Impeachment Techniques in an Era of Fake News: A Principled Approach — The Art and Science of Persuasion*

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The most persuasive litigators are the best storytellers: this principle has been the basis of this series, now in its twelfth essay, since its inception in 2011. Prior articles have addressed such topics as story-driven advocacy,[1] the psychology underlying the effectiveness of such advocacy,[2] opening statements,[3] expert evidence,[4] alternative dispute resolution,[5] closing statements,[6] the advocate as narrator,[7] tribunal advocacy,[8] key principles for discovery,[9] demeanour

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1 Todd L. Archibald and J. Manuel Mendelzon, "The Trial Advocate as Storyteller: The Art and Science of Persuasion" in Archibald & Echlin, eds., *Annual Review of Civil Litigation* (Toronto: Thomson Reuters, 2011).

2 Todd L. Archibald and Shannon S.W. O'Connor, "Cognitive Psychology in the Courtroom: The Art and Science of Persuasion — Chapter II" in Archibald & Echlin, eds., *Annual Review of Civil Litigation* (Toronto: Thomson Reuters, 2012).

3 Todd L. Archibald and Joshua Tong, "Impactful Trial Opening Statements in the Courtroom: The Art and Science of Persuasion — Chapter III" in Archibald & Echlin, eds., *Annual Review of Civil Litigation* (Toronto: Thomson Reuters, 2013).

4 Todd L. Archibald and Jeremy Fox, "Examining the Reliability of Expert Soft Science Evidence in the Courtroom: The Art and Science of Persuasion — Chapter IV" in Archibald & Echlin, eds., *Annual Review of Civil Litigation* (Toronto: Thomson Reuters, 2014).

5 Todd L. Archibald and Christian Vernon, "Incorporating Insights from Experimental Psychology and Behavioural Economics into ADR Practices: The Art and Science of Persuasion — Chapter V" in Archibald & Echlin, eds., *Annual Review of Civil Litigation* (Toronto: Thomson Reuters, 2015).

6 Todd L. Archibald and Eric Brousseau, "The Closing Address: The Opening Chapter in Trial Preparation: The Art and Science of Persuasion — Chapter VI," in Archibald, ed., *Annual Review of Civil Litigation* (Toronto: Thomson Reuters, 2016).

7 Todd L. Archibald and Mark Friedman, "Advocating with Persuasive Authority: The Art and Science of Persuasion — Chapter VII" in Archibald & Echlin, eds., *Annual Review of Civil Litigation* (Toronto: Thomson Reuters, 2017).

8 Todd L. Archibald and Brett Hughes, "Looking into an Advocacy Mirror: The Parallels

evidence,[10] and examination in chief.[11] This essay focuses on the use of impeachment in weaving a compelling narrative.

The concept of truth is under siege. Witness books with titles like *The Death of Truth: Notes on Falsehood in the Age of Trump* and *Weaponized Lies: How to Think Critically in the Post-Truth Era*.[12] Former President Donald Trump has "wracked up a Guinness Book of World Records in falsehoods."[13] The *Washington Post* reported in March 2019, that Trump "averaged nearly 5.9 false or misleading claims per day in his first year in office. He hit nearly 16.5 a day in his second year.[14]

The era of fake news is not restricted to U.S. politics. In a campaign speech ahead of the 2019 Canadian federal election, Maxime Bernier asked, "Are Canadians happy to subsidize 74 percent of our current immigrants?" A thorough fact-check by the CBC concluded that this statement was false, by using "cherry-picked data" that did not reflect our immigrants' contribution to the Canadian economy.[15]

Reputable scholarly presses are publishing new philosophical texts with titles such as *Post-Truth* and *The Misinformation Age: How False Beliefs Spread*.[16] Of interest during the COVID-19 pandemic, studies have shown that dishonesty

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Between Tribunals and Courts — The Art and Science of Persuasion — Chapter VIII," in Archibald, ed., *Annual Review of Civil Litigation* (Toronto: Thomson Reuters, 2018).

9 Todd L. Archibald, Roger B. Campbell, and Mitchell Fournie, "Discovery as a Forum for Persuasive Advocacy: The Art and Science of Persuasion—Chapter IX" in Archibald, ed., *Annual Review of Civil Litigation* (Toronto: Thomson Reuters, 2019).

10 Todd L Archibald and Patrick Harris, "Demeanour Evidence: Appearances are Often Deceiving: The Art and Science of Persuasion-Chapter X" in (2020) 51 ADV. Q 1.

11 Todd L Archibald and Chantelle van Wiltenburg, "Conducting an Effective Examination in Chief: The Art and Science of Persuasion-Chapter X1" in Archibald, ed., *Annual Review of Civil Litigation* (Toronto: Thomson Reuters, 2020).

12 Michiko Kakutani, *The Death of Truth: Notes on Falsehood in the Age of Trump* (New York: Tim Duggan Books, 2018); Daniel J. Levitin, *Weaponized Lies: How to Think Critically in the Post-Truth Era* (New York: Penguin Random House, 2016).

13 Bernard E. Harcourt in "The Last Refuge of Scoundrels: The Problem of Truth in a Time of Lying" at 8, paper prepared for NOMOS and presented at the 2019 conference of the American Society for Political and Legal Philosophy on "Truth and Evidence" at Princeton University on Friday, September 27, 2019, Electronic copy available at: < www.ssrn.com/abstract = 3433975 > .

14 *Ibid.*

15 Sadiya Ansari, "The Extremism Machine" (Spring 2021) University of Toronto Magazine.

16 Lee McIntyre, *Post-Truth* (Cambridge: MIT Press, 2018); Cailin O'Connor and James Owen Weatherall, *The Misinformation Age: How False Beliefs Spread* (New Haven: Yale University Press, 2018) as cited by Bernard E. Harcourt in "The Last Refuge of Scoundrels: The Problem of Truth in a Time of Lying", paper prepared for NOMOS and presented at the 2019 conference of the American Society for Political and Legal Philosophy on "Truth and Evidence" at Princeton University on Friday, September 27, 2019. Electronic copy available at: < www.ssrn.com/abstract = 3433975 > .

increases with social distance.[17] It is easier to lie over the internet than it is to lie to a person's face. A recent 2020 study in the financial industry showed evidence of widespread dishonesty, finding that over 92 percent of subjects lie at least once.[18]

The attack on truth will impact our trials and hearings. Legal history contains many examples where the impeachment of a witness as a liar was a turning point in a trial.[19] Catching a witness in a lie could undermine that witness's entire testimony.[20] In an era where some presidents and business officers appear to be able to prevaricate with impunity, will jurors or even judges attach as much significance to an admitted lie as was the case historically? [21]

Our answer is that the era of fake news has demonstrated the central importance of effective techniques to detect falsehoods. In this article, we utilize the example of impeachment of witness testimony[22] to advance the following important principles.

1. Why Telling the Truth Matters

According to Immanuel Kant, lying is "the greatest violation of a human being's duty to himself regarded merely as a moral being".[23] From the perspective of advocacy techniques, it will be essential to persuade the trier of fact of the importance of truth telling itself. Moreover, it will be vital to lay the foundation of why a given piece of evidence "tells the truth". The science of

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[17] Daniel Hermann and Andreas Ostermaier, "Be close to me and I will be honest: How social distance influences honesty" (February 2018): Center for European, Governance and Economic Development Research, Discussion Papers Number 340 (February 2018).

[18] Chloe Tergiman and Marie Claire Villeval, "The Way People Lie in Markets" WP 1927 — September 2019, revised June 2020. Electronic copy available at: < www.ssrn.com/abstract = 3635302 > .

[19] *People v. Armstrong,* Illinois, (1858) where the attorney representing the defendant conducting the cross-examination was Abraham Lincoln, cited in Martin Schwartz & John Nicodemo, "Impeachment Methods Illustrated: Movies, Novels, and High Profile Cases" (2012) 28 Touro L. Rev. 55.

[20] If the testimony of a witness shows that he is dishonest on a major point rather than merely mistaken, this dishonesty likely submarines his evidence such that a court should not "cherry pick" portions of the evidence from the testimony. See Archibald and Jull, *Profiting from Risk Management and Compliance* (Toronto: Thomson Reuters 2020) Chapter 12. Individual Liability Within Organizations II. Types of Liability.

[21] Michael P. Goodyear Priam's Folly: United States v. Alvarez And The Fake News Trojan Horse (forthcoming 2021) 73 Stan. L. Rev. online.

[22] We have previously written in this area. See Todd Archibald and Kenneth Jull, "An Empirical Approach Towards a New Methodology of Impeachment" in Todd L. Archibald & Randall Scott Echlin, eds., *Annual Review of Civil Litigation* (Toronto: Thomson Reuters, 2004).

[23] Immanuel Kant, *The Metaphysics of Morals [1797]* ed. Mary J. Gregor (Cambridge: 1996)

impeachment is at the heart of creating a compelling narrative to persuade the trier of fact of the strength of an advocate's case.

It will also be important to recognize the threats to truth telling. The concept of moral incrementalism erodes the value and importance of truth. A simple example of moral incrementalism is the "white lie" that cascades into another. We advance two responses to the threat of moral incrementalism in trials. First, we recommend tapping into behavioral research to help our courts identify the creep of moral incrementalism. Secondly, the cross-examiner must set out enough detail to underscore the circumstances of reliability that apply to a given issue.

2. Witnesses Must Be Confronted with the Opponent's Version of the Truth

Perhaps the most famous fictional example of confronting a witness with the truth is from the movie "A Few Good Men" (1992):

> LTJG Kaffee: Colonel Jessep! Did you order the Code Red?!
> Judge Randolph: You don't have to answer that question!
> Col Jessup: I'll answer the question. You want answers?
> LTJG Kaffee: I think I'm entitled to them.
> Col Jessup: You want answers?!
> LTJG Kaffee: I want the truth!
> Col Jessup: You can't handle the truth![24]

If the cross-examiner intends to impeach the credibility of a witness by means of extrinsic evidence, he or she must give that witness notice of his intention. This was the rule laid down in *Browne v. Dunn*.[25] Some lawyers do not appreciate that the rule in *Browne v. Dunn* is a general principle of fairness that applies to the conduct of the trial itself, and not simply to the way in which questions are phrased during an impeachment concerning a prior inconsistent question. The result in some cases is that lawyers fail to cross-examine witnesses on key points that they will later be calling evidence about.

In 2020, the Supreme Court of Canada held that a failure to comply with the rule in *Browne v. Dunn* may render a criminal trial unfair and require a new trial.[26] In 2021, the Manitoba Court of Appeal held that a breach of the rule in *Browne v. Dunn* and failure to advocate for witnesses to be recalled to cure the breach did not meet the standard of reasonable professional judgment.[27] The reasoning in these cases aptly applies to the civil and administrative arenas.

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[24] < www.americanrhetoric.com/MovieSpeeches/specialengagements/moviespeechafew-goodmencodered.html > .

[25] (1893), 6 R. 67 (U.K. H.L.). John Sopinka et al., *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at 946.

[26] *R. v. Doonanco*, 2020 SCC 2 (S.C.C.).

3. The Dichotomy Between Seeking Truth Versus Attacking Credibility Will Control Advocacy Strategy

There is nothing that draws more controversy in the teaching of trial advocacy than the techniques of impeaching a witness. It is essential for advocacy students to master the basic "three C's" principles of commit, confirm and confront. Once students are comfortable with the basic steps of impeachment, the debate begins about the order of the steps and whether there should be two or four "C's".[28]

The controlling factor in this debate is the goal. If the objective is to convince a witness to adopt a prior statement as the truth, this will impact the order of the "three C's". Conversely, if the goal is to attack the credibility of the witness, a different order and methodology is called for.

4. Psychological Factors Suggest a Methodology with Four Steps

In 2004, we advanced a suggested four step methodology based on psychological factors. The method was as follows:[29]

i. Validate the circumstances of reliability underlying the making of the prior statement; ("credit")
ii. Show the prior statement to the witness; ("confront")
iii. Compare prior statement to evidence in chief; ("commit") and
iv. Ensure that the goal is achieved; ("carry through").

In this article, we will attempt to demonstrate why these steps, and the order of these steps, are particularly relevant in the era of fake news. The four steps allow for flexibility because they do not require an up-front election between an impeachment to establish the truth versus an impeachment to attack credibility. The four-step approach can accommodate either truth or an attack on credibility. They allow for switching between the two goals depending upon the answers from the witness.

I. WHY TELLING THE TRUTH MATTERS AND THE PROBLEM OF MORAL INCREMENTALISM

In the "post-truth" era, it will be essential to persuade the trier of fact of the importance of truth telling itself. Misconduct in the contractual world has been

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[27] *R. v. Leslie*, 2021 MBCA 29 (C.A.) at paras. 51-52.

[28] Jacqueline L. King and Joel Berkovitz "Impeaching a Witness's Credibility Through Prior Inconsistent Statements" 50A:20.10, Personal Injury Practice in Motor Vehicle Cases.

[29] Todd Archibald and Kenneth Jull, "An Empirical Approach Towards a New Methodology of Impeachment" in Todd L. Archibald & Randall Scott Echlin, eds., *Annual Review of Civil Litigation* (Toronto: Thomson Reuters, 2004).

recently identified by the Supreme Court of Canada in *C.M. Callow Inc. v. Zollinger* as including lies, half-truths, omissions, and even silence, depending upon the circumstances.[30] The reference in *Callow* to the spectrum of lies and half-truths raises the issue of moral incrementalism.[31] The concept of moral incrementalism erodes the value and importance of truth.

A simple example of moral incrementalism is the "white lie" that escalates into another. The common perception of the white lie is that no one really gets hurt by it and it may save someone from embarrassment. If a person gets away with a white lie, they are more likely to do it again, but the lie may be slightly more serious the next time. The lesson taught by moral incrementalism is that the line of truth must be a hard line; otherwise, it will be eroded slowly but inevitably.

Eugene Soltes, a Harvard Business Professor, has written a perceptive text entitled *Why They Do It: Inside the Mind of the White Collar Criminal*.[32] Soltes uses the example of car purchase haggling to expose grey moral areas in negotiations:

> When the dealer says "I'm giving you the best price I can", however, we don't normally think that it's literally the lowest price he could possibly offer. Few would think the seller acted wrongly if he had the authority to lower the price even further — we'd just say that they buyer should have negotiated more aggressively. Few would accuse the dealer of outright fraud since what he said is understood as simply part of the negotiation process.[33]

Soltes gives several real-life examples to illustrate his point:

> People misstate, misrepresent, and exaggerate all the time in business. Sometimes these practices are tolerated as acceptable — as in negotiations for a new car — and sometimes they are fraudulent and possibly constitute crimes — as in the bond market. The legal ramifications are radically different, but the distinction between these different kinds of deception is not always so clear.[34]

The common use of misstatements or exaggerations does not mean, however, that we should become complacent concerning such misrepresentations. If a person lies under oath about a minor matter and is not caught in cross-

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[30] 2020 SCC 45, 2020 CarswellOnt 18468 (S.C.C.) [*Callow*]. See Ian Spiegel, Kenneth Jull, James Cook, and Jonathan James Nehmetallah, "Viewing the Supreme Court of Canada's Decision in Callow Through A Compliance Lens" (2021) 22 Mun L. R. Mgt.

[31] See Richard A. Epstein, *Skepticism and Freedom: A Modern Case for Classical Liberalism* (Chicago and London: University of Chicago Press, 2003) Chapter 4: Moral Incrementalism.

[32] Eugene Soltes, *Why They Do It: Inside the Mind of the White Collar Criminal* (Public Affairs
2016).

[33] *Ibid.* at 165.

[34] *Ibid.* at 167.

examination, they may be emboldened to lie about more serious matters. Of equal importance, if the trier of fact does not view "minor white lies" as being problematic in the era of fake news, the impeachment of a witness as a liar will be less persuasive.

Former President Trump presents himself as the ultimate truth-teller. Most of his supporters believe that Trump is in fact the only one telling the truth. "He tells it like it is." "He is funding his own campaign. Nobody owns him."[35] Trump said this himself: "I don't lie. I mean I don't lie. In fact, if anything, I'm so truthful that it gets me in trouble, OK? They say I'm too truthful. And, no I don't lie. I don't lie. I'm self-funding my campaign. I tell the truth."[36]

As briefly outlined in our introduction, we advance two responses to the threat of moral incrementalism in trials and hearings. First, we recommend tapping into behavioural research to help our courts identify the creep of moral incrementalism. The behavioural economics movement attempts to inject behavioural empiricism into rational choice models. For example, Richard Thaler (now a Nobel Prize winner) has written on "fairness games" and methods to encourage cooperation in business, which apply behavioural theory.[37]

From the perspective of the person being told a half truth, it is not unreasonable for that person to assume that the other individual is being truthful. This tendency is what Malcolm Gladwell describes as the "default to truth" that permitted criminals such as Bernie Madoff to go undetected.[38] In the same way, in a trial or hearing, there is generally a default to the truth in favour of a witness who holds a reputable position in society. Yet, this assumption may be misguided when the true facts are discovered.

Behavioural research reveals the potential for "ethical blind spots". In the context of lawyers' ethics, Robbennolt and Sternlight describe the behavioural explanation for ethical blind spots as follows:

> Each of us tends to believe that we see the world objectively; to see ourselves as more fair, unbiased, competent, and deserving than average; and to be overconfident about our abilities and prospects. This tendency to view the self in positive terms is heightened when the characteristic at issue is socially desirable as is the case with

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[35] Bernard E. Harcourt in "The Last Refuge of Scoundrels: The Problem of Truth in a Time of Lying" at 9.

[36] Jack Shafer, "How Donald Trump Destroyed the Interview: A century-old political institution may have met its match" (May 27, 2016) Politico Magazine, available at < www.politico.com/magazine/story/2016/05/2016-donald-trump-media-journalism-interview-tv-213922 > .

[37] Richard Thaler, *Misbehaving: The Making of Behavioral Economics* (New York: Norton & Co., 2015). See also Cialdini, *Pre-suasion: A Revolutionary Way to Influence and Persuade* (Toronto: Simon & Schuster, 2016) and Cass R. Sunstein, "Fifty Shades of Manipulation" (2016), 1 J. Marketing Behav. 213.

[38] Malcolm Gladwell, *Talking to Strangers* (Little Brown and Company: New York, 2019).

> ethical behavior. Indeed, attorneys tend to believe that their own ethics and their firm's ethical standards are more stringent than those of other attorneys and other firms.[39]

Behavioural research also provides insight into the search for truth in our digital world. By the time a case reaches a courtroom or tribunal setting, various forms of media may have commented on the issues. Each party may have already advanced their version of the truth in media interviews or on social media.[40] Jeffrey Fisher and Allison Larsen argue that advocacy before the United States Supreme Court has changed in the digital era. They assert that the advent of blogs, Twitter, podcasts, and various other forms of social media has led to the rise of "virtual briefing" in which online advocacy—either written or oral—is "targeted at particular cases pending at the Supreme Court and outside of the normal briefing process."[41] The parties' arguments may be explored in blog posts and podcasts, sometimes, even just days before or after their oral argument.

Modern lawyers must learn to brief the media about the theory of their cases in a careful manner that is grounded upon facts and only admissible evidence. In a world of fake news, it is likely no longer advisable to say "no comment" in the face of untruths that may be advanced by the opposite party or the media.

Our second recommendation to deal with moral incrementalism in trials and hearings relates to advocacy techniques. For the trial lawyer, the focus shifts to the touchstones that either confirm the truth or uncover lies. The cross-examiner must set out enough detail to underscore the circumstances of reliability which apply to a given issue in order to create a compelling narrative.

(i) The Circumstances of Reliability

A simple factual example assists in demonstrating a technique to underscore the importance of the benchmarks of reliability. The following example is unrealistic but illustrates this key point. Suppose that a witness views an accident between two cars, that is caused by the reckless actions of a third vehicle that does not collide with either of the two cars. The witness observes the third car speed away without stopping. When giving a statement to the police within one hour of the accident, the witness describes the third car as a "blue Honda".

Assume that you are acting on behalf of the alleged third driver. Your client drives a red Honda.

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[39] Robbennolt and Sternlight, "Behavioral Legal Ethics" (2013), 45 Ariz. St. L.J 1107 at 1116.

[40] Peter Lauwers, "Reflections on the Influence of Social Media on Judging," 18 Can. J. L. & Tech. 121.

[41] Jeffrey L Fisher & Allison Orr Larsen, "Virtual Briefing at the Supreme Court" (2019) Williams & Mary Law School Research Paper No. 09-397 at 8 cited in Peter Lauwers, "Reflections on the Influence of Social Media on Judging," 18 Can. J. L. & Tech. 121.

The plaintiff's case is framed in negligence and breach of the statutory duty to stop at the scene of an accident where a driver is involved or at fault. At trial, the witness asserts that the car that caused the accident was a "red Honda". In effect, the evidence of the witness points to your client as the culprit who caused the accident and then sped away.

If you can persuade the witness that his prior statement is true, and that the car he saw was blue, you will win the case outright. This is a case of mistaken identity. Your client and his red Honda could not possibly be liable, as the real culprit is still out there driving a blue Honda. If, on the other hand, the witness will not admit that the car that he saw was blue, then the inconsistency by itself raises some significant doubt about either his powers of observation, or his honesty.

In this simple example, the following cross-examination questions in their sequence underscore the key components of reliability:

- The accident occurred around 7:00 p.m.
- In June, there is plenty of light around 7:00 p.m.
- June 5th—the day of the accident—was a sunny day.
- When the Honda sped away, it made tire screeching noises that attracted your attention.
- You had a good view of the car as it sped away.
- You were interviewed by a police officer on the evening of June 5th.
- The interview was at 8:00 p.m.
- You gave an interview within an hour of seeing the accident.
- You understood the importance of providing accurate information to the officer.
- The officer took notes as you talked.
- The officer was in uniform.
- The officer was polite.
- The officer acted professionally.
- You knew that it was important to tell the police everything that you saw.
- You knew it was important to be as accurate as possible.
- You were able to provide a description of what you saw to the officer.
- She made notes as you talked.
- She did not rush you.
- The officer asked clarification questions.
- She provided you with a card with her identification.
- You did not feel it was necessary to contact the officer to change your statement in any way.

By that sequence and manner, the witness is essentially trapped and cannot wiggle out of either her lie or mistaken observation.

An alternate method utilizes the internal consistency of the prior statement. This type of validation is often used where there is a specific duty on a witness to keep notes or records, and the document contains no note relating to the details that the witness now remembers. This is often the approach utilized to cross-examine doctors or police officers on their notes.

Advocacy techniques can highlight various types or sources of reliability. The common law recognized five principal goals of impeachment by outlining one or more of the following:[42]

- Defects in the witness's testimonial capacity.
- A witness's bias or interest.
- A witness's (poor) character for truthfulness, including prior criminal convictions.
- Prior statements that are inconsistent with the witness's testimony.
- Contradiction of the witness by other witnesses on material facts.

The above categories reveal that the concept of truth is not monolithic but rather is nuanced. Someone may not tell the "truth" because of defects in testimonial capacity. A defect in capacity is not morally reprehensible; however, a witness's bias or interest that leads to misrepresentation or lies is. Yet, both categories could lead to miscarriages of justice.

The attack on truth in the era of fake news does not mean that trial and administrative lawyers should admit defeat. Rather, the attack on truth demands a more robust approach using advocacy techniques to underline the importance of truth in the trial process. Once the value of truth is established, the touchstones of reliability should be categorized into the types of impeachment and reinforced for the trier of fact.

Hearings do not produce absolute truth; rather truth is a matter of probability. Michael A. Crysta comments that "This is not to say the absolute truth is not a desired outcome in the modern adversary process—it is, but only as an aspirational goal."[43] Truth as a matter of probability can be quantified by mathematical means. We have argued in another forum that the balance of probabilities standard equates to 50.1 percent. A higher standard of clear and convincing equates to approximately 75 percent, while proof beyond a reasonable doubt would be 99 percent.[44]

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[42] Daniel D. Blinka, "Why Modern Evidence Law Lacks Credibility" < www.ssrn.com/abstract = 1372763 > .

[43] Michael A. Crysta "The Troubles with Trials Past and Present: Does the Adversary Criminal Trial Produce Truth?" 14 J. Parliamentary & Pol. L. 565 October, 2020 at 571.

[44] Todd Archibald and Kenneth Jull "Clear And Convincing" Evidence Cannot Reside in the House of Balance of Probabilities: A Scientific Approach" 51 The Advocates' Quarterly 315.

On a philosophical level, Thomas Kuhn spent a lifetime articulating the theory of scientific revolutions. As the old paradigm failed to explain anomalies (think of the flat earth theory), a period of crisis led to a totally new paradigm (the earth is round). As Kuhn argues, the world has not changed, but our perceptions of it have.[45] Finally, on the value of truth in an era of fake news, we take refuge in the basic and generally accepted model of risk assessment which can be empirically verified and is divided into four activities:

(i) identifying the potential hazard;
(ii) drawing a dose/response curve;
(iii) estimating the amount of human exposure; and
(iv) categorizing the result.[46]

II. WITNESSES MUST BE CONFRONTED WITH THE OPPONENT'S VERSION OF THE TRUTH

The fictional court confrontation in "A Few Good Men" pales in comparison to the real confrontation that occurred in the 1994 California double murder prosecution against former NFL star O.J. Simpson. During the trial, police Detective Mark Fuhrman testified for the prosecution that he found a key piece of evidence near Simpson's residence that linked him to the murders of his former wife and her friend, specifically the infamous "bloody glove" found at the murder scene. The defence, attempting to discredit Fuhrman's testimony, cross-examined him about his racial biases which he denied. Some observers at the time criticized renowned attorney F. Lee Bailey for what initially appeared to be an ineffective cross-examination that netted little except repeated denials.

The cross-examination by Bailey was not only an example of the requirement to confront a witness but also it was a brilliant demonstration of the technique of widening the circle to catch a witness in increasingly incredulous statements:[47]

Bailey: Q. Do you use the word "n—" in describing people?
Prosecutor Clark: Same objection.
The Court: Presently?
Bailey: Yes.
The Court: Overruled.
Fuhrman: A. No. Sir.
Bailey: Q. Have you used that word in the past ten years?

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[45] T. Kuhn, *The Structure of Scientific Revolutions*, 2nd ed., enlarged (Chicago: University of Chicago Press, 1970) at Chapter 10, "Revolutions as Changes of World View".

[46] Todd Archibald and Kenneth Jull, *Profiting from Risk Management and Compliance* (Toronto: Thomson Reuters, 2020) Chapter 12. Individual Liability Within Organizations at § 2:39. Risk Assessment.

[47] < wwwcrossx.blogspot.com/2020/10/f-lee-baileys-legendary-cross.html > .

A. Not that I recall. No.
Q. You mean if you called someone a "n—" you have forgotten it?
A. I'm not sure I can answer the question the way you phrased it. Sir.
Q. You have difficulty understanding the question?
A. Yes.
Q. I will rephrase it. I want you to assume that perhaps at some time, since 1985 or 6, you addressed a member of the African American race as a "n—". Is it possible that you have forgotten that fact on your part?
A. No, it is not possible.
Q. Are you therefore saying that you have not used that word in the past ten years, Detective Fuhrman?
A. Yes, that is what I'm saying.
Q. And you say under oath that you have not addressed any black person as a "n—" or spoken about black people as "n—" in the past ten years, detective Fuhrman?
A. That's what I'm saying. Sir.

The defence called witnesses to say that Fuhrman used that ignominious racial slur. In addition, the defence introduced audiotapes of statements in which Fuhrman used racial slurs several times.[48] Fuhrman was later convicted of perjury and sentenced to three years' probation.

The above example illustrates the courage required of an advocate to confront a witness with sometimes very unpleasant facts and to give the witness an opportunity to explain before introducing contradictory evidence. The example also demonstrates the skill required to carefully set up a witness before springing the trap of confronting the witness with contradictory evidence. In the O.J. Simpson example, there is an additional important twist. After Fuhrman's numerous denials, Bailey did not put the tapes to Fuhrman as is required by the rule in *Browne v. Dunn*. If he had done so, that impeachment would have been incredibly effective.

If the cross-examiner intends to impeach the credibility of a witness by means of extrinsic evidence, he or she must give that witness notice of his intention. This is the *Browne v. Dunn* principle.[49] The reason that Bailey did not confront Fuhrman with the tapes is that he had not known at the time of their existence. Bailey said he had picked the 10-year reference arbitrarily, because Judge Ito had already ruled that even more-distant problems of a racial nature that Fuhrman allegedly had could not be allowed in as evidence.[50] When the

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[48] Martin A. Schwartz & John Nicodemo, "Impeachment Methods Illustrated: Movies, Novels, And High Profile Cases" 28 Touro L. Rev. 55 (2012) at 65-66.

[49] (1893), 6 R. 67 (U.K. H.L.). John Sopinka et al., *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at 946.

[50] Bob Greene "F. Lee Bailey: "I Had No Idea There Were Any Tapes" (October 18, 1995)

McKinny tape-recorded interviews with Fuhrman surfaced during the summer, "It was by the most sheer coincidence that he started to shoot his mouth off in April of 1985," Bailey said. Thus, there was proof that Fuhrman used the racial epithet 9 years and 11 months prior to Bailey's cross-examination—or one month inside of Bailey's arbitrary 10-year parameter.[51]

Without the McKinny tapes, Bailey was calling witnesses who would claim to have heard Fuhrman use the epithet. Witnesses can be challenged, though—the tapes could not once their accuracy and authenticity were satisfactorily proven. Fuhrman, citing the 5th Amendment, refused to answer questions after the tapes surfaced. Bailey said that if he had been permitted to further question Fuhrman, "It would have been a delightful scene."[52]

The extent to which a witness must be challenged in the context of upholding the fairness rule is largely dependent upon the circumstances of each case, giving regard to the materiality of the issue at hand, along with *what* the evidence is. It is a fundamental principle of justice that an individual should be provided with the opportunity to make full answer and defence. The rule in *Browne v. Dunn*[53] requires counsel to give notice to those witnesses whom the cross-examiner intends later to impeach. The rationale for the rule was explained by Lord Herschell at pp. 70-71:

> Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit.[54]

As a rule of fairness, *Browne v. Dunn* is not a hard and fast legal rule. The extent of its application lies within the sound discretion of the trial judge and depends upon the circumstances of each case.[55] Confronting the witness with the evidence suggesting that he or she was not telling the truth not only prevents the witness's "ambush" by providing an opportunity to explain before contradictory

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Chicago Tribune: <www.chicagotribune.com/news/ct-xpm-1995-10-18-9510180372-story.html>.

51 *Ibid.*

52 *Ibid.*

53 *Browne v. Dunn* (1893), 6 R. 67 (U.K. H.L.).

54 *R. v. Martin*, 2013 ONSC 7011, 2013 CarswellOnt 19020 (S.C.J.) at para. 14.

55 *R. v. Quansah*, 2015 ONCA 237, 2015 CarswellOnt 4940 (C.A.) at para. 80, leave to appeal refused 2016 CarswellOnt 14796 (S.C.C.).

evidence is adduced, but also, if necessary, permits the "advancing of further facts in confirmation of the evidence which he or she has given."[56]

The Ontario Court of Appeal in *Verney* discussed when the rule of *Browne v. Dunn* has been breached. Justice Finlayson wrote as follows: "*Browne v. Dunn* is a rule of fairness that prevents the "ambush" of a witness by not giving him an opportunity to state his position with respect to later evidence which contradicts him on an essential matter."[57] Therefore, a witness need not be confronted with trivial matters of little to no significance, but rather only matters that are material to the case before them. Further, the Court acknowledged that, "drawing the line is not always easy . . . counsel must not feel obliged to slog through a witness's evidence-in-chief putting him on notice of every detail that the defence does not accept. Defence counsel must be free to use his own judgment about how to cross-examine a witness".[58]

To better exemplify the extent to which a court might expect counsel to allow a witness to provide an explanation for certain contradicting evidence, Justice Ewaschuk in *Machado* provides some clarity. It was held that the existence of surveillance films and their contents ought to have been put to the witness to afford a fair opportunity to explain, as the witness was unaware of the films' existence. Depending upon the issue's materiality along with *what* the evidence is, the contradictory evidence must be put to the witness in an express and particularized manner.[59]

In 2020, the Supreme Court of Canada held that a failure to comply with the rule in *Browne v. Dunn* may render a trial unfair and require a new trial.[60] Here, an expert crown witness, Dr. Graham Glancy, was called in rebuttal to address the defence arguments relating to "battered woman syndrome." The defence asked for a direction from the trial judge to curtail any ability of Dr. Glancy to directly respond to or contradict evidence of Dr. Walker on matters not put to Dr. Walker in cross-examination by the Crown.[61] Justice Moldaver for the Supreme Court ruled that "The Crown's failure to disclose Dr. Glancy's report before Dr. Walker completed her testimony, when considered together with the Crown's failure to cross-examine Dr. Walker on the contents of that report, interfered with Ms. Doonanco's ability to know the case she had to meet and make full answer and defence."[62] The stark remedy justifiably ordered by the court was a new trial.

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[56] *R. v. Verney* (1993), 87 C.C.C. (3d) 363 (Ont. C.A.).
[57] *Ibid.* at para. 28.
[58] *Ibid.*
[59] *Machado v. Berlet*, 1986 CarswellOnt 498, 57 O.R. (2d) 207, 15 C.P.C. (2d) 207, 32 D.L.R. (4th) 634, [1986] O.J. No. 1195 (Ont. H.C.).
[60] *R. v. Doonanco*, 2020 SCC 2 (S.C.C.).
[61] *R. v. Doonanco*, 2019 ABCA 118 (C.A.), leave to appeal refused *Deborah Lee Doonanco v. Her Majesty the Queen*, 2019 CarswellAlta 2039 (S.C.C.), reversed 2020 CarswellAlta 308 (S.C.C.).

In 2021, the Manitoba Court of Appeal held that a breach of *Browne v. Dunn* and the failure to advocate for witnesses to be recalled to cure the breach did not meet the standard of reasonable professional judgment. In the case of *R. v. Leslie*,[63] the issue related to a portion of the cross-examination where the complainant was asked if she had gone to her office after the alleged sexual assault, and whether she had left the accused in the field where the alleged assault had taken place. She denied both. Despite this, she was not confronted with the reality that she had earlier made those statements to her boyfriend.

In the view of Justice Cameron, the breach of the rule in *Browne v. Dunn* was determinative of the matter:

> Finally, having breached the rule in Browne v Dunn, prior counsel did not advocate for the complainant to be recalled, nor did she argue that the trial judge should not take into account the breaches of that rule in assessing the accused's credibility. She made no comment regarding any consequence that might result from the failure to cross-examine the complainant about the description of the incident she gave to her boyfriend. That is, she did not argue mitigation of any of the effects of the breaches. In *Gardiner v R,* 2010 NBCA 46, Richard JA, writing for the Court, found that lack of counsel's knowledge regarding how to handle the rule in *Browne v Dunn* in the event that the application of the rule risked the exclusion of critical evidence demonstrated incompetence (see paras 29-32).
>
> The combination of the above deficiencies leads me to conclude that prior counsel's representation of the accused did not meet the standard of reasonable professional judgment.[64]

In conclusion on this section, in a post truth world of fake news, counsel must be ever vigilant to ensure that they confront witnesses in accordance with *Browne v. Dunn*. This approach requires advance planning. Counsel must chart out their case and the potential lines of cross-examination well in advance to ensure that as the other parties case goes in, they are prepared to challenge the evidence in accordance with fair trial procedure. It is not appropriate to "pop up" later with a novel theory or with evidence that was not put to opposing witnesses in cross-examination. The truth deserves nothing less.

III. THE DICHOTOMY BETWEEN SEEKING TRUTH VERSUS ATTACKING CREDIBILITY WILL CONTROL STRATEGY

The authors of this article have taught trial advocacy for over 30 years in various forums including regularly in a graduate LL.M. course.[65] In this article,

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62 *R. v. Doonanco*, 2020 SCC 2 (S.C.C.) at para. 1.
63 *R. v. Leslie*, 2021 MBCA 29 (C.A.) at paras. 51-52.
64 *Ibid.*
65 "Advanced Trial Advocacy and Evidence Issues", Osgoode Hall Law School LL.M. programme.

we use the techniques for impeachment of witness testimony to illustrate some larger themes about advocacy instructions in the era of fake news.

There is nothing that draws more controversy in the teaching of trial advocacy than the techniques of impeaching a witness. It is essential for students to master the basic "three C's" principles of commit, confirm and confront.[66] Once students are comfortable with the basic steps of impeachment, the debate begins about the order of the steps and whether there should be two or four "C's".[67]

The controlling factor in this debate is the aim. If the objective is to convince a witness to adopt a prior statement as the truth, this will impact the order of the "three C's". Conversely, if the goal is to attack the credibility of the witness, a different order and methodology is called for.

A. Purpose: Truth or Credibility?

Yankee legend Yogi Berra once observed that "you've got to be very careful if you don't know where you are going, because you might not get there."[68] The same wisdom applies to impeachment strategies. A prior statement, taken close to an event or under a duty to be accurate, will often reflect the truth. The later statement, shown to be inconsistent, may simply reflect weaknesses of human memory over time. This may be the case even where the later testimony is given under oath.

If the point in issue in the testimony is important to the resolution of the legal issues, it is likely that the cross-examination will seek the witness to admit that the earlier statement is indeed accurate and true. If, on the other hand, the point is not material, or the witness simply will not admit the truth, the inconsistency goes to the issue of the powers of observation of the witness, or credibility.

A simple factual example assists in demonstrating the ways in which these goals may change the order of the questions asked. Let us return to the "red Honda/blue Honda" example cited earlier in this article. If you can persuade the witness that his prior statement is true, and that the car he saw speeding away was a blue Honda (your client's car is red), you will win the case outright. If on the other hand, the witness will not admit that the car that he saw speed away was blue, then the inconsistency by itself raises some significant doubt about either his powers of observation, or his honesty. The goals of the cross-examination will determine which method is preferable. One can always start

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[66] F. Dennis Saylor IV and Daniel I. Small "Cross-examination and the three C's of impeachment"
(November 2, 2017) Massachusetts Lawyers Weekly.

[67] Jacqueline L. King and Joel Berkovitz, "Impeaching a Witness's Credibility Through Prior Inconsistent Statements" 50A:20.10 Personal Injury Practice In Motor Vehicle Cases.

[68] < www.ftw.usatoday.com/2019/03/the-50-greatest-yogi-berra-quotes > .

with the attempt to use the prior statement for its truth, and then if this fails, move to credibility. The reverse procedure obviously is not logical, as once credibility of the witness is impeached, the statement loses much of its evidentiary value.

B. The Classic Method: Best for Credibility?

The "classic" method of impeaching a witness with a prior inconsistent statement has become part of trial practice lore. Courses in trial advocacy teach this three-step method. Yet, one rarely sees the classic method used in television or movie depictions of trials, as it appears cumbersome.[69]

The classic method has three basic steps:

1. Recommit the witness; ("commit")
2. Validate the circumstances of reliability underlying the making of the prior statement; ("credit") and
3. Confront the witness with the prior statement. ("confront")

The classic method is ideally suited to an impeachment of the witness's credibility. The method sets up the contrast between the two statements by putting them side by side. This approach in effect creates parameters by which the court may compare the two statements, and naturally will lead to the conclusion that both statements cannot be true.

(i) Recommit the Witness ("Commit")

The rationale for this step is threefold. First, it sets the parameters for comparison. Secondly, in a long trial, the trier of fact may simply have forgotten the details of the evidence in chief, and this repetition serves as a reminder. Finally, the step avoids any misunderstandings about what the witness did in fact say at trial under oath. At the same time, you are locking the witness into the statement in order to prevent him from wiggling out, when once confronted, by claiming confusion or mistake.[70]

The best practice is to repeat to the witness, verbatim, the evidence. For example, one might say:

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[69] Martin A. Schwartz & John Nicodemo "Impeachment Methods Illustrated: Movies, Novels, And High Profile Cases" 28 Touro L. Rev. 55 (2012). Schwartz and Nicodemo cite the 1957 classic, *Witness for the Prosecution*, where a letter that Christine (played by screen legend Marlene Dietrich) wrote to her lover that evening came into defence counsel's possession. The letter stated that she planned to lie on the witness stand in order to send her husband to prison and to be free of playing the part of a loving, grateful wife. The next day, upon re-calling Christine to the stand, defence counsel read the letter aloud into the record, forcing Christine, with an icy stare, to admit writing it.

[70] F. Dennis Saylor IV and Daniel I. Small "Cross-examination and the three C's of impeachment"
(November 2, 2017) Massachusetts Lawyers Weekly.

> I typed your testimony into my computer, and you said: "I saw the third car speeding away from the accident. It was a red Honda that sped away". You would agree that those were your exact words.

If the witness is not sure about the exact words, and if they are critical, it is appropriate to ask the court reporter to read the record back.

Professor Garry Watson, a leading trial advocacy teacher, views the early recommitment of the witness as an essential step, when the attack centres upon credibility. Professor Watson warns that if one starts out by confronting the witness with his prior out of court statement, he may well agree with it, but then, when confronted with his testimony in chief, he may simply say that his testimony in chief was mistaken. The problem of the "slide-away" is addressed by the early re-committal:

> The moral here is that if your goal is to impeach the *credibility of the witness* by showing that he/she has told two different stories at two different times, then it will usually be wise (nay, imperative) to recommit the witness to his/her present testimony first, before introducing or referring to the prior statement.[71]

(ii) Validate the Circumstances of Reliability Underlying the Making of the Prior Statement ("Credit")

This step is perhaps the most important and paradoxically the most ignored by counsel. It is tempting to skip this step, and to jump right to the prior statement, as this affords great drama, and counsel are often eager to achieve the desired impeachment. The cross-examiner should set out enough detail to prevent a witness from denying the validity or wording of the prior statement. In our example, when ultimately confronted with the prior statement that the car is blue, the witness may be tempted to say that the officer simply made a mistake and wrote the wrong colour down. The witness may be adamant that he told the officer that the car was red. This strategy shifts the blame for any inconsistency onto another witness and minimizes the credibility attack. The "shift the blame" strategy may also be seen where the prior statement is made at discovery. The witness may argue that counsel was not fair in the way the question was worded, or that he simply was not properly prepared, and had not reviewed the key documents in advance of the discovery to refresh his memory.

The placement of the set-up, prior to the confrontation, makes the validity line of questioning easier. Most witnesses will have forgotten about the inconsistency in prior statements and will not be resistant to an innocuous line of questioning about details. In section II, entitled "Why Telling the Truth

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[71] Professor Garry Watson, "Impeachment by Prior Inconsistent Statement", "Intensive Trial Advocacy Workshop", Professional Development Programme, Osgoode Hall Law School, 2003.

Matters," we argued that the concept of crediting circumstances of reliability has heightened importance in the world of fake news. In that section, we set out the types of questions that underscore the touchstones of reliability.

(iii) Confront with the Prior Statement ("Confront")

The Evidence Acts and *Browne v. Dunn* require that counsel must call the witness's attention to the contradicting parts of a document. The prior statement is not admitted as an exhibit, a fact that inexperienced counsel may find elusive; the trier of fact does not receive a copy.

The witness is now confronted with the prior statement that the Honda was blue. The witness must acknowledge that this statement was made. This will be easier done when this step follows the credit of circumstances of reliability as set out above. There is a debate amongst trial advocacy teachers as to whether counsel should attempt to maximize[72] the contrast by comparing the statements. The witness may on his or her own ask for an opportunity to explain the apparent contradiction. This issue leads back to the prior discussion of notice in *Browne*.

We are of the view that if the impeachment is compelling enough to warrant courtroom time, then counsel should maximize the contradiction where credibility is under attack. Counsel should not be afraid that the witness will explain it away. If the contradiction is strong, any witness trying to explain it away will likely dig themselves a bigger hole to fall into. If the contradiction can be easily explained, then counsel should not pursue that impeachment in the first place.

Technology can also assist with highlighting the contradiction. Trials in the COVID-19 world have been conducted virtually. One advantage of virtual hearings is the ability to share screens and compare documents side by side. In the post pandemic world, this technology will be more acceptable to courts and tribunals. Consideration should be given to "blowing up" a document electronically and comparing the two statements. A further technique is to underline or highlight the prior statement.[73]

C. The Elegant Method: Best Suited for Truth

The classic method is sometimes called the "traditional" approach. It is contrasted against the "elegant" alternative, as these terms were coined by Lubet in *Modern Trial Advocacy Canada*.[74] The elegant alternative is designed to avoid the repetition of the damaging evidence. It rather comes at the

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[72] John Olah, Chapter 13, "Cross-Examination: The Impeachment" from The Art and Science of Advocacy" (Carswell looseleaf).

[73] F. Dennis Saylor IV and Daniel I. Small, "Cross-examination and the three C's of impeachment"
(November 2, 2017) Massachusetts Lawyers Weekly.

confrontation through the back door. In the classic method, note that the evidence of a "red Honda" was repeated twice, (if one includes the examination in chief). The reference to the "blue Honda" was only mentioned once. Re-examination may again elicit another reference to the "red Honda". The elegant alternative attempts to avoid this problem. Here is an example:

Q: You saw a blue Honda speed away?
A: Yes, that is correct. (Goal accomplished).
If a denial:
A: No, that is not true, the Honda I saw speed away was red.
Q: Follow steps 2 (credit) and 3 (confrontation).

The advantages of the elegant method are several. The method clearly signals to the trier of fact what counsel's theory is: the truth is that the Honda was blue. The method avoids unnecessary repetition of the damaging evidence. The question puts the proposition forward in a more dramatic fashion. In the odd case, if the demeanor of the cross-examiner is not hostile, there is a possibility that the witness will simply agree. The goal is then accomplished. In such an event, counsel could then give the witness a face-saving way to resolve the testimony in chief. For example, counsel could say, "Now that you have refreshed your memory that the car was blue, it is fair to say that your earlier testimony today that it was red was simply a mistake."

Sometimes the elegant method can backfire. The witness may disagree by saying something like, "No, that is not true, as I said this morning, I saw a red Honda not a blue one. Even if I previously said that the car was blue, I was mistaken. I am sure that the car was red." In addition, as Lubet points out, some judges and lawyers are not accustomed to the elegant method, as they may only recognize an impeachment when set up in the traditional fashion. As counsel moves to step 2, the judge may have forgotten the evidence in chief, and inquire as to where counsel is going. This interruption may have the real effect of throwing counsel off her impeachment script. It also may allow the witness time to regroup. In any event, counsel can always revert to the classic method if necessary.

When counsel reaches step 2, and the goal is to have the witness admit that the prior statement is true, it will be important to emphasize the logical reasons why this scenario is more likely. The fact is, that in many cases, the words spoken or written closest to the event are in fact more accurate.

The cross-examiner should, with care, set out the external reasons why the prior statement is reliable. In addition to questions about method or detail, the questions can highlight the relevance of the time frame. In our example, it seems

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[74] Steven Lubet, *Modern Trial Advocacy Canada*, Canadian Adaption by Sheila Block and Cynthia Tape, 2nd ed., National Institute for Trial Advocacy, 2000 at 149-152.

self-evident to assert that a statement taken within an hour of an event is more reliable. With discovery evidence, that point is less useful. An effective tactic when using discovery evidence is to focus on the steps taken to prepare for discovery, the assistance of counsel, and the fact that it was taken under oath. These factors enhance the reliability of the prior discovery.

D. The Dramatic Method: Higher Risk

Some commentators are of the view that counsel should increase the drama of the impeachment by relegating the validation of the circumstances of reliability to the last step. It is said that this step is the most tedious for judges, and juries will not understand why it is relevant without some context. The dramatic method relies upon the stark contrast between the evidence in chief and the prior statement, put side by side.

The dramatic method puts the order as follows:

1. Recommit the witness; (“commit”); e.g. The Honda was Red.
2. Confront the witness with the prior statement; (“confront”) e.g. The Honda was Blue.
3. Validate the circumstances of reliability underlying the making of the prior statement. (“credit”)

We are of the view that this is a very high-risk approach. It may not be successful if the witness has experience giving testimony. For example, a police officer, now alerted to the contradiction, will be highly motivated to fight counsel on the validation of the circumstances of reliability underlying the making of the prior statement. Excuses may be forthcoming about the difficult conditions under which such notes were made, etc.

We are also of the view that “first time witnesses” will also resist the validation of the circumstances of reliability when this method is used. The witness will feel under attack and may experience what psychologists have referred to as “reactance” or “ego bias” (considered in more detail below). In other words, witnesses will naturally fight to defend their honour, even if they are honestly mistaken. In our example, a witness may try to save the day by stating that the officer simply made a mistake and wrote down “blue”, when the witness said “red”. When counsel then asks questions such as, “She made notes as you talked”, and “She did not rush you”, the answers may be resistant. The witness may say that he cannot recall if the officer made the notes simultaneously as he talked, and that the officer seemed to be in a rush. That may explain why she made the mistake in her notes.

The above analysis of the three methods of impeachment is to some degree speculative on our part. This is the central problem with trial advocacy writing and teaching, where members of the bench and bar rely upon personal experiences rather than scientific method. Nonetheless, in saying that, we

acknowledge that proper advocacy teaching has largely been validated through trial verdicts and judgments. In the next section, we subject the above methods to psychological analysis, to develop some hypotheses that could be the subject of empirical testing.

IV. PSYCHOLOGICAL FACTORS SUGGEST A METHODOLOGY WITH FOUR STEPS

In 2004, we advanced a suggested four-step methodology based on psychological factors. The method was as follows:[75]

1. Validate the circumstances of reliability underlying the making of the prior statement; ("credit")
2. Show the prior statement to the witness; ("confront")
3. Compare prior statement to evidence in chief; ("commit") and
4. Ensure that the goal is achieved ("carry through").

In this article, we will attempt to demonstrate why these steps, and the order of these steps, are particularly relevant today. The four steps allow for flexibility because they do not require an up-front election between an impeachment to establish the truth versus an impeachment to attach credibility. The four-step approach can accommodate either truth, or an attack on credibility. They also allow for switching between the two goals depending upon the witness's answers.

(i) Psychological Factors

A. The Effect of Emotions

Justice Peter Lauwers observes that advocates often appeal to emotions and judges must routinely make allowance for their own emotional reactions. Good advocacy tells a story which has main characters and heroes.[76] Ideally, one's client can be portrayed as a protagonist or even a hero who wears the equivalent of a white hat, and in rare cases, counsel may be viewed as a heroic figure.[77] Audiences cheer for the hero and this invokes potentially strong emotions.

The evidence is that "judges—like most adults—do not easily convert their emotional reactions into orderly, rational responses."[78] When emotions take

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[75] Todd Archibald and Kenneth Jull, "An Empirical Approach Towards a New Methodology of Impeachment" in Todd L. Archibald & Randall Scott Echlin, eds., *Annual Review of Civil Litigation* (Toronto: Thomson Reuters, 2004).

[76] Todd L. Archibald and J. Manuel Mendelzon, "The Trial Advocate as Storyteller: The Art and Science of Persuasion" in Archibald & Echlin, eds., *Annual Review of Civil Litigation* (Toronto: Thomson Reuters, 2011).

[77] Jonathan A. Rapping "It's a Sin to Kill a Mockingbird: The Need for Idealism in the Legal Profession" (2016) 114 Mich. L. Rev. 847.

over, they distort deliberative reasoning, which can be transformed into "motivated cognition" or "motivated reasoning." When that happens, Justice Lauwers asserts that instead of an impartial assessment of the evidence and arguments, the decision-maker looks for evidence and arguments that support the desired outcome in a way that is not impartial.

It might be asked, what is the relevance of emotions to the proper order of impeachment "C's" or the discovery of the truth? The choice of method will impact and accommodate appropriate emotional reactions and avoid distortion of deliberative reasoning. At first blush, it appears that the elegant method would be best to stimulate an appropriate emotional response by putting the proposition of truth up front. In our example, the proposition that the Honda was blue and the client is innocent is front loaded and arguably has the most impact.

Counsel must conduct a careful risk analysis. The danger is that the elegant strategy is high risk and may backfire. If the witness resists the suggestion that the Honda was indeed blue, the result may be a precipitous descent into a fight between the witness and counsel that has the potential to become the focus rather than the search for the truth. As the contest becomes more hostile, effective advocacy almost always suffers.[79]

B. Ego Bias

Most people overestimate their own capabilities and will react to what they perceive to be a challenge to their ego. Guthrie *et al.* summarize the main themes of the psychological literature on ego bias:

> People tend to make judgments about themselves and their abilities that are "egocentric" or "self-serving." People routinely estimate, for example, that they are above average on a variety of desirable characteristics, including health, driving, professional skills, and likelihood of having a successful marriage. Moreover, people overestimate their contribution to joint activities. For example, after a conversation both parties will estimate that they spoke more than half the time. Similarly, when married couples are asked to estimate the percentage of household tasks they perform, their estimates typically add up to more than 100%.[80]

When a witness is confronted under the classic method with the contrast in evidence, this confrontation is a clear challenge to her ego. The ego bias

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[78] Peter Lauwers, "Reflections on the Influence of Social Media on Judging," 18 Can. J. L. & Tech. 121 citing Andrew J Wistrich, Jeffrey J Rachlinski & Chris Guthrie, "Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?" (2014-2015) 93 Tex L Rev 855 at 863.

[79] Warmth and Competence on the Witness Stand: Implications for the Credibility of Male and Female Expert Witnesses, J Am Acad Psychiatry Law 40:488 —97, 2012.

[80] Chris Guthrie, Jeffrey J. Rachlinski and Andrew J. Wistrich, "Inside the Judicial Mind" (2001), 86 Cornell Law Review at 777 at 811.

hypothesizes that she will *overestimate* her ability to be confident that the car was red (in our example). While this overestimation assists the trial lawyer in highlighting the contrast, it may lead the normally honest witness down the path of exaggeration. When confronted with the earlier statement that the car was blue, the witness is tempted to testify that she is sure that her memory and testimony under oath is correct, and that the prior statement cannot be true.

The classic method underlines the stark contrast in the evidence, and to save face, the witness may be motivated to fight back. We speculate that if the line of questioning directly attacks ego, the witness may be likely to stick with the latest version, given under oath (even though it is not correct). While this method may be the best way of impeaching the credibility of a witness, from the point of view of promoting justice, it may not be superior. The result may be that the witness will be backed into a corner more easily, rather than providing an opportunity to admit that she was mistaken.

C. Anchoring

The psychological concept of anchoring refers to the early introduction of information or cues that anchor a decision maker to be pre-disposed to decide the case in accordance with this early information.

> When people make numerical estimates (e.g., the fair market value of a house), they commonly rely on the initial value available to them (e.g., the list price). That initial value tends to "anchor" their final estimates. In many situations, reliance on an anchor is reasonable because many anchors convey relevant information about the actual value of an item (although people might rely too heavily on anchors). The problem, however, is that anchors that do not provide any information about the actual value of an item also influence judgment.[81]

Civil litigation is particularly susceptible to anchoring, as it sets up monetary claims for damages which are introduced early in the proceedings. Guthrie *et al.* summarize some of the empirical work that has been done to prove this:

> Legal scholars have long thought that anchors influence jurors. In five separate studies, researchers have found that plaintiffs' lawyers' damage requests influenced mock jurors' assessments of the appropriate amount of damages to award in civil suits. In one study, for instance, mock jurors awarded slightly more than $90,000 when the plaintiff's lawyer requested $100,000 in damages; but when the plaintiff's lawyer requested $500,000 in damages in the very same case, mock jurors awarded nearly $300,000. Even silly and outrageous damage requests can influence juror decision making. For example, mock jurors in another study awarded the plaintiff substantially more in damages when the plaintiff's lawyer requested an outlandish $1 billion than when the plaintiff's lawyer requested a more plausible amount. The moral of these

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[81] Chris Guthrie, Jeffrey J. Rachlinski and Andrew J. Wistrich, "Inside the Judicial Mind" (2001), 86 Cornell Law Review at 777 at 787-788.

> anchoring studies seems to be, "Ask and ye shall receive." In each, "when more money was requested for damages by the plaintiff's
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> attorney, the jurors awarded more."[82]

Guthrie *et al.*'s study inquired whether judges would be as susceptible to jurors to the anchoring effect, given their legal training to disabuse their minds of extraneous matters. The study method was to give federal judges the same fact pattern, but then to divide them into two control groups. One group heard a motion to dismiss the case on the basis that it did not meet a jurisdictional monetary threshold. This motion clearly had no merit, as the case on any standard clearly passed this low threshold. The other group did not hear the preliminary motion. The judges were then asked to estimate what the case was worth. The judges in the first group who heard the meritless motion, tended to award less than the judges in the second group, even though the facts were identical. The authors speculated as to why this difference occurred:

> The judges in our study relied on an anchor — the $75,000 jurisdictional minimum raised by the motion to dismiss — to estimate damage awards in a hypothetical personal-injury case. Ruling on this motion might have caused the judges to consider the possibility that the true damages in this case were exceptionally low. If so, the judges would have been thinking about cases in which the maximum awards are quite low when they made their damage estimates. Consequently, they might have mentally filled in the factual gaps in our hypothetical with details that would have made an award greater than $75,000 implausible, thereby producing comparatively low damage estimates. A process like this would be consistent with the research on how anchoring works.
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> Alternatively, judges in our study might have believed that the anchor signalled relevant information. They might, for example, have reasoned that a defendant would have been more inclined to file such a motion in a case where the damages were actually low. (The opposite inference might, in fact, be more plausible, inasmuch as frivolous motions are usually designed to delay an adverse outcome, such as a high damage award.) If the judges believed this, then it might have been reasonable for them to infer from the motion that the defendant believed that the damages were low. The psychological literature on anchoring, however, combined with the magnitude of the difference between the Anchor and No Anchor groups in our study, suggests that anchoring provides a better account of our results
>
> than does this alternative explanation.[83]

The anchoring effect is related to the framing effect, which is a cognitive bias in which the decision-maker is influenced by how a choice is framed. Choices can often be framed in more than one way, highlighting either the positive or negative aspects of a particular option. Although two outcomes might be

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[82] *Ibid.* at 789-790.
[83] *Ibid.* at 792-793.

otherwise comparable, a decisionmaker could be influenced by how a particular choice is framed.

Justice Lauwers notes that framing is a method advocates use to attract positive judicial attention. Advocates aim to frame the question for determination in a way that aligns their preferred outcome with what they believe to be the natural sympathies of the court—hoping that the judge will be enticed to favour their position.[84]

Returning to the impeachment discussion, the earlier introduction of the defence theory that the car was blue, may serve to "anchor" a trier of fact to attach additional importance to this point. The elegant method anchors the trier of fact toward the desired result (blue as true) and away from the evidence in chief (red) which is sought to be avoided. The psychological literature would suggest that this method is indeed superior when the goal is to convert the prior statement into the truth as accepted by the court. When the goal is to have the prior statement admitted for the truth of its contents, the elegant method works better than the classic method. The problem with the classic method in this scenario, is that it confuses the issue by anchoring the trier of fact to the very reverse of the defence theory.

D. Reactance

Reactance is related to ego bias but has a foundation in the human need for autonomy. If people feel that someone, such as a cross-examining lawyer, is attempting to interfere with their autonomy of decision making, the natural psychological reaction is to push back. The result may be a decision based on emotion, rather than logic.

Studies have shown that reactance is "least when we seek to restrict freedom to do something that is not very important to us, greatest when the freedom subjected to control is something the regulated actor deeply cares about."[85]

We speculate that reactance explains why the dramatic method may fail. The witness is confronted with the clear contradiction in his evidence, for all to see. The implicit assumption is that the witness is either not telling the truth or is unreliable in observing or recalling the events. The witness is most likely to stand by the testimony just given under oath since this is the position that the cross-examiner is trying to push them away from. Reactance predicts that the witness will resist the suggestion that either the prior statement is correct, or that they are mistaken. When counsel gets to the validation of the circumstances

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[84] Peter Lauwers, "Reflections on the Influence of Social Media on Judging," 18 Can. J. L. & Tech. 121.

[85] S.S. Brehm and J.W. Brehm, Psychological Reactance: A Theory of Freedom and Control (New York: Academic Press, 1981), as cited in John Braithwaite, "On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republican Separation of Power" (1997) 47 Univ. of Toronto L.J. 305 at 322.

surrounding the taking of the prior statement, the witness will likely look for ways in which he can restore his autonomy by undercutting the reliability of the prior statement. For example, the witness may assert that prior to the discovery, he had not carefully read the documents in question, but before giving evidence under oath at trial, he had reviewed them with more care. The restoration of autonomy often is accompanied by the shifting of the blame for the inconsistency to another actor, such as counsel. This shifting of blame also accompanies the ego reaction to inconsistency.

A related concept to reactance is the confirmation bias. When we evaluate a proposition, we do not look for evidence on both sides and then weigh up which side is more likely to be true. Rather, we start with an initial perspective, and then we set out to see if we can find any evidence to confirm it. Authors Archibald and O'Connor have explored these points in detail in their 2012 *Annual Review* article about cognitive psychology.[86]

E. Archetypes

Screenwriters know that audiences will readily identify with film archetypes. It is a short form of characterization. In a movie, these archetypes serve to quickly distinguish the characters from one another. A survey of Hollywood films by Kristin Thompson found that most characters were introduced early in the film with an assigned set of clear personality traits, and "our first impressions of those traits will last through the film; that is, the characters act consistently."[87] Good trial lawyers understand the role and use of archetypes in the courtroom. The use of archetypes may enhance efficiency and empathy, as the trier of fact can quickly identify with the characters that she has known in her life. The danger in the use of archetypes is the potential for prejudice: the character may be judged as a stereotype, rather than for the actual and individual traits of the person.

The potential for stereotyping is a concern in cases especially where equality issues apply.[88] For example, jurors may expect a woman to be more emotional than a man, based upon the stereotype.[89] Janice Schuetz identified the use of archetypes in the O.J. Simpson case:

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[86] Peter Lauwers, "Reflections on the Influence of Social Media on Judging," 18 Can. J. L. & Tech. 121. See also, Todd L. Archibald and Shannon S.W. O'Connor, "Cognitive Psychology in the Courtroom: The Art and Science of Persuasion — Chapter II" in Archibald & Echlin, eds., *Annual Review of Civil Litigation* (Toronto: Thomson Reuters, 2012).

[87] Kristin Thompson, *Storytelling in the New Hollywood* (Harvard University Press, 1999) at 13.

[88] See the innovative argument by Sally Frank, "Eve was right to eat the apple: the importance of narrative in the art of lawyering" (1996) 8 Yale Journal of Law and Feminism 79.

> Courtroom narratives are persuasive because audiences listen to the narrative with a "stock of stories in their minds," and they use these stock stories to decide whether the courtroom narratives ring true with the stories they know and understand . . . These stories come from the social knowledge of the audiences. The social knowledge of audiences that applies to the Simpson case includes stories about his football fame, domestic abuse, police corruption, and excessive monetary settlements in civil lawsuits. The stories about the criminal case and its verdict also entered into the interpretive frames of reference for the jurors and for the public during the civil trial."[90]

The relevance of archetypes for impeachment theory is subtle, but important. A witness who is caught in an inconsistency may be quickly identified with the dishonest witness archetype. Yet, the reality may simply be that the witness is mistaken, and not dishonest. More work needs to be done in extending a link among law, literature, movies and psychology.[91]

(ii) Suggested New Template for Impeachment

We argue that there is an optimal approach to impeachment, based on the psychological forces identified in this paper, and based upon our own anecdotal but extensive trial experience. The following template is put forth as a potential model that might be subject to empirical testing in mock trials. Until such testing is complete, the template has no more persuasive value than any other method of impeachment. We first put this template forward in 2004.[92] We are still of the belief that it is valid, although perhaps that is reflective of our own confirmation and ego bias.

The template has four steps, the order of which is consistent, regardless of whether the goal is to impeach credibility or to prove that the prior statement is true. The only difference between the two purposes or goals is one of emphasis. One advantage of this consistent method is simplicity. Impeachment is often difficult to accomplish, even for the most experienced advocate, because a trial moves very quickly. An advocate may have very little time to anticipate the subtle shifting in a witness's evidence, and then to decide which impeachment method should be selected, and in what order the steps should be taken.

The suggested template consists of the following four steps:

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[89] Catherine O'Sullivan, "Has the Real Monster been Left off the Hook? Karla Homolka's Femininity(ies)" (2000) 2 Hibernian Law Journal 226.

[90] Janice Schuetz, "Final Summation: Narratives in Contrast", in Janice Schuetz and Lin S. Lilley, eds., *The O.J. Simpson Trials: Rhetoric, Media, and the Law* (Carbondale, Ill: Southern Illinois UP, 1999) at 104-105.

[91] See Richard Posner, *Law and Literature* (Harvard University Press, 2000).

[92] Todd Archibald and Kenneth Jull, "An Empirical Approach Towards a New Methodology of Impeachment" in Todd L. Archibald & Randall Scott Echlin, eds., *Annual Review of Civil Litigation* (Toronto: Thomson Reuters, 2004).

1. Validate the circumstances of reliability underlying the making of the prior statement; (“credit”)
2. Show the prior statement to the witness; (“confront”)
3. Compare prior statement to evidence in chief; (“commit”) and
4. Ensure that the goal is achieved; (“carry through”).

1. Validate the Circumstances of Reliability Underlying the Making of the Prior Statement (“Credit”)

The witness will have no reactance to basic questions underlying reliability and the origins of the making of a prior statement. Most witnesses will not anticipate why this is even relevant. They may have forgotten that they made the prior statement.

The only problem with commencing a line of questioning with questions about the making of a prior statement, is the “tedium” factor. A trial judge, or opposing counsel, may inquire as to the relevance of this line of questioning. It will not be apparent to the trier of fact that there is any inconsistency or purpose behind the questions. If a judge queries counsel as to where a more obscure line of questioning is headed, counsel should ask that the witness be excused from the courtroom. In the absence of the witness, counsel can then indicate the goal of the impeachment. That foreshadowing will serve to highlight it if the impeachment is achieved. Counsel should not be reticent to remind the bench, when necessary, that the particular style of cross-examination is proper and within the discretion of a cross-examiner.

As for the jury, the context may be enhanced by a line of questioning that informs them about the process. This is particularly the case with questions about the scope and purpose of discovery with which the average juror, especially if they watch television shows about trials, is totally unfamiliar. The nature of the questions should remind the witness about the reason for discovery, the environment within which a discovery took place, and the role of counsel.

2. Show the prior statement to the witness (“Confront”)

Once the validation of this method surrounding the making of the prior statement is accomplished, it is a logical next step to take the witness to that statement. Having just acknowledged that the method is sound, it is harder for the witness to deny the making of the statement. Our template departs from the elegant method (of going right to the proposition that the car is actually blue). Our approach avoids the reactance that such a confrontation may create. The law requires that the attention of the witness be drawn to the relevant passage, or counsel may simply show the prior statement or document to the witness. There is no need for a confrontation at this point. The early introduction of the

evidence of the prior statement will have significant impact, both for the witness and the trier of fact.

3. Compare Prior Statement to Evidence in Chief (“Commit”)

Step three will differ, not in order, but in style, depending upon the goal of the impeachment.

(a) Credibility

The parameters for comparison, which is the evidence in chief that the car was red, follows right after the evidence of the prior statement that the car was blue. In other words, like the classic method, we put these side by side, but simply at a later point in the impeachment. The comparison is still conducted, without the initial reactance.

One potential criticism of this method is the “slide-away”. We recognize the need for empirical study of this issue. We speculate that both judges and jurors will be able to distinguish between sincere mistakes versus flippant reversals. The key is the witness’s reaction in reacting to and addressing the inconsistency.

(b) Truth

If truth of the prior statement is the goal, it is the cross-examiner who wants the witness to slide away from the evidence in chief, and counsel may suggest many avenues for this escape. Such an approach will have more credit under such circumstances, than in the scenario where the witness attempts on his own to undermine the testimony given under oath.

The key to avoiding the ego bias and reactance, is to provide a witness with “face saving” avenues of escape. We submit that if the witness is given such escape routes, it will be much easier for the witness to adopt the prior statement for its truth. The template that we suggest both avoids confrontation and anchors the trier of fact as early as possible to the prior evidence, or discovery transcript.

Face-saving devices relate to the inadvertent ways in which a witness may have been mistaken in giving evidence in chief. For example, perhaps the witness has not had a recent opportunity to review the prior statement in detail and has simply failed to properly refresh his/her memory. This explanation often rings true with discovery transcripts, where witnesses have not gone through their evidence with the same degree of attention as has their lawyer. Perhaps, the witness was nervous when giving evidence in chief. Again, the sincerity of the explanation for the inconsistency will partially rest upon the witness’s reaction.

4. Ensure that The Goal Is Achieved (“Carry Through”)

Some teachers of trial advocacy warn that witnesses should not be encouraged to offer explanations for any inconsistencies, as this is the

equivalent of an open-ended question wherein the lawyer loses control over the witness. The problem with this approach, however, is that it leaves the impeachment hanging, and the goal is not clearly achieved. There are other practical problems with this approach as well. When confronted with an inconsistency, many witnesses will request an opportunity to explain. Counsel who refuse the witness this opportunity, while within their rights to do so (if the questions have been narrowly framed) may appear to be either unfair, or not interested in the ends of justice. Moreover, opposing counsel will ultimately give the witness the chance to explain through re-examination.

Our view is that the better practice is for counsel to ensure that the goal of the impeachment is both precise and is achieved. Returning to the three objectives, we suggest the following:

1. Where the witness admits the prior statement as being true and this is the desired result of counsel, counsel should tie up the remaining loose ends by suggesting to the witness that the evidence in chief was a mistake. The purpose of this added question is to cut off at the pass any chance of opposing counsel re-examining on this point, in order to rehabilitate the evidence in chief.
2. Where the witness admits that she was mistaken in one of the versions (either prior or subsequent) and that her powers of observation are thereby weakened, counsel should be precise about the scope of this mistake. If counsel intends to argue the broader conclusion at closing, that other parts of the testimony are also subject to the weakened powers of observation, this proposition ought to be put to the witness. For example, if counsel wish to argue that the witness was mistaken in seeing a red car, and by virtue of this, could be mistaken about other details of the accident, some of those other inconsistent details should be canvassed. This approach will only serve to underline the inadequacies in the witness's testimony.
3. Where the witness admits (or the conclusion is inescapable) that her story changed either due to bias or dishonesty, no more needs to be done, as her bias or dishonesty will submarine her testimony in its entirety.

(iii) Our Template Simplified to Two "C's"

We are gratified to see that a simplified version of our template has been recently developed in trial advocacy teaching. This is the "two C's" method of "Credit" and "Confront".[93] The advantage of this method is simplicity. A two-step method is easier to teach. A two-step method is easier to apply in practice in a fast-paced trial where the dynamic is constantly shifting. Although this

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[93] Intensive Trial Advocacy Workshop 40th Anniversary (2019) Osgood Hall Law School: < www.osgoodepd.ca/wp-content/uploads/2016/08/2019-OPD-ITAW.pdf > .

method does not complete the circle by comparing the prior inconsistent statement with the evidence in chief or draw conclusions, it is also less risky. Younger advocates may want to try this method out first, before venturing into the more complex world of achieving the ultimate goals.

V. CONCLUSION

At the beginning of this article, we posed the question: In the era of fake news does anyone care anymore if someone is caught lying, when it appears that everyone is doing it on some level? Our answer is that it matters more than it ever did to buttress the value of telling the truth. The attack on truth demands a robust approach using behavioural research and advocacy techniques to underline the importance of truth in the trial process. Trials do not produce absolute truth; rather truth is a matter of probability. We take refuge in that basic and generally accepted model of risk assessment which can be empirically verified.

We used famous examples such as the cross-examination of Mark Fuhrman to illustrate the courage required of an advocate to confront a witness with sometimes unpleasant facts, and, at the same time, to give the witness an opportunity to explain before introducing contradictory evidence. Counsel must be ever vigilant to ensure that they confront witnesses in accordance with the rule in *Browne v. Dunn*.

We have suggested four "C's" in a specific order as a template for impeachment. We believe that these steps have stood the test of time since we last wrote about this topic in 2004 in the *Annual Review*. Above all, we hope that these steps will assist counsel in the fight for a just and principled trial or tribunal hearing judgment. We submit that the four "C's" approach will dramatically reduce the possibility of the impeachment failing or not being persuasive. It will also lead to added clarity for the trier of fact to discern the contours and depth of the inconsistency. An effective impeachment strategy is an important advocacy tool in creating a compelling narrative.