Chapter 31

Handling Prosecution Witnesses

§ 31.01 CROSS-EXAMINING PROSECUTION WITNESSES – GENERALLY

§ 31.01(a) The Right to Cross-Examine; Bases for Objecting to Judicial Curtailment of Cross-examination

The right to a "searching and wide-ranging cross-examination" is commonly guaranteed by state law (*State v. Thaden*, 210 Neb. 622, 627, 316 N.W.2d 317, 321 (1982)). *See*, *e.g.*, *Ex Parte Willis*, 455 So. 2d 917, 919 (Ala. 1984); *Wooten v. State*, 464 So. 2d 640, 641 (Fla. App. 1985); *State v. DeCristofaro,* 102 R.I. 193, 197, 229 A.2d 613, 615 (1967). In addition, "[t]he Confrontation Clause [of the Sixth Amendment to the federal Constitution] . . . has long been read as securing an adequate opportunity to cross-examine adverse witnesses" (*United States v. Owens,* 484 U.S. 554, 557 (1988) (dictum)). *See, e.g., Douglas v. Alabama,* 380 U.S. 415, 418 (1965); *Lee v. Illinois,* 476 U.S. 530, 539-43 (1986). *See also Crawford v. Washington*, 541 U.S. 36, 61 (2004) (the Confrontation "Clause's ultimate goal is to ensure reliability of [prosecution] evidence . . . [by] command[ing] . . . that reliability be assessed in a particular manner: by testing in the crucible of cross-examination").

Accordingly, "restrictions imposed by . . . the trial court on the scope of cross-examination" are constitutionally assailable (*Delaware v. Fensterer,* 474 U.S. 15, 18 (1985) (per curiam) (dictum)). *See, e.g., Smith v. Illinois,* 390 U.S. 129 (1968); *Davis v. Alaska*, 415 U.S. 308, 315-20 (1974); *Olden v. Kentucky*, 488 U.S. 227 (1988) (per curiam); *Alvarez v. Ercole*, 763 F.3d 223, 231-32 (2d Cir. 2014); *Sussman v. Jenkins*, 636 F.3d 329, 358 (7th Cir. 2011); *State v. Johnson*, 255 Neb. 865, 587 N.W.2d 546 (1998). *See also Blackston v. Rapelje*, 780 F.3d 340, 348-57 (6th Cir. 2015). Counsel should object to any attempt by the court to '"protect a witness from being discredited'" (*Davis v. Alaska,* 415 U.S. at 320).

Specifically, "a criminal defendant [or juvenile respondent] states a violation of the Confrontation Clause by showing that he [or she] was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury [or the judge in a bench trial] the facts from which jurors [or a judicial trier of fact] . . . could appropriately draw inferences relating to the reliability of the witness'" (*Delaware v. Van Arsdall,* 475 U.S. 673, 680 (1986) (dictum), quoting *Davis v. Alaska,* 415 U.S. at 318). *See, e.g.*, *Ortiz v. Yates*, 704 F.3d 1026, 1034-40 (9th Cir. 2012). "Bias is a term used in the 'common law of evidence' to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor or against a party [*sic*]. Bias may be induced by a witness' [*sic*] like, dislike, or fear of a party, or by the witness' [*sic*] self-interest. Proof of bias is almost always relevant because the jury [or the judge in a bench trial], 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' [*sic*] testimony."

United States v. Abel, 469 U.S. 45, 52 (1984). *See, e.g.*, *Nappi v. Yelich*, 793 F.3d 246, 248, 253 (2d Cir. 2015) (the trial court violated the Confrontation Clause by precluding defense counsel from cross-examining the accused's wife about her romantic relationship with another man to show that the wife had "a motive to implicate Nappi in the illegal possession of a weapon – which she knew was a violation of his parole"); *Henry v. State*, 123 So. 3d 1167 (Fla App. 2013) ("In a proffer, the defense sought to cross-examine the victim to establish that (1) he was charged with aggravated stalking; (2) the charge was a third-degree felony; (3) the maximum penalty for a third-degree felony is five years in prison; (4) the victim received 18 months on probation pursuant to his plea bargain; (5) the victim was arrested on December 6, 2005; and (6) the victim remained in jail from the time of his arrest until he entered his plea in mid-January of 2006. The prosecutor objected to the proposed cross-examination on the grounds that it was 'improper impeachment,' and that the victim's crime was 'not a conviction' or a 'crime of dishonesty.' The trial court sustained the objection and prohibited the testimony." *Id*. at 1168. "'A well recognized area of cross examination is how pending criminal charges may have influenced a witness' [*sic*] cooperation with the state and the content of in-court statements.'" *Id*. at 1170. "Here, the victim testified that he had pending, unrelated charges which were resolved without any deal to testify in this case. However, the jury was not required to accept the victim's characterization of the resolution of his pending case. The defendant was entitled to ask the victim about the six areas of cross-examination identified above to evaluate the victim's credibility." *Id*.). And the Sixth Amendment right of cross-examination extends not only to questions calling for answers that directly show bias but also to questions that could open up a line of further examination ultimately showing bias. *Smith v. Illinois*, 390 U.S. at 750-51.

§ 31.01(b) Deciding Whether to Cross-Examine; The Possible Goals of Cross-examination

Cross-examination should not be undertaken without good reason. Most of what most witnesses testify is both unimportant and unassailable. Cross-examination on this material can only undermine the first point and underline the second in the eyes of the judge or jury. Unless counsel has a specific, affirmative goal that can realistically be achieved by cross-examination, the better course is to forego cross-examining.

Depending on the nature of the case and what was elicited on direct examination, counsel might pursue one or more of the following goals in cross-examining a prosecution witness:

(1) *To demonstrate the possibility of error or inaccuracy in*:

(a) perception by the witness;

(b) interpretation by the witness of what s/he perceived;

(c) memory of the witness;

(d) judgment, estimation, or opinion by the witness;

(e) articulation by the witness, in his or her testimony on direct examination.

Cross-examination may undertake to establish the existence of one or more of these factors (*e.g.*, limited opportunity to observe, or poor conditions for observation, by the witness; inattentiveness by the witness; "set" or bias on the part of the witness; prior or subsequent experiences by the witness which s/he may have confused with the occasion that s/he is purporting to narrate) by:

(i) getting the witness to admit the relevant facts (*e.g.*, to state that s/he was paying attention to something else at the time when s/he purports to have observed certain details), or

(ii) getting the witness to admit other facts from which the relevant facts can be inferred (*e.g.*, to state that something else was going on to which an ordinary person in the witness's situation would have been paying attention instead of attending to the details which the witness purports to have observed), or

(iii) getting the witness to deny the relevant facts incredibly (*e.g.*, to state that s/he was *not* attending to something else, when this statement is likely to be disbelieved by the trier of fact because, *inter alia*, it is belied by his or her demeanor in uttering the denial on the witness stand; *or* it is belied by his or her earlier statements or behavior which the cross-examiner can prove through or independently of the witness; *or* it is belied by the level of detail with which the witness is presently able to recount aspects of the situation that s/he denies were the focus of his or her attention; *or* it is belied by the trier's conceptions that, in common human experience, no one situated like the witness could fail to focus attention on those aspects), or

(iv) getting the witness to demonstrate the relevant facts by his or her present performance (*e.g.*, to describe in microscopic detail the "something else" to which s/he therefore must have been closely attending), or

(v) more than one of these means.

Errors or inaccuracies may also be suggested indirectly, without pinpointing any specific factor that may have caused them, or even the specific area (*e.g.*, perception *versus* memory) in which they are operating. Take for example a prosecution witness who testifies on direct examination that at a particular time and place (which happen to have been five minutes before the commission of a crime, and in its near vicinity), s/he saw a youth whom s/he identifies as the

respondent walking down the street wearing tan trousers (which, as it happens, the perpetrator of the crime was wearing, according to the victim's account). On cross-examination, this witness might be asked whether the youth s/he saw was wearing a jacket, what kind, what color; whether he was wearing a shirt, what kind, what color; what sort of footgear did he have; how was he wearing his hair, etc. – details which, from the perspective of an observer in the witness's situation, would occupy equal prominence with the tan pants that the witness purports to have seen and to recall. If s/he cannot recount other details of equal prominence, the trier of fact may well become skeptical of the tan-pants story; if s/he can, the cumulation of such details may enable counsel to argue to the jury or judge the incredibility of a witness who professes to have made and memorized a minute inspection of a passing stranger that s/he had no particular reason to scrutinize so closely. (The argument would not be viable, and the line of cross could be quite dangerous, in the case of a witness who *did* have a reason to scrutinize the stranger – for example, s/he saw him running from the crime scene after a hue and cry had been raised.)

(2) *To demonstrate that the witness's testimony on direct examination was unfair or misleading.*

If cross-examination elicits facts omitted on direct which manifestly qualify or alter the significance of the facts to which the witness testified on direct, the result may be more than a mere neutralization of the direct. By portraying the direct as misleading, counsel has acquired grounds to argue in closing that the witness or the prosecutor (or both) were "telling a half-truth," or "covering up awkward facts," or "trying to conceal whatever didn't fit their version of the story." The credibility gap thus created may spread to other features of the witness's testimony or of the prosecutor's case.

(3) *To demonstrate the possibility that the witness is lying*.

In the case of the ordinary witness, this is exceedingly difficult. Particularly if the witness is at all personable, it will be easier to persuade the jury or judge that the witness is honestly and reasonably mistaken than that s/he is indefensibly reckless or unconsciously biased, and it will be easier to persuade the jury or judge of either of these latter things than that the witness is intentionally lying. However, some witnesses (*e.g.*, an accomplice who testifies for the prosecution, admitting the crime and saying that the respondent participated in planning and committing it) cannot plausibly be mistaken if they are truthful: They must be challenged as liars or not at all. Usually, the challenge can succeed only if both motivation to lie and some other indication of untruthfulness (*e.g.*, a prior inconsistent statement of the witness; discrepancies between the witness's story and other evidence; shiftless demeanor) are shown; and cross-examination must be directed to making these showings. Because an unsuccessful attempt to brand a witness as a liar can alienate the jury or judge – in direct proportion to the likeability of the witness – the effort should not be made without strong ammunition that promises a reasonable prospect of success.

(4) *To make the witness unattractive*.

This is often easier than making the witness out to be a liar. The jury or judge may discredit a witness whom it perceives as having bad judgment, and it may identify bad judgment with cockiness, pig-headedness, self-righteousness, egotism, inconsiderateness, meanness, pettiness, snoopiness, gossipiness, and a host of other major and minor vices, including simply acting, talking or thinking like someone whom the jurors would not want their son or daughter to marry. Unattractive traits of a witness may be brought out on cross either by enticing the witness to display them on the stand or by eliciting from the witness facts about what s/he did or said in connection with the subject matter of his or her testimony that manifests the traits.

(5) *To confine the reach of the witness's testimony on direct.*

This goal includes both (a) establishing explicitly the limits of assertions made by the witness on direct, so that s/he will not appear to be saying more than s/he has said, and (b) establishing facts that impede the drawing of inferences unfavorable to counsel's case from what the witness has said on direct.

(a) Q. "You testified on direct examination that you arrived at approximately 8:00 p.m., is that correct?
A. "Yes.
Q. "You did not testify that it was exactly 8:00 p.m., right?
A. "It was about 8:00 p.m.

(b) Q. "You did not consult your watch at the time you arrived?
A. "No.
Q. "You had no reason to attend to the exact time of your arrival, did you?
A. "Not really.
Q. "The first occasion on which you had a reason to focus on the question of the time of your arrival is when the detective asked you about it, correct?
A. "Well, you mean specifically? I guess that's right."

(6) *To elicit information that (a) affirmatively supports the defense's case, or (b) is inconsistent with, and thereby discredits, other evidence presented in the prosecutor's case.*

Subspecies (a) is particularly useful when counsel can get it. To be able to argue to the jury or judge that "even the prosecution's witnesses admit that [a fact favorable to the defense] is true" can add considerable persuasiveness to the defense case. Subspecies (b) plays the prosecutor's witnesses off against one another: "They can't both be right," counsel can argue in closing.

§ 31.01(c) Avoiding the Most Common Pitfalls of Cross-examination

Before beginning cross-examination, counsel should give careful thought to the *areas that s/he had best stay out of* as well as to the areas that s/he wants to go into. S/he should review

the elements of the offense and the overall state of the prosecutor's record on those elements, so as to avoid the cardinal sin of helping the prosecution by filling in the missing links in its case. Counsel should keep in mind that by touching any particular subject on cross, s/he will open the door to redirect examination by the prosecutor on that subject, with the danger that the prosecution will improve its case. Conversely, subjects "beyond the scope of cross" may not ordinarily be taken up on redirect; and although trial judges have discretion to relieve a party of the rigor of this rule, most judges are more inclined to enforce the rule strictly than to relax it.

§ 31.01(d) Framing Cross-examination Questions for Maximum Effectiveness

Leading questions are permitted on cross-examination and are a particularly useful tool: Not only can they be used to pin a witness down to specifics and to keep the witness from straying into areas that counsel does not want to open up, but they can also be used to obtain admissions of facts stated in the terms most favorable to the respondent's theory of the case. The standard form of cross-examination question for these purposes is a declarative statement followed by "isn't that true?" or an equivalent phrase. For example:

> "The man who robbed you approached you from the direction of the gas station, isn't that true?"
>
> "When you first saw him, he was between you and the gas station, right?"
>
> "In reporting the robbery to the police, you said that you could not tell whether the man had come out of the gas station parking area or out of the vacant lot next door, didn't you?"
>
> "At the time you first saw him, he was far enough from the gas station so that you could not tell whether he had been on the station's property, is that correct?"
>
> "From your location, all of the gas station lights were behind him, weren't they?"
>
> "And looking at him come toward you, you were facing directly into the lights at the gas station, weren't you?"

The aim in fashioning questions of this sort is to phrase the facts as strongly in favor of the defense as is possible without running a serious risk that the witness will give a credible "no" answer. Thus the final question in the preceding series is preferable to "Looking at him come toward you, you were facing the lights at the gas station, weren't you?" because the latter formulation is unnecessarily weak. On the other hand, "the lights of the gas station were in your eyes, weren't they?" would be overly risky; and even "you were *looking* directly into the lights" is not as safe as "you were *facing* directly into the lights."

The preceding series also exemplifies the often profitable technique of using "probe"

questions to lock the witness into a position in which s/he must give the desired answer to a "payload" question or, alternatively, to forewarn counsel that the payload question should not be asked. A negative answer to any of the questions before the last one would have permitted and advised the cross-examiner to drop the entire line without embarrassment or risk of a damaging backfire, whereas affirmative answers to all of them made it almost impossible for the witness to avoid giving an affirmative answer to the final question.

§ 31.02 POLICE WITNESSES

Counsel should keep in mind that policing is a highly rule-bound profession. Departmental regulations flourish, governing many aspects of police work and surrounding them with detailed codes of *shall*'s and *shall not*'s that are often utterly impractical for the officer in the field to obey. At the police academy and in police manuals, officers are taught "the way" to do this or that. The approved procedure remains in their minds as "the way" to do it, even though in practice they soon develop shortcuts that deviate dramatically from that procedure. As a result, police officers frequently fail to do all of the things that it is possible for defense counsel to show on cross-examination were required or expected of them. They are constantly neglecting to file prescribed reports, leaving items uncompleted in the filling out of reports, departing from specified investigative procedures, and so forth. (For example, it seems virtually impossible to train police not to pick up a gun found at the scene of a crime to check whether it is loaded, although the gun may have latent fingerprints on it.)

Thus a relatively productive way to impeach the testimony of a police officer is to set the officer up as an expert in criminal investigation by eliciting the officer's testimony that s/he is one; then to lead the officer into agreeing that certain specified methods described by counsel are proper (or, better still, required by local police regulations) in gathering evidence to be used at trial or in recording observations or the progress of an investigation; then to retrace the officer's direct-examination testimony in detail to demonstrate that s/he deviated substantially from the specified methods, that s/he failed to take various steps which they call for, and that much of the officer's testimony was not written into his or her report at the time of the incident, despite the fact that s/he handles hundreds of cases and intends to use his or her notes to refresh his or her recollection for trial. Counsel will find it helpful to peruse local police instructional manuals, teaching materials used at the local police academy or training center, and standard police texts on criminal investigation to help identify points of error in police techniques.

It is sometimes tempting to try to show that the police have it in for the respondent or are picking on the respondent, but the effort to do so out of the mouths of the police almost never succeeds. *In no event* should counsel ask a police officer "What attracted your attention to the respondent?" or similar questions. The reply is guaranteed to elicit the police officer's experience with the respondent's prior criminal acts and may also elicit damaging rumor. (If police witnesses volunteer prejudicial prior-crime or prior-arrest evidence, as they will frequently seek some pretext to do, a motion for a mistrial is in order. *See State v. Acker*, 133 Hawai'i 253, 279, 327 P.3d 931, 957 (2014) (dictum) ("'the deliberate and unresponsive injection by prosecution

witnesses of irrelevant references to prior arrests, convictions, or imprisonment may generate insurmountable prejudice to the cause of an accused' . . . [and] constitute an 'evidential harpoon' requiring a mistrial" (quoting *State v. Kahinu,* 53 Hawai'i 536, 549, 498 P.2d 635, 643 (1972))); *see id*. at 548-49, 498 P.2d at 643-44 and cases cited; *cf*. *Bowen v. Eyman,* 324 F. Supp. 339 (D. Ariz. 1970).)

In general, cross-examination of police witnesses should be very specific, calling for short *factual* answers and giving the witness no leeway to stray. Counsel should ask: "When you first caught sight of the man, what clothing did you observe that he was wearing?" not "What was the man you saw wearing?" (because the latter question will elicit a minute description of everything that the officer observed about the man's clothing during his first sighting or at any later time); "What specifically did you see Pat do next?" not "What happened next?"; "What words did Susan use in telling you about the shooter's statement?" not "What did Susan tell you the shooter said?" If a police officer begins to describe what Pat did next by saying "Pat appeared to be . . ." – or begins to describe Susan's communication by saying "She indicated that . . . " – counsel should immediately interrupt and ask the judge to instruct the witness to answer the question, not to state his or her opinion. And counsel should never ask *why* a police officer did something. Counsel should ask only what the police officer did and the factual circumstances under which s/he did it. Counsel can argue in closing argument that the police officer did it for the wrong reasons if that is a permissible inference from the officer's actions in the circumstances. But trying to elicit a police officer's reasons from the officer's own mouth will get counsel nothing except self-serving protestations of angelic good faith, coupled with everything damning to the respondent that the officer can think of.

§ 31.03 ACCOMPLICES TURNED STATE'S EVIDENCE

When accomplices turn state's evidence and testify for the prosecution, their testimony is usually damning. Ordinarily, the surest way to undermine an accomplice's testimony is to show that s/he has some motive for fabricating. Standard techniques are to demonstrate (a) the consideration s/he is getting or expecting to get from the prosecution for testifying (see the following paragraph); (b) his or her prior criminal record or bad character for truthfulness or both, within the limits allowed by local law and constitutional doctrines (see § 30.07(c) *supra;* §§ 31.11-31.12 *infra*); (c) the inconsistent story that s/he told (accomplices almost always do) when first taken into custody, denying any complicity in these crimes (see § 31.10 *supra*); and/or (d) any reasons s/he has for "harbor[ing] animosity towards the [respondent]" (*cf. Lloyd v. State*, 909 So. 2d 580, 581 (Fla. App. 2005); *State v. Ofield*, 635 S.W.2d 73, 75 (Mo. App. 1982)).

An accomplice should ordinarily be asked whether charges against him or her have been filed; if so, whether they have been dropped or reduced and whether s/he is aware of any discussions that have been had regarding the possible dropping or reduction of those charges or regarding the sentence s/he might receive. *See*, *e.g.*, *State v. Summers*, 506 S.W.2d 67, 71 (Mo. App. 1974) (defense counsel should have been permitted to ask an accomplice, testifying as a prosecution witness, "'how many burglaries have you participated in?'" because this question

"constituted a foundation to subsequently show that the witness had been promised consideration or leniency by the state concerning other burglaries in return for his cooperation in the instant case, likewise bearing on the witness' [*sic*] credibility"); *Parker v.State*, 657 S.W.2d 137 (Tex. Crim App. 1983). (If the accomplice lies, the prosecutor is constitutionally obliged to disclose the truth or suffer the invalidation of the respondent's conviction when the deal with the accomplice is kept and the truth is discovered. *Napue v. Illinois,* 360 U.S. 264 (1959); *Giglio v. United States,* 405 U.S. 150 (1972); *DeMarco v. United States,* 415 U.S. 449 (1974) (per curiam); *Jenkins v. Artuz*, 294 F.3d 284 (2d Cir. 2002); *Hawkins v. United States,* 324 F.2d 873 (5th Cir. 1963); *see Ring v. United States,* 419 U.S. 18 (1974) (per curiam). If a respondent is convicted at a trial at which an accomplice has testified for the prosecution and has denied making any deal with the authorities in exchange for his or her testimony, counsel should keep a close eye on the disposition of the charges against the accomplice – which are usually left pending until after s/he has testified and then fairly promptly disposed of – so that counsel can make a new trial motion on *Napue* grounds as soon as evidence of a *Napue* violation appears.) Stressing the maximum penalties to which the accomplice could have been sentenced had there been no deal is one way to impress upon a jury (or a judge in a bench trial) why someone in the accomplice's predicament would lie. *See*, *e.g.*, *Henry v. State*, 123 So. 3d 1167 (Fla App. 2013), summarized in § 31.01(a) third paragraph *supra*. Even in the absence of a provable testimonial agreement between the turncoat accomplice and the prosecutor, defense counsel may ask the accomplice whether it is not true that s/he has been charged with designated offenses and that those charges have not yet been resolved (*see Washington v. United States,* 461 A.2d 1037 (D.C. 1983)), so as to lay the foundation for arguing in closing that the witness "harbor[ed] a hope of better treatment if he testified as he did" (*id*. at 1038)). *See also*, *e.g.*, *State v. Clark*, 364 S.W.3d 540, 544-45 (Mo. 2012) (defense counsel was entitled to cross-examine a prosecution witness about having pleaded guilty to unrelated charges and his hope that "he would reap a benefit" from testifying for the state even though there was no plea agreement to that effect; the witness's "belief that his testimony would have a favorable effect on future sentencing may have been mistaken or speculative, but what is important is what he believed.").

One caution should be observed in exploring the background of relations between an accomplice and the respondent in an effort to show personal animosity. If counsel's interview of the client reveals that the client and the accomplice know each other primarily through their commission together of crimes in addition to the one for which the respondent is presently being tried, counsel should ordinarily refrain from cross-examining the accomplice about his or her feelings toward the respondent, in order to avoid the risk of eliciting otherwise inadmissible "other crimes" evidence (see § 30.07(a) *supra*). Sometimes it will be sufficient to phrase questions carefully and to instruct the witness to answer certain of them yes or no. But this is risky and should not be undertaken unless counsel has first requested and obtained from the court (a) an admonition to the witness not to go beyond yes-or-no answers to these questions on cross, and (b) a ruling *in limine* precluding the prosecution from asking the witness on redirect any questions that will bring out the respondent's participation in other crimes (*see* §§ 7.03(c), 30.02(a)(1), 30.02(a)(2) *supra*).

§ 31.04 COMPLAINANTS IN THEFT CASES

Many complainants who are victims of theft have no personal knowledge of the accused. Their only function is to identify the stolen items as those that were taken from them. If the item is unique, no cross-examination is ordinarily warranted. See § 31.01(b) *supra*. Indeed, if the complainant is particularly vulnerable or personable, a stipulation is usually advisable. See § 30.02(b) *supra*. If the item is a standard model, the complainant should be examined cordially about the basis for his or her claim that s/he recognizes this particular item as the one stolen. Were there others like it at the source from which s/he purchased it? Has s/he seen others like it for sale or in the possession of family members or friends? This is all the cross-examination that is needed to lay the foundation for counsel's closing argument that the object in question is no different than those that can be found anywhere, by the hundreds.

§ 31.05 COMPLAINANTS WHO IDENTIFY THE RESPONDENT, AND OTHER IDENTIFICATION WITNESSES

Frequently an identification of the respondent as the perpetrator is made by a complainant or eyewitness who did not know the perpetrator and viewed him or her only momentarily. The in-court identification usually follows an out-of-court identification in a pretrial show-up, lineup, or photographic identification procedure. Chapter 25 *supra* describes the various constitutional and state-law challenges that can be made to testimony concerning out-of-court identifications as well as to in-court identifications that are tainted by an earlier, improper out-of-court identification process or that are otherwise unreliable. As explained in Chapters 22 and 25, many jurisdictions provide for a pretrial evidentiary hearing on a motion to suppress identification testimony, at which counsel can cross-examine the police officer who conducted the identification procedure and often the complainant or eyewitness who identified the respondent. Thus, by the time of the trial, counsel will frequently have had a prior opportunity to cross-examine the identifying witness and will know which cross-examination questions work and which do not. See §§ 22.02, 22.04(b), 22.04(c) *supra*.

Complainants who were victimized while confronting their assailant and who identify the respondent are best examined with an emphasis on the speed of the transaction, any bad lighting and obstructions to vision, the lack of opportunity to observe carefully under the circumstances, and the fear that they were feeling at the time and that impeded detached and accurate appreciation of events or attention to the features of the assailant. See § 31.01(b), subdivision (1) *supra*. *See, e.g.*, *People v. Bailey*, 102 A.D.3d 701, 702, 958 N.Y.S.2d 173, 175 (N.Y. App. Div., 2d Dep't 2013). It should be brought out that the complainant never saw the assailant before the few seconds or minutes in question and (if this is so) has not seen the assailant since. The complainant may be portrayed as one who is willing to risk an innocent person's conviction on false self-confidence in a stressful spur-of-the-moment impression.

Any discrepancies between the respondent's appearance at trial and the description of the assailant given to the police by the complainant should be brought out. This can best be done by

(a) asking whether the complainant described the assailant to the police; (b) asking on how many occasions descriptions were given; (c) asking what those descriptions were; (d) reading the description in the police report, unless the complainant relates it accurately, and asking whether that is not more like it; (e) exploring all details of discrepancy; and (f) asking whether the complainant's recollection was not better immediately after the offense than it is now. *Omission* in the original description of salient characteristics of the respondent is significant. *See, e.g.*, *People v. Greene*, 110 A.D.3d 827, 828-29, 973 N.Y.S.2d 239, 241 (N.Y. App. Div., 2d Dep't 2013) (dictum) (defense counsel should have been permitted to cross-examine an eyewitness about the omission of a physical characteristic in his initial description of the perpetrator: the witness, who testified at trial that the defendant's "'squinting,' 'partly closed' left eye" was "a significant factor in his identifying the defendant as the assailant," could properly be impeached on the ground of the "omission of this observation of the assailant's appearance when he described the assailant to the police.").

Even if a motion to suppress identification testimony has been litigated and denied, counsel is entitled to present a misidentification defense at trial and, in support of that defense, to explore at trial any suggestive police behavior that might have contributed to a misidentification. *Sales v. Harris,* 675 F.2d 532, 539-40 (2d Cir. 1982) (the trial judge erred by instructing the jury, on the basis of a pretrial suppression ruling, that photographic identification procedures were nonsuggestive as a matter of law); *cf. Crane v. Kentucky,* 476 U.S. 683 (1986) (an accused's constitutional right to present a defense entitles the accused to adduce evidence at trial that his or her confession was coerced even though that issue was resolved against the accused in a pretrial suppression hearing); *and see People v. Santiago*, 17 N.Y.3d 661, 672-73, 958 N.E.2d 874, 883-84, 934 N.Y.S.2d 746, 754-55 (2011) (the trial court abused its discretion and committed reversible error by denying a defense request to call an expert witness to testify at a jury trial regarding the reliability of eyewitness identifications). If the complainant identified the respondent in a lineup or other police-staged confrontation, emphasis should be placed on (1) any circumstances in the identification situation that tended to single out, or "finger," the respondent (Was the respondent exhibited to the complainant alone? If in a lineup, was s/he dressed unlike the others? How much did the others resemble the respondent in gross characteristics?); and (2) any circumstances pointing to police persuasion or suggestion. It is fruitful to explore everything said by the police to the complainant prior to, or at the time of, the identification. But this can be safely done *only* if counsel knows from the pretrial suppression hearing or a *voir dire* hearing that questions on this subject will not elicit damaging answers (*e.g.*, that the respondent had been convicted for earlier similar offenses).

Authorities and sources of information useful in challenging the reliability of eyewitness identifications are collected in §§ 25.03, 11.01(a) subdivision 13, 11.01(b) third paragraph *supra*; see also § 6.02(b) fourth and fifth paragraphs *supra*.

§ 31.06 THE COMPLAINANT IN A RAPE OR OTHER SEXUAL OFFENSE

When cross-examining a complainant in a sex-offense prosecution, counsel should

ordinarily adopt as solicitous and kindly a manner as possible. This is not merely a matter of showing consideration for an individual who has been traumatized; the factfinder (whether judge or jury) is likely to feel sympathy for the complainant, so that a belligerent or bantering tone on counsel's part will probably arouse the judge's or jury's ire. This is especially true when the complainant is a child. See § 31.08 *infra.*

The traditional defense technique of showing the victim's prior sexual history and lack of chastity has been prohibited or limited in numerous jurisdictions by statutes, court rules, and appellate decisions usually called generically "rape shield laws." *See, e.g.*, *Michigan v. Lucas*, 500 U.S. 145, 146-47 (1991); I. Bennett Capers, *Real Women, Real Rape*, 60 U.C.L.A. L. REV. 826 (2013), and sources cited). Even where the technique remains available, it is likely to backfire with judges and jurors who subscribe to the now-largely-accepted view that prior sexual history has nothing to do with whether one has or has not been raped. *See, e.g., McLean v. United States,* 377 A.2d 74 (D.C. 1977) (upholding a trial judge's exclusion of evidence of the complainant's reputation for unchastity and prior sexual relations with persons other than the accused because this evidence was insufficiently probative of consent). Some uses of evidence of a rape complainant's sexual behavior on occasions other than the one at issue are permissible and may be persuasive. *Compare State v. Lavalleur*, 289 Neb. 102, 108, 111, 853 N.W.2d 203, 210, 212 (2014) ("Nebraska's rape shield statute," which "bars '[e]vidence offered to prove that any victim engaged in other sexual behavior' and '[e]vidence offered to prove any victim's sexual predisposition,'" did not apply to defense counsel's intended cross-examination of the complainant about her "romantic relationship . . . with another woman" in order to "establish that [complainant] M.J. had a motive to falsify her accounting of the events"); *State v. Montoya*, 333 P.3d 935, 937, 944 (N.M. 2014) (the rape shield law did not bar defense counsel's intended cross-examination of the complainant about her past sexual relationship with the defendant: "Defendant does not argue that because of 'make-up sex' in that past, Victim must have intended consensual 'make-up sex' on this occasion. Defendant's theory goes not to Victim's propensity or her state of mind; it goes solely to his own thinking (specific intent) in light of an alleged pattern of conduct and understanding between the two parties in the context of allegedly similar circumstances. Defendant was free to point out that once he realized that the facts and circumstances were not similar to a pattern of 'make-up sex,' his sexual advances ceased." *Id*. at 944. "The rape shield law should not serve to protect the prosecution and its characterization of a case, especially when . . . concerns regarding Victim's embarrassment and harassment are minimal." *Id*.). Local precedents and practice should be consulted.

There are essentially three defenses in rape cases: (i) misidentification; (ii) fabrication; and (iii) consent.

In cases in which the defense is misidentification, counsel should cross-examine the complainant on the factors that prevented the complainant from getting a good look at the assailant: it was dark out; the complainant's face was covered; the assailant's face was covered; the complainant was so terrified as to be unable to focus meaningfully on the perpetrator's face; and so forth. See § 31.05 *supra* and the cross-references there. Whenever a misidentification

defense is presented, it is extremely important that counsel speak with the prosecution's DNA and serology experts (see §§ 6.02(b), last two paragraphs, 11.02 *supra*) and consider retaining defense experts as consultants and potential expert witnesses (see Chapter 11).

In cases in which the defense is fabrication (either that there was no sexual act at all or that the complainant is deliberately blaming the respondent for a sexual act committed by someone else), counsel will have to establish that the complainant bears a severe enough bias or grudge against the respondent to motivate a false charge of this magnitude. *See Sussman v. Jenkins*, 636 F.3d 329, 358-59 (7th Cir. 2011).

In cases in which the defense is consent (or, more precisely, in which counsel plans to argue that the prosecution has not proved the element of lack of consent beyond a reasonable doubt), counsel should stress any objective manifestations of consent – words spoken by the complainant or acts committed by the complainant that are consistent with consent. Unused opportunities for escape or outcry should also be brought out.

If the respondent is charged with a sexual offense against a minor, the applicable statute or caselaw usually specifies that consent is not a defense. Accordingly, the cross-examination will need to pursue any available evidence of fabrication or misidentification. See also § 31.08 *infra*.

§ 31.07 THE MUTUAL ASSAULT COMPLAINANT

In assault cases arising out of fights, cross-examination should emphasize the aggressiveness of the complainant. If the complainant can be made, while being cross-examined, to express hostility to the respondent or counsel, that sort of display is useful. Sometimes it can be elicited by a slightly abrasive or sarcastic manner of examination.

When favorable, the comparative size of the complainant and respondent, any disparity in their weapons, and any disproportion in the numbers of their allies should be developed. The complainant's ability to avoid the affray should also be developed, especially in cases involving charges of assault and battery on police officers. A police officer with a nearby radio to call for assistance, a partner to help quiet a situation, and training in handling arrests and disturbances should rarely have to resort to much physical force to control a juvenile. This can be pointed out in closing argument if the underlying facts are elicited on cross-examination. Counsel should remember that juries seldom apply the technical rules of self-defense in mutual assault cases and are rather prone to balance the equities and vote for the underdog.

§ 31.08 THE CHILD COMPLAINANT OR WITNESS

The subject of children's competency to testify is covered in § 30.05 *supra.*

In cross-examining child witnesses, counsel must treat them with the consideration that

counsel would want to have extended to his or her own child, since the factfinder (whether jury or judge) will resent any treatment harsher than that which they would want extended to their children. Moreover, gentle methods and a considerate tone are most likely to win the confidence of the child and to establish that counsel is not the child's enemy. If the child witness responds to counsel's solicitous manner with recalcitrance or belligerence, then the factfinder will tolerate counsel's employment of a somewhat more aggressive manner.

Any young child's testimony can be attacked in one of two ways. If it is detailed, it smacks of something "pat" or "rehearsed," and counsel should stress the extent of the child's pretrial discussions of the case with parents, police, social workers, therapists, and the prosecutor. If it is sketchy, *that* should be emphasized in order to depict the child as one whose vagueness demonstrates a general unreliability arising from a failure to appreciate the significance of the whole matter.

§ 31.09 PROSECUTION EXPERTS

Cross-examining an expert witness is ordinarily a difficult and risky business. Most experts who testify are also expert testifiers, and counsel who attacks them needlessly does so at the peril of being made to look like a knave or a fool. In a jury trial especially, these appearances can prove far more harmful to the respondent's case than is the substance of the expert's testimony.

The general procedure for qualifying a witness as an expert is discussed in § 33.12 *infra*. When the prosecution calls a witness whom defense counsel anticipates that the prosecutor will attempt to qualify as an expert, counsel should consider whether to stipulate to the witness's qualifications. See § 30.02(b) *supra*. A stipulation will render unnecessary the standard qualifying routine (see § 33.12(a)) which – in addition to serving its technical function of bringing the rules of expert testimony into play – may make the witness come across as impressive and thereby enhance his or her persuasiveness to the trier of fact. If counsel's appraisal of the witness's credentials and demeanor suggest that this is the case, a stipulation is usually wise. If the witness's technical qualifications are doubtful or if his or her exposition of them is likely to appear self-touting, pompous, or otherwise unattractive, counsel should usually let the prosecutor proceed with the qualifying routine. In a jury trial, counsel should come to the bench (see § 30.02(a)(2) *supra*) to make whatever objections and arguments s/he may have regarding a prosecution expert's qualifications; and if counsel chooses to cross-examine the witness as a basis for those objections, s/he should ask that the jury be sent out during this examination (see §§ 30.02(a)(2), 30.02(a)(3) *supra*, 34.05 *infra*). In the event that the witness is permitted to testify as an expert, counsel may later want to point out any weaknesses in the expert's credentials or experience as grounds for disparaging his or her observations and conclusions; and counsel will not want the jury to hear this aspect of closing argument as a rehash of a mid-trial open-court colloquy in which counsel made similar points to which the judge responded by ruling the witness a qualified expert. (Jurors are unlikely to understand that the credentials for expert qualification are minimal and that the judge's ruling does not constitute

an endorsement of an expert's worth.) When defense investigation has disclosed potentially fatal defects in a prosecution expert's qualifications, a pretrial motion *in limine* to preclude his or her testimony may be in order. See §§ 7.03(c), 30.02(a)(1), 30.02(a)(2) *supra*. However, counsel should keep in mind that it is often a better defense strategy to permit the prosecution to go to trial with a dubiously qualified expert – and to use the expert's lack of qualifications as a ground (among others) for asking the trier of fact to discredit his or her opinions – than to unhorse a prosecution expert before trial and alert the prosecutor to the need to retain a more persuasive one.

Counsel should ask that the prosecution state specifically *in what field* it seeks to have a witness qualified as an expert, and should ask the judge to include a specification of the field of expertise in any ruling qualifying an expert. Whether through carelessness or craftiness, prosecution experts often offer opinions that exceed the bounds of their field of qualification. Counsel wants to be in a position to object to these. *See*, *e.g.*, *Commonwealth v. Montavo*, 439 Pa. Super. 216, 223, 653 A.2d 700, 703-04 (1995) ("Trooper Bozich should not have been allowed to testify concerning a matter which was beyond the scope of his qualification as an expert and which was not beyond the ken of lay jurors. Accordingly, we reverse and remand for a new trial because of the severely prejudicial effect of permitting the arresting officer to state expressly that he was convinced that appellant was involved in narcotics trafficking."); *Gabaree v. Steele*, 792 F.3d 991, 998, 1000 (8th Cir. 2015) ("we do not think it reasonable not to object when an expert witness tells the jury he believed the girls were truthful when speaking with a different doctor. Dr. Kelly's testimony, in fact, was inadmissible bolstering of other witnesses (the girls) and, as the state court recognized, should have been excluded after a proper objection. . . . ¶ Dr. Sisk testified that Gabaree, if he was following the beliefs he expressed to Dr. Sisk, was 'probably abusing or neglecting the children,' including by using them to meet his sexual needs. Like Dr. Kelly's testimony, Dr. Sisk's opinion improperly concluded for the jury that Gabaree had acted on his expressed beliefs and sexually abused his children. His testimony, with proper objection, would have been excluded. ¶ This testimony improperly drew a conclusion about Gabaree's actions that was the jury's to make.").

In general, an expert should not be cross-examined at any length unless s/he has substantially contributed to the prosecution's case or hurt the defense. Experts whose testimony supports minor or technical prosecution points may be passed without cross-examination or asked a few questions designed to demonstrate the narrow scope of their testimony (see § 31.01(b) *supra*).

An expert whose testimony is significantly damaging must usually be cross-examined, but it is often wiser to attack him or her on some narrow point on which s/he is particularly vulnerable – and subsequently to urge in closing argument that the expert's failure on this point demonstrates ineptitude or carelessness that makes the expert's other views unworthy of credence – than to attack the expert broadside in the cross-examination itself. *Cf.* John T. Philipsborn, *Feature: When Fine Print Matters; Reviewing Mental Health Assessment and Testing-Related Literature and Test Manuals is a Key to Effectively Preparing and Examining Mentral Health*

Experts, 37 CHAMPION 40 (Feb. 2013). When there are no demonstrable flaws in the expert's methodology or reasoning, cross-examination should ordinarily be limited to asking whether the expert's conclusions are not simply his or her opinions and whether they do not depend on fact *A* or fact *B,* which the expert has been told by others in the course of his or her investigations or which s/he has been asked to assume hypothetically in court. Rebuttal evidence can then be addressed to specifics – to showing that fact *A* or *B* may not be true or that the witness's expert opinion differs from that of equally reputable experts.

An expert is frequently best cross-examined by confronting him or her with the fact that s/he differs from another expert and asking for an explanation of the disagreement. S/he will tend to do one of three things, all helpful to the cross-examiner: (a) display dogmatism by asserting that s/he is right; (b) display indecisiveness by admitting that it is a matter of a reasonable difference of opinion; or (c) attempt a technical resolution of the conflict and so lose the understanding of the factfinder (whether jury or judge).

Preparation for cross-examination of an expert imperatively requires that counsel (a) obtain the expert's report or the substance of the expert's testimony by pretrial investigation or discovery (*see* §§ 9.07(c) subdivision 3, 11.02 *supra*); (b) obtain the original materials which the expert examined or analyzed (*see* §§ 9.07(c) subdivision 1); (c) obtain the expert's c.v. (*see* § 11.02 *supra*); and (d) consult with a defense expert who can help counsel to (i) understand what the prosecution expert is saying, (ii) find holes in it, and (iii) identify recognized standard texts containing assertions of opinion inconsistent with those of the prosecution expert (see §§ 11.01(b), 12.08 *supra*).

Armed with an inconsistent statement in a reputable textbook, counsel should ask the prosecution expert: (1) whether s/he recognizes the text as a reputable standard work; (2) whether s/he has read it; and (3) whether s/he consulted it in preparing his or her testimony for trial. [If s/he has read, or if s/he has used, the book, s/he should be asked: (4) whether it supports the opinion that s/he has given.] S/he should then be read specific passages from the text and asked to answer, with a yes or no: (5) whether s/he agrees with the statement just read; (6) whether it supports the opinion to which s/he has testified; and (7) whether it is not, in fact, inconsistent with the opinion to which s/he has testified. (In jury trials, it is especially important to press for a yes-or-no concession of inconsistency, since the jury will understand this response but may not understand the expert's direct examination. If the prosecutor objects to the forcing of the witness to answer yes or no, counsel should remind the court that the prosecutor will have an ample opportunity to let the witness explain on redirect.)

If no standard texts can be found on which to base this sort of examination, conflicting opinions can be brought in by asking whether, if another reputable expert had made a study of the matter and concluded that . . . [*describing the conclusion of the defense expert*], the witness would think that such a conclusion was beyond the range of reasonable expert judgment. If the prosecutor objects that the question lacks foundation, counsel should offer to connect it up or, alternatively, ask for leave to recall the prosecution's expert for cross-examination following

testimony by the defense expert.

Counsel should have the defense expert in court throughout the testimony of the prosecution expert (see §§ 11.01(b), 12.08(b), 27.11 second paragraph *supra*) and, at the conclusion of the latter's direct examination, should request a recess to confer with the defense expert in order to prepare for cross. (In jury trials this request should be made at the bench so that if the defense expert is unable to discern any openings for productive cross-examination, it will not appear to the jury that the defense expert has been consulted and has given the prosecution's expert a clean bill of health.) After conferring with the defense expert, counsel should decide whether points of vulnerability in the testimony of the prosecution expert are best assailed by (1) cross-examining the prosecution expert or (2) having the defense expert do a book review of the prosecution expert's testimony when the defense expert testifies or (3) arguing in closing argument that the conclusions of the prosecution expert rest upon incorrect or unproved factual assumptions or upon illogical reasoning or (4) arguing in closing that the expert's basic methodology – or his or her entire field of purported expertise – is too untested or too unreliable for credence or (5) more than one of these methods.

Much forensic-science evidence is less trustworthy than has been traditionally assumed. There is a burgeoning academic and popular literature criticizing junk science. *See*, *e.g.*, COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCES COMMUNITY, NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009); ERIN E. MURPHY, INSIDE THE CELL: THE DARK SIDE OF FORENSIC DNA (2015); Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163 (2007); Jennifer E. Laurin, *Remapping the Path Forward: Toward a Systemic View of Forensic Science Reform and Oversight*, 91 TEX. L. REV. 1051 (2013); Simon A. Cole, *Response: Forensic Science Reform: Out of the Laboratory and into the Crime Scene*, 91 TEX. L. REV. See Also 123 (2013); Michael Shermer, *Can We Trust Crime Forensics?*, SCIENTIFIC AMERICAN, September 1, 2015, http://www.scientificamerican.com/article/can-we-trust-crime-forensics/; Brandon L. Garrett, *The Genetic Panopticon*, BOSTON REVIEW, March 17, 2016, http://bostonreview.net/us/brandon-garrett-dna-crime-lab-forensics?utm_content=buffer0e77e&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer. Studies evaluating forensic-science techniques can be located through, *e.g.*, The Wrongful Convictions Blog, http://wrongfulconvictionsblog.org/category/junk-science/, and The Innocence Project Website, http://www.innocenceproject.org/causes-wrongful-conviction/unvalidated-or-improper-forensic-science. Media exposés of crime-lab scandals and anecdotes about erroneous convictions based on specious scientific evidence have made judges and juries increasingly skeptical about the validity of prosecution expert testimony. Conversely, the glamorous high-tech CSI shows that dominate TV drama have set a high standard for forensic-science performers. These development can favor the defense in either of two ways. Defense expert testimony book-reviewing the prosecution's scientific case (questioning the performance of the prosecution experts in the particular case at bar or more generally debunking the sub-field of forensic scientific involved) may play well with triers of fact. And even without presenting defense evidence, counsel may be able to shake a

trier's confidence in the prosecution's scientific proof by adverting in argument to well-advertised miscarriages of justice based on similar sorts of proof, or by suggesting that the prosecution's experts fell far short of the exacting standards that the trier is entitled to demand in these days of scientific sophistication.

Counsel should *not* routinely cross-examine on every point of a prosecution expert's testimony that counsel intends to dispute. Often, a critical review of the prosecution expert's reasoning by the defense expert, or even a critical review by defense counsel in closing argument, invoking the common sense of the factfinder to reveal the shortcomings of the prosecution expert's reasoning, will be more effective than attempting to obtain concessions of error from a hostile expert witness on cross.

§ 31.10 IMPEACHING PROSECUTION WITNESSES WITH THEIR PRIOR INCONSISTENT STATEMENTS

One of the most convincing ways of impeaching any witness is by confronting him or her with a prior inconsistent statement. This is permissible in all jurisdictions. *See, e.g.*, *United States v. Mergen*, 764 F.3d 199, 206-07 (2d Cir. 2014); *Mendenhall v. State*, 18 So. 3d 915 (Miss. App. 2009). In many cases counsel will have prior statements by a prosecution witness – either because a written or an oral statement was taken by the police or prosecuting authorities and has been turned over to defense counsel by the prosecution (see §§ 9.07(c), 27.12(a)(1) *supra*) or because a defense investigator has interviewed the witness and obtained either a written or an oral statement (see § 8.12 *supra*). A prosecution witness can be impeached with a prior inconsistent statement by asking the following series of questions:

(1) "Now, on direct examination, you stated that . . . [repeating the statement verbatim]?"
(2) "Have you ever given [*or* told] anyone a different version of that event [*or* "those facts" *or* "that description of the mugger" *or* "who spoke first" *or whatever*]?"
(3) "You did discuss the matter with Officer *X* [*or* "You did testify at the preliminary hearing in this case" . . . *or whatever*], did you not?"
(4) "That was on . . . [date] at . . . [place]?"
(5) "Was anyone else present, do you remember?"
(6) "Do you remember that *Y* was there at that time?"
(7) "Did you make a statement at that time relating to the event [*or* "the facts" *or whatever*] that was the subject of your testimony on direct examination in which you said . . . [repeating the statement verbatim]?"
(8) "Was the statement you made on . . . [date] honest and truthful, so far as you know?"
(9) "Your memory would have been fresher then than it is now, would it not?"

[In the case of an oral statement]:

(10a) "And at that time, did you not say . . . [reciting the inconsistent statement]?"

[In the case of a written statement]:

(10b) "Was that statement written down, do you know?"
(11) "Who wrote it down?"
(12) "And did you read the statement that *Z* wrote down?"
(13) "Did it accurately record what you said at that time?"
(14) *[If the statement is signed]:* "Did you sign the statement?"

Counsel should now have the statement marked as an exhibit for identification.

(15) "I show you the document marked defense exhibit number 1 for identification. What is that document, if you know?"
(16) "Is that the statement which you made on . . . [date] and which *Z* wrote down?"
(17) [If the statement is signed]: "Directing your attention to page 2 of defense exhibit number 1 for identification, at the bottom of the page: Is that your signature?"
(18) "Directing your attention to page 2, line 7, did you not state at that time, quote . . . [reading inconsistent statement], end quote?"

The following questions should be asked *only if* it is clear that the witness will not be able to reconcile the two statements or to explain the earlier one away persuasively:

(19) "The statement I have just read, which you made on . . . [date], was not the same as your testimony on direct examination here in court today, was it?"
(20) "Was the statement that you made on . . . [date] a lie?"
(21) "Were you hiding something or trying to cover something up when you made it?"
(22) "Then your testimony on direct examination has changed from your earlier truthful statement on this subject, hasn't it?"

[If counsel wants to take up additional inconsistencies]:

(23) "Now was there anything else in your testimony on direct examination that was not accurate?"
(24) "Was there anything else that was inconsistent with your statement on . . . [date]?"

Counsel should now repeat questions (18)-(22) for each inconsistency, omitting questions (19)-(21) if the witness is personable or if the inconsistency is subtle.

In the federal courts (*see* FED. RULE EVID. 613(a)) and in some state jurisdictions, it is permissible to cross-examine a witness concerning prior inconsistent statements without showing or disclosing the statement to the witness. Where this is allowed, it may be more effective for counsel to paraphrase than to quote the prior statement, particularly when a quick-minded

witness assisted by the exact text could seize upon details to reconcile it with his or her present testimony.

Counsel should ordinarily not impeach a witness with prior statements unless the statements clearly contradict points of some importance in the witness's testimony. Confronting a witness with hypertechnical or trivial inconsistencies appears to be mere carping and usually does more harm to counsel's credibility than to the witness's. The principal exception to this rule is the case in which there are numerous minor inconsistencies in the prior statement or statements of a witness who could not be honestly mistaken (such as an accomplice turned state's evidence) and whom counsel is therefore attempting to portray as a deliberate liar.

If a prosecution witness admits having made a prior inconsistent statement, no additional ("extrinsic") evidence on the subject is permitted. *See*, *e.g.*, *Aikins v. State*, 256 Ind. 671, 271 N.E.2d 418 (1971). Traditionally, if a witness *denies* having made a prior statement and if the statement is "non-collateral" (or, in some jurisdictions, "material"), counsel is permitted to present extrinsic evidence in the defense case to prove that the witness did make the statement. *Compare State v. Valentine*, 240 Conn. 395, 397-405, 692 A.2d 727, 730-34 (1997), *and Pearce v. State*, 880 So. 2d 561, 568-70 (Fla. 2004) (dictum), *with State v. Walsh*, 731 A.2d 696, 698 (R.I. 1999). The Federal Evidence Rules and the rules in many States that have followed the lead of the Federal Rules eliminate the requirement that the prior statement be "non-collateral." FED. RULE EVID. 613(b) provides: "Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires." A prior oral statement may be proved by the testimony of anyone who heard it. *See*, *e.g.*, *Elmer v. State*, 114 So. 3d 198 (Fla. App. 2012); *State v. Fossick*, 333 S.C. 66, 508 S.E.2d 32 (1998) (dictum). A prior written statement may be admitted as an exhibit upon proper authentication by anyone who wrote it or saw it written or heard the witness acknowledge it as his or her statement.

If a witness professes not to remember having made a prior statement (rather than expressly denying the statement), the jurisdictions differ on whether the statement can be proved extrinsically. Ordinarily, counsel should respond to protestations of lack of memory by questioning the witness in detail about the circumstances surrounding the witness's making of the statement: "Do you remember that *X* was there at the time?" "This was down in the jail, in the second floor cellblock, do you remember?" "Do you remember that you said . . . [repeating the statement in detail]?" Some jurisdictions permit counsel to hand the witness a prior written statement and ask the witness if that refreshes his or her recollection, even though the document itself is not technically admissible.

§ 31.11 IMPEACHING PROSECUTION WITNESSES WITH THEIR PRIOR CONVICTIONS AND PRIOR [BAD] ACTS

As explained in § 27.12(a)(2) *supra*, some jurisdictions require that the prosecution turn over to defense counsel the judgments of conviction of each prosecution witness who has a prior

criminal record, or at least inform defense counsel about the prior convictions so that counsel can obtain a certified copy of the judgments from the convicting court. Counsel should request discovery of such criminal records – and of information regarding any pending charges or investigations implicating every prosecution witness – even in jurisdictions that do not expressly require this disclosure. Because *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974), and cognate cases cited in § 30.07(c) *supra* entitle the respondent to use these materials for impeachment, they come within the Due Process disclosure requirements of *Brady v. Maryland*, 373 U.S. 83 (1963). *See*, *e.g.*, *Wearry v. Cain*, 136 S. Ct. 1002, 1006-07 (2016) (per curiam) ("the rule stated in *Brady* applies to evidence undermining witness credibility"); section 9.09(a) *supra*. To the extent described in § 30.07(c) *supra*, the defense is also entitled to obtain from the prosecutor, and to use for impeachment, information regarding any prior juvenile adjudications of prosecution witnesses, and any [bad] acts bearing on bias (*see*, *e.g.*, *Lobato v. State*, 120 Nev. 512, 96 P.3d 765 (2004)), or lack of veracity that the witness committed as an adult or as a juvenile (*see*, *e.g.*, *Bennett v. United States*, 763 A.2d 1117 (D.C. 2000); *Thomas v. State*, 422 Md. 67, 29 A.3d 286 (2011)). *And see Taylor v. State*, 407 Md. 137, 963 A.2d 197 (2009) (holding that where the prosecution had presented hearsay testimony of the complainant in a prosecution for sexual assault of a 15-year old, the defendant had the right to present extrinsic evidence of the boy's lying to his father about his sexual experiences on earlier occasions, to impeach the admissible hearsay).

To impeach a witness with a prior conviction, counsel should ask:

> "Are you the Joseph B. Smith who was convicted of the crime of burglary on May 14, 2016, in the Circuit Court for *X* County in the State of *Y*?"

If the witness admits the prior conviction, it neither needs to be nor may be proved extrinsically as well. If s/he denies the conviction, it may be proved by extrinsic evidence. A conviction is ordinarily proved by a certified record of the judgment and through identification of the witness as the convicted person by the testimony of a participant in his or her trial. (Some States accept identity of names as sufficient.)

If the witness does not deny the prior conviction but merely professes not to remember it, the jurisdictions differ on whether the defense is entitled to present extrinsic proof. In any event, counsel can and should question the witness in detail about the circumstances surrounding the conviction and – unless the facts of the crime were less damning than its name – about the underlying events on which the conviction was based. Although these underlying events are ordinarily not admissible if the witness either admits or denies the prior conviction, they are a proper subject of cross-examination of a witness who claims not to remember a prior conviction, provided that counsel frames the cross-examination as an effort to jog the witness's memory. (For example, "Would it refresh your recollection to know that the conviction I am asking you about was for beating John Doe with a tire iron?") Some courts will also permit counsel to hand the witness a certified copy of the judgment of conviction and to ask the witness if it refreshes his or her recollection, even though the document itself cannot be offered into evidence unless the

witness denies the conviction. (When handing the document to the witness, counsel can ask, "Would it refresh your memory of this particular conviction if I show you a certified copy of the judgment of the Circuit Court for *X* County in the State of *Y,* convicting Joseph B. Smith of the crime of burglary on May 14, 2016?") Where the factual details of the witness's conduct underlying a prior conviction or the specifics of a "bad" act admissible for impeachment are significantly more probative of bias or of lack of veracity than the name of the crime or generic description of the "bad act" alone, the constitutional right to confrontation would seem to entitle the respondent to elicit the minutiae. *See Longus v. United States*, 52 A.3d 836, 853-54 (D.C. 2012) ("[T]he trial court's ruling was based on the erroneous belief that cross-examination about the fact of a pending investigation, without allowing defense counsel to probe into and present extrinsic evidence of the underlying facts, satisfied appellant's right under the Sixth Amendment to expose all of Detective Brown's potential biases relevant to his testimony in appellant's trial. This cross-examination was probative. It would have permitted the jury reasonably to infer not only that Detective Brown was motivated to curry favor with the government because he was under criminal investigation, but also that he was not a trustworthy witness as shown by his prior corrupt behavior in the Club U homicide investigation. . . . [D]efense counsel 'was entitled to impeach [the detective's] credibility with both the fact and the subject matter of the investigation.'").

Of course, it is impermissible to engage in this kind of examination unless the questions have a basis in fact, and counsel should be prepared to explain that basis to the court on request. However, the facts relied upon to supply the basis for cross-examining do not need to be provable by legally admissible evidence. *See*, *e.g.*, *Thomas v. State*, 422 Md. at 76-79, 29 A.3d at 290-92.

§ 31.12 IMPEACHING WITNESSES WITH THEIR REPUTATION FOR DISHONESTY

Extrinsic evidence of a witness's general lack of veracity – commonly in the form of "testimony about the witness's reputation for having a character for . . . untruthfulness, or by testimony in the form of an opinion about that character" – is ordinarily admissible for impeachment (*see, e.g.*, FED. RULE EVID. 608(a); *People v. Fernandez*, 17 N.Y.3d 70, 76-78, 950 N.E.2d 126, 130-32, 926 N.Y.S.2d 390, 394-96 (2011)), although local rules relating to this sort of evidence differ and should be consulted. Usually, it is profitless to attack a prosecution witness by this route unless (1) the prosecution witness is critical to the prosecution's case and is uncorroborated on essential points and (2) the defense can present several witnesses – themselves reasonably attractive – to testify to the bad character of the prosecution witness.

§ 31.13 THE PROSECUTOR'S TENDER OF A WITNESS TO AVOID A MISSING WITNESS INFERENCE

Some prosecutors guard against a missing witness inference or instruction (see § 10.08 *supra*) by tendering to defense counsel at trial witnesses whom the prosecution is not going to call. If counsel has not previously interviewed the witness and unless it is clear that what the

witness knows is insignificant, counsel should request a continuance that is adequate to interview the witness privately. Thereafter, counsel may call the witness as a defense witness or may ask leave of court to call him or her as a hostile witness or may request that the court call him or her as a court witness. (See § 33.25 *infra.*)

The latter two procedures are particularly important in jurisdictions that follow the common-law rule forbidding a party to lead or impeach the party's own witnesses. A witness who is found by the court to be "hostile" to the party wishing to present the witness's testimony may be called for questioning as though s/he were on cross-examination and may be impeached by the calling party; and a court witness is called for cross-examination and is subject to impeachment by both parties.

Hostility (that is, adversity to the calling party's interests) must be demonstrated in order to support a request that a witness be called as hostile. Jurisdictions and individual judges vary considerably regarding the kind of showing of hostility that they require. But defense counsel can often obtain some relaxation of the respondent's burden by citing *Chambers v. Mississippi,* 410 U.S. 284 (1973), which holds that the federal Constitution forbids a State to couple rigorous "hostility" requirements with rigid prohibitions against impeaching one's own witness, so as to deprive the accused of any fair opportunity to present vital defensive evidence. See § 33.04 *infra; and cf. Green v. Georgia,* 442 U.S. 95 (1979) (per curiam).

Sometimes prosecutors tender a witness in open court, announcing that they are not calling him or her because the witness's testimony would be "cumulative." Counsel may want to respond by moving for a mistrial on the ground that the prosecutor is seeking to bolster the prosecution's case unfairly by asserting that s/he has unpresented evidence which confirms the testimony of the witnesses whom s/he did present. (By analogy, a prosecutor's assertion that "information not presented to the jury supports . . . [a prosecution] witness's testimony" has consistently been held improper (*United States v. Hermanek*, 289 F.3d 1076, 1098 (9th Cir. 2002) (dictum); *State v. Ish*, 170 Wash. 2d 189, 196, 241 P.3d 389, 392-93 (2010) (dictum); *see also Commonwealth v. Brooks*, 362 Pa. Super. 236, 238, 523 A.2d 1169, 1170 (1987) ("The prosecutor may not argue facts outside the record 'unless such facts are matter of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.'"); § 36.11 *infra*).) In this situation, a refusal by the court to designate the witness as a court witness and allow the defense to question him or her in cross-examination mode, at the least, is an apparent denial of the right to confrontation. See § 31.01(a) *supra.*

In a jury trial, if the prosecutor tenders a witness in front of the jury, counsel should approach the bench and request that the jury go out. If counsel wants a recess to interview the witness, counsel should ask that the jury be excused without being told the purpose of the recess, so that the defense will not be prejudiced if counsel decides not to call the witness. After counsel has spoken with the witness and if counsel is not going to call the witness, counsel may want to move for a mistrial on the grounds mentioned in the preceding paragraph. Alternatively, it may be sufficient (depending on the witness's relation to the case as shown in other testimony) to ask

the court to charge the jury when it returns that:

> Just before the recess there was mention of a possible witness, a [Mr.] [Ms.] _____. The Court and counsel have discussed the matter, and it appears that neither the prosecution nor the defense sees any need for this witness's testimony. I instruct you that you should not infer anything from the fact that the witness was not called and you should not hold that fact against either party or consider it in your deliberations because both sides are agreed that this witness has no information which would be helpful to the jurors' understanding of the case.

Or counsel may prefer simply to announce to the court on the jury's return that if the prosecutor is not going to vouch for the credibility of this witness, the defense certainly does not want to hear the witness.

§ 31.14 PROSECUTION CLAIM OF SURPRISE

Sometimes a prosecutor will elicit nothing incriminating from a witness and will claim "surprise" in order to impeach the witness with a prior statement that *is* incriminating. *Cf.* § 33.24 *infra.* The prior statement is theoretically being used to "neutralize" or discredit the witness's present testimony but is, in fact, the prosecutor's method of introducing inadmissible hearsay.

If the witness in his or her direct testimony has simply refused to answer or has said s/he does not remember, or if the witness has given no testimony affirmatively damaging to the prosecution's case, counsel should resist any attempt to impeach the witness with a prior statement on the grounds (a) that there is nothing to neutralize or to impeach (*see*, *e.g.*, *People v. Villegas*, 222 Ill.App.3d 546, 552-54, 584 N.E.2d 248, 253-54, 165 Ill. Dec. 69, 74-75 (1991) (dictum)), and (b) that the admission of the prior statement will violate the respondent's constitutional right of confrontation (*see Douglas v. Alabama*, 380 U.S. 415 (1965)).

If the witness has damaged the prosecution, counsel should request leave to *voir dire* the witness (in a jury trial, out of the presence of the jury), before the claim of "surprise" is allowed. Counsel should then attempt to establish that the witness has indicated in some way to the prosecutor, before being called, either that s/he did not wish to testify for the prosecution or that s/he would not testify consistently with his or her prior statement or that s/he was going to give testimony of the sort which s/he did, in fact, give. Unless the prosecutor was, in reality, surprised, the prosecutor should not be permitted to claim surprise. *See, e.g.*, *King v. State*, 994 So. 2d 890, 896-98 (Miss. App. 2008); *State v. Cope,* 309 N.C. 47, 305 S.E.2d 676 (1983). If the prosecution is given inconsistent stories by a witness prior to trial, it has a way of getting every legitimate benefit of the witness's possibly favorable testimony, without calling the witness in such a manner as to deprive the respondent of a fair trial and of the Sixth Amendment right of confrontation (see § 31.01(a) *supra*). The prosecution can call the witness out of the presence of the jury and examine him or her. If the witness testifies favorably to the prosecution, there will be

no problem; the prosecutor can then proceed to take the witness's testimony in open court. If the witness does not give the testimony the prosecutor wants, the prosecutor should not put the witness on the stand in the jury's presence, and there will be no occasion of "surprise" or for impeachment. Counsel should insist that this is the proper method of proceeding for a prosecutor who has any inkling that a witness will not give favorable testimony (*see State v. Guido*, 40 N.J. 191, 199-200, 191 A.2d 45, 50 (1963); *cf. State v. McDonald*, 312 N.C. 264, 269-70, 321 S.E.2d 849, 852 (1984)), and that a prosecutor who fails to follow it is not entitled to claim "surprise."