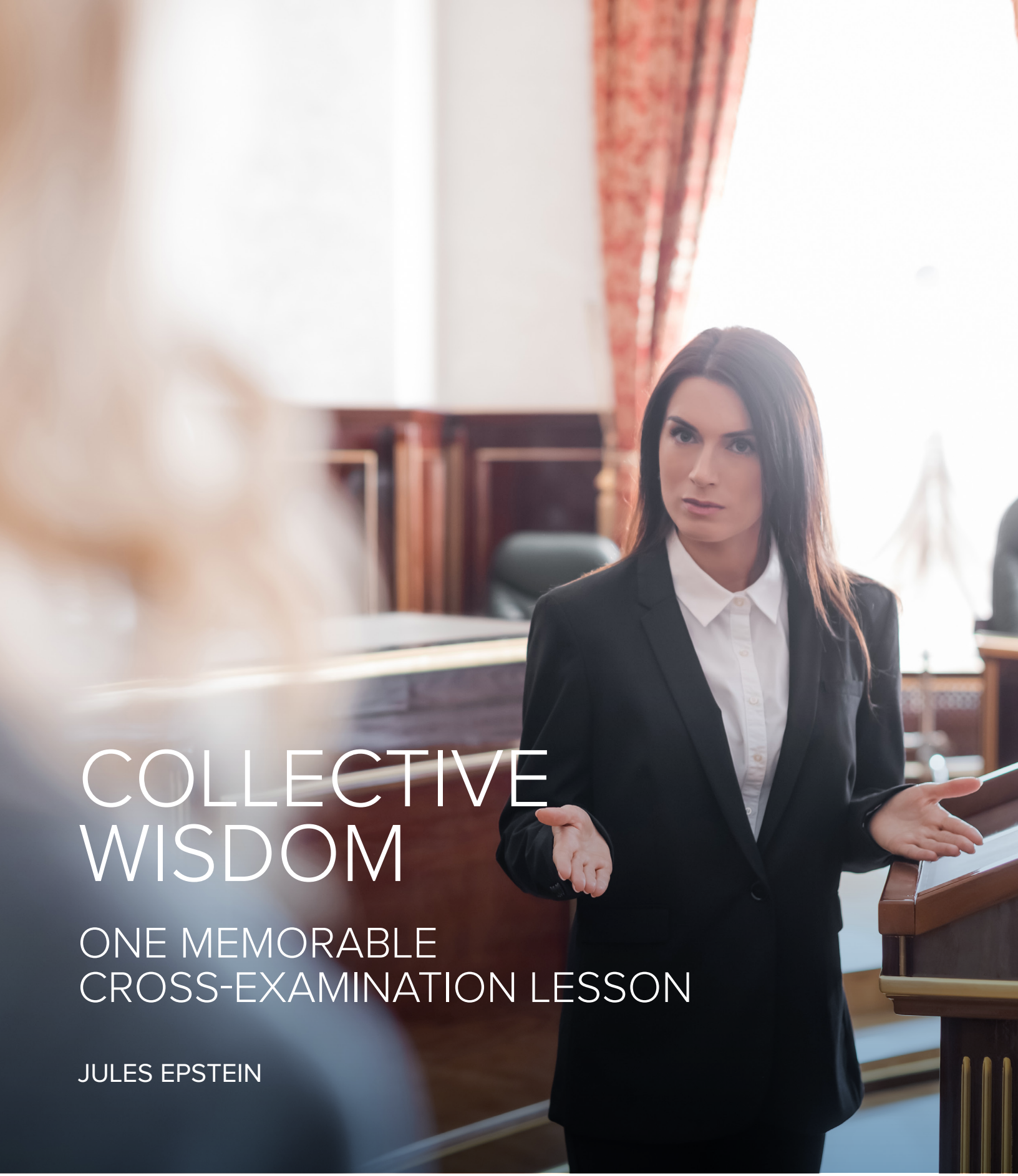

COLLECTIVE WISDOM

ONE MEMORABLE CROSS-EXAMINATION LESSON

JULES EPSTEIN

NITA®

One Memorable Cross-Examination Lesson

Cross-examination can be viewed through many lenses: as the "greatest legal engine ever invented for the discovery of truth," an "art," "less about a search for truth than . . . a crucial vehicle for a lawyer to tell his client's story,"[1] an "engine that works better in theory than practice,"[2] and a skill that can be learned "with practice."[3]

Cross-examination's power and limits—as a tool to expose liars—cannot be untethered from its origins. Here is a brief origin story.

> The roots of cross-examination are more easily traced to England and the development of its adversarial trial process. A recognition of the importance of cross-examination was developed in French criminal justice theory in the late sixteenth-century writings of Pierre Ayrault, who emphasized the desirability of cross-examination as a complement to the face-to-face rendering of an accuser's testimony.
>
> According to McCormick, as early as 1668 a court rejected an out-of-court statement because "the other party could not cross-examine the party sworn." Professor Langbein tracked this as the transition from "[t]he oath-based system [that] presupposed the witness's fear that God would damn a perjurer. . . . [to] the new order [that] substituted its faith in the truth- detecting efficacy of cross-examining." In his exceptional tracing of the history of adversary cross-examination, Professor Langbein dates the acceptance or institutionalizing of defense cross-examination in non-treason cases to the 1730s. Langbein found cross-examination to be a necessary (albeit, in his view, ill-desired) response to three occurrences in the English trial system: the growing use of lawyers to present prosecutions in both the investigative and trial stages; the reward system that offered bounties to those who provided testimony establishing that a crime reached the severity (or degree of financial loss) to qualify as a felony and thus invited fraudulent testimony, the corrupt motive of which required cross-examination as an antidote; and "the crown witness system for obtaining accomplice evidence in gang crimes, a prosecutorial technique that created further risks of perjured testimony."[4]

But whatever its roots, and whatever success rate it has overall, the need to be able to conduct a strong and beneficial cross-examination remains at the core of the adversarial process.

And how do we learn it?

There are practice guides galore, as well as exceptional in-person training programs. But another way is by illustration: by studying discrete cross-examination "lessons," be they from typical witness examinations or idiosyncratic ones.

What follows are a series of such lessons, each crafted by a master of trial advocacy education with only one stricture: the lesson could run for no more than two pages. Some may have daily utility and application; others may be for more idiosyncratic circumstances. Together, they are a compendium of useful devices and strategies. **Enjoy as you learn.**

[1] Bennett, Eight Traits of Great Trial Lawyers: A Federal Judge's View on How to Shed the Moniker "I am a Litigator," 33 REV. LITIG. 1, 21 (2014).

[2] Roy Black, Irving Younger's Ungodly Ten Commandments, BLACK'S LAW, A BLOG (July 18, 2012), http://www.royblack.com/blog/irving-youngers-ungodly-ten-commandments/.

[3] G. Fred Metos, Cross-Examination: Methods and Preparations, UTAH B.J., Nov. 1990, at 11.

[4] Epstein, Cross-Examination: Seemingly Ubiquitous, Purportedly Omnipotent, and "At Risk," 14 WIDENER L. REV. 427, 429–430 (2009).

Kelly Navarro

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BUILD THEM UP TO PIN THEM DOWN

Irving Younger's *Rule Number 3: Use Only Leading Questions* rarely fails. But once in a while, consider stepping away from the playbook by using open-ended questions to "build them up."

This example comes from cross-examining a doctor charged with sexually assaulting patients over a 10+ year period. The case was tough because he chose a place he had control over with no witnesses, his own examination rooms, to assault his victims. He assaulted the most vulnerable of his patients whom he thought no one would believe. In our case-in-chief, we called other crime witnesses to defeat questions related to the witness's credibility. Our witnesses bravely and beautifully explained the psychology of the delayed outcry: why they left the doctor's office without telling a soul, and why they kept quiet for many years, which also explained why we had no DNA evidence. At the end of our case, we were in pretty good shape, except one aspect of the defense still made sense. The doctor would not have assaulted these women in office because his staff could have walked in. This became the central question in the case.

When it came time to cross the doctor, my partner and I took stock of what we knew. We needed to

support our theme: a man with two faces, a split personality who could be charming and gracious or a controlling violent predator. We knew the doctor was a textbook narcissist. Controlling him by asking short declarative statements followed by a "yes" from the witness wasn't going to work. We knew he loved to talk, especially about himself, and that he was a control freak. Most importantly, it was clear he thought he was beating the case. From his dismissive behavior at pretrial appearances, we also knew he had little regard for me, a 30-something female prosecutor.

We made a list of what we needed from cross. We needed to showcase his sometimes "charming" and other times controlling and narcissistic nature. We needed to establish he had control over his employees. None of his employees agreed to speak to our investigators, which was a sign that he controlled them. We needed him to say he spent time alone in exam rooms with patients with the door shut. We had pictures of his examination rooms showing flags on the side of the door. We suspected that when he went into the room with a patient, he put up the flag alerting employees not to enter, and they wouldn't dare.

For this cross, I built him up and let him talk. I asked open-ended questions about his accolades and his philanthropic service treating cancer patients. Let me tell you, it was uncomfortable, but I continued to let him puff-up and show-off. I kept an eye on the jurors and when they also appeared nauseated with his grandiose self-promotion, I moved on.

When it was time to move on to prove up his controlling nature, I asked him to talk about his employees and their loyalty, and about what a tight ship he ran at his practice. He gave long rambling answers about loyalty, which played right into our case. To bring out his narcissism, I let him correct me on insignificant details and let him interrupt me once in a while. At this point, he perceived he was in control of the cross.

We all know the devil is in the details, and I still needed to pin him down. I needed him to say he spent time alone with patients in exam rooms, with the door shut, and to explain why employees wouldn't walk in. I showed him the picture of his exam room door and asked him to tell me what the flags were for. He told me that when the door is shut, the flag lets the staff know he's in the room with a patient. I asked him to tell me more about how he makes patients feel safe, and he talked about how for patients to completely trust him they need to know the room is private. I asked him what happens if he needs help in a room while alone with the patient, and he said he'd call the nurses' station or he leave the room to get a nurse. He still perceived he was in control of this cross. I switched back to short declarative statements: "So you examine patients alone." Followed by a "yes." "With the door closed." Followed by a "yes." "And when the door was shut, your staff would never enter." Followed by "yes." I was shocked, I looked at my partner who gave me a nod, I said, "No more questions," and sat down. The defense tried to rehabilitate, but by that point it was over. The jury found him guilty on all counts, and the case was affirmed on appeal.

The lesson? Know where you're going and what you need. There are times you'll have to build them up, be prepared, listen, be patient, and set the right tone in order to pin them down to what you need.

Professor Elizabeth Lippy

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"CATCH THE BEES"

Cross-examining the victim of a crime is challenging. It requires the right "touch," so to speak.

If, as the cross-examiner, you come across as too abrasive, the jury may take pity on the victim and dislike you and hold it against your client. If, on the other hand, you strike the right balance, the cross-examination of a victim in any criminal case can make your defense.

If you practice in a jurisdiction that requires preliminary hearings, take advantage of that. Unless the prosecutor offers a sweetheart of a deal to waive that hearing, having the opportunity to test the veracity and memory of a victim during a preliminary hearing is a must. Not only does a preliminary hearing allow for a transcript of the victim's prior testimony (think: future impeachment opportunities!), but there is no jury present at the preliminary hearing.

Not that you should act offensively during a preliminary hearing, but it is a good chance to be more abrasive. Oftentimes, I will intentionally make a testifying witness at a preliminary hearing despise me. It works like a charm because once that witness testifies at the actual trial, their demeanor automatically shifts when I stand up for cross-examination. Without even asking my first question, they visibly become more defensive. Once I do ask my questions, they often try to qualify all answers with an excuse or an explanation. It's incredible fodder for closing argument to be able to argue to the jury that the witness cannot be believed by pointing to their change in demeanor during cross-examination.

For those who practice in a jurisdiction that does not require a preliminary hearing, the trial may be the first chance you have to cross-examine a victim. Tread lightly — at least at first. If you come too hot out the gate, you'll lose the jury. You must earn the ability to become more abrasive, particularly with a victim of a crime.

One of my greatest cross-examinations was one of my greatest arguments with my client. It's day one of trial. By the time opening statements finished and the direct examination of the victim ended, it was already 5:00 p.m. I was hopeful the judge would allow the jury to retire for the evening so I could start my cross first thing in the a.m. Not a chance. As the jury impatiently looked at their watches and my stamina faded, I had to begin cross-examination of a victim of an alleged sexual assault. Talk about pressure!

My approach when handling cases, particularly sexual assault cases, is not to blame the victim, rather make the victim feel that I am on their side. For two hours (yup . . . until after 7:00 p.m.), I gently crossed the victim. Part of my theory was that this victim was traumatized because of her family relationships—she had to endure her parents' divorce, two moves, and three new high schools by the time she was on the stand. Due to all those difficult circumstances, my theory was that the victim wanted attention and that her claims were fabricated to get that attention. At the end of each section of my cross, I repeated the idea of "that had to be hard for you, wasn't it?"

At no point did I raise my voice. At no point did I "fight" with the victim. Instead, I sat back and let her explain how hard her teenaged years were. How much she had to go through.

I left the courtroom exhausted but confident that the cross did what I intended—it called into question her credibility, pushed my theory, and yet still allowed the jury to like me and thus my client. That evening, however, I received a panicked phone call from my client. He insisted that my cross was ineffective. I immediately began questioning myself and the approach to the case. Fortunately, my gut instinct was accurate, and we ultimately won a not guilty verdict.

As I do with most of my trials when the judge allows it, I spoke to some of the jurors afterwards. One juror told me that the case was over after the cross-examination of the victim. He indicated that he felt bad for the victim, but that my cross effectively pointed out all her inconsistencies and helped the jury understand why she made the claims. Phew. That was a relief.

To summarize, be careful how you approach a cross-examination of a victim. You get more bees with honey!

Captain Valonne Ehrhardt*

Judge Advocate

United States Marine Corps

DON'T JUST TELL THEM — SHOW THEM

Demonstrative evidence can be super-effective on cross-examination. Often, your cross will focus on attacking the credibility of the witness in some way—whether it be attacking their perceptions, truthfulness, or actions. You can use a demonstrative aid to lay out the facts showing the witness's lack of credibility, rather than simply question them on it. In my experience, I've used a flip chart to list the facts in question—but this can be done in many ways, including a PowerPoint that builds. When done, this can feel risky because it may require giving the witness a little control, as well as asking a few non-leading questions. But if done correctly, it can be very successful.

Whenever I have a set of facts that illustrates the witness's lack of credibility, I ask myself how important these facts are to my theory of the witness. For example, if I know that a witness mixed up the days of the week (the "when") and my theory is that the witness is intentionally fabricating the act in question (the "what"), that fact might not be that important to my theory of the witness. I may still cross-examine them on it, but this is not where I'd "show" the jury.

Here are a few examples of using demonstratives to show the jury the witness's lack of credibility.

Texts after the Incident

The witness on the stand for the government had testified that after the incident, they never spoke to the defendant again. However, the phone records indicated that they had texted the defendant for months afterwards. The defense's theory of the case was that the witness was fabricating the incident due to rejection by the defendant. As a part of the defense case, we admitted the phone records as an exhibit. In all, the witness had, over the course of several months, texted the defendant 36 times after the incident. I decided to illustrate these texts in demonstrative form for a few reasons:

1. The phone records included all text messages the witness had sent during the period—to anyone, not just to the defendant. It may have been cumbersome to the jury to parse out which texts were relevant. Outlining the texts via demonstrative highlighted the amount and duration of the texting relationship.

2. In all, 36 texts sent over several months might not sound like a lot to a jury member. Using a demonstrative to outline the time

span over which the texts were sent paints a better picture of the significance of the number of texts sent. It also allowed us to show how one-sided the relationship was.

How I Did It

First, similar to an impeachment of a prior inconsistent statement, I confirmed the witness's testimony that they never spoke to the defendant again after the incident. I then provided the witness with a copy of the exhibit of the phone records with all the witness's texts to the defendant highlighted (permitted in our jurisdiction and marked as an appellate exhibit). I then used a flip chart and titled it "Texts after the Incident." I proceeded to question the witness:

Q: Please turn to page 3 of the exhibit. What is the first date and time highlighted?
A: June 2, 2021, at 7:32 AM.
Q: And on June 2, you sent [the defendant] three text messages?
A: Yes.

[wrote and underlined "JUNE 2021," then underneath wrote, "June 2, 2021 — sent 3 texts"]

Q: Ok, when is the next date and time highlighted?
A: June 3, 2021.
Q: On June 3, you texted [the defendant] six times, right?
A: Yes.

[wrote "June 3, 2021 — sent 6 texts"]

Q: And when you texted [the defendant] on June 3, he didn't answer, did he?
A: No.
Q: Ok, now you didn't text him anymore in June, did you?
A: No.
Q: What date in July did you text?

[wrote and underlined "JULY 2021," then the dates in July and so on and so forth]

Final Q: And all those text conversations between you and [the defendant], you initiated those?

This process took 10 to 20 minutes. During this portion, I was also able to question the witness on certain texts that expressed positive feelings toward the defendant that were contradictory to the witness's testimony on direct examination. After this cross-examination, multiple attorneys who had been observing expressed to me how effective that cross-examination was to show that the witness had fabricated the extent of their relationship with the defendant.

Lack of Investigation

An investigating agent testified for the government; this happens in virtually every trial I've had. In this instance, the investigating agent made some heavy assumptions as to the outcome of the case before concluding the investigation. Essentially, the agent interrogated my client while he was heavily intoxicated, and my client made some incriminating admissions (that were later proved false with forensic evidence). These assumptions led the agent to omit many typical steps in the investigation.

How I Did It

Using a flip chart, I wrote "Investigative Steps" at the top.

Q: Special Agent, the incident occurred at a party?
A: Yes.
Q: Typically, when an incident occurs in a group of people, you'd question eyewitnesses?
A: Yes.
Q: You didn't even make a list of who was at this party?
A: No.

[wrote and crossed out "~~Create list of potential eyewitnesses~~"]

Q: You didn't question anyone.
A: No, I didn't.

[wrote and crossed out "~~Question eyewitnesses~~"]

Q: Typically, you take pictures of the scene where the incident or alleged crime occurred.
A: Yes.

[wrote "Take crime scene photos"]

Q: Here, you didn't take any pictures.
A: No.

[crossed out "~~Take crime scene photos~~" and continued on so forth and so on]

*Any views expressed by Captain Ehrhardt are those of Captain Ehrhardt and are not attributable to the Department of Defense (DoD), the Department of the Navy (DON), or the United States Marine Corps (USMC).

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Adjunct Professor
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"NOTE" THIS

Many years ago (early 1998), I took the deposition of an insurance underwriter in a coverage dispute. In his deposition I asked him the usual questions about preparation, including whether he had reviewed any documents and whether any of those documents refreshed his memory about the underwriting of the particular policy we were litigating. He testified, truthfully, that "I wouldn't have remembered anything about this insured or this policy if I hadn't reviewed my file." Turns out he was a prolific note taker and a bit of a packrat, so he had a file about six inches thick full of notes, policy language, loss information, and other underwriting materials.

At trial, he testified on direct examination to the alleged mutual understanding of the parties with respect to the central dispute in the litigation, which was whether the policy created a manifestation trigger of coverage. Problem was there was nothing in his file to support this supposed mutual understanding. On cross-examination, I asked him to show me in the file where this mutual understanding was recorded. And then, at the court's direction, I handed him the complete file. After he sat on the stand and reviewed the file for what must have been an hour, he testified that there was nothing in the file that reflected that understanding.

During the other side's closing argument (a nonjury trial), the lawyer referred to the witness's testimony about this mutual intent—at which point the judge said: "I didn't find Mr. X credible. If he had a sardine sandwich for lunch, he would have written a note about it. And he has no note about this supposed mutual agreement." Needless to say, I always ask the set-up question in depositions.

John N. Sharifi

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REACH THE FOURTH DIMENSION

The full scope of what a cross-examiner may elicit from a particular witness is not often readily apparent, even after careful review of discovery. It is only when the cross-examiner reaches a place where the witness's role in the larger narrative reveals previously unreachable areas of cross-examination that the angles open up. I call that place the "fourth dimension." It's where cases are won.

Standard fare when preparing the cross of a witness consists of reviewing the witness's prior statements (if any), facts directly involving the witness, and on-the-fly rebuttals to statements made on direct examination. This three-dimensional approach is limiting. Open it up. When preparing the cross, first undergo an aggressively comprehensive search for logical inferences supporting your narrative using all the evidence—not just from the witness. Next, identify relationships between those inferences, whatever their source, and the witness. Think hard. It is challenging, but critical to success. If you can go there, you will find yourself in a field flush with ripened evidence. You just noticed something come out of the woodwork? Congratulations, you've reached the fourth dimension. Elicit those facts on cross. There is nothing the witness or your opponent can do about it.

I try to reach the fourth dimension in every case, with every witness. The last time was in a double homicide case I was defending. The State claimed my client had calculated a trap for the commission of ambush-style murders. In reality, he was quite the sheltered teen, almost naïve, and manipulated by his co-defendants. My efforts throughout the course of the trial were geared toward showing this to the jury. Part of that required demonstrating that my client was not the sophisticated mastermind the prosecution made him out to be. I tried to do that as often as I could. An interesting opportunity arose during the cross-examination of the police officer who transported my client to jail following his arrest.

When he was transported, my client was intentionally put in the back of a police vehicle with a co-defendant. The vehicle was equipped with recording equipment that captured audio and video. The police were hoping to obtain incriminating statements. They did. The two defendants spoke openly with each other. Watching the recording made it evident that my client had knowledge of the criminal activity that had occurred. But during the 20-minute drive, he

also made statements unrelated to the murders. One such statement was randomly made as the police vehicle drove past a local, well-known public high school en route to the jail. My client, looking out the window, mentioned that he had never heard of the school. The comment stood out to me as telling: he was a lifelong resident of the county in which he was being arrested, had only recently graduated from another public high school in the same county, and was unaware of this other high school. This is not a criminal mastermind; this kid is clueless.

The prosecution moved the entirety of the recording into evidence through the transport officer and played it for the jury. A three-dimensional cross-examination may have focused on such obvious topics as what my client didn't say, the limited context of the recording, or how he was cooperative. That wouldn't get it done. I had to reach the fourth dimension. I asked the officer about my client's age. It was established that he was a recent high school graduate. I asked about the route from the arrest location to the jail. I asked about the high school. I replayed the part of the video where my client makes his comment. The officer had no idea what the purpose of my cross was, so there was no defensiveness or arguing. The prosecutor had no cause for interruption: the video was already in evidence and my questions were ostensibly innocuous. But I am confident the jury knew why I was asking those questions. If there was any doubt, I made it clear in closing argument. His comments about the high school were but another fact, more ammunition I had to argue against any alleged conspiratorial guile. I would not have it without reaching the fourth dimension. **It's always worth the trip.**

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REMAIN ON THE OFFENSE

In my career as a prosecutor, I often handled delayed disclosures of child sexual abuse.[1] Of course, every case, every witness presents a test of credibility, but with delayed disclosures, it is the victim's memory of an incident or ongoing abuse, without any corroboration, that may sustain the Commonwealth's burden of proof. Prosecutors cross-examine relatively rarely, but in delayed disclosures, more so than in virtually any other case I handled, the accused would waive their Fifth Amendment right and testify in their own defense.

It is from the perspective of prosecuting these "credibility cases" that I propose this lesson on cross-examination.

In delayed disclosures, the physical evidence is long gone, if it ever existed in the first place. By the very nature of its perpetration, there is no eyewitness to the crime; no 9-1-1 radio call to replay; no video surveillance to display; no excited utterance; often no records of the abuse from schools, hospitals, case workers, or otherwise. These cases are essentially one person's word against another's.

As a prosecutor, I was trained to always remain on offense and never chase the defense.

With that in mind, my trial prep in delayed disclosure cases would begin with a review of one of the most powerful and important jury instructions: "credibility of witnesses, general." Pa. SSJI (Crim) 4.17 states:

1. As judges of the facts, you are sole judges of the credibility of the witnesses and their testimony. This means you must judge the truthfulness and accuracy of each witness's testimony and decide whether to believe all or part or none of that testimony. The following are some of the factors that you may and should consider when judging credibility and deciding whether or not to believe testimony:

    a. Was the witness able to see, hear, or know the things about which s/he testified?

    b. How well could the witness remember and describe the things about which s/he testified?

    c. . . .

    d. Did the witness testify in a convincing manner? [How did s/he look, act, and speak while testifying?]

    e. Did the witness have any interest in the outcome of the case, bias, prejudice, or

[1] I refer to these cases, generally, throughout as "delayed disclosures."

other motive that might affect his/her testimony?

f. How well does the testimony of the witness square with the other evidence in the case, including the testimony of other witnesses?

2. While you are judging the credibility of each witness, you are likely to be judging the credibility of other witnesses or evidence. If there is a real, irreconcilable conflict, it is up to you to decide which, if any, conflicting testimony or evidence to believe.]

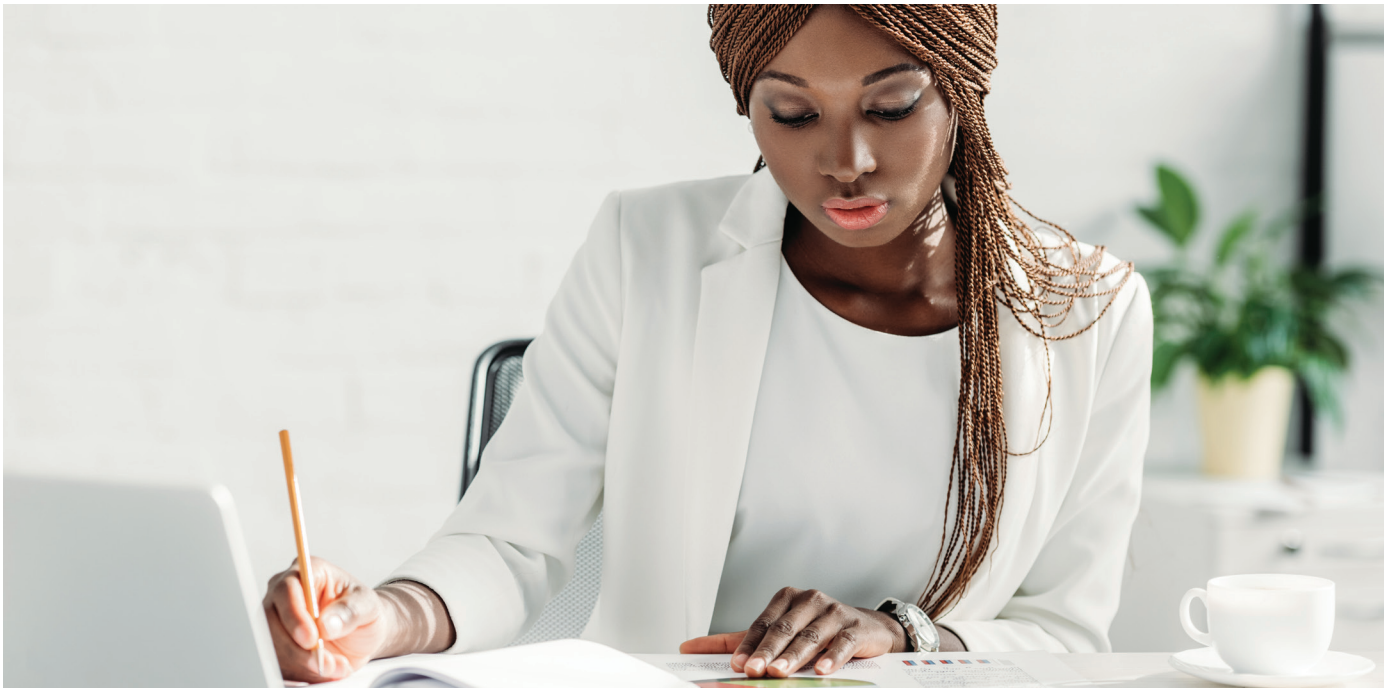
All witness examinations should anticipatorily buttress the closing argument. Using this jury instruction as an outline, my closing, prepared pre-trial as a form of proactive messaging, could be divided into five chapters: Details, Demeanor, Interest, Corroboration, Common Sense. These same points guided my cross-examination of defendants accused in delayed disclosure cases.

Details/Corroboration

The cross-examination of the defendant would reveal how many details the victim got "right" about the time and the place of the abuse or the relationship of the defendant to the victim. In other words, the defendant would agree with all the seemingly innocuous details that I will later argue give the testimony the "ring of truth." "Yes, that was where we lived at the time." "Yes, that's where my bedroom was in relation to hers." "Yes, her mom worked nights and I was the adult in charge." "Yes, I remember that particular birthday party when I drove her home." "No, the one bathroom in the house didn't have a lock on the door."

Demeanor

I seldom cross-examined the defendant about the victim's demeanor, but I would question the defendant about things s/he may have done in



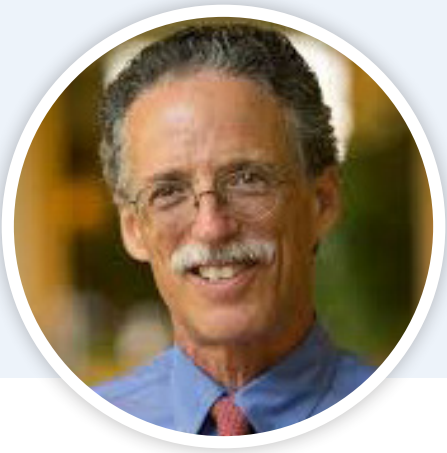
court or on the stand. “I noticed you smiling a lot during the complainant’s testimony. Can you tell us what you found funny?” “Is there a reason you keep looking over at the complainant’s mother?” Sometimes, I experienced the inverse of what Professor Lippy’s described as a victim’s shifting demeanor. If the defendant remembered me—not fondly—from the preliminary hearing or the bail hearing or the motions hearing, the perfectly affable, cooperative witness–defendant from direct would turn icy, defensive, arrogant, or aggressive when I stood up to cross-examine. Those shifts were gifts that kept on giving in closing.

Interest

Again, this is the chance to buttress the complainant’s testimony and support the argument that the complainant has no axe to grind, no motive to lie, no interest in the outcome of the case, and nothing to gain from having come forward. “You and the complainant’s family were on good terms until this report was made? Up until then, they were congregants at your church.” “You and the complainant’s mother divorced amicably? You simply went your separate ways? There’s no fight over child support or alimony?” “The report against you came as a shock, didn’t it? Because you haven’t seen or heard from the complainant since she graduated from your elementary school?” This section becomes difficult if there is a complicated family court history or if there is a civil suit pending or other “bad blood” between the parties. This difficulty is navigable if the cross-examination of the victim was particularly harrowing (“Would the complainant really subject herself to that for ten minutes in the spotlight?”) or with other likeable, credible witnesses for the prosecution (“You, members of the jury, met the complainant’s mom. Do you think she’d put her only daughter up to this . . . and carry it this far?”)

Common Sense

While I enjoy cross-examination, admittedly I’ve never had that Law & Order moment where the defendant breaks down on the stand and admits their wrongdoing. Sometimes, the best strategy to appeal to jurors’ common sense in delayed disclosure cases is to simply expose how neatly the defendant’s testimony squares with the complainant’s. This also creates circumstantial corroboration in cases where no other testimony or physical evidence may be offered. “You’ll agree that you were a trusted member of the complainant’s family? So trusted, in fact, that her mom asked you to pick the complainant up from school? Everyday? And take her home? And stay with her until her mom got home from work? Sometimes six or eight hours later? And in all that time, no one else was home with you? You were in charge?” With a series of yeses here, the defendant will have proved his own access, means, and opportunity to abuse the victim.



Professor Jules Epstein

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"SURE"

Sure connotes certainty. It is a condition "marked by or given to feelings of confident certainty[,]" one "admitting of no doubt."[1] The below two examinations used the single word, in differing circumstances and with different emphases, to undercut credibility and establish extreme *uncertainty.*

Example 1

Following chaotic street protests and mass arrests during the 2000 Republican National Convention in Philadelphia, a team of criminal defense lawyers volunteered to represent individual protestors. A few lawyers coordinated the representation and at some point reached out and asked me to represent "Bobby," charged with assaulting a police lieutenant at a particular street corner on a specific date. Why was I asked to handle the case? Because another protestor had already been tried and convicted for that specific assault, a duplicate prosecution the Office of the District Attorney (and the testifying police officers) failed to acknowledge or admit.

Armed with the transcript of the first trial, I went to court with Bobby. The arresting officer claimed on direct that he saw Bobby jump on the back of "my lieutenant," at which time he was grabbed and arrested.

Cross-examination began softly, by confirming that one person committed the assault. The following then occurred:

Q: You've never identified anyone else as having jumped on your lieutenant's back, have you?
A: No.
Q: Are you sure?
A: Yes.
Q: *Are you very sure?*
A: Yes.

The trap was fully set, and as this was a bench trial the presiding judge knew something had to follow. It did. Asking permission to approach the witness with the transcript, it was quickly established that it was the same officer (same badge number) testifying against a different defendant. We then patiently read aloud the testimony from that trial, where the officer described the jump on the back, the immediate

[1] https://www.merriam-webster.com/dictionary/sure (last visited April 6, 2022).

grabbing of the assailant, and the in-court identification. My only question after reading each line aloud was to say, "Did I read that correctly?"

The lesson here was simple and clear—where the impeachment is incontrovertible, letting the witness proclaim their certainty of Fact A with the simple word "sure" led to a complete repudiation of the witness's claim and credibility.

Example 2

At a federal criminal trial, the defendant was accused of having masterminded an armored car robbery committed by two others. The robbery was foiled when police came upon the crime in progress. In all the police paperwork and prior testimony, the two arresting officers spoke only of having seen the two robbers.

To my surprise, at trial the first arresting officer claimed, ". . . and I saw a third guy, down the street, who was the size and fit the general appearance of this defendant." The cross-examination was angry and confrontational as we reviewed every document where that was omitted.

When the officer's partner was called, a new strategy was required—he was older, and an angry cross would serve no purpose and instead alienate jurors. "Sure" took on a new role.

Q: Officer, today you told this jury that you saw a third man, resembling my client. Correct?

A: Yes.

Q: As an experienced officer, I am sure you wrote that in the little incident report pad that every officer carries?

A: Well, no, I didn't.

Q: That's ok, because I'm sure that when you went back to the station and were able to give a full interview to the detective, you talked about the third man.

A: No.

Q: Understood. Well, I'm sure, given your experience, that you told about the third man at the preliminary hearing, when you testified under oath?

A: No.

The questioning persisted, each time with the word "sure" and a polite tone as we went through the grand jury testimony and the debriefing with FBI agents. The answer was always no. The closing argument then asked the jury a rhetorical question:

Here we are in a federal court, where the quality of justice should be at its highest. Did any of you ever think you would hear so many police lies in one case?

The jury acquitted, and I am "sure" it was because they were offended by obvious untruths. And the defendant was served well by my being "sure" of what a competent officer would have done, and respectfully using that model to impeach. The same can be done with an expert witness. "Sure" can be a tool of great power.

H. Scott Fingerhut

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TAKE MY WORD, PLEASE

As technologically advanced modern trial work has become, much real evidence remains undocumented and unpreserved, and witness testimony, as ever, uncorroborated and contradicted, and subject, therefore, to believability grounded in self-proclaimed credibility: "Believe me because I said so." Simply, "Take my word for it, please."

This kind of witness is a luxury to cross-examine. In my home state of Florida, the evidence code specifies five ways to impeach.[1] For all five, your mission is to maneuver the "take my word" witness into a corner by getting them to admit that their ultimate ask is for jurors to accept their (uncorroborated, even contradicted) testimony as true.

Once cornered, now impeach.
It works all five ways.

1. No Corroborating or Impeachment Evidence Available

Here, the witness is on an island, all by themselves, with no real or testimonial evidence to support them. That said, you have no evidence, either, to contradict. Thus, your best cross point may indeed be the common-sense proposition: that a witness asking to be believed without anything to back them up is not worthy of belief at all.

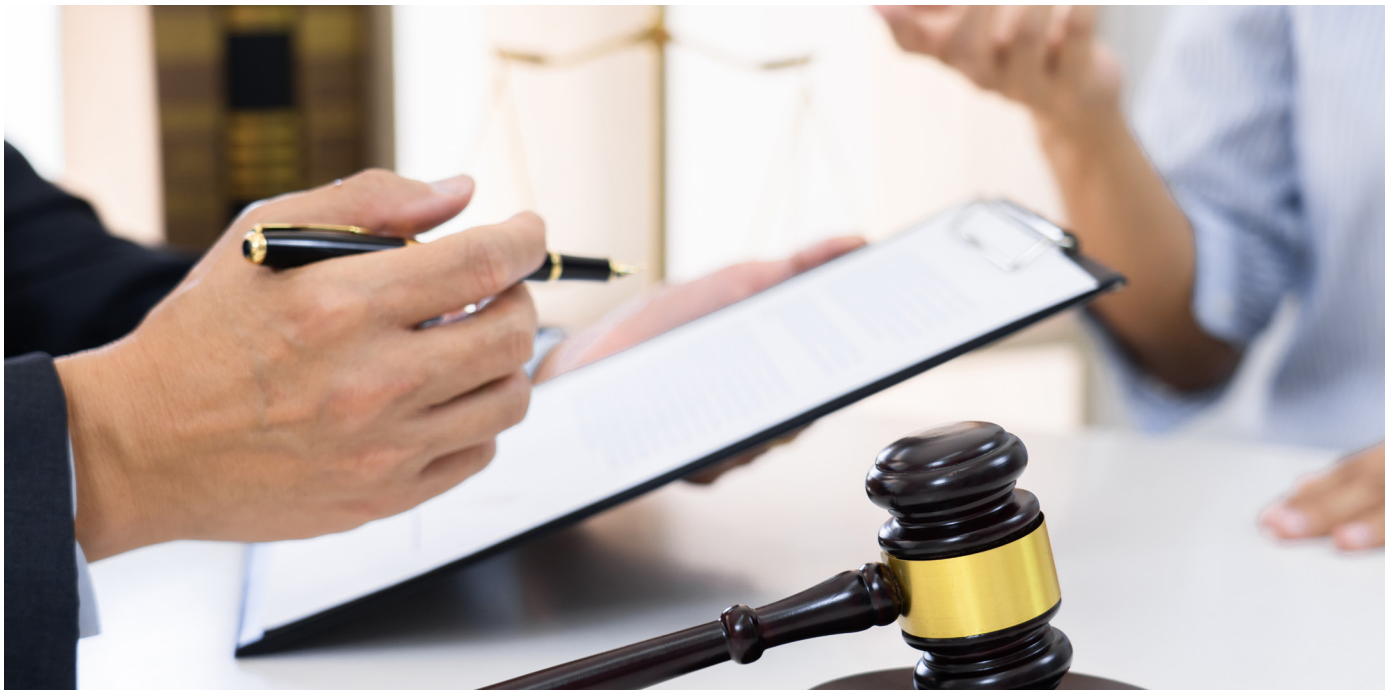
2. Contrary Evidence Available

Here, the witness is on an island without any friends. Use whatever contradictory real evidence or other witness testimony you have to discredit what they say.

3. Fact Impeachment Available

Here, the witness is on the wrong island. Based on the evidence you have available, impeach their testimony for bias or defect in capacity, ability, or opportunity to observe, remember, or recount.

[1] Florida Evidence Code s. 90.608 provides for impeachment (1) by prior inconsistent statement, (2) for bias, (3) character attack, (4) defect of capacity, ability, or opportunity to observe, remember, or recount, and (5) proof by other witnesses that the witness being impeached is untrue.



4. Prior Inconsistent Statement Available

Here, the witness cannot decide what island they're on. One moment they're "here," the next, "there." Lack of truth-telling is in their inconsistency. All you have to do is point it out.

5. Character Impeachment Available

Here, you can't believe there's an island at all. Florida provides two cross options for character attack: community reputation for lack of truthfulness and impeachment with a qualifying prior conviction—either a felony or, best of all for the "take my word" witness, a crime involving dishonesty or false statement. Here's where this cross works best: after you get the witness to admit that their word is all they have, demonstrate the unreasonableness of their ask. After all, how valuable is their word when they've already been convicted of a crime for not telling the truth?

However you get there, your message will be clear: take this witness' word for nothing. Your jurors—and your client—will be glad they did.

Rachel Brockl

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TEMPO

One of the most important traits for a killer cross-examination is to keep a solid pace with your questions. Similar to how a pendulum swings, your cross questions need to come out one after the other with the answer of "yes" between each next swing.

There are several reasons why keeping a forward tempo matters.

If you don't keep your questions swift, you run the risk of confusing the witness and having to rephrase due to their confusion to understand your request. You may also get objected to if your question is too long, vague, or compound. Pushing questions out one after the other will also prevent the witness from identifying where you are going with your questions, keeps them from getting ahead of you, and from framing their answers more favorably. You want to be the one playing chess and thinking ahead of the witness, not the other way around. Lastly, keeping questions short and concise helps to get quicker answers, which means opposing counsel won't have time to object—and if they do, it will be too late for the question and the answer will have already been heard by the jury.

Many prosecutors do not get a lot of experience in cross-examination because defendants frequently do not testify and the prosecutor is charged with proving up cases, which results in a lot of direct examinations. When I practiced as a Deputy District Attorney, almost all the defendants in my jury trials testified. This was great for me because I love cross-examination and their own statements on the stand usually became my best evidence.

I'll never forget the DUI case where a motorcycle driver went off the road, crashed into the side of a mountain, and broke several ribs. His motorcycle gang friends brought a trailer to remove his motorcycle from the scene just as the police were arriving. The defendant's story was that he wasn't the driver. Instead, he hopped on a woman's motorcycle after taking several shots of alcohol during a large motorcycle gathering at a bar. He claimed that he brought his helmet with him to the bar, but was adamant that he did not drive any vehicle that day. When asked why he would have his helmet with him if he didn't drive, he said that he brings the helmet with him everywhere. I repeated what he said to commit him to this statement: "You bring the helmet everywhere with you even when you aren't going to drive?" Answer: "Yes." After a pregnant pause while I looked around him on the stand, then back at counsel

table, and then back to him again, I asked, “But you don’t have the helmet here with you in court today?” His eyes got wide, and he hesitantly answered, “No, I don’t bring it to court.” I could have saved this for closing argument, but I knew he could not wiggle out of this at risk of lying again. My next question was, “Fair to say that you don’t bring the helmet with you everywhere you go?” A slow, painful “yes” followed and his alibi started to come undone.

In that same case, the defendant expanded on his alibi. He claimed that a woman at the bar had asked if he wanted to ride on the back of her motorcycle. Conveniently, right after he swung his leg over the other side of the bike and put his arms around her waist (he also conveniently did not know her name), he completely blacked out. Part of the reasoning for this defense was because every EMT, nurse, doctor, etc. who spoke to him, recalled him saying that he was driving his own motorcycle. My line of cross focused on how if he was blacked out and he had no idea what happened during that time frame, it was very possible he could have driven the motorcycle at some point. The defendant stuck to his guns and said he knew that there was no way he drove a motorcycle that day. I re-asked the question in different ways until he finally admitted that it was “possible” he drove that day since he was blacked out and could not remember anything that happened after that moment. Not only did the jury find the defendant guilty in this case, but he was reprimanded by the judge for blatantly lying on the stand and not taking responsibility for his actions.

In another case I tried, a defendant had driven while under the influence of alcohol and used the necessity defense that he was having a medical emergency that required him to drive to the hospital. The medical condition that he claimed he was experiencing was severe back spasms and that there were no reasonable alternatives. I began asking the obvious questions about what he didn’t do: “You did not call a friend to pick you up?” “You did not call a cab?” “You didn’t request ride share like Lyft or Uber?” “You didn’t call your sister to come drive your car for you?” “You didn’t try walking?”, etc. I also asked him, “You didn’t call 9-1-1, did you?” After he said “no,” I immediately asked him, “That’s because you call 9-1-1 for emergencies?” “Yes,” and “This wasn’t an emergency?” Amazingly, he agreed! The necessity defense was sunk now that he had admitted that this was not a dire situation where alternative options were not feasible. Because I kept a quick tempo with my questions, he was unable to see the trap I was setting and tanked his own defense.

These are just a few examples of how powerful your cross-examination can be if you keep a controlled tempo. Rapid-fire questions do a lot of damage and can be extremely helpful even if you go off-script, ask the ultimate question, set a trap, or lay foundation for impeachment.

A.J. Bellido de Luna

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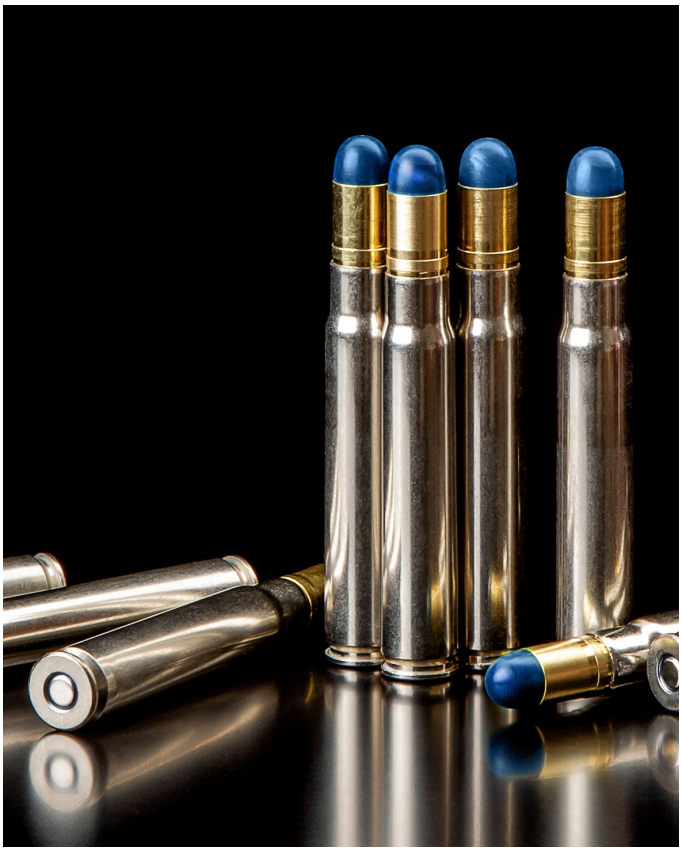
THE JUDGE RULES THE DAY [RULE 104(A)]

When I was in law school, I took a new scientific evidence class. The *Kumho Tire* decision was fresh and I had an interest in all of the advocacy courses, so I took it. As part of the class, a paper could be written instead of an exam. For weeks I was unsure what I should write about. Then I read a tiny, 100-word article in *Scientific American Magazine* that informed the reader about a paper explaining how bullets were made. I ordered the paper and immediately realized that crime lab analysts had been testifying for years that a person could trace a single bullet to a box of bullets using lead bullet analysis. Based on the science, it is actually impossible to know where a single bullet came from without knowing where every bullet came from. I wrote my paper and a few months later, my professor wrote a far more in-depth paper challenging the science. Coincidence or not, a few months after that, the Federal Bureau of Investigations (FBI) changed its policy and no longer permitted its personnel to testify that a bullet could be traced to a box of bullets.



Several years later, an attorney could not be present for hearing involving this very issue. As you can imagine, there are probably plenty of people sitting in prison to this day who have been convicted based on evidence claiming a bullet found at a crime scene matched the box of bullets in someone's house. In our case, the client sat in prison for over 20 years. He had a solid alibi that he was not at the scene that day, there were no witnesses or evidence to place him on the scene,

no fingerprints, no cameras, and, of course, no DNA. The only thing that could place him at the scene was the bullet recovered from the victim's body. However, a box of bullets was found on his property and an FBI agent testified that the bullet used to kill the victim matched the box of bullets found on the defendant's property. An all-white jury found our client guilty based on that single piece of evidence.

I jumped at the chance to represent the client. I met with him ahead of time, explained what we would be doing. I read the current FBI crime lab manual and even read a book written by the director of the lab. There was a passage that stated something to the effect that FBI agents would no longer testify that a specific bullet could be traced to a specific box of ammunition. I asked friends about the prosecutor assigned to the case and learned from others he was doing the same with me.

On the day of our hearing, there was an incident in the cell area that prevented me from visiting with my client. When the judge came out, I asked her to give me a few moments to speak with my client. She was not happy with me, but she gave me the time. I was as ready as I have ever been for trial. Case law, bullet points, written questions with specific page references, pre-marked exhibits, objections prepped, and case mooted multiple times. A paralegal was at my side who worked with me to prep everything ahead of time. He knew the case just as well as I did and could argue it just as well.

With everything prepped, I knew we would have a great day and word got around about the case. Law clerks came in to watch, and some seasoned lawyers, came in as well. I really thought I was ready to go and I was going to right the wrong that happened more than 20 years earlier. However, I soon learned I would not rue the day. The one thing I did not do was research the judge assigned to the case: a former federal prosecutor. She was not happy with me when I took away a few minutes from trial to meet with my client, and she did not like the way I was conducting the cross of the crime lab director. At one point, the judge stopped me and asked if I knew who was on the stand. She stopped me from asking leading questions on cross and I lost my way. My client lost that day, but luckily, his primary attorney said I did what she needed me to do, and she appealed to the Court of Appeals (now the Supreme Court) and the junk science was discarded. Without any evidence other than the false lead bullet analysis, the case was dropped and our client was free.

The point here is something I share with my students every day. You need to know the judge and the way they run their rooms, because it does not matter if you have pretty exhibits that are pre-marked or if you mooted the case with leading attorneys in the state or that you wrote the best cross ever. None of that matters if your judge says, "You can't do that here." Remember Rule 104 A: the judge rules the day. Prepare; Practice; Perform all you want, but make sure you know your judge, or all your hard work can be for naught.

Professor Laura Anne Rose

University of South Dakota Knudson School of Law

WHEN THE UNEXPECTED HAPPENS: TRUST YOUR TRAINING

In March 2012, I competed as a law student in the ABA National Criminal Justice Competition hosted by what is now the University of Illinois Chicago School of Law. My co-counsel was a male, second-year law student. Together we represented the state in the mock criminal trial of the *People v. Pat Baer.* The defendant, a law student, stood accused of murder.

This was my counsel's first time "under the lights," and the practice process to prepare for competition was long and brutal. Hours upon hours were spent developing each stage of the trial, and at one point, I am fairly positive, we knew those facts better than the details of our own lives. Thanks to our training, my co-counsel understood that our cross-examinations needed to be comprised of short, leading statements designed to discredit the witness in front of the jury and give us the facts we needed for our closing argument.

But as practices ran long in Gulfport, my co-counsel never seemed satisfied with his cross. He felt as if some component of the examination was eluding him, keeping him bound to the questions he had written. This led to incredible frustration whenever a witness would stray from the topics he planned to discuss. That frustration would mount when feedback from coaches and guest judges pointed out that he was leaving great opportunities on the table because he was so tied to the "list" of questions he had prepared. As his co-counsel, I tried to reassure him that learning cross was a process, that if he kept working at it he would get to his moment.

That moment came during our round at competition. My co-counsel moved to a section of his cross that covered some of the pre-trial stipulations, and the witness responded with, "Well, my attorneys handled that, I don't know about those things or the effects they have." At counsel table, I felt my heart rate pick up: in all our practices, we had never had a witness give that answer. In that moment, I watched my co-counsel go from a student determined to stick to his planned list of questions to a deadly advocate. I can close my eyes and see him spin around so quickly in that narrow courtroom that the back of his suit jacket flared out.

"Ma'am, you went to law school?" Yes, I did. "Went for all three years." Yes, I did. "You haven't taken the bar exam because of this case, but you graduated, right?" Yes, I did. "To do that you

had to take classes on doctrinal law." Yes, I did. "Classes on procedure?" Yes, I did. "Experiential classes." Yes, I did. "Classes about ethics." Yes. "About the duty lawyers have to explain things to their clients." A brief pause before a shaky "yes" from the witness. "Classes that taught you how lawyers can reach agreements on certain issues before trial." At this point, opposing counsel set out an objection to relevance that the judge immediately overruled. The witness did eventually answer "yes" when my co-counsel re-asked his question. "And you want this jury to believe you don't know the effect of a stipulation?" Crickets and uncomfortable silence were his only response for several long, tense moments. The defendant eventually capitulated to a "yes." Every person in that room knew my co-counsel had just completely destroyed the witness's credibility, and you better believed I argued as much in my closing argument.

Fast forward to March 2019, and I am back at the same competition—this time not as a student, but as a coach for the University of South Dakota Knudson School of Law. The case was *People v. Dr. Waters*, where the defendant was charged with Delivery of a Controlled Substance Causing Death. Essentially, the state's case was that the defendant doctor prescribed a combination of medications to the victim that were stronger than heroin and that those medications ultimately killed the victim. My team and I spent hours upon hours refining their work, having them get up and practice over and over again. Remembering my own experiences as a competitor, I threw every weird answer I could think of at them as the witness on cross-examination.

At the competition in our round representing the State, during the testimony of the defendant's husband, an issue we could never have anticipated became a factor in the cross-examination. One of the exhibits was a sign-in sheet, where this witness's initials appeared on the line indicating the victim of the case had, in fact, visited the clinic. I watched as my student published an enlargement of the exhibit, and then asked the witness, "Here on the sign in sheet we see the name Brian Bissel under patient name?" Yes. "Your initials are on that line as having check him in." Rather than the "yes" she anticipated, the witness said, "Oh, no, those aren't my initials. My initials are M.W., that first letter looks like a sideways E to me." Being a coach did not protect me from my heartrate picking up as I waited to see if my student would seize the moment. I should not have worried, because, in a move nearly identical to that of my co-counsel some seven years before, my student spun on her heel, tilted her head to the side, and stared that witness down.

"Sir, let's look at that first letter. The first portion of it is a line that goes up?" A confident "yes" from the witness, who seemed assured they were fine. "Connected to that is a diagonal line that points down and to the middle of the letter?" Yes. "Connected to that is another diagonal line of the same proportion that moves back up in the letter?" A brief pause, then a slightly shaky "yes" from the witness. "And finally, the last part of that letter goes straight back down." Yes. "Just like that first line." Yes. "That's an M." As my student made use of eye contact, posture, and presence in the room to hold that witness to account, you could almost hear the wheels in the witness's head desperately turning. The silence stretched until he finally responded with "It's a sideways E." Without missing a beat, my student pinned the witness with "It's. An. M. Isn't it, Mr. Mo Waters?" I will never forget how the witness's shoulders dropped in defeat as he finally had to admit that this letter was, in fact, an M. When she went to give her closing argument, she told the jury they had the ability to disregard every favorable word the defendant's husband stated, because he could not even be honest about a single letter.

After both these experiences, I spoke with the advocate, thrilled with what she had done but curious as to how she had managed it. While her exact words were different, she spoke about the hours of preparation she had put into the case, the effort she had given all of her training, and told me that when her witnesses went sideways, she had a moment where the core lesson of cross-examination crystalized. That lesson is the one I now share with you: When the unexpected happens, take a breath, trust your training, and use it to destroy the credibility of witnesses who play games.

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Stetson University College of Law

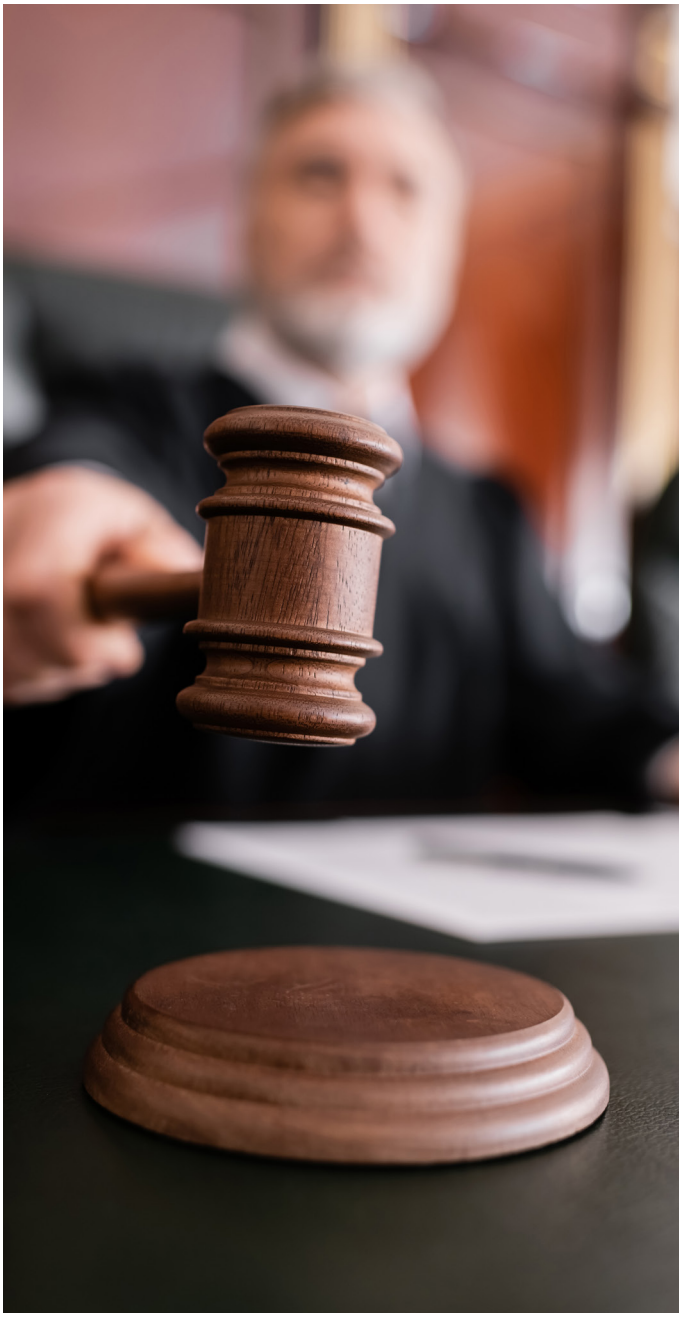
"YOU TELL ME"

I thought I would always adhere to the golden rule of cross-examination: ask only single-fact, leading questions. Until the day I made the deliberate decision to break that rule.

I was still a relatively new prosecutor at this point. I had tried many cases, but none yet where a defendant had chosen to testify. Recognizing I would need to cross-examine a defendant who had not made any prior statements that I could use to impeach him, I thought if I listened carefully to his testimony on direct, I could box him in on cross. I quickly learned, however, that would not be the case.

The defense attorney started (and ended) his direct examination with just one question: "What do you want to tell the jury?" The defendant's narrative testimony followed for about 25 minutes. When he was finished, I commenced my cross-examination using my furiously scribbled notes. I started with the classic:

Q: You claim [fact]?
A: No, that's not true.
Q: You just testified on direct [fact]?
A: No, I didn't say that.



[play back from the court reporter]

We repeated this cycle about three times as I tried to ask follow-up questions. The defendant kept interrupting me, saying, "I wasn't being clear before, what I meant was . . . ." I quickly realized this cross-examination was going nowhere (fast) because the defendant was willing to just keep changing his story. In other words, he would not let me lock him into anything. So, I made a deliberate decision to let him lock himself into something. I calmly put my notes down on counsel table and did something I never thought I would: I looked at the jury, and then at him, and said, "You tell me exactly where you claim you were standing when . . . ?"

And he did. He took the bait just like I knew he would and did exactly what I expected: he locked himself into a story. It was a calculated risk, but I was confident it would pay off. Given the defense theory presented through the cross-examination of my witnesses, the evidence introduced in my case-in-chief, and the multiple, but similar, stories the defendant had told thus far, I was confident he would take the bait and back himself into a corner in which I could trap him during my rebuttal case.

My plan worked. In my rebuttal case—as I knew I would be able to—I called a couple witnesses who undermined the defendant's version of events. In my closing argument, I commented on the defendant's demeanor while testifying and his ever-changing stories about what happened that night. In addition, knowing jurors do not necessarily understand the fundamental techniques of direct examination (open-ended questions) and cross-examination (leading questions), I made it a point to also say that I gave the defendant a full and fair opportunity to explain his version of events completely and clearly by asking him point blank, "You tell me . . . ." His story simply did not make sense given all the independent eyewitness accounts and the physical evidence presented in the case. The jury returned a guilty verdict.

The moral of the story is that sometimes you cannot lock a witness into something: they need to lock themselves into it.