Effective Cross-Examination and Use of Evidence Rules in Family Law Cases

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Cross-examination can be described as both an art *and* a science. It is typically the part of a litigated matter that advocates enjoy the most—perhaps the closest thing we as lawyers get to the "*You can't handle the truth*"[1] moments we see on television or in the movies. The excitement. The thrills. Perhaps even a "smoking gun"-type answer where you walk back to counsel table trying to hide your smile and sense of fulfillment. Ultimately, how are we as family law practitioners expected to get to the truth of a matter and persuade a trial court judge in our client's favor without this very fundamental trial skill? The last time we checked, each litigant always enters a courtroom with their own version of the truth. Developing and arriving at the version you need a judge to find in a trial decision is, as a result, a product of strategy, preparation, and performance.

Indeed, it is very difficult to conduct a great, *case-defining* cross-examination of a witness. It is far easier and within our reasonable grasp as lawyers to conduct a very good, *effective* cross-examination—it merely requires knowledge and preparation. Preparation in this context, however, requires an understanding of the *Rules of Evidence*; an encyclopedic knowledge of the "file;" and at least a modicum of knowledge about psychology. Although attorneys should know every *Rule of Evidence*, the purpose of this article is to highlight key evidence rules for use at trial, as well as helpful cross-examination tips.

I. Creating a Theme and Using Discovery as the Building Block of an Effective Cross-Examination

Before we get to the *Rules of Evidence*, it is important that we discuss fundamental cross-examination principles. Indeed, without those principles, the *Rules of Evidence* are nothing more than a chronological series of rules that may help you *admit* certain evidence at trial if you know how to properly apply them. This is, of course, only half the battle (and not the "fun" half).

As Francis L. Wellman opined in *The Art of Cross-Examination*, "There is no short cut, no royal road to proficiency, in the art of advocacy. It is experience, and one might almost say experience alone, that brings success . . . Success in the art, as someone has said, comes more often to the happy possessor of a genius for it."[2] The authors of this article learned and developed their cross-examination skills by observing others (the "what to do and not do" approach), reading trial and cross-examination literature, creating their own voice and style to their examinations, knowing the law, knowing the case, and more. Every lawyer who performs a cross-examination has their own style. Every lawyer walks out of a cross-examination thinking it went well in some respects and could have been better in others. We are lawyers after all, and a mix of confidence and second-guessing is in our DNA. Where, ultimately, do the building blocks of an effective cross-examination begin? The simple answer: long before the cross-examination ever occurs.

i. Developing a Theme and Determining a Desired Outcome for Your Case and for Each Witness

From the outset of your case, think about what you are trying to prove and what result you want from the trial judge. By way of examples:

- How do I prove that my client should be awarded primary physical custody?
- How do I persuade the judge that my client should receive a certain amount of alimony for a specified length of time?
- What information do I need to procure my client's desired equitable distribution of the subject business in dispute?

In a similar vein, all cases—including non-jury, Family Part cases—should have a "theme" (or a story you wish to tell) during cross-examination. You can break the themes down into sections or "chapters"[3] to assist the court. For example, you may have a section or "theme" during cross-examination about the other party's inability to co-parent. You may have a theme about the witness's poor decision-making vis-à-vis medical care. You should think about that theme from the consultation,

through summation, and develop each of your sections or "chapters" with those themes in mind.

Also think about what you are trying to procure from each adverse witness – are you trying to procure information from the witness to develop your factual narrative? Are you trying to discredit the witness? Are you cross-examining the witness with some other goal in mind? Each witness has its own purpose, whether testifying for your client or for the adverse party. Using adverse witnesses to develop your overall case theme and achieve your desired outcome is a critical component of case strategy that you should consider at all times during your matter.

With a desired outcome and narrative theme, the next step in developing your cross-examination is to procure discovery that will aid you in achieving your desired result.

ii. Discovery

Preparing an effective cross-examination actually starts with the discovery process. The goal of cross-examination is to elicit responses you want (i.e., the "right" answer) to, as indicated above, craft your client's narrative and persuade of its truth. Use discovery to build the foundations for the "right" answer you will seek to elicit on cross-examination. Obtain the information you need for your trial and closing summation—and use that information on cross-examination to get you *to that summation*.

Use of traditional and non-traditional discovery techniques will help you achieve your goal if you know how to properly procure and apply the information received from the opposing party. The techniques can be as general as issuing written discovery in the form of Interrogatories[4] and a Request for Documents,[5] or be as specific as ensuring you have the right forensic accountant to investigate your case and help determine/obtain the information necessary to craft your examination (and perhaps even aid in preparing that examination).

During a divorce most family law practitioners issue a similar form of traditional discovery requests, which include Interrogatories and a Request for Documents. There may be several types of interrogatories to address finances, custody and parenting time, employability, lifestyle, and more. The requests typically cast a very broad net to ensure no stone goes unturned. Some cases may merit the issuance of a Request for Admissions or the taking of a deposition to pinpoint an opposing litigant's point of view.

What if your case involves a business and the opposing party is the business owner where a valuation of the marital business interest is required for equitable distribution? Starting with discovery may be somewhat daunting because the information you may need to build your cross-examination could fall beyond what is covered by the more traditional Interrogatories and Request for Documents. Once you receive the information, you may also not be able to interpret the information like your expert can. Working with your forensic accountant to develop a list of tailored document and information requests, decipher the information received, prepare the valuation, understand the targeted points for inquiry, and, ultimately, working with the expert to prepare specific questions to ask the opposing party/opposing expert/other relevant third parties could make or break an outcome on issues involving the value of the marital interest in a business, an opposing party/business owner's cash flow and more. These steps can be both valuable during an information-gathering or cross-examination type deposition, or at a future cross-examination at trial.

Upon collecting the responses and (often inevitably) addressing deficiencies, it is then incumbent upon the attorney to use the information to start building that future cross-examination. In fact, it is better to start envisioning what the future examination may look like rather than waiting until the eve of trial to start formulating your approach. Moreover, you are not just using the information/documentation procured to build your cross-examination, but also to procure more information to support your theme. You are developing your set of facts and your examination roadmap one building block at a time.

II. Developing Your Cross-Examination Style to Tell Your Client's Story and Impeach Testimony and Discredit a Witness

i. Style *and* Substance

We all have our own examination style in litigation. We also all have our own examination skill sets. No one style or skill set can be used as a blanket in questioning a witness. Each examination depends, in part, on the witness, the theme, the discovery, the adversary, the judge and so much more. No one cross-examination, as a result, can mimic the next if it is done correctly.

You are not just merely confronting the witness. You are, more importantly, examining the witness. Too many practitioners relish only in the former and undervalue the latter. Cross-examination is not merely an opportunity

for you to impeach the witness's testimony and discredit the witness in the eyes of the jurist presiding over your case. In fact, the best cross-examiners use the "credibility" component of cross-examination as an ancillary (though important) benefit. Rather, cross-examination is the opportunity for you to *tell your client's story* through the words of an adverse party, expert or third-party witness. When you can achieve that end—and master it (which no one will ever do since we will all be "practicing" until we decide to step away) —there is nothing more powerful or persuasive in a trial. This relates to the next principle.

ii. Know Your Witness from the Inside/Out

Proper and effective cross-examination of a witness also requires you to know the witness to the extent possible since a large part of any cross-examination, or any examination for that matter, is psychology. Who is your witness? What is their personality? How will they react to a more tough-minded/confrontational approach compared to a friendlier approach? What is the person's backstory? What will resonate with the witness?

It may sound obvious, or even pointless, but pinpointing what resonates with your witness may (if not "should") aid you in getting to the testimony you want to hear. For instance, what are your witness's interests and hobbies – innocuous questions to comfort the witness may make them more willing to talk. A more serious approach may require you to know or understand a difficult time the witness had in their life. In some ways it is not entirely unlike the adverse witness lying on the therapy couch and you as the therapist knowing what opening you can use to get the patient to start talking.

As expected, most adverse witnesses already dislike the attorney conducting the cross-examination. There is immediate skepticism, frustration, perhaps even anger toward the opposing attorney. If the witness sees or hears that you as the cross-examiner understand them and perhaps can even relate on a human level, which, quite frankly, is not always easy as an attorney, you may more easily get the witness to say what you want said. The old "you catch more flies with honey" expression comes to mind. Of course, as discussed below, it is imperative that once you get the witness talking on cross that you know what the person is actually going to say – cross-examiners generally do not like surprises so framing your questions and how you get your witness to settle in also requires precision.

On the flip side, many adverse witnesses are like a block of ice that simply cannot be thawed with charm or a transparent attempt at bonding. In those cases, adjusting to the tenor of the witness from the outset and simply diving right into a sharp examination may be your only effective approach.

iii. What are Your Client's Goals with the Cross-Examination of an Adverse Party or Witness?

As difficult as it may be to comprehend on occasion, we also must consider what our client wants out of a particular cross-examination. What story do they want told? What facts do they want you to elicit to build on what was addressed during your direct examination? What tone do they want you to take? Will they only accept a tough-minded approach, or will they accept you attempting to coax answers from the witness by being more "friend than foe"? To that end, does your client even care if your examination results in the right story being told, or do they simply want you to hold the witness's feet to the fire? What makes the cross-examination a success or worthwhile in the client's eyes?

At the most basic level, for example, how we cross-examine a party witness as compared to a third-party or expert is vastly different. While the cross-examination of a party is far more expansive based on the entirety of facts and circumstances involved, the cross-examination of a third-party or witness is commonly a far more focused endeavor.

As a threshold matter, for example, a third-party witness customarily has a more limited knowledge of the case as compared to a party witness and is presented by opposing counsel with a specific focus in mind. A few examples include, but are not limited to: (i) a third-party parent of the opposing spouse may testify as to whether money provided to purchase the marital home was provided only to the opposing spouse or to both parties, and/or whether the money was a loan or gift; (ii) a third-party cohabitant testifying as to the nature of their relationship with the payee spouse; (iii) a third-party business partner of the opposing spouse testifying regarding details of the business subject to equitable distribution; and (iv) a third-party co-respondent testifying about monies spent on them by the opposing spouse in connection with a dissipation claim. When the authors of this article draft a third-party cross-examination, we use our more expansive knowledge of the case to devalue/discredit the witness's direct testimony. Cross-examination here may also be ripe to explore the witness's poten-

tial bias, especially if they are a family member, friend or significant other of the opposing party.

The authors of this article also find that cross-examining an expert not only requires a detailed knowledge of the entire case and the expert's area of claimed expertise, but also a knowledge and understanding of how to effectively question the expert and ideally discredit the subject report. For instance, many of us have read forensic accounting business valuations and cash flow reports, but how many of us really understand their contents and conclusions to the point that we know how to develop a cross-examination calling said contents, methodologies and conclusions into question. Doing so is not just about having your own expert (if you have one) develop for you your cross-examination, but being able to – while on your feet – address the expert's answers, adjust to answers that may differ from what you expect, and ultimately elicit testimony that will persuade the trial judge to favor your own expert's report over that of the opposing party.

iv. Credibility – Impeach the Testimony, Discredit the Witness

It is well-known that trial courts, especially in the Family Part, are owed substantial deference in their findings when supported by "adequate, substantial, credible evidence."[6] Deference is especially appropriate "when the evidence is largely testimonial and involves questions of credibility."[7] "Because a trial court hears the case, sees and observes the witnesses, [and] hears them testify, it has a better perspective than a reviewing court in evaluating the veracity of witnesses."[8]

There is no question that credibility is at the heart of almost every family law matter. Establishing and impeaching credibility, as a result, is a critical component of any litigation, especially in this practice where so much of what we do is dependent on "he said/she said" allegations. There are five generally acceptable modes of attack upon the credibility of witness: prior inconsistent statements; partiality (or bias); defective character, subject to N.J.R.E. 608; defective capacity of witness to observe, remember, or recount matters; and proof by others that material facts are otherwise than as testified to by witness under attack.[9] There is perhaps no better example of how the impeachment of testimony and discrediting of a witness can result in success than during hearing for a Final Restraining Order where the practitioner has minimal access to the traditional discovery tools referenced above.

If you have studied trial practice or attended any CLE courses regarding cross-examination, you know that most attorneys agree: "*do not ask a question on cross-examination to which you do not know the answer.*" While that is true 99% of the time, we would add: "do not ask a question on cross-examination to which you do not know the answer*(s)*." Meaning, you may face a difficult witness who could theoretically provide one of two different answers based on the evidence in the case (and either answer is helpful for you). You should know how to deal with *both* answers—and have impeachment[10] material prepared and ready regardless of which path the witness takes.

To that end, Wellman sagely comments about how we as litigators should not only be prepared with how to address *both* answers, but also how to physically react when the answer is not necessarily as we anticipated:

> A good advocate should be a good actor. The most cautious cross-examiner will often elicit a damaging answer. Now is the time for the greatest self-control. If you show by your face how the answer hurt, you may lose your case on that one point alone . . . With the really experienced trial lawyer, such answers, instead of appearing to surprise or disconcert him, will seem to come as a matter of course, and will fall perfectly flat. He will proceed with the next question as if nothing had happened, or even perhaps give the witness an incredulous smile, as if to say, "Who do you suppose would believe that for a minute?"[11]

On a related point, do not ask a question on cross-examination for which you do not have impeachment material. As noted above, while we want the adverse witness to tell your client's story, we also want answers that we know are coming, perhaps only in "yes" or "no" form as needed, and not a narrative that allows the witness to escape or do an end-run around what our ultimate goal is in both cross-examining the witness and in the case as a whole. Moreover, consider the value of your intended line of questions designed to impeach. In other words, what answer are you trying to discredit? Is there real value in doing so, what issue does it help you prove, is it just designed to make the witness look bad and, by focusing on such impeachment is the trial judge going to side with your desired view of the opposing witness? You want to elicit your desired response. You want to effectuate your desired impeachment. Most importantly, you want to persuade the trial judge of in support of your theme.

v. Effective Cross-Examination Techniques and Examples

a. Showing a Witness Their Own Words.

You are probably not one of the 1% (or less) of individuals with eidetic memories. Accordingly, you should prepare an outline — one that corresponds with your developed themes. Your outline should have the locations, in the record, of deposition testimony you may use to impeach an "incorrect" answer.[12] After all, it is during the deposition when you often asked more open-ended questions now opening the door to the very impeachment you seek to effectuate. And by this we mean: exhibit numbers, as well as page and line numbers, which you will provide to the court, the court reporter, and the witness. This same principle applies to Certifications you may use, emails, and any other material you may use to impeach. Rest assured, if you confront witnesses three or four times with conflicting testimony from a transcript (or Certification) inclusive of the page, line, and place in the record — before the witnesses even have a moment to catch their breath — you may break their will very early on in the cross-examination.

Consider the famous philosophical saying, "*Tell me and I will forget; show me and I may remember; involve me and I will understand*."[13] If you confront a witness with "didn't you say . . .[,]" the witness may very well say "I don't know." This may be a proverbial "death knell" for an entire line of questioning. If you show witnesses their words, they are more likely to remember. But if you convince the witnesses that you are working with them, you will have them testifying on your behalf in no time. Take this real-world excerpt from a cross-examination by one of the authors (Nunn) regarding PTSD, disability, collateral information, and forensic guidelines, all of which stemmed from a payor's attempt to avoid alimony:

- He told you that his accountant made an error that caused him to take a lot of money out of savings to give to the IRS? [*Yes.*]
- And you've opined that financial stress is a contributing factor to his disability; correct? [*Contributing factor, yes.*]
- Did you speak to his accountant? [*Nope.*]
- Did you speak to anyone from the IRS? [*No.*]
- Did you review any records that would corroborate that statement about the accountant making a mistake? [*I did not.*]
- **Because they weren't provided to you; correct?** [*Correct.*]
- He's worried about his financial situation? [*Correct.*]
- Worried about losing his home? [*Correct.*]
- Over the course of your four reports, you did not review a single financial record of Mr. _____? [*Correct.*]
- **Because none were provided to you; correct?** [*Correct.*]

. . . .

- Where in your report do you have any details about the traumatic events he allegedly suffered? [*He asked me not to put it in, but I will state – say that he was abused at summer camp.*]
- According to him? [*According to him.*]
- He's the ***lone source*** of that information? [*Absolutely.*]
- You reviewed his therapists' notes? [*Yes.*]
- Nothing about this abuse in those notes? [*Correct.*]

. . . .

- You're familiar with the "Specialty Guidelines for Forensic Psychology"? [*I am.*]
- Do you believe you followed them? [*I believe that I asked for the records that were available. I believe that, you know, I had sufficient sources of information on which to base my opinion. So, yes.*]
- Look at guideline 8.03 on Page 14. [*Ok.*]
- You believe you complied with this guideline? [*I would have liked to have seen the relevant discovery. That's the one part that I wish I had seen.*][14]
- Can you also turn to guideline 9.02? [*Yep.*]
- Would you agree with me that that guideline is titled "Use of Multiple Sources of Information"? [*Yes.*]
- It reads: "Forensic practitioners ordinarily avoid relying solely on one source of data and corroborate important data whenever feasible," and then there are citations; correct? [*And I would argue that I utilized batteries of psychological and neuropsychological tests in order to meet that standard.*]
- And Mr. _____is the one who took the tests? [*Correct.*]
  And gave you the information in the interviews. [*Yes.*]
- And you didn't speak to anyone else? [*Correct.*]
- **And so your opinion was limited by what was provided to you?** [*Yes.*]

Through this examination the witness believed the examiner was "helping" him or giving him a "way out." In other words, the examiner "involved" the witness in the examination as opposed to just impeaching him with documents. The consistent theme of the examination was

to lay blame at the feet of the litigant who was less than candid with his expert.

b. Primacy and Recency.

Next, remember the principles of primacy and recency (or "start strong" and "end strong"). These principles are based on, respectively, the well-accepted notion that factfinders, even judges, will believe the credible or impactful testimony they hear first and remember that which they hear last. You can use this to your advantage in the "middle" of your cross-examination to throw the witness off the "scent" of your overall theme. It is essential in planning cross-examination to ensure a strong opening and stronger finish (hopefully, with your best point or points). Take this real-world excerpt from a cross-examination by one of the authors (Nunn) in which the expert's report included a recommendation that the child (age 3 at the time of trial), who had been living *pendente lite* with both parents, should be in the mother's primary custody because it was important to form the primary attachment with his mother through ***age 4***:

- Now, the third phase of the formation of attachments is referred to as the attachment phase? [*Yes.*]
- This occurs between seven months and two years? [*Yes.*]
- And the final phase is referred to as the Goal Corrected Partnership Phase? [*All right.*]
- **And this from the ages of 2 to 4?15 [*All right. Correct.*]**
- We then moved on, for approximately an hour-and-a-half, to other subjects. When the witness appeared tired, I circled back:
- You cited to an article from Lamb and Kelly? [*Kelly and Lamb, yes.*]
- Now can you go to page 44 of your report? [*Yes.*]
- I asked you earlier about the final attachment phase, correct? [*You did.*]
- And you agreed with me that this occurs between . . . [*Two and four.*]
- Two and four? [*Mm-hmm.*]

The witness was then confronted with the first page of the (updated) article from Kelly and Lamb.

- Would you agree this is the article that you are referring to in the referenced at Page 44 of your report? [*Yes.*]
- Turn to page 4. What are the last words at the bottom of page? [*Goal Corrected Partnerships.*]
- Can you turn the page? Can you read the first sentence? ["*Finally, the Goal of Corrected Partnerships phase occurs between 24 and 36 months of age.*"]
- **Not 48 months of age, correct? [*Thirty-six months, correct.*]**
- **So, you mis-cited this article, correct? [*I did.*]**
- So, we've already established that _____is attached to both parents, correct? [*Yes.*]
- He's thriving? [*That's my opinion, yes.*]
- Spending equal time with the parents? [*Hour-wise, yes.*]
- And in both your report and your testimony today, you misrepresented, the final phase is from 24 months to 4 years, correct? [*I am I stand corrected, correct.*]
- **You believe Ms. _____ is the Primary attachment figure, correct? [*No.*]**
- **No? [*She said she was. I didn't say she was.*]**

As you can see, the expert, who previously identified the mother as the primary attachment figure in his report, changed his opinion on the stand. The examiner did not further impeach the witness with the report—the damage was done, which leads to another tip: *do not ask one question too many.*[16]

c. Visual Aids

Another useful approach is to use visual aids when appropriate. This may not only provide a level of comfort for the opposing witness, but also simplify matters for a trial judge who is attempting to make sense of it all. The authors of this article find the use of visual aids to be of particular potential value when examining an expert witness. In the below example taken from the testimony of an opposing custody expert, one author (Epstein) challenged the expert's ultimate conclusions, especially as to the recommended parenting time schedule, by presenting the expert with a blank piece of paper and marker and asking her to draw a calendar of her recommended schedule. At the conclusion of this line of questioning – which the author designed to coincide with the end of that day's testimony – the expert discredited her own primary custody and parenting time recommendation:

- You make a [ ] recommendation that mom should be designated as the parent of primary residence, correct? [*Yes*].
- And that the children should really only be at one residence, right? [*Yes*].
- I want you to do me a favor . . . I want you to write out for me just so I have an understanding of what your recommended parenting time schedule is. [Attorney approaches with piece of paper to have

expert draw a calendar of her recommended schedule for both children at issue].

- [Approximately five minutes of silence pass while the expert attempts to write out her recommended schedule. The delay only further highlighted counsel's effort to discredit the expert's recommendation.]
- How's it going? [*I made a mistake. I'll explain what I did.*] [Attorney approaches to retrieve the drafted schedule after which expert attempts with difficulty to explain the schedule broken down for each child and her admitted mistake.]

. . .

- Just to reiterate my question, you just made an indication that you recommended the children should also spend time together with one parent. [*Yes.*]
- Can you let me know as to the regular parenting time schedule, where in your report it says that? [Long pause follows.] The parenting time schedule is detailed on pages 45 and 46. [*Right.*] [Long pause follows.] [*Okay, I was leaving that up to the, um, parents' discretion . . .*]

. . .

- Let's take a step back. You just made an indication before you started going into that calendar again that you were leaving it up to the discretion of the parties. Where in your report as to the parenting time does it indicate that you are leaving anything to discretion of these parties with respect to these children being together? [*I don't see it in the report.*]

. . .

- Upon further being questioned about her recommended parenting time schedule and the hand drawn calendar she drew during her testimony, the expert further backtracked. [*I'm sorry, I misspoke. And I also made a mistake in this chart here too.*]
- What do you mean? [*It wouldn't work out because I separated them too much.*]

. . .

- [Attorney then approaches with his own hand drawn schedule based on his understanding of the expert's recommended parenting time.] Based on your recommendation, doesn't that confirm that the only day the children are together is on Monday? [*Yes.*]
- If I told you that both parties agree that the children should not be separated during their parenting time, would that impact upon your determination and recommendations here? [*That would effect it, yes.*]
- And isn't it fair to say that if the children are only together, because they're in school for most of the day, they're only together one day a week, that their relationship will essentially be non-existent? [*Yes. Yes.*]
- And that would not be in their best interests, correct? [*Right, right.*]
- [At this point in the time the expert asks to stop testimony for the day.]

Thus, even the simple presentation of a visual aid – handcrafted by the expert under cross-examination scrutiny – helped in discrediting the expert's core recommendation upon which the entirety of a substantial report was based.

d. Looping

An effective cross-examination almost always includes "looping," which is the practice of repeating important answers or themes elicited in the testimony through follow-up questions (i.e., the examiner keeps "looping" back to prior answers).[17] Arguably, the use of looping implicates N.J.R.E. 403 and N.J.R.E. 611. Though certainly not the most important substantive evidence rules, a trial attorney must understand those two rules. These rules serve as bedrocks of *how* the court will conduct trial. While many family law attorneys know N.J.R.E. 611 as the "leading question" rule and N.J.R.E. 403 as the "exclusion" rule, their importance goes far beyond those issues.

If you watch enough *Law and Order*, you will hear "asked and answered;" you will not find that phrase in the *Rules of Evidence*. Indeed, when you hear that phrase, what the objecting attorney really means is "Judge, the question calls for the needless presentation of cumulative evidence,[18] it is harassing in nature,[19] and/or it is a waste of the court's time."[20] Simply expressing by rote use of "asked and answered" fails to inform the court (or the Appellate Division) as to the specific evidence-based objection. The key, therefore, to avoid a sustained objection on those grounds is to add additional facts to subsequent questions—the practice of looping:

- Where did you go to college? [*I attended Rutgers University.*]
- When did you graduate from Rutgers? [*In 1997.*]
- After your graduation from Rutgers in 1997, did you attend any other school? [*I attended Harvard Law School.*]
- Did you graduate from Harvard Law School? [*Yes.*]
- What year did you graduate from Harvard Law School? [*2000.*]
- After you graduated from Rutgers in 1997 and

finished Harvard Law School, what did you do? [*I went on to clerk for a circuit court of appeals judge.*]

This is a very simple example of "looping" prior facts into later questions. Why would you care to "loop" like this? In broad terms, most witnesses will agree with questions in which their own words are accurately recited. As to this specific snapshot, you just established and re-affirmed to anyone listening, that this individual is highly educated. Bear in mind though, even though you may add additional facts as part of "looping," the key to cross-examination is to breakdown your questions into small pieces that require the witness to respond with short answers (i.e., break down every sentence into a series of one-word statements). Here is another real-world example from one of the authors (Nunn) in a relocation trial on remand from the Supreme Court:

- You just testified about 27 email chains, correct? [*Yes.*]
- Each of those 27 email chains were between you and your ex-husband? [*Yes.*]
- Each of those 27 email chains between you and your ex-husband occurred after the court ordered your return from _____? [*Yes.*]
- In each of those 27 email chains, your ex-husband asked for additional parenting time? [*Yes.*]
- In none of those 27 email chains did you afford your ex-husband any additional parenting time? [*I don't know.*]
- Show me which one of the 27 email chains includes additional time offered by you to your ex-husband? [*I can't.*]
- You answered discovery in this case? [*Yes.*]
- You provided documents in discovery? [*Yes.*]
- You did not produce in discovery any documentary evidence of any additional parenting time you afforded your ex-husband since you returned from _____? [*I don't know.*]
- You did not produce, at trial, any documentary evidence of any additional parenting time you afforded your ex-husband since you returned from _____? [*I don't know.*]
- You did not produce any written documentation in which you afforded additional parenting time to your ex-husband since you returned from _____? [*I don't know.*]

Anecdotally, there was no concern on the examiner's part that the witness would produce any written evidence as none had ever been produced and the examiner had copies of all emails and text messages between the parties, as well as communications between counsel. Moreover, the three "I don't knows" made the witness look foolish to the trial court judge.[21]

Another effective use of looping is to loop in previously provided answers to "box in" an opposing witness to a desired series of answers. For example, using an opposing spouse's answers to custody and parenting time interrogatories is often a ripe source of attack through the looping method. A line of questioning often employed in similar by one author (Epstein) is as follows (with presumed answers included to develop the point):

- In response to interrogatory #X, you answered that you believe you should have primary residential custody of the children because you are a better parent than the other party. [*Yes.*]
- How are you a better parent than the other party? [*Because I am more available to our children than he is.*]
- You heard him testify earlier that he can modify his working hours so that he can take the children to school, pick them up from school and transport them to after-school activities? [*Yes.*]
- Assuming that is true, would you say he would be just as available to the children as you are? [*….I guess.*]
- Are there any other reasons that you believe you are a better parent than the other party beyond your claimed greater availability for the children? [*I expect our children to follow rules and he is more "hands off" with them.*]
- So you have a different parenting style than he does? [*Yes.*]
- Different, but not necessarily better for the children? [*Yes.*]
- There has been no proof you have provided to this Court that your style of parenting is more in the children's best interests than his style of parenting? [*No, there is no proof.*]
- In fact, when your own custody expert testified on your behalf, at no point in time did she state that you should have primary residential custody of the children over him simply because you have different parenting styles, right? [*Right.*]
- Other than your claimed greater availability for the children and allegedly more effective parenting style, are there any other reasons why you believe you are a better parent than the other party? [*No, that is all.*]

The author has used a similar line of questioning to that outlined above on numerous occasions and it often proves effective in cornering the opposing witness into

your desired theme while simultaneously discrediting their testimony. The author will also often combine this technique with a visual aid approach by having the opposing witness write down each answer as the line of questioning unfolds. In other words, the opposing witness is bearing witness to the looping of their own answers.

III. Specific Rules of Evidence to Remember

i. Relevancy and its Limits

Relevancy is another bedrock rule of evidence. "Relevant evidence" means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action.[22] With respect to cross-examination, you generally cannot ask questions on cross-examination that are outside the scope of direct examination unless your questions relate to credibility.[23] Accordingly, if you ask a question on cross-examination and an objection is sustained for being "outside the scope of direct," make a notation in your outline and call the adverse witness as your witness; this will enable you to both ask the question and do so in a leading manner.[24] Bear in mind though, you have some latitude to develop your cross-examination.[25] That is, it is appropriate—in response to a relevancy objection—advise the judge that the questions will be connected in the next few questions, 10 minutes, etc. (i.e., conditionally relevant facts).

Now consider the "27 email" email line of examination. The attorney opposing the examination could have objected on "cumulative" grounds (i.e., "Mr. Nunn is wasting time going through 27 email chains").[26] The opposing attorney also could have objected that the witness's failure to allow visitation in any of the 27 email chains was impermissible "propensity"[27] evidence or designed to make the witness look bad.[28] In response, the cross-examiner could have answered: (i) propensity evidence is permissible to show intent (i.e., the witness's intent[29] is to deprive the children of a relationship with the parent); and (ii) that the best interest factors require a consideration of whether there is "any history of unwillingness to allow parenting time not based on substantiated abuse . . . ."[30] *Practice tip: anticipate objections and have the corollary evidence rules at your disposal.*

ii. Hearsay

Perhaps the most important substantive rule is "hearsay"[31] and its exceptions.[32] It is also the rule upon which practitioners rely most when addressing an opposing advocate's ongoing examination. Much of the initial law school evidence courses focus on hearsay—and with good reason. As practitioners know, hearsay is not admissible[33] except as set forth in N.J.R.E. 803. Hearsay can be broken down as follows: (i) a statement made by a declarant; (ii) the statement is not made by the declarant while testifying at the trial; and (iii) the party offering the statement does so for the *truth* of the out-of-court statement.[34] Hearsay is *not* implicated where an attorney seeks to use an out-of-court statement at trial for some purpose *other than* the truth of the statement. If the statement is only offered to show that a statement was made and something occurred *as a result of that statement*, it is not hearsay (i.e., an "effect on the listener" is not hearsay).[35] Take the following for example of a direct examination regarding the purchase of shares of stock:

- You purchased 1,000 shares of Blackberry at $100 per share? [*Yes.*]
- The stock dropped $90 per share over the course of the marriage? [*Unfortunately, yes.*]
- Why did you buy the shares of Blackberry? [*My investment advisor told me it would be a great idea.*]
- OBJECTION, HEARSAY. [*Response from counsel: the litigant's answer is not intended to demonstrate that the purchase was actually a "great idea," it is to explain why the litigant purchased the stock.*]

The witness's answer is an appropriate use of an out-of-court statement for non-hearsay purposes. Clearly the purchase of Blackberry was not a "great" idea.

Similarly, statements made by the opposing party, which you seek to introduce against the adverse party, are not hearsay (meaning, they are not even an exception to hearsay—they are *not* hearsay).[36] Take the preceding Blackberry example and now consider cross-examination:

- On September 22, 2009, your financial advisor told you that your wife called regarding stock holdings? [*Yes.*]
- He advised you that your wife expressed concern about the Blackberry shares? [*Yes.*]
- Specifically, that you should sell them? [*Yeah.*]
- Because they had rebounded a bit? [*Yes.*]
- The shares as of September 22 were valued at $84/share? [*Looks that way.*]
- You told the financial advisor: "screw her. You are my guy, do not sell anything without my approval" [*Appears so.*]
- At the time of the divorce, the shares were $8 per share? [*uh huh.*]

The witness's statement: "screw her. You are my guy,

do not sell anything without my approval" is a non-hearsay, party-opponent statement.

Lastly, before discussing hearsay exceptions[37] you must understand how to properly impeach a witness with a prior inconsistent statement.[38] This rule implicates a few "hurdles": (i) the prior statement you seek to use as impeachment (inconsistent) must be admissible;[39] (ii) the statement must actually be inconsistent with the testimony at your trial; (iii) you must use the prior statement in accordance with N.J.R.E. 613;[40] and (iv) if you called the witness, the prior inconsistent statement must be: in a sound recording; in a writing made or signed by the witness in circumstances establishing its reliability (e.g., a Certification); or given under oath at a trial or other judicial, quasi-judicial, legislative, administrative or grand jury proceeding, or in a deposition.

N.J.R.E. 803© provides the hearsay exceptions. A frequently encountered scenario occurs with the use – or attempted use – of police reports. Assuming a party can obtain access to relevant police reports, a question is: *how can the records be used in my case*? Police reports are frequently relied upon in domestic violence matters. A party seeking, or defending, the imposition of a Final Restraining Order may attempt to use police reports to their advantage. Often, attempts are made to offer the report without the necessary witness(es) that would make the contents of the report admissible. For example, the proponent of the police report does not call the police efinier who wrote the report or a custodian of records who can authenticate the report.

Generally, assuming you call the appropriate witness to authenticate the record and lay a foundation,[41] a police report should be deemed admissible as a record of a regularly conducted activity (i.e., that a police officer responded to a call on a particular date and time).[42] To what end can the contents of the report be used? A police report may be admissible to prove the fact that certain statements were made to an officer. For example, the police report may relay that a domestic violence defendant — if offered against the defendant in a domestic violence trial — admitted to striking the victim, which would be admissible under N.J.R.E. 803(b)(1)(party-opponent). But, absent another hearsay exception, the report may not be offered for the truth if the police officer's report contains statements from non-party witnesses. In other words, the report may be admitted, but the out-of-court (non-party) statement is hearsay (unless it meets another exception, like excited utterance[43]).

The contents of the police report can also be used to impeach the opposing party's testimony even if the report is deemed inadmissible. There may be occasions where you do not want the contents of the report admitted into evidence, but still want to discredit an opposing witness's testimony. Simply identifying the exhibit and asking questions during cross-examination to impeach can be a highly effective technique.

What do you do, however, if the report is admitted over your objection and the police officer is unavailable for cross-examination? Fortunately, N.J.R.E. 806[44] allows the credibility of a hearsay declarant (e.g., the police officer who wrote the report that is admissible under N.J.R.E. 803©(6)) to be attacked as if the officer had been in court that day. For example, in a different context (a contested adoption case Nunn tried), the trial court allowed admission of a party's hearsay statements (the statement was *not* offered *against* the party) offered in court through hearsay documents. Fortunately, a private investigator was hired to observe that party prior to the proceeding. Following admission of the hearsay statements, we called the private investigator to testify. The adverse counsel objected on relevancy grounds and the adverse litigant failed to appear in court for cross-examination. We relied on N.J.R.E. 806 as grounds to impeach the party (also a hearsay declarant in this context) as to the statements made in the hearsay document.

Due to the reliance of experts in Family Part matters, you must understand how to use a learned treatise as part of your cross-examination.[45] A learned treatise is "A statement contained in a published treatise, periodical, or pamphlet on a subject of history, medicine, or other science or art, if: (A) the statement is relied on by an expert witness on direct examination or called to the attention of the expert on cross-examination; and (B) the publication is established as a reliable authority by testimony or by judicial notice.[46] Consider, from this emotional distress case, the following questions by Nunn:

- You provided your CV in this case? [*Yes.*]
- You listed lectures you have given? [*Yes.*]
- In ____ you gave a lecture for _____? [*Yes.*]
- You wrote an article about malingering?[47] [*Yes.*]
- You cited Dr. Richard Rogers in that article? [*Yes.*]
- Dr. Rogers is an expert in the field of malingering? [*Yes.*]

I asked the expert to read into the trial record the definitions of "pure malingering" and "false imputation" from Dr. Rogers's book (a different book than the one

cited by the witness in their article, which is why it was important to get the witness to accept Rogers as an expert in the field).[48] The following then occurred:

- Assume Mrs. Litigant testified in this case that in July of 2012, Mr. Litigant threw her down a flight of steps in Bayhead, New Jersey, and as a result she injured her back. Assume that event *never* happened, yet, Mrs. Litigant claims to suffer back pain and other related discomfort related to that alleged incident, would that qualify as pure malingering? [*Yes, if it never happened.*]
- Assume in December of 2011, Mrs. Litigant informed a physician that she injured her back while moving a pile of leaves and suffered a disc herniation. Four years later she testified during this trial that Mr. Litigant body slammed her 9 times resulting in that same back injury. If Ms. Litigant actually injured her back moving leaves, would you agree with me that that would be a situation of a false imputation? [*Yes.*]

A few more examples of malingering and false imputation were addressed, resulting in similar Responses. The key to this line of cross-examination is that the court already heard testimony, *from the treating physician for Mrs. Litigant*, regarding Mrs. Litigant's chronic back issues, all of which she attributed to reasons other than Mr. Litigant.

iii. Excited utterances and present sense impressions

Excited utterances[49] and present sense impressions[50] are also important hearsay exceptions. They bear similarities, but they are not the same. Think of it this way—almost every excited utterance is a present sense impression, but many present sense impressions are not excited utterances. Consider a diary entry in which the scrivener writes:

> "*a beautiful bird is flying past my window.*"

Consider, the same scrivener, now on the telephone with a friend:

> "*moments ago I saw a beautiful bird fly past my window . . . holy sh-t, it just smashed into the windshield of a car; now the car crashed; and now the car is on fire.*"

The former is a present sense impression, and the latter contains both present sense impressions and excited utterances.[51] These statements would be admissible as exceptions to hearsay.

iv. Prior consistent statements, prior inconsistent statements, and impeachment by conduct.

You should know that under N.J.R.E. 607 you can attack the *credibility* of a witness with extrinsic evidence, e.g., a prior inconsistent statement,[52] but under N.J.R.E. 608, you are generally prohibited from using extrinsic evidence (outside evidence of conduct) to attack a witness's character for "truthfulness or untruthfulness."[53] For example, in an extreme cruelty/*Tevis* case based on allegations of abuse, a defendant can introduce medical records under N.J.R.E. 607 to impeach the plaintiff if those medical records delineate that the plaintiff offered a different causation for the injuries than espoused in a Complaint for Divorce. However, in that same trial, N.J.R.E. 608 prohibits the defendant from using extrinsic evidence in the form of a fraudulent property insurance claim (unrelated to the case) submitted by the plaintiff solely to demonstrate that the plaintiff is, in general, untruthful. Moreover, even if the judge does allow you to delve into specific instances of conduct (e.g., the fraudulent property insurance claim example), you must know that you are barred from impeaching the witness with extrinsic evidence (i.e., the actual documentation demonstrating the fraud) to prove your assertion. In other words, you are "stuck" with the witness's answer. Consider the following:

- Isn't it true you claimed $50,000 of insurance damage for tree damage? [*Yes.*]
- You claimed it happened during a storm? [*Yes.*]
- But in reality you cut the branch directly over your garage causing it to fall on the garage? [*No.*]

If a judge is following N.J.R.E. 608—and assuming that the $50,000 is not a relevant issue in the case—the examiner would be precluded from introducing into evidence "extrinsic" evidence to rebut the witness's lie.

v. Refreshing recollection with records and substantive use of records

A writing used to refresh a recollection,[54] is different than a writing introduced as a recorded recollection.[55] A writing used to refresh recollection allows a witness to review any writing, even one prepared by a third-party, to "jog" the witness's memory. It does not allow that witness to admit the writing in evidence. On the other hand, a recorded recollection permits admission of trustworthy

writings prepared by the witness if the witness has insufficient present recollection; the writing was made while the person's memory was fresh; it was made by or at the witness's direction; and the witness had requisite knowledge when made.[56] For example, in a custody case, N.J.R.E. 612 (writing to refresh recollection) would permit a party to look at pediatrician records to refresh her recollection as to whether she attended doctor visits. Under N.J.R.E. 803©(5) (recorded recollection), that same party could introduce as evidence a calendar of wellness visits she prepared if the entries were made at or near in time of each visit, each entry was made by the witness, and she had actual knowledge when it was made.

vi. Completeness and authentication

Many family law trials are document intensive. You must know N.J.R.E. 106,[57] also referred to as the "doctrine of completeness,"[58] as well as N.J.R.E. 901,[59] which covers authentication. N.J.R.E. 106 requires a party who has introduced a writing/recording to introduce, contemporaneously, any other part of the writing/recording that "in fairness ought to be considered at the same time."[60] In practice, we used this rule during our adversary's direct examination to discredit their mental health expert. In that case, which involved an alimony obligor who sought to eliminate his support payments based on "disability," the expert cited to theefinitionn of "malingering," which in lay terms means "faking sick," within the DSM-V (as in, the expert opined the obligor was not malingering). As we followed along with the expert, we realized that he excluded a key component of the definition. We objected and the expert was then forced to read that malingering should be strongly suspected where: "*the individual is referred by an attorney to the clinician for examination or the individual self-refers while litigation or criminal charges are pending.*" Note: you may also encounter completeness issues with the use of deposition transcripts. If so, you should look to *Rule* 4:16-1(d).

On a related point, N.J.R.E. 901 is a "must-know" since it implicates the mechanics of admitting evidence. Since many of our cases involve Facebook, emails, and text messages, we direct you to *State v. Hannah*, a case involving social media (Twitter) messages, where the New Jersey Supreme Court held that traditional authentication principles apply.[61] Specifically, it held "Authenticity can be established by direct proof—such as testimony by the author admitting authenticity—but direct proof is not required."[62] The Court added: "Authentication does not require absolute certainty or conclusive proof—only a prima facie showing of authenticity is required."[63] It provided helpful examples of how to authenticate: "circumstantial proof may include demonstrating that the statement 'divulged intimate knowledge of information which one would expect only the person alleged to have been the writer or participant to have" and "under the reply doctrine, a writing "may be authenticated by circumstantial evidence establishing that it was sent in reply to a previous communication."[64] Thus, while it is easy to authenticate and admit text messages or emails, do not forget that you can, contemporaneous with the direct examination about those writings, insist that other portions of the text or email are read into the record, so the Judge does not have a misconception about the relevancy.

vii. Conclusion

We hope you found this material instructive and helpful. We intended it to provide some basic principles, as well as some more nuanced, higher-level cross-examination techniques. We also highlighted evidence rules that often arise during trials—but you really should know all of them to which we could devote another 10,000 words. ■

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Endnotes

1. A Few Good Men (Columbia Pictures 1992).
2. Francis L. Wellman, *The Art of Cross-Examination: With the Cross-Examinations of Important Witnesses in Some Celebrated Cases* (Good Press 2002), pp. 13 and 14 (separate quotes utilized).
3. Dodd, Roger and Pozner, Larry, "Cross-Examination: Science and Techniques," §§2.01-2.25, Lexis-Nexis (3d. 2018).
4. *R.* 4:17-1 to -8.
5. *R.* 4:18-1.

6. *Cesare v. Cesare*, 154 N.J. 394, 411-12 (1997) (citing *Rova Farms Resort, Inc. v. Investors Ins. Co.*, 65 N.J. 474, 484 (1974)).
7. *In re Return of Weapons to J.W.D.*, 149 N.J. 108, 117 (1997).
8. *Cesare*, *supra* (quoting *Pascale v. Pascale*, 113 N.J. 20, 33 (1988)).
9. *State v. Silva*, 131 N.J. 438 (1993).
10. When we say "impeachment material" it is not necessary to think of this information as "smoking gun" evidence. It could simply be that the witness said "X" during trial, but wrote "Y" during discovery. If you repeatedly impeach a witness with "small" material, you may effectively achieve the "death by a thousand cuts" of that witness's credibility.
11. Wellman, *supra*, *The Art of Cross-Examination*, pp. 15-16. Similarly, when your cross-examination elicits from the opposing witness what you want to hear, also maintain your composure as you try to convey that there could not possibly have been any answer other than what the trial judge just heard.
12. You may also want to Bates stamp every document you intend to use so that you can simply refer to the Bates stamp numbers.
13. Both Benjamin Franklin and Confucius have been credited with this or a similar form of this saying, so the authors determined it cannot hurt to credit both of them.
14. Although additional questions were prepared, the examiner moved on because of the favorable answer.
15. This was from the expert's report. He was citing an outdated edition of the article.
16. Had the witness answered "yes," I had approximately 10 additional questions based on his report, and the Kelly and Lamb article, to show the absurdity of the opinion.
17. Timothy B. Walthall, *The Secrets of Cross-Examination How to Avoid the Pitfalls at Trial*, 44 ABA Litigation Journal 4, at 26, 29 (Summer 2018).
18. N.J.R.E. 403(b).
19. N.J.R.E. 611(a)(3).
20. N.J.R.E. 611(a)(2).
21. *See Bisbing v. Bisbing*, 468 N.J. Super. 112 (App. Div. 2021) (regarding large counsel fee award).
22. N.J.R.E. 401.
23. N.J.R.E. 611(b). Of course, attacking credibility is an exception.
24. N.J.R.E. 611(c).
25. N.J.R.E. 104(b)(conditional relevance).
26. N.J.R.E. 403(b)(allowing a court to exclude cumulative evidence).
27. N.J.R.E. 404(b)(1) ("Except as otherwise provided by Rule 608(b), evidence of other crimes, wrongs, or acts is not admissible to prove a person's disposition in order to show that on a particular occasion the person acted in conformity with such disposition.").
28. N.J.R.E. 403 (permitting a court to exclude unduly prejudicial evidence).
29. N.J.R.E. 404(b)(2)(" This evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident when such matters are relevant to a material issue in dispute.").
30. N.J.S.A. 9:2-4(c).
31. N.J.R.E. 801(c).
32. N.J.R.E. 803(c).
33. N.J.R.E. 802.
34. N.J.R.E. 801(c).
35. *See, e.g.*, *Carmona v. Resorts Hotel*, 189 N.J. 354, 376 (2007)(permitting use of a company's investigative report to rebut the allegation that an employee's termination was based on retaliation); *see also Jugan v. Pollen*, 253 N.J. Super. 123, 136-37 (App. Div. 1992) (holding that statements made to plaintiff regarding the limitations of his activity were not hearsay when "offered to prove that plaintiff limited his activity based upon advice given to him.").
36. N.J.R.E. 803(b). In Family Part cases, "party-opponent" statements are often the most used source of information for party cross-examination, as well as the cross-examination of the adverse party's expert.
37. N.J.R.E. 803(c).
38. N.J.R.E. 803(a)(1):

    (a) A Declarant-Witness' Prior Statement. The declarant-witness testifies and is subject to cross-examination about a prior otherwise admissible statement, and the statement:

    (1) is inconsistent with the declarant-witness' testimony at the trial or hearing and is offered in compliance with Rule 613.

    However, when the statement is offered by the party calling the declarant-witness, it is admissible only if, in addition to the foregoing requirements, it (A) is contained in a sound recording or in a writing made or signed by the declarant-witness in circumstances establishing its reliability or (B) was

given under oath at a trial or other judicial, quasi-judicial, legislative, administrative or grand jury proceeding, or in a deposition; . . . .

[(Emphasis added).]

39. *Ibid.*
40. The Rule requires as follows:

    (a) Examining Witness Concerning Prior Statement. When examining a witness about the witness' prior statement whether written or not, a party need not show it or disclose its contents to the witness. But the party must upon request show it or disclose its contents to an adverse party's attorney or a self-represented litigant unless the self-represented litigant is the witness.

    (b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a witness' prior inconsistent statement may be excluded unless the witness is afforded an opportunity to explain or deny the statement and the opposing party is afforded an opportunity to interrogate on the statement, or the interests of justice otherwise require. This rule does not apply to admissions of a party opponent as defined in Rule 803(b).

    Consider the language in (b) allows—even on cross-examination—a witness to explain a prior inconsistent statement with which the witness has been impeached. In other words, the typical "yes" or "no" responses you seek may be temporarily halted to allow a more robust response (if the Judge and/or your adversary know the rules).
41. *See* N.J.R.E. 601 (competency); N.J.R.E. 602 (personal knowledge requirement); and N.J.R.E. 901 (Authentication).
42. *See* N.J.R.E. 803(c)(6)(business records), and as a public record, *see* N.J.R.E. 803(c)(8).
43. *See* N.J.R.E. 805 (hearsay within hearsay). In this example, the hearsay statement of the non-party witness embedded within the hearsay report, may not be admissible without some other exception.
44. This little-known and little-used rule is quite powerful:

    When a hearsay statement has been admitted in evidence, *the credibility of the declarant may be attacked*, and if attacked may be supported, *by any evidence which would be admissible for those purposes if the declarant had testified as a witness.* The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, that party is entitled to examine the declarant on the statement as if under cross-examination. [(Emphasis added).]
45. N.J.R.E. 803(c)(18).
46. *Ibid.*
47. "Malingering" is defined in the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 726-727 (5th ed. 2013) as:

    The essential feature of malingering is the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as avoiding military duty, avoiding work, obtaining financial compensation, evading criminal prosecution, or obtaining drugs. Under some circumstances, malingering may represent adaptive behavior—for example, feigning illness while a captive of the enemy during wartime. Malingering should be strongly suspected if any combination of the following is noted:

    1. Medicolegal context of presentation (e.g., the individual is referred by an attorney to the clinician for examination, or the individual self-refers while litigation or criminal charges are pending).
    2. Marked discrepancy between the individual's claimed stress or disability and the objective findings and observations.
    3. Lack of cooperation during the diagnostic evaluation and in complying with the prescribed treatment regimen.
    4. The presence of antisocial personality disorder.

    Malingering differs from factitious disorder in that the motivation for the symptom production in malingering is an external incentive, whereas in factitious disorder external incentives are absent.

    Malingering is differentiated from conversion disorder and somatic symptom–related mental disorders by the intentional production of symptoms and by the obvious external incentives associated with it. Definite evidence of feigning (such as clear evidence that loss of function is present during the examination but not at home) would suggest a diagnosis of factitious disorder if the individual's apparent aim is to assume the sick role, or malingering if it is to obtain an incentive, such as money.

    If you handle personal injury litigation or Tevis

claims in your divorce cases (e.g., claims regarding intentional infliction of emotional distress and other tort-based claims), you must be aware of malingering and structure discovery around it.

48. Practice point: it is fair game to use a learned treatise if the witness on the stand does not identify it as such. Accordingly, if your expert recognizes a treatise as an authoritative material in the field, you may rely on it. The judge, however, decides how much weight to give the dueling witness testimony about the treatise.
49. N.J.R.E. 803(c)(2)("A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition and without opportunity to deliberate or fabricate.").
50. N.J.R.E. 803(c)(1)(" A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it and without opportunity to deliberate or fabricate.").
51. For an example of an utterance that did not qualify as an excited utterance, *see Gonzales v. Hugelmeyer*, 441 N.J. Super. 451 (App. Div. 2015). On the other hand, *State v. Buda*, 195 N.J. 278 (2008), provides an explanation of the importance of the "shock" or uncontrolled response to a startling event.
52. N.J.R.E. 613(b).
53. *See* N.J.R.E. 405(a) and N.J.R.E. 608(a). However, in a criminal case, specific instances of conduct can be used to attack the character of a witness. In September 2019, the New Jersey Supreme Court ordered amendments to the New Jersey Rules of Evidence (approved and adopted effective July 1, 2020) following recommendations from the Supreme Court Committee on the Rules of Evidence (the "Committee"). The amendments to N.J.R.E. 608 expanded the scope of permissible cross-examination in criminal trials, permitting inquiry into specific acts of the conduct of a witness when probative of his/her character for truthfulness or better stated, lack of truthfulness. The amendments came in the wake of the Court's opinion in *State v. Scott*, 299 N.J. 469 (2017), which led to the Court's referral of the matter to the Committee. As noted in the Scott opinion, the federal courts and a majority of other state courts allow examination into specific instances of conduct that bear upon untruthfulness. In the Committee's 2017-2019 Report (issued in January 2019), a narrow majority of committee members recommended expanding N.J.R.E. 608 to allow inquiry on cross-examination, in certain limited circumstances, into a witness's specific instances of conduct. The committee's Minority Report argued against the amendments as did the State Bar Association and the County Prosecutors Association. By way of example—and to show what is impressible in a civil case—in *United States v. Jones*, 900 F.2d 512, 520-21 (2d Cir. 1990), the court affirmed use, as character impeachment, of false statements on applications for employment, an apartment, driver's license, loan, and membership in an association. In *United States v. Carlin*, 698 F.2d 1133, 1137 (11th Cir. 1983), the court allowed cross-examination of a witness as to the truthfulness of his answer on his verified application for used car dealer licenses. In *United States v. Leake*, 642 F.2d 715, 718-719 (4th Cir. 1981), the court held that conduct such as obtaining money under false pretenses, defrauding an innkeeper, writing checks that were returned for insufficient funds, and having numerous default judgments entered against the witness regarding repayment of loans "established a pattern of fraudulent activity that, if revealed, would have placed [the witness's] credibility in question." The information in this footnote is provided because efforts are being made to allow this line of attack in Family Part cases.
54. N.J.R.E. 612.
55. N.J.R.E. 803(c)(5).
56. *Ibid.*
57. "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part, or any other writing or recorded statement, that in fairness ought to be considered at the same time."
58. *Alves v. Rosenberg*, 400 N.J. Super. 553 (App. Div. 2008).
59. "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must present evidence sufficient to support a finding that the item is what its proponent claims." N.J.R.E. 901.
60. N.J.R.E. 106.
61. *State v. Hannah*, 448 N.J. Super. 78, 88-92 (App. Div. 2016).
62. *Id.* at 90.
63. *Id.* at 89.
64. *Id.* at 90 (internal quotations and citations omitted).

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