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Dirty Tricks of Cross-Examination

The Influence of Conjectural Evidence on the Jury*

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A mock jury study was conducted to test the hypothesis that perceptions of a witness can be biased by presumptuous cross-examination questions. A total of 105 subjects read a rape trial in which the cross-examiner asked a question that implied something negative about the reputation of either the victim or an expert. Within each condition, the question was met with either a denial, an admission, or an objection from the witness's attorney. Results indicated that although ratings of the victim's credibility were not affected by the presumptuous question, the expert's credibility was significantly diminished—even when the question had elicited a denial or a sustained objection. Conceptual and practical implications of these findings are discussed.

To reconstruct past events that are in dispute, juries must evaluate the credibility of witnesses based on their direct and cross-examination testimony. On direct examination, trial lawyers elicit their witness's story through open-ended, non-leading questions that call for narrative answers. On cross-examination, they try to discredit opposing witnesses through leading questions designed to probe for signs of prejudice, incompetence, or dishonesty.

The rules of evidence and trial procedure that guide the questioning of witnesses are intended to facilitate the jury's quest for the truth (Cleary, 1972). In theory, direct and cross-examination should thus enhance the credibility of witnesses who are accurate and honest, while diminishing the credibility of those who are inaccurate or dishonest—in other words, it should heighten the jury's

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fact-finding competence. There is no way of knowing how frequently the law's objectives are actually achieved. Though much is written about effective questioning techniques (Keeton, 1973; Kestler, 1982; Wellman, 1936), surprisingly little research has examined their prevalence or their impact on the jury (see Loftus & Greene, 1985). One problem, however, seems evident. Even though trial lawyers are expected to adhere to the rules of evidence (Federal Rules of Evidence, 1984) and keep their trial strategies within the boundaries of ethical conduct (A.B.A. Model Code of Professional Responsibility, 1983), they often bend the rules and stretch the boundaries (Underwood & Fortune, 1988). Thus we ask, to what extent can the examination of witnesses be used to subvert a jury's quest for the truth?

There are several ethically questionable trial practices, or "dirty tricks," that could make it difficult for jurors to make sound credibility judgments. Coaching witnesses before trial, leading their testimony in court, distracting the jury at critical moments in an opponent's case, and asking questions that invite the introduction of inadmissible evidence are among the many possibilities (McElhaney, 1981; Underwood, 1982). There is one particularly egregious tactic that is sometimes used to introduce the deposition testimony of absent witnesses into evidence. When witnesses are unable to appear in court, their pretrial depositions are typically transcribed and read aloud from the witness stand by someone appointed by the witness's attorney. In lieu of videotaped depositions, this procedure paves the way for much abuse. It has been suggested, for example, that the "imaginative" lawyer faced with a witness who does not come across favorably should take a deposition and replace the witness with an attractive surrogate (Morrill, 1972). Indeed, the first author once observed an audition of professional actors for this purpose in a highly publicized civil case. Through variations in their nonverbal demeanor, these actors tried to convey certain positive or negative impressions of the actual witnesses. Unfortunately, this strategy may prove effective. In a mock jury experiment, Kassin (1983) found that opinions of a witness were influenced by the surrogate's demeanor.

Research suggests two ways in which a juror's perception of the evidence can also be jaded by the content of a lawyer's questions. First, a witness's testimony can be shaped in subtle ways by the simple wording of nonleading questions (Loftus, 1975; Loftus & Palmer, 1974). Second, people often process information "between the lines" and erroneously recall hearing not just what was said, but what was pragmatically implied. Thus, mock jurors who heard a witness testify that "I ran up to the burglar alarm" erroneously assumed the witness had said, "I rang the burglar alarm" (Harris & Monaco, 1978; Harris, Teske, & Ginns, 1975).

Because of the nearly unrestricted use of leading questions, cross-examination provides additional opportunity to influence jurors through questions that are designed either to *elicit* misleading information from the witness or to *impart* misleading information to the jury. According to Underwood and Fortune (1988), "one of the most common abuses of cross examination takes the form of a question implying a serious charge against the witness, for which counsel has little or no proof. All too often, trial attorneys ask such questions for the sole purpose of wafting unwarranted innuendo into the jury box" (p. 346).

When lawyers ask questions that suggest their own answers, are jurors influenced by the information implied by those questions? Is cross-examination by innuendo an effective device? Research in nonlegal settings tentatively suggests an affirmative answer. Swann, Guiliano, and Wegner (1982), for example, had subjects listen to an interviewer ask questions that were based on the premise that the interviewee was either introverted (e.g., "Have you ever felt left out of a social group?") or extroverted (e.g., "What do you do to liven things up at a party?"). Hearing the questions, subjects inferred that the interviewee possessed the implied traits. According to Swann et al. (1982), such questions serve as conjunctural evidence (see also Wegner, Wenclaff, Kerker, & Beattie, 1981).

The present study was designed to test the hypothesis that juror perceptions of a witness are similarly biased by presumptuous cross-examination questions. Fortunately, when lawyers ask questions designed to communicate nonevidentiary, damaging information about a witness's reputation, jurors have the benefit of knowing the context of those questions (e.g., the adversarial relationship between the cross-examiner and witness) and hearing the responses they evoke (e.g., the witness's admission or vehement denial of the implication, an objection from the witness's attorney). Thus, we sought not only to investigate the effects of presumptuous questions, but to determine whether such effects are mediated by the reactions elicited from a witness or attorney.

METHOD

Subjects and Design

One-hundred five Williams College undergraduates (51 male, 54 female) were randomly assigned to one of seven groups. All subjects read a transcript of a rape trial. Forty-five subjects read a version of the case in which presumptuous questions were asked of the rape victim, and 45 read a version in which such questions were asked of an eyewitness expert for the defense. Within each version, the questions were met with one of three reactions: a denial from the targeted witness, an admission, or an objection from the witness's attorney ($n = 15$ per cell). An additional 15 subjects read a control transcript that did not contain any such questions.

Stimulus Trial

Seven versions were written of a rape-trial transcript entitled *People v. Herman Burks*. In this case, a woman named Louella Wilson testified that she was raped at gunpoint in the dimly lit corridor of her Chicago apartment building. As her assailant, she identified a man named Herman Burks who, at the time, was visiting a friend who lived in the building and was having a party. The defendant admitted he was in the building on the day in question, but claims he never left his friend's apartment during the approximate time of the alleged rape. Supported by an eyewitness expert who testified on the effects of high stress levels on perfor-

mance, the defense argued that the victim was mistaken in her identification. The transcript was 28 pages long and included opening statements, closing arguments, judge's instructions, and the examination of three witnesses. The three witnesses, in order of appearance, were Louella Wilson, the victim; Herman Burks, the defendant; and psychologist George Blackburn, an eyewitness expert for the defense. These examinations were nine, seven, and five pages in length, respectively.

In the *targeted victim* version of the transcript, Louella Wilson was asked, at the start of her cross-examination, the following pair (an initial question and follow-up) of presumptuous questions: "Isn't it true that you have accused men of rape before?" and "Isn't it true that, four years ago, you called the police claiming that you had been raped?" In the *targeted expert* version, it was Dr. Blackburn who was confronted at the start of cross-examination with a pair of accusatory questions: "Isn't it true that your work is poorly regarded by your colleagues?" and "Hasn't your work been sharply criticized in the past?" In each case, the cross-examiner's questions received one of three responses: an *admission* ("yes," "yes it is [has]"), a *denial* ("no," "no it isn't [hasn't]"), or an *objection* by the witness's lawyer, after which the question was withdrawn before the witness had a chance to respond. In the control group, subjects read a transcript in which no presumptuous questions were asked.

Dependent Measures

After reading a version of the trial, subjects completed a four-page questionnaire, individually and without deliberation. First, they voted guilty or not guilty, rated their confidence in that verdict on a 1–10-point scale, and estimated the probability that the defendant had committed the crime as well as the probability they believed necessary for conviction (both on 0–100-point scales). Subjects then rated all witnesses on four indices of their credibility—honesty, believability, competence, and persuasiveness. Next, they rated the prosecution and defense attorneys for how effective, well-prepared, fair, and likable they were. All ratings were made on 10-point scales.

Finally, subjects responded true or false (an "I don't know" option was included) to a set of statements as a test of their beliefs and recall of the facts in the case. Included among these statements were two critical items: "Louella Wilson accused a man of rape once before," and "Dr. Blackburn, the psychologist, has a poor reputation among his colleagues." To examine whether negative presumptuous questions lead people to make inferences concerning other aspects of a witness, six additional statements were included that were not based on facts contained in the transcript. Regarding the victim, subjects were asked for their beliefs about the following three statements about her lifestyle: "Louella Wilson was married twice before," "Louella Wilson cares for her younger sister as well as her children," and "Louella Wilson works evenings in a bar." For the expert, subjects responded to additional statements about his professional credentials: "Dr. Blackburn earned his degree at a prestigious university," "Dr. Blackburn is the editor of a scientific journal," and "Dr. Blackburn had never testified as an expert before."

RESULTS

To test our hypothesis concerning the effects of negative presumptuous questions, two sets of analyses were conducted. One set compared the *expert*-denial, objection, admission, and no-question control groups; the other set compared the *victim*-denial, objection, admission, and control groups. Because the stimulus trial involved rape—a crime toward which men and women may have different reactions (Feild, 1978)—sex was also included in our analyses. Thus, all data were submitted to a 2 (male, female) \times 4 (expert or victim denial, objection, admission, and control) factorial ANOVA.

Verdicts

Overall, 39 subjects voted guilty, and 66 voted not guilty, yielding a 37.14% conviction rate. To test the effects of both sex and questioning condition on subjects' decisions, verdicts and confidence ratings were combined for analysis. By assigning positive confidence values to guilty verdicts and negative values to verdicts of not guilty, scores could thus range from -10 (maximum confidence in a not guilty verdict) to $+10$ (maximum confidence in a guilty verdict). In addition, subjects estimated, on a scale of 0–100, the probability that the defendant had committed the crime.

Within the expert-examination groups, a 2 \times 4 ANOVA on this scalar variable revealed that female subjects were significantly more prone than males to favor the defendant's conviction (M 's = 1.19 and -3.41 , respectively), $F(1,52) = 9.29$, $p < .005$. This sex difference appeared on the probability-of-commission scale (M 's = .53 and .72, respectively), $F(1,52) = 13.85$, $p < .001$, but it was also qualified by a significant interaction, $F(3,52) = 3.36$, $p < .05$. As it turned out, female subjects were more likely than their male counterparts to view the defendant as guilty only when the expert's credentials were called into question, but regardless of whether he then reacted with a denial, admission, or objection (male and female M 's = .43 and .76, .61 and .72, and .46 and .81, respectively; all p 's $< .05$).¹ There were no significant sex differences in the control group.

Among subjects in the victim-examination groups, there was no main effect for sex, but a significant Sex \times Examination interaction, $F(3,52) = 2.91$, $p < .05$, indicated that females were more likely than males to favor conviction in one specific situation—when the defense attorney asked an accusatory question that elicited the victim's denial (M 's = -5.17 and 2.63, respectively; $p < .05$).

Perceptions of Credibility

The main hypothesis we sought to test was that negative presumptuous questions would diminish a witness's credibility. To examine the impact of such questions when asked of an *expert*, subjects in the expert-denial, objection, admission, and control groups were compared. Similarly, to examine the impact of such

¹ All posthoc comparisons were made via Newman-Keuls tests.

questions on the *victim*, we compared subjects in the victim-denial, objection, admission, and control groups. In both cases, overall evaluations of the witness's *credibility* were derived by summing each subject's ratings of that witness on the dimensions of honesty, believability, competence, and persuasiveness. These measures were highly intercorrelated (average $r = .64$, $N = 105$, $p < .001$), and yielded credibility scores that could range from 4 to 40.

For ratings of the expert, a two-way ANOVA revealed strong support for the hypothesis that jurors' views of a witness are influenced by the negative implications of a cross-examination question, $F(3,52) = 2.78$, $p < .05$. As illustrated in Figure 1, ratings of the expert were lower in the three experimental groups than in the no-question control group (denial $p < .05$; objection $p < .10$; admission $p < .05$). Moreover, these results did not depend on either the sex of subject or the reaction elicited by the presumptuous question. Regardless of whether the question was met with a denial, objection, or admission, it diminished perceptions of the expert's credibility.²

In light of the foregoing results, it is interesting that the cross-examination of the rape victim did not have the same effect. Also depicted in Figure 1, questions concerning her prior accusations of rape did not significantly diminish her credibility ratings in any of the experimental conditions, $F(3,52) = 1.12$, n.s..

Acceptance of the Presumption

To examine whether subjects accepted as true the facts implied by the negative presumptuous questions, we asked them to indicate whether they agreed or disagreed with a series of factual statements that included two critical items: "Dr. Blackburn, the psychologist, has a poor reputation among his colleagues," and "Louella Wilson accused a man of rape once before." For the expert, a significant main effect was obtained on responses to the first item $F(3,52) = 5.35$, $p < .005$. As depicted in Figure 2, compared to the low agreement rate in the control group, there was a significant increase when the expert admitted to having a poor reputation ($p < .01$). Subjects did not, however, accept the negative presumption when the question elicited either a denial from the expert or an objection from his attorney. Also, there was no evidence to suggest that subjects made inferences about other aspects of the expert's credentials.

Among subjects for whom the presumptuous cross-examination question was directed at the victim, responses to the second item followed a similar but not identical pattern to the first, $F(3,52) = 34.54$, $p < .001$. Looking at Figure 2, it can be seen that compared to those in the control group and in the denial group, subjects were significantly more likely to believe that the victim had previously accused men of rape when the question elicited an admission ($p < .01$). Unfortunately, the agreement rate on this item was also elevated when the question was met by an objection from the prosecuting attorney ($p < .01$). Again, subjects generally did not make inferences about other aspects of the victim's lifestyle.

² Contributing to the reduction in perceived credibility, significant effects were obtained on ratings of the expert's competence, persuasiveness, and believability (not on ratings of honesty).

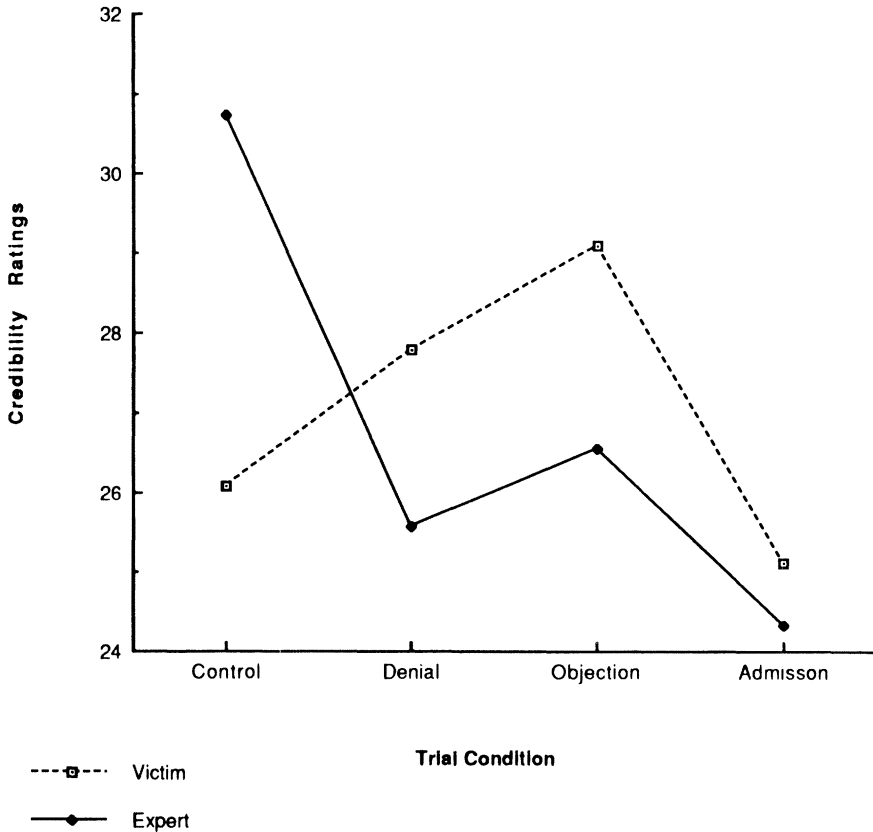


Fig. 1. Overall credibility ratings for both the victim and the expert witness in the denial, objection, admission, and no-question control groups.

Evaluations of the Lawyers

Subjects rated the two attorneys in the case for how effective, well-prepared, likable, and fair they were in the examination of witnesses. Since these measures were highly intercorrelated (average $r = .47$, $N = 105$, $p < .001$), overall evaluations for each attorney were derived by summing the various ratings, thus yielding favorability scores that could range from 4 to 40.

Among subjects for whom the expert's cross-examination was varied, 2×4 ANOVAs on these attorney scores revealed that men were generally more favorable toward the defense lawyer than were women (M 's = 26.97 and 23.59, respectively, $F(1,52) = 4.89$, $p < .05$). At the same time, no differences were obtained on ratings of the prosecutor. Among subjects for whom the victim's cross-examination was varied, men were again more favorable toward the defense lawyer than were women (M 's = 28.48 and 25.13, respectively, $F(1,52) = 6.21$, $p < .02$). A significant two-way interaction, however, indicated that although there were no sex differences in the admission group, female subjects disparaged the defense lawyer in the control, denial, and objection conditions, $F(1,52) = 3.35$, $p < .05$.

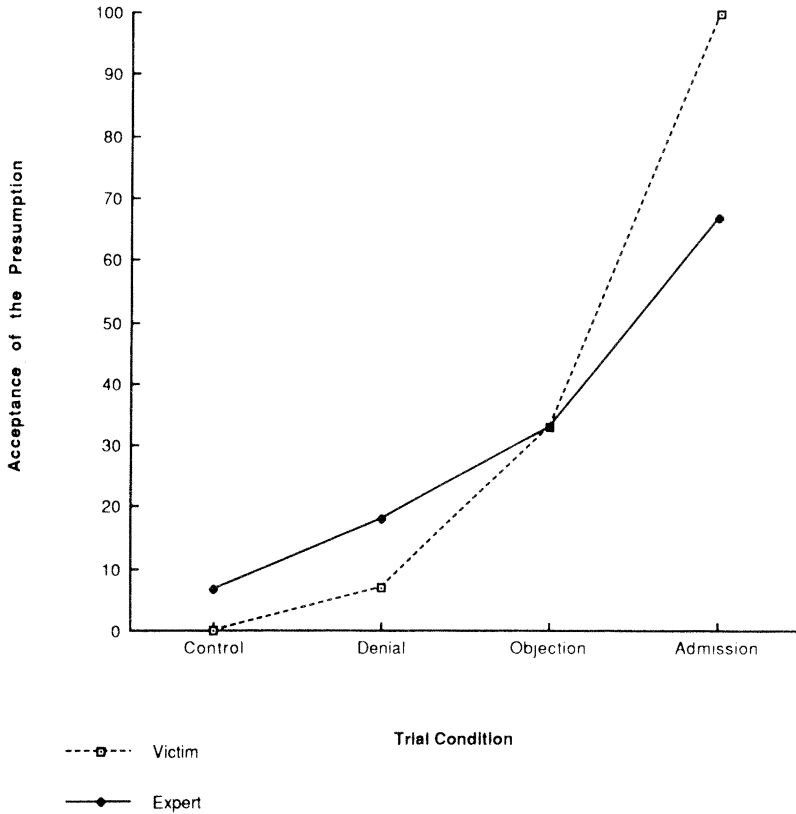


Fig. 2. Percentage of subjects who accepted the negative presumption concerning the victim and expert witnesses.

DISCUSSION

The present study tested the hypothesis that presumptuous cross-examination questions can influence jurors' perceptions of a witness and that their effects depend on the reactions these questions elicit from a witness and his or her attorney. Our results provide strong but qualified support for this prediction.

When the recipient of a damaging presumptuous question was a psychological expert, the technique of cross-examination by innuendo proved highly effective. Whenever the expert's professional reputation was called into question, even though the charge was not corroborated by other evidence, subjects lowered their ratings of his credibility as a witness (i.e., he was perceived as less competent, believable, and persuasive). Indeed, among female subjects—who were generally less sympathetic to the defense than males—probability-of-commission estimates were higher in all the innuendo conditions than in the control group, a result that reflects the diminished impact of the defense expert. It is interesting that these negative effects were obtained regardless of whether the presumptuous question had elicited a denial, an objection, or an admission. It is particularly interesting

that this effect was obtained in the denial and objection conditions, where many subjects reported that they did not believe the derogatory statement concerning the expert. In short, even when the expert denied the charge, even when his attorney objected to the question, and even though many subjects in both situations did not accept the cross-examiner's presumption, the witness became "damaged goods" as soon as the reputation question was raised.

Although the expert witness was harmed by innuendo, the victim was not. Even though it was suggested that she had previously accused men of rape, and even though the truth of this presumption was accepted by many subjects in the objection group and by all subjects in the admission group, evaluations of the victim's credibility were unaffected. Unfortunately, the expert and victim manipulations differed in so many ways that the asymmetry of effects obtained for the two witnesses cannot clearly be explained by our data. Perhaps subjects felt that presumptuous questions, though fair play when directed at an educated expert witness, were unfair when directed at the female rape victim. Or perhaps it is generally easier to influence jurors with questions that imply subjective matters (e.g., opinions of an expert's reputation) compared to those that make insinuations about objective, verifiable facts (e.g., whether a complaining witness had made prior accusations). In an earlier pilot study, we presented mock jurors with the same trial as in the present research and obtained exactly the same pattern—an effect of presumptuous questions on the expert witness but not the victim. Thus, the effect appears to be reliable. Further research is needed, however, to determine the factors that moderate these results.

Further research is also needed to evaluate the extent to which our findings generalize to real juries. On this matter, it is important to note that our "dirty tricks" were embedded within a lengthy trial transcript, not an abbreviated summary in which independent variables are heightened in their salience (Bray & Kerr, 1982). It is also important to note that while this study focused on individual jurors, it is reasonable to expect similar results at a group level. There are two bases for this prediction. First, beginning with Kalven and Zeisel's (1966) conclusion that "the real decision is often made before the deliberation begins" (p. 488), studies have shown that a jury's final verdict is largely predictable from the initial distribution of individual preferences (e.g., Stasser, Kerr, & Bray, 1982). Indeed, through a combination of informational and normative influences, juries exhibit group polarization, making decisions that are not only in the same direction but more extreme than the average of individual opinions (Kaplan & Miller, 1983). Second, research on the effects of other biasing, objectionable material—such as pretrial publicity and inadmissible testimony—indicate that just as individual mock jurors are influenced by forbidden information, so too are groups that have had the opportunity to deliberate (Carretta & Moreland, 1983; Padawer-Singer & Barton, 1975).

At this point, it is important to address some conceptual and practical questions raised by the present research. To begin with, why were mock jurors influenced by uncorroborated presumptions contained within a cross-examiner's questions? There are at least two possible explanations. First, research in communication suggests that when people hear a speaker offer a premise in conversation,

they naturally assume that he or she has an evidentiary basis for that premise (Grice, 1975; Hopper, 1981). Within the context of a trial, it is conceivable that jurors—naïve about the dirty tricks of cross-examination—adhere to a similar implicit rule. In other words, jurors may assume that a lawyer who implies something negative about an expert's reputation must have information to support that premise and treat it as though it were a foregone conclusion.

A second possible reason for the impact of presumptuous questions is that after all the evidence in a case has been presented, jurors may be unable to separate in memory the information communicated within the questions from those contained within the answers. Studies of the sleeper effect in persuasion indicate that people often remember the contents of a message, but forget the source (Kelman & Hovland, 1953; Pratkanis, Greenwald, Leippe, & Baumgardner, 1988). Similarly, research on reality monitoring has shown that people often cannot discriminate among the possible sources of their current knowledge (Johnson & Raye, 1981; Johnson, 1987). Such confusion is particularly likely to occur when the different sources of information are distant in time and equally plausible—as when jurors must recall after days, weeks, or months of testimony, whether a particular belief was derived from a lawyer's questions or a witness's answers. At this point, it remains to be seen whether source identification errors are responsible for the impact of presumptuous questions.

From a practical standpoint, this study suggests that the use of presumptuous questions is a dirty trick that can be used to distort jurors' evaluations of a witness's credibility. As cross-examiners regularly employ such tactics (Underwood & Fortune, 1988), judges should be aware of the dangers and make a serious effort to control them. According to Rule 3.4(e) of the American Bar Association Rules of Professional Conduct (1983), trial lawyers "shall not allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence." In practice, however, judges set a relatively lax standard, demanding only that lawyers have a "good faith belief" in the truthfulness of the assertions contained within their cross-examination questions (e.g., *United States v. Brown*, 1975).

Two approaches can be taken to the problem of cross-examination by innuendo. Since witnesses typically have an opportunity to deny false assertions, and since lawyers typically have an opportunity to object or "set the record straight" on redirect examination, one approach is to allow cross-examiners a good deal of latitude and then trust the self-corrective mechanisms already in place. Our study suggests, however, that both a witness's denials and an attorney's objections may fall on deaf ears. In the case of our expert, subjects lowered their ratings of his credibility even when he flatly denied the charge and even when his attorney won a favorable ruling on an objection. In fact, these strategies may well backfire. Research suggests that people are suspicious of others who are forced to proclaim their innocence too vociferously (Shaffer, 1985; Yandell, 1979). Likewise, research indicates that instructions to disregard objectionable material are often ineffective, and sometimes counterproductive (Carretta & Moreland, 1983; Sue, Smith, & Caldwell, 1973; Thompson, Fong, & Rosenhan, 1981; Wolf & Montgomery, 1977).

Rather than taking a hands-off policy, our results lead us to believe that the courts should intervene in some way to control presumptuous leading questions, as well as other dirty tricks. As a matter of judicial discretion in trial management, judges may admonish counsel who insert false premises into their questions. In some cases, the courts have even sustained the right of an opposing party to call a cross-examiner to the witness stand to inquire into the "good faith basis" for a specific line of questions (*U.S. v. Pugliese*, 1945; *U.S. v. Cardarella*, 1978).

An alternative approach is to address the problem through cautionary instructions to the jury. If innuendo has an impact because jurors follow the implicit rule of conversational logic that speakers have an evidentiary basis for their premises, then perhaps jurors should be forewarned about the use of dirty tricks. In a nonlegal context, Swann et al. (1982) had subjects listen to an interviewer ask questions that presumed the respondent to be introverted or extroverted. Hearing the questions, subjects inferred that the interviewee possessed the implied traits. When they were told, however, that the interviewer's questions were chosen at random (i.e., without a reason), subjects did not make the inference. Applied to the courtroom, it may be similarly effective to remind jurors that premises contained within lawyers' questions are not evidence and alert them to possible abuses. At this point, further research is needed to determine the effectiveness of such measures.

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