

Cross Examination

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I. Introduction

Goal- Control the witness so you can tell a story that advances your theory of the case.

A. Three Rules of Control

1. Ask Leading Questions only
 - Cross to Close (Death by 1,000 cuts)
 - “ *You are not going to get the Knockout hit, you want to win on points, win on jabs*” -Terry MacCarthy (Federal Public Defender Northern District Of Illinois)
2. Don't ask a question you do not know the answer to (there are some rare exceptions)
3. NEVER ask the “Home Run” question

B. Pointers

1. Do not use contractions

EXAMPLE: Instead of “you didn't take pictures of the car”
Say “You did not take pictures of the car”

2. Go slow- One fact per question
 - DO NOT ASK COMPOUND QUESTIONS
3. Do not be a jerk unless the witness deserves it.

Rule of Thumb: Always try to be less of a jerk than the witness.

4. LISTEN TO THE WITNESS' ANSWERS! Do not focus on your next question the whole time. Make sure the witness has already answered your question before you move on.

II. IMPEACHMENT- PRIOR INCONSISTENT STATEMENT

How to Impeach: Commit, Credit, Confront

A. EXAMPLE: Robbery 1 Trial

Victim made an audio recorded statement to the police after the event in question. “I was leaving the checkers on Skyland when a man climbed into the passenger seat of my car, pointed a gun at me and took all my money. I had \$1,100 in my pocket that I just received from cashing my tax return check. The guy was a black male. Six foot two, 220 pounds. Man had short hair, kind of a high-top fade. He took my car and drove East on Skyland Blvd. It’s a red Nissan, tag # XXXXXXXX.”

Trial Testimony: I was robbed by a Black male. He was average height or shorter. Probably weighed around 160 pounds. He had long hair, but I did not get a great look because I was frightened.

Note: Day of the trial is 28 months after the alleged incident took place. The Defendant is 5’8 and weighs 150 pounds. On the day of the trial, the Defendant’s hair is long.

Cross Story: The witness’ original statement is correct. If that statement is correct, the defendant did not do it.

B. COMMIT

- Your testimony today is that you were robbed by a black male?
- This happened over two years ago?
- TODAY, you say the man weighed about 160 pounds?
- TODAY, you say the man was “average height”?
- OR Shorter?
- NOW, you say the man’s hair was long?

C. CREDIT (what you said before was true)

- You gave a statement to the police?
- You gave that statement the same day you were robbed?
- Less than 15 minutes after?
- You wanted police to find the man that robbed you?
- You needed them to find that man? (Answer here does not matter)
- That man took everything you had?
- He took \$1,100?
- Money that belonged to you?
- Money you needed?
- That same man took your car?
- You needed that car?
- You live in Brookwood?
- You work in Tuscaloosa?

- You wanted to help the police find this man?
- To find your money?
- To find your car?
- So you gave the police all the information you could?

(Begin to build momentum for the confrontation)

- You told the police the man took a red Nissan?
- You gave them the tag number?
- You told them he drove East on Skyland?

D. CONFRONT (HE LIED)

- You described the man who took that car?
- A few minutes after the robbery?
- You did not say the man was average height?
- You said he was Six Foot Two?
- Minutes after the robbery, you did not say the man weighed around 160 pounds?
- You said he probably weighed around 220?
- Minutes after the robbery, you did not say the man had long hair?
- You said it was short?
- Probably a fade?

***Practice Pointer: Have the audio statement (body cam etc) ready to play before you begin your cross examination. Make sure you make time stamp notes about every question.**

III. IMPEACHMENT BY OMISSION

How To: Same 3 C's: Commit, Credit, Confront

The credit part is even more important here- must illustrate why the witness would have said something earlier if it were the truth.

A. EXAMPLE:

Defendant says a man tried to shoot him because he was sleeping with his girlfriend. The Defendant fired back in self -defense, killing the victim.

Witness prior statement from body cam: TPD Officer is blocking off the crime scene. A large crowd has gathered, and he is keeping them back. Witness approaches the officer and says he wants to give a statement. Witness then says he heard two gunshots, came outside and saw a body on the ground. Witness then says he saw the Defendant, John Doe, running away. Victim, James Smith, "is a great guy and has been my neighbor for years. I know John Doe is a bad guy and I want him caught, he is a bad influence on my kids and on the other kids in the neighborhood".

Trial Testimony: I heard a gunshot and looked out my window. I saw John Doe standing over the victim who was on the ground. John shot James in the head execution style.

Cross Story: The Witness' first statement is absolutely true and complete. If he saw more, he would have said so during his original statement.

B. COMMIT

- It is your testimony today that you saw John Doe shoot James Smith?
- Three years ago?
- Back in 2019?
- Today, you say you only heard one gunshot?
- You then looked out your window?
- You saw John Doe holding a gun?
- And you saw John Doe shoot James Smith in the head?
- Execution style?

C. CREDIT (If that were true, you would have said it then)

- You gave another statement about what you saw?
- Back in 2019?
- Right after this event happened?
- The same night James Smith was shot?
- You spoke to a TPD Officer?
- He was there blocking off the crime scene?

- He was not taking statements?
- He was not talking to witnesses?
- But you wanted to give a statement?
- Because you know what you saw?
- You approached the officer?
- Told him you wanted to help?
- James Smith was a friend of yours?
- He was your neighbor for years?
- You thought he was a good guy?
- You do not feel the same way about John Doe?
- You thought John was a bad guy?
- A bad influence on your kids?
- You wanted Justice for your friend?
- You wanted John Doe “caught”?
- You wanted him off the streets?
- You wanted to help the police make that happen?
- You told them what you saw?
- You wanted to give them ALL the information they needed?
- To get justice for your friend?

D. CONFRONT

- In 2019, you told the police you heard two gunshots?
- You came outside?
- You saw your friend’s body on the ground.
- That is it?
- You did not say you saw John Doe Holding a gun?
- You did not say you saw John Doe shooting a gun?
- You did not say you witnessed an “execution style” killing?

IV. WAYS TO CONFRONT

A. JUST ASK THE QUESTION

1. Easiest way to do it. Keeps the flow going and it allows you to keep control. This works for all different types of prior statement.

EXAMPLE: “In 2019, you said _____.” “In 2019, you did not say _____”

2. If you get the answer you want, YOU CANNOT OFFER EXTRINSIC EVIDENCE OF THE SAME STATEMENT. MOVE ON!

B. PLAY AUDIO OR VIDEO

1. You can go straight to this step once you have laid the foundation that the witness gave a prior statement on X date, X time and under X circumstances. Once the foundation is laid, you can go straight into playing the prior inconsistent statement without asking anything else.
2. If the witness is being difficult and is not admitting that they said “X”, I would play the tape where the witness says X.
3. If the Witness says he does not remember, you CAN refresh recollection, but you do not have to. As long as you have laid the foundation, that is sufficient enough to play the recording.

***Practice Pointer: (Foundation)** 1. The statement was made prior to trial AND 2. Witness made the prior statement AND 3. Circumstances of the prior statement (date, place, time, etc.)

C. SHOW THE PRIOR WRITTEN STATEMENT TO THE WITNESS

1. Ask the question, “You said X”, and the witness says “no” or “I don’t know”. Show the statement to the witness and read aloud.
2. This will only work IF the statement was made or adopted by the witness. Must be in the witness’ handwriting OR written by someone and signed by the witness.

D. PRIOR STATEMENT NOT ADOPTED BY THE WITNESS

1. If the witness did not adopt that statement by reading it and signing it, there is an extra step. (Quotes written by police officers in IO reports)
2. Impeach the same way you do everything else BUT be sure to give more background information about the time/ place and circumstances of the statement. When it comes time to confront (Third C), you cannot read the prior statement.
3. YOU MUST CALL THE OFFICER OR WHOEVER TOOK THE STATEMENT TO TESTIFY ABOUT WHAT WAS SAID.
4. If you confront the witness and they say they cannot remember what they said, you can refresh recollection, but you do not have to.
5. YOU CAN REFRESH RECOLLECTION WITH ANYTHING- Does not have to be something made or even adopted by the witness.