

## Good Secondary Sources for Cross-Examination

THOMAS A. MAUET, TRIAL TECHNIQUES (Vicki Been et al. eds., 8<sup>th</sup> Ed. 2010).

POZNER & DODD, CROSS-EXAMINATION: SCIENCE AND TECHNIQUES (LexisNexis 2d Ed. 2009).

## Case Summaries – Cross-Examination

*Cheshire Medical Center v. W.R. Grace*, 853 F. Supp. 564 (D.N.H. 1994) (Scope of cross-examination)

- The trial court permitted the defendant to ask questions of the plaintiff's expert pertaining to the defendant's statute of limitations defense.
- Plaintiff claimed this was impermissible "open cross" in violation of Federal Rule of Evidence 611.
- Rule 611 gives the trial court discretion to determine the proper scope of cross-examination.
- In this case, questions about the statute of limitations defense were proper. This was a long trial with complex evidence. It was within the trial court's discretion to permit limited questioning to promote efficiency and the jury's understanding of the issues in the case. The court contrasted this case with cases from other jurisdictions where "open cross" caused extensive delay and got out of hand.

*State v. Brum*, 155 N.H 408 (2007) (scope of cross-examination in sexual assault case)

- In a sexual assault case, the trial court did not impermissibly limit the scope of the defendant's cross-examination of the victim.
- Prior to the current allegation, the victim had made an allegation of sexual assault against a co-worker; no charges were filed based on the allegation. The defendant conceded the prior allegation was truthful. After the allegations that were the subject of the current trial, the victim wrote a statement about the prior allegations against the co-worker that differed in several respects from her initial allegations.
- The trial court permitted limited inquiry about the prior allegations and statement, limiting cross-examination to the differences between the two accounts (initial allegations and the written statement years later). The trial court did not allow defense counsel to ask the victim about whether charges were ever filed. The Supreme Court upheld the trial court's decision, reasoning, "Based on the evidence before it, the trial court reasonably could have found that whether charges were ever filed against the

victim' co-worker was not probative of the victim's character for truthfulness or untruthfulness."

- The trial court also ruled that extrinsic evidence of the prior statement about the co-worker allegations were inadmissible under the Rule 608(b) exception, which permits rebuttal evidence in sexual assault cases where the allegations of sexual assault are similar and the evidence is highly probative of the material issue of the complainant's motive. The trial court found the allegations were not similar and the Supreme Court agreed.

*Elgabri v. Lekas*, 964 F.2d 1255 (1st Cir. 1992) (no unfettered right to call defendant in case-in-chief; scope of cross-examination)

- Plaintiff doctor sued various other doctors and hospitals after they denied him privileges to practice in each hospital.
- On appeal, the doctor claimed the trial court erred by not permitting him to call each defendant doctor as part of his case-in-chief. The trial court permitted the plaintiff to question, in his case-in-chief, the defendant doctors on any matter that he could not obtain by other means. He could then fully cross-examine the defendants. The First Circuit held the plaintiff did not have an "unfettered right" to call defendants during his case-in-chief and found the trial court properly exercised its discretion to control the manner and order of the presentation of evidence at trial.
- The First Circuit also upheld the trial court's finding that the plaintiff could not cross-examine one of the defendants about another defendant's inability or refusal to perform a procedure. The trial court found that the testimony would be "getting a long way from where we're going" and precluded the questioning on cross-examination.

*Kelley v. Airborne Freight Corp.*, 140 F.3d 335 (1<sup>st</sup> Cir. 1998) (trial court can exclude evidence and limit cross-examination to save time so long as there is no prejudice to the party attempting to elicit or introduce the evidence; importance of preserving the record by making an offer of proof)

- Regional manager terminated from employment and sued for age discrimination.
- Manager presented evidence that the employer had not followed company guidelines during his termination. Employer attempted to elicit rebuttal evidence through cross-examination of the manager that he had not followed company guidelines when terminating a subordinate. The trial court limited the cross-examination out of frustration due to the extremely slow pace of the trial. It also excluded direct testimony of a similar nature as cumulative.

- Employer made an offer of proof of manager's expected testimony, which the First Circuit Court of Appeals determined was tangentially relevant but not so much that its preclusion could have prejudices the employer.
- Employer did not make an offer of proof as to the direct testimony, which was fatal on appeal because the Court could not determine whether the employer was prejudiced.
- The First Circuit Court of Appeals upheld the trial court's evidentiary rulings, finding that a trial court has the authority to exercise reasonable control over "the mode and order of interrogating witnesses and presenting evidence" so as to "make the interrogation and presentation effective for the ascertainment of truth" and to "avoid needless consumption of time."

*State v. Isaacson*, 129 N.H. 438 (1987) (a criminal defendant has a constitutional right to confront his accusers by way of cross-examination, including through the use of specific instance of conduct but a trial court has broad discretion to limit cross-examination to avoid confusion, delay, and prejudice).

- Defendant was charged with selling drugs and, during trial, sought to elicit evidence that the supervisor of the undercover officer to whom she had sold marijuana had misused funds during the investigation.
- The defendant's theory was that the sale had not occurred, that the officer and his supervisor had made the story up and that the investigation had been improperly conducted.
- The trial court had permitted the defendant to cross-examine the officer about his feigned use of marijuana, beer drinking during the investigation, and use of police department money. However, the court precluded the questioning about the alleged misuse of funds, finding that the evidence was immaterial and potentially confusing to the jury.
- The Supreme Court upheld the trial court's ruling. While recognizing that cross-examination is a matter of right, the Court held that pursuant to Rule 608(b) of the NH Rules of Evidence (impeaching a witness's credibility through specific instances of conduct), a trial court has broad discretion when determining the scope of cross-examination.
- Generally, a trial court should allow wide latitude to a party attempting to challenge a witness's credibility but must also balance the probative value of the proffered evidence against prejudice, confusion, and delay.

- The Court held that since the defendant had attempted to elicit the evidence from the undercover officer as opposed to his supervisor, who was the one who allegedly misused the funds, the defendant's constitutional right of confrontation was not a prevailing factor.

*Santos v. Posada De P.R. Assocs.*, 452 F.3d 59 (1<sup>st</sup> Cir. 2006) (Rule 611 gives a trial court wide latitude in controlling the mode and order of presenting evidence)

- Hotel guest slipped and fell while getting into the pool. At trial, the plaintiff's medical expert was unavailable to testify until after the completion of the remainder of the plaintiff's evidence so the trial court ordered the defendant to present its case before the plaintiff rested. The defendant complained that this last minute alteration of the order of proof limited its ability to prepare its own witnesses and amounted to an improper shifting of the burden of proof.
- The First Circuit Court of Appeals rejected the defendant's arguments based on Rule 611(a), which states that a trial court has the discretion to exercise reasonable control over the mode and order of presenting evidence.
- A party challenging a trial court's exercise of its Rule 611 discretion must make a substantial showing of unfair prejudice.