THEODORE ROOSELVET INN OF COURT'S
NIGHT AT THE MOVIES
CROSS EXAMINATION

I. THE NUTS AND BOLTS OF CROSS EXAMINATION[1]

A. Cross-Examination Generally

1. Refers simply to a stage in the process of presenting witness testimony: after completion of direct examination, the witness is tendered for cross by the opposing party.
2. Considered a right, denial of which may constitute reversible error. *See Davis v. Alaska*, 415 U.S. 308 (1974); *Douglas v. Owens*, 50 F.3d 1226, 1230-31 n.6 (3rd Cir 1995).
3. Trial court can reasonably limit, often based on concerns regarding prejudice, harassment, confusion of the issues, and so on. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

B. Planning for Cross

1. Four ways to keep surprises to a minimum:
   i. Compile a list of all potential adverse Ws and their likely testimony
   ii. Is there a basis for keeping the witness off the stand or excluding part of their testimony? What are the likely objections?
   iii. Factual weaknesses of each adverse witness
   iv. Catalog all favorable information you can obtain from each W
2. Risk adverse preparation—consider your anticipated closing, what you want to say about this witness and the facts he/she presented.
3. Note: in certain circumstances, if the person is over 100 miles away or outside the state, you may not be able to subpoena them to appear at trial, in which case your only opportunity for cross may be at a deposition—you should know when that may be the case and prepare accordingly.

C. The Law of Cross

1. The Sixth Amendment: in criminal cases, preserves the right of the accused to confront witnesses against him. *See also Crawford v. Washington*, 541 U.S. 36 (2004).
2. Understood as an aspect of due process in civil cases.
3. Leading Questions Generally Permitted
   i. Most obvious distinction from direct: leading questions are permitted.
   ii. Federal Rule of Evidence 611(c): Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.
   iii. Rationale: an adverse witness will have little incentive to cooperate with you, and you may not be able to interview them in advance.
   iv. A leading question is one that contains or suggests its own answer.

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[1] Adapted from Steven Lubet, *Modern Trial Advocacy*, Law School Edition (Second Edition) (National Institute for Trial Advocacy 2004).

v. Ability to use leading questions is also usually understood to include the right to insist on a responsive answer.
vi. The qualifier, "ordinarily," authorizes the court to limit the use of leading questions when, for example, the cross-examiner is questioning a friendly witness such as her own client. *Schultz v. Rice*, 908 F.2d 643, 654 (10th Cir. 1986).

4. Limitations on Scope
   i. General rule: cross is limited to the scope of the direct.
   ii. FRE 611(b). Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.
   iii. Thus, the judge has discretion to allow inquiry beyond the scope of direct but, note, ". . . as if on direct" means no leading if permitted to go beyond the scope, unless some other basis for it exists (i.e. adverse or hostile witness).
   iv. The "scope of direct" is defined differently from jurisdiction to jurisdiction, courtroom to courtroom, and even case to case—a narrow application can limit cross to the precise events and occurrences the witness discussed on direct; a broader approach would allow questioning on related and similar events.
      a. The modern trend is a more generous approach to scope of cross, but how a particular judge will apply this limitation in a given case is hard to predict and will depend on the nature of the evidence and manner in which the lawyers have conducted themselves.
      b. English rule—wide open cross re any relevant issue; a few American jurisdictions have adopted this approach.
   v. In most states, a defendant who takes the stand and waives his Fifth Amendment rights is thereafter subject to cross regarding all aspects of the alleged crime.
   vi. Two general exceptions to scope of direct rule: (1) the credibility of a witness is always in issue; and (2) may cross beyond scope of direct if the witness herself has opened the door to additional matters
   vii. If an essential topic is beyond the scope of the direct, there are two possible routes to take: (1) ask for permission to go outside the scope as if on direct, in which case the judge may require you to ask non-leading questions or (2) re-call the witness in your case in chief on direct.

5. Other restrictions
   i. Argumentative questions
      a. Not permitted
      b. Exact definition of argumentative isn't clear
      c. Much depends on your demeanor
   ii. Intimidating behavior
      a. Cannot loom over the witness, shout, make threatening gestures, or otherwise intimidate, bully or badger the witness
   iii. Unfair characterizations
      a. Cannot mischaracterize the witness's testimony or ask trick questions

iv. Assuming facts
    a. A cross examiner can inquire as to facts not yet in evidence
    b. Distinction is that he cannot use a non-record fact as a premise rather than as a separate subject of inquiry, which denies the witness opportunity to refute its validity
v. Compound and other defective questions
    a. Compound questions contain more than a single inquiry—any answer is necessarily ambiguous
    b. Cumulative or asked and answered questions cover the same ground
    c. Vague questions tend to elicit vague answers

D. Content
1. First ask whether you should cross at all
2. Then, should it be brief or extensive?
3. Ask these questions both in your pretrial preparation and at the end of direct (reevaluate your planned cross)
4. Possible objectives on cross
    i. Repair or minimize damage done on direct
    ii. Enhance your case (positive facts adduced to contribute to your version of events)
    iii. Detract from their case (inconsistencies among witnesses)
    iv. Establish foundation for an exhibit or offer of evidence by another witness
    v. Discredit the witness's direct testimony (internal inconsistencies, lack of certainty, lack of opportunity to observe, inherently implausible, conflicts with another's testimony)
    vi. Discredit the witness herself (biased, motive to fabricate, character for untruthfulness, otherwise unworthy of belief)
    vii. Reflect on credibility of another witness (favorably or unfavorably)

E. Organization: General Principles
1. Idea is to focus attention away from the witness's direct and on to your story in the middle of the other side's case
2. Use implication and innuendo: do not ask the "ultimate question"
3. Be indirect to avoid telegraphing your strategy to the witness—often witnesses will concede a lot that they would not concede if you asked them directly
4. Misdirection: If a W has an inclination to be particularly uncooperative, you can use misdirection—create and then exploit a misdirected image; intentionally construct a line of questioning you know the witness will fight you on, and by fighting you on it he walks into the point you want to make.
5. Get friendly information first, before they get defensive
6. Topical organization is recommended: pick the few topics you want to cover and ask a set of questions for each.
7. Your final question should be strong; your final point must be absolutely admissible and should be central to your theory/theme

F. Technique
1. Essential goal: control over the testimony and the witness.
2. Make each question short and have it contain only one fact or implication
3. For every question, you should either (1) know the answer, (2) be able to otherwise document or prove the answer, or (3) any answer will work.

4. Walk the witness around the point—box the witness in by establishing one side of the corral at a time, until you can put the last piece in place with an inescapable final proposition.
5. Prepare only an outline with each topic and the points you want to establish under each; across from each detail that is important, make a note with the source for the point in case of a false or evasive answer, such as a deposition page and line or a specific memo.
6. Proceed in a series of small, steady steps—incremental questions; as Judge Thacher says, take small bites.
7. Listen to the witness—parse out or expand on the answer if needed before you move on to your next question. Does something the witness said not make logical sense? Use your common, everyday knowledge.
8. Insist on an answer—do not move on without getting one.
9. Questions that lose control: nonleading, why or explanation, long, fishing, and "you testified" questions (invite the witness to argue with you over the exact language used on direct)

G. Ethics
1. Each question must have a good faith basis in fact (Model Rules of Professional Conduct 3:4(e))
2. The good faith basis cannot be comprised of solely inadmissible evidence
3. Cannot assert personal knowledge of facts in issue or state a personal opinion as to the justness of a cause, the credibility of a witness, culpability or guilt of a litigant or accused (MRPC 3:4(e))
4. Unethical to ask questions solely for purposes of harassing, degrading, or humiliating a witness
5. May not misuse evidence admitted for a limited purpose

II. PURPOSES OF CROSS

A. Developing your own theory of the case
1. Especially crucial skills for this purpose:
   i. Have a solid theme/theory of your case
   ii. Have a good grasp on the big picture
   iii. Control over the witness
2. One of the main roles of cross examination
3. Where does each witness fit into the bigger picture?
4. In order to develop your own theory with each witness, some combination of three techniques:
   i. Draw out facts or details that tend to bolster or are consistent with your theory and undermine or are inconsistent with the other side's theory,
   ii. Flesh out the details of the witness's direct examination to demonstrate that the details could be consistent with either theory of the case
   iii. Demonstrate that witness's lack of credibility or reliability
5. Common objection: outside the scope of direct, so be prepared

B. Opportunity to see
1. Especially crucial skills for this purpose:
   i. Put the jury physically there—paint them a picture. This requires taking tiny, incremental steps. Make it real and concrete for the jury.

ii. Do not ask the final question

2. Lighting
   i. Main idea: was the lighting such that the witness could not have seen what she claims to have seen, or could not have seen it clearly enough to be confident?
   ii. This could mean it was too dark or that it was too glaringly bright.
   iii. Relevant facts:
      a. Time of day or night the event occurred
      b. On that day what time the sun rose and set, and the phase of the moon
      c. Weather on the day in question
      d. Lighting conditions of the area and other sources of light
3. Impairment of senses
   i. Main idea: is one or more of the senses on which the witness relied for observation impaired?
   ii. Sight and hearing are the most common, but do not discount the others if they are important/relevant to the particular circumstance.
   iii. Sight
      a. Does the person usually wear glasses or contacts but was not wearing them at the time?
      b. Is the witness near or far sighted?
      c. Was the witness recovering from an eye procedure?
      d. Is the witness color blind?
   iv. Hearing
      a. Is the witness hard of hearing?
      b. Does he wear a hearing aid?
      c. Was there a loud explosion preceding the events that may have left the witness temporarily unable to hear clearly?
   v. Note: Smell—what a witness smelled can be important. For example, if there was a fire or an explosion, the details of what witnesses smelled can tell investigators such as ATF what the likely combustion agent was.
4. Physical Obstructions
   i. Main idea: what exactly was between the witness and the event he claims to have observed that may have obstructed his view?
   ii. Lay out the complete picture from the person's eyes all the way to the event—again, take small bites.
   iii. Was the witness wearing sunglasses? Were there cars, people, trees, bushes or buildings in between? Was there a window she was looking through that was dirty?
5. Distance
   i. Main idea: was the witness too far away to have seen the event or person clearly?
   ii. Two step process:
      a. Get the witness to settle on a distance.
      b. Compare it to an everyday thing or even to the courtroom so that the distance becomes concrete for the jury.
6. Angle of sight
   i. Main idea: was the person or event the witness claims to have observed at such an angle that observation would have been difficult or impossible?

i. This could be left to right or up and down.
ii. Identification of an individual, for example, would be at least much less accurate if the person were facing away or the witness could only see the person's profile.

6. Amount of time/duration of observation
   i. Main idea: was the amount of time so short that witness description is unlikely to be reliable?
   ii. Possible relevant facts:
      a. Was the witness or thing observed moving and, if so, how fast?
      b. Was the witness or thing being observed on or in something that was moving (train, car, bus) and how fast?
      c. Was clear observation possible for only a moment before obstruction impeded view?
      d. Is there a way to scientifically determine some facts, such as stopping distance of an automobile

C. Bias:
   1. Courts generally allow wide latitude, but consider:
      i. Personal relationships: a witness might be employed by relative of defendant, as in *United States v. Canales*, 744 F2d 413 (5th Cir. 1984), or,
      ii. Might be a partner of defendant (*United States v. Robinson*, 530 F2d 1076 (DC Cir. 1976), or might have financial stake or employment (*Wilmington Trust Co. v. Manufacturer's Life Ins.*, 624 F2d 707 (5th Cir. 1980).

D. Use of Prior Criminal Acts in criminal cases:
   1. See CLP §60.40:
   2. See also Federal Rule of Evidence §609, which allows impeachment of a witness through criminal convictions in criminal cases.
      i. Perjury, fraud and embezzlement are always admissible against witness if his character for truth telling is in question;
      ii. Felony of false statement is admissible in certain circumstances, if the probative value of such evidence outweighs prejudice effect to the defendant;
      iii. Only criminal conviction that are less than 10 years old, and were punishable by more than a year imprisonment. Misdemeanors or minor dishonesties or false statements are never admissible. FRE §609(a)(1)(A)(b)

E. Use of Deposition Testimony at Trial:
   1. Under Federal Rules:
      i. Under FRCP §32, you may use a deposition to impeach a witness or if the witness is unavailable as allowed under the Federal Rules of Evidence.
      ii. Under FRE §613, for purposes of impeachment you may use a deposition to show the witness made a prior inconsistent statement while under oath, and, at a formal proceeding.
      iii. Under FRE §612, a deposition may be used to refresh a witness's recollection of their previously given statements.
   2. In NY, under CPLR §4517 you may also impeach a witness by prior inconsistent statements.

i. Deposition may be used to impeach an adverse witness. The procedure in NY requires you to provide a copy of the deposition to the judge, and in your question to the witness identify the record the page and line, and ask whether or not they gave that statement.

ii. On direct, the deposition can be used when the witness has died, is more than 100 miles, he/she is so infirm that cannot attend trial, could not be procured by diligent efforts by party seeking to use witness or such exigent circumstances that court determines warrants the use of the deposition.

iii. Remember that, if you use part of a deposition, the adversary is entitled to use the balance so that it is not "out of context"

3. Under CPLR §4514, you may use a deposition to impeach the witness with his prior inconsistent statement, if it was either subscribed or given under oath.

APPENDIX A: FEDERAL RULES OF EVIDENCE

Rule 104. Preliminary Questions

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule. For the purpose of attacking the character for truthfulness of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Rule 611. Mode and Order of Interrogation and Presentation

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Rule 613. Prior Statements of Witnesses

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . .

(18) **Learned treatises**. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

APPENDIX B: FEDERAL RULES OF CIVIL PROCEDURE

Rule 32. Using Depositions in Court Proceedings

(a) Using Depositions.

(1) In General. At a hearing or trial, all or part of a deposition may be used against a party on these conditions:

(A) the party was present or represented at the taking of the deposition or had reasonable notice of it;

(B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and

(C) the use is allowed by Rule 32(a)(2) through (8).

(2) Impeachment and Other Uses. Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.

(3) Deposition of Party, Agent, or Designee. An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

(4) Unavailable Witness. A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:

(A) that the witness is dead;

(B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;

(C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

(D) that the party offering the deposition could not procure the witness's attendance by subpoena; or

(E) on motion and notice, that exceptional circumstances make it desirable — in the interest of justice and with due regard to the importance of live testimony in open court — to permit the deposition to be used.

(5) Limitations on Use.

(A) Deposition Taken on Short Notice. A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place — and this motion was still pending when the deposition was taken.

(B) *Unavailable Deponent; Party Could Not Obtain an Attorney.* A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.

(6) Using Part of a Deposition. If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

(7) Substituting a Party. Substituting a party under Rule 25 does not affect the right to use a deposition previously taken.

(8) Deposition Taken in an Earlier Action. A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.

(b) Objections to Admissibility. Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(c) Form of presentation. Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise.

(d) Waiver of Objections.

(1) To the Notice. An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(2) To the Officer's Qualification. An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:

(A) before the deposition begins; or

(B) promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(3) To the Taking of the Deposition.

(A) Objection to Competence, Relevance, or Materiality. An objection to a deponent's competence — or to the competence, relevance, or materiality of testimony — is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(B) *Objection to an Error or Irregularity.* An objection to an error or irregularity at an oral examination is waived if:

(i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and

(ii) it is not timely made during the deposition.

(C) *Objection to a Written Question.* An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross question, within 7 days after being served with it.

(4) To Completing and Returning the Deposition. An objection to how the officer transcribed the testimony — or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition — is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

Rule 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

(a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

APPENDIX D: NEW YORK STATUES

CRIMINAL:

McKinney's § CLP 60.40: Rules of evidence; Proof of Previous Conviction; When Allowed

1. If in the course of a criminal proceeding, any witness, including a defendant, is properly asked whether he was previously convicted of a specified offense and answers in the negative or in an equivocal manner, the party adverse to the one who called him may independently prove such conviction. If in response to proper inquiry whether he has ever been convicted of any offense the witness answers in the negative or in an equivocal manner, the adverse party may independently prove any previous conviction of the witness.

2. If a defendant in a criminal proceeding, through the testimony of a witness called by him, offers evidence of his good character, the people may independently prove any previous conviction of the defendant for an offense the commission of which would tend to negate any character trait or quality attributed to the defendant in such witness' testimony.

3. Subject to the limitations prescribed in section 200.60, the people may prove that a defendant has been previously convicted of an offense when the fact of such previous conviction constitutes an element of the offense charged, or proof thereof is otherwise essential to the establishment of a legally sufficient case.

JURY SELECTION:

McKinney's CPLR § 4108: Challenges Generally

An objection to the qualifications of a juror must be made by a challenge unless the parties stipulate to excuse him. A challenge of a juror, or a challenge to the panel or array of jurors, shall be tried and determined by the court.

McKinney's CPLR § 4109: Peremptory Challenges

The plaintiff or plaintiffs shall have a combined total of three peremptory challenges plus one peremptory challenge for every two alternate jurors. The defendant or defendants (other than any third-party defendant or defendants) shall have a combined total of three peremptory challenges, plus one peremptory challenge for every two alternate jurors. The court, in its discretion before the examination of jurors begins, may grant an equal number of additional challenges to both sides as may be appropriate. In any case where a side has two or more parties, the court, in its discretion, may allocate that side's combined total of peremptory challenges among those parties in such manner as may be appropriate.

McKinney's CPLR § 4110: Challenges for Cause

(a) Challenge to the favor. The fact that a juror is in the employ of a party to the action; or if a party to the action is a corporation, that he is a shareholder or a stockholder therein; or, in an action for damages for injuries to person or property, that he is a shareholder, stockholder, director, officer or employee, or in any manner interested, in any insurance company issuing policies for protection against liability for damages for injury to persons or property; shall constitute a ground for a challenge to the favor as to such juror. The fact that a juror is a resident of, or liable to pay taxes in, a city, village, town or county which is a party to the action shall not constitute a ground for challenge to the favor as to such juror.

(b) Disqualification of juror for relationship. Persons shall be disqualified from sitting as jurors if related within the sixth degree by consanguinity or affinity to a party. The party related to the juror must raise the objection before the case is opened; any other party must raise the objection no later than six months after the verdict.

McKinney's CPLR § 4110-b: Instructions to Jury; Objection

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court, out of the hearing of the jury, shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict stating the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

WITNESSES:

McKinney's CPLR § 4512: Competency of Interested Witness or Spouse

Except as otherwise expressly prescribed, a person shall not be excluded or excused from being a witness, by reason of his interest in the event or because he is a party or the spouse of a party.

McKinney's CPLR § 4513: Competency of Person Convicted of Crime

A person who has been convicted of a crime is a competent witness; but the conviction may be proved, for the purpose of affecting the weight of his testimony, either by cross-examination, upon which he shall be required to answer any relevant question, or by the record. The party cross-examining is not concluded by such person's answer.

McKinney's CPLR § 4514: Impeachment of Witness by Prior Inconsistent Statement

In addition to impeachment in the manner permitted by common law, any party may introduce proof that any witness has made a prior statement inconsistent with his testimony if the statement was made in a writing subscribed by him or was made under oath.

McKinney's CPLR § 4517: Prior Testimony in a Civil Action

(a) Impeachment of witnesses; parties; unavailable witness. In a civil action, at the trial or upon the hearing of a motion or an interlocutory proceeding, all or any part of the testimony of a witness that was taken at a prior trial in the same action or at a prior trial involving the same parties or their representatives and arising from the same subject matter, so far as admissible under the rules of evidence, may be used in accordance with any of the following provisions:

1. any such testimony may be used by any party for the purpose of contradicting or impeaching the testimony of the same witness;

2. the prior trial testimony of a party or of any person who was a party when the testimony was given or of any person who at the time the testimony was given was an officer, director, member, employee, or

managing or authorized agent of a party, may be used for any purpose by any party who is adversely interested when the prior testimony is offered in evidence;

3. the prior trial testimony of any person may be used by any party for any purpose against any other party, provided the court finds:

(i) that the witness is dead; or

(ii) that the witness is at a greater distance than one hundred miles from the place of trial or is out of the state, unless it appears that the absence of the witness was procured by the party offering the testimony; or

(iii) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or

(iv) that the party offering the testimony has been unable to procure the attendance of the witness by diligent efforts; or

v) upon motion on notice, that such exceptional circumstances exist as to make its use desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court;

4. the prior trial testimony of a person authorized to practice medicine may be used by any party without the necessity of showing unavailability or special circumstances subject to the right of any party to move for preclusion upon the ground that admission of the prior testimony would be prejudicial under the circumstances.

(b) Use of part of the prior trial testimony of a witness. If only part of the prior trial testimony of a witness is read at the trial by a party, any other party may read any other part of the prior testimony of that witness that ought in fairness to be considered in connection with the part read.

(c) Substitution of parties; prior actions. Substitution of parties does not affect the right to use testimony previously taken at trial.