THE ART AND PLAN OF CROSS-EXAMINATION[1]

INTRODUCTION

Cross-examination is a treacherous process, loaded with danger, as so many others have already eloquently stated.[2] Indeed, we hear, read and see so much about what decisive effect cross-examination can have in a borderline case that perhaps we create, quite unintentionally, a most undesirable effect: the paralyzing fear of failure. I hope you will humour me a while today; I want to try to alleviate the fear.

To that end, I begin with this shaping thesis: cross-examination can be effective, even easy, if only the examiner will follow a few simple rules. In advancing this view I wish to make clear that I am not referring to what is sometimes called "friendly" cross-examination, the situation in which the examiner questions an adverse party whose testimony is compatible with or sympathetic to the side represented by the cross-examiner. My thesis is meant to apply in the case of witnesses who are "unfriendly," or opposed to the position advocated by the cross-examiner. I have in mind, in other words, cross-examination which aims to undermine, discredit or impeach the

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1 This paper was initially prepared for and delivered at the *Law Society of Upper Canada's Continuing Legal Education Program* in Toronto on September 24, 1998. Its subject matter includes but also goes beyond my specific topic for today, "Cross-examination: The Tool to tell the Story."

2 Mauet, Thomas A. et. al., *Fundamentals of Trial Techniques*, Canadian Edition (Toronto: Little, Brown and Company, 1984), pp. 199 - 250.
Stuesser, Lee, *An Advocacy Primer*, (Toronto: Carswell, 1990) pp. 115 - 143.
Dublin Charles L., Q.C., *"Cross-Examination before Juries*," in *Special Lectures of the Law Society of Upper Canada 1959* (Toronto: Richard De Boo Limited, 1959), pp. 101-117.

recipient.

The technique I propose requires acceptance of two pre-conditions. The first is a commitment to abandon the notion that cross-examination has to be "won," that the ground must shake beneath the feet of the battered, beaten witness rendering him a withering mass of worthless protoplasm. Rarely does a single question or series of questions lay waste the victim or render him unworthy of *any* credit. Good cross-examination proceeds from more modest and realistic expectations. Good cross-examination is an instrument for communicating to the judge or jury with candour, clarity and concision. There is the key to the method: cross-examination as an aid to communication between the examiner and the trier of fact. Once this notion is grasped, fear falls away because there no longer exists any need to feel that the witness has to be vanquished or pilloried. Instead, the cross-examiner uses the occasion to tell a story, the cross-examiner's version of the narrative.

The second prerequisite for the success of the method is the eschewing of the notion that cross-examination succeeds only when the examiner elicits *the* desired answer, the answer the examiner most wants or expects to hear. No. It is better to think of the cross-examination as simply a tool, a device, to reveal *an* answer, not *any* answer, but an answer consistent with the examiner's theory of the case. The key here is that the answer elicited in cross-examination is framed or determined by the examiner well before the trial. At some point in the preparation stage the advocate must be able to articulate why her client should win. She should be able to state clearly, simply, and directly what happened in the case and why. Good cross-examination will constitute a reaffirmation and a reiteration of her understanding of the case.

Again, then, by way of introduction, the two prerequisites of the method I wish now to lay

out for your consideration are these: the cross-examination is not "won" but used to tell a story; the "story" told by and through the cross-examiner's questions will be powerful to the extent that the examiner knows it in full before the trial starts and uses each question to advance a particular facet of it.

THE PURPOSES OF CROSS-EXAMINATION

The manifold purposes of cross-examination are well known. Chief among them are these: to discredit or impeach the testimony of a witness; to support some evidence favourable to the side of the cross-examiner; or to provide some independent evidence favourable to the position of the cross-examiner. While these are laudable objectives, I prefer to think of the single most important goal of the cross-examination this way: to tell a narrative so effectively that the trier of fact must feel constrained, however reluctantly, to let you win.

The challenge, and the satisfaction, is to communicate so persuasively as to convince the trier of fact to arrive at the "desired" result, the one most favourable to the client. The good examiner seizes upon every statement, every argument, every question of every witness to tell his side of the story. Because he is permitted to ask leading questions in cross-examination, he can use the occasion to tell the story clearly, concisely, sharply, without interruption.

Think about this: the rules of cross-examination are almost too good to be true. You can say exactly what you think happened to every witness, regardless of their answers. You can continue this way until you have told the complete story as you believe and want the jury or judge to know it. And when you are finished with the witnesses, really finished with them and have told your story through them, then you can turn to the judge or jury at the end of the trial and say with

confidence that everything you suggested in cross-examination is true and should be accepted as true. Can it get any better than this?

THE PLAN

Before the victory, before the euphoria, however, there comes the plan and the work of the plan. Assume for a moment that, like a few lawyers I know, you are inclined sometimes to a cynical view of things and that in this frame of mind you persuade yourself that some judges actually reason backwards, listening to all of the evidence, determining which side they think should win, then rationalizing their decision by emphasizing those portions of the evidence which accord with their conclusions. Now I am proud to say that I am no cynic, but I know people who are and they insist that the situation I have just described occasionally occurs. Even if it does, all the more reason to have a plan of cross-examination. Even before the trial starts, know what you want to say to the judge or jury at the end. If, for example, your defence of John Smith at a criminal trial is alibi, your closing comments to a jury might be:

> John Smith did not commit this robbery. He does not say that a robbery did not take place because clearly a robbery occurred. His defence is that *he* did not commit this robbery. Moreover, he *could not* have committed it. He was in another city on the date and at the time that this robbery was committed. Therefore, you should acquit him.

Knowing that these are the words you are going to speak at the end of the trial, the plan must be that every question you ask in cross-examination will tell the story of the alibi. So to each

witness in cross-examination you may put questions such as these:

Q. You did not see John Smith at the bank on July 10?

(Note: In this method you do not have to embellish the question, making it longer and more awkward, by preceding the substance of it with worthless fluff such as "I would like to suggest to you that" or "What would you say if I suggested to you that . . ." All fluff. Avoid the fluff.)

Q. You did not see John Smith at the bank on July 10?

A. It was him.

Q. It could not have been him because he was in Kitchener on that date and at that time?

A. I thought it was him.

Q. If he was in Kitchener on that date and at that time he could not have been the person you saw at the bank?

A. Yes, I guess that would be true.

Having a plan of cross-examination is nothing other than having a plan about and knowing where you are going in the trial. Even allowing for unforeseen circumstances and the inevitable ebb and flow of the trial process, you should be able to ask questions that permit you to argue at the end of the case the narrative your client wishes to tell, a narrative which, if believed, will lead any judge or jury to decide in his or her favour. Thus, to the difficult question "What to ask?" the answer is: only those questions which contain facets of or elicit responses compatible with your theory of the case.

The Art of the Plan

Bearing in mind that the purpose of cross-examination is to allow the advocate to tell the

client's story through questions that fit with the plan, care must also be given to how the questions are asked. The best approach is to use simple, unadorned questions to obtain the information necessary to support the argument you intend to make at the end. No matter how uncomplicated the case may seem to you, the judge and jury are hearing it for the first time. In any forum, in any medium, effective communication is a triumph against overwhelming odds, so on first telling even a simple case may seem confusing to the audience. An essential part of the technique, then, is the short, simple question in plain words. Short questions in plain language will not confuse either the receiver or the audience who awaits the receiver's response.

As everyone knows, leading questions are not only permissible but also expected in cross-examination. Leading questions make it easy to tell a narrative directly and forcefully. Leading questions are so powerful that many have argued they ought to be the only ones asked in cross-examination. Good advice, generally. But occasions may arise when non-leading, open-ended questions are required to discover information that will then allow for attack with leading questions. For example, if you don't know the exact physical location of a witness in relation to an incident you might have to ask a non-leading question before a series of leading questions which then seek to impeach the witness.

Q. (non-leading)	Where were you when you saw the accident?
A.	On the southeast corner.
Q.	You could not have seen the driver of the blue car because you were sixty-five feet away?
A.	I saw him.
Q.	Your view was obstructed by the red car?
A.	I could see through its windows.

Q. There were 6 people inside the blue car?

A. Maybe, I don't know.

Q. And the blue car had tinted windows?

A. I agree.

The first open-ended question fixes the position of the witness and sets up a series of questions designed to attack the reliability of what the witness claims to have seen from that vantage point. Allowing for rare non-leading moments during cross-examination, the standard wisdom might be amended modestly to provide as follows: ask leading questions only, unless it is first essential to elicit information in relation to which further leading questions can then be made.

No-frills Questions

The trier of fact knows nothing of the case until it hears the evidence. As the evidence is called, the judge or jury looks for cues to figure out what happened. One of the most effective ways to ensure that the trier of fact embraces your side of the story is to ensure that your cues are specific and clear, like flashing lights on a dark, dark night. Long, rambling questions are not merely tedious to listen to, they also blur the focus. They cause confusion; they snuff out the lights. You know what I mean:

Q. Now, Mrs. Smith let me ask you a question about one of our exhibits. Exhibit number three for the edification of the court and the ladies and gentlemen of our jury is what appears to be a hand-written, one- page note that does not bear a signature. Will you please tell the

members of the jury Mrs. Smith, whether or not you have ever seen this one-page note before?

The question is wordy. The crux of it is preceded by approximately 50 words of preamble. Fluff. A whole series of questions like this could well cause the jury to become impatient with the questioner. To a jury, verbosity itself can be cruel and unusual punishment. Compare the former approach to this one:

Q. Please look at exhibit three.

A. Okay.

Q. That handwriting is your own?

A. It might be.

Q. That is the note you wrote to Mr. Smith on June 3rd?

A. I might have.

Short simple questions: the narrative advances, the jury stays conscious, the focus stays clear.

Plain Words

Lawyers love circumlocution. Why say "You were driving too fast" (5 words), when you can say "May I suggest to you that on the day in question, as earlier specified, you were driving or at least you appeared to others who witnessed you on the occasion to be driving at an excessive rate of speed" (39 words)? How many times have you heard even very competent lawyers begin a question with these words, "Is it not true that" or end a question with "Is that not right?"? The words contribute nothing of substance. They are padding. And occasionally they have the effect of

blurring the meaning.

Q. Is it not true that the colour of the car is blue?

A. Yes.

What does the answer mean? Yes, it is true that the car's colour is blue or, yes, it is not true that the car's colour is blue?

Q. You loved the sound of her voice, is that not right?

A. Yes.

Yes, that's not right or, yes, that's right? To avoid such confusion, do not combine a positive and a negative within the same question. Better to ask:

Q. You agree that the car was blue?

A. Yes.

Q. You loved the sound of her voice?

A. Yes.

Avoiding Words and Phrases that Render a Question Meaningless or Inconsequential

Linguistic diffidence, hedging our thoughts in thickets of words and phrases, can take many forms. One is the tendency to rely on words, even familiar words, devoid of concrete, specific meaning.

Q. Was he acting in a way that was normal?

A. What do you call normal?

The answer is a good one. What does "normal" mean? Normal to whom? In relation to what? Words such as these - - "big", "small", "great", "huge" - - are "loaded" in that they are

susceptible to virtually limitless interpretation. Words that can mean anything or everything, mean nothing.

Q. Would it be fair to say that he appeared tired?

A. Yes.

What have we learned here? The questioner presumably wants the witness to confirm signs of fatigue. What does "fairness" have to do with it? Although it may be "fair" to say something, it may also be wrong to say it. This witness may feel that it is fair to say the person was tired even if the witness knows with certainty that he was not.

Q. Did you have an opportunity to see his boat?

A. Yes.

The witness may have had an opportunity to see the boat, but did he see it? If the questioner really wants to know if the witness saw the boat, not if he had an opportunity to see it, then a different and better question is required.

Avoiding Legalese

Some legal jargon is to be avoided at all costs. The words reveal more than we know, principally that we have been languishing in dry, unhappy spaces for too long. Learn to resist, and to despise, stilted words and phrases such as the following:

It is suggested
Notwithstanding
Hereinafter
Thereupon
Cease and desist
Forthwith, etc., etc.

Note in the first example, "it is suggested", the presence of the passive voice, the realm of the politician who wishes of course to say nothing, to avoid all responsibility. Remember Nixon? "The nation was deceived" not "I deceived the nation." In the passive voice, the original subject becomes part of an optional "by" phrase: It is suggested (by me) . . .." Most users of the passive voice opt to leave out the "by" phrase. Hence, in our facta, we write (over and over again) "It is submitted that . . . . ".

As lawyers we should pledge to try to speak the language of the living, leaving behind the outmoded, the arcane, and, yes, the latin. I mean, *iter alia*, woe unto those lawyers who continue to attempt to communicate with jurors in a language other than the jurors' own. Lord Balfour said it well: talk English, not law.

VIGOROUS CROSS-EXAMINATION: BE NOT AFRAID

Early in my career I tended to shy away from vigorous cross-examination of witnesses for fear that jurors might interpret my style as heavy-handed, overbearing or intimidating. I have since been persuaded, however, that jurors and judges are generally impressed by a vigorous and thorough cross-examination. Of course, one has to be professional always, to draw upon language appropriate to the dignity of the courtroom, avoiding any inappropriate humour, slang or personal

opinion. But jurors and judges respect lawyers who by the manner and method of their questioning demonstrate true enthusiasm for the side they represent. So long as the lawyer's fervour is not over-reaching or strident, but remains a direct and powerful challenge to the other side, the trier will be impressed.

I also believe, with respect for those of a contrary view, that jurors are not offended by vigorous objections raised during the course of the trial so long as one demonstrates adequate support or reason for the objection. Provided there is merit to the objection, jurors are likely to perceive it as a meritorious demonstration of the lawyer's allegiance to his narrative.

WHEN NOT TO CROSS-EXAMINE

You have heard this admonition: Never ask a question in cross-examination the answer to which you do not already know. Good advice, but probably impossible to heed in every circumstance. Some of the best questions ever asked in cross-examination were by counsel who did not know the answers in advance. Sometimes one must risk asking questions without knowing what answers they will elicit. Even then, an unfavourable answer does not necessarily mean that the question was without merit.

Just follow the plan: pose questions of a leading nature and tell the story by the questions asked, regardless of the answers, knowing all the while that the questions are a prelude to the argument to be made at the end of the case. For example, while the question, "It was you, not the accused, who shot John Smith?", is unlikely to garner a favourable answer, it is helpful because it advances the story you want to tell, that is, that the accused is not the killer. The question thus becomes a prelude to the jury address. With one short, sharp question the jury is told:

> The accused is not the killer; the killer is in the witness box right now. We fully expect of course, that he will not admit to the act. Why would he? If he did, he would be in the same predicament as the accused. You should expect that the defence will call evidence to support its contention that the accused is not the killer.
>
> You might also expect from the defence evidence that this witness is.

One question, short and sharp, has the capability of telling a whole story to a thoughtful, engaged juror.

When should you forego cross-examination of any particular witness? The answer is to be found in the response to a second question; "Did this witness hurt our case in any way?" If the answer to the latter question is "no", then it is probably best not to cross-examine.

I propose now to demonstrate in more detail both the form and substance of this cross-examining method in two particular criminal trial contexts: confronting a witness with transcripts of his or her prior evidence, and making the best of a police officer's notes.

TRANSCRIPTS OF PRIOR EVIDENCE

Impeachment by Confrontation

In a criminal proceeding, a primary repository of inconsistent testimony is the preliminary inquiry transcript. For this reason, the technique of the cross-examiner at the preliminary should be different from the technique at trial. At the preliminary, the aim ought to be to gather as much information as possible as part of an overall discovery process in the hope that some of the information can be used for impeachment later at trial. This is why the open-ended question in cross-examination at the preliminary is often a neat counterpoint to the tight, closed, pointed questions at trial. For example, at the preliminary it is not unusual to observe good counsel asking questions such as these:

Q. Describe in as much detail as you can the appearance of your assailant?

A. I believe he was approximately 6 feet tall, about 200 lbs. and he was wearing blue jeans, a sweatshirt and a cowboy hat.

Q. What about his facial hair?

A. I believe he had a moustache and a goatee and his sideburns were kind of long so that they were down below his ears.

Q. What unusual marks or scars did he have on his face?

A. None that I noticed.

Now at trial the questions will have a very different character: again, short and sharp, the purpose being to demonstrate that the accused could not possibly have been the assailant.

Q. You did not see any distinguishing marks or scars on the face of your assailant?

A. No.

Q. When you look at the accused today, you can see that he has an obvious brown mole on the right side of his face?

A. Yes I see it.

Q. The accused does not have a moustache?

A. No

Q. You previously described your assailant as a person with a moustache?

A. Yes.

Q. Nor does the accused have sideburns below his ears?

A. Yes I agree with that, but he may have shaved them off.

Q. For the accused to match the description of your assailant, he would have had to remove the mole from his face and grow both a moustache and sideburns?

A. A man can easily shave his moustache and sideburns.

The series of questions aims to impeach present testimony by prior inconsistent testimony. If the witness does not admit to the prior description as presented in cross-examination, you will simply advise the court that you intend to embark upon cross-examination based on what you say is prior inconsistent testimony at the preliminary inquiry. Then you will proceed as follows:

Q. Do you recall being questioned under oath concerning these very matters on December 23, 1996 at the Ontario Court (Provincial Division) on Windsor Avenue?

A. Yes.

Q. At that time you were asked certain questions and gave certain answers?

A. Yes.

Q. And you gave those answers under oath?

A. Yes.

Q. I am going to read to you the following questions and answers from that preliminary inquiry, and after reading the questions and answers I will ask you further questions about your testimony then and your testimony now.

You then present the questions and answers, the contents of which support the physical description suggested in your earlier questions.

Impeachment by Omission

At or near the end of a preliminary inquiry and before the completion of cross-examination of any particular witness, ask the witness whether or not there is anything that the witness would like to add to the testimony. Most will decline the invitation, particularly if they have testified at length about an event. They are usually very happy to come to the end of the experience. So one last follow-up question cannot hurt:

Q. To your knowledge, then, you have told us everything you can remember concerning this event?

If at trial the witness adds something to the evidence previously given, then he has opened himself for attack:

Q. You testified under oath just six months ago at a preliminary inquiry about this same event?

A. Yes.

Q. You testified for over two hours answering many questions concerning the details of this event?

A. Yes.

Q. You were then asked if there was anything you wished to add to your testimony, and you could not think of a single thing that you had omitted?

A. I may have, but now I remember that the accused threatened me that if I told anyone he would hurt me.

Q. You would not have left out such an important detail during your prior testimony if in fact there had been such a threat?

A. I just forgot.

Q. You have added this allegation of threat to enhance your testimony?

A. No I haven't.

In this way, it is possible to impeach a witness by way of omission, by way of what he or she has previously left out. The technique is especially effective in the cross-examination of a witness who may be expected to remember in great detail, either because the event described is significant or traumatic in his life or because he has a duty or responsibility to remember or record all the details, as in the case of an investigating police officer.

Use of Transcripts to Remind a Witness of Prior Testimony

When a witness testifies during a trial that he does not remember an incident or event but has previously testified under oath or given a statement demonstrating memory of that incident or event, you may show him a copy of the previous testimony to refresh his memory. This is done not to discredit him, but to assist him in remembering. In ***R. v. Coffin***,[3] the Supreme Court of Canada sanctioned a procedure perhaps best described as relaxation of the general rule prohibiting counsel from posing leading questions in examination-in-chief. Kellock, J. said:

> ...while, as a general rule, a party may not either in direct or re-examination put leading questions, the court has a discretion, not open to review, to relax it whenever it is considered necessary in the interests of justice, as the learned justice appears to have considered was the situation in the case at bar. . . Moreover, the authorities make

[3] ***R. v. Coffin***, [1956] S.C.R. p.191

> it clear that a witness may be allowed to refresh his memory by reference to his earlier depositions and that it is only where the object of the examination is to discredit or contradict a party's own witness that Section 9 of the *Canada Evidence Act* applies. In the present case... Counsel did not wish...to discredit Petrie but to obtain from her the evidence she had given in her depositions if, on bringing the depositions to her attention, her memory would permit her to adopt them.[4]

The ***Coffin*** procedure thus flows from the common law. It is not a statutory imperative. To refresh a witness's memory either in examination-in-chief or in cross- examination you may use the previous testimony to call back the memory, perhaps by means of a series of questions:

Q. Do you remember testifying at the preliminary inquiry in October of last year about this very issue?

A. Yes.

Q. Do you recall being asked questions and giving answers concerning this very matter?

A. Yes.

Q. Would you like to refresh your memory from that prior testimony?

A. Yes.

Now present the prior testimony to the witness and ask the witness to read the testimony to himself, then resume questioning:

Q. You have now read your prior testimony?

A. Yes.

Q. Do you recall having been asked those questions and having given those answers?

A. Yes.

Q. Are the answers that you gave at the time of the preliminary hearing true?

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[4] ***Supra*** at pp. 211-212

A. Yes.

Q. Now, having refreshed your memory from that prior testimony, are you able to answer this question...[and counsel now asks the question that the witness was previously unable to answer because of lack of memory].

Transcripts other than Preliminary Inquiry Transcripts

Preliminary Inquiry transcripts are fertile grounds to till for relevant prior testimony. But there are also other useful transcript sources, for example, transcripts of an examination for discovery, a judgment/debtor examination, and proceedings before administrative tribunals or other courts. Affidavit evidence and examinations or cross-examinations during interlocutory proceedings also meet the standard of previous statements made under oath. A prior inconsistent statement made under oath can be a deadly weapon in the arsenal of a skilful cross-examiner. A witness under oath is presumed to know the importance of accuracy and truthfulness and understands the thundering consequences of perjury. A summary argument is always compelling when it highlights the evidence of an adversarial witness who has been shown to have previously lied under oath.

Practical Problems Associated With Confronting Witnesses with Prior Transcripts

Before embarking upon the impeachment of a witness on the basis of prior testimony, be sure to establish that there is in fact a *real* inconsistency. Prior testimony merely *different* from the present will not suffice. The testimony must not only be inconsistent from present testimony but also meaningful and relevant. Inconsequential, irrelevant inconsistencies are likely to strike the trier of fact as signs of your own unfairness or pettiness rather than as a true measure of the witness's credibility. Ordinary experience suggests that on minor or inconsequential matters it is

perfectly understandable for a witness to be or become confused or inconsistent in recollection.

Moreover, you must first have "locked in" the witness to his present testimony before confronting him with apparent inconsistencies from prior testimony. Although the temptation is great to confront the witness quickly and dramatically, patience is important. A premature strike can blunt the intended effect. Wedding the witness to his present testimony prevents him from escaping from an apparent inconsistency with some explanation or rationalization for the inconsistency. To lock in the witness counsel asks a series of questions eliciting, for example, a date, place, time and circumstance so as to assure that the alleged prior inconsistent testimony is clearly highlighted. To use a very simple example, if the witness in present testimony describes a car's colour as being light blue but in previous testimony has described it as "dark" in colour, you might ask a series of questions such as the following to prevent any escape route:

Q. You have described the car that was southbound as light blue in colour?

A. Yes.

Q. The other car involved in the accident was white?

A. Yes.

Q. There were only two cars involved in this collision?

A. Yes.

Q. To your recollection there were no other vehicles other than these two vehicles anywhere in sight?

A. Yes.

Q. This accident occurred on Saturday, July 15th, 1997?

A. Yes.

Q. This accident took place at the corner of Goyeau and Erie Streets?

A. Yes.

Q. You did not witness any other accidents in the whole month of July, 1997?

A. No.

Q. There was no vehicle involved in this accident that you would describe as dark in colour?

A. No.

Q. The southbound vehicle was light blue in colour, so you would never describe it as a "dark" vehicle, would you?

A. No.

Q. Of course you would not describe the white vehicle as a "dark" vehicle?

A. No.

The foundation having been laid, you will then set about confronting the witness with his prior testimony that the southbound vehicle was a "dark" colour. It would not be open to the witness to claim that he misunderstood which vehicle you were speaking about or that he was confused about the nature or timing of the accident.

POLICE OFFICERS' NOTES

Because most police officers are experienced at testifying under oath they are often difficult witnesses to cross-examine. The Guy Paul Morin inquiry and other recent revelations of police misconduct aside, the public generally continues to hold police officers in high esteem, so defence lawyers face a special burden when they undertake the daunting challenge of dismantling the evidence of these persons in authority. Avoiding the challenge is not an option, because in

virtually every criminal trial at least one police officer testifies on behalf of the prosecution.

But a measured approach can sometimes yield interesting results. The first step is to obtain every piece of information or disclosure concerning the investigation. In ***Stinchcombe v. R.,***[5] the Supreme Court of Canada held that the defence was entitled to all information in the possession of the prosecution unless the information was privileged or clearly irrelevant or unless its disclosure would impede completion of an investigation. The notes of police officers are therefore appropriately disclosed to defence counsel *upon request*.

If police notes are worth obtaining for possible use by the defence, then at the very least they must be decipherable. If the notes are illegible or cannot be decoded, then you should insist of the prosecutor that the notes be typed or transcribed so that every word, every abbreviation, every sign in them is clearly understood. Standard requests for disclosure should include not only requests for the police officers' hand-written notes but also for copies of occurrence reports, supplementary reports, and "scrap notes" from which finalized notes are prepared. Complete, comprehensive, full disclosure well before trial is a good beginning and an absolute prerequisite to cross-examining officers on their notes at trial.

Cross-Examining the Police Officer who is not the Enemy

In some cases, a police officer's testimony is not detrimental and even helpful to an accused. From this witness you want to develop evidence from which the trier of fact may infer innocence. For instance, in a domestic assault case an officer may arrive at the scene, receive the information from the complainant, then charge the accused. But she may also have observed in her notes that the complainant suffered no apparent injuries, that none of the furniture in the residence appeared to

[5]***Stinchcombe v. R.*** (1991), 68 C.C.C. (3d) 1

be disturbed, and that the accused gave an exculpatory statement. While in the cross-examination of this officer, you are not permitted to elicit the self-serving exculpatory utterance of the accused unless and until there is a direct or implied suggestion of fabrication, you certainly can adduce from the police officer, and confirm by her notes, the absence of injury and the absence of any physical signs of a struggle. The police officer's evidence is thus at least neutralized and perhaps even regarded as favourable to the accused.

On those occasions the way to bolster the credibility of the officer and the value of the officer's notes is with a line of questioning such as this:

Q. You made these notes right at the time of your investigation?

A. That's correct.

Q. You investigate many instances where it is alleged that domestic violence has occurred?

A. Yes.

Q. You are trained to make careful observations of the people involved and the place where the violence is alleged to have occurred?

A. Yes.

Q. You made careful observation of both the complainant and the accused?

A. Yes.

Q. You made no note of any injuries to the complainant?

A. That's right.

Q. You have no independent recollection of any injury to the complainant?

A. Correct.

Q. In making your notes you attempt to record them as completely and accurately as possible?

A. Yes.

Q. You are trained to keep complete and accurate notes in order to assist you later in your testimony?

A. Yes.

The impression left is that of a well-trained officer familiar with allegations of domestic violence specifically looking for signs of violence but finding none and reducing to writing observations notable by the utter absence of signs of violence. All of this commends the officer's testimony to the accused's interests.

Cross-examining the Police Officer who is the Enemy

There are many ways to attempt to undermine the adverse or hostile police witness with his own notes. One way is to set off one officer's notes against another's. Whether the notes are virtually identical or wildly divergent, either situation may open up ground for cross-examination. Because police officers are called upon to investigate so many matters, the vast majority of them, despite their evidence to the contrary, actually testify with little or no independent recollection of the events in question. Instead, they rely heavily on their notes and those notes become their memory for the purposes of their testimony at trial. Because officers tend to lack independent recollection, you can try to develop leverage against their seemingly pat recollection of events with a line of questioning such as this:

Q. You obviously conferred with Officer Smith before making your own notes?

A. No I did not.

Q. It is a coincidence, then, that you and Officer Smith have noted exactly the same times in your notes to describe 27 different events?

A. We may have discussed the times, but the rest of the notes are my own as to what actually happened.

Q. Both you and Officer Smith describe Mr. Jones as "plump, pleasant and 47 years of age"?

A. Yes, that's what he is.

Q. You must have conferred with your colleague in order to describe Mr. Jones in precisely the same words and precisely the same order?

A. I'm sure it was just a coincidence.

Some police officers, simply by acknowledging their common practice, may well admit that they collaborated with a colleague in making their notes but that the act of conferring did not in any way diminish their independent recollection of events. If so, they open up a line of questioning such as this:

Q. When you interview two persons who witness an event you always interview them separately?

A. Yes.

Q. You do so because you do not want one witness's version to influence the other witness?

A. Yes.

Q. You do not want the thoughts or recollections of one witness to influence the thoughts or recollections of another witness?

A. That's correct.

Q. This method, to your knowledge, is standard police practice?

A. Yes.

Q. But you and Officer Smith conferred with each other when making your notes?

A. Yes.

Q. You failed to ensure that your thoughts and recollections would not be influenced by him by taking the same precautions that you routinely take with any other witness?

A. Maybe.

Sometimes the fact that one police officer's notes differ from another's may assist in the cross-examination of either officer. Police officers are not disinterested parties at a criminal trial. Their bias is in favour of the side on whose behalf they are called to give their evidence. It is a fact that police officers who have played a part in an arrest and in the formulation of the criminal charges often take a strong interest in the outcome of the trial. Many officers, understandably, see effective information-gathering as being intricately bound up with successful prosecution and some of them attempt to use their record of convictions as a springboard to promotion and as a guarantor of status within the ranks. It is naive, therefore, to assume that police officers are simply governmental employees detached from or unaffected by or uninterested in the outcome of the trial. Given this reality, why not suggest to the adverse police witness that he or she has exaggerated the testimony in favour of the prosecution and against the accused and that the exaggeration and embellishment are easily demonstrated by the difference between the witness's notes and that of another police officer?

Q. In your notes you describe the accused as "staggering and stumbling"?

A. Yes.

Q. You also describe the accused as having "slurred speech"?

A. Yes.

Q. You describe the accused as "holding on to his car for support"?

A. Yes.

Q. In short, the accused, in your view, was extremely intoxicated?

A. Yes.

Q. Officer Smith, however, who was with you throughout this investigation has described the accused as having "a moderate odour of alcohol on his breath, whose speech was fine and whose walking was normal"?

A. Well maybe that's how Officer Smith saw him.

Q. The best explanation for the exaggerated symptoms that you describe is that you have purposely exaggerated them?

A. I disagree with that.

Officer Smith may also testify that the accused was impaired, but her far more favourable description of the accused will undermine the credibility of her fellow officer.

A SHORT REVIEW

An effective cross-examination technique is not difficult to develop, if it is founded on two fundamental precepts. First, leading questions in cross-examination are powerful tools to tell the jury the story even before argument. Second, the best leading questions are those which are short and simple and which fit the plan. The purpose of the plan is to tell a persuasive story consistent with the examiner's well thought-out theory of the case.