Part Four of a five-part series.

What I Learned From Teaching Trial Advocacy:
The Cross-Examination

TAKEAWAYS >>

- The cross-examining attorney's role is to teach the jury while never giving it an opportunity to learn from an opposing witness.
- To avoid turning the jury against you, carefully set up the witness during cross-examination with leading and closed questions, and questions for which you know the answers. Never provide a witness you are cross-examining with an open-ended question.
- Impeaching a witness requires establishing a strong foundation with such elements as proof of a prior inconsistent statement or proof by omission.

BY GINO DiVITO

ISBA RESOURCES >>

- Arlo Walsman, *The Incomplete Impeachment Conundrum*, 109 Ill. B.J. 28 (Sept. 2021), law.isba.org/46CCSge.
- ISBA Free On-Demand CLE, *Eight Things Every Trial Lawyer Should Know* (recorded Apr. 2020), law.isba.org/46DTKnV.
- Hon. James M. Varga, *A Short Guide to Using Cross-Examination to Impeach Experts*, 100 Ill. B.J. 492 (Sept. 2012), law.isba.org/3RicLqy.

CROSS-EXAMINATION ENABLES QUESTIONING IN BOTH CONSTRUCTIVE AND DESTRUCTIVE WAYS. For your opponent's witness, who assuredly will supply helpful evidence for your case (or be impeached), you should question in a pleasant, constructive manner. In rare cases, obtaining helpful information may be the sole basis for your questions. In most cases, however, you'll no doubt begin or follow up in destructive mode, challenging the credibility of your opponent's witness.

Unlike direct examination, where the witness occupies center-stage as the provider of information, a witness under cross-examination and subjected to the destructive mode should be neither the focus of the jury nor the source of information. The cross-examiner must fulfill both roles. The object of cross-examination in destructive mode is not to ask questions that provide answers for the enlightenment of the jury, as in direct examination. Asking open-ended questions of an opposing party's witness invariably invites narrative answers leading to dire consequences.

To fulfill the goal of providing information, the cross-examiner takes a central position in the courtroom: center-stage, in a position central to the jury. That position draws the focus of the jury on both the questioner and the controlled information contained within the questions.

Destructive cross-examination, in sum, must never be an opportunity for the jury to learn from the witness. It must always present an opportunity for the cross-examiner to teach the jury. A proper cross-examination is one that asks only control questions. So, let's move on to how to do it.

How to control the witness

In beginning my lecture on cross-examination, I told students they may have noted that everyone insists that a successful cross-examination requires control of the witness. That certainly is true, but no one ever tells you how to do it. I disclosed, however, that I had the secret for controlling the witness on cross-examination and was willing to share it with them if they promised not to share it with anyone else. I asked if they would make that promise. Hearing a few almost inaudible responses and no unanimity, I shouted, "Will you make that promise!?" I received a loud chorus of "yeses," but, because I was uncertain that everyone had promised not to share the secret, I shouted even louder, "Will everyone make that promise!!?" This time I was almost certain that the students made the promise. But to be sure, I said, "If any of you have not made the promise not to share the secret, please leave the room now." No one left, so I began to share the secret.

I first pointed out that the ultimate way to control a witness on cross-examination is to garner the judge's support, through an objection based on the witness not properly answering the question, an objection possessed only by a questioning attorney: "Objection, your honor, the witness is not responding to my question. I ask your honor to instruct the witness to answer my question." I follow that advice by asking if everyone understood that method for controlling the witness. When I received some nods and weak responses from students, I shout, "Do you understand!?" I receive a chorus of "yesses."

I then will say, "OK. You understand how to use that allowable method. But set it aside,

From October 2023 through February 2024, the Illinois Bar Journal will be publishing a special five-part series on trial advocacy by **GINO DiVITO**, *who cofounded and is a partner in the Chicago law firm of Tabet DiVito & Rothstein LLC. He has served as a trial judge and as a justice of the First District of the Illinois Appellate Court. He is the author of the ISBA publication, "The Illinois Rules of Evidence: A Color-Coded Guide," which is updated annually.*

GDiVito@TDRLAW.com

… NEVER ASK AN OPEN-ENDED QUESTION ON CROSS-EXAMINATION. IF YOU ASK SUCH A QUESTION, YOU WILL INVITE A NARRATIVE ANSWER, YOU WILL HAVE LOST CONTROL OF THE WITNESS, AND THE ANSWER IS LIKELY TO BE HARMFUL AND PERHAPS DEVASTATING.

for you'll never, ever use that method to control a witness! You won't use it, for you don't need the judge's help because, for reasons you'll soon learn, you want the witness not to respond properly."

I then stressed that there are other things you don't do to control witnesses:

You don't control witnesses by talking over them. You don't control witnesses by questioning more rapidly than they answer. You don't control by out-shouting witnesses. And you don't control witnesses by approaching them so closely that you're able to reach for their jugular vein. You don't do those things because jurors will feel you're being unfair. And, if you do all or any of them, they will hate you!

Having provided the students what not to do, I proceeded to tell them what to do to control the witness:

1) You ask the right question.
2) If the witness does not respond correctly (*e.g.*, by answering with a question, by answering with an answer unrelated to the question, by responding with a narrative, by answering the question but following with an explanation) you politely interrupt the witness and repeat the question. If that doesn't work, you've asked the wrong question.

I then requested and obtained a volunteer for my two-step approach. I told the volunteer that I am going to ask a single question: "What color is your car?" I instructed the volunteer not to answer. A response could include the make of the car, its model, its age, its condition, its horsepower, its speed, how many doors it has, how well it travelled on the road, how many miles per gallon of gas it requires, any other attributes of the car, or anything about any subject. But under no circumstance was the volunteer to answer the question about the color of the car.

We then proceeded with my question about the color of the car and the volunteer's various nonresponsive answers, followed by my politely interrupting the answers and repeating the question. Over many decades, few students heeded my instructions. Almost every student relented after a handful of questions by responding with a color.

Why did so many volunteers reject my firm instructions not to provide the color? The answer is obvious. Unlike the few who tenaciously followed my demands, the many others ultimately sensed that avoiding the answer was silly and embarrassingly indicative of a lack of trustworthiness. In a trial, jurors perceive the same things. And so do witnesses. The result is witness-control. So, if you do it right—if you ask the right questions—the witness who has experienced control will remain under control. And careful questions designed to control answers will follow.

But if the witness doesn't get it—if the witness dances around proper questions or persists in expanding answers—you should rejoice internally. (I would demonstrate by leaping in the air while clicking my heels.) That is so because the witness will have lost credibility, while yours is enhanced. The two-step approach, a process that, as in the example of the color of the car, will have jurors internally screaming the equivalent of, "Color, damn it, give us the color!" When that occurs, when the witness self-destructs, you will understand why I've told you not to invoke the judge's help in dealing with witnesses' answers. To win the battle for credibility, you need to persist in the so-called "struggle" to get answers to proper questions without the aid of the judge.

If the witness gives an improper but *harmless* testimony, ignore it by continuing the two-step process, but include the improper answer in your next question, such as, "Okay, you've said your car is a dream car; but what color is your car?" By doing that, you enhance the jurors' reaction to the witness's improper response to your question.

You should invoke the help of the judge only if the witness provides improper *prejudicial* testimony in response to your question: "Your honor, I object to that statement as not responsive to my question." After the judge sustains the objection, your next request is, "I ask the court to strike the statement." After that's granted, your next request is, "I ask that the jury be instructed to ignore that statement." Perhaps, depending on the seriousness of the prejudice, you might ask for a mistrial or that the witness be taken out and shot—the latter, a tongue-in-cheek exaggeration, is to suggest asking for whatever relief is necessary—but with the added feature of ensuring jurors recognize the witness's wrongdoing. Parenthetically, the one objection you should never make in the presence of the jury—at any phase of trial—is that the question or answer is prejudicial. That objection only highlights the prejudice. Make such arguments outside the jury's presence.

Proper control

At this point, we've discussed only the consequences for witnesses not properly answering questions rather than fulfilling my promise to share the secret for controlling the witness on cross-examination. So, we now turn to the specific questions for asking the right cross-examination questions to control the witness. They are:

1) Ask leading questions.
2) Ask closed questions that require only single or limited answers.
3) Ask questions to which you know what the answers should be, and that provide an opportunity for impeachment if you receive a

different answer.

Let's unpack those three questions.

Leading questions. A leading question is one that suggests the answer and invites only a "yes" or "no" answer, or "I don't know" or "I don't remember." For example: "Is your car blue?" or "The color of your car is blue, isn't it?" or "Was that when you crossed the street?" or "Do you enjoy listening to music?" or "Did you cross the street when the light turned green?" Accept nothing other than a yes or no answer or an answer claiming lack of knowledge. In the latter response, in some instances you'll impeach the witness by using techniques we'll soon discuss. For now, note that, as in the preceding examples, the form of the verbs "to be" (*e.g.*, "is," "are," "were," "was," "could," "would") and "to do" usually result in framing leading questions.

Closed questions. A closed question invites a limited single or near-single answer. For example, "What color is your car?" should elicit only a single or multicolor response. Examples of closed questions that should elicit single or near-single responses include questions calling for color, speed, height, weight, size, and distance.

Known answers. A question with a known answer is somewhat misleading because no one knows what witnesses may say. We know only that the question is safe, for we know what the witnesses should say because they said it previously. So, if they don't give the same answer, they will be impeached—a result even more desirable than getting the expected answer because of the negative effect on witness credibility.

Evasive answers to the listed control questions are what allow you to politely interrupt the witness's answer and to repeat the question. And if the witness gives a correct answer to the control question, but continues to speak, it allows you to interrupt the witness by saying, "Excuse me, Mr. Jones, but you've answered my question." As previously explained, the witness's consequence for evading questions is either loss of credibility or awareness of being under control. Either way, you prevail.

When posing control questions, *never help witnesses to answer* by telling them they can or should answer questions with a "yes" or "no" or a single answer. Some lawyers use that as a way to control the witness. But if you do that, jurors will conclude that you're treating the witness unfairly. And they will begin focusing on whether you're asking only "yes" or "no" or single-answer questions. When that happens, jurors' focus might be misplaced, and you will have revealed the secret—the secret that you have promised to keep. You must not reveal the secret by exposing to the jury your methods for cross-examination.

For that reason, in addition to not directing the witness how to answer the question, I encourage a combination of the three forms of questions provided above. Vary your questions with leading questions, closed questions, and questions that require the expected answer.

From the foregoing discussion, you know that you should never ask an open-ended question on cross-examination. If you ask such a question, you will invite a narrative answer, you will have lost control of the witness, and the answer is likely to be harmful and perhaps devastating. The same applies to a question that requests an opinion of a nonexpert witness.

To illustrate the danger of an opinion question, especially one based on a witness's personal knowledge, I have shared with my students the following real-life cross-examination of witnesses during one of my jury trials as a prosecutor.

A female university student shared an apartment with three male students. Their apartment was invaded one night by a group of armed intruders, who initially placed pillowcases over the heads of all the males and took their money and other property. The female was taken to a bedroom, where she was raped by three of the intruders.

The female victim, whose head was not covered with a pillowcase, viewed a photo array, and identified a photo of a man as one of her rapists. He was arrested and charged with rape, armed robbery, and home invasion. At trial, she identified the defendant as one of her rapists.

IMPEACHMENT REQUIRES SET UP: ASKING ALL THREE SETS OF QUESTIONS—IN THE ORDER PROVIDED—ARE STRONGLY RECOMMENDED, FOR THEY PROVIDE MULTIPLE OPPORTUNITIES FOR ESTABLISHING THE JURY'S AWARENESS OF THE WITNESS'S FABRICATIONS.

After her testimony, to provide evidence for the offenses of armed robbery and home invasion, one of the males testified about the intrusion and property taken from him. He testified that he could not identify the intruders. On cross-examination, he was specifically asked if he knew whether the defendant had raped the female victim. He gave a negative response.

A lunch recess was then declared. During that time, I talked to the next male scheduled to testify. I asked him if he knew who raped the female roommate, whom we'll call Jane Doe. He said no. I responded by telling him that there were a lot of things I knew that I had not personally witnessed. For example, I knew there was a place called China even though I never experienced or visited it. I knew it existed because I have seen photos purporting to be of China and many claimed maps of that country, and I've read many trusted historical reports and information about it. So, I know China exists.

I then asked him what he thought of Jane Doe, starting with how well he knew her and asking questions about her specific traits: whether she was intelligent; whether she was trustworthy or prone to fabricate; whether she was impulsive; whether she made rash judgments; whether she was prudent; whether anyone

could convince her to identify someone if she was unable to do so; whether she would identify the defendant as one of her rapists if she was not sure of that fact; whether she firmly believed the defendant had raped her. He answered as I had anticipated. I then asked him if he knew who raped Jane Doe even though he had not personally seen him.

After he answered yes to that final question, I told him to honestly answer all the defense attorney's questions, especially if he was asked whether he knew that the defendant raped Jane Doe, and how he knew.

When trial resumed, the defense attorney asked the second male witness questions similar to those he had asked the first male witness. When the attorney asked the witness if he knew whether the defendant had raped Jane Doe, he answered with a firm "Yes." When the attorney figuratively picked himself off the floor, he looked at me and was smart enough not to ask how the witness knew the defendant was one of the offenders. He asked instead, "You never saw any of the men who raped Jane Doe, did you?" If he had asked the witness how he knew that the defendant had raped Jane Doe, he would have received a version of the China story, as it applied to Jane Doe's credibility and certainty in identifying the defendant.

Impeachment

Impeachment, which refers to the effort to remove governmental officials, is also a legal term for challenging a witness's credibility. You impeach witnesses by challenging their credibility in many different ways. Some of the most common forms of impeachment include proof of interest in the trial's outcome, any motive to fabricate, relationships with a party or a relative or a friend of a party, being under the influence of alcohol or drugs during the event or at trial, and acting under duress.

A frequently used way to challenge a witness's credibility—especially by a defense attorney in a criminal case where the witness is giving testimony against a friend or a fellow gang member of the defendant on trial—is to do so without rancor. In such a case, the theory of the cross-examination is that the witness, charged with the same offense or a different one, has turned on his friend or fellow gang member to save himself. The questions reflect that motive: "You were caught red-handed, right?"; "You had been in prison before, right?"; "You knew you were on your way to prison again, correct?"; "You didn't want to go to prison again, did you?"; "You knew that telling the police and the prosecutor that Bill was guilty would result in your not going to prison, isn't that so?"; or "As a matter of fact, didn't the prosecutor promise to reduce your crime to a misdemeanor?"

But the two most effective ways to challenge witness credibility are through proof of a prior inconsistent statement or through proof by omission. That is so because these methods of impeachment constitute direct assaults on the witness's credibility—as opposed to the other methods that suggest the possibility of lack of credibility—because everyone knows that a person who changes stories or fails to relay something important is untrustworthy.

Both impeachment methods require substantial preliminary questions. You must lay a proper foundation for the desired impeachment effect.

Proof of a prior inconsistent statement. Some lawyers immediately and wrongly jump to the bottom-line question without suitable preliminary questions. But for appropriate impact, there must be proper lead-up. The line of questioning should result in answers that establish:

1) commitment to testimony given by the witness on direct examination;
2) confrontation based on reality (*i.e.*, based on the subject matter the witness testified about in direct examination); and
3) confrontation based on the witness's prior inconsistent statement.

The answers to these three sets of questions ultimately reveal a witness's mendacity.

Examples of questions for the commitment phase should proceed in the following fashion:

1) You've told the jury the black car drove through the red light and struck the blue car, right?
2) And did you testify before the jury that you saw the black car drive through the red light?
3) Did you have an unobstructed view of the black car driving through the red light?
4) Are you sure the black car drove through the red light?
5) There's no doubt in your mind that the black car drove through the red light?
6) And you told the jury the black car collided with the blue car, right?
7) Are you sure the black car crashed into the blue car?
8) Did you talk to a police officer after you saw the collision?
9) Did you tell the police officer, as you've told the jury, that the black car went through the red light?

With the (exhaustive) "yes" answers to these questions, even with a denial that the witness talked to a police officer, the witness has committed to his prior direct testimony. The next round of questions about reality follows:

1) Isn't it true that the blue car went through the red light?
2) Didn't the blue car actually crash into the black car?
3) Isn't it true that the black car had the green light?
4) Did you talk to a police officer about the accident?
5) You didn't lie to the police officer, did you?
6) Did you tell the police officer the truth about the accident?

With the answers to these questions, the witness has been confronted, not with what he told the officer, but about the event concerning his testimony—about what really happened. The ultimate questions about what the witness told the officer are now posed:

1) As a matter of fact, isn't it true that

you told the police officer that the blue car went through the red light?

2) Didn't you tell the police officer that the blue car crashed into the black car?

With the "no" answers to those questions, the foundation has been set for the police officer's rebuttal testimony that the witness told him the blue car was responsible for the collision. And the entire series of questions and answers have set the table for the jurors' awareness of the differences between you as the questioner and the witness's answers—an awareness resulting favorably when the police officer testifies.

As noted, some lawyers improperly ask the ultimate question without prefacing the other sets of questions, thus eliminating all the witness's prior fabrications. The result is a major reduction of the effect on the jury. Other lawyers tend to ask only the commitment question, skipping the second phase of questioning, before asking the ultimate question. Asking all three sets of questions—in the order provided—are strongly recommended, for they provide multiple opportunities for establishing the jury's awareness of the witness's fabrications.

When setting up a witness for impeachment by prior inconsistent statements, you want jurors to feel they are the direct targets of the witness's falsehoods. You do that by including jurors in your setup questions. Rather than lead-up questions, always beginning with, "Are you saying that …?" or "Did you testify that …?" or "Did you say that …?" You should occasionally ask, "Are you telling the jury that …?" or "Didn't you tell the jury that …?" or "Did you swear under oath before this jury that …?" When jurors feel a witness has personally misled them, they're likely to react with justified outrage.

Here's how to create a little drama in handling the final impeachment-by-prior-inconsistent statement. Impeachable statements are usually in what we'll refer to as a "document," simply a writing containing information about a prior inconsistent statement from any source. When you have such a "document," keep it on the table. Don't hold it. Act as though it doesn't exist. You, of course, have full knowledge of the information it contains.

Without resorting to the document, you ask a series of questions identical in nature to the questions for impeaching a witness by proof of a prior inconsistent statement. If, at some point in response to your lead-up questions or your ultimate questions, the witness concedes the difference between his prior inconsistent statement and his current testimony, he will have self-impeached. So, fortified by the jurors' standing ovation based solely on your deft questioning, you will have no need to pick up the document.

If, however, the witness adamantly

Some Random Thoughts on Cross-Examinations

Being in tune with the jury. A rule to abide by in all phases of trial advocacy, especially during cross-examination, is to do what jurors would do if they were in your shoes. If you're laughing when jurors are outraged by some occurrence or you display sadness when jurors are laughing, jurors are likely to conclude you're not in tune with reality. On the other hand, if you have established that a witness has testified falsely, it's OK to pummel him if you believe jurors would act similarly. Being in tune with the jury is clearly positive, but don't overdo it. Being out of step with the jury is likely to lead to disaster.

Going "Bananas." At the end of my lecture on cross-examination, I invariably told the students about the impact that Woody Allen's movie "Bananas" had on me.

In "Bananas," Woody Allen plays a character named Fielding Mellish, a dual citizen of the U.S. and the president of a country named San Marcos. In a U.S. courtroom, he has been charged with fraud, inciting to riot, conspiracy to overthrow the government, and using the word "thighs" in mixed company. He is representing himself. As a penalty for disrupting the court, he is gagged and tied to a chair. After a witness testifies that she overheard his treasonous remarks about this country, he is allowed to cross-examine her. So, seated and bound to the chair and gagged, he hobbles close to the witness. Through his gagged mouth, he asks a series of muffled questions, no part of which is understandable. But after each muffled question, the witness answers his "questions" in the following sequence:

"Yes, I did."
"No, I don't remember."
"No."
"Don't put words in my mouth!"
"Yes."
"Yes, it's true. I lied!"

I told the students that if they are able to perform as well as Fielding Mellish, with or without the obstacles he endured, they'll surely experience the pinnacle of success—similar to those they would experience when, in Perry Mason fashion, any witness confesses during cross-examination.

Keeping a defendant from testifying. In criminal trials, defendants frequently do not testify. That is so because experienced defense attorneys understand the perils of a defendant's testimony under cross-examination. They rely, instead, on the rule that the defendant's failure to testify cannot be asserted or questioned by the prosecutor and may not be considered by the jury. They also rightly emphasize jury instructions that the defendant bears no burden of proof and that the sole burden is on prosecutor to prove guilt beyond a reasonable doubt. Indeed, those jury instructions often provide a criminal defense attorney's primary argument for acquittal.

But there are two other important reasons for a criminal defendant not testifying. Both are related to the defendant's probable lack of credibility: 1) the need to keep from the jury evidence of the defendant's admissible prior criminal conviction(s); and 2) an effective cross-examination that results in the jury's focus on the defendant's mendacity, thus enhancing the prosecutor's burden of proof and fostering the likelihood of conviction.

Defense attorneys must be aware of those dangers, share them with those they represent, and counsel them on the possible negative consequences of their testimony.

stands by his previous trial testimony in answering your questions, he will have created tension about whether you or the witness is truthful. This tension is welcome, for it ends favorably when it's established that the cause of tension is due to the witness's inconsistency, not questions dreamt up by you. So, after you've concluded the lead-up questions we've discussed, you take the document from the counsel table and ask the ultimate questions about the witness's prior inconsistent statement based on what is in the document. Using the document in that fashion might give jurors greater credence in your framing of the ultimate question—a credence that will be fortified when another witness provides testimony concerning the witness's prior inconsistent statement.

This use of a document is particularly effective where it includes verbatim, prior inconsistent statements of the witness's own writing, electronic recording, or prior transcribed testimony. For maximum effect, when you're asking questions before holding the document during the earlier stages of questioning, your questions should perfectly align with the verbatim, prior inconsistent statements of the witness in the document—especially in using, when available, identical important words. Here also, if the witness persists in adhering to his prior direct testimony, the witness who provided the document's inconsistent statement will give appropriate rebuttal testimony.

As a follow-up to instances where the impeaching evidence is the witness's own verbatim statement, such as those just discussed, it's essential that the questioner focus on the appropriate issue. Some attorneys muddle the ultimate cross-examination question, which is designed to prove the prior inconsistent testimony, by not focusing on the correct issue.

An attorney does this by initially correctly marking as an exhibit and showing the witness under cross-examination the witness's verbatim statement. The attorney then correctly invites the witness to read along with him the verbatim statement, while the attorney reads it aloud for the jury. When the reading is concluded, the attorney then asks the witness if the attorney read it correctly. When the witness answers affirmatively, the attorney wrongly ends the questioning on the topic.

The mistake made by the attorney is that the questioning terminated prematurely. The attorney's focus was wrong. The issue is not whether the attorney read the writing correctly. The issue must be focused on whether the witness previously said what the writing contains. That is the basis for proof by prior inconsistent statement.

Asking the witness if the attorney read the writing correctly is proper and even desirable. But the final question must be, "Is what I read aloud for the jury, as you read it along with me, what you said?" If the witness says "Yes," he has been impeached. If he says, "No, the writing is not accurate," you will cross-examine him about the inaccuracy if you have one or more witnesses who will provide rebuttal testimony that the writing is correct. If the witness testifies that the writing is accurate, but he misspoke, you have a choice. You may pursue him on the basis of his alleged error, if you feel his explanation lacks merit based on the context of the statement or that it's inherently improbable. Or you may choose not to allow him to explain why he spoke erroneously, leaving that responsibility to his attorney, thus possibly providing you another opportunity to reveal his untrustworthiness through rebuttal cross-examination.

Impeachment by omission. Impeachment by omission includes impeachment by prior inconsistent statements, but unfolds differently. The "blue car, black car" example given above provides an appropriate example. Assume that in this case the police officer testified in rebuttal that the witness told him that the blue car went through the red light and caused the collision. His police report, however, includes nothing about that conversation.

On cross-examination, the lawyer's first requirement is to highlight the importance and, where applicable, the necessity of the omitted statement in the police report:

> Officer, you told the jury that the witness told you the blue car went through the red light and caused the collision with the black car, correct?
>
> And you've told the jury that you remember the witness telling you that, right?
>
> Is one of your duties as a police officer to prepare a report about an incident such as the one that occurred in this case?
>
> You prepare a report for many reasons, right?
>
> Do you prepare a report because you're required to do so?
>
> Is a report required to make a record of your investigation?
>
> Is it required to inform others, such as a prosecutor or the secretary of state, of what happened and who was responsible?
>
> Do they need that information to prosecute a person or to take other appropriate action?
>
> Is a report designed to make a record of the evidence you obtained for anyone who needs it?
>
> Do you provide your report to one or more of your supervisors?
>
> Is a report a way to inform your supervisors of your activities?
>
> Is it a way for your supervisors to evaluate your activities?
>
> And to have you or another officer do further investigation?
>
> Because of the passage of time and the number of cases you investigate, is it also a way to refresh your memory?
>
> Do you try to be as comprehensive as possible in making a report?
>
> You wouldn't withhold information in a report, would you?
>
> Do you take care to be as accurate as

possible and not write false information in making a report?

So, for all of those reasons, do you agree that an accurate police report is extremely important?

"No" answers to any of these questions invite additional impeachment opportunities. "Yes" answers establish the necessity and importance of a police report and set the stage for impeachment by omission.

Some lawyers begin questioning, without establishing the importance of the report, by prematurely asking the officer if he wrote in his report that the witness told him the blue car ran the red light and caused the collision. Others will ask the same question after merely establishing the importance of the report. When you start with that question—at the very outset or immediately after establishing the importance of the report—the officer, who is likely to have read his report before testifying and knows that the report says nothing about the witness saying the blue car caused the collision, is likely to say "no," thus terminating any follow-up questioning.

The preferred method for proving impeachment by omission establishes the importance of the report, followed not by questioning the officer about whether he put the witness's statement in his report, but by beginning with the officer's report. This focus on the report avoids a prompt admission by the officer that he did not include the witness's statement in his report, thus circumventing all questions about its importance. The benefits of the lead-up questions are thus lost.

Instead, after establishing the importance of the report through questions as indicated above, you mark it as an exhibit for identification, show it to opposing counsel, and then show it to the officer. At this stage, you first ask the officer whether he recognizes it. After he answers, your target is to ask the officer to read where he put the statement of the witness in his report. But before you go down that path, there are other questions to be answered:

Officer, I show you this document.

Do you recognize it?

Is it your report about the accident you testified about on direct examination?

For all the reasons we discussed, you try to be as accurate as possible in writing your report, do you not?

You try to be comprehensive and truthful, correct?

You wouldn't write something false in your report, would you?

Or withhold information in a report?

Considering all the answers you gave to my previous questions, do you agree that a police report such as this one is important for many reasons?

So, you certainly agree that any important information a witness gives you would need to be put in your report, do you not?

Officer, read aloud for the jury where you wrote in your report that the witness said anything about the black car running the red light and being responsible for the collision.

Because you first laid the foundation for the importance of the report, the jury would reject any effort on the part of the officer to deny the importance of any of your questions. And, of course, the officer is unable to find or read aloud what the witness said about the black car's responsibility for the collision.

As in proof of a prior inconsistent statement, by following the methods provided for proof by omission, you will have given the jury the basis for rejecting, or at least questioning, what the officer claimed the witness had told him. IBJ

Part Five of this series, concerning closing arguments, will appear in the February 2024 Illinois Bar Journal. All parts are available online at www.isba.org/ibj.