel elects not to call a contradicting witness or to offer a document into evidence but rather perhaps simply to hold a piece of paper in his or her hand as a threat, this requires scrupulous care to avoid any mischaracterization that would violate provisions of the appropriate rules of professional conduct. As explained elsewhere, "[i]t would seem that deliberately conveying to the jury, by implication or innuendo, the impression that a document in your hands is a statement containing certain assertions, when in fact you know it does not contain them, would violate American Bar Association Code of Professional Responsibility, Canon 7." R. Keeton, *Trial Tactics and Methods* 104 (2d

ed. 1973). The current constraints are to be found in Model Rules of Professional Conduct 1.2(d), 1.6, 3.3(a)(4), and 3.4(e).

Some proponents of the technique have rejected the assertion that when counsel use this technique they engage in improper conduct. For example, phantom impeachment is among the examples of how an attorney can use a deposition transcript at trial in D. M. Malone, *Deposition Rules: The Essential Handbook to Who, What, When, Where, Why and How* (4th ed. 2006). Malone describes using a deposition to good effect to impeach the witness a number of times, setting it up this way: "Now you have reached a point where you both know what the truth is—the car was red—but you know it is not in the transcript. She is not certain whether it is in the transcript or not." *Id.* at 118. After asking the witness to confirm that the car was red, she hesitates, and the lawyer picks up the transcript but remains silent. Visibly cringing, the witness responds that the car was indeed red. Malone continues: "You could not have impeached with the transcript and you knew it. But she didn't. Some think this is improper, that counsel is misleading the witness. But suggesting that you know and can prove the truth, if the witness lies again, really is not misleading. It is phantom impeachment." *Id.*

A deliberate and knowing misrepresentation is hard to justify in any context. But there is a grey area here. McElhaney refers to a lawyer's "hope" and Malone speaks in terms of "know[ing] what the truth is" even without having specific and actual documentation of that fact to implement the impeachment. In his multi-volume work *Trying Cases to Win* (1993), Judge Stern has described "the second great tool of cross-examination" as "the rules and laws of probability" arising from reasonable inferences and deductions from the facts and all someone knows about life and the case. H.J. Stern, *3 Trying Cases to Win: Cross-Examination* 177–78 (1993). Irving Younger's famous "commandments," including the one about never asking a question that you do not know the answer to, provide a guide for relatively safe cross-examination, especially for less experienced lawyers. But neither a trial in general nor cross-examination in particular is an activity without risk. Ultimately, this distills to the fundamental and indeed primordial requirement that a lawyer have a good-faith basis for the questions that he or she asks.

How Do Courts Approach the Good-Faith Basis for Questioning Witnesses?

The good-faith basis requirement for questioning witnesses is an aspect of the general obligation that an attorney as an advocate has to be honest with a court and to not "perpetrate a fraud upon the court." But as might be expected, what constitutes a "good-faith basis" is subject to some variability.

There appear to be two approaches to good faith: one strict and one relaxed.

The strict view of good faith requires that an examiner have admissible evidence showing that the impeaching fact is true. *See, e.g., State v. Williams,* 210 N.W.2d 21, 26 n. 7 (Minn. 1973); *State v. Spencer,* 319 N.J. Super. 284, 305, 725 A.2d 106, 117 (N.J. Super. Ct. App. Div. 1999) ("[t]he question must be based upon facts in evidence or based upon a proffer by the cross-examiner indicating his ability to prove the facts contained in the question"). Under this view, good faith would require that to assert to a witness, "you said before that the light was red," the cross-examiner must have admissible evidence that the witness said that the light was red. If the examiner has only some indication that the statement had been made, but has no admissible proof, the statement is not in good faith. It is this standard of "good faith" that was tacitly used in *Manata. But cf. Cavanaugh v. Skil Corp.,* 331 N.J. Super. 134, 175–76, 751 A.2d 564, 587 (N.J. Super. Ct. App. Div. 1999), *aff'd,* 164 N.J. 1, 751 A.2d 518 (2000) (commenting on the good-faith basis for cross-examination questions, "however tacky they go to the issue of bias and credibility and were proper").

The second good-faith view treats the good-faith requirement as a rule of reasonableness; specifically, as long as an examiner has a reasonable basis for believing that the impeaching fact is true, he or she operated in good faith. *See State v. Gillard,* 633 N.E.2d 272, 277–78 (Ohio 1988), *cert. denied,* 492 U.S. 925 (1989) ("effective cross-examination often requires a tentative and probing approach to the witness' direct testimony, and this cannot always be done with hard proof in hand of every assumed fact"); *Hazel v. United States,* 319 A.2d 136, 140 (D.C. App. 1974)("the assumed factual predicate for the question was neither known by counsel to be false, nor inherently incredible, thus to amount to unprofessional conduct"). For example, under this view, if an examiner has a basis for believing that a witness made a previous inconsistent statement that the examiner will use to impeach the witness, the examiner will act in good faith if he or she uses it as a basis for questions. Thus, if an examiner's basis for impeachment is a hearsay report, made by someone other than the witness, and the report nevertheless seems authentic and reliable, the examiner may assert the impeaching fact contained in the report.

A more in-depth review of the ethical issues of "good-faith basis" can be found in J. Alexander Tanford, *The Ethics of Evidence*, 25 Am. J. Trial Advoc. 487, 507 (2002). The words of Judge Stern provide an anchor for the technique of phantom impeachment. Taking a previous statement out of context to create an inconsistency is the primary focus of his comments rather than phantom impeachment, but his observations are still powerful and germane regarding misusing the technique deliberately:

> Whether or not one is ever caught and punished for twisting the meaning of prior testimony or for unfairly editing prior statements, it simply should not be done. It is not merely a matter of practicality. It is not even just a matter of good morals. It is a matter of personal and professional pride and dignity. No one who stoops to such conduct does anything less than to demean himself and the rest of us who share his profession.

Stern, *supra*, at 88.

This is a standard that all members of the bar should strive to adhere to. Certainly in jurisdictions such as New Jersey, in light of *Manata v. Pereira,* counsel making a decision to use the phantom impeachment technique need to be prepared to prove the actual impeachment sufficiently if the point is not conceded by the witness or at least be ready to make an adequate proffer to demonstrate an arguable basis for admitting the impeaching information, including inferences from items already in evidence.