ANALYSIS OF THE CROSS-EXAMINATION SHOWN IN MOVIES

PRESENTATION TO THE
GEORGE MASON AMERICAN INN OF COURT

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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-Examination
   1. Four ways to keep surprises to a minimum:
      i. Compile a list of all potential adverse witnesses 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 witness
   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.
      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

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

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 witness 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.
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 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. 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 steps.
    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?
    ii. This could be left to right or up and down.

iii. Identification of an individual, for example, would be at least much less accurate if the person was facing away or the witness could only see the person's profile.

7. Amount of time/duration of observation
   i. Main idea: was the amount of time the witness had to observe a person or event so short that his description is unlikely to be reliable?
   ii. Possible relevant facts:
      a. Was the witness or the thing/person being observed moving (running or walking)? How fast?
      b. Was the witness or thing/person being observed on or in something that was moving (bike, car, train)? How fast?
      c. Was clear observation only possible for a moment before an obstruction impeded the view?
   iii. Often comes up in cases where a car was involved. VA. CODE § 46.2-880 has a table of speeds and stopping distances of which courts must take judicial notice. It provides, among other things, based on a given speed in miles per hour how fast that is in feet per second, how many feet it would take an automobile to stop at that speed, and how many feet the average driver going that speed travels before he can react.
   iv. Again, the important thing is making this time concrete for a jury.

C. Bias

1. Virginia
   i. Witness may be favorably inclined toward a party due to: kinship or social/business contact. Witness may be hostile to a party due to: social/religious prejudice, prior quarrels, etc. The witness may also have a financial interest or may have taken a bribe in exchange for perjured testimony.
   ii. SCOPE: A party has an absolute right to show that a witness is biased. On cross-examination, <u>great latitude</u> is allowed.
      a. The general rule is that anything that tends to show a witness's bias may be drawn out. *Kirk v. Commonwealth*, 21 Va. App. 291, 299 (Ct. App. 1995) (quoting *Henning v. Thomas*, 235 Va. 181, 188 (1988) (evidence that alibi witness was defendant's homosexual lover)).
   iii. Expert Witness Bias:
      a. Insurance Company – It is permissible to examine a witness to show that the witness is employed by defendant's insurance company, in order to show bias or interest. *Lombard v. Rohrbaugh*, 262 Va. 484 (2001).
         1. Testimony concerning liability insurance may be elicited to show bias of the witness if there is a "substantial connection" between the witness and the liability carrier. *Lombard v. Rohrbaugh*, 262 Va. 484 (2001).
   iv. IF a witness denies bias, he may be contradicted by extrinsic evidence of the statements or acts which reveal bias. It appears from case law that bias is not a collateral issue, and the cross-examining counsel is NOT forced to "take his answer." *See generally* McCormick Evidence § 47 (3d ed. 1984).
2. Federal Rules
   i. Scope of cross-examination
      a. Rule 611(b) provides that cross-examination "should be" limited to subjects raised on direct examination and credibility issues.

b. Courts generally allow the cross-examiner wide latitude, interpreting the subject matter of direct examination to include all "inferences and implications" arising from the direct testimony.

ii. Bias as a Method of Impeachment:
   a. Personal relationship
      1. *United States v. Canales*, 744 F.2d 413, 425 (5th Cir. 1984) (trial court properly permitted cross-examination of defense witness demonstrating that the witness was employed by brother of the defendant and the mother of defense counsel).
      2. *United States v. Robinson*, 530 F.2d 1076, 1079-81 (D.C. Cir. 1976) (proper for prosecution to show that defense witness and the defendant were partners in business selling drugs).
   b. Witness has a financial stake or employment
      1. *Wilmington Trust Co. v. Manufacturers Life Ins. Co.*, 624 F.2d 707, 708-09 (5th Cir. 1980) (summary judgment for insurance company was improperly granted because it was based on the testimony of the company's employee and the plaintiff was denied the opportunity to impeach by showing the witness was biased in favor of his employer).

D. Prior Criminal Acts

1. Virginia
   i. A person convicted of a felony or perjury is competent to testify, but his conviction may be used to affect his credibility. Va. Code 19.2-269.
   ii. However, except in the case of perjury, the name and nature of the felony may not be shown regarding convictions of the defendant. *Harmon v. Commonwealth*, 212 Va. 442 (1971).
   iii. NOTE: there is a difference between prior convictions and evidence of specific acts of misconduct.
      a. Evidence of specific acts of misconduct is generally not admissible in Virginia to impeach a witness's credibility. ONLY admissible if relevant to show that a witness is biased or has a motive to fabricate. *Clark v. Commonwealth*, 202 Va. 787 (1961); *Banks v. Commonwealth*, 16 Va. App. 959 (Ct. App. 1993).
2. Federal Rules
   i. Federal Rule 609. Impeachment by Evidence of Conviction of Crimes
      a. Criminal Convictions – Rule 609
      b. Under the common law, can impeach based on felonies, misdemeanors of moral turpitude.
      c. Criminal convictions have always come in, but 609 delineated specific burdens of proof.

609(a):

	Criminal Accused	Any Other Witness
Dishonesty/False Statement (perjury, fraud, embezzlement, or false pretenses)	Always Admissible	Always Admissible
Felony Non-Dishonesty/False Statement	Only Admissible if probative value outweighs unfair prejudice (burden of proof falls on the impeaching party).	Admissible unless inadmissible under 403
Misdemeanor/Minor Non-Dishonesty/False Statement	Never admissible	Never admissible

d. 609(b) Time Limit: there is a more stringent balancing test for convictions that are at least 10 years old. The time frame for measuring the ten-year time limit begins with the date of conviction or the date of the witness's release from any confinement imposed for that conviction, whichever is later.
e. Reverse 403 test – the stringent balancing test effectively creates a presumption against admissibility.
f. A party planning to use a remote conviction must provide his opponent sufficient advance written notice to afford him a fair opportunity to contest the evidence.

ii. Rules 609(c), (d), and (e)
a. Prior convictions are not admissible if there was a pardon, annulment, or certificate of rehabilitation. Implicated in finding of innocence; or based on a finding of rehabilitation – can't be convicted of a subsequent serious crime (can't be convicted of a subsequent felony)
b. Juvenile adjudications – not admissible b/c don't want to infer something that the witness did when they were a child; all the stuff relating to juveniles use to be kept very private.

iii. Rule gives a little wiggle room to the judge – there are 3 conditions:
a. 1) witness can't be accused;
b. 2) the conviction must be for such an offense that would affect an adult's credibility (satisfies Rule 609);
c. 3) the judge must determine that justice requires its admission. The rule is still respecting the privacy of the juvenile; not letting it come out if it's the D, but when its somebody else, then can do what is just and fair under the circumstances.

E. Using Deposition Testimony at Trial; Generally

1. A deposition can be used at trial in several different scenarios
   i. Where the deponent is unavailable;
   ii. To impeach the witness with a prior inconsistent statement; and
   iii. To refresh a witness's memory
2. Virginia Law
   i. The use of deposition testimony in court proceedings is governed by Supreme Court of Virginia Rule 4:7.

ii. Pursuant to Rule 4:7, deposition testimony may be used at trial so far as it is admissible under the rules of evidence applied as though the witness is present and testifying. Moreover, the deposition testimony may be used against any party present during the deposition or who had reasonable notice of it.

3. Federal Rules
   i. Deposition testimony may be used in federal district court if three requirements are satisfied (Fed. R. Civ. P. 32(a))
      a. First, the deposition testimony must be admissible if the deponent were testifying in court
      b. Second, the opposing party must have been present or represented at the taking of the deposition, or had reasonable notice of the deposition
      c. Third, circumstances permitting admissibility must be present
         1. This requirement is satisfied if the deposition testimony falls within one of the following categories:
            i. The deposition is being used to impeach a witness's testimony
            ii. The deponent is an adverse party
            iii. The deponent is unavailable at trial or other hearing
            iv. Exceptional circumstances are present, determined by the court on motion and notice

F. **Impeaching a Witness Using Deposition Testimony**

1. Virginia Law
   i. Where a witness has made a prior inconsistent statement, deposition testimony may be used to impeach the witness on cross-examination.
   ii. Significantly, it is necessary to lay a foundation for the impeachment when attempting to use deposition testimony, unlike a situation in which testimony conflicts with other evidence, in which no foundation is necessary.
   iii. To lay the proper foundation, counsel should first call to the witness's attention the time, place, and circumstances surrounding the witness's previous statement; counsel should also remind the witness of the substance of the relevant statement.
      a. Generally, the statement should be described fully, though some cases have followed a less stringent approach.
   iv. If the witness denies having made the inconsistent statement or attempts to explain or qualify, a foundation has been laid and counsel may introduce deposition testimony consisting of the inconsistent statement.
      a. Note that if the witness admits the statement without any attempt to qualify or explain away, no further evidence is permitted.
      b. Note also that, where a witness has testified on direct examination concerning the existence and contents of a prior inconsistent statement, no further foundation need be laid by counsel on cross.
   v. If the deposition testimony is admitted for the purpose of impeachment, Virginia law requires that the witness be given an opportunity to explain the relevant statement. *See* VA. CODE ANN. § 8.01-404.
   vi. The prior inconsistent statement need not be exactly opposite to the current statement; rather, the statement need only be inconsistent.

vii. The reporter taking notes during the deposition need not be present at trial when counsel seeks to use the transcript for impeachment in order to prove the transcript. *See* VA. CODE ANN. § 8.01-420.3.

viii. If a witness denies having made the prior inconsistent testimony at her deposition, a transcript of the deposition is admissible to prove that the witness made the prior testimony. *See Waller v. Commonwealth*, 22 Va. App. 53, 467 S.E.2d 844 (1996).

2. Federal Rules

i. The use of a prior statement from a deposition is governed under the Federal Rules of Evidence, specifically Rule 613.

ii. Rule 613 provides that, when questioning a witness concerning a prior statement—whether or not the statement is written—counsel need not show or disclose the contents of the statement to the witness at the time, but must show or disclose the statement to opposing counsel when requested. Fed. R. Evid. 613(a).

iii. Subsection (b) governs the use of extrinsic evidence of a witness's prior inconsistent statement. Pursuant to 613(b), such extrinsic evidence is inadmissible "unless the witness is afforded an opportunity to explain or deny the [statement] and the opposite party is afforded an opportunity to interrogate him thereon." 613(b).

G. Use of Deposition Testimony to Refresh Witness's Memory

1. Virginia Law

i. Generally, a non-hostile witness called on direct examination must testify without using extraneous materials such as notes or memory aids. However, if it is established that the witness needs to refer to other materials to refresh her memory, such materials may be referred to.

ii. Before these materials may be given to the witness, the witness's recollection must be exhausted. The witness may then be shown extraneous materials to refresh her memory, but she must subsequently testify from her own recollection refreshed, as opposed to reading or recounting what the extraneous material consists of. *See, e.g.*, *Harrison v. Middleton*, 52 Va. (11 Gratt.) 527 (1854).

a. The materials to which the witness refers are not necessarily admissible, though opposing counsel has the right to examine them, show them to the jury, and use them in cross-examination. *See McGann v. Commonwealth*, 15 Va. App. 448, 424 S.E.2d 706 (1992).

iii. Note that the use of extraneous materials, such as a deposition, to refresh a witness's testimony is not equivalent to the doctrine of past recollection recorded, where the witness is currently unable to remember certain relevant facts and a document containing those facts is admitted into evidence as an exception to the hearsay rule.

iv. Note also that extraneous materials, such as deposition testimony, used to refresh a witness's testimony before she takes the stand is outside the scope of the present memory refreshed doctrine.

2. Federal Rules

i. Deposition testimony may be used to refresh a witness's memory in the federal courts as well.

ii. In order to be used to refresh a witness's memory, the deposition testimony must be utilized to enable a witness who suffers from memory loss to "recall at the time

of his testimony matters he perceived in the past." The purpose of using the deposition testimony is to facilitate the witness's testimony—not to serve as evidence.

iii. For this reason, if the testimony does not refresh the witness's testimony, Fed. R. Evid. 612 prohibits the witness from reading into evidence the deposition testimony.

H. **Use of Articles in Cross-Examination**

1. Virginia Law
   i. When cross-examining an expert witness, counsel may utilize a published treatise, periodical, or pamphlet on the subject of history, medicine, or other science or art. The material must be established as reliable authority by testimony or by stipulation.
   ii. The treatise, periodical, or pamphlet must be called to the attention of the expert on cross or relied upon by the expert in direct examination.
   iii. The treatise, periodical, or pamphlet will not be excluded as hearsay.
   iv. If the treatise, periodical, or pamphlet is admitted, it may be read into evidence but not received as an exhibit. If the treatise, periodical, or pamphlet.
   v. Note that if an expert relies on the treatise or periodical on direct examination, copies of the article must be provided to opposing parties thirty days prior to trial unless the court orders otherwise.
   vi. The party relying on the treatise should specify particular portions of voluminous material to be used at trial. *May v. Caruso*, 264 Va. 358, 568 S.E.2d 690 (2002).
2. Federal Rules
   i. Under the Federal Rules, widespread acceptance or reliability of a treatise must be shown before its substance may be read on cross-examination. *See, e.g., United States v. Jones*, 712 F.2d 114, 121 (5th Cir. 1983); *Farmers Union v. McChesney*, 251 F.2d 441, 445 (8th Cir. 1958); Fed. R. Evid. 104.
   ii. This requirement is only appropriate where the item is offered as reflecting a consensus in the relevant field; this is not required if the objective is to show conflict within the field rather than the truth of what the treatise states.
   iii. Under Fed. R. Evid. 803(18), a treatise may be read into evidence as an exception to the hearsay rule—the rule does not allow the admission of a treatise as an exhibit.

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.

APPENDIX C: MODEL RULES OF PROFESSIONAL CONDUCT

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: VIRGINIA CODE

VA. CODE ANN. § 8.01-404. Contradiction by prior inconsistent writing.

A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, relative to the subject matter of the civil action, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to the particular occasion on which the writing is supposed to have been made, and he may be asked if he did not make a writing of the purport of the one to be offered to contradict him, and if he denies making it, or does not admit its execution, it shall then be shown to him, and if he admits its genuineness, he shall be allowed to make his own explanation of it; but it shall be competent for the court at any time during the trial to require the production of the writing for its inspection, and the court may thereupon make such use of it for the purpose of the trial as it may think best. This section is subject to the qualification, that in an action to recover for a personal injury or death by wrongful act or neglect, no ex parte affidavit or statement in writing other than a deposition, after due notice, of a witness and no extrajudicial recording made at any time other than simultaneously with the wrongful act or negligence at issue of the voice of such witness, or reproduction or transcript thereof, as to the facts or circumstances attending the wrongful act or neglect complained of, shall be used to contradict him as a witness in the case. Nothing in this section shall be construed to prohibit the use of any such ex parte affidavit or statement in an action on an insurance policy based upon a judgment recovered in a personal injury or death by wrongful act case.

VA. CODE ANN. § 8.01-420.3. Court reporters to provide transcripts; when recording may be stopped; use of transcript as evidence.

Upon the request of any counsel of record, or of any party not represented by counsel, and upon payment of the reasonable cost thereof, the court reporter covering any proceeding shall provide the requesting party with a copy of the transcript of such proceeding or any requested portion thereof.

The court shall not direct the court reporter to cease recording any portion of the proceeding without the consent of all parties or of their counsel of record.

Whenever a party seeks to introduce the transcript or record of the testimony of a witness at an earlier trial, hearing or deposition, it shall not be necessary for the reporter to be present to prove the transcript or record, provided the reporter duly certifies, in writing, the accuracy of the transcript or record.

VA. CODE ANN. § 19.2-269. Convicts as witnesses.

A person convicted of a felony or perjury shall not be incompetent to testify, but the fact of conviction may be shown in evidence to affect his credit.

VA. CODE ANN. § 46.2-880. Tables of speed and stopping distances.

All courts shall take notice of the following tables of speed and stopping distances of motor vehicles, which shall not raise a presumption, in actions in which inquiry thereon is pertinent to the issues:

Miles Per Hour	Feet Per Second	Automobile Brakes (In Feet)	Brakes on All Wheels (In Feet)	Reaction Time (1.5 Seconds) (In Feet)	Automobiles (In Feet)	Trucks (In Feet)
10	14.7	5	6	22	27	28
15	22.0	11	14	33	44	47
20	29.3	19	25	44	63	69
25	36.7	30	40	55	85	95
30	44.0	43	57	66	109	123
35	51.3	58	78	77	135	155
40	58.7	76	102	88	164	190
45	66.0	96	129	99	195	228
50	73.3	119	159	110	229	269
55	80.7	144	192	121	265	313
60	88.0	171	229	132	303	361
65	95.3	201	268	143	344	411
70	102.7	233	311	154	387	465

75	110.0	268	357	165	433	522
80	117.3	305	406	176	481	582
85	124.7	344	459	187	531	646
90	132.0	386	514	198	584	712
95	139.3	430	573	209	639	782
100	146.7	476	635	220	696	855

The courts shall further take notice that the above table has been constructed, using scientific reasoning, to provide factfinders with an average baseline for motor vehicle stopping distances: (1) for a vehicle in good condition and (2) on a level, dry stretch of highway, free from loose material.

Deviations from these circumstances do not negate the usefulness of the table, but rather call for additional site-specific examination and/or explanation.

Site-specific research may be utilized under any circumstances.

APPENDIX E: SUPREME COURT OF VIRGINIA RULES

Rule 4:7. Use of Depositions in Court Proceedings.

(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition taken in a civil action may be used for any purpose in supporting or opposing an equitable claim; provided, however, that such a deposition may be used on an issue heard by an advisory jury empaneled pursuant to Code § 8.01-336(E) or a hearing ore tenus only as provided by subdivision (a)(4) of this Rule.

(2) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(3) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 4:5(b)(6) or 4:6(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(4) The deposition of a witness, whether or not a party, may be used by any party for any purpose in any action upon a claim arising at law, issue heard by an advisory jury empaneled pursuant to Code § 8.01-336(E), or hearing ore tenus upon an equitable claim if the court finds:

(A) that the witness is dead; or

(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of this Commonwealth, unless it appears that the absence of the witness was procured by the party offering the deposition; or

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

(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) that the witness is a judge, or is a superintendent of a hospital for the insane more than 30 miles from the place of trial, or is a physician, surgeon, dentist, chiropractor, or registered nurse who, in the regular course of his profession, treated or examined any party to the proceeding, or is in any public office or service the duties of which prevent his attending court provided, however, that if

the deponent is subject to the jurisdiction of the court, the court may, upon a showing of good cause or sua sponte, order him to attend and to testify ore tenus; or

(F) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(5) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

(6) No deposition shall be read in any action against a person under a disability unless it be taken in the presence of the guardian ad litem appointed or attorney serving pursuant to § 8.01-9, or upon questions agreed on by the guardian or attorney before the taking.

(7) In any action, the fact that a deposition has not been offered in evidence prior to an interlocutory decree or order shall not prevent its thereafter being so offered except as to matters ruled upon in such interlocutory decree or order; provided, however, that such deposition may be read as to matters ruled upon in such an interlocutory decree or order if the principles applicable to after-discovered evidence would permit its introduction.

Substitution of parties does not affect the right to use depositions previously taken; and when there are pending in the same court several actions or suits between the same parties, depending upon the same facts, or involving the same matter of controversy, in whole or in part, a deposition taken in one of such actions or suits, upon notice to the same party or parties, may be read in all, so far as it is applicable and relevant to the issue; and, when an action in any court of the United States or of this or any other state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the one action may be used in the other as if originally taken therefor.

(b) Form of Presentation; Objections to Admissibility. A party may offer deposition testimony pursuant to this Rule in stenographic or nonstenographic form. Except as otherwise directed by the court, if all or part of a deposition is offered in nonstenographic form, the offering party shall also provide the court with a transcript of the portions so offered. Except as provided in Rule 1:18 and subject to the provisions of subdivision (d)(3) of this Rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) Effect of Taking or Using Depositions. A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by

an adverse party of a deposition under subdivision (a)(3) of this Rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(d) Effect of Errors and Irregularities in Depositions.

(1) As to Notice. - All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to Disqualification of Officer. - Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to Taking of Deposition. -

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 4:6 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) As to Completion and Return of Deposition. - Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed or otherwise dealt with by the officer under Rules 4:5 and 4:6 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

(e) Limitation on Use of Depositions. No motion for summary judgment in any action at law or to strike the evidence shall be sustained when based in whole or in part upon any depositions under Rule 4:5, unless such depositions are received in evidence under Rule 4:7(a)(4) or all parties to the suit or action shall agree that such deposition may be so used.

(f) Record. Depositions shall become a part of the record only to the extent that they are offered in evidence.