**Joint Meeting – Salmon P. Chase and Potter Stewart Inn of Court**

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**Effective Cross-Examination**

Cross-Examination Defined

The purpose of cross-examination is to discredit a witness before the fact-finder in any of several ways, as by bringing out contradictions and improbabilities in earlier testimony, by suggesting doubts to the witness and by trapping the witness into admissions that weaken the testimony.

KRE 611(b) – Scope of Cross-Examination

“A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the trial court may limit cross-examination with respect to matters not testified to on direct examination.”

* “Cross-examination of a witness is a matter of right.” *Alford v. U.S.*, 282 U.S. 687 (1931)
* “Cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal… This right is recognized in the Sixth Amendment to the United States Constitution as well as Section 11 of the Kentucky Constitution.” *Perry v. Commonwealth*, 390 S.W.3d 122, 130 (Ky. 2012)

Ohio Evid. E. 611(b)—Scope of Cross-Examination

“Cross-examination shall be permitted on all relevant matters and matters affecting credibility.”

* In Ohio, cross-examination is not limited to the subject matter of direct examination. It is available for all matters pertinent to the case that the party calling the witness would have been entitled or required to raise. [*Smith v. State* (1932), 125 Ohio St. 137, 180 N.E. 695](https://advance.lexis.com/document/teaserdocument/?pdmfid=1000516&crid=0c76b2d5-362c-439f-aeb0-5d312b45274f&pdteaserkey=h1&pditab=allpods&ecomp=dy_fk&earg=sr0&prid=176de608-1cf5-4cb6-8f8a-2b3275d23f7c), paragraph one of the syllabus.

Purpose of Cross-Examination

* Bias
* Detecting False Statements
* Admissions

Listening: The Key to Cross-Examination

* Match questions with elicited responses
* Each question should seek to elicit specific information
* Each question should be clear as to the information requested

Preparation: The second key to an effective cross-examination

Credibility: Determining who to believe

* Corroboration
  + Comparing with contemporaneous evidence that does not require human recollection
* Examples:
  + Records produced during the event or soon after
  + Direct evidence (photos/video recordings)
* Consistency/reliability of other parts of the evidence
  + If witness is unbelievable/unreliable on one point, likely to be unreliable on another point
  + Of course this is not always true
  + Is the witness speculating on matters that they cannot properly do so?
* Clouded recollection
  + Passage of time
  + Something else that makes the previously pure substance murky –
  + Unconscious bias
  + “Witnesses, especially those who are emotional, who think that they are orally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism…that with every day that passes the memory becomes fainter and the imagination becomes more active.”
* Demeanor – most difficult!
  + How the witness answers questions/does he or she refuse to answer certain questions?
  + Consider cultural backgrounds (i.e. language barriers) that may make demeanor harder to interpret

Bias

Motive to make false statements?

* + Witness’s benefit he hopes or expects to receive for testifying
  + Interest in the outcome of the case (i.e. the defendant)
  + Character for truthfulness (KRE 608(a)); (Ohio Evid. R. 608(a))
  + Inconsistent statements (KRE 801(a)); (Ohio Evid. R. 801(D)(1))

Admissions

* Party Opponent
  + KRE 801A(b)– not hearsay if:

(1) The party's own statement, in either an individual or a representative capacity;

(2) A statement of which the party has manifested an adoption or belief in its truth;

(3) A statement by a person authorized by the party to make a statement concerning the subject;

(4) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or

(5) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

* + Ohio Evid. R. 801(D)(2)—a statement is not hearsay if:

The statement is offered against a party and is

1. the party’s own statement, in either an individual or representative capacity, or
2. a statement of which the party has manifested an adoption or belief in its truth, or
3. a statement by a person authorized by the party to make a statement concerning the subject, or
4. a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or
5. a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.

* Expert Witnesses
  + KRE 801A(a)

(1) Inconsistent with the declarant’s testimony

Information in Expert Witness’s Possession

* Information received from opposing counsel
  + Correspondence, etc.
* Inferences to be drawn from information received and timing of receipt

Impeachment by Prior Inconsistent Statement

* Confirm
  + Always begin impeachment by confirming the witness’s inconsistent testimony exactly.
  + Ask, “is it your testimony that [insert exact quote of oral testimony if possible]?”
* Credit
  + Establish that the witness gave a prior statement and that the prior statement was true.
* Confront
  + Read the defendant’s prior statement verbatim
* Now move on!
  + Do not ask the one question too many.