PRACTICAL "APPROACHES" FOR CROSS-EXAMINATION

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Introduction

In her introductory lecture, Dean Deryl Dantzler of the National College for Criminal Defense in Macon, Georgia, demonstrates how to control a witness by having a person cross-examined on the clothes that they are wearing. The cross-examiner attempts to prove how the person is attired and the witness attempts to avoid providing that testimony.

Assume that the witness is a male attired in a conventional suit, tie, with shoes and socks. The cross-examiner might commence as follows:

Q: What are you wearing?
A: I am wearing clothes.
Q: Is that a suit that you are wearing?
A: I don't know if you can call it a suit.
Q: What do you call it?
A: I call it clothes.
Q: Don't most people refer to what you are wearing as a suit?
A: I don’t know. Do most people?

As you can see, this kind of cross-examination does not accomplish what the attorney set out to do. It may look like the witness is purposely evasive which might have some impact on that witness's credibility, but it does not meet the goal of the cross-examination.

The problem lies in the use of language. The word "suit" is a conclusion based upon a multitude of individual facts. For a male, a suit consists of a jacket and a pair of pants. That

jacket and those pants must be of the same color, the same fabric and tailored to comprise what is commonly referred to as a "suit."

The open ended questions allow an adversely motivated witness to evade, avoid, and quibble with the attorney's questions. Worse, the questions establish a relationship in which the attorney has the power to formulate a question, but the witness is equally empowered to formulate answers. Indeed, the witness becomes the source of facts and the jury's "instructor;" as opposed to the attorney. What can you do?

Controlling the Witness

First and foremost, you have to seize control of the cross-examination, and you need to do that from the very outset. To do that, you have to formulate questions that are not subject to interpretation. A suit is a conclusion upon which reasonable people might disagree. A disagreement as to the definition of the suit is not so far beyond the bounds of common sense as to offend a jury's sensibility.

Men's socks, on the other hand, are socks. They are not stockings, although some salesmen refer to them as men's hosiery. It is difficult for a male witness who is sitting on the stand wearing socks, to credibly quibble with the question: "You are wearing socks?"

Now, socks may not be the most important thing that you want to establish in regard to the witness's attire. It may be of little or no relevance, but it is a tool that may be used to gain control of a witness.

You might have started with the question: "You are wearing clothes?" Clothes are a concept that is pretty much universally accepted, but it is still a conclusion drawn from the facts of individual garments. The question can conceivably be argued with. Accordingly, facts are always safer than concepts.

Remember, the idea is to gain control of the witness and condition the witness to agree with the statements being made to the witness by the attorney which are minimally camouflaged in the form of questions. For example:

Q: Mr. Jones, you are wearing socks.
A: Yes.

The simplicity of the question commands an equally simple response; to wit: "yes." Control of the witness flows from the formulation of simple and concise questions, which compel the witness to respond "yes." You need to have control of the witness before you venture into significant areas in which you hope to establish facts; impeach facts alleged on direct examination of the witness; or discredit the witness altogether.

So we proceed. We have established a beachhead because the witness has responded "yes" to the first question concerning his socks. We can now move to conditioning the witness to the

concept of the attorney testifying and the witness agreeing with the statements that the attorney is making:

Q: The socks that you are wearing have a color?
A: Yes.
Q: The color of the socks that you are wearing is black?
A: Well, I think they are dark blue.
Q: The color of the socks you are wearing are dark blue?
A: Yes.
Q: You are wearing shoes?
A: Yes.
Q: The shoes you are wearing are made of leather?
A: Yes.
Q: The leather of the shoes that you are wearing has a color?
A: Yes.
Q: The color of the leather shoes that you are wearing is brown?
A: Yes.

Looping

Here, we are establishing facts such as the fact that the witness is wearing shoes, and then we are "looping" that fact; *i.e.*, the wearing of shoes; back into our next question. We add a new fact which is that the shoes are made of leather. We can then "loop" the two discreet facts of leather and shoes back into the next question which establishes the color of that leather.

By adding one fact per question and incorporating the facts previously established in the new questions, we repeat the facts that we want the jury to retain and use in reaching their verdict. This is how we learned in school and this is how jurors

learn in a courtroom. Establish a base of knowledge and then build on that foundation adding information as you go along.

Avoid Compound Questions

The key is to avoid compound questions which contain information that the witness hasn't already affirmed. For example:

Q: The weather was cold and wet, and the roads were slippery?
A: No.

To what part of the question is the witness answering no? The question needs to be broken down:

Q: It was cold?
A: Yes.
Q: The roads were wet?
A: Yes.
Q: The roads were slippery?
A: No.

Once you gain control of the witness, retain that control by breaking the point that you are trying to establish down into a multitude of little questions to which the answer must be yes. Witnesses will rebel, but with this methodology, the area of rebellion is usually limited to the additional fact that you introduced into your questions.

Conditioning the Witness

The rebellion can be used to teach the witness not to rebel. For example, the witness answers no to the question: "Your shoes are brown?" The attorney can respond by asking a series of

questions that make the witness look like she is quibbling at best; or foolish at worst.

Q: Your shoes are not yellow?
A: No.
Q: Your shoes are not green?
A: No.
Q: Your shoes are not purple?
A: No.
Q: Your shoes are not orange?
A: No.
Q: Your shoes are not black?
A: No.
Q: Your shoes are brown?
A: Yes.

The struggle for control should be confined to areas that are of relatively little significance. You are trying to prove that he was wearing shoes; the color is not relevant, but it is helpful in establishing control.

Organizing Your Cross-Examination -- The Chapter Method

Mastering this method of cross-examination requires discipline and practice. You have to think about the points that you want to make on cross-examination and then break them down into a multitude of little points. In order to do this, you have to organize your cross-examination.

The chapter method of organizing cross-examination is a widely used and commonly accepted method of organizing cross-examination. Essentially, it consists of breaking down your cross-examination into distinct chapters consisting of the points and sub-points that you want to make for your cross-examination of a particular witness.

The theory of this approach is that it breaks down an enormous and, frequently, overwhelming task into a series of little chapters. You are not attempting to deal with the entire testimony of the witness. You are dealing with discreet pieces of that testimony.

By breaking down the points that you want to make into chapters, you need only deal with one chapter at a time. Chapter 9 of Larry S. Pozner & Roger J. Dodd, Cross-Examination: Science & Techniques, (2d ed. 2004) provides a comprehensive and exhaustive discussion of this approach.

The cross-examination of the arresting officer in a DWI case provides a classic opportunity to use this method of cross-examination. On direct-examination, the officer testifies to stopping the defendant's vehicle for speeding. The District Attorney takes him through the stereotypic evidence of alcohol consumption and impairment consisting of the odor of an alcoholic beverage, bloodshot eyes, slurred speech and flunking the field sobriety tests. The witness is then turned over for cross-examination.

Using the chapter method, the cross-examination of the officer can be broken down into (a) vehicle operation, (b) the stop of the vehicle, (c) defendant in the car, (d) defendant's exit of the car, (e) defendant's walk to the front or rear of the car, (f) defendant at rear or front of car, (g) first field

sobriety test - horizontal gaze nystagmus, (h) second field sobriety test - walk-and-turn, (i) third field sobriety test - one-leg stand.

Depending upon the facts and the approach to the cross-examination, chapters and subchapters can be added to this matrix. Each chapter or subchapter should have its own page so that the pages can be "shuffled," or rearranged in different sequences depending upon the direct-examination; and/or changes in strategy as the case progresses. Each point can be analyzed and questions can be written out in an effective sequence that leaves no room for the witness to disagree or to "run" on the cross-examiner.

Do Not Read Questions to the Witness

The purpose of writing out the questions is not to provide a list of questions to read to the witness. Writing out questions forces the attorney to organize her thoughts and prepare her questions in a logical order that commands the witness to arrive at the goal set for that chapter. Writing questions imprints them in your mind and teaches you how to formulate sequential questioning. It also requires you to analyze the issue and stimulates creativity.

Cross-examination is a dynamic interchange that requires a great deal of flexibility. Tying yourself to a list of questions prevents you from listening to the answers and from responding to

them. No witness will remain within your script and, accordingly, tying yourself to a script becomes a disadvantage, rather than an advantage.

The Stop of the Vehicle

For example, let's say that the direct examination focused on the allegation that the officer stopped a client's vehicle because it was speeding. No other testimony of aberrant driving was elicited on direct examination.

At a pretrial hearing, your approach might be to commit the officer to the proposition that speeding was the only aberrant driving that was observed. First, you must commit the officer to the thoroughness of the officer's answers to the questions asked by the District Attorney on direct examination. It might go something like this:

Q: Officer, on direct examination, the District Attorney asked you questions about John Smith?
A: Yes.
Q: The District Attorney asked you when you first noticed John's car?
A: Yes.
Q: The District Attorney asked you where you first noticed John's car?
A: Yes.
Q: You told the District Attorney where you first saw John's car?
A: Yes.
Q: You told the District Attorney when you first saw John's car?
A: Yes.
Q: The District Attorney asked you what you noticed about John's driving?
A: Yes.

Q: You told the District Attorney that you noticed John was speeding?
A: Yes.
Q: You told the District Attorney that you estimated the speed of John's car?
A: Yes.
Q: You told the District Attorney that you followed John's car?
A: Yes.
Q: You told the District Attorney that you decided to pull John over?
A: Yes.
Q: You told the District Attorney what you observed about John's driving?
A: Yes.
Q: Today, the District Attorney asked you to tell the court all of the observations that you made of John's driving?
A: Yes.
Q: And you answered the District Attorney's questions?
A: Yes.
Q: You testified to all of the observations that you made of John's driving?
A: Yes.
Q: Other than those for driving while intoxicated, the only citation that you issued was for speeding?
A: Yes.
Q: Other than the notes pertaining to driving while intoxicated, the only note that you made in regard to his driving was the speeding?
A: Yes.
Q: The only observation that you made about John's driving was the speeding?
A: Yes.

The goal is to commit the witness to the fact that there were no observations of aberrant driving other than the speeding. Speeding is as consistent with sobriety as it is with intoxication. The purpose of the cross-examination is to

eliminate any future allegations of swerving, crossing lines, or other driving that is consistent with impairment or intoxication.

Subsequent cross-examination might deal with the absence of signs of impairment and intoxication involving John's response to the police lights, the manner in which John pulled over, John's production of his license and registration, how John got out of the car, etc.

Sequencing your cross-examination is critical so that you do not alert the witness to where you are going and tempt the witness into "remembering" things that weren't charged, noted or, otherwise, recorded. This is why the "commitment" phase of cross-examination is so important. If you are going to impeach a witness with all of the things they did not see, you must first commit the witness to all of the things they did see, and, most importantly, that they did not see anything else.

You need to establish the fact that the witness was trained to look for signs of impairment. That the witness was trained to note the signs of impairment that they saw. That the witness did look for signs of impairment in this case and testified to the signs of impairment that the witness observed.

Rehearsals

One thing that you can do to prepare is to conduct a shadow trial of your case where you have attorneys or friends play the roles of the witnesses, opposing counsel and the judge. This can

be as elaborate or as simple as circumstances permit. Family members and friends make great witnesses. They make it possible for you to hear what your cross sounds like. What looks good on paper may not sound good in a courtroom. It is better to learn that while cross-examining your neighbor in your living room, than in the middle of your trial.

Sizing Up The Witness -- Who Is This Guy?

One of the basic principles in the art of negotiation is that different people want different things. There is the story of the developer who wanted to build a shopping center on a piece of land owned by a wealthy and elderly man. The developer wanted to negotiate a price for the land, but couldn't even get the landowner to respond to his calls or letters, let alone negotiate with him.

The developer wanted to offer the man a great deal of money for his land. The developer finally consulted a lawyer who knew the man. The attorney advised the developer that the man was wealthy, elderly and had no children. The lawyer suggested a different approach.

He proposed to the landowner that they build a shopping center which would be named after the landowner. Facing what would have been an, otherwise, obscure demise, the landowner embraced the proposal that would memorialize his name.

The point of the story is that a cookiecutter approach to cross-examination ignores the psychology of the individual witness. In criminal cases, the common assumption is that police officers want your client convicted, and will tailor their testimony to obtain that result.

While it is certainly the goal of most police officer witnesses, it is not necessarily their highest priority. One of the attractions of a career in law enforcement is the pride and prestige offered by the uniform and badge.

None of us like to be embarrassed, and professional embarrassment can be excruciating. For most police officers, the witness stand is an unfamiliar and uncomfortable place. It places their qualifications, performance, and competence at issue. Worse, it does so publicly. Succinctly, the unspoken prayer of most police witnesses upon taking the stand is: "Dear God, don't let me look bad."

Direct examination is highly informative. The demeanor, posture, and choice of language tell you a great deal about the witness's feelings and emotional orientation. For example, in a routine DWI arrest, the officer may have listed only the basics in the report and written only a citation for speeding in addition to the DWI charge even though there were more infractions which could have been noted and charged. Similarly,

other observations of impairment or intoxication may have been omitted.

In cross-examining the officer's training, the knee-jerk reaction is to either minimize its value or ignore it altogether. In some cases, however, cross-examination can be used to establish that the officer was trained to (a) look for signs of impairment or intoxication, (b) note those signs of impairment or intoxication, and (c) testify to those signs of impairment or intoxication. If those signs of impairment or intoxication are there, he sees them. If he sees them, he notes them. And if he notes them, he testifies to them. The inference is that what was not noted was not there to be seen.

For most witnesses, how they look on the witness stand is far more important than the ultimate verdict.

Impeachment With Prior Inconsistent Statement

In chapter 16 of their book, Cross-Examination: Science and Techniques, Pozner and Dodd list eight steps of impeachment. The chapter provides an exhaustive and comprehensive discussion of this area of cross-examination.

Typically, the cross-examiner is faced with a witness who testifies to a fact on direct that is contradicted by that same witness's previously written report or statement. For example, the following deals with a situation which the witness has testified on direct that the light was red at the time of the

collision in the intersection for Joe Driver. Previously, he filled out a report saying that Joe had the green light. On cross-examination, the opposing counsel might ask the following:

Q: You just told us on direct examination that the light was red for Joe at the time of the collision?
A: Yes.
Q: You filled out a report in regard to this collision a few days after it occurred?
A: Yes.
Q: You read that report after you finished filling it out?
A: Yes.
Q: You were truthful in filling out the report?
A: Yes.
Q: The information that you wrote in the report was thorough?
A: Yes.
Q: The information that you wrote in the report was accurate?
A: Yes.
Q: You signed the report once you had completed writing and reading it?
A: Yes.
Q: I show you what has been marked as Defendant's Exhibit A for identification. Is that the report that you filled out in regard to this collision a few days after it occurred?
A: Yes.
Q: The report has a place to record what color the light was for each party at the time of the collision?
A: Yes.
Q: You wrote in the color of the light that Joe had at the time of the collision?
A: Yes.
Q: The color that you wrote that the light was that Joe had at the time of the collision was green?
A:

> If the witness answers yes, that is usually the end of it. Neither the report, nor the testimony is evidence of what the color of the light actually was. It is simply evidence that the witness had made a statement on a prior occasion that contradicts the testimony that he gave on direct examination.
>
> If he denies that he previously stated that the light was green, that portion of the report containing the information in regard to the light, as well as the parts identifying the witness as the maker of the report, should be received in evidence for impeachment purposes only, and not as direct evidence of the light's color at the time of the collision.

Scope of Cross-Examination

Generally, cross-examination is limited to the material discussed on direct-examination. The word "generally" is used because the law allows wide latitude on cross-examination. The idea of cross is to test the validity of the information provided on direct examination.

Cross-examination is the crucible of truth and is vital to the pursuit of justice. While the goal of the respective parties is victory, the integrity of our judicial system is dependent upon the vigorous advocacy engendered in effective cross-examination.

Making the Witness Your Own

While one side or the other calls witnesses, the witnesses, themselves, are not necessarily prosecution or defense witnesses.

Accordingly, one side may wish to elicit information on cross-examination that was not touched upon in the direct examination of the opposing party.

This is permissible so long as the information being sought is relevant to the issues in the case and is, otherwise, admissible. When this happens, it is called "making the witness your own." Essentially, the attorney is switching from the cross-examination of the witness; to asking questions that are designed to obtain testimony that was not addressed by the lawyer who called the witness and conducted the direct-examination in the first instance.

When an attorney "makes a witness his own," it is as if he called the witness and has the witness on direct examination. While the lawyer was free to lead this same witness while he was cross-examining the testimony produced by his opponent on direct-examination, the lawyer is now constrained by the same rules that would apply had he called the witness himself. He may not ask leading questions, but must elicit the testimony as he would in a direct-examination. Like every rule, there are exceptions.

The Hostile Witness

The most common exception is where the witness is hostile or has demonstrated a bias against the side that is now attempting to call them as their witness. Hostile witnesses may be asked leading questions even though they are called by the party to

whom they are hostile. This is equally true when they become that party's witness through the process of "making the witness their own."

Badgering the Witness

This is an objection that is made when the examination becomes argumentative or emotional. The fact that the witness is not providing the expected answers does not justify an emotional reaction on the part of the attorney asking the questions. The impeachment of a witness rarely justifies the genuine expression of emotion and is usually inappropriate. Calculated and measured emotional expression, however, is very effectively used to signal and/or emphasize important points. Incredulity can also be expressed in the attorney's demeanor and tone of voice. Truly emotional articulation of your case should be reserved for summation.

Like every rule of cross-examination, there are many exceptions. The expression of emotion in the courtroom, however, should always be calculated to advance the interests of your client. Genuine expressions of irritation or impatience are self-indulgent and unprofessional. First and foremost, the litigator requires self-discipline. Responses to the bench and to your adversary should always be measured and controlled. Representation of another is a sacred trust which requires constant maintenance of a professional demeanor.

Redirect & Re-cross Examination

The purpose of redirect examination is to rehabilitate the witness in regard to things established on cross-examination. It is not generally an opportunity for the attorney to bring up those things that they forgot to ask on direct examination.

The scope of redirect is generally limited to matters addressed on cross-examination. If the witness was impeached with a part of a prior statement on cross-examination, the redirect may attempt to rehabilitate the witness by explaining the inconsistency brought out on cross.

Re-cross is similarly limited to matters brought up on redirect examination. It is not an occasion to revisit the original cross-examination. This is particularly the case where one side or the other has left something out of their direct or cross-examination that they deem crucial to their case. Good advocates will stretch the limits of either redirect or re-cross in order to put in the needed testimony. Good Judges will keep such advocates within the boundaries of proper discretion.

Frequently, lawyers will purposely limit, or forego, their cross-examination to foreclose any redirect in a crucial area that the direct examination did not cover. Similarly, an advocate with limit or forgo a redirect in order to avoid opening the door to a re-cross examination.

The words: "no questions" can be very chilling in some circumstances where a lawyer was counting on a second chance to make a forgotten point. While a court does have discretion to allow a party to reopen their case, or even recall a witness, this is rarely done, and only allowed for good cause shown.

Impeaching Your Own Witness

The general rule is that you cannot impeach your own witness. The exception is where the testimony concerns a material issue that tends to disprove your case.

The witness has previously testified that he saw the defendant shoot John in the head with his pistol. He now testifies that it was Bob, and not the defendant who did the shooting. The prosecutor attempts to impeach his own witness by confronting him with his prior testimony. The defense objects on the ground that a party may not impeach their own witness.

CPL § 60.35(1) allows a party who called a witness to introduce evidence of a prior signed statement, or an oral statement taken under oath, which contradicts the witness's present testimony, BUT ONLY WHEN that witness's present testimony concerns "a material issue of the case which tends to disprove the position of such party." CPL § 60.35(1). Accordingly, the ADA should be allowed to use the prior testimony to impeach the witness since the central issue in the case is whether the defendant shot John.

Assume that the witness denies giving the prior testimony and that portion of the transcript is received into evidence.

May the jury consider that prior sworn testimony as evidence that the defendant did shoot John?

CPL § 60.35(2) specifically prohibits the prior statement from being used for this purpose. It requires that the prior inconsistent statement "be received only for the purpose of impeaching the credibility of the witness with respect to his testimony upon the subject, and does not constitute evidence in chief." CPL § 60.35(2).

Moreover, the statute requires, at a jury trial, that the Judge so instruct the jury. The fact that the witness previously said that the defendant shot John can be considered in regard to that witness's credibility. It is not evidence that the defendant shot John.

Basically, the prosecutor called the witness thinking that the witness would testify as he had before. The witness now surprises him by saying that Bob shot John. This not only deprives the prosecutor of the evidence that was expected, but tends to disprove the People's case.

The law allows the prosecutor to use the prior testimony to show that the witness is unbelievable, but not to prove that the defendant did the shooting. The reason for this is that the prior statement is hearsay coming in only because of this statutory exception.

What if the contradictory testimony involves something that hurts the People's case, but is not a material issue that tends to disprove their position? For example, the witness now testifies that he believes that the defendant used a shotgun to shoot John. Previously, he had testified that it was a rifle.

CPL § 60.35(3) prohibits the prosecutor from introducing any evidence of the fact that there was a prior inconsistent statement. The prosecutor can use the prior testimony to refresh the recollection of the witness, but must do so in a manner that does not disclose the contents of the prior statement to the jury.

Refreshing the Witness's Recollection

Frequently, the witness cannot recall the information being requested. This is very common since hearings and trials occur months after the events that are being litigated. Accordingly, witnesses are dependent upon their notes and documents that they previously prepared. It is, therefore, common for an attorney to seek to "refresh" the witness's recollection.

Q: Officer, what color was the car that you stopped on January 7, 2017?
A: I don't recall.
Q: Did you make any notes, at the time, in regard to the color of the car?
A: Yes, I did.
Q: Officer, I show you what has been marked as People's 1 for identification and ask you to tell the court what it is?
A: These are the notes that I took on January 7, 2017, in regard to this case.

Q: Officer, would reviewing these notes refresh your recollection in regard to the color of the car?
A: Yes, it would.

Your Honor, I request that the witness be allowed to refresh his recollection in regard to the color of the car by reviewing his notes which were made on the day of the events in question.

THE COURT: The witness may refresh his recollection by referring to his notes.

(The proceedings stop while the witness refreshes his recollection.)

Q: Officer, have you refreshed your recollection in regard to the issue of color of the car?
A: Yes, I have.

(The witness should be directed to return the exhibit or place it face down on the table before him. Generally, a witness may not refer to documents unless given permission by the court in response to a request by counsel.

Witnesses, however, routinely will take the stand with notes and refer to them throughout their testimony. Unless one of the parties objects, Judges do not generally intervene on their own unless they deem it prejudicial to the process.)

Q: What color was the car?
A: Blue.

It should be emphasized that the notes, report, or memorandum are not evidence, and are not being offered into evidence, but are merely being used for the purpose of refreshing the witness's recollection.

Accordingly, the document will be marked for identification and identified so that there is a record of what was used. The

document, itself, may not be received or read into evidence, and it must be clear that the witness's recollection was refreshed as opposed to the witness merely reading into the record something that the witness or someone else had written at a previous time.

Since this is the case, the document used to refresh the witness's recollection need not be one that the witness themselves had written. The idea is to simply use the document for the purpose of stimulating the witness's memory.

Virtually anything can be used to refresh a witness's memory. The issue is whether it refreshes their recollection. It could be an object or anything else that serves the purpose.

What can the lawyer do if the witness says that their recollection is not refreshed?

Past Recollection Recorded

Where the witness testifies that the examination of the document does not refresh the witness’s recollection, and:

(a) The document contains a record of the information being sought, and

(b) The information was observed by the witness at the time that it occurred, and

(c) The record was made when the witness's memory of the events recorded was fresh, and

(d) The witness testifies that the witness knows that the record was accurate when it was made.

Under these circumstances, the record can be admitted as past recollection recorded.

"Objection, your Honor, the document contains inadmissible hearsay."

The fact that parts of a document are admissible such as those parts constituting the past recollection recorded does not mean that the entire document is admissible. While a report may contain the observations of the witness that were the subject of the past recollection recorded, it may also contain other information that is not admissible.

Under these circumstances, opposing counsel can request that the exhibit be redacted.

Putting Business Records in Evidence -- The Hearsay Exception

One of the most used and abused exceptions to the hearsay rule is the business records exception. The premise of the exception is that records that are made and kept in the normal course of business of a private or public entity have a presumption of a validity and legitimacy arising from the presumption that there is little chance that routine records of any entity will be subject to error or falsification. Accordingly, these records are admissible if they are relevant to the issue under consideration; and the proper foundation is laid. That foundation is set forth below and constitutes a formalistic

mantra that should be memorized and used to lay the foundation for such evidence:

> Q: I show you what has been marked as People's 1 for identification, can you tell us what it is?
>
> A: This is the Bethlehem Police Department's Weekly Simulator Test Record pertaining to breath test instrument number 123456.
>
> Q: Was that the instrument used to test the defendant in this case?
>
> A: Yes.
>
> Q: What period does this test record encompass?
>
> A: The period during which the defendant's test was performed.
>
> Q: Who is the keeper of this record?
>
> A: I along with the other breath test operators of the Bethlehem Police Department.
>
> Q: Is this record made and kept in the normal course of business of the Bethlehem Police Department?
>
> A: Yes.
>
> Q: Is it the business of the Bethlehem Police Department to make and keep such records?
>
> A: Yes.
>
> At this time, I offer People's 1 for identification into evidence pursuant to § 4518(a) of the Civil Practice Law and Rules.

A detailed analysis of this section follows. The important thing to note in dealing with this exception is the identification of the record and the elicitation of the testimony:

> Is this document made and kept in the normal course of business of the police department?
>
> Is it the business of the police department to make and keep such records?

This formula has been used to lay the foundation of many records that would have, otherwise, been totally inadmissible. The fact that a record is made and kept in the normal course of business of an entity does not make it admissible if it is not relevant. Typically, it does not mean that all of the contents of the record are admissible regardless of whether the record itself is made and kept in the normal course of business of that entity.

For example, a medical record that contains a nurse's negative opinion of a patient would not make that opinion admissible if it did not pertain to diagnosis and treatment. The making and recording of negative opinions is not part of the medical facility's "normal course of business." Accordingly, it is important that the contents of the record be carefully examined to determine their admissibility even if the proper foundation for the record as a whole has been laid. Inadmissible portions should be redacted or removed.

CPLR § 4518 Analysis

The primary statute dealing with the admission of business records is CPLR § 4518 (a.k.a. the business records rule). CPLR § 4518(a) provides, in pertinent part:

> (a) Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. An electronic record, as defined in [State Technology Law § 302], used or stored as such a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record. The court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record. All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility. The term business includes a business, profession, occupation and calling of every kind.

In order to lay a foundation that complies with CPLR § 4518(a), a live witness is required. The witness must establish the following:

1. that the record was made by a "business";

2. "that [the record] was made in the regular course of such business";

3. "that it was the regular course of such business to make [the record]";

4. that the record was made "at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter;" and

5. in the case of an electronic record, that "the exhibit is a true and accurate representation of such electronic record."

In addition, it must be demonstrated that "the record was made as a part of the duty of the person making it, or on information imparted by persons who were under a duty to impart such information." Johnson v. Lutz, 253 N.Y. 124, 128 (1930). See also Matter of Leon RR, 48 N.Y.2d 117, 122, 421 N.Y.S.2d 863, 866-67 (1979).

Once this foundation has been laid, the attorney offering the document into evidence should hand the document to his or her opponent. At that time, the opposing attorney may interpose various objections, ranging from whether the document falls within the framework of CPLR § 4518 to whether various information in the document is inadmissible for some other reason.

Critically, the mere fact that some portion of a document is admissible does not mean that every single thing written in the document is admissible. Similarly, the mere fact that CPLR § 4518 is satisfied does not mean that a document is automatically admissible. In this regard, all of the other rules of evidence still apply. See, e.g., Bostic v. State of New York, 232 A.D.2d 837, 839, 649 N.Y.S.2d 200, 201-02 (3d Dep't 1996); People v.

Tortorice, 142 A.D.2d 916, 918, 531 N.Y.S.2d 414, 416 (3d Dep't 1988).

CPLR § 4518(c)

While a foundation under CPLR § 4518(a) requires live witness testimony, CPLR § 4518(c) provides an exception in the case of "certified" hospital, library and government records. In this regard CPLR § 4518(c) provides, in pertinent part:

> (c) Other records. All records, writings and other things referred to in [CPLR §§] 2306 and 2307 are admissible in evidence under this rule and are prima facie evidence of the facts contained, provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or of the state, or by an employee delegated for that purpose or by a qualified physician.

A proper CPLR § 4518(c) certification provides the proponent of a document with two significant benefits: (1) a live witness is not required to lay a CPLR § 4518(a) foundation, and (2) a document properly certified pursuant to CPLR § 4518(c) not only is admissible over a hearsay objection but, more importantly, constitutes "prima facie evidence of the facts contained" therein.

> In order to take advantage of CPLR 4518(c), the proponent must ensure that the certification of the record is properly made. The persons authorized by the statute to make the certification are either the head of the organization whose records are in question, any employee of the organization to whom the

> task of certification has been delegated, or a qualified physician. (The latter authorization presumably covers medical records or laboratory reports in cases where a physician is not employed by the facility).
>
> The certificate will serve to authenticate the record, *i.e.*, establish its genuineness. But the certificate must do more than this. The contents of the certification must demonstrate that the requirements of subdivision (a) of CPLR 4518 have been met, *i.e.*, that the record was made in the regular course of business, that it was the regular course of the business to make a record of this type and that the record was made at or about the time of occurrence of the event recorded. In other words, the elements of the business records hearsay exception must still be demonstrated; the certification procedure of subdivision (c) merely dispenses with the need for in-court foundation testimony. The certificate must contain the same information that would be provided by a witness if the record were being sponsored through live testimony.

Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR § 4518, at 469-70 (citation omitted). See generally People v. Gower, 42 N.Y.2d 117, 121, 397 N.Y.S.2d 368, 370 (1977) ("It would seem that the requirements of CPLR 4518 could very easily be met and thus its benefits be realized by the prosecution"); People v. Mertz, 68 N.Y.2d 136, 506 N.Y.S.2d 290 (1986).

Crawford v. Washington

In addition, in criminal cases the Confrontation Clause of the 6th Amendment may bar the introduction into evidence of a

document that would be admissible in a civil case. See Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004). In Crawford, the Supreme Court held that the Confrontation Clause prohibits the use of "testimonial" evidence against the defendant at trial unless (a) the declarant is unavailable, *and* (b) the defendant had a prior opportunity to cross-examine him or her. Id. at 68, 124 S.Ct. at 1374.

Admission of the following documents at trial has been found to violate Crawford:

1. A blood test result. See Bullcoming v. New Mexico, ___ U.S. ___, 131 S.Ct. 2705 (2011); People v. Rogers, 8 A.D.3d 888, ___, 780 N.Y.S.2d 393, 397 (3d Dep't 2004);

2. A VTL § 214 "Affidavit of Regularity/Proof of Mailing" of a DMV employee. See People v. Pacer, 6 N.Y.3d 504, 814 N.Y.S.2d 575 (2006); People v. Darrisaw, 66 A.D.3d 1427, 886 N.Y.S.2d 315 (4th Dep't 2009); People v. Wolters, 41 A.D.3d 518, 838 N.Y.S.2d 117 (2d Dep't 2007); People v. Capellan, 6 Misc. 3d 809, ___, 791 N.Y.S.2d 315, 316 (N.Y. City Crim. Ct. 2004);

3. A "Latent Print Report." People v. Hernandez, 7 Misc. 3d 568, ___, 794 N.Y.S.2d 788, 789 (N.Y. County Supreme Ct. 2005); and

4. A lab report stating that a substance was cocaine. See Melendez-Diaz v. Massachusetts, 557 U.S. ___, 129 S.Ct. 2527 (2009).

Courts have reached differing conclusions as to whether the documents typically used to lay a foundation for the admission of a defendant's breath test results (e.g., Breath Test Instrument Record of Inspection/Maintenance/Calibration, Simulator Solution

Certificate of Analysis) fall within the ambit of Crawford. However, the majority view is that such documents are *not* covered by Crawford. See, e.g., People v. Lebrecht, 13 Misc. 3d 45, 823 N.Y.S.2d 824 (App. Term, 9th & 10th Jud. Dist. 2006).

Notably, in footnote 1 of its decision in Melendez-Diaz, *supra*, the Supreme Court commented that:

> Contrary to the dissent's suggestion, we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, *or accuracy of the testing device*, must appear in person as part of the prosecution's case. While the dissent is correct that "[i]t is the obligation of the prosecution to establish the chain of custody," this does not mean that everyone who laid hands on the evidence must be called. As stated in the dissent's own quotation from United States v. Lott, "gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility." It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony is introduced must (if the defendant objects) be introduced live. *Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records*.

557 U.S. at ___ n.1, 129 S.Ct. at 2532 n.1 (emphases added) (citations omitted).

In addition, Courts have made clear that the 6th Amendment right of confrontation is essentially a trial right, and thus that Crawford is inapplicable to various pre-trial and post-conviction proceedings. See, e.g., People v. Brink, 31 A.D.3d

1139, 818 N.Y.S.2d 374 (4th Dep't 2006) (Crawford inapplicable to pre-trial suppression hearing); People v. Williams, 30 A.D.3d 980, 818 N.Y.S.2d 694 (4th Dep't 2006) (6th Amendment right of confrontation inapplicable to sentencing proceedings).

Redaction

Redaction is where only part of a document is admissible and the other part must be excluded. Essentially, the part that must be excluded is covered over and the document is copied. The copy is then received in evidence with the objectionable parts deleted.

Redaction of documents is a common occurrence in both hearings and trials. While it is discussed under "Past Recollection Recorded," it is not limited to that circumstance.

Conclusion

Cross-examination is an art, not a science. The test of any technique or approach is how it works in a courtroom. There are lawyers who succeed violating all of the conventional rules. There are others who crash and burn despite rigid adherence to technical procedure. All of us have to learn what works for us. We learn from experience and we learn from each other. It is an elusive art that challenges us throughout our careers.