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LETTER FROM THE EDITOR

We are pleased to present this issue of the United States Attorneys' Bulletin, focusing on cross-examination and other trial issues. We have now finished an extensive series on specific substantive law topics and gratefully acknowledge the contributions of the authors from the Department of Justice components who provided us with the product of their efforts.

We now turn a new page with the next several editions of the Bulletin where we will focus on courtroom practice. Our feature article, Effective Cross-Examination, was written by Assistant United States Attorney (AUSA) Alan Burrow from the District of Idaho. Special thanks go to Mr. Burrow for his thoughtful treatment of one of our most important advocacy techniques. In his article, he explains the theory and then demonstrates methodology with sample Questions and Answers. AUSA Stewart Walz (D. Utah) follows with an article on impeachment by prior inconsistent statements. Office of International Affairs (OIA) attorney Richard Douglas writes about a relatively new procedure we can use in "Live Video Testimony — New Tool for International Criminal Assistance." AUSA Mike Love's (D. Maine) resourcefulness is to be commended. He decided that there ought to be a crime fraud exception to the psychotherapist-patient privilege and then convinced the First Circuit Court of Appeals to recognize one! See his case note of *In re Grand Jury Proceedings (Gregory P. Violette).*

In closing, we want to stress that this is your opportunity to send us articles about the innovative techniques you are developing so that we can share them with other federal prosecutors and improve our collective efforts to serve the United States. We welcome your input and await your contributions, comments, and suggestions. Please call me anytime at (340) 773-3920 or email me at avic01.

David Marshall Nissman
Editor-in-Chief

Trial Advocacy

In This Issue

Effective Cross-examination: a Practical Approach for Prosecutors

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Introduction

Cross-examination causes more angst and insecurity for the average attorney than any other aspect of trial practice. Even for seasoned trial attorneys, cross-examination can be a daunting prospect. This is particularly true for prosecutors whose primary concern is the government's case-in-chief, and who frequently enter trial with only an educated guess as to whether the defense will present a case, and if so, who the witnesses will be and what they will say.

Making matters worse is the aura of mystery and lore which enshrouds the so-called "Art of Cross-Examination." TV lawyers such as Perry Mason and Ben Matlock conduct impromptu cross-examinations with such mastery that the witness — or even a spectator in the gallery — confesses to the crime on the spot. The literature on the subject is filled with accounts of epic cross-examinations by legendary lawyers, disastrous crosses by amateurs, and lists of eclectic do's and don'ts, that offer little in the way of a cohesive philosophy of cross-examination. The implicit message? You can learn other aspects of trial advocacy, but when it comes to cross-examination — you either have the gift or you don't.

It is the premise of this article that while induction into the Cross-Examination Hall of Fame may not be a realistic goal, every attorney who has the desire, is willing to work, and has a modicum of ability can be an effective cross-examiner. The chief need of most attorneys is a simple, yet comprehensive, philosophy of cross-examination which will enable them to collate and apply the various lessons and examples encountered in literature or observed in the courtroom.

Accordingly, I have attempted to set out a cohesive, practical approach to cross-examination. My first two points — Know Why and When to Cross-Examine and Play It Safe — set forth the core philosophy of why, when, and how to cross-examine. My final three points — Be Prepared, Be Tactful, and Be Ethical — round out the subject by addressing proper trial preparation, demeanor, and ethics. All of the illustrations are from a prosecutor's perspective and are derived, with some modification, from actual cases.

I. Know Why and When to Cross-examine.

There are only two purposes for cross-examination: to elicit favorable testimony and to discredit unfavorable testimony. If you have no reasonable expectation of accomplishing either of these objectives, do not cross-examine the witness. The only exception is the rare occasion when failure to cross will seriously jeopardize your case, which we will discuss in more detail later. (*See II, C, infra*).

A. Eliciting favorable testimony.

Most defense witnesses have something to say which is favorable to, or at least consistent with, your theory of the case. Unless these points are insignificant, elicit and emphasize them during cross-examination.

Illustration # 1

Defendant is on trial for possession with intent to distribute cocaine base. A search of Defendant's car, of which he was the sole occupant at the time of arrest, yielded a dealer amount of crack cocaine in a plastic bag concealed under the spare tire. Defendant's fingerprints were found on the plastic bag.

Defendant takes the stand and testifies that the bag was given to him by an unknown individual at the local pool hall. The individual told him to take the bag to a particular apartment and to give it to the person who answered the door. Defendant did not know what was in the bag. Out of fear of the guy in the pool hall, Defendant was in the process of following instructions when he was stopped by the police.

Q. So, Mr. Defendant, you admit that you possessed the crack cocaine?

A. I didn't know it was crack.

Q. It was in fact crack cocaine, wasn't it?

A. I know that now.

Q. And you took the crack into your hands?

A. It was in a bag. I didn't know what was in it.

Q. You took the bag into your hands, didn't you?

A. Yeah.

And the bag had crack in it, didn't it?

A. I know that now.

Q. And you held it?

A. Yeah.

Q. And you carried it with you?

A. Yeah.

Q. And you put it in your car?

A. Yeah.

Q. You hid it under the spare tire?

A. I didn't know what it was.

Q. But you did hide it under the spare tire, didn't you?

A. Yeah.

Q. And you drove in your car with the crack cocaine?

A. I didn't know what it was.

Q. But it was crack cocaine, wasn't it?

A. Yeah.

Q. And you had it in your car?

A. Yeah.

Q. And there wasn't anybody else in your car, was there?

A. No.

Q. Nobody else had the crack at that time, did they?

A. No.

Q. Just you?

A. Yeah.

Q. And you intended to give this crack cocaine to another person, didn't you?

A. I didn't know what it was.

Q. Whether you knew or you didn't, you had it and you intended to give it to another person, didn't you?

A. Yeah.

Q. But you didn't intend to give it to the police, did you?

A. I was afraid of the dude.

Q. So, the answer is "no"; you didn't intend to give it to the police, did you?

A. No. Like I said, I was afraid of the dude.

Q. But "the dude" wasn't with you, was he?

A. No.

Q. You were by yourself in your own car, weren't you?

A. Yeah.

Q. And you didn't go for help, did you?

A. I was scared, man!

Q. You say you were scared, but you didn't go for help, did you?

A. I was just doing what the dude said.
Q. So, the answer is "no"; you didn't go for help, did you?

A. No.

By effective use of leading questions, the prosecutor in this illustration extracted from the defendant admissions as to every element of the offense except knowledge, and at the same time called attention to the implausibility of the defendant's ignorance defense.

B. Discrediting unfavorable testimony.

Although theoretical distinctions can be drawn in this area — such as whether you are seeking to discredit the witness or only his testimony, whether you are suggesting that the witness is lying or only mistaken, and whether you are suggesting that the witness is in fact lying (or mistaken) or only that he may be — the bottom line is that you must give the jury reason to discount the unfavorable testimony. There are at least seven ways to do this.

Ideas for portions of this section were derived from Thomas A. Mauet, *Fundamentals of Trial Techniques* (Little, Brown & Company: 4th ed., 1980); and Paul B. Bergman, *A Practical Approach to Cross-Examination: Safety First* (UCLA Law Review, Vol. 25:247, 1978).

1. Expose bias on the part of the witness.

Why? To discredit the witness' unfavorable testimony you may show that he or she has a conscious or unconscious reason to slant his testimony in favor of the defendant.

What? "Bias is a term used . . . to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest." *United States v. Abel*, 469 U.S. 45, 52 (1984).

When? Whenever you have a good faith basis to believe that the witness is biased and has slanted his or her testimony in favor of the defendant. (For an example of a cross-examination to show bias, see *Illustration # 3, infra*).

Specific Instances of Conduct? You may normally inquire into specific instances of conduct which are probative of bias. *See, e.g., Abel*, 469 U.S. at 54 (witness' membership with defendant in, "secret prison sect sworn to perjury and self-protection" was proper focus of cross-examination, because such matters "bore directly . . . on the fact[,] . . . source and strength of . . . [the witness'] bias").

Extrinsic Evidence? If the witness does not admit the alleged bias on cross-examination, you may almost always present extrinsic evidence, including relevant instances of conduct, to prove the bias. *Id.* at 52 ("Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony").

2. Impeach the witness by prior conviction.

Why? To discredit the witness' unfavorable testimony by showing that the witness cannot be presumed to possess normal human scruples against perjury.

What? You may cross-examine a witness about prior convictions for two kinds of crime: (1) those involving dishonesty or false statement, and (2) felonies if the court determines that the probative value outweighs the prejudicial effect. *See* Fed. R. Evid. 609 (a). Generally, prior convictions cannot be used for impeachment if more than ten years have elapsed since conviction or release from incarceration, whichever occurred most recently. *See* Fed. R. Evid. 609 (b).

When? Whenever you have a good faith basis to believe that the witness has one or more prior convictions which fall within the purview of Rule 609. A good faith basis is normally established by a rap sheet or other record indicating the conviction.

Extrinsic Evidence? If the witness does not admit the existence of a prior conviction under Rule 609, you may normally introduce extrinsic evidence to prove the conviction. Proof normally consists of a court certified copy of the record of conviction. *See United States v. Nevitt*, 563 F.2d 406, 409 (9th Cir. 1977) (certified court record of prior conviction admissible to prove conviction under Rule 609 if witness has forgotten or denies its existence).

3. Question the witness concerning prior inconsistent statements.

Why? Prior inconsistent statements may be used to discredit the unfavorable testimony by showing that it is inconsistent with a prior statement by the witness.

What? Inconsistent statements may consist of (1) *statements* made orally, signed, written, or adopted by the witness; (2) *testimony* by the witness under oath subject to penalty of perjury at trial or other proceeding; (3) *nonverbal conduct* of the witness if intended by the witness as an assertion; (4) *omissions* of material fact from a prior statement by the witness which under the circumstances should have been included in the prior statement; (5) *authorized statements* on behalf of the defendant by an agent or representative; and (6) *coconspirator statements* made during and in furtherance of a conspiracy with the defendant. *See* Fed. R. Evid. 613, 801 (a), 801 (d) (1) & (2).

When? Whenever you have a good faith basis to believe that the witness' testimony is inconsistent with a prior statement by the witness, you may cross-examine them on both material and collateral statements.

Extrinsic Evidence? Extrinsic proof of a prior inconsistent statement is admissible only on material issues. *See United States v. Nace*, 561 F.2d 763, 771 (9th Cir. 1977); *United States v. Shoupe*, 548 F.2d 636, 642-43 (6th Cir. 1977); *United States v. Harvey*, 547 F.2d 720, 722 (2nd Cir. 1976).

4. Examine character witnesses regarding inconsistent specific instances of conduct by the defendant.

Why? A prosecutor may also discredit unfavorable character testimony by showing that the defendant has acted inconsistently with the trait alleged.

What? If a witness testifies regarding a pertinent character trait of the defendant, you may cross-examine regarding specific instances of conduct by the defendant which are inconsistent with the character trait. *See* Fed. R. Evid. 404 (a), 405 (a). Pertinent character traits may include law-abidingness, truthfulness (if the charge involves dishonesty, the defendant testifies or his credibility is otherwise in issue), peacefulness (if the charge is a crime of

violence), temperance and other traits which tend to show that the defendant is not the sort of person who would commit the crime charged. *See* Fed. R. Evid. 404 (a) (1); *see also Michelson v. United States*, 335 U.S. 469, 476 (1948); *United States v. West*, 670 F.2d 675, 682 (7th Cir. 1982); *United States v. Hewitt*, 634 F.2d 277, 279-80 (5th Cir. 1981).

Character evidence typically takes the form of opinion testimony ("In my opinion, the defendant is a peaceful person.") or reputation testimony ("The defendant's reputation in the community is that of a peaceful person."). *See* Fed. R. Evid. 404 (a). If the defendant testifies as to his own character, the purpose of this type of cross is to show that the witness is not the sort of person he says he is. If another witness is testifying, the purpose is to show that the witness has insufficient knowledge of the defendant in the case of opinion testimony, and insufficient acquaintance with the defendant's reputation in the case of reputation testimony. Opinion witnesses are typically crossed with "Did you know?" questions, and reputation witnesses with "Have you heard?" questions. For example, in response to testimony regarding the defendant's character for peaceableness, you might ask: "Did you know (or "have you heard") that on August 1, 1998, at Joe's Bar, the defendant broke a bottle over a man's head? Did you know (or "have you heard") that the man suffered a concussion and received 30 stitches as a result of the defendant's action?" Evidence that the defendant was arrested for the prior conduct is normally inadmissible as being irrelevant and unduly prejudicial. *See* Fed. R. Evid. 403, 404 (a). Do not mention the arrest unless the witness makes it relevant by testifying, for example, that the defendant has never been in trouble with the law. (For a fuller treatment of character evidence and impeachment of character witnesses, *see* J. Randolph Maney, Jr., and Ruth E. Lucas, *Courtroom Evidence*, pp. 16-28, 100-08 (OLE Litigation Series: September 1998).

When? Whenever you have a good faith basis to believe that the defendant engaged in a specific instance of conduct which is inconsistent with the character trait testified to.

Extrinsic Evidence? The general rule is that specific instances of conduct may not be proved by extrinsic evidence. *See* Fed. R. Evid. 608(b). However, if the character evidence goes to a material issue at trial, most courts will permit extrinsic evidence. *See United States v. Opager*, 589 F.2d 799, 801-02 (5th Cir. 1979) ("We consider Rule 608(b) to be inapplicable in determining the admissibility of relevant evidence introduced to contradict a witness' testimony as to a material issue"); *United States v. Calle*, 822 F.2d 1016, 1021 (llth Cir. 1987) (extrinsic evidence of specific instances of conduct admissible when it refutes "a specific fact material to the defendant's case"); *see also, e.g., United States v. Cousins*, 842 F.2d 1245, 1248-49 (11th Cir. 1988) (evidence of defendant's illegal drug use admissible, because defendant's testimony that he was "anti-drug person, if believed by the jury, may have led to his acquittal"); *United States v. Rippy*, 606 F.2d 1150 (D.C. Cir. 1979) (government permitted to present testimony of defendant's uncharged drug deals to rebut defendant's testimony that he did not deal drugs).

5. Cross-examine the witness concerning his ability to perceive.

Why? To discredit unfavorable testimony a prosecutor may show that the circumstances under which the witness observed the event were not conducive to accurate perception.

What? This type of cross is normally used with event or occurrence testimony and focuses on the witness' ability and opportunity to observe the event. You may want to show, for example, that the witness was surprised, frightened, sleepy, or intoxicated, or that the event occurred rapidly and unexpectedly.

6. Cross-examine the witness regarding his ability to remember.

Why? A prosecutor may also discredit unfavorable testimony by casting doubt on the witness' ability to accurately recall the event.

What? Even when a witness had an excellent opportunity to observe an event, other factors may impair his ability to recall it accurately. These may include the apparent insignificance of the event at the time it occurred, the repetitiveness of the event in the witness' experience, and the elapsed time since the event. You may want to show, for example, that the witness made no effort to record what happened, has forgotten details, or cannot distinguish this event from similar ones.

7. Cross-examine the witness concerning aspects of his testimony which are inconsistent with common sense and normal human experience.

Why? Finally, a prosecutor may discredit unfavorable testimony by showing that it is inconsistent with common sense and normal human experience.

What? Emphasize those portions of the witness' testimony which conflict with normal human experience. This is one of the few occasions when you may want the witness to repeat a portion of his or her direct testimony.

II. Play it Safe

The ideas and much of the material for this section were derived from Bergman, *A Practical Approach to Cross-Examination: Safety First, supra.* The illustrations are this author's.

You may have heard what is sometimes called the Cardinal Rule of Cross-Examination: Never ask a question to which you do not know the answer. Asking indiscriminate questions to a hostile witness is like walking through a mine field in the dark — the chances of coming through unscathed are slim and the potential harm could prove deadly. Unfortunately, it is often impossible to apply the Cardinal Rule literally, especially for prosecutors who frequently go into trial with nothing more than an educated guess as to what the defendant's case will be. We will, therefore, amend the Cardinal Rule: Whenever possible, avoid asking a question unless you can refute an undesirable answer. In other words, play it safe.

A. Safe questions.

Some questions are safer than others, the safest being when independent, admissible evidence is available to directly refute an undesirable answer.

1. Independent, admissible evidence.

Independent, admissible evidence may take the form of another witness, a prior inconsistent statement, or other documentary or physical evidence. Whatever it is, the evidence must be admissible and directly refute the undesirable answer. If your evidence consists of another witness, the witness should be of equal or greater credibility than the witness you are cross-examining.

Illustration # 2

Defendant is on trial for selling crack cocaine in the parking lot of a small, local bar. There is an identity issue, and the defense calls the bar owner who testifies (1) that he is opposed to illegal drugs, (2) that he personally supervises the operation of his bar and knows what is going on in his parking lot, (3) that if anyone sold drugs in his parking lot, he would know it and would call the police, and (4) that no one was selling drugs in his parking lot on the date in question.

During pretrial preparation, the Sergeant of the local drug squad told you that in the past year, the squad conducted over 200 other drug arrests in the same parking lot. The Sergeant suspects the bar

owner of encouraging or condoning drug trafficking, because drug sales have been conducted openly in the parking lot, and the bar owner has never called the police.

Q: Mr. Bar Owner, is it your testimony that drug dealing is not a problem at the parking lot of your bar?

A: Yes.

Q: And you testified, did you not, that if anyone was dealing drugs in your parking lot, you would know it?

A: Yes.

Q: And you testified that if anyone was selling drugs in your parking lot, you would call the police?

A: That's right.

Q: Mr. Bar Owner, the real truth is that your parking lot is a major distribution point for illegal drugs, isn't it?

A: No.

Q: Illegal drugs are sold openly in your parking lot on a daily basis, aren't they?

A: No.

Q: Isn't it true that in the past year alone, the police arrested over 200 people in your parking lot for selling drugs?

A: No.

Q: And that hardly a day goes by that someone is not arrested for selling drugs in your parking lot?

A: No.

Q: Yet, you've never called the police, have you?

A: No.

Q: Not one, single call?

A: Haven't had any need to.

Q: Well, you testified that if someone were selling drugs in your parking lot, you would call the police, right?

A: Right.

Q: Wouldn't you agree that if over 200 people sold drugs in your parking lot during the past year, you had serious reason to call the police?

A: I didn't have people selling drugs in my parking lot.

Q: Who were all those people the police arrested in your parking lot?

A: I wouldn't know.

Q: Well, then, you don't really know what goes on in your parking lot, do you?

A: Yeah, I do.

In this illustration, it does not matter what answer the bar owner gives. If he gives unfavorable answers, you can refute his testimony through the testimony of a witness more credible than he.

Here, the prosecutor set up the cross-examination by locking the witness into his testimony. This serves two purposes: it focuses the jury's attention on the witness' previous answers and limits his ability to explain them away. Notice two important aspects of locking down the witness. First, the prosecutor's questions were matter-of-fact, in contrast to the rest of the cross which was much more pointed. If you go on the attack immediately, the witness may become suspicious and qualify his previous answers. Second, the witness was asked to reaffirm only those answers which were necessary to set up the cross.

2. Prior statements of the witness.

You are also on safe ground when you have a prior statement of the witness you can use to refute an undesirable answer. In the classic situation, the witness testifies to something on direct which is contrary to a statement he or she made prior to trial. Or the witness may say something during

direct which is favorable to your case; you can then force the witness to repeat it, or impeach him with his own testimony.

When you use prior inconsistent statements, you must make a tactical decision as to whether you want the jury to believe the prior statement over the witness' current testimony, or simply wish to discredit the witness. If your goal is to discredit, you can proceed in the normal fashion by locking down the witness, confronting him with the prior inconsistent statement, and, if necessary, introducing extrinsic evidence of the prior statement. If, on the other hand, you want the jury to believe the prior statement over the witness' current testimony, you must highlight factors showing the prior statement to be more credible. These may include the fact that the prior statement was made when the witness' memory was fresher, or when the witness had no motive to lie.

B. Relatively safe questions.

Even if you have no evidence to directly refute an undesirable answer, you can ask *relatively* safe questions when the evidence at trial gives you the *probability* of obtaining the desired answer. There are two main categories of relatively safe questions: (1) those concerning facts which accord with the witness' previous testimony, and (2) those concerning facts which conflict with common sense and normal human experience.

1. Facts consistent with the witness' previous testimony.

With this type of cross-examination, you call upon the witness to repeat a portion of his or her previous testimony or to concede something which would logically follow from the previous testimony.

2. Facts consistent with common sense and normal human experience.

This type of cross-examination is a two-edged sword: it can be used to elicit desired testimony which accords with normal human experience, and to discredit unfavorable testimony inconsistent with normal human experience.

a. Eliciting favorable testimony consistent with normal human experience.

Illustration # 3

The defendant is on trial for a serious felony. During the defense case, the defendant's mother takes the stand and testifies that her son has always been a good boy, is a law-abiding citizen and is not capable of committing such a crime. She testifies that she was never aware of anything suggesting that her son was involved in criminal activity, and that if he had been, she would have known it.

Q. Ms. Jones, you love your son, don't you?

A. Yes.

Q. And you've tried to be the best mother you know how to be, haven't you?

A. Well, I tried.

Q. You've always tried to be there to help your son when he needed you, haven't you?

A. Yes.

Q. Ms. Jones, you realize your son is in a lot of trouble here today, don't you?

A. Yes.

Q. He has been charged with a very serious crime, hasn't he?

A. Yes.

Q. And you know that he could go to jail for a long time if he is convicted?

A. Yes.

This line of questioning is designed to demonstrate the mother's bias in favor of her son, and is based on the jury's knowledge and experience regarding the mother-child relationship. The witness must either give the desired answer or

impeach herself by providing answers which fly in the face of normal human experience.

b. Discrediting unfavorable testimony inconsistent with normal human experience.

Illustration # 4

Defendant is on trial for conspiracy to possess with intent to distribute crack cocaine. You have presented testimony from several police officers and a cooperating witness ("CW") who was a member of the conspiracy.

According to the testimony, CW was pulled over for a traffic violation while operating a rental van rented by Defendant for $500 cash. An impound inventory of the van revealed over 50 grams of crack cocaine and a firearm. A search of CW revealed $800 in cash and a digital pager. The pager company records indicate that Defendant bought the pager for $150 cash. The day after CW's arrest, Defendant posted $5,000 cash to bail CW out of jail.

CW testified that Defendant was a drug dealer whom he had known for about six months. CW worked for Defendant, and his job was supplying Defendant's street dealers and collecting the drug proceeds. The van, the pager, the gun, and the crack all belonged to Defendant. After he bonded CW out of jail, Defendant questioned CW regarding what the police found and what CW told them. Defendant threatened to kill CW if he told the police anything.

Defendant takes the stand and denies any involvement with illegal drugs and any knowledge that CW was so involved. CW was a friend who said he was starting a business and needed some help. Defendant bought the pager and rented the van to help CW out. Defendant knew CW was in a lot of trouble when he got arrested with the crack cocaine, and Defendant wanted to help his friend, so he bonded CW out of jail. Defendant saw CW after he made bond, but Defendant did not ask CW anything about his arrest or what the police had asked him. He and CW just laughed about the incident.

Q. Mr. Defendant, let me make sure I understand your testimony. You rented the van that CW was driving at the time of his arrest, is that correct?

A. Yeah.

Q. But you didn't rent the van for yourself?

A. No.

Q. You rented the van for CW?

A. Yeah.

Q. Because he said he wanted to start a business?

A. Right.

Q. And you paid $500 cash for the van?

A. About that.

Q. And you also purchased a pager from the Pager Company?

A. Uh-huh.

Q. And it cost $150?

A. About that.

Q. But you didn't buy the pager for yourself?

A. No.

Q. You bought it for CW?

A. Yeah.

Q. Because he wanted to start a business?

A. Right.

Q. Now, you had only known CW for about six months at the time of his arrest, is that right?

A. Yeah, about that.

Q. Did CW tell you what kind of business he wanted to start?

A. Not really. I assumed it was some kind of delivery business.

Q. Did you assume it was a crack cocaine delivery business?

A. No.

Q. Well, it was in fact a crack cocaine delivery business that he was conducting out of your van, wasn't it?

A. I guess so.

Q. And you learned that CW had been arrested for crack cocaine while driving your van and carrying your pager?

A. Yeah.

Q. And then you went straight down to the police station and bonded him out?

A. I went down the next day.

Q. You went down the next morning, didn't you?

A. Yeah.

Q. And you plopped down $5,000 cash to bond CW out of jail, didn't you?

A. Yeah.

Q. And after you bonded him out, the two of you went to the bar?

A. Right.

Q. And then you asked CW what the police had found and what he had told them, didn't you?

A. Nope.

Q. You didn't ask CW what he was doing in your van, carrying your pager, with a large amount of crack cocaine and a gun?

A. Nope.

Q. You didn't ask him where he got the crack cocaine?

A. Nope.

Q. You weren't worried that you would be implicated in the possession of that crack cocaine?

A. Nope.

Q. You weren't worried about what CW might tell the police about that crack cocaine and who really owned it?

A. Nope.

Q. In fact, you testified that you and CW just laughed about the incident, isn't that right?

A. Yeah.

Q. You weren't worried, you weren't curious, and you didn't ask about the incident?

A. I already told you.

Q. Instead, you and CW just laughed about it?

A. I already told you.

While this kind of cross can be done with varying degrees of flare, simply requiring the witness to repeat those portions of his testimony which do not square with human experience is sufficient. Here, through carefully worded leading questions, the prosecutor also emphasized the improbability of the defendant's story.

Sometimes a witness' direct testimony seems improbable based on normal human experience, but a piece of the puzzle may be missing. In this illustration, for example, the defendant testified on direct that he had purchased the beeper and rented the van to help CW start a business. On the face of it, there is a certain improbability in this story. It would be even more improbable if the witness did not first investigate the nature of the business, but he did not address that point in his direct testimony. Since you do not know what the witness' answer will be, do not emphasize the matter until you have the missing information. This is one of the few situations in which a non-leading question may be productive. In this illustration, for example, the prosecutor asked: "Did CW tell you what kind of business he wanted to start?", and the defendant answered, "Not really. I assumed it was some kind of delivery business." Having obtained an answer which increased the improbability of the story, the prosecutor could then place greater emphasis on this point.

Sometimes no improbability will appear on the face of the witness' testimony, but you can still, with relative safety, ask questions based on

common sense and normal human experience.

Illustration # 5

Assume the same scenario as Illustration # 4.

Q. ***You were angry at CW when you found out he had been arrested with crack cocaine in your rental van, weren't you?***

A. No.

Q. And you were worried that the police would think you were involved with the crack cocaine, weren't you?

A. No.

These questions are relatively safe, because any normal person would be angry and worried under the circumstances. Again, the witness must either give the desired answers or impeach himself by contradicting normal human experience.

A tactical decision to make is whether to emphasize the improbability during cross-examination, or to wait until closing thereby denying the witness an opportunity to explain it away. Consider the following factors in making your decision:

(1) How apparent is the improbability? If it is obvious, the jury will likely notice it and recall it at the time of closing. But if the improbability is less apparent — if it only appears in the juxtaposition of two answers separated by other testimony — there is a good chance the jury will not pick up on it. It will then be up to you to bring the two answers together and highlight the improbability during cross-examination.

(2) How likely is it that the witness can offer a plausible explanation which is not susceptible to refutation? The greater the likelihood that the witness can present such an explanation, the less inclined you should be to give him or her the opportunity to explain. But if the witness has *no* plausible explanation, you may want to *ask* him to explain . . . and explain and explain. A witness who increases the improbability of his or her story with each successive explanation is a thoroughly discredited witness.

C. Dangerous questions.

Questions to which undesirable answers cannot be refuted, either directly or by appealing to human experience, are dangerous questions and should be avoided. If you have no reasonable expectation of using safe or relatively safe questions to elicit favorable or discredit unfavorable testimony, do not cross-examine the witness. The only exception is when failure to cross will seriously jeopardize your case, in which instance, you have nothing to lose. Perhaps the most common example of when you *must* cross is when the defendant takes the stand, and you need a successful cross to revive a floundering case. Fortunately, this desperate situation does not often arise, and the far more common (and sometimes fatal) error of inexperienced lawyers is to assume they must cross-examine every witness.

When you *must* cross and there are no safe or relatively safe questions available, you can fall back on a technique I call "closing through the witness." With this device, you essentially take your closing argument, put it in the form of leading questions, and fire them at the witness in rapid sequence.

Illustration # 6

Assume the same scenario as Illustration # 4.

Q. Mr. Defendant, that was your crack cocaine CW was arrested with, wasn't it?

A. No.

Q. You gave the crack to CW, didn't you?

A. No.

Q. You gave it to him, because he was working for you?

A. No.

Q. He was supplying your street dealers, wasn't he?

A. No.

Q. And he was picking up the drug money and bringing it back to you?

A. No.

Q. And that's why you rented the van?

A. No.

Q. So CW could keep your street dealers supplied?

A. No.

Q. That's why you paid $500 to rent a van you didn't even drive?

A. No.

Q. That was a small price to pay compared to all the drug money you were going to make, wasn't it?

A. No.

Q. That's why you paid $150 to buy a beeper you didn't carry?

A. No.

Q. Because you needed to stay in touch with CW?

A. No.

Q. You needed your street dealers to be able to get in touch with CW any time day or night?

A. No.

Q. And that's why you gave CW that gun?

A. No.

Q. So he could protect your drugs?

A. No.

Q. Because drug trafficking is a dangerous business, isn't it?

A. No.

Q. People will steal your drugs, won't they?

A. No.

Q. And you can't go to the police when they do, can you?

A. No.

Q. You were afraid the police would find out who had rented that van?

A. No.

Q. You were afraid the police would find out who had bought that beeper?

A. No.

Q. You were afraid the police would find out who gave CW that gun?

A. No.

Q. You were afraid CW would talk to the police?

A. No.

Q. You were afraid he would tell the police that it was your crack cocaine?

A. No.

Q. You were afraid he would tell them you were the boss?

A. No.

Q. And he was just your errand boy doing the dirty work?

A. No.

Q. That's why you went down to the jail as soon as you could?

A. No.

Q. That's why you paid $5,000 to bond CW out?

A. No.

Q. Because you had to get him away from the police, didn't you?

A. No.

Q. Because the longer he stayed in jail, the greater the risk that he would talk?

A. No.

Q. And that's why you asked him what happened as soon as you got him out of jail?

A. No.

Q. You wanted to know everything he told the police?

A. No.

Q. And that's why you threatened him?

A. No.

Q. You threatened to kill him?

A. No.

Q. Because you had to keep his mouth shut, didn't you?

A. No.

Q. You knew, if he told the truth, you were finished?

A. No.

In this illustration it does not matter what answer the witness gives, because in a very real sense it is the prosecutor who is making the points. And because the central issue is not what happened, but whether the defendant was in a conspiracy with CW, the prosecutor's focus is not so much on the events of the case, as it is on the defendant's state of mind — his knowledge, motives and intent. Through leading questions, the prosecutor repeatedly imputes to the defendant a guilty mind. Note also the strong rhythm and rapid pace of the cross. The goal is to get the jurors into the rhythm, which may prompt them to question the defendant's truthfulness. Finally, note that while the "close-through-the-witness" technique is useful when you have no safe or relatively safe questions, it need not be reserved for that predicament. It can also be employed very effectively in conjunction with safe or relatively safe cross-examination. For example, a combination of portions of the cross-examinations in *Illustrations 5* and *6* would be a very powerful cross.

III. Be Prepared

With cross-examination, as with any other aspect of trial, there is no substitute for preparation. Preparing for cross is not an easy task, however. Prosecutors often do not know whether the defense will even present a case, much less the identity of the witnesses and the substance of their testimony. This very fact makes it all the more important that you do what you can to thoroughly prepare.

A. Master the facts.

You should have a strangle-hold on *all* the facts of the case, not just the ones you consider necessary to prove your case. Mastery of the facts maximizes your supply of refutation evidence and your arsenal of safe questions. Do not simply rely on investigative reports. Invariably there are facts omitted from the reports which become significant during the course of trial.

1. Witnesses. Thoroughly familiarize yourself with the testimony of all potential witnesses, even those you do not intend to call. Some may become important once the defendant's trial strategy becomes apparent.

2. Physical and documentary evidence. Be familiar with all evidentiary items, even those you do not intend to introduce. Pay particular attention to documents seized during searches: Correspondence, household bills, and scraps of paper can give you insight into the defense and become rich sources of refutation evidence.

3. Statements. Know all relevant statements, particularly those of the defendant, including: (1) pre-arrest statements made to or overheard by witnesses; (2) post-arrest statements made upon

advice and waiver of *Miranda* rights; and (3) post-arrest spontaneous statements made in the hearing of a law enforcement officer, another inmate, medical personnel, etc. Spontaneous statements are frequently omitted from investigative reports, yet can be wonderful sources of ammunition for cross-examination. If the case involves a conspiracy, familiarize yourself with all known coconspirator statements. Statements made by coconspirators during, and in furtherance of, the conspiracy are admissible against the defendant, regardless of whether the defendant is actually charged with conspiracy. *See* Fed. R. Evid. 801 (d) (2) (E). You should also be familiar with statements or assertions made by the defendant during pretrial stages of the case. If, for example, the defendant testified at a bond hearing, suppression hearing, or other pretrial proceeding, have his testimony transcribed and review it completely.

B. Identify the defense theory of the case.

One of the benefits of mastering the facts is that it helps you identify the defense theory of the case. Somewhere within the field of facts from which you built your case, the defendant will look for room to build a defense. If you can anticipate the defense, you will be better able to predict whether the defendant will present evidence and, if so, what kind will be presented.

1. Think like a defense attorney.

Examine your own case through the eyes of a defense attorney, paying particular attention to any weak spots. Then consider all potential defenses: which ones are foreclosed by the facts, and which ones are still possible? Review each element of the charged offenses, looking for any "wiggle room" the defendant might exploit. Finally, ask yourself whether the facts give the defense an opening to put the government on trial by attacking the motives and conduct of the agents and prosecutors.

2. Pay attention during pretrial and trial proceedings.

Pay close attention to what the defense does in all pretrial proceedings, and especially if they present evidence. Remember, that any witnesses at pretrial proceedings are potential trial witnesses; unless you are sure they will not reappear, have their pretrial testimony transcribed.

Another important benefit of thoroughly preparing your case prior to trial is that it allows you to pay full attention during trial. Some attorneys are so preoccupied with their next move that they do not pay careful attention to what is occurring in the courtroom. Listen closely to defense counsel's opening statement and cross-examination of your witnesses. These will help you see where the defense is headed.

C. Look for ammunition.

As already discussed, thorough familiarity with the facts will help provide you with ammunition for cross-examination. Here are some other sources for ammunition.

1. Criminal record.

You are required to provide defense counsel with the defendant's rap sheet as a part of pretrial discovery. *See* Fed. R. Crim. P. 16 (a) (1) (B). Study it. Does the defendant have any convictions within the scope of Fed. R. Evid. 609? If so, get certified copies of the judgments and sentences for use as impeachment should the defendant take the stand.

Does the defendant have any arrests for offenses similar to the charged offense? If so, get a copy of the arrest report or interview the arresting officer to ascertain the circumstances. Even if the arrest did not result in a conviction, the underlying facts may be useful as evidence of knowledge, intent, plan, or absence of mistake under Fed. R. Evid. 404(b). Even if such evidence is not admissible during your case-in-chief, it may be excellent ammunition for cross-examination. See Step One, Section B, 2, of this article.

As you identify each of the defense witnesses, go through the same process with their rap sheets. Look for prior convictions which can be used for impeachment and arrests or convictions which might provide a basis for cross-examination regarding prior conduct.

2. Income tax records.

If the charged offense is a greed motivated crime, or a crime where evidence of unexplained income is relevant, get copies of the defendant's income tax returns for the period of the charged criminal activity. This can be done by making an *ex parte* application for a court order to obtain tax return information. *See* 26 U.S.C. § 6103 (i) (1). If the defendant filed no income tax returns for the years in question, the IRS will send you a certified record stating that no returns were filed. Knowing what the defendant did or did not report to the IRS can be very useful during cross-examination.

IV. Be Tactful

Your demeanor during cross-examination should be appropriate given the identity and attitude of the witness, the questions being asked, and the evidence in the case. Do not make the critical mistake of displaying a uniformly hostile attitude. There are times when you can and should "take the gloves off" with a witness, but if you are inappropriately hostile, you risk alienating judge and jury. Even in discrediting a witness, it pays to use a sword rather than a club.

A. Eliciting favorable Testimony.

If your goal is to elicit favorable testimony, you are more likely to succeed using honey rather than vinegar. If you also plan to attack the witness, elicit favorable testimony first and be cordial while doing so.

B. Truthful defense witnesses.

Not every defense witness is your enemy, and not every defense witness is lying. The witness may simply be a disinterested person telling the truth to the best of his or her ability. More times than not, this kind of witness is either harmless, in which case you need not cross, or can give you as much favorable testimony as he or she gave to the defense. In the latter instance, you have the opportunity to show the jury a bit of magic by transforming a defense witness into a prosecution witness before their very eyes.

Illustration # 7

Defendants, husband and wife, are on trial for arson and insurance fraud. You are seeking to prove that the defendants paid to have their house burned so that they could collect the insurance proceeds. As part of the defendants' alibi defense, they call a minister who testifies that he used to pastor the church the defendants attended, that he moved to another church about 120 miles away, that the defendants happened to be in the area camping and dropped by his home, and that while visiting they received a phone call and learned that their house had burned down. The witness appears truthful and disinterested.

Q. Reverend Jones, how long were you pastor of the defendants' church?

A. Oh, about five years.

Q. How long before the fire did you move to your current church?

A. Let's see, around two years.

Q. And your current home is about 120 miles from your previous one?

A. Yes.

Q. Were you close friends with the defendants when you pastored their church?

A. No, not really. It was a decent size church. They were just members of the congregation.

Q. In the two years between the time of your move and the day of the fire, had you had any contact with the defendants?

A. No.

Q. The defendants never visited during that time?

A. No.

Q. They never called?

A. No.

Q. They never wrote?

A. No.

Q. On the day of the fire, did the defendants call ahead to let you know they would be stopping by?

A. No.

Q. Would it be fair to say that you were surprised when they showed up?

A. Very.

Q. When the call came for the defendants, who answered the phone?

A. I did.

Q. Did the person on the phone give a name?

A. No.

Q. Did you recognize the voice?

A. No.

Q. And this person asked for the defendants by name?

A. Yes.

Q. Then, according to what the defendants told you, this person advised them that their house had burned down?

A. Yes.

Q. And then the defendants left?

A. Yes.

Q. How long were they at your house?

A. Not long, maybe half an hour, 45 minutes.

Q. Did the defendants make or receive any other phone calls at your house?

A. No.

Q. Do you have any idea how the caller knew the defendants would be at your house?

A. No, not unless the defendants told him.

Q. But that would mean the visit was planned, not spontaneous?

A. It would seem so.

Q. But that's not what the defendants told you, is it?

A. No.

Q. They told you that they just happened to be in the area camping and decided to drop by?

A. Yes.

Q. If they took the trouble to notify the caller that they would be at your house, do you know of any reason why they wouldn't notify you of their intended visit?

A. No.

C. Protectiveness by the jury toward certain witnesses.

Depending on the community setting, the jury may assume a protective attitude toward certain witnesses such as children, the elderly, or the physically infirm. Tread lightly with these witnesses unless and until you can show the jury that they are hostile or lying.

D. Meandering, evasive, or unresponsive witnesses.

An important part of being a cross-examiner is knowing how to deal tactfully with a meandering, evasive, or unresponsive witness. One of the oft-cited rules of cross-examination is: Never allow the witness to explain an answer. Not only is it impossible to strictly apply this rule, it is often poor trial strategy. Today, most courts allow witnesses to give short explanations during cross,

as long as they are not being evasive or unresponsive. Continually cutting the witness off may cause the jury to perceive you as a bully who is trying to hide something. It is generally a good practice to allow reasonable explanations as long as the witness is not being evasive or unresponsive.

If a witness responds to a simple question by launching into gratuitous explanation, but ultimately answers the question, you can refocus the jury's attention and tactfully discourage the witness from this practice by restating the witness' answer in your next question.

Illustration # 8 *The Chatterer*

Q. The defendant stayed at your apartment on the evening of August the 1st, didn't he?

A. Well, you see, he called me up and said that he had broken up with his girlfriend, and that he didn't have any place to stay. He sounded really down and, I thought, well, it's only for one night. So, I felt sorry for him and I told him that he could stay.

Q. So the answer to my question is yes; the defendant did stay at your house on the night of August the 1st?

A. Yes.

If the witness is intentionally evasive or unresponsive, your response should be firmer in direct proportion to the hostility of the witness. The goal is to negatively reinforce the witness for being evasive or unresponsive without arguing or otherwise descending to the witness' level.

Illustration # 9 *The Amnesiac*

The witness answers defense counsel's questions precisely and succinctly. Now, on cross-examination, you are probing into the same events, but the witness seems to have developed sudden amnesia.

Q. At that point, you gave the defendant the keys to your car, didn't you?

A. I can't recall.

Q. Well, if you can't recall, then you can't deny that you gave the defendant the keys to your car, can you?

OR

Q. Can you tell me why you had no problem answering defense counsel's questions, but when I ask you the same type of questions about the same events, you can't recall anything?

Another response to the amnesiac is to ask a list of simple questions. If the witness persists in being unresponsive, he will impeach himself by revealing what he really is — a biased witness with a selective memory.

Illustration # 10 *The Smart Aleck*

Q. You then allowed the defendant to borrow your car, didn't you?

A. I might have.

Q. Did you or did you not allow the defendant to borrow your car?

OR

Q. I'll repeat my question. You then allowed the defendant to borrow your car, didn't you?

OR

Q. *I asked you a simple, straightforward question, and I would appreciate a straightforward answer. You then allowed the defendant to borrow your car, didn't you?*

OR

Q. We're not interested in what you might have done; we're interested in what you did. You allowed the defendant to borrow your car, didn't you?

Illustration # 11 ***The Saboteur***

Q. At that point, you were approached by Officer Green, weren't you?

A. Yeah, he was always following me around, trying to get me on some trumped up charge.

Q. Your honor, I move to strike the answer as unresponsive except for the word "yeah."

THE COURT: The motion to strike is granted. The jury will disregard the answer except for the word "yeah."

Q. And I ask that the witness be admonished to simply answer the question.

V. Be Ethical

Every attorney should be ethical, but when you represent the sovereign, you are held to an even higher standard. If you employ unethical tactics or even get close to the line, you run the risk of losing credibility with the court. Be ever vigilant of the ethical pitfalls that commonly appear during cross-examination, and take pains to avoid them.

1. Proper purpose. Do not ask a question designed solely to humiliate or embarrass the witness. It is unprofessional to ask a question if you have no reasonable basis to believe it is relevant to the case, and the purpose of the question is to degrade the witness or another person. *See* ABA Code of Professional Responsibility, DR 7-106 (C) (2).

2. Good faith basis. Do not ask a question for which you have no good faith basis. Do not, for example, ask a character witness about a prior crime or bad act unless you have a good faith basis to believe that it occurred. It is unprofessional conduct to ask a question which implies the existence of a factual predicate which the examiner knows he or she cannot support by evidence. *See* ABA Standards 5.6(d) and 7.6(d).

3. Stricken or excluded evidence. Do not refer to evidence before the jury which has been refused by the court, stricken fom the record, or excluded as a result of a motion to suppress or motion *in limine.*

4. Characterizing the evidence. Do not intentionally misstate or distort the evidence

Conclusion

Obviously, much more could be said about cross-examination. The space of this article does not permit a full treatment of this complex subject. Hopefully, this article has helped to clarify the two simple purposes of cross-examination and the safest, most effective way of achieving those purposes. These are the fundamentals; use them as a foundation upon which to build your own style of cross-examination. Always remember that though different styles may abound, those who are most successful are those who master the fundamentals. ~

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First Circuit Creates Crime-Fraud Exception to the Psychotherapist-Patient Privilege

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In the 1996 case of *Jaffee v. Richmond*, 518 U.S. 1 (1996), the United States Supreme Court resolved a split among the Federal Circuit Courts of Appeals and recognized the psychotherapist-patient privilege. In doing so, the Court stated: "Because this is the first case in which we have recognized a psychotherapist-patient privilege, it is neither necessary nor feasible to delineate its full contours in a way that would 'govern all conceivable future questions in this area.'" (citation omitted) *Jaffee* at 18. It must have seemed that the need for defining the contours of the new privilege was on a collision course with the rising number of criminal investigations of health care fraud. As it turned out, one of the first efforts, if not the first effort, to define the new privilege arose in an ordinary bank/insurance/mail fraud investigation, and landed before the First Circuit Court of Appeals while the investigation was still in the grand jury stage.

The only facts which may be disclosed are those that the First Circuit made public in its published opinion. *In Re Grand Jury Proceedings (Gregory P. Violette),* 183 F.3d 71, 72 (1st. Cir. 1999).

> Since at least October 1997, Gregory P. Violette has been the target of a federal grand jury investigation focused on possible bank fraud and related crimes. The government says that Violette made false statements to financial institutions (presumably in violation of 18 U.S.C. § 1014) for the purpose of obtaining loans and credit disability insurance; that he trumped up an array of disabilities, which he communicated to selected health-care providers; and that he caused information from these providers to be transmitted to the companies that had underwritten the credit disability policies (presumably in violation of 18 U.S.C. § 1341), thus fraudulently inducing payments.

The need to seek a crime-fraud exception to the new psychotherapist-patient privilege arose during the investigation when copies of psychotherapist records pertaining to the target of the investigation, Gregory P. Violette, were received from the credit disability insurance companies. The insurance companies had received the records from the psychotherapists as a part of the disability insurance claims process. The problem for the investigation was that the records received from the insurance

companies were not complete copies of the psychotherapist's files. It was assumed that Violette would invoke the new psychotherapist-patient privilege.

Research indicated that the best course was to seek to have the District Court recognize or "create" a crime-fraud exception to the psychotherapist-patient privilege. It was further decided to also ask the Court to adopt the procedures used for establishing the crime-fraud exception to the attorney-client privilege. Two of the psychotherapists, and their files, were subpoenaed by the Grand Jury, the psychotherapists thereafter invoked the privilege, and the United States sought to compel responses to the subpoenas. The District Court held that a crime-fraud exception to the psychotherapist-patient privilege should exist and ordered enforcement of the subpoenas. Violette appealed the District Court's ruling to the First Circuit Court of Appeals.

The arguments made by the United States to the First Circuit were substantially identical to those made to the District Court.

- As the Supreme Court pointed out in *Jaffee*, both the attorney-client privilege and the psychotherapist-patient privilege are intended to encourage confidential relations. *Jaffee*, 518 U.S. at 10. Both privileges exist to promote the confidential communications which will allow these goals to be achieved.
- The underpinnings of the crime-fraud exception to the attorney-client privilege are equally applicable to the psychotherapist-patient privilege. It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the "seal of secrecy"...between the lawyer and the client does not extend to communications "made for the purpose of getting advice for the commission of a fraud" or crime. *United States v. Zolin*, 491 U.S. 554, 563, (1989).
- Research does not reveal any effort among the judiciary, legislatures, the Bar, or the media, to repeal the crime-fraud exception to the attorney-client privilege. From the lack of any such effort, it is reasonable to conclude that the existence of the crime-fraud exception has not caused an unacceptable erosion of the attorney-client privilege.
- It is of no help to look at how the states handle crime-fraud exceptions to the psychotherapist-patient privilege. Absolutely no consensus exists among the states. Comment, *When Should Federal Courts Require Psychotherapists to Testify About Their Patients? An Interpretation of Jaffee v. Redmond*, Daniel A. Cantu, 1998 U. Chi. Legal F. 375, 383 (containing a review of the various types of state exceptions to the psychotherapist-patient privilege).
- The absence of a crime-fraud exception from Rule 504, the psychotherapist-patient privilege rule proposed by the 1972 Judicial Conference Advisory Committee and rejected by Congress, is entitled to little, if any, weight. As one commentator has stated:

> Although the Proposed rule should help guide courts, *Jaffee* signals unequivocally that the Proposed rule is not a blueprint for federal common-law development. In *Jaffee*, even as it recognized the existence of the privilege, the Court parted ways with the Proposed Rule's definition of the privilege. Although the Proposed Rule extended the privilege only to psychiatrists and psychologists, *Jaffee* extended the privilege to social workers as well. This extension of the privilege beyond that originally proposed in rule 504 demonstrates the limited persuasive force of the Proposed Rule.

Anne Bowen Poulin, *The Psychotherapist-Patient Privilege After Jaffee v. Redmond: Where Do We Go From Here*, 76 Wash. U.L.Q. 1341, 1344 (Winter 1998).

- The adoption of a crime-fraud exception to the

> psychotherapist-patient privilege identical to the well defined crime-fraud exception to the attorney-client privilege, would speed the development of the law in this area and add a substantial degree of certainty to the scope of the exception. This would also help to diminish the harm that can flow from uncertainty about the scope of the privilege.

In it's opinion, the First Circuit agreed that analogizing the psychotherapist-patient privilege to the attorney-client privilege was appropriate. In doing so, the Court stated:

> As the Supreme Court has framed the issues, the parallels are striking. The attorney-client privilege and the psychotherapist-patient privilege both exist to foster the confidence and trust required for effective counseling relationships (legal and psychiatric, respectively). The private interests served by these relationships, however, do not justify a privilege. Rather, we customarily respect the confidentiality of communications made in the course of these relationships because, on balance, doing so serves the public weal. The attorney-client privilege promotes "the observance of law and administration of justice," Upjohn, 449 U.S. at 389, 101 S.Ct. 677, just as the psychotherapist-patient privilege promotes "[t]he mental health of our citizenry," Jaffee, 518 U.S. at 11, 116 S.Ct. 1923.

The Court continued the analogy in its analysis of the crime-fraud exception and stated:

> This sense of parity carries over to the crime-fraud exception. In the attorney-client context, we exclude from the privilege communications made in furtherance of crime or fraud because the costs to truth-seeking outweigh the justice-enhancing effects of complete and candid attorney-client conversations. In the psychotherapist-patient context, we likewise should exclude from the privilege communications made in furtherance of crime or fraud because the mental health benefits, if any, of protecting such communications pale in comparison to "the normally predominant principle of utilizing all rational means for ascertaining truth." Trammel, 445 U.S. at 50, 100 S.Ct. 906 (quoting *Elkins v. United States*, 364 U.S. 206, 234, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960) (dissent)).

For establishing the crime-fraud exception to the psychotherapist-patient privilege, the First Circuit adopted the same procedures which already exist for establishing the crime-fraud exception to the attorney-client privilege. Although these procedures vary to some extent from circuit to circuit, they are fairly clear. The adoption of the crime-fraud exception and these pre-existing procedures has certainly sped the delineation of the "contours" of the psychotherapist-patient privilege. ~

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Impeachment by Prior Inconsistent Statements

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A prosecution witness is on the stand. His or her prior statements have been disclosed to the defense based on the government's discovery obligations. Able defense counsel, highlighting every difference between the witness' trial testimony and prior statements creates grave doubt about the witness' credibility. Later at trial, the defendant takes the stand. The prosecutor rises to cross-examine, holding no cards like the defense attorney because no prior statements of the defendant exist, have been disclosed, or have been obtained through investigation. Many prosecutors learn two lessons from this all-too-familiar experience: (1) impeachment by prior inconsistent statement is the primary tool of defense lawyers; and (2) impeachment by prior inconsistent statement is for destructive purposes only. Both lessons are too limited. This memorandum explores the law relating to prior inconsistent statements, with the goal of broadening our awareness of the uses of impeachment by prior inconsistent statements.

The Rules

Federal Rule of Evidence 613 provides for impeachment of witnesses by any prior inconsistent statement.

Rule 613 states:

> (a) **Examining witness concerning prior statement.** In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.
>
> (b) **Extrinsic evidence of prior inconsistent statement of witness.** Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party opponent as defined in rule 801(d)(2).

Subsection (b) of that Rule allows for the introduction of extensive evidence of the inconsistent statement after the witness has been afforded an opportunity to explain or deny the inconsistency during cross-examination. Thus, only after such cross-examination may the impeaching party offer evidence that the witness has told a different tale on an earlier occasion. If the witness admits the prior statement during cross, there is no need for extrinsic evidence.

Rule 613 impeachment is designed to permit the cross-examiner to create doubt about witness credibility when the witness tells a different story about the relevant facts, that is, the witness blows hot and cold. It does not permit the cross-examiner to assert that the impeaching statement is true. The Rule, therefore, covers pure impeachment, not substantive evidence. *See United States v. Winchenbach*, 197 F.3d 548, 558 (1st Cir. 1999).

Another rule allows the cross-examiner the best of both worlds; impeachment and use of the impeaching statement as substantive evidence. Rule 801(d)(1)(A) allows for the use of the impeaching statement for the truth, that is, as substantive evidence when the prior statement was given under oath.

> Rule 801(d)(1) (A). **Statements which are not hearsay.** A statement is not hearsay if the declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition....
> The Rule requires that the witness testify at trial and be subject to cross-examination concerning the statement at trial. However it does not matter that there was no opportunity for cross-examination when the prior statement was given. That is a requirement of the prior testimony exception to the hearsay rule in Rule 801(b)(1). Impeachment under 801(d)(1)(A) is defined as non-hearsay.

This rule permits a federal prosecutor to "lock in" a witness to testimony in the grand jury, and, then use the grand jury testimony as part of the government's case-in-chief when the witness recants at trial. Of course, any testimony previously under oath can be used; whether in a sworn affidavit, civil (or criminal) deposition, or testimony at a prior trial.

It is important to remember that the testimony need not be irreconcilably inconsistent, e.g., the car was red; the car was blue. Vague or incomplete answers, or "I don't remember" answers, can trigger the use of this Rule. *See United States v. Distler*, 617 F.2d 954 (6th Cir. 1981). Otherwise, a feigned memory loss would insulate the witness from being impeached under this rule. *United States v. Knox*, 124 F.3d 1360, 1364 (10th Cir. 1997). The Rule, however, requires the opponent be able to cross-examine the witness about any prior inconsistent statements. Thus, the statement might be admissible if the witness cannot remember making it. *United States v. DiCaro*, 772 F.2d 1314 (7th Cir. 1985).

Who May Impeach?

Rule 607 provides that any party, including the party calling the witness, may impeach the witness. There is one caveat to this rule prosecutors must heed, however. A prosecutor may not call a witness, knowing this witness is not going to offer helpful testimony, for the sole purpose of impeaching the witness with what would otherwise be inadmissible hearsay. *United States v. Ince*, 21 F.3d 576 (4th Cir. 1994); *United States v. Miller*, 664 F.2d 94 (5th Cir. 1981). When a prosecutor learns, usually through a pretrial interview, that a witness will not testify consistently with his prior, *unsworn* statements, the prosecutor *cannot* call the witness for the sole purpose of introducing the prior unsworn statement, e.g., statements contained in F.B.I. 302's or D.E.A. 6's, in the guise of Rule 613 impeachment.

Obviously, this limitation does not apply if the prior, inconsistent statements are under oath, because such statements are neither inadmissible as substantive evidence or hearsay. Accordingly, this is one reason to consider putting a witness who potentially may "go south" in front of the grand jury prior to indictment.

The test, according to one court, for whether a prosecutor may call the witness knowing the witness will be impeached with contradictory hearsay, is whether the witness, sure to be unhelpful to the government's case, is being called solely as a subterfuge to introduce what would otherwise be inadmissible evidence, e.g., the statements to agents. *United States v. Kane*, 944 F.2d 1406, 1412 (7th Cir. 1991). If the witness will provide helpful evidence also, he or she may be called and impeached after testifying inconsistently with prior unsworn statements. *Id*. Also, a prosecutor is entitled to assume, presumably absent any concrete evidence to the contrary, that a witness will testify truthfully. *United States v. Patterson*, 23 F.3d 1239 (7th Cir. 1994); *United States v. Carter*, 973 F.2d 1509 (10th Cir. 1992).

When to Use These Rules

Based upon the foregoing, prosecutors should consider using prior inconsistent statement impeachment when the following situations arise:

1. When a defense witness testifies inconsistently with prior statements, use of the prior statements is impeachment for credibility only under Rule 613. The prosecutor may argue that the witness should not be believed, regardless of the substantive value of the impeaching statements.

2. When a defense witness testifies inconsistently with prior statements under oath, and the prior statement is helpful to the prosecution's case, the prior statement can be offered as substantive evidence. This will often occur when the prosecutor does not want to call the witness in the government's case for strategic or ethical reasons.

3. When a prosecution witness "goes south," either intentionally or for innocent reasons, and the prosecutor has prior inconsistent statements not given under oath, a "soft" reminder of the prior statement may return the frightened, forgetful, or timid witness to the intended testimony. A "hard" impeachment of the defense partisan may be required, however. This impeachment is subject to the "impermissible purpose" rule enunciated in *United States v. Miller*, 664 F.2d 94 (5th Cir. 1981).

4. When a prosecution witness provides testimony that is inconsistent with some or all of prior sworn testimony here, impeachment of important facts with the prior testimony under oath will provide substantive evidence of those facts. Again, how hard or frequently the witness is impeached depends on the witness, the reason for being incorrect, how important the testimony is, the amount of other evidence, and other factors. This prior statement evidence might save a case, because under Fed. R. Crim. P. 29, the evidence at the time of a motion for dismissal is judged in the light most favorable to the United States. Thus, the prior statements alone might get you to the jury. The situations enumerated are presented in a black or white fashion, a fashion that is not always presented at trial. How, when, and how stridently to impeach is a matter left to the sound discretion of the prosecutor. ~

ABOUT THE AUTHOR

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Use of Guilty Plea — Case Note

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In *United States v. Universal Rehabilitation Services (PA), Inc.*, 205 F.3d 657 (3d Cir. 2000) (en banc), the Third Circuit, by a vote of 7-5, held that the district court has discretion to permit the government to elicit on direct examination the guilty plea of a cooperating witness, in order to establish the witness' credibility, dampen suspicion of selective prosecution, and show the witness' first-hand knowledge of events. The Court held that such evidence is permissible even if the defense offers not to refer to the plea on cross-examination and not to challenge credibility or suggest selective prosecution on the basis of the plea. The Court held that the "government may seek to introduce a witness's guilty plea and/or plea agreement even in the absence of a challenge to the witness's credibility." *Id*. at 666.

The majority, in part, also held that the witness' plea agreement may be introduced along with the fact of the plea:

> Once one accepts the premise that a witness' guilty plea has probative value, especially with respect to the witness' credibility, the introduction of the terms of the plea agreement becomes a necessary complement to disclose to the jury that the witness has not been promised a 'sweetheart deal' in exchange for the testimony. *Id* at 664.

The Court of Appeals will "accord great deference to the District Court's ultimate decision." *Id.* at 665. The Court stressed that the district court has discretion to balance the probative nature of evidence against its prejudicial impact, and stated that the district court's decision on admission of evidence under Rule 403 "cannot be reversed merely because we, as members of a reviewing court, possess a different view concerning the probative value or prejudicial effect of the challenged evidence. . . . In order to justify reversal, a district court's analysis and resulting conclusion must be 'arbitrary or irrational.'" *Id.*

The Court reminded that a witness' guilty plea may not be used as affirmative evidence of the defendant's guilt, and that a cautionary instruction is mandatory when a guilty plea is introduced to bolster the witness' credibility. ~

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Live Video Testimony: New Tool for International Criminal Assistance

Richard Douglas
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More and more, federal, state, and local prosecutors must contend with international issues, and the Department of Justice is committed to identifying useful tools to help them.

Live video communication is a promising new tool, which combines modern technology with existing legal mechanisms for international assistance in criminal matters. Satellite and other live video testimony may be available to a growing number of federal and state prosecutors to meet and prevail over the challenges of international crime. As explained below, state and federal courts have upheld the use of this technology at trial.

Practical Considerations

With Department of Justice help, Florida and United States prosecutors recently employed live video communications to obtain decisive testimony

from unavailable, but crucial, overseas witnesses, and to help a foreign government with several prosecutions.

In October 1998, a Miami prosecutor charged a defendant with attempted armed robbery. The Swiss victims could not travel to Miami for trial, and without their testimony, the prosecution would probably have failed. Instead, the prosecutor and the Department of Justice's Office of International Affairs (OIA) invoked the United States-Switzerland Mutual Legal Assistance Treaty (MLAT), whereupon Swiss authorities arranged a live video link from Geneva. The victims testified live during the Miami trial, and the defendant was convicted.

In June 1999, a Marianna, Florida, prosecutor and OIA invoked the United States-Spain Mutual Legal Assistance Treaty, and helped the prosecutor to convict a man of practicing medicine illegally. Via live video link, and despite a seven hour time difference, the Barcelona, Spain, Medical School registrar testified live from Spain during the Marianna jury trial. The witness testified that the defendant's Barcelona Medical School diploma was forged and the defendant was convicted.

Since November 1997, video technology has also been employed many times to help Italian authorities interview witnesses in the United States Federal Witness Protection Program and in federal prison in connection with a number of sensitive organized crime prosecutions.

These cases confirm that modern technology can work for prosecutors in an international judicial setting. In the noted cases, substantial groundwork was necessary to make the assistance possible, and significant legal and technical questions were answered, such as:

- Will the witness testify voluntarily in the foreign country via live video?
- Will the foreign country's judicial assistance authorities agree to provide this kind of assistance?
- Will the foreign authority be able or willing to make logistical arrangements for the desired testimony?
- Do legal norms or privileges in the foreign jurisdiction pose obstacles to employment of live video technology?
- Will a foreign court compel an uncooperative witness to testify via video link?
- Will the United States court permit the use of live video testimony?
- Will the United States court agree to order payment of the government's costs for arranging the testimony?
- Does the United States have a mutual legal assistance treaty with the country where the witness is located?
- If not, is this kind of assistance from the foreign state nevertheless possible using a letter rogatory?
- Is necessary video equipment available in both the United States and foreign jurisdictions?
- Is a certified court interpreter available in the United States jurisdiction for the relevant foreign language?

For the case in which testimony was taken from the robbery victims in Switzerland, it was first necessary for Florida prosecutors to obtain an order from the Florida court authorizing the video testimony and payment of costs. For their part, Swiss authorities concluded that — although the United States-Swiss MLAT did not specifically provide for this kind of assistance — neither that treaty nor Swiss domestic law prevent it.

In accordance with Swiss law, the Swiss Central Authority appointed a magistrate to execute Florida's MLAT request. The Swiss magistrate later noted that, while the video procedure is useful for voluntary witnesses, under current Swiss law, no witness could be compelled to provide testimony via video. Nor could the procedure be employed to take testimony from a witness about a third party (e.g., a bank), without the third party's permission. The Swiss government office responsible for judicial assistance to the United States coordinated the logistical arrangements in Switzerland after the Florida prosecutor identified a commercial equipment provider in Geneva. The Florida prosecutor paid all costs involved.

For the case involving testimony from the medical school registrar in Spain, Florida prosecutors were likewise obliged to obtain an order from the Florida court, (despite defense opposition) before making live video testimony

arrangements. The United States-Spain MLAT is silent on this kind of assistance, like the Swiss treaty; but after initial reluctance, the Spanish magistrate, assigned by the Spanish Central Authority to supervise arrangements in Spain, concluded that Spanish law does not prevent it.

American consular officers, seated in the Spanish courtroom during the Spanish witness's testimony, reported that effort should be made to improve the quality of the Spanish translation in the Florida courtroom. Although the Spanish interpreter used in Florida spoke both English and Spanish, the interpreter apparently had little courtroom experience, and was unable to translate technical legal terms correctly.

In addition, in an interesting comment which underlines the differences between United States and foreign legal systems, the supervising Spanish magistrate said that he would have held Florida defense counsel in contempt, had counsel "performed" in a Spanish courtroom as he did in the Florida forum. In contrast to the Swiss case, Spanish authorities in Madrid were unable to assist with the logistical arrangements needed to obtain the witness' testimony. Consequently, the burden of making these arrangements in Spain was shouldered completely by the Florida prosecutor, who, after obtaining the permission of the Spanish magistrates, traveled to Barcelona several days before trial to finalize arrangements.

In the cases described above, the Department of Justice worked closely with the state prosecutors involved, as well as foreign authorities, to ensure that all necessary arrangements were made.

Federal and State Courts Authority

Federal Court Action

On January 22, 1999, the United States Court of Appeals for the Second Circuit held in *United States v. Gigante* (166 F.3d 75 (2d Cir. 1999),that admission of testimony via closed circuit video (CCV) does not constitute an inherent violation of the rights guaranteed by the Confrontation Clause of the Sixth Amendment. In upholding the lower court's decision to use a video link, the Second Circuit adopted the standards applicable to depositions under Rule 15 of the Federal Rules of Criminal Procedure (i.e., testimony taken in advance of trial — either in the United States or in a foreign country — for later use at trial).

In *Gigante*, CCV was used to take live testimony from a terminally ill declarant in the Federal Witness Protection Program. Although the defense argued that the testimony violated the defendant's right to confrontation, Senior District Court Judge Weinstein determined that the witness, whose testimony was crucial, was unable to appear in court, and allowed the use of a video link. In upholding use of this tool, the Second Circuit found: (1) the standards governing depositions under Rule 15 are applicable to video link; (2) the right to confrontation is not necessarily violated by the use of video link; and (3) the video link procedure ensures the reliability of testimony.

Gigante demonstrates that the use of live video technology to obtain testimony during federal criminal trials is a viable alternative to a Rule 15 deposition. *Gigante* can be used to support a prosecutor's use of live video communications to obtain testimony from a remote location. The standard necessary to obtain a deposition under Rule 15, however, must be met. Federal case law has generally required that the witness be unavailable, and the testimony be material to the issue of guilt or innocence. There must also be a finding that this method of obtaining testimony is required due to exceptional circumstances, and that it will further the interests of justice.

The witness is deemed unavailable if, for example, he or she is physically or mentally ill, or unwilling to travel, and is beyond the subpoena power of the court. Exceptional circumstances may warrant the use of video link to obtain testimony during a trial. A witness's testimony may be crucial to the just outcome of a trial, and if that witness is unavailable, exceptional circumstances will exist.

To ensure the reliability of testimony, the effects of face-to-face confrontation must be met. The testimony must be given under oath, there must be an opportunity for cross-examination, and the judge must have the ability to observe the witness' demeanor while he or she testifies.

Gigante has influenced other recent decisions, including *Carron ex rel. Carron v. Holland*

American Line - Westours, Inc., 151 F.Supp. 2d 322 (E.D.N.Y. 1999), where, in a personal injury action, the court cited the availability of live video technology for depositions before approving the defendant's application for a change of venue from New York to Washington State. Also in *State v. Sewell*, 595 N.W.2d 207 (Minn. App. 1999), the court held that prosecution witness testimony given via interactive television did not violate the defendant's constitutional rights.

State Court Action

The Supreme Court of Florida ruled in 1998 on the constitutionality of using live video communications at trial. In *Harrell v. Florida*, 709 So.2d 1364 (Fla. 1998), the witnesses, who resided in Argentina, had been robbed while on vacation in Florida. Due to the distance, and one witness's health problems, the trial court allowed the use of live video communication to take witness testimony at trial. The defendant was convicted and appealed.

While the Supreme Court of Florida declined to find that video is the equivalent of physical, face-to-face confrontation, the procedure was evaluated to see if it could qualify as an exception to the Confrontation Clause. To qualify, the court said that the procedure must be justified, on a case-specific finding, by important state interests, public policies, or necessities of the case, and must satisfy the three elements of confrontation: oath, cross-examination, and observation of the witness's demeanor. The court found that an important state interest was at issue, because the witness lived beyond the subpoena power of the court, and it was in the state's interest to resolve criminal matters in an expeditious and just manner. Also, the evidence that one of the witnesses had health problems showed an inability of the witness to travel. Additionally, the testimony of the witnesses was essential for a just result. The court determined that the three elements of confrontation were satisfied. Both witnesses were placed under oath by a court clerk in Miami. The defense had the opportunity to cross-examine them, the jury was able to observe the witnesses, and the witnesses could see the jury. Because of these factors, it was held that the safeguards of the Confrontation Clause were met. A lower Florida appellate court, relying on *Harrell*, recently rejected the appeal of a Florida court order to revoke probation, after a victim of domestic violence testified live from Pennsylvania via video concerning a Florida convict's parole violations. *Lima v. State*, 732 So.2d 1173 (Fla. App. 3rd Dist. 1999). In upholding revocation of the defendant's parole, the *Lima* court said that the video procedures employed in the case were similar to, and functionally indistinguishable, from those employed in *Harrell*.

Conclusion

Live video testimony offers the potential for an extremely useful tool which requires careful preparation. It is expected that, with time and the accumulation of international experience with this technology, the use of live video will become prevalent. The Office of International Affairs (202-514-0000), is available now to discuss questions prosecutors may have about live video testimony. OIA has a growing reservoir of experience with this type of assistance, and will be pleased to discuss the array of issues which may arise in the context of taking live evidence from abroad via video. ~

ABOUT THE AUTHOR

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Responding to Crises: Resources for U.S. Attorney's Offices

Laurie Robinson
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Under the leadership of this Administration and the U.S. Attorneys nationwide, crime has been dropping for the past seven years. Despite the drop in the crime rate, there is no shortage of high-profile incidents of public violence that can shake citizen perceptions of safety. From the horror of the Oklahoma City bombing, to the shootings at Columbine High School, to anti-Semitic attacks in Illinois and Southern California, violence remains at the top of the news.

The role of the U.S. Attorney as "public safety lawyer" has no doubt played a part in the overall decline in crime. A basic part of being a public safety lawyer is taking an interest in the impact of crime on the community. Beyond the traditional roles of investigation and prosecution, U.S. Attorneys nationwide are taking an interest in hate crimes and events of mass violence. Even when these cases are ultimately prosecuted by state officials, U.S. Attorney's Offices are providing leadership in community crisis response by coordinating resources for victims services.

The Office of Justice Programs (OJP) has and will continue to help U.S. Attorneys respond to mass violence in their communities.

OJP's Office for Victims of Crime (OVC) provides federal leadership to help victims and communities in the aftermath of violence. OVC can help U.S. Attorneys identify and coordinate available local resources to support immediate crisis response services. After the May 1999 school shootings in Littleton, Colorado, OVC called upon Denver-area organizations supported by OVC's Victim Services 2000 demonstration project to provide ongoing, onsite counseling. OVC also mobilized local teams in Yosemite and Eureka, California after two teenage girls and a mother disappeared while on vacation in the area in March 1999.

Since many states and communities already have the personnel and resources to effectively respond to major crises, OVC is encouraging the development of state and local integrated response plans to ensure victims are provided long-term services. U.S. Attorney's Offices can take the lead in establishing local community crisis response teams by working with OVC, Victims of Crime Act program administrators in their state, and local officials.

For the most severe incidents, the 1996 Antiterrorism Act established a special fund within OVC to provide supplemental funding, assistance, and compensation to victims of terrorism and mass violence, including American victims of terrorism abroad. Grants from this fund help states provide direct assistance to victims and victims' families by paying for funeral costs, travel, mental health counseling, and medical bills. Grants are also available to U.S. Attorney's offices to provide updates and briefings to victims and victims' families. The antiterrorism fund currently is supporting activities for the families of Pan Am Flight 103 victims, including briefings in Washington, D.C. and Scotland, a Website to provide updates on court proceedings, travel expenses for families to attend the trial in the Netherlands, and a secure satellite link so families may view the trial from the U.S. The U.S. Attorney's Office for the Southern District of New York has also received funds to support outreach to victims of East Africa embassy bombings.

For more information on OVC's Community Crisis Response programs, contact the Office for Victims of Crime at 202-307-5983. Crisis response assistance is just one of many ways in which OJP is coordinating with U.S. Attorney's

Offices on public safety issues. For more information on OJP programs for your community, visit the OJP Website at *www.ojp.usdoj.gov*, or contact OJP's Office of Congressional and Public Affairs at 202-307-0703. ~

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' **Laurie Robinson** was the Former Assistant Attorney General for the Office of Justice Programs in Washington, D.C.a

NOTES

UPCOMING PUBLICATIONS

The second part of our trial advocacy series will be devoted to jury issues. You will also meet Mark Calloway who is the United States Attorney from the Western District of North Carolina and the Chair of the Attorney General's Advisory Committee (AGAC). In the featured interview, he shares his view of the role of the AGAC and highlights some of the significant issues currently facing the AGAC.

September 2000	**Jury Issues**
November 2000	**Pre-trial Settlements**