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Virtual Cross-Examination: The Art of Impeaching Hearsay

John G. Douglass
University of Richmond, jdougla2@richmond.edu

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I
INTRODUCTION

Trial lawyers and judges are quite accustomed to courtroom battles over the *admissibility* of hearsay. But relatively few have much experience at challenging the *credibility* of hearsay. Once hearsay is admitted in evidence, even the ablest advocates typically proceed as if the hearsay battle were over, at least until the appeal. Few lawyers take advantage of the opportunities available to impeach the hearsay declarant. Consider the perspective of one experienced trial judge:

> I sometimes wonder at what seems to me the passing up of golden opportunities by the able advocate. Foremost among these lost opportunities is the virtual total neglect to do anything about the other side's hearsay once it has been admitted by the trial judge into evidence. True enough, the able advocate fought valiantly against the hearsay admission; but, having lost that position, he does not fall back to the next logical position—impeaching the hearsay declarant.[1]

Federal Rule of Evidence 806, which explicitly provides for impeachment of hearsay declarants, may be the most neglected of the Federal Rules relating to hearsay.[2] Rule 806 states:

> When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be

*Professor of Law, University of Richmond. A.B., Dartmouth College; J.D., Harvard University.

[1]Anthony M. Brannon, Successful Shadowboxing: The Art of Impeaching Hearsay Declarants, 13 Campbell L.Rev. 157, 158 (1991).

[2]Basic texts on trial advocacy seldom address Rule 806 or the impeachment of hearsay declarants. See, e.g., Steven Lubet, Modern Trial Advocacy 151-207 (2d ed. 1997) (discussing impeachment without reference to impeaching hearsay declarants); Thomas A. Mauet, Trial Techniques 264 (1996) (devoting one half page to impeachment of hearsay declarants); Robert E. Keeton, Trial Tactics and Methods 94-162 (2d ed. 1973) (addressing cross-examination and impeachment without mention of hearsay declarants).

> admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to the requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.[3]

The last sentence of the rule describes a relatively familiar process: calling an adverse witness—in this case the declarant of hearsay offered by your opponent—for hostile cross-examination. While that process itself may be both valuable and often overlooked, this paper deals with a second process envisioned by Rule 806: that of impeaching the hearsay declarant who never testifies at trial. I call that process "virtual cross-examination."[4] My aim in this paper is to suggest why the skill of virtual cross-examination is essential to modern trial lawyering, and to demonstrate its use and its efficacy.

II
THE INCREASING IMPORTANCE OF IMPEACHING HEARSAY

As Judge Brannon suggests, impeaching the hearsay declarant is a fallback position. Logically, it is the next step after you hear the judge deny your hearsay objection. In today's litigation environment, such a fallback position will present itself with increasing frequency, and in increasingly important situations. The reason is simple: courts are admitting more and more hearsay.

Few trends in the law of evidence are more pronounced than the liberalization of the hearsay rule in recent decades. The modern history of hearsay exceptions is a one-way street: once new hearsay exceptions are born, they almost never die.[5] And hearsay exceptions tend to grow, rather than to shrink, over time.[6] The Federal Rules of Evidence can take some credit—or blame—for the modern trend toward admissibility of an expanding variety

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[3]Fed. R. Evid. 806.

[4]I coined the phrase, "virtual cross-examination" and described the process in more detail, in an earlier article which addresses a criminal defendant's Sixth Amendment right to "confront" hearsay, in part by impeaching the hearsay declarant. John G. Douglass, Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay, 67 Geo. Wash. L. Rev. 191 (1999).

[5]See Ronald J. Allen, A Response to Professor Friedman: The Evolution of the Hearsay Rule to a Rule of Admission, 76 Minn. L. Rev. 797, 799 (1992) ("[H]earsay exceptions, once formed, remain. To my knowledge, there are virtually no examples of hearsay exceptions being eliminated . . .").

[6]For a more detailed account of the expansion of hearsay exceptions in criminal litigation, see John G. Douglass, Balancing Hearsay and Criminal Discovery, 68 Fordham L. Rev. 2097, 2127-28 (2000).

of hearsay.[7] At the same time, the interstate and international nature of modern litigation has strained the limits of traditional hearsay exceptions.[8] The doctrinal heart of this movement is increased judicial acceptance of hearsay as a reliable alternative to live testimony. Many modern courts see hearsay as an acceptable alternative to the carefully rehearsed performances that typify live testimony in many trials. Hearsay is generally more spontaneous, and always closer in time to the events in question. Indeed, the Supreme Court of the United States has gone so far as to say that hearsay is the form of evidence to be preferred in some cases.[9]

In sum, the wall of exclusion has already been breached in many sectors. Effective advocates must challenge hearsay effectively on new ground, after the battle over admissibility has been lost. And their best weapon in this new battle is really a very old weapon: cross-examination. But hearsay adds a new twist. Advocates must learn to cross-examine a witness who never appears in court.

III
THE ART OF VIRTUAL CROSS-EXAMINATION

A. How Do You Do It?: The Technique of Virtual Cross-Examination

How can you cross-examine an absent hearsay declarant, a "witness" who is not in the courtroom? The answer lies in how an able advocate cross-examines a witness who *is* in the courtroom. Most effective cross-examination consists of "questions" that are not really questions at all. Rather, they are assertions of fact, based on information already known to the cross-examiner, and which the examiner typically can prove through independent

[7]See Allen, supra note 5, at 800 ("The hearsay rule is, in short, no longer a rule of exclusion; it is a rule of admission that is doing its subversive work under the cover of darkness. Article VIII of the Federal Rules purports to continue the common law development of hearsay in most respects, but it is a false promise. The Federal Rules, in concert with modern discovery principles, are quite clearly the harbinger of its demise. My instinct is that it is a death well-deserved, and after a burial suitable to its station, the hearsay rule should be allowed to lie quietly, undisturbed, for eternity."); Faust F. Rossi, The Silent Revolution in The Litigation Manual: A Primer for Trial Lawyers 640, 653 (John G. Koeltl, ed., 1989) (recounting the "rapid erosion of the doctrine of hearsay" as a result of the Federal Rules of Evidence).

[8]See, e.g., United States v. Salim, 664 F. Supp. 682, 686-89 (E.D.N.Y. 1987)(admitting, under both the "former testimony" and the "residual" exceptions to the hearsay rule, a deposition by written interrogatories taken pursuant to French law).

[9]See United States v. Inadi, 475 U.S. 387, 395 (1986)(finding that in-court testimony by a coconspirator "seldom will reproduce . . . the evidentiary value of his statements during the course of the conspiracy").

evidence if the witness waffles, evades or lies.[10] More often than not, it is the question itself, along with the exposure of that independent evidence, which gives an impeaching cross-examination its impact. For example, assume that a witness testifies on direct examination that she saw the defendant running from the scene of the crime. The able cross-examiner then unveils her written statement, taken only moments after the event, when she wrote, "I didn't get a very good look at him." But the cross-examiner's question is simple and limited. He asks only, "That is the statement that you wrote, isn't it?" Similarly, assume that, on direct examination, the witness comes across as a pillar of respectability. On cross-examination, opposing counsel then pulls out her prior conviction for fraud. The cross-examiner does not invite the witness to "Tell us about the conviction." The best and safest question is, once again, simple and limited: "You are the same Cindy Jones who was convicted of fraud, correct?" In each instance, if counsel effectively controls the cross-examination, the response of the witness is little more than a mumbled "yes," or a shrug of acknowledgment. No previously unknown information is discovered, the witness has no opportunity to explain anything—and the cross-examiner is glad of it!

These are commonplace patterns of impeachment. They, as well as most others, can be replicated in large part even where the declarant "witness" is absent from the courtroom. The questions, and the information related to the jury, are essentially the same as in live cross-examination. The difference, of course, is that the questions are not addressed to the declarant. Rather, the questions are about the declarant, addressed to someone else. Ideally, that "someone else" will be the witness who relates the hearsay statements to the jury. In that instance, the opponent of hearsay can ask the impeaching questions shortly after the jury hears the declarant's "testimony," just as with cross-examination of a live witness. Sometimes, the opponent of hearsay may find it advantageous instead to wait. He may, for example wait to call his own witness, in order to lay the foundations necessary to admit the impeaching material. In either event, if the questions are addressed to the right "someone else," and if the questioner has the independent evidence to back them up, then the answers will be both predictable and helpful to the cross-examiner. Applied effectively, "virtual cross-examination" can have the look, the sound, and at least some of the drama of real cross-examination of the declarant. And it carries few of the risks of cross-examining a well-prepared, adverse witness.

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[10]For a more detailed description of the tactics of cross-examination, see Douglass, Beyond Admissibility, supra note 4, at 254-55.

B. What to Ask?: The Substance of Virtual Cross-Examination

Rule 806 permits the opponent of hearsay to introduce any evidence that would have been admissible to impeach the declarant had she testified in person. The substance of virtual cross-examination, then, is essentially the same as that of live cross-examination.

Classic texts on trial advocacy identify nine basic modes of impeachment.[11] All may be employed, in one form or another, when impeaching a hearsay declarant.[12] Rule 806 explicitly provides for impeachment by prior inconsistent statement, even where the declarant is unavailable to deny or explain the statement.[13] Reported cases and commentary from experienced practitioners offer examples of virtual cross-examination based on faulty perception,[14] bias or corrupt motive,[15] prior convictions,[16] and prior "bad acts."[17] And, of course, opinion or reputation evidence regarding untruthfulness as a facet of the declarant's character would be equally available, and equally admissible, whether the declarant is on the stand or unavailable.[18]

The physical presence and live testimony of a declarant normally are not necessary to prove her prior convictions, prior inconsistent statements, history of mental illness, past drug abuse, reputation for untruthfulness, or many of the other facts that could serve to impeach hearsay. Essential to any virtual cross-examination on these matters, of course, would be independent evidence to prove the impeaching fact in the absence of the declarant. But, as a practical matter, that same independent evidence (or "ammunition" as many cross-examiners might call it) would be necessary before counsel would attempt a live cross-examination of a testifying witness.[19] In either sit-

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[11]See, e.g., Irving Younger, The Advocate's Deskbook: The Essentials of Trying Case 253 (1988).

[12]See Brannon, supra note 1, at 160; Fred Warren Bennett, How to Administer the "Big Hurt" in a Criminal Case: The Life and Times of Federal Rule of Evidence 806, 44 Cath. U. L. Rev. 1135, 1142-63 (1995).

[13]Fed. R. Evid. 806. In this regard, Rule 806 goes one step beyond the limits which normally apply to the impeachment of a live witness. Under Federal Rule of Evidence 613(b), extrinsic evidence of a prior inconsistent statement is normally inadmissible unless the witness is afforded a chance to deny or explain the contradiction. But an absent declarant cannot deny or explain. Federal Rule 806 explicitly resolves the problem in favor of impeachment.

[14]See State v. Howard, 78 N.C. App. 262, 337 S.E.2d 598 (1985) (allowing extrinsic evidence regarding medications taken by declarant and their effects on perception).

[15]See United States v. Check, 582 F.2d 668 (2d Cir. 1978) (allowing defendant to ask hearsay-recounting police officer about pending charges which might give declarant a motive to falsify).

[16]See United States v. Robinson, 783 F.2d 64 (7th Cir. 1986); United States v. Bovain, 708 F.2d 606 (11th Cir. 1983).

[17]See Bennett, supra note 12, at 1155.

[18]See United States v. Moody, 903 F.2d 321 (5th Cir. 1990) (ruling that both Rule 806 and the Confrontation Clause provide for impeachment of a non-testifying declarant by means of adverse character evidence).

[19]For a discussion of the importance of "ammunition" in impeaching hearsay, and of the role of discovery in collecting that "ammunition," see Douglass, Balancing Hearsay, supra note 6, at 2100-01 n.11.

uation, absent prior possession of independent evidence of such impeaching facts, it is unlikely that counsel, acting prudently, would attempt first to discover them by a blind "fishing expedition" in front of the jury.[20]

IV
THE EFFICACY OF VIRTUAL CROSS-EXAMINATION

It is fair to ask, of course, whether any process can be effective in impeaching a declarant who never appears in front of the jury, and a candid assessment of virtual cross-examination requires acknowledgment of some its limits. First, the virtual cross-examiner cannot uncover new information which only the absent declarant possesses. The rare case may be won when the witness unexpectedly reveals a new and highly significant fact during cross-examination, that sort of victory cannot be won through virtual cross-examination. Second, the virtual cross-examiner has no opportunity to demonstrate falsehood through the demeanor of the witness. The jury never sees the absent declarant sweat or stammer in response to a surprising question in the heat of cross-examination.[21] But, as I suggest below, these limits may turn out to be advantages. In reality, both the opportunity to uncover "new" information and the demeanor of the witness play less dramatic roles in cross-examination than many would imagine. And, as the most candid trial lawyers would acknowledge, these factors tend to work against the cross-examiner more often than not. By comparison, virtual cross-examination is less risky.

A. New Revelations on Cross-Examination

Despite popularized images to the contrary, cross-examination is seldom a process intended to uncover new information. Advocates who use live cross-examination for "discovery" often receive unfavorable responses to questions they then regret having asked.[22] Experienced trial lawyers caution

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[20]See infra text at notes 22-24.

[21]But this limit is not universal. Occasionally, the virtual cross-examiner may find an opportunity to impeach an absent declarant with demeanor evidence. See, e.g., United States v. Salim, 664 F. Supp. 682, 691-92 (E.D.N.Y. 1987) (allowing court reporter to testify that declarant was "on the verge of tears" during deposition). Sometimes opponents offer hearsay simply to avoid calling a witness whose physical appearance may prove less than impressive to a jury. In those circumstances the virtual cross-examiner might offer an enlarged photograph of the declarant, preferably unshaven and with tattoos prominently displayed.

[22]Professor Lubet describes the odds against successful "fishing" on cross-examination:

> Fishing questions are the ones that you ask in the hope that you might catch something. It has been said before and it is worth repeating here: Do not ask questions to which you do not know the answers. For every reason that you have to think that the answer will be favorable, there are a dozen reasons you haven't thought of, all of which suggest disaster.

Lubet, supra note 2, at 121-22. See also Mauet, supra note 2, at 220.

cross-examiners never to ask a question to which they do not already know the answer.[23] While virtual cross-examination may carry a lesser promise than cross-examination for resounding success—the jury will never see the witness "break down" on the stand and confess to the crime—it also carries a much lower risk of colossal failure. Cross-examination is a high-risk venture in the best of circumstances. There is always a substantial risk that the witness will say something unexpected, and damaging, despite the cross-examiner's efforts to control the answer with carefully worded leading questions. And that risk is multiplied where the opponent has carefully prepared the witness. Cross-examination has been compared to tap dancing through a minefield, and for good reason. The well-prepared witness often holds a "land mine" or two in store for the cross-examiner, to "explode" at the most inopportune moment. But an absent declarant cannot provide unexpected and damaging information. The hearsay-relating witness—when confronted with the inconsistent statement, criminal conviction, bad acts or other impeaching facts relating to the hearsay declarant—typically will have nothing to say other than "yes, that's what the document says," or "I don't know." Most times, either answer will be a small victory for the cross-examiner. The absent declarant cannot explain away the inconsistency, blunt the impact of the impeaching fact, or distract the jury by exploding the "land mine" of an unexpected disclosure.

B. Witness Demeanor and the Lawyer-Witness Popularity Contest

Live witnesses sometimes betray their deceitfulness or sinister motives not by what they say, but by how they say it.[24] Virtual cross-examination cannot replicate shifty eyes, stumbling speech, or the surprised blush of the unskilled liar caught in the act. But the absence of any "demeanor impact" in virtual cross-examination may be more of a blessing than a curse. Jurors' perceptions of witness demeanor are unpredictable.[25] In fact, there is no

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[23]Lubet, supra note 2, at 121-22. See also Mauet, supra note 2, at 220; Irving Younger, The Art of Cross-Examination 23 (American Bar Ass'n, Section of Litigation Monograph, Series No. 1, 1976)("Never, never ask a question to which you do not already know the answer.").

[24]Historically, both courts and commentators have placed significant emphasis on the jury's ability to assess credibility by observing the demeanor of a witness testifying under cross-examination. See, e.g., Mattox v. United States, 156 U.S. 237, 242 (1895) (noting that a witness is compelled "to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."); 3 William Blackstone, Commentaries *345 ("[T]he occasional questions of the judge, the jury, and the counsel, propounded to the witness on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled . . . .").

[25]Racial or cultural stereotypes probably play a larger role in assessing credibility than any "legitimate" clues drawn from a testifying witness' demeanor. Consider the likely false impressions of jurors in David Guterson's fictional account of the trial of a young Japanese defendant in an American courtroom immediately following World War II:

empirical evidence that jurors' assessments of credibility based on witness demeanor are likely to be any more reliable than random guesses.[26] And the reactions of live witnesses to the stress of testimony may be equally unpredictable.[27] The experienced liar may appear composed, confident and articulate, while the truth teller may react with fear or shock in the face of the cross-examiner's challenge. At a minimum, the virtual cross-examiner avoids those uncertainties.

Witness demeanor is of especially limited value in modern trial practice because of the extensive preparation of witnesses in American litigation practice.[28] Today, a witness' courtroom performance is almost always rehearsed, and rehearsal often includes mock cross-examination more rigorous than the real thing. Videotape allows witnesses before trial to study their own demeanor and make appropriate adjustments. At trial, the jury sees only

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> The accused man sat so rigorously in his chair, so unmovable and stolid. He did not appear remorseful. He did not turn his head or move his eyes, nor did he change his expression. He seemed to Ishmael proud and defiant and detached from the possibility of his own death by hanging. It reminded him . . . of a training lecture he'd listened to at Parris Island. The Japanese soldier, a colonel had explained, would die fighting before he would surrender.
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> Kabuo Miyamoto rose in the witness box so that the citizens in the gallery saw him fully—a Japanese man standing proudly before them . . . . The citizens in the gallery were reminded of photographs they had seen of Japanese soldiers. The man before them was noble in appearance, and the shadows played across the planes of his face in a way that made their angles harden; his aspect connoted dignity. And there was nothing akin to softness in him anywhere, no part of him that was vulnerable. He was, they decided, not like them at all, and the detached and aloof manner in which he watched the snowfall made this palpable and self-evident.

David Guterson, Snow Falling on Cedars 344, 412 (1995).

[26]Most empirical studies suggest that witness demeanor is a poor criterion for assessing credibility. See Jeremy A. Blumenthal, A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility, 72 Neb. L. Rev. 1157, 1189 (1993); Olin Guy Wellborn III, Demeanor, 76 Cornell L. Rev. 1075, 1091 (1991) (arguing that transcripts are superior to live testimony as a basis for credibility judgments). See generally James P. Timony, Demeanor Credibility, 49 Cath. U. L. Rev. 903 (2000) (arguing that expert behavioral scientist testimony can enhance a jury's ability to assess credibility based on demeanor).

The accuracy of jurors in detecting deception based on demeanor is about the same as identifying liars based on a roll of the dice. See Paul Ekman, Telling Lies 162 (1985) ("Most liars can fool most people most of the time. Our research, and the research of most others, has found that few people do better than chance in judging whether someone is lying or truthful.").

[27]One classic trial advocacy text observes:

> Although the demeanor of the witness often helps illuminate the truth or falsity of testimony, it may do just the opposite. An unscrupulous lying witness, well trained, may not betray himself by his manner. He may look the jury square in the eye; he may have an excellent poker face. . . . . A disturbed neurotic may appear to be a serene and accurate witness, at worst only an eccentric. . . .. An aged and dignified witness may suffer lapses of memory which he cleverly conceals, even from himself, filling in the gaps with falsities, but he may impress a jury.

J. W. Ehrlich, The Lost Art of Cross-Examination 46-47 (1970).

[28]By contrast, in the British system, rules of ethics prohibit barristers from discussing the case with witnesses in advance of trial. See The General Standards, Code of Conduct of the Bar of England and Wales, ¶ 6.1.5 (1990).

the "polished" final performance.[29] Hearsay tends to neutralize this polishing process. Neither the proponent of hearsay nor the virtual cross-examiner gets to "polish" its declarant.

Another "demeanor" issue can be equally troublesome for the cross-examiner. On some level, trials are, at least in part, popularity contests. It can matter whom the jury likes and dislikes. Generally, juries are predisposed to view witnesses more favorably than lawyers.[30] Thus, any lawyer who vigorously attacks a live human being with an impeaching cross-examination faces a real risk that the tactic will backfire. What little the lawyer may win through exposure of impeaching facts may be lost if, to the jury, he appears sharp, aggressive or overbearing.[31] Virtual cross-examination can shift the popularity "presumption" in the lawyer's favor. Instead of attacking a live human being in front of the jury, the virtual cross-examiner simply shifts the blame for false information to that most convenient of targets: a declarant whom the jury never sees.

V
CONCLUSION

In sum, while virtual cross-examination has its limitations, it does offer an opportunity to do most of what most trial lawyers do in cross-examining most witnesses most of the time: put before the jury, using a persuasive form of questioning, already known facts which contradict the witness or undermine her credibility. Compared to the alternative—simply leaving hearsay alone after a losing battle over admissibility or, at best, attacking it in closing argument—that is no small opportunity. And virtual cross-examination carries one major advantage over the real cross-examination of a live witness. The process of virtual cross-examination is much easier to control. Absent declarants do not talk back.

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[29]See Ehrlich, supra note 27, at 53 ("People come before a jury with their cases prepared and give evidence which they have determined they will give. Like untidy housekeepers, many people come before the judge and jury with clean floors; all the dirt is hidden under the rug." For a more detailed account of the "polishing" of testimony during trial preparation, see John G. Douglass, Confronting the Reluctant Accomplice, 101 Colum. L. Rev. 1797, 1833-39 (2001).

[30]See Richard H. Underwood, The Limits of Cross-Examination, 21 Am. J. Trial Advoc. 113, 122 (1997) (quoting Francis Wellman, The Art of Cross-Examination 30 (1903); Mauet, supra note 2, at 217 ("In the cross-examination game, ties go to the witness.").

[31]See Janeen Kerper, Killing Him Softly with His Words: The Art and Ethics of Impeachment with Prior Statements, 21 Am. J. Trial Advoc. 83 (1997) ("[I]f the impeachment fails, or the point turns out to be a trivial one, the attorney, rather than the witness, loses credibility.").