PROGRAM MATERIALS
Program #3627
February 24, 2026

Litigation Series: Session 6 - The Building Blocks of Cross-Examination - Part 1

Celesq® AttorneysEd Center
www.celesq.com

5301 North Federal Highway, Suite 150, Boca Raton, FL 33487
Phone 561-241-1919

The Building Blocks of Cross-Examination – Part 1

MICHAEL DEBLIS III, ESQ.

- Trial Lawyer
- Actor
- Author
- NCDC Graduate
- Marathon runner

JOHN HOUSEMAN

AS THE INIMITABLE PROFESSOR KINGSFIELD IN THE TIMELESS CLASSIC, 'THE PAPER CHASE."

Famous Quotes

“The very nature of a trial is the search for truth.” Nix v. Whiteside, 374 U.S. 157, 158 (1986).

“Cross-examination is the greatest legal engine ever invented for the discovery of truth.” John H. Wigmore, quote in Lilly v. Virginia, 527 U.S. 116 (1999).

Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence: nor is the law less stable than the fact.

Famous Qoute -John Adams

THE ADVERSE WITNESS – Enemy Combatant?

Or Labrador Puppy?

For my part, I view every adverse witness that I have to cross-examine as a puppy that has to be trained instead of as an enemy combatant that has to be destroyed.

This does NOT mean that it will be a “soft” cross! Au contraire.

My Approach

All too often I hear lawyers talk about how they are going to tear that witness to shreds and make him woo the day that he messed with “my client.” Treating the witness as an enemy combatant will inevitably lead to a “pillage and plunder” cross-examination that will backfire.

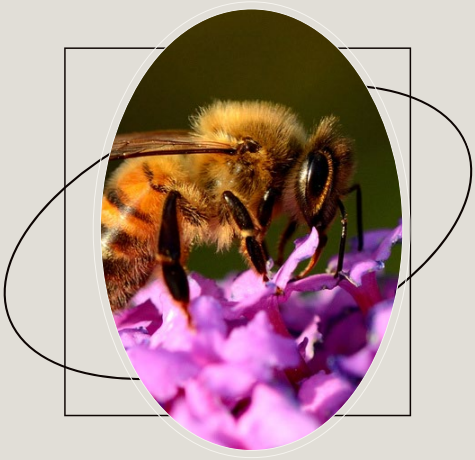
Why? For the simple reason that no one wants to be embarrassed, disgraced, or made to look like a fool, especially in a courtroom.

Thus, the witness will immediately get defensive, confrontational, and begin to offer up explanations that the jury might find plausible. Now basic facts that you needed a simple “yes” answer to will be accompanied by “verbal sparring” in the same way that two toddlers fight over a toy. Getting the witness to affirm even the smallest detail will be like pulling teeth. It will not take long before it becomes argumentative and your adversary begins lodging objections.

Instead of treating an adversarial witness as an enemy combatant that has to be destroyed, I treat such a witness as a puppy who has to be trained. If you've ever had a puppy before, you know that they get into everything – from chewing furniture, to going to the bathroom on the rug, to jumping up on counters where there is food, to eating foreign objects from off the ground, to biting flesh without any warning, to random barking.

Having grown up around dogs myself and having recently welcomed a new puppy into my home, I'm reminded time and time again of the importance of patience. After all, Rome wasn't built in a day. If I can elicit the desired conduct from my dog by rewarding her with a tasty treat instead of locking her up inside her cage for a "time out," then I'm going to do the former. The latter will be harder since I'd have to round her up first and drag her kicking and screaming into her crate and listen to her whine for the next hour. Now there may be times that I have to resort to the cage, but I will have the strength and fortitude for those times since they will be few and far between.

The two principles at play here are, "Follow the path of least resistance," which helps you save your strength for when you need it the most and "You get more bees with honey than with vinegar."



A civil, yet firm attorney who gets the witness to confirm key facts that are needed to advance the theory and theme of the case will develop a rhythm or tempo that moves the story along smoothly, organically, and without disruptions so that the jury can follow along. Thus, it is more jury-focused than the attorney who attempts to bludgeon the witness to death with every question and comes out looking like he has been in a street fight with little if anything to show for it. Not only will the story be lost on the jury but you will also risk losing your credibility along the way.

Sure there may be times to strike a "final blow," but do yourself a favor and wait until you've asked the questions that you needed answers to first rather than tweaking the witness and stirring up a hornet's nest with the first question that you ask. And even then, you must still wait until you get the jury's permission. If so, then have at it.

While this might seem sneaky, it is nothing more than a tactic for helping to avoid the turbulence that inevitably creeps up in cross-examining an adverse witness. This approach embraces the idea that we are always storytelling during a trial, especially when we are cross-examining witnesses. The idea that we are only storytelling when we break the "fourth wall" and address the jury directly during opening and closing is nonsense.

TH E CASE FOR

STORYTELLING

While this is a book about cross-examination, it is difficult to talk about cross-examination without discussing storytelling in the courtroom. Therefore, this will be our starting place.

When you think about it, the very essence of a trial is a story – the story of a human experience.

StORY IS THE MOST POWERFUL TOOL OF PERSUASION.
VERY SIMPLY, PEOPLE THINK IN TERMS OF A STORY.

Examples from Childhood Stories

Once upon a time, in a city called New Orleans, there was a boy who lived and breathed and dreamt music. He loved the sound of the trumpet, but he could not afford a trumpet. This is the story of Luis Armstrong, a poor boy who could not afford a trumpet, who became the greatest trumpeter of all time.

Why is storytelling so powerful?

- It is the principal means by which we have taught one another from the beginning of time. For example, the story of great hunts and terrible battles were passed from generation to generation and became the history of the tribe.
- Its structure is natural. It permits the speaker to speak easily, openly, powerfully from the heart.

It is an antidote to the worst poison that can be injected into any argument– boredom. Finally, we are moved by a story because it touches us in those soft, unprotected places where our decisions are always made.

Storytelling is no longer an optional technique.

First, jurors are *not* fresh canvasses upon which lawyers can paint. They arrive at the courtroom with their own experiences, “handed down frames of reference,” and biases.

As the lawyer, you must be able to address these disparate jurors and tell a story that will impart a single perspective to the entire jury, a narrative framework in which they can view the evidence.

Second, put yourself in the shoes of the jury. They have been herded like cattle into an unfamiliar and intimidating place called the courtroom, stripped of their smart phones and any other connection to the outside world, and squeezed into a small rectangular box where they are forced to sit elbow to elbow with perfect strangers.

Then we bombard them with legalese and a torrent of evidence that comes in bit by bit through oral testimony and physical exhibits– often out of order – and disrupted by continuous objections, sidebars, and removal of the jury from the courtroom so that legal arguments can be made and ruled upon outside of their presence.

We also have the problem with limited attention spans today. Studies have shown that a speaker has twenty seconds to capture an audience's attention before they look at the next post on their Facebook page. Even though a jury doesn't have their smart phones, they will substitute daydreaming for looking at social media.

To make matters worse, the opposing side is advancing a completely different version of the story.

To say that the jury is in "sensory overload" would be a complete understatement.

The jury is left with the unenviable task of sorting through this mess and somehow making sense out of it.

And how do they do this? They begin to imagine a story almost immediately, interpreting facts to fit into a familiar framework. In other words, a jury instinctively begins imagining a story out of necessity.

Effective trial advocacy requires tapping into this narrative instinct by suggesting a powerful story from the very beginning. If your story rings true to the jurors, they will interpret the evidence to fit your case.

When this happens, it will be difficult for the jury to see these same facts through a competing account of what happened.

Witnesses will be viewed in the context of how they provide validation of your story. And witnesses who contradict your story will be viewed with a healthy dose of skepticism.

Third, without a story, the jury may judge your client based on nothing more than the crime itself – i.e., on the "bare fact" that he has killed or raped.

The danger that this poses is obvious. One who commits a heinous crime is hard to care about.

But there is no such thing as a set of "bare facts" that tell the whole story. Two worlds always exist:

One is the world that is apparent, the one we see: the bare facts. The other is the world we do not see: a world that is personal, perhaps even secret. The latter is the world in which our client lives.

As much as I hate to use absolutes, when defending a person accused of a crime, we must never allow him to be judged on the bare facts!

Fourth, storytelling helps the jury to *empathize* with your client. When the jury goes to deliberate, the primary goal is to leave them thinking: “I may not have done what Bill did, but I can at least understand *why* he did it.”

As human beings, we measure the validity of what we hear by comparing it with our own life experiences.

A story that is complete, internally consistent, and conforms to our notions of common sense allows the jury to relate to it on a personal level.

Finally, storytelling elevates the credibility of the attorney to that of a rock star.

To become good storytellers and effective trial lawyers, we must now accept the fact that a trial is a human drama, and that it is our job to tell how the jury how the experience was lived and felt by the people involved.

CONTROL

- Even in cross-examination, especially in cross examination, we're telling our client's story.
- Essential to a good cross-examination is the ability to exercise control over the witness at will.
- Succinct questions with laser-beam accuracy are necessary.
- It's easy to attach a negative stereotype to "control." I don't use control here in the sense of domineering, intimidating, or bossy.
- Control need not be hostile.

The objective is to conduct a smooth flowing, fact-by-fact cross-examination without distracting verbal mannerisms (e.g., beginning each question with "Isn't it a fact that …") that has a rhythm to it.

The following is a useful method for learning control.

RULE NUMBER 1

Ask ONLY LEADING QUESTIONS.

There ARE A FEW REASONS WHY.

First, any information delivered to the jury must come from the attorney, and not from the witness. You want the witness to merely confirm the information with a monosyllabic, “Yes.”

At the risk of being crass, the witness should be viewed as nothing more than a stooge who responds with one answer to each question: “Yes.”

When the information comes from you, your credibility rises in the eyes of the jury. The jury says to themselves, "This attorney is forthcoming and honest, and well-prepared. We can trust him."

Second, when the information comes from the attorney, it will be presented in the form desired by the attorney.

Third, the witness will be discouraged from explaining and will develop a habit of responding obediently, like a trained puppy.

Finally, asking leading questions advances our goal of storytelling on cross-examination. Indeed, storytelling does not end after opening statement. Contrary to popular belief, storytelling during cross-examination is just as important – if not more so – than storytelling during open statement. And for good reason.

Because it's adversarial and because oral testimony does not follow a linear, chronological path but instead is wildly unpredictable with twists and turns and sudden and surprising changes some of which include incomplete thoughts, interruptions, misunderstandings, and objections, jurors may find it hard to follow along.

For this reason, it is incumbent upon the cross-examining attorney to be part of the solution and not the problem. Embracing storytelling will allow him or her to do just that. The good news is that cross-examination is a powerful delivery-mechanism for storytelling. For example, if you were to take the actual transcript of a cross-examination conducted by an attorney who scrupulously adhered to this rule and removed all of the monosyllabic responses that were uttered by the witness, what remained would be the attorney's leading questions and those questions, when crafted in a meticulous and skillful way, would read like a story even though there is a question mark and not a period at the end of each line.

Why? Because the questions are not actually questions. They are statements. And herein lies an important point: Storytelling cannot be told in questions. Declarative statements are necessary. This is why asking leading questions is an essential element of cross-examination. And so don't be deceived by the fact that question marks appear at the end of every line in a transcript. They will always be there.

More important is how the questions were asked. Were they spoken as declarative statements and in such a way that the cross-examining attorney was seeking for the witness to affirm them as opposed to an invitation for the witness to answer them in the narrative? It is often as subtle as what word the emphasis fell on. Typically, when a person's voice goes up on the last word in a line, it signals a question and not a statement.

EXAMPLES

Q: What are you wearing?
Criticism: This is an open-ended question.
Q: Are you wearing suspenders?
Criticism: Better, but still not leading. Do not invite the witness to volunteer information.
Q: Is that a blouse you have on?
Criticism: Still insufficient for establishing control over the witness. Avoid beginning questions with the words, “are,” “is,” “do,” “did.”
Q: You have on a blouse, don’t you?
Criticism: I love it! Here are some variations, “Isn’t it true that …” “You do have … don’t you?” “It is a fact that … isn’t it?”

One caveat about the phrases: “Isn’t it true that …” “You do have … don’t you?” “It is a fact that … isn’t it?” We don’t talk like this in real life when we’re speaking amongst friends and family. It is too formal (i.e., “snobbish”). These are nothing more than “filler words” that we use as a crutch in order to buy more time to think of what we are going to say next.

As the great Terry McCarthy once said, “You want to talk to the jury the way you’d talk to a friend in a bar.”

You might have noticed that I’ve inserted question marks at the end of these phrases. Don’t be tricked into believing that they are “questions” in the inquisitive sense or that you should put emphasis on the last syllable of the last word so that it sounds like a question.

What IF THE WITNESS DOESN'T CONFIRM YOUR AFFIRMATIVE STATEMENTS? IN OTHER WORDS, SHE IS THE STEREOTYPICAL, "RUNAWAY WITNESS."

You can steer her in the right direction with an occasional, "Don't you?" or "Right?"

I'm often asked, "Does this mean that it is never appropriate to ask an open-ended question of an adverse witness?"

Not necessarily. A rule as rigid as one that sweepingly prohibits inquiry into an area of incomplete knowledge would deprive an attorney of potentially helpful information.

When can you explore an area in which your knowledge is lacking? If your questions will do no harm to your credibility or to your case, it may be all right to proceed.

Decisions about whether to initiate a certain line of questioning should be made by balancing the potential good versus the potential harm. This does not mean that you will have the luxury of cogitating over it for a day. You might have a "split second" to make the decision. Yikes!

In the back of my mind, I can hear the clever words of my evidence professor echoing, "When you know, you want to be the one to tell the jury. When you don't know, you should not pretend you do."

RULE NUMBER 2

One FACT PER QUESTION.

W HY?

Example

Q: You have on an black and orange striped shirt, don't you?
Criticism: This is five questions.
(1) Shirt
(2) More than one color
(3) One color is black
(4) One color is orange
(5) Black and orange are arranged in stripes

This is like a long sausage that has been hastily thrown on a platter without being carved up into chipolatas. It overwhelms even the hungriest stomach. It is better to establish each of these points separately.

Think about it. If the witness answers, "No," what part of the question does he disagree with? He might be quarreling with one fact in the broad question or multiple facts, but you'll never know. Very simply, a negative answer is ambiguous.

Does the witness dispUT E "SHIRT," "BLACK," "ORANGE," OR "STRIPES?"

When one fACT IS POSED PER QUESTION, THE WITNESS WILL BE FORCED TO AGREE TO EACH SEPARATE FACT.

In addition, greater emphasis is achieved when progression to the ultimate point occurs steadily and gradually.

Compare

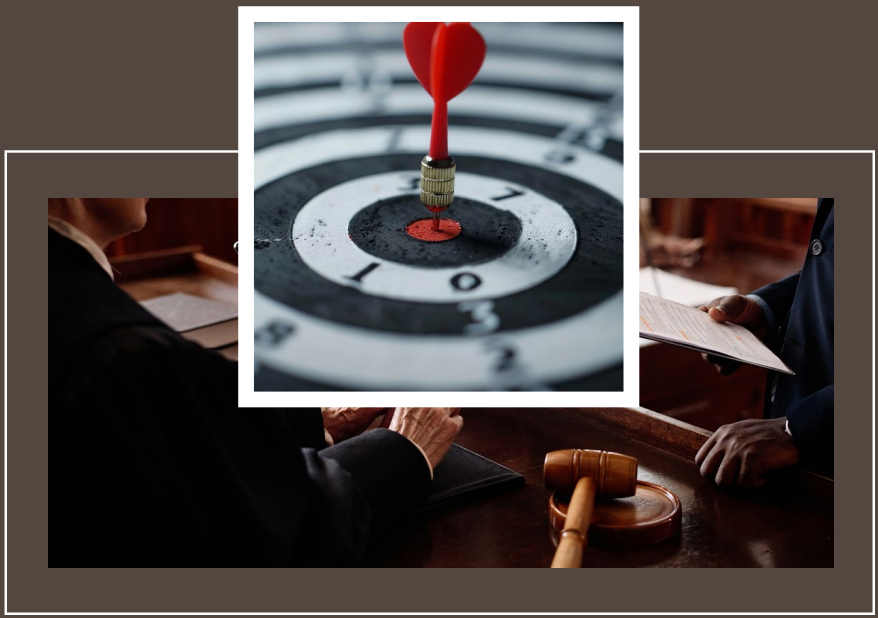
(1) You have on a shirt, right?
(2) It has two colors?
(3) Black?
(4) And orange?
(5) And the black and orange are arranged in stripes?

RULE NUMBER 3

Know the ANSWER.

Example

Q: Your belt is leather?
Criticism: Be careful. Leather and vinyl look alike. The witness may say, “no.”
Q: Your belt is leather or a leather-like material?
Critique: Much safer.



RULE NUMBER 4

Select A SPECIFIC FACTUAL GOAL.

Good cross-examination cannot be done “on the fly” or by “winging it.” Great trial lawyers don’t stand up and begin asking questions off the cuff.

Never lose site of the purpose of cross as emphasized by Pozner and Dodd: “To advance [your] theory of the case or to undermine [your] opponent’s theory of the case.”

I hate to be the bearer of bad news but trials are never won by casting one fatal blow. Perry Mason moments are as rare as a four-leaf clover.

As Pozner and Dodd so eloquently state, "the credibility of witnesses and cases bleed to death from a thousand little pin-pricks."

Each factual goal must be bifurcated and proven separately, even though it may be closely aligned to a similar goal.

For example, if it is important to show the robber had no earing in his left ear, then that individual topic deserves its own topic and should be drafted separately from the other chapters that deal with the robber's description.

In a non-chapter system, YOUR NOTES MIGHT LOOK SOMETHING LIKE THIS:

Description

- Blue jeans
- Earing
- Height
- Body type

Working from such a short-hand set of notes is dangerous because it is far too general and runs the risk of failing to establish the goal.

By asking the minimum number of questions needed to set up the goal, you will deprive the jury of the detail and specificity that they need to make a factual conclusion or inference that favors your theory of the case.

It also deprives you of the opportunity to “show-off” by demonstrating how well you know the facts of the case.

You also lose an opportunity to bolster your own credibility by reassuring the jury you are candid and forthcoming and that your version of the facts should be believed over that of your adversaries.

RULE NUMBER 5

Avoid ch ARACTERIZATIONS AND CONCLUSIONS.

Example

Q: Your shirt is posh, right?
Criticism: In the witness's opinion, he might not be ready to sport this shirt on the cover of "Esquire" magazine and he might reject the suggestion that his shirt is making a "fashion statement." He might become so indignant about it that it becomes difficult to reign him in.

Try instead

(1) Q: Your shirt is predominantly blue?
(2) Q: It has white letters embroidered across the front?
(3) Q: The letters are raised?
(4) Q: They are made of a soft material?
(5) Q: They form a word?
(6) Q: "Abercrombie?"

RULE NUMBER6

Be cautious about beginning any question with the word "So" or "Therefore." Questions such as these should be reserved for closing argument. The infamous "one question too many" usually begins with "so" or "therefore."

What is the ONE QUESTION TOO MANY?

Recall the infamous “nose bite” case.

No less than Abraham Lincoln was the criminal defense attorney.

He cross-examined the prosecutor’s witness. Initially, he brought out that the witness was bird-watching.

Then Lincoln suggested to the witness that he, the witness, had not seen the defendant bite off the victim’s nose. The witness agreed.

We are told by Irving Younger that Lincoln should have stopped and sat down. But he continued and violated the sacred commandment of asking “the one question too many.”

Lincoln’s last question to the witness, the one question too many, was: “So if you did not see him bite the nose off, how do you know he bit it off?”

The witness responds: “I saw him spit it out.”

In other words, Lincoln should have simply stopped after establishing that the witness did not see the nose being bitten off.
This is a great story and makes the point for the “one question too many” commandment but it has many shortcomings.

For starters, the prosecutor gets to redirect the witness.

And what will the prosecutor's first question be? You guessed it: "If you did not see Ned bite off the nose, how do you know he bit it off?"

In the first instance, when Lincoln asked the "one question too many," he looked foolish.

In the second instance, when Lincoln observed the commandment and it was left to the prosecutor to bring out this damaging information, Lincoln looked like he was hiding something. This would have caused the jury to distrust him.

Second, we are never told what are the characteristics of the "one question too many."

RULE NUMBER 7

Demand the answer to which you are entitled: "Yes." This is the best method for telling a story through an adverse witness.

It is for this reason that "yes" answers always earn the attorney two jelly beans instead of just one.

Which cross-examination is easier to follow?

Version 1

Q: Once upon a time there lived a girl named Elizabeth?
A: Most people called her by her nickname, "Liza."
Q: She lived with her parents in a city?
A: It was a small metropolitan area in the Midwest, no where near the size of a city.
Q: It was her first day of school?
A: She had three days of orientation with her parents leading up to the first day.

Version 2

Q: Once upon a time there lived a girl named Elizabeth?
A: Yes.
Q: She lived with her parents in a city?
A: Yes.
Q: It was her first day of school?
A: Yes.
Q: She was going to grade five?
A: Yes.
Q: Her mom walked into her room to wake her up?

A: Yes.
Q: She rolled out of bed and rushed into the bathroom to brush her teeth?
A: Yes.

Example

Q: Your shirt is red?
A: I guess so.

Try repeating the question. If this doesn't work, eliminate alternatives:
Q: Your shirt isn't blue?
Q: It isn't green?
Q: It isn't yellow?
Q: It's red.

Either you will win, or the witness will be the one who looks like a fool.

The reason why this is important, even for the most benign question, is that it reinforces the concept of control.

If you are sloppy and let the response, "I guess so" slide by without correction, the message you will be sending the witness is that it is okay for him to meander about and deviate from answering, "Yes." This will only get worse as the cross-examination goes on. Never forget the expression, "If you give him an inch, he'll take a mile."

RULE NUMBER 8

Use primacy AND RECENCY.

In other words, start on a high note and end on a high note.

Most trial lawyers start cross-examination with a salutation. We also like to introduce ourselves.

We greet the witness, almost always by name and try to be polite and civil, like we're asking them out for tea and trinkets.

Example: "Good morning, Mrs. Smith. I hope you had a pleasant trip to the courthouse this morning. Let me introduce myself. I'm John Smith. If you don't hear or understand me, stop me anytime and let me know. I'll repeat the question. This won't take long."

If the jury could speak back from the jury box they would be screaming, "Get to the point. You're boring us to tears!"

Okay. Maybe I'm exaggerating a little, but you get the point.

These formalities hurt rather than help your cross.

A study done at Duke University found that jurors are "turned off" by salutations.

They want the lawyer to jump right into cross and deliver a message. This is what's meant by, "primacy."

A Slight Digression

Here, I'd like to take a slight digression into how I view cross-examination. I can't do it without resorting to a metaphor.

Every cross has its organic flow. I view it in three segments.

The first segment of a cross-examination is the "launch" off the rocket pad.

You've seen rockets being launched. Do you know how much kinetic energy is necessary to launch that rocket?

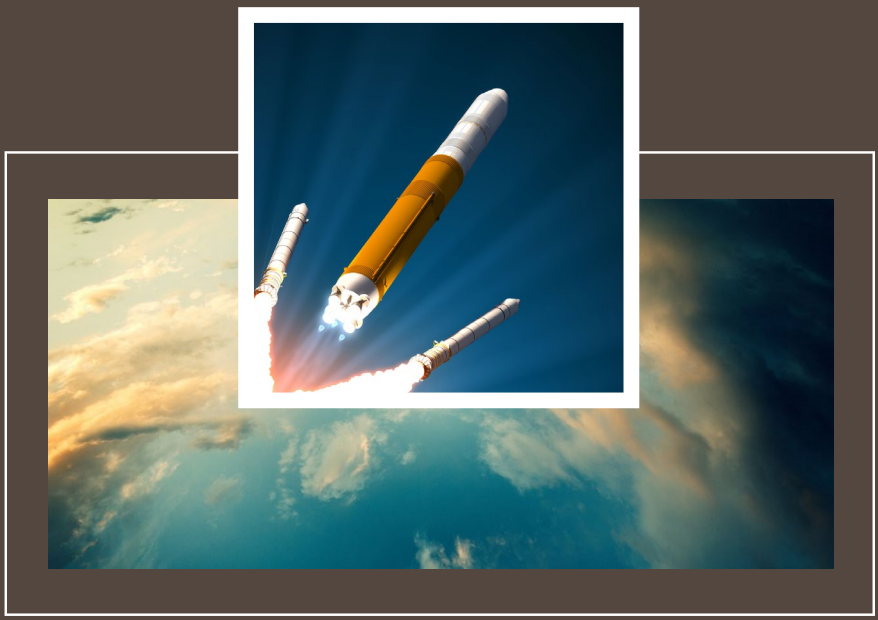
Most of it is in the takeoff. You see all the power. You see the flames shooting out. The rocket is hardly moving and then slowly it begins its upward trajectory.

- The second segment is the booster rocket where you want to get out of the atmosphere.

- The third segment puts you into the stratosphere. The objective, of course, is not to fall to Earth.

That's the problem for most cross-examining attorneys, including myself – staying in the stratosphere.

Most good cross-examiners can get themselves into the stratosphere but how long they can stay there is another story.



RULE NUMBER 8

Let us apply primacy to cross-examination. Consider a purse-snatching case.

Jenny leaves Jakes Tavern around 1 AM. She has to walk four blogs to get home. The second block requires her to walk under a bridge.

Although lamps once illuminated the darkness underneath the overpass, they burned out some time ago and were never replaced.

It is pitch dark underneath the overpass. As Jenny is walking, she sees the shadow of a man jump out from behind a pillar. The assailant snatches her purse and runs.

On direct examination, Jenny identifies Mark, your client, as the man who mugged her and stole her purse.

To ADD INSULT TO INJURY, SHE SAYS, “I WOULD NEVER FORGET HIS FACE.”

You must NOW CROSS-EXAMINE JENNY.

The idea is to start with primacy – i.e., your strongest fact. As hopeless as this case might seem, there are always good facts lying underneath the bad ones waiting to be discovered.

What are the go OD FACTS?

This is an eyewitness identification case, and it was pitch dark when Jenny saw her mugger. Your defense is likely to be mistaken identification.

Note, however, that other good themes might exist: (1) Other bar patrons saw Jenny taking “shots” at Jake’s throughout the night and described her as being “three sheets to the wind” before leaving; (2) it is a cross-racial identification; (3) Jenny’s description of the mugger does not completely fit Mark.

We'll USE THE FACT THAT "IT WAS DARK"
AS OUR THEME FOR PRIMACY.

You might begin your cross by asking, "It was dark out that night?"

Ofte N, PRIMACY IS THEMATIC.

Another great source of primacy is impeachment.

Personally, the one that gives me he greatest pleasure and that I can't wait to unleash is available only in criminal cases when cross-examining the deceptive "snitch" (with a prior criminal record) who sits in jail hatching his plan of escape at the expense of your client's.

How about this f OR PRIMACY?

Q: We can agree that you are a convicted felon?

Or, if this does not strike your fancy, you could always start with, "You would do almost anything to avoid going back to jail?"

Just as you want to start on a high note, so too do you want to end on a high note. This is what is meant by recency.

Let’s return to tHE PURSE SNATCHING CASE.

Assume, as it is often the case, that Jenny does not drink (she is a volunteer at her church and was raising money for a charity to help find foster families for abandoned and neglected children), there is no cross-racial identification, and that her description matches Mark in every respect.

We still have “it was dark” as our primacy, but we have nothing else for recency?

What do you do?
Accept your limitations. Your recency will be, “It was dark under the overpass?”

REMEMBER:

Never conclude a cross-examination with an open-ended question, lest you repeat the same mistake as good ‘ole Abe.

RULE NUMBER 9

Maintain credibility throughout. Credibility is everything. As trial lawyers, it's all we have. Absent credibility, the trial is lost before it has even begun.

Everything that you do in the courtroom should revolve around establishing and maintaining credibility with the jury.

Your client's case DEPENDS ON IT.

Never violate the sacred trust that you form with the jury.

Tips for Maintaining CREDIBILITY

- Your affirmative statements should never be inconsistent with the theory of your case.
- Remember that there will be re-direct. One of the biggest dangers is when an adversary's re direct makes you appear unfair, sneaky, or slick.

RULE NUMBER 10

Be pati ENT.

In acting, rushing is the enemy of the moment. When an actor rushes the moment, it looks like they have been shot out of a canon.

As actors, we are taught that “things take the time they take, to live the moment out all the way through, and to finish the moment. Then wait to see what your scene partner does.”

A cardinal rule for actors is to work from moment to unanticipated moment. This applies to lawyers as well.

Returning to the courtroom, recall that the one fact per question format not only keeps the witness under control but adds emphasis to the point being made. Impatience could sacrifice both.

Also, as eager as you might be to pounce on your best point, you have to save something juicy for the end, otherwise in the words of the great poet T. S. Eliot, you’ll go out with a “whimper” instead of a “bang.”

RULE NUMBER 11

Do YOUR CLIENT NO HARM.

To me, this is a sacred oath that we take when defending a client accused of a crime – to have no harm befall him when we are in control of the proceedings.

If the witness utters something damaging on cross-examination, it is twice as bad as when it happens on direct examination. Why? Because you elicited it. It happened on your watch. And because you elicited it, it's as if you are endorsing it, however heavy-handed that might seem.

This is yet another reason not to ask the witness any open-ended questions.

RULE NUMBER 12

Close off all escape hatches. Just like a master chess-player at a chess tournament, the cross-examiner who patiently eliminates every conceivable escape route before taking the witness head on puts himself in the best position of "trapping" the witness.

This often comes up in impeachment, during the "accreditation" stage.

Example

An officer testifies on direct examination to a fact that is inconsistent to what he wrote in his police report. You want the jury to consider the earlier statement (i.e., the one made in the police report) as being true because it is more favorable to your client.

The more you do to explain the reasons that the officer had for being complete and honest at the time he wrote his report, the more the jury will believe that he probably was.

IMPEACHMENT STEPS

Let's take a slight digression to discuss the steps involved for impeachment:

Step 1: Recommit: Remind the witness and the jury exactly what the witness said on direct that you intend to contradict. This is called, "re-committing."
Step 2: Accredit: This is the part where you set the scene for the earlier statement.
Step 3: Confront. Let the jury know exactly what the witness said before.

Practically speaking, HERE'S HOW IT WORKS:

Step 1: "On direct examination, you said that you saw John throw a bag of drugs onto the ground?"

Step 2:

- "I'd like to show you a copy of your police report?"
- "Is this your report?"
- "This is the report that you wrote following the arrest?"
- "One of your responsibilities as a police officer is to write police reports?"

- “Following an arrest, you file a report of that arrest?”
- “Your reports are received by others involved in the investigation?”
- They rely on the information in those reports.
- Your superiors rely on your reports when deciding what action to take.
- You want to assist others who are involved in your investigation.
- So, of course, you are thorough, accurate, and complete when writing your reports.
- A police report must include all of the details.
- Because you are only human.
- And you might forget things if you don’t write them down when they’re fresh in your mind.
- If there was something that you forgot to include in your police report, you could file a supplemental report.
- You didn’t file a supplemental report in this case .

Step 3:

- Q: “I’d like to show you a copy of your police report?”
- Q: “Take a look at the first sentence of the third paragraph?”
- Q: “It says, ‘I did not observe anything in Mr. Smith’s hands.’”

As an aside, I’d recommend concluding the impeachment here. You have all the ammunition you need to drive your point home in summation.

RULE NUMBER 13

Deryl Dantzler, former Dean of the National Criminal Defense College cleverly dubbed this rule, “Never insult the alligators before you’ve finished crossing the swamp.”

Let’s set the stage. You are cross-examining a critical government witness. You are in a “muddy” where you are unable to establish your point by prior statement or through other witnesses. Cooperation of the witness is therefore, essential.

The key here is the manner in which the questions are asked.
The tone should be empathetic, never sarcastic. Accusatory wording or a hostile attitude will almost always result in the witness putting up a wall, “pushing back,” and being oppositional defiant.

Example:

Q: Ms. Smith, you wanted to help catch the man who did this terrible thing to you? [With sympathy and not seething with sarcasm]
Q: You knew the police needed a description so that they could look for him?
Q: And you gave them a description because you wanted to help them?
Q: You saw them taking notes when you described the man, right?

Q: And what you told them was …[reading from victim's statement]
This sets up an incomplete description to impeach an eye-witness identification.

Not surprisingly, this will backfire if it happens on the heals of a "pillage and plunder" strategy on another topic.

Therefore, the technique is most productive early in the examination. Hence the expression– never insult the alligators before crossing the swamp!

This cooperative technique also depends on your willingness to adapt quickly to alternative justifications on the fly in order to maintain agreement.

This is not the time to insist on your exact words.

Don't be literal, be essential.

RULE NUMBER 14

Be “jury - c ENTERED."

Never forget that your goal is to persuade the jury, not the witness. One of the biggest traps attorneys fall into is trying to convince the witness that he is wrong. These attorneys are looking to capture a “Perry Mason” moment that shifts the outcome of the trial in one fell swoop (e.g., where the victim unexpectedly blurts out, “Oh my God! I made a terrible mistake. Your client wasn’t the man who robbed me!”)

I hate to be the bearer of bad news, but these moments are few and far between.

Instead, focus on putting dents in the witness’s armor, one at a time. At the conclusion of your cross-examination, you might be surprised to find that the aggregate number of dents is voluminous enough that it just as damaging to the witness’s reputation as the unexpected bombshell that goes off during a Perry Mason moment.

As Pozner and Dodd so eloquently state, “the credibility of witnesses and cases bleed to death from a thousand little pin-pricks.”

Being jury-centered requires checking in with the jury regularly to see how they are responding and to have the humility to change course when something isn't working. We do this all of the time in real life, but it becomes a herculean challenge to do so when we have spent so much time and effort writing, re-writing, and editing our written words to arrive at a final draft that is as close a thing to a "work of art" as possible. It's our great idea.

Being jury-centered also requires getting specific about the points you want to make on cross-examination and to follow the path of least resistance to make them since you have an unwilling participant. This requires trimming the fat by removing any extraneous questions that will detract and dilute the substantive points that must be made to advance the theory of your case.

RULE NUMBER 15

Keep your emotions appropriat E TO THE SITUATION.

Instead of beating the witness to a pulp in contradicting a minor point, use the power of impeachment responsibly. It may be better to use a prior statement to “refresh” the witness’s memory than to do a full-blown impeachment.

A concession from an adverse witness may be more important than discrediting him.

As a colleague of mine once said, “Never shoot a mouse in the ass with a cannon.”

RULE NUMBER 16

Ge t permission before going for the kill.

When you've got the witness "on the ropes" and you are chomping at the bit to unleash the final blow, wait until the jury gives you permission. If you strike too soon, the jurors will identify more with the witness than with you.

Until they share your sense of outrage at the witness's deception, an overt attack can cause the jury to come to the witness's rescue and to instinctively protect him like a Mother Bear protecting her cub.

The great Deryl Dantzler takes us on a ride back in time to Roman civilization to emphasize this point:

"If you can visualize the courtroom as the Roman Coliseum and the jury as Caesar, withhold the fatal thrust until you perceive the down-turned thumb. Then have at it. It's one of those little moments that makes life worth living."

RULE NUMBER 17

BUILD CHAPTERS

I recommend building chapters. Why?

Consider the following example: A prior felony conviction of a *State's witness*. In order to blunt the impact of this coming out on cross, the prosecutor makes a strategic decision to elicit from his witness *on direct that he has a felony conviction*

On cross, the defense may re-establish the fact that the witness had been convicted of a felony.

Detailed Notes for Detailed Chapters

Most defense attorneys would ask the following abbreviated questions on cross:

Q: Mr. Smith, you are a convicted felon?
Q: In 1988, you were convicted of a robbery?
Q: You got sentenced to prison for five years?

While the defense attorney scrupulously adhered to the fundamental rules of cross-examination, you can sense that something is missing.

While the lawyer established the fact that the witness was a convicted felon, he did so without any pomp and circumstance.

The felony conviction is a nothing more than a cold fact. There is nothing damaging about this chapter, except the fact that the witness was convicted of a robbery and served time in prison.

Worse yet, if the witness had been "coached" well, he may have even aroused some sympathy on the part of the jurors when he said that the time he spent away from his family was unbearable and that he was counting the days before he could come home so that he could hold his newborn child in his arms. Also, he stepped up to the plate, took responsibility, and "paid [his] debt to society."

A better strategy would be to attack the witness's credibility, so that the jury will conclude that he cannot be trusted.

But the questions asked above amount to nothing more than a news reporter making idle observations. We need to delve deeper!

The summary nature of this chapter was so utterly benign that it wrung all of the emotion out of the chapter because it failed to generate any drama and suspense.

It doesn't show how this damning fact bears on the credibility of the witness.

The good news is that it doesn't take much in order to fix this snafu.

By breaking down the topic of the witness's prior felony conviction into smaller parts (i.e., divide them into additional chapters), each chapter becomes more enriching with more detail and factual context.

You may choose to br eak the prior felony into four separate but related chapters:

- Facts of armed robbery;
- The deal;
- The sentence; and
- The time served.

Here's an example of a cross - examination of each of these chapters.

NOTE ABOUT HYPO

Sometimes I get carried away with my hypos, specifically when it comes to questions put to a snitch on cross-examination that go specifically to his private discussions with his attorney in deciding whether or not to accept a favorable plea deal. To be certain, this line of questioning violates the attorney-client privilege.

At the same time, that line of questioning that pertains to what the snitch stands to gain by accepting the deal (i.e., reduced sentence, less time incarcerated, his freedom and a return to a normal way of life, being re-united with family who he loves and who loves him) versus what he stands to lose if he goes to trial and loses is par for the course (i.e., a lengthy prison sentence away from family and friends where he is confined to a small cell; given limited time for recess; where he is always looking over his shoulder and his safety is always at risk; where the rules are strict and limiting dictating what he can and cannot do at any given time, including when he can shower and when he can eat; where the mattress is so thin that he wakes up in the morning with imprints of the springs on his back; where the meals are so unappetizing and meager that he goes to bed hungry every night).

The details of this need to be fleshed out with as much specificity as possible so that the jury comes away thinking, “I can understand why this person would falsely implicate the defendant. He had so much to lose, yet so much to gain.” Broad strokes will not do it alone.

Example:

Yo u are an armed robber (Chapter heading)

Q: I'd like to ask you some questions about October 29, 2007?
Q: You remember that day don't you?
Q: That was the day you were arrested?
Q: Not for jay walking?
Q: Not for walking your dog without a leash?
Q: Not for DUI?
Q: But for robbery?
Q: On this day, you walked up with a gun in your waistband to a liquor store in your own neighborhood?
Q: A .44 magnum revolver?
Q: It was loaded with six bullets?
Q: From outside the window you looked in?
Q: You looked back?
Q: You looked all around?
Q: You looked in and saw that there was only one man inside the store?
Q: A middle-aged man standing behind the counter?
Q: You went in that door, ran up to that man, and put that gun to his head?
Q: You said, "Give me the money or I'll blow your brains out?"
Q: "You can bank on it."
Q: He did as you ordered?
Q: That armed robbery didn't go exactly according to plan?

Q: Because in that store you didn't know that, although you traumatized another human being, there was a panic button under the counter?
Q: A little button set up so that robbers can't run roughshod over an entire part of town?
Q: You ran out of the store?
Q: You didn't get a half-a-block away before you heard the sirens?
Q: You ran faster?
Q: Within a block of that store, the police were on you?
Q: You dropped your weapon?
Q: You were arrested?
Q: In one hand your gun, your trusty friend?
Q: In the other hand, a bag of money?
Q: Someone else's money?
Q: You were cuffed and taken to the police station on Carson Avenue?

Yo u Got A Deal (Chapter Heading)

Q: I'd like to talk to you about what happened on December 15, the day of your jury trial?
Q: You got up early?
Q: You put on your trial suit?
Q: You got on the early bus to the courthouse?
Q: You knew nothing positive could happen at that jury trial?
Q: You met with your lawyer?
Q: You discussed the case?
Q: Over and over?

Q: You talked about any chance the clerk might not show up for waiving that gun at his head and threatening his life?
Q: You knew that wasn't going to happen?
Q: You knew twelve jurors were going to convict you in a skinny minute?
Q: You also knew that once you were convicted, you were going to get the maximum sentence under the law for armed robbery?
Q: Twenty years?
Q: Day for day?
Q: No early release for a violent felon?
Q: You were doing the math in your head as fast as you could and said, "I guess I'll be out some time around Halloween 2027?"
Q: Your lawyer came into the holding area early that morning?
Q: She sat down and talked to you?
Q: You were running through all of the things that you might say?
Q: And what might happen if you just pleaded guilty … what you might face?
Q: She said, "With the nature of the crime, expect the max?"
–Q: You expected to pick that jury at 10 AM in Judge Smith's courtroom on the fourth floor?
Q: You looked for a way out?
A: No.
Q: Well you weren't looking for a way into the trial were you?
A: No.
Q: So you looked for a way out?

Q: Your lawyer told you there are none?
Q: But they think you might have evidence on Bobby?
Q: They think you might know something and that might give me the leverage to help you?
Q: You paused and you paused and you paused. And you realized, the smart thing, the only thing was to point the finger at Bobby?
Q: Let's talk about this deal?
Q: You're saying that you played a major role and conspired to kill a police officer?
Q: That carries life without any possibility of parole?
Q: You got immunity?
Q: That means no prosecution?
Q: That means no charge?
Q: For all practical purposes, it was as if you were never even there?
Q: This armed robbery that you were going to do five to twenty years day-for-day, that got wiped away?
Q: That got downgraded to a non-violent felony?
Q: Like a purse snatching?
Q: Your lawyer went through the math with you?
Q: She went through that on zero to five, worse case scenario, you get the whole five?
Q: Sixty months?
Q: You can do that standing on your head?

You got the deal of the century!
(Chapter heading)

Sixty Months Isn't Really Sixty Months (Sub-chapter 1)

Q: Then your lawyer went through what sixty months really means when it's a non-violent charge?

Q: She went through that with good time, that knocks off twenty percent of the sentence?
Q: One year?
Q: You're down to 48 months?
Q: She told you that with work credit, here's the kicker: you don't even have to work to get the credit. All you have to do is not refuse to work and you get ten percent off of that 48 months, right?
Q: That becomes more than four and a half months off?
Q: You're down to 43 months?
Q: And that's before early release?
Q: Early release is for people with non-violent charges because we need the prisons filled up with violent offenders who waive guns at people and threaten lives?
Q: The early out for you "non-violent" guys is 50% off the 43 months?
Q: You're looking at 21½ months?
Q: This comes as no surprise to you?
Q: It might surprise the people in the jury box?
Q: But it doesn't surprise you at all?

Credit for time-served (Sub-chapter 2)

Q: You know that you get credit for this year you've been incarcerated?
Q: Every day?
Q: You have eleven months and counting as of today?
Q: If you get the maximum sentence from His Honor, the worst case scenario is that you'll miss the next fourth of July 2009 but you'll be home shortly after that?
Q: And you'll be home with no supervision?
Q: No reporting requirements?
Q: No parole or probation hassles?

Anticipat ed Sentence (Chapter Heading)

Q: It gets even better than next July, doesn't it?
Q: Because your lawyer is talking to you about this as the worst case scenario – coming home around baseball season?
Q: Your lawyer also talked to you about the best case scenario?
Q: The best case scenario is that as soon as this trial's over, your lawyer is going to turn to this same judge and say, "My client played a key role for the government. Another eleven months won't do him any good. He should be given credit for time-served and be released today?"
Q: And you expect to be released next week?
Q: And when you come in front of His Honor after this trial is over, you're going to walk in here and stand behind this podium?
Q: You're going to raise your right hand and swear to tell the truth?
Q: You're going to look His Honor in the eye?
Q: Just like you looked these jurors?
Q: Just like you looked that poor store clerk?
Q: And what are you going to say?
Q: You're going to say, "It's the honest to god truth judge, I wouldn't tell a lie. I won't get in trouble again. Release me today?"
Q: Are you going to say, "Judge, it's the absolute truth. I won't commit another crime?"
Q: Are you going to say, "Judge, you can bank on it. I won't be back?"

COMMENTARY

By breaking down the prior felony conviction, you have proven to the jury why it should not believe this witness because he has too much to lose by not taking this deal and conflating a story that falsely incriminates your client.

It is far more powerful than a bare bones or “soft” cross - examination that lets the witness off the hook by merely repeating what the prosecutor had already established on direct: that he is a convicted felon who served a four-year prison sentence.

This type of specificity is sure to leave a sour taste in the mouths of the jurors that this witness manufactured an elaborate story and tried to sell it to the police.

The way THE JURY FEELS ABOUT A WITNESS IS CRITICAL!

RULE NUMBER 18

The Triangle

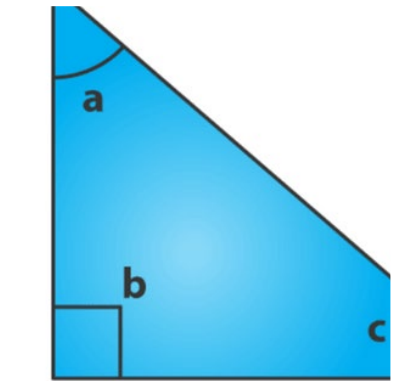
I'm fascinated with this concept of space and how we fill it both on-stage and in a courtroom.

FBI Special Agents are trained to make eye contact with the jury whenever they are testifying -- whether on direct or cross. This allows them to make a very strong connection with the jury.

The AUSA will usually position themselves near the jury well when conducting a direct examination so that the agent need only swivel their head ever so slightly to make eye contact w/ the jury.

What can we, as defense attorneys, learn from this?

When cross-examining a special agent, it is a good practice to create a right triangle with the agent at one point, the jury box at another, and you at a third. A right-angled triangle is a type of triangle that has one of its angles equal to 90 degrees.



Simplifying this, I try to stand on the opposite side of the courtroom from the jury box. That forces the witness to crane their neck and turn their head in a direction that is opposite to the jury box in order to look at me when I am asking the question. The agent is less likely to turn back to the jury box and face the jury when answering the question. Seasoned agents will still break eye contact with the attorney and turn back to face the jury when answering the question. However, in my experience, it does not happen with the same amount of frequency as when the defense attorney stands on the opposite side of the courtroom from the jury box.

RULE NUMBER 19

CROSS-EXAMINING A SYMPATHETIC WITNESS WHO BECOMES EMOTIONAL

Using sustained time and bound flow is useful when cross-examining a sexual assault victim or any victim of a violent offense who becomes emotional while testifying because it helps to calm them down. And if you combine this with asking leading factual questions, you'll get them into the left-side of their brain where there is more logic and less emotion.

Essentially, what we're attempting to do is to "shrink" the intuiting and feeling planets and to "grow" the thinking planet. Leading factual questions will do just that.

RULE 20

DEALING WITH THE "TRIGGER - HAPPY" ADVERSARY WHO ADOPTS A SCORCH AND BURN STRATEGY OF CONTINUOUSLY OBJECTING

Undoubtedly, there will be times when cross-examining an adversarial witness that you are "on a role" and/or you have the witness "on the ropes" only to be ambushed by a number of trivial objections lodged by your adversary. While couched in terms that make it seem like you have run afoul of the rules of evidence, your gut tells you that these "hand grenades" are being lobbed merely to disrupt your flow and to slow you down.

Don't ignore it. Your gut is right more times than not. Other times, frequent objections will make the prosecutor's strategy blatantly obvious even to the jury. Notwithstanding jury instructions to the contrary, it won't take long to see how the jury feels about them. The looks on their faces will say it all. And if you could read their minds, they would be saying, "Why won't that lawyer let the witness speak?" "What doesn't he want me to hear?"

Indeed, the "annoyance factor" created by this strategy can be so great that it turns the jury against your adversary.

But for those who would prefer to be proactive, there is at least one tool at your disposal to keep your adversary from getting too "trigger happy" and to send a loud message that you are not going to just sit back and take it.

To the extent that you can respond to these objections in open court while in the presence of the jury, my advice would be to couch your rebuttal in such terms that the jury can see that you are fighting for them to hear the truth.

Here's how that might look: "Your Honor, the Jury has every right to know …" or "Your Honor, the Jury should not be prevented from hearing …"

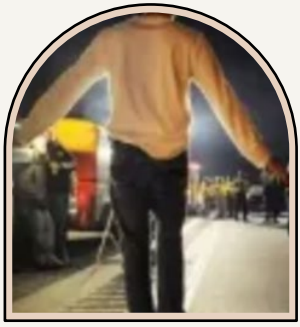
In this way, the jury comes to rely on you as a beacon of truth. You become the self-proclaimed, "knight in shining armor" taking the jury by the hand and leading them out of the darkness just like a lighthouse gently guides a wayward ship back to shore all while scoring precious points along the way.

FODDER FOR CROSS-EXAMINING THE ARRESTING DWI OFFICER

You represent John Doe who has been arrested and charged with driving under the influence of alcohol. Not unlike most defendants charged with DWI, the officer (Officer Smith) administered a roadside sobriety test shortly after stopping John.

For those unfamiliar with roadside sobriety tests, they are nothing more than a series of physical tests and observations allegedly designed to allow the officer to determine if the driver was driving under the influence of alcohol or narcotics.

One of the standard roadside tests is called the "heel to toe" test. In this test, the driver must walk a certain number of steps down an imaginary or real line, beginning with the foot designated by the officer. After taking the designated number of steps, the officer instructs the driver to turn around, begin with a designated foot, and walk another designated number of steps. All of this is to be accomplished with the driver's arms at his sides.



In his report, Officer Smith wrote in conclusory fashion, that "Mr. Doe failed the heel to toe test."

He cited the following error

"On steps four and five, Mr. Doe lost his balance and had to raise his arms to remain on the line."

Assume that John cannot refute this assertion. However, he challenges the notion that he "failed" the heel to toe test. He is also irate over the test being a valid indication of whether he was driving while intoxicated in the first place.

While this might appear to be a hopeless case, there may still be a great number of helpful facts or golden nuggets. A little bit of brainstorming can get the wheels inside your head turning so that you can discover them.

Here are some helpful tips for cross-examining Officer Smith, beginning with a study of the terrain where the test was conducted.

Was this test conducted on the side of a busy highway with 18-wheeler trucks zooming by at 70 miles an hour?

Was this test conducted on an uneven and unpaved shoulder of the road, or on gravel?

W as it light out or was it dark?

W as John asked to take his shoes off and walk barefoot?

If the driver was a female, was she wearing high-heeled shoes. Did her shoes remain on throughout the test?

Was it raining or snowing during the test?
Was the line real or only imaginary?

Did the officer keep flashing all of the lights of his cruiser during the tests such that it would have been nerve-wracking for anyone in a situation like this?

These and many more facts may be marshaled into one or more convincing chapters that demonstrate the difficulty for any driver of performing this test at this location.

The chapters concerning the site of the test and the conditions of the test do not even scratch the surface of the test itself.

For example …

If John was told to take ten steps before turning around and he did take ten steps before turning around, then he passed the memory part of the test.

If John was told to begin with his left foot and did begin with his left foot, then he passed that part of the test.

If John was told that after reaching the end of the line, he should turn to his left before coming back and he did turn to the left, then he passed that part of the test.

If John was told that after turning, he had to take five steps toward the officer and he did take five steps toward the officer, then he passed that part of the test.

The idea is to visualize the scenario in your mind's eye as vividly as possible in order to find those facts that can be marshaled together to form a coherent picture of "things done right by John."

This will undermine the incomplete picture painted by Officer Smith on direct examination.

The only caveat is that no fact by itself can create a complete picture for this story. For this reason, you must sift through all of the facts and isolate those that will help you to establish your goal.

The chapter method cross -examination is the perfect tool for doing so.

Moreover, it is naive to think that one goal is enough. As demonstrated here, there are several goals that can be accomplished by breaking down the heel to toe test into its individual parts.