Witness Control

The Uses, Abuses, and Ethics of Phantom Impeachment

By John Zen Jackson

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Witness control is central to an effective cross-examination. Among the essential tools, of course, are leading questions and especially short questions. The ability to impeach a witness is another key component.

More than 20 years ago Herbert J. Stern—New Jersey's "Tiger in the Court," a moniker memorialized in a book about him with that title regarding his days as a federal prosecutor—was regularly conducting trial advocacy courses. Judge Stern had a story illustrating the witness control that flowed from the ability to impeach.

A traveling carnival had an act challenging spectators to coax an elephant down onto his knees and thereby win $500. After several burly adults had tried but failed to achieve the goal, a lanky, skinny kid came up to accept the imposing dare. He first stared the elephant in the eye and then went behind it and kicked hard. The elephant collapsed to his knees. Although protesting that this was not permitted, the carney with his small hands and smelling of cabbage handed over the money.

The following year the carnival returned to that small town. The rules for the act had been changed. Now to win the $500, the object was to make the elephant to move his head up and down and then from side to side—without touching him. The same skinny kid, a bit taller now, showed up. The carney forcefully explained the rules to him. The kid shrugged and went up to the elephant. Once again looking the elephant in the eye, the skinny kid said, "Do you remember me?" The elephant nodded yes. The kid then said, "Do you want me to do it again?" And the elephant vigorously shook his head from side to side.

There are a number of approaches to impeaching a witness to discredit his or her testimony. These include impeachment by contradiction to disprove the facts testified to by one witness with contrary evidence from another witness or another evidentiary source. *See generally* K.S. Broun, *McCormick on Evidence* §45 (7th ed. 2013). The contradiction may be differing perceptions and reports of an event or even demonstrated with a prior inconsistent statement to challenge the witness' credibility.

The focus here will be on the technique of phantom impeachment, during which an opposing witness answers questions posed by an examining attorney truthfully, and the witness contradicts the prior

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testimony without any actual impeaching proofs being presented.

When and How Does Phantom Impeachment Work?

The tactic works when an examining attorney convinces a witness at trial that as a cross-examiner he or she has absolute mastery of a deposition or other documents.

Nonetheless, phantom impeachment has been upheld in the case law.

After a number of successful impeachments, a witness becomes less willing to contest the testimonial position advanced by this cross-examiner as he or she picks up questioning lines from the deposition transcript or other sources. Indeed, a skillful attorney may be able to force a witness to tell the truth by making apparent use of a deposition transcript or other document even though the deposition or document did not contain any testimony or information on the point in issue. It is at that moment that the phantom flits through the courtroom. *See generally* D.M. Malone, P.T. Hoffman & A.J. Bocchino, *The Effective Deposition* 288–89 (rev. 3d ed. 2007). These authors compare this phenomenon to the long-standing observation of others that a witness effectively confronted on cross-examination may "forget himself and speak the truth" as had been noted in classic works on cross-examination. *See* Francis Wellman, *The Art of Cross-Examination* at 135 (4th ed. 1962).

Phantom impeachment is not always done in an elegant fashion or effectively, except perhaps in television, movies, and legal thrillers. Perry Mason in particular had a recurring bluff during cross-examination of "Suppose I should tell you…." *See, e.g.,* Erle Stanley Gardner, *The Case of the Fan Dancer's Horse* 154 (1947). Nonetheless, phantom impeachment has been upheld in the case law. *See, e.g., Warner v. General Motors,* 357 N.W.2d 689, 695–96 (Mich. App. 1984). But there indeed appear to be some limits to its use.

When Will Courts Generally View the Tactic as Proper?

In the recent decision *Manata v. Pereira,* 436 N.J. Super. 330, 93 A.3d 74 (N.J. Super. Ct. App. Div. 2014), the court reversed a verdict for a plaintiff, finding that the plaintiff's counsel had "engaged in improper cross-examination when he confronted defendant with a police report that counsel did not offer in evidence, but whose substance he communicated to the jury." The opinion purported to "chart limits on the use of impeachment by omission when a cross-examiner references a third-party report to discredit a witness, without seeking to introduce the report into evidence."

These are the pertinent facts. The defendant's car hit the plaintiff as she was crossing the street. The plaintiff claimed that she was a pedestrian in the crosswalk on the one-way street and that the defendant apologized at the scene, indicating that he had not been able to see her because of sun glare. In his defense, the driver asserted that the plaintiff was attempting to cross the street in the middle of the block and had darted out between two buses. The plaintiff's main effort to discredit the defense version was based on a police report that was neither marked for identification nor introduced into evidence. Nonetheless, the plaintiff's counsel made extensive use of the document during the trial. It was later made part of the record on appeal by consent.

The police did not respond to the scene of the accident, and the defendant went to the police station later that day where he provided his version of events. The defendant testified that he believed that he spoke with the officer who prepared the accident report. The final report was undated and did not include the defendant's version of events. The defendant maintained that after he received a copy of the report, he asked the police to correct it to include his version, but it was not done. A crash diagram in the report showed the defendant's car at the head of a line of cars in the street touching the crosswalk and with a stick figure in the crosswalk. The report did not explicitly indicate that the officer and defendant had spoken.

Questions about the police report formed the major part of the cross-examination of the defendant by the plaintiff's counsel, which was directed at showing that the defendant had fabricated that plaintiff had darted out. The plaintiff's counsel capitalized on the absence of the defendant's version in the report and did not admit the police report as evidence or present the investigating officer as a witness. Questioning the defendant, who previous testified that he talked to the plaintiff in Portuguese, established "the absence of any language barrier with the officer" and elicited a denial by the defendant that he told the officer that the pedestrian was in the crosswalk when struck as well as a denial that he said that he had stopped at the red light rather than in the middle of the block. In response to a defense objection that the report was hearsay, the plaintiff's counsel indicated that he would not offer the report. The police report was not even marked for identification as a potential exhibit, but the plaintiff's counsel still used it liberally during the cross-examination. The plaintiff's counsel questioned the defendant about the contents of the report and that it did not mention anybody darting out. The court sustained an objection to a question as to whether the police officer was "wrong" in not mentioning that the plaintiff had darted out into the street. The plaintiff's counsel also questioned the witness on the diagram in the report, which placed the plaintiff in the crosswalk.

During his summation, the plaintiff's counsel emphasized that the police report did not include that the plaintiff had darted out and that this assertion emerged only in defense of the litigation. In his testimony, the defendant had acknowledged that there was sun glare. But he denied that this caused the accident. The plaintiff's counsel took the fact of the accident and the admitted sun glare and suggested to the jury that members ought to think about why the defense changed the reason for the accident to the dart out, why it not been in the police report, why the police officer was left with the impression that the plaintiff was in crosswalk, and ultimately whether the defendant's explanation was credible. In the course of deliberations, the jury asked to see the police report but the defense counsel objected on the ground that it was not admitted into evidence.

On the appeal, the court noted that impeachment by omission was a well-established basis for challenging witness

credibility and that such omission might be considered a prior inconsistent statement. But it concluded that in this case it was an "improper attempt to impeach by omission" and the summation built upon it was capable of producing an unjust result. *Id.* at 334, 93 A.3d at 777. The appellate court reversed the judgment and remanded the matter for a new trial.

The plaintiff's argument that the omission of defendant's version of the accident in the police report demonstrated that it was a fabrication was manifestly accepted by the jury. But the argument was missing the predicate evidence. The appellate court noted that the defendant persisted in his testimonial position that he had told the police about the pedestrian darting out and that plaintiff's counsel could have attempted to offer the extrinsic evidence of the omitted version by offering the police report as evidence. It was admissible as a hearsay exception either as a business record or a public record: "A police report may be admissible to prove the fact that certain statements were made to an officer, but, absent another hearsay exception, not the truth of those statements." *Id*. at 345, 93 A.3d at 784. In this case, it could have been offered to prove that the defendant made the "dart out" statement, but not that the plaintiff did in fact dart out. However, the appellate court underscored the trial judge's discretion to control the admissibility of such evidence under to N.J.R.E. 803(c)(6) and 803(c)(7) if "the sources or information or the method, purpose or circumstances of preparation indicate that it is not trustworthy" or "circumstances indicate that the inference of nonoccurrence or nonexistence is not trustworthy." The appellate court also noted that the circumstances raised questions about the preparation of the report and its characterization as a business record and "the inference that [the] defendant omitted his trial version of the accident [was] trustworthy." *Id*. at 347, 93 A.3d at 785.

Emphasizing that the plaintiff made no attempt to introduce the police report into evidence, the appellate court criticized the plaintiff's counsel for engaging in "a form of 'phantom impeachment.'" *Id.* Although acknowledging that cross-examination relating to credibility need not be based on evidence presented at trial, the questioning becomes improper when the examiner does not have the ability to show the factual basis for the questions: "[T]he question of the cross-examiner is not evidence and yet suggests the existence of evidence… which is not properly before the jury." *Id.* at 348, 93 A.3d at 786 (quoting *State v. Spencer,* 319 N.J. Super. 284, 305, 725 A.2d 106, 117 (N.J. Super. Ct. App. Div. 1999)).

How Can an Attorney Surmount the Technique's Challenges?

In criticizing the plaintiff's counsel for engaging "in a form of 'phantom impeachment,'" the court in *Manata* referred to a 1991 *ABA Journal* article by James McElhaney entitled "Phantom Impeachment." 77 A.B.A. J. 82 (Nov. 1991). This article also appears in the book *McElhaney's Litigation* (1995), which is a compilation of many of his monthly columns. Both in "Phantom Impeachment" and a 1994 article entitled "Blind Cross-Examination," McElhaney describes the problems associated with the technique but also how to do it. He presents the circumstance of having an oral statement that contradicts the witness but which was made by a person who will not testify. Referring to "phantom impeachment," McElhaney notes that the attack on a witness typically ended by asking if some other person had testified to the contrary would that other person be lying. He wrote that this is "speculative, argumentative, and doesn't work very well." McElhaney, *McElhaney's Litigation, supra,* at 173. His recommendation is to develop the fact that other witnesses saw what happened to suggest that they might disagree with the witness on the stand and stop there.

The analysis was more fully developed in the 1991 piece. McElhaney points out that the use of phantom impeachment includes predicting what a witness would say if the witness were there, even though the witness is not. This approach rests on facts that have not been introduced as evidence and asks the cross-examined witness to assume things that have not been and may never be established. It also involves a hearsay component in that the examining lawyer does some testifying in presenting the contradicting statement. Furthermore, framing the question with the "would that person be lying" tagline calls on a witness to speculate about the mental process of another person, which does not meet the fundamental personal knowledge that Federal Rule of Evidence 602 requires. McElhaney articulates one more problem with phantom impeachment:

> The real purpose of the question was not to get information about Sergeant Robertson's thinking—or any information at all, for that matter. It was argumentative. It was saying to the jury in the middle of the trial, "This witness is lying like a dog. Remember Sergeant Robertson? He said the light was red and he obviously had no motive to lie"—which the lawyer is welcome to say in final argument, but not now.

McElhaney, *McElhaney's Litigation, supra,* at 157.

McElhaney advocates doing it "the right way in the first place." His approach requires proving the contradiction through the other person's actual testimony and then in cross-examination reminding the to-be-impeached witness of the earlier testimony and it having taken place right in front of the witness. The ultimate question that a cross-examiner would put to a witness would call on the witness to agree to the truth of the proposition and change his previous testimony. McElhaney rebuffs the suggestion that this is improperly argumentative: "The question invites the witness to change his testimony, and gives him a good reason for doing it. There is nothing in the evidence rules that says you cannot hope." *Id*. at 158.

Does Phantom Impeachment Involve Ethical Ambiguities?

The evidentiary concerns associated with phantom impeachment also have an ethical component. When counsel elects not to call a contradicting witness or to offer a document into evidence but rather perhaps simply to hold a piece of paper in his or her hand as a threat, this requires scrupulous care to avoid any mischaracterization that would violate provisions of the appropriate rules of professional conduct. As explained elsewhere, "[i]t would seem that deliberately conveying to the jury, by implication or innuendo, the impression that a document in your hands is a statement containing certain assertions, when in fact you know it does not contain them, would violate American Bar Association Code of Professional Responsibility, Canon 7." R. Keeton, *Trial Tactics and Methods* 104 (2d

ed. 1973). The current constraints are to be found in Model Rules of Professional Conduct 1.2(d), 1.6, 3.3(a)(4), and 3.4(e).

Some proponents of the technique have rejected the assertion that when counsel use this technique they engage in improper conduct. For example, phantom impeachment is among the examples of how an attorney can use a deposition transcript at trial in D. M. Malone, *Deposition Rules: The Essential Handbook to Who, What, When, Where, Why and How* (4th ed. 2006). Malone describes using a deposition to good effect to impeach the witness a number of times, setting it up this way: "Now you have reached a point where you both know what the truth is—the car was red—but you know it is not in the transcript. She is not certain whether it is in the transcript or not." *Id.* at 118. After asking the witness to confirm that the car was red, she hesitates, and the lawyer picks up the transcript but remains silent. Visibly cringing, the witness responds that the car was indeed red. Malone continues: "You could not have impeached with the transcript and you knew it. But she didn't. Some think this is improper, that counsel is misleading the witness. But suggesting that you know and can prove the truth, if the witness lies again, really is not misleading. It is phantom impeachment." *Id.*

A deliberate and knowing misrepresentation is hard to justify in any context. But there is a grey area here. McElhaney refers to a lawyer's "hope" and Malone speaks in terms of "know[ing] what the truth is" even without having specific and actual documentation of that fact to implement the impeachment. In his multi-volume work *Trying Cases to Win* (1993), Judge Stern has described "the second great tool of cross-examination" as "the rules and laws of probability" arising from reasonable inferences and deductions from the facts and all someone knows about life and the case. H.J. Stern, *3 Trying Cases to Win: Cross-Examination* 177–78 (1993). Irving Younger's famous "commandments," including the one about never asking a question that you do not know the answer to, provide a guide for relatively safe cross-examination, especially for less experienced lawyers. But neither a trial in general nor cross-examination in particular is an activity without risk. Ultimately, this distills to the fundamental and indeed primordial requirement that a lawyer have a good-faith basis for the questions that he or she asks.

How Do Courts Approach the Good-Faith Basis for Questioning Witnesses?

The good-faith basis requirement for questioning witnesses is an aspect of the general obligation that an attorney as an advocate has to be honest with a court and to not "perpetrate a fraud upon the court." But as might be expected, what constitutes a "good-faith basis" is subject to some variability.

There appear to be two approaches to good faith: one strict and one relaxed.

The strict view of good faith requires that an examiner have admissible evidence showing that the impeaching fact is true. *See, e.g., State v. Williams,* 210 N.W.2d 21, 26 n. 7 (Minn. 1973); *State v. Spencer,* 319 N.J. Super. 284, 305, 725 A.2d 106, 117 (N.J. Super. Ct. App. Div. 1999) ("[t]he question must be based upon facts in evidence or based upon a proffer by the cross-examiner indicating his ability to prove the facts contained in the question"). Under this view, good faith would require that to assert to a witness, "you said before that the light was red," the cross-examiner must have admissible evidence that the witness said that the light was red. If the examiner has only some indication that the statement had been made, but has no admissible proof, the statement is not in good faith. It is this standard of "good faith" that was tacitly used in *Manata. But cf. Cavanaugh v. Skil Corp.,* 331 N.J. Super. 134, 175–76, 751 A.2d 564, 587 (N.J. Super. Ct. App. Div. 1999), *aff'd,* 164 N.J. 1, 751 A.2d 518 (2000) (commenting on the good-faith basis for cross-examination questions, "however tacky they go to the issue of bias and credibility and were proper").

The second good-faith view treats the good-faith requirement as a rule of reasonableness; specifically, as long as an examiner has a reasonable basis for believing that the impeaching fact is true, he or she operated in good faith. *See State v. Gillard,* 633 N.E.2d 272, 277–78 (Ohio 1988), *cert. denied,* 492 U.S. 925 (1989) ("effective cross-examination often requires a tentative and probing approach to the witness' direct testimony, and this cannot always be done with hard proof in hand of every assumed fact"); *Hazel v. United States,* 319 A.2d 136, 140 (D.C. App. 1974)("the assumed factual predicate for the question was neither known by counsel to be false, nor inherently incredible, thus to amount to unprofessional conduct"). For example, under this view, if an examiner has a basis for believing that a witness made a previous inconsistent statement that the examiner will use to impeach the witness, the examiner will act in good faith if he or she uses it as a basis for questions. Thus, if an examiner's basis for impeachment is a hearsay report, made by someone other than the witness, and the report nevertheless seems authentic and reliable, the examiner may assert the impeaching fact contained in the report.

A more in-depth review of the ethical issues of "good-faith basis" can be found in J. Alexander Tanford, *The Ethics of Evidence*, 25 Am. J. Trial Advoc. 487, 507 (2002). The words of Judge Stern provide an anchor for the technique of phantom impeachment. Taking a previous statement out of context to create an inconsistency is the primary focus of his comments rather than phantom impeachment, but his observations are still powerful and germane regarding misusing the technique deliberately:

> Whether or not one is ever caught and punished for twisting the meaning of prior testimony or for unfairly editing prior statements, it simply should not be done. It is not merely a matter of practicality. It is not even just a matter of good morals. It is a matter of personal and professional pride and dignity. No one who stoops to such conduct does anything less than to demean himself and the rest of us who share his profession.

Stern, *supra*, at 88.

This is a standard that all members of the bar should strive to adhere to. Certainly in jurisdictions such as New Jersey, in light of *Manata v. Pereira,* counsel making a decision to use the phantom impeachment technique need to be prepared to prove the actual impeachment sufficiently if the point is not conceded by the witness or at least be ready to make an adequate proffer to demonstrate an arguable basis for admitting the impeaching information, including inferences from items already in evidence.