

Ethical/Professional and Legal Issues in Cross-Examination For Prosecutors

by
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I. ROLE OF THE PROSECUTOR

A. "DEEP THOUGHTS" ABOUT THE ROLE OF THE PROSECUTOR

1. "The prosecutor has more control over life, liberty and reputation than any other person in America."

Robert H. Jackson
"The Federal Prosecutor,"
a speech delivered at the Second Annual
Conference of United States Attorneys,
Washington, D.C., April 1, 1940.

1. "The duty of the prosecutor is to seek justice, not merely to convict."

Prosecution Function Standard 3-1.2(c)
American Bar Association (1993)

2. "The primary responsibility of prosecution is to see that justice is accomplished."

National Prosecution Standards
Section 66.1 (1991)

4. "To be a prosecutor is to accept the responsibility of being the only thing standing between the defendant and the jailhouse door."

Christopher Darden
In Contempt (1996)

5. "The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps

the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.

Robert H. Jackson
1940 Speech *supra*.

6. "A spirit of fair play and decency...should animate the prosecutor. Your positions are of such independence and importance that while you are being diligent, strict and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done."

Robert H. Jackson
1940 Speech *supra*.

7. "The American prosecutor enjoys an independence and a wealth of discretionary power unmatched in the world. With few exceptions, he is a locally elected official and the chief law enforcement official of his community. He represents a local jurisdiction, is selected for the position by the voting public and his office is endowed with unreviewable discretionary authority. Nowhere else in the world does this combination of features define prosecution."

Joan E. Jacoby
"The American Prosecutor in Historical Context," *The Prosecutor* (1997)

8. "The [Prosecuting] Attorney is the representative not of an ordinary party to a controversy, but to a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Justice George Sutherland
Berger v. United States,
295 U.S. 78 (1935).

9. "A prosecutor hopes and expects to be a judge, and after that he will aspire to be

governor, then senator, and President, in their regular turn. To accomplish this noble ambition he must in each position give the people what they want, and more; and there are no rungs in the ladder of fame upon which lawyers can plant their feet like the dead bodies of their victims.ö

Clarence Darrow
The Story of My Life (1932)

10. The prosecutor's code of conduct under *National Prosecution Standard 6.5* requires:
1. Candor, good faith, and courtesy in all relations with opposing counsel and integrity in all communications, interactions and agreements with opposing counsel.
 2. Avoiding the expression of personal animosity toward opposing counsel, regardless of personal opinion.
 3. Proper respect and consideration for the judiciary.
 4. Punctuality in all court appearances and prompt notice to opposing counsel and the court when absence or tardiness is unavoidable.
 5. Proper restraint and dignity throughout the proceedings, avoiding disruptive conduct.
 6. Fair treatment of all witness.
 7. Avoiding obstructive tactics, including:
 - (1) Bringing frivolous objections, including unfounded objections intended only to disrupt opposing counsel;
 - (2) Attempting to proceed in a manner previously barred by the court;
 - (3) Attempting to ask improper questions or to introduce inadmissible evidence;
 - (4) Using dilatory actions or tactics;
 - (5) Creating prejudicial or inflammatory argument or publicity.

II TERMINOLOGY

- A. When a judge screws up at trial, it is called error.

A. When a defense lawyer screws up at trial, it is called, at worst, ineffective assistance of counsel.

A. When a prosecutor screws up, even unintentionally, it is called
"PROSECUTORIAL MISCONDUCT!"

III TRIAL PRACTICE

A. "DEEP THOUGHTS" ABOUT PROFESSIONALISM & TRIAL PRACTICE.

1. THREE "TRUTHS"

(1) Professionalism requires competence.

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Rule 4-1.1

Rules of Professional Conduct

(2) It takes about 20 jury trials before everything that can happen to you in a courtroom will have happened.

(3) From then on, you can slide by as "competent" or you can strive for excellence and improve with every trial.

2. "Every criminal trial is a man-hunt where the object of the pack is to get the prey. The purpose of the defense is to effect his escape."

Clarence Darrow

The Story of My Life (1932)

3. "The very first time I cross-examined a witness, as a direct and immediate consequence of my cross-examination of that witness, my client went to jail. It took me long while to realize that there is something with which to reassure yourself about it. No matter [how badly you do in your cross-examination], it is the client who goes to jail."

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4. “Whenever I prosecuted a murder case, I always at least aspired to a masterpiece. Whether I achieved it or not is another story.”

Vincent Bugliosi
Outrage: The Five Reasons Why O.J. Simpson Got Away With Murder (1996)

5. “An ideal client [for a criminal defense lawyer] is a very rich man, thoroughly scared.”

Frank J. Hogan
America’s Advocate (1958)

6. “[A] trial lawyer has to be confident in front of the jury. If he’s not, then he has to be a good actor and at least appear to be confident. It’s one of the most important ingredients of a successful trial lawyer. If he’s not confident, the jury will pick it up just like that - in the way he walks, the expression on his face, the inflection in his voice.”

Vincent Bugliosi
Outrage: The Five Reasons O.J. Simpson Got Away With Murder (1996).

7. “‘If there were no bad people there would be no good lawyers.’”

Charles Dickens
The Old Curiosity Shop (1841)

8. “‘All courtroom proceedings seem more like prize-ring combat than a calm, dignified effort to find out the truth.’”

Clarence Darrow
The Story of My Life (1932)

9. “‘The thousandth time you try a case, you will be as terrified as you were the first time you tried a case. But you turn it to advantage through a physiological process I cannot explain, but which every trial lawyer experiences and after a while comes to master. That terror produces a flow of adrenaline that is beyond belief.’”

I am positive when I try a case that if a madman came running up with a .38 revolver and from six inches away pulled the trigger twice, the bullets would bounce off. If a locomotive came through the back wall of the courtroom, with one hand I could stop it. That is why every trial lawyer does things in the courtroom on his feet when on trial that he is not smart enough to do in the office. You hear yourself saying things and, my God, that's clever! Am I really saying that? It's you with adrenaline running through your bloodstream. What you are able to do after a while is put a cap on it. You make the adrenaline work for you.

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IV. CROSS-EXAMINATION

A. "DEEP THOUGHTS" ON CROSS-EXAMINATION

1. "Not even the abuses, the mishandlings, and the puerilities which are so often associated with cross-examination have availed to nullify its value. It may be that in more than one sense it takes the place in our system which torture occupied in the medieval system of the civilians. Nevertheless, it is beyond any doubt the greatest engine ever invented for the discovery of truth."

John Henry Wigmore
Evidence in Trials at Common Law
Sec. 1367 (Chadbourn Rev. 1974)

2. "The issue of a cause rarely depends upon a speech and is but seldom even affected by it. But there is never is a cause contested, the result of which is not mainly dependent upon the skill with which the advocate conducts his cross-examination."

Francis L. Wellman
The Art of Cross-Examination (1903)

3. "Cross-examination is a lost art, and I doubt you could find more than a handful of superb cross-examiners in the entire country."

Vincent Bugliosi

Outrage: The Five Reasons Why O.J. Simpson Got Away With Murder (1996)

4. öCounsel should not misuse the power of cross-examination or impeachment to ridicule, discredit, undermine or hold the witness up to contempt, if counsel knows the witness is testifying truthfully. The credibility of any witness may be alluded to by showing of any prior conviction.ö

National Prosecution Standards
Section 77.6 (1991)

5. öWitnesses should not be subjected to degrading, demeaning, or otherwise invasive or insulting questioning unless the prosecutor honestly believes that such questioning may prove beneficial to the case. Nor should a prosecutor be abusive or inconsiderate in the interrogation of a witness. As with all courtroom behavior, the prosecutor should strive to act professionally and should not adopt an unwarranted or unnecessary combative demeanor in direct or cross-examination. While the prosecutor should not harass a witness without just cause, this caveat does not preclude otherwise vigorous cross-examination. Ultimately, the prosecutor must always exercise discretion in determining the extent to which damage done to the reputation of a witness is justified by the contribution that a particular line of questioning may make to the truth-finding function of the trial.ö

Prosecution Function Standard 3-5-7
Commentary, American Bar Assn (1993)

6. öAs a general thing, it is unwise for the cross-examiner to attempt to cope with a specialist in his own field of inquiry. Lengthy cross-examinations along the lines of the expert's theory are usually disastrous and should rarely be attempted.ö

Francis L. Wellman
The Art of Cross-Examination (1903)

7. ABA *Prosecution Function Standard 3-5.6:*

1. A prosecutor should not knowingly offer false evidence whether by documents, tangible evidence, or the testimony

of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity.

2. A prosecutor should not knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury.
3. A prosecutor should not permit any tangible evidence to be displayed in the view of the judge or jury which would tend to prejudice fair consideration by the judge or jury until such time as a good faith tender of such evidence is made.
4. A prosecutor should not tender tangible evidence in the view of the judge or jury if it would tend to prejudice fair consideration by the judge or jury unless there is a reasonable basis for its admission into evidence. When there is any substantial doubt about the admissibility of such evidence, it should be tendered by an offer of proof and a ruling obtained.

8. *National Prosecution Standard 77.1:*

The examination of all witnesses should be conducted fairly, objectively, and with due regard for the reasonable privacy of witnesses.

9. *National Prosecution Standard 77.2:*

Counsel should not ask a question which implies the existence of a factual predicate which he knows to be untrue or has no reasonable basis for believing is true.

B. SUGGESTIONS FOR AN ETHICAL CROSS

1. Work out your cross-examination in advance. Use the verdict director to identify elements defendant will admit. Try to end on a high note.
2. Do not ask the witness on the stand whether another witness was lying in his or her testimony.

State v. Roper, 136 S.W.3d 891 (Mo. App. W.D. 2004). When defendant took the stand, the prosecutor directed his attention to the testimony of another witness and asked, "So when that witness testified to that fact, he was lying?" HELD: "The principle that a witness should not be asked to opine upon the truth or veracity of another witness's testimony has a long history in Missouri." The proper objection is that it is argumentative. "When seeking to expose contradiction between the testimony of several witnesses, an attorney may not directly ask one witness if another was lying . . . argumentative questions of this type should not be continued, and objections to such questions should be sustained."

3. Do not ask a defendant who invoked *Miranda* rights and NEVER spoke to police why he never told his story to the police.

LANDMARK CASE: *Doyle v. Ohio*, 426 U.S. 610 (1976). Two defendants were on trial for selling 10 pounds of marijuana and claimed they had been framed. In cross, the prosecutor asked why they had not bothered telling the arresting officer the story about being framed. Rather, they had invoked their *Miranda* rights when advised of them upon arrest. The questioning went along these lines:

Q: [The police officer] arrived at the scene?

A: Yes, he did.

Q: And I assume you told him all about what happened to you?

A: No.

Q: You didn't tell [the police officer] that this guy put \$1,300 in your car?

A: No, sir.

Q: Mr. Wood, if that is all you had to do with this and you are innocent, when [the police officer] arrived on the scene, why didn't you tell him?

A: [Silence]

Q: But in any event you didn't bother to tell [the police officer] anything about this [story that you were framed]?

A: No, sir.

HELD: The impeachment was improper. It violates due process to tell an arrestee he has a right to remain silent and then use that very silence against him.

4. If the defendant was not given *Miranda* warnings, his failure to

offer his exculpatory story at the first opportunity may be explored on cross.

EXAMPLE: *Jenkins v. Anderson*, 447 U.S. 231 (1980).

Defendant was being prosecuted for murder for stabbing another man. The defendant was not apprehended until he turned himself in two weeks later. His claim at trial was self-defense. He said the other man attacked him with a knife and he defended himself. During cross, the prosecutor pointed out his failure to claim self-defense immediately:

Q: And I suppose you waited for the police, to tell them what happened?

A: No, I didn't.

Q: You didn't?

A: No.

Q: I see.

[Discussion about the date defendant surrendered.]

Q: When was the first time that you reported the things that you have told us in Court today to anybody?

A: Two days after it happened.

Q: And who did you report it to?

A: To my probation officer.

Q: Well, apart from him?

A: No one.

Q: Did you ever go to a police officer or to anyone else?

A: No, I didn't.

Q: As a matter of fact, it was two weeks later, wasn't it?

A: Yes.

¶ In this case, no governmental action induced defendant to remain silent before arrest. The failure to speak occurred before the defendant was taken into custody and given *Miranda* warnings. Consequently, the fundamental unfairness present in *Doyle* is not present in this case. We hold that impeachment by the use of pre-arrest silence does not violate the Fourteenth Amendment. ¶

SEE ALSO: *Fletcher v. Weir*, 455 U.S. 603 (1982). Defendant was being prosecuted for murder for stabbing a person in a nightclub parking lot. At trial, he claimed self-defense. The court allowed the prosecutor to cross-examine him about his failure to mention the self-defense claim to the police after he was arrested. He had not been advised of *Miranda* warnings. HELD: ¶ In the absence of *Miranda* warnings, we do not believe it violates due process of law for a State to permit cross-examination as to

post-arrest silence when a defendant chooses to take the stand.ö The Court declined to broaden the *Doyle* holding. öCommon law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted.ö *Doyle* is a case öwhere the government had induced silence by implicitly assuring the defendant that his silence would not be used against him.ö That is not the case when the defendant is under arrest, but no *Miranda* warnings have been given.

SEE ALSO: *State v. Myers*, 997 S.W.2d 26 (Mo. App. S.D. 1999).

Defendant was charged with assault for shooting a rifle from an overpass into passing cars. He took the stand and gave an exculpatory story that he was framed by a man who died a month before trial. The prosecutor was allowed to cross-examine him with the question whether he had ever told öthis storyö to anyone associated with the investigation of the case before his testimony. Defendant claims a *Doyle* violation. HELD: The State may not use a defendant's post-arrest silence, following the receipt of *Miranda* warnings, as either substantive evidence of guilt or for impeachment. However, in the absence of *Miranda* warnings, it does not violate due process to permit cross-examination as to post-arrest silence when a defendant chooses to take the stand. Where a defendant offers an explanation for his conduct under circumstances suggesting he naturally would have given the explanation earlier, if true, his previous silence may be used for impeachment purposes if his silence was not the result of an exercise of a constitutional right.

SEE ALSO: *State v. Wilder*, 946 S.W.2d 760 (Mo. App. E.D. 1997) and 955 S.W.2d 229 (Mo. App. E.D. 1997). Defendant was arrested in Ste. Genevieve and transported to St. Louis by police to face charges for robbery and homicide at a pawnshop. He presented an alibi defense. When he testified, the prosecutor asked over objection whether it was true he had never told the police of his alibi witness at the time he was told by them the exact time and date the robbery had taken place. HELD: The State may not use a defendant's post-arrest silence, following receipt of *Miranda* warnings, as either substantive evidence of guilt or for impeachment. NOTE: Prosecutors sometimes make this error because they fail to realize that although the alibi witnesses themselves can be asked why they did not come forward sooner, a defendant who has been given *Miranda* warnings and chose to

remain silent may not be asked that sort of question.

5. Do not ask about the details of an underlying conviction when you are impeaching with a prior conviction. You may only inquire about the date of the conviction, the court, the charge and the disposition.

EXAMPLE: *United States v. Dow*, 457 F.2d 246 (1972).

Defendant was on trial for knifing another inmate in prison.

Defendant claimed self-defense. The victim was a schizophrenic who had recently been given too much medication, so it was not a case of obvious guilt. During the cross of the defendant, the prosecutor went deeply into the underlying facts of defendant's convictions:

Q: Have you ever been convicted of a felony?

A: Yes.

Q: How many times?

A: Three, I think.

Q: When was your first felony conviction?

A: 1965.

Q: What was that for?

A: Unauthorized use of a motor vehicle.

Q: And where did that take place?

A: In Portland, Oregon.

Q: When did your next felony conviction occur?

A: At Oregon State Penitentiary.

Q: What was that conviction for?

A: Escape.

Q: From where did you escape?

A: From the prison farm.

Q: How did you effect your escape?

A: I was with another boy. He hit the officer.

Q: The other boy hit the officer?

A: Yes, he did.

Q: You didn't take part in hitting the officer?

A: No. I didn't.

Q: What else happened during the escape?

A: We took his keys and his car, took off.

Q: You stood by while the other fellow attacked the officer?

A: Yes.

Q: You stood by and watched?

A: Yes, I was there.

Q: You didn't assist in any manner in overpowering the

officer?

A: I didn't hit the officer at all.

Q: Did you hold him?

A: No.

Q: What was your third conviction for?

A: It stemmed from that escape. Well, it is confusing.

Even the records office is still confused on it, because there was three charges that stemmed from the escape that night at the farm - was auto theft, robbery, escape from official detention.

Q: You still say you have been convicted of a felony three times?

A: Well, I guess it would have to be. I guess it would have to be, well, see, I went to court the first time for the auto theft and on, then, on that time was the second time. And the third time was when I escaped from Lomppoc Federal Correctional Institution. That is what I meant when I said three.

Q: And isn't it true that the fourth time you were convicted of armed robbery?

A: No.

Q: Well, when did your armed robbery conviction take place?

A: What I meant, I am confused on that. What I meant is the auto theft was the first time, the first felony I was convicted on. I would have to say there was three felonies that stemmed from the escape itself from the farm, the assault and robbery and escape from, or the auto theft.

Q: So there's four felony convictions?

A: (Affirmative nod.) And then the escape from Lompoc.

Q: Where did the armed robbery take place?

A: I don't recall any armed robbery.

Q: Well, you stated you were convicted of robbery.

A: Assault and robbery.

Q: Did you have a weapon when you effected the robbery?

A: I didn't have no weapon, no.

Q: Where did the robbery take place that you were convicted of?

A: Marion County, Salem, Oregon.

Q: And what did you rob?

Defense Counsel: Your Honor, I am going to object at this time. The question has been asked whether he was

convicted of these felonies. He has admitted it, and I don't think the details are relevant or material.

Prosecutor: Shows the pattern of conduct, Your Honor.

Court: I will sustain the objection.

The appellate court called this cross-examination "reprehensible" and reversed the conviction because of it. "As can be seen from the line of questions pursued by the prosecutor, with its excessive concentration on the prior criminal acts of the defendant, an attempt was made to destroy the character of the accused and not merely to impeach him as a witness. The line of questioning employed tended to portray the defendant as a dangerous criminal, likely to commit any offense. Indeed, the prosecutor admitted that this was his purpose when, in resisting defendant's objection to some of these questions, he stated that they "show the pattern of conduct." Such a tactic by the prosecution is reprehensible and goes well beyond the limitations of permissible cross examination. Questions of this nature, since their effect is to show criminal propensities, unfairly prejudice the defendant as to his guilt or innocence of the specific crime charged. Guilt must be predicated upon evidence relevant to the offense charged, and not founded upon past crimes."

EXAMPLE: *State v. Aye*, 927 S.W.2d 951 (Mo. App. E.D. 1996). Defendant was being tried for possession of cocaine. He was claiming it was planted on him. The prosecutor cross-examined him with a prior conviction for possession of cocaine, and went into detail about the facts of the underlying crime of the prior conviction. HELD: For impeachment purposes, the scope of cross-examination about prior convictions is limited to the nature, date and place of each prior conviction and the resulting sentence. The cross-examiner is not allowed to delve into the details of the crime leading up to the prior conviction. Reversed.

NOTE: Be aware that in Missouri you may impeach in criminal cases both with convictions and with guilty pleas (even an SIS).

491.050, RSMo. Any person who has been convicted of a crime is, notwithstanding, a competent witness; however, any prior criminal convictions may be proved to affect his credibility in a civil or criminal case and, further, any prior pleas of guilty, pleas of nolo contendere, and findings of guilty may be proved to affect his credibility in a criminal case. Such proof may be either by the record or by his own

cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer.

6. Be careful not to structure your questioning so that a cross-examination question about defendant's prior conviction to a similar crime will invite the jury to consider it for his guilt in addition to his credibility.

EXAMPLE: *United States v. Carter*, 482 F.2d 738 (D.C.Cir. 1973). The defendant was on trial for robbery. He had six prior convictions for robbery. The prosecutor prepared his cross so that the impeachment with the priors came right after a denial that defendant would do a robbery. It went as follows:

Q: And you wouldn't rob that man, right?

A: I had no reason to rob when I am working.

Q: You wouldn't do something like that?

A: No, I wouldn't.

Q: But in 1968, you were convicted of six counts of robbery and assault with a dangerous weapon, weren't you, on three different people?

A: Yes, I was, and I have learned my lesson from that.

The appellate court reversed this conviction, saying that the manner in which the prosecutor elicited evidence of the defendant's priors was improper because it was "calculated to defeat the purpose of the rule" limiting use of the defendant's prior convictions to a determination of his credibility, rather than his propensity to commit the crime. Even though the trial judge gave a curative instruction, the conviction was still reversed and a new trial ordered, solely because of the structuring of the prosecutor's cross-examination.

7. You may ask whether a witness has been convicted of any crimes, even if you do not know the answer.

EXAMPLE: *State v. Mustacchio*, 57 N.J. 265, 271 A.2d 582 (1970). The prosecutor had not had time to run a criminal history on the defense witness. At trial, the prosecutor asked whether the witness had any prior convictions. The witness said no. The defense asked for a mistrial on the theory that the question should never have been asked since the prosecutor did not have a good faith belief about the existence of any prior. The appellate court holds that "it is harmless to ask a witness blandly if he has been convicted of a crime" and the "witness is not stigmatized in the eyes

of the jury if his answer is in the negative.ö The cross-examiner öneed not have in his possession the record of a prior conviction or knowledge thereof, although in such event he may be bound by a negative answer from the witness.ö A prosecutor may ösimply ask a witness whether he has been convicted of crime where the prosecutor has had no fair opportunity to look into the matter and in good faith believes that the witness may have a criminal record. What we have said should of course not be taken as encouraging such inquiry.ö Normally, a prosecutor will have had time to run a criminal history on the defense witness and will not need to ask such questions blindly.

BUT SEE: öAlthough a prosecutor may impeach a witness by proof of prior convictions, it is questionable whether he can ask the witness whether he or she has ever been convicted of a crime when the prosecutor does not know the answer to the question or is not able to disprove the denial. The question is clearly improper if the prosecutor knows the answer is no. But even asking the question without knowledge of the answer invites abuse.ö Bennett L. Gershman, *Prosecutorial Misconduct*, Section 10:42 (Thomsen West 2007).

EXAMPLE: *State v. Gustafson*, 432 P.2d 323 (Ore. 1967). The defendant was being prosecuted for rape. The defense called as a witness the person in whose apartment the alleged rape occurred. On cross, the prosecutor took a shot in the dark about priors:

Q: Mr. Goozee, you ever been convicted of a crime?

A: Yes.

Q: It is your privilege at this time, Mr. Goozee, you can state the circumstances if you wish.

A: Well, couple of juvenile things and once for drunk and that is it.

Defense counsel: Was this drunk in the City of Seaside?

A: Right.

The defense counsel moved for a mistrial out of the hearing of the jury since the prosecutor had elicited improper testimony about juvenile priors and a municipal conviction. The trial judge denied the request for a mistrial, but gave an oral instruction to the jury: öLadies and gentlemen of the jury, just before you were excused, the District Attorney put a question to this witness to the effect of asking him whether or not he had ever been convicted of a crime, and the witness answered, ÷Yes.ø That he had a juvenile conviction and that he had also been convicted in the City of Seaside as I

recall. Now I instruct you that juvenile convictions do not constitute convictions of crime and convictions of city ordinances do not constitute convictions of crimes. Therefore, I now instruct you to disregard the question the District Attorney put to this witness in asking him if he had been convicted of a crime and all that part of the witness's answer wherein he related the juvenile conviction or the conviction of a municipal ordinance in the City of Seaside. That is stricken from the record and the jury is instructed to disregard it. The appellate court said that courts have condemned cross-examination about prior convictions unless the prosecution is prepared to prove the convictions if they are denied. The court was within its discretion in denying the mistrial, though, particularly in light of the curative instruction.

8. Do not suggest that a non-testifying defendant has prior convictions by questions you ask other witnesses when cross-examining them.

EXAMPLE: *Bellew v. Gunn*, 424 F. Supp. 31 (D.C. Cal. 1976). Defendant did not take the stand, so the jury did not know about his prior convictions. When the prosecutor cross-examined a defense witness who had been in prison, the prosecutor asked:

Q: When you first met [defendant], you were in state prison at that time, weren't you?

Although the question went unanswered, the inference that the defendant had served time in prison was virtually inescapable. This Court cannot condemn too strongly a seemingly deliberate effort on the part of the prosecutor to reveal a highly prejudicial piece of information. The conviction was not reversed, but only because the misconduct was harmless beyond a reasonable doubt.

9. If cross-examining with a prior statement to you, do NOT point out that the statement was to you, and do NOT structure your questions so that you in effect become a witness in that your credibility is pitted against that of the witness as to what she told you.

EXAMPLE: *State v. Bailey*, 58 N.Y.2d 272, 447 N.E.2d 1273 (1983). In a burglary case where the identification of the burglar leaving the premises was the key issue, a witness who had previously identified the burglar changed her story on the stand, resulting in this prosecutorial outburst of a cross-examination:

Q. You told me [about the blonde hair] yesterday?

A. Yes, in your office, that he had dirty blonde hair and an

afro.

Q. I submit to you, ma'am, you're telling a bald face lie right now!

Defense attorney: I request that statement be stricken.

Prosecutor: I'll take the stand and testify to that. No further questions.

Witness: Excuse me. He asked me if the guy had reddish hair, too, and I said dirty blonde.

Defense attorney: I have no further questions.

Court: Witness excused.

Prosecutor: I apologize to the Court.

The conviction is reversed because of this prosecutorial misconduct. Although it would have been perfectly permissible for the prosecutor here to have concentrated in argument, on proved facts and circumstances and the inferences to be drawn therefrom in order to support or undermine the credibility of any witness, it was utterly impermissible for him to present himself, as he here in effect did, as an unsworn witness to the witness's truthfulness.

10. Do not cross-examine defendant about his religious beliefs.

EXAMPLE: *Commonwealth v. Eubanks*, 511 Pa. 201, 512 A.2d 619 (1986). Defendant was on trial for the rape of a woman who lived next door to him in his apartment complex. During his testimony, he said he had planned to go to his parish later in the day to do some painting. The prosecutor questioned the defendant as follows:

Q: Is it correct that you were working for the parish?

A: Yes.

Q: It's because you were a good Christian?

Defense lawyer: Objection.

Court: Sustained. It will be stricken from the record. The jury is instructed to ignore it.

Q: Does this church teach smoking marijuana?

Defense lawyer: Objection.

Court: Sustained.

Q: Premarital sex?

Defense lawyer: Objection.

Court: Sustained.

Q: Did you think that smoking marijuana with [the rape victim] at 5 in the morning was going to help you do a good job for the church?

Defense counsel: Objection.

Court: Sustained.

Q. And you go to church, right?

Court: Mr. Carpenter! [the prosecutor].

The prosecutor explained that his line of questioning constituted a sarcastic commentary on the defendant's attempt to clothe himself in innocence by bringing up his affiliation with his church. The appellate court ruled the questions improper. "While circumstances can be imagined in which religious affiliation would be of relevance," the questioning in this case "was irrelevant to any issue in the case" and questioning about the defendant's religious beliefs "continued even after the court sustained objections." The conviction is reversed specifically because of this cross-examination.

EXAMPLE: *People v. Brocato*, 17 Mich. App. 277, 169 N.W.2d 483 (1969). The prosecutor began his cross-examination:

Q: Do you believe in God?

A: Oh, yes.

Q: So there is no question about the oath you have taken here?

A: Oh, no.

The appellate court said this question was "highly improper." The case was reversed due to other extensive prosecutorial misconduct.

11. In general, do not cross-examine with bad acts not amounting to convictions.

EXAMPLE: *Commonwealth v. Bricker*, 487 A.2d 346 (Pa. 1985). In a murder case where a police drug informant was shot to death, a defense witness was a bartender, called to dispute whether a meeting had taken place at his bar. The prosecutor began the cross:

Q: How's the drug business?

Defense counsel: Objection. [The objection was sustained and the prosecutor ordered to rephrase his question.]

Q: The judge asked me to rephrase the question, so I will. Do you deal drugs from the bar?

A: No.

Q: Ever deal drugs?

A: Look on my record, no.

Q: I don't want to look at the record. Did you ever deal

drugs?

A: No.

There was no evidence that the witness dealt drugs. Although drug-dealing was relevant in this case as a backdrop, it was improper to impeach [the bartender] in that fashion, as there was no evidence of involvement on his part in the drug business. The conviction was reversed for this and other prosecutorial misconduct.

EXAMPLE: *United States v. Dow*, 457 F.2d 246 (1972).

Defendant was on trial for stabbing another prison inmate to death. His claim was self-defense. During the cross-examination, the prosecutor asked:

Q: Now, isn't it true that while you were at the institution there in Oregon that you led a race riot?

[Defense objection sustained.]

Q: Were you ever involved in a race riot?

[Defense objection sustained.]

Q: Did you ever have a fight with an inmate named Mariono?

[Defense objection sustained, prosecutor admonished, and jury instructed not to draw any adverse inference from these improper questions.]

Although the jury was given a cautionary instruction regarding these questions, in our judgment the damage done was so extensive and serious that it could not be removed by an instruction. The indelible impression left with the jury was that the defendant hated negroes and that previously he had acted out his animosity in an overtly violent fashion. Questions like those propounded here are, of course, improper for two reasons. First, and perhaps most significantly, appeals to racial prejudice have no place in the courts of this country. Also, it is improper during cross-examination to question a defendant as to prior wrongful acts not resulting in a conviction.

12. Do not try to show "guilt by association" by cross-examining defendant about the prior convictions of his associates.

EXAMPLE: *United States v. Romo*, 669 F.2d 285 (5th Cir. 1982).

Defendant was on trial for conspiracy to distribute cocaine. At trial, the prosecution cross-examined the defendant about his knowledge of drug-related convictions of his associates. Defendant denied knowing about their various convictions.

HELD: "Cross-examination of a defendant may not extend to questions about convictions of relatives and associates." It is a long-established rule "that a defendant's guilt may not be proven by showing that he associates with unsavory characters. That one is married to, associated with, or in the company of a criminal does not support the inference that the person is a criminal or shares in the criminal's guilty knowledge." This cross-examination was "a highly prejudicial attempt to taint defendant's character through guilt by association." Conviction reversed.

13. When cross-examining character witnesses, ask them "Have you heard [about a prior bad act]?" not "Did you know [about a prior bad act]?"

EXAMPLE: *Michelson v. United States*, 335 U.S. 469 (1948). The defendant was on trial for bribing a federal revenue agent. His claim was entrapment. The defense called five character witnesses to prove that he enjoyed a good reputation. Their direct examination followed these general lines:

Q: Do you know the defendant? A: Yes.

Q: How long have you known him? A: About 30 years.

Q: Do you know other people who know him? A: Yes.

Q: Have you had occasion to discuss his reputation for honesty and truthfulness and for being a law-abiding citizen?

Q: Yes. It is very good.

On cross, the prosecutor asked two important questions:

Q: Did you ever hear that Mr. Michelson on March 4, 1927, was convicted of a violation of the trademark law in New York City in regard to watches?

Q: Did you hear that on October 11, 1920, the defendant, Solomon Michelson, was arrested for receiving stolen goods?

The prosecutor established his good faith for asking both questions outside the presence of the jury by showing a criminal history of the defendant. Two of the witnesses had heard about the trademark law conviction, and two had not. None of the witnesses had heard about the arrest that did not lead to a conviction. In *Michelson*, Justice Robert Jackson gives a good summary of the law relating to cross-examination of character witnesses. He points out that this area of the law is different from all others in that the character witnesses are only allowed to testify as to opinion based upon hearsay, but can be cross-examined about specific instances of bad

conduct (which would normally be inadmissible). When the defendant elects to initiate a character inquiry, not only is he permitted to call witnesses to testify from hearsay, but indeed such a witness is not allowed to base his testimony on anything but hearsay. What commonly is called "character evidence" is only such when "character" is employed as a synonym for "reputation." The witness may not testify about defendant's specific acts or courses of conduct or his possession of a particular disposition or of benign mental or moral traits; nor can he testify that his own acquaintance, observation, and knowledge of defendant leads to his own independent opinion that defendant possesses a good general or specific character, inconsistent with commission of acts charged. The witness is, however, allowed to summarize what he has heard in the community, although much of it may have been said by persons less qualified to judge than himself. . . . The witness must qualify to give an opinion by showing such acquaintance with the defendant, the community in which he has lived and the circles in which he has moved, as to speak with authority of the terms in which generally he is regarded The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him. The prosecution may pursue the inquiry with contradictory witnesses to show that damaging rumors, whether or not well-grounded, were afloat and for it is not the man that he is, but the name that he has which is put at issue It may test the sufficiency of his knowledge by asking what stories were circulating concerning events, such as one's arrest, about which people normally comment and speculate. Thus, while the law gives defendant the option to show as a fact that his reputation reflects a life and habit incompatible with commission of the offense charged, it subjects his proof to tests of credibility designed to prevent him from profiting by a mere parade of partisans. [A classic example in the books is a character witness in a trial for murder. She testified she grew up with defendant, knew his reputation for peace and quiet, and that it was good. On cross-examination she was asked if she had heard that the defendant had shot anybody and, if so, how many. She answered, "Three or four," and gave the names of two but could not recall the names of the others. She still insisted, however, that he was of "good character." The jury seems to have valued her information more highly than her judgment, and on appeal from conviction the cross-examination was held proper.] . . . A character witness may be cross-examined as to an arrest, whether or not it

culminated in a conviction, according to the overwhelming weight of authority. . . . Since the whole inquiry, as we have pointed out, is calculated to ascertain the general talk of people about the defendant, rather than the witness's own knowledge of him, the form of the inquiry, "Have you heard?" has general approval, and "Do you know?" is not allowed. Thus, both questions in the *Michelson* case were upheld as proper cross-examination.

14. Do not subject an expert witness to a demeaning personal attack. EXAMPLE: *State v. King*, 1986 WL 15039 (Tenn. Crim App.) The defense expert, a chemist, testified that he did not find any traces of drugs in the blood of a defendant charged with vehicular manslaughter. The prosecutor's cross included:

Q: Sir, haven't you heard that the effect of that is that the THC, the cannabinoids, the kind of thing you're looking for adhere to the glass in the tube and cannot even be removed - you cannot even test for that really and it very terrifically affects your test results?

A. I was not aware of that.

Q. Where did you go to school?

Defense counsel: Objection!

The appellate court noted that the schools the witness attended had already been established when he was shown to be a qualified expert witness, and it was prosecutorial misconduct for the prosecutor to ask the "improper question" about the school. "Although great latitude is permissible in cross-examination, and an expert witness may be subjected to rigorous cross-examination, he should not be subjected to a demeaning personal attack before a jury, especially on an issue previously determined, i.e., whether he had qualified to testify as an expert witness." Although the question was improper, the conviction was not reversed on that ground because the improper conduct could not have affected the verdict.

15. Do not use names of other high-profile criminal defendants an expert has testified for to try to prejudice the jury against that expert.

EXAMPLE. *State v. Blasus*, 445 N.W.2d 535 (Minn. 1989). Defendant, a 69-year-old man with no criminal record, had killed his wife. He is claiming mental disease. The defense called a psychiatrist. After properly establishing through cross that the psychiatrist had testified 30 times as an expert, and always for the

defense, the prosecutor could not resist naming names of notorious criminals the psychiatrist had testified for. The conviction was reversed specifically because of the cross-examination. "In the instant case, any impression that [the defense expert] testified equally often for the prosecution as for the defense had already been corrected before the prosecutor launched into the objectionable questions . . . Even the state does not argue that the testimony regarding specific cases had any unique evidentiary value . . . The murders referred to were gruesome and reprehensible, and the prosecution intended the jury to mentally link appellant with the frightening violence of these other cases, as is evident by the remarks in closing argument [where the prosecutor mentioned again that the psychiatrist had one of the notorious murderers for a former client]."

IX. WORKING TOWARD EXCELLENCE AS A TRIAL LAWYER.

1. "A lawyer learns most of his law at the expense of his clients. No matter what his preparation is, he isn't much when he starts practicing, and he either learns or he doesn't learn from then on."

Robert H. Jackson
America's Advocate: Robert H. Jackson (1958)

2. "I now had a license to practice law, but no one had called me to practice on him."

Clarence Darrow
The Story of My Life (1932)

3. "My staff is young, and designedly so. That's the only way you can get the kind of enthusiasm you need to run a law office. With the exception of a few mature men, the way to run a prosecuting office is to have men whose futures are ahead of them and not behind them."

Thomas E. Dewey
Twenty Against the Underworld (1974)

4. "No man should be in public office who can't make more money in private life."

Thomas E. Dewey
Twenty Against the Underworld (1974)

5. "I have not devoted eight years of my life to the administration of justice because I

take pleasure in prosecuting and convicting. Rather, I think of them as eight years spent in one of the laboratories which tests the qualities of government and its ability to make right those things that are wrong.ö

Thomas E. Dewey
Twenty Against the Underworld (1974)

6. öI could win most of my cases if it weren't for the clients.ö

Horace Rumpole
Rumpole For the Defense (1981)

7. öDuring his prosecutor days, former Chief Justice Earl Warren wrote in a preface to a proposed manual that the district attorney öhas become the most powerful officer in local government.ö He noted that the prosecutor ödeclares and determines the law enforcement standards of his countryö and decides who shall be prosecuted and who öshall not be subjected to our criminal procedure.ö Warren thought it strange öthat no one had ever bothered to write a book about the business of being a district attorney.ö

John D. Weaver
Warren: The Man, The Court, The Era
(1967)

X. SUGGESTED READING

- A. *National Prosecution Standards, Second Edition*, National District Attorneys Association (1991).
- B. *ABA Standards for Criminal Justice Prosecution Function and Defense Function, Third Edition*, American Bar Association (1993).
- C. *Doing Justice: A Prosecutor's Guide to Ethics and Civil Liability*, National College of District Attorneys (2002).
- D. Bennett L. Gershman, *Prosecutorial Misconduct, Second Edition* (2007).
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- G. Traver, Robert, *Small-Town D.A.* (1954).
- H. Dewey, Thomas E., *Twenty Against the Underworld* (1974).
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- K. Mortimer, John, *Rumpole of the Bailey* (1978).

- L. Wellman, Francis L., *The Art of Cross-Examination* (1903).
- M. Younger, Irving, *Credibility and Cross-Examination*, videotaped lecture available from Professional Education Group, Inc., Minnetonka, Minnesota.
www.proedgroup.com, 800.229.CLE1.
- N. Swingle, Morley, *Scoundrels to the Hoosgow: Perry Mason Moments and Entertaining Cases From the Files of a Prosecuting Attorney* (University of Missouri Press, 2007).