



PROGRAM MATERIALS
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**Litigation Series: Session 16 -
Exposing the Expert: Advanced Cross-
Examination Skills - Part 1**

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- **Michael J. DeBlis III, Esq. - DeBlis & DeBlis Law Firm**

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

The Law Surrounding Experts

- Rule 702. Testimony by Experts: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case

The Law Surrounding Experts

- FRYE and DAUBERT tests.

Expert Opinion

- Expert Opinion
 - Four basic requirements for expert testimony to be admissible:

Expert Opinion

- An expert must have special knowledge, skill, training, education, or experience. Court has broad discretion to determine what constitutes such type of skill

Expert Opinion

- The opinion must be helpful or assist the trier of fact in understanding the evidence,
 - Appropriate subject matter: Means the opinion must “assist” the trier of fact. Subdivides into requirement that (1) the methodology must be reliable and (2) the opinion must be relevant (“fit” the facts of the case). Reliability and relevance (fit) are conditions to admissibility. This means that the proponent must convince the trial judge by a *preponderance of the evidence* that these conditions have been satisfied

Expert Opinion

- The witness must be *qualified* as an expert,
 - In other words, the opinion must be within the expert's field of expertise
 - Qualifications need not be formal or academic. An expert can be qualified based merely on experience

Expert Opinion

- Example: An expert truck mechanic who was qualified as an expert mechanic may not give an opinion as to the speed of two vehicles at the point of impact. That type of opinion is beyond the scope of the expert mechanic's field of expertise. To give an opinion on the speed of vehicles at the point of impact would require an expert on accident reconstruction, not an expert mechanic

Expert Opinion

- The expert must possess reasonable certainty or probability regarding the opinion,
 - “Doctor, do you have an opinion based upon reasonable medical certainty about...”

Expert Opinion

- Basis of opinion by expert
 - Issue: On what facts may an expert base his opinion?
 - Opinion must be supported by a proper factual basis

Expert Opinion

- Facts supporting the opinion must be either:
 - Facts w/in the personal knowledge of the expert; or
 - Testimony by a coroner (qualified as an expert witness) as to the findings of an autopsy. These would be facts perceived before trial and would be a proper basis for an opinion

Expert Opinion

- Facts that would not be within the personal knowledge of the expert but which could be supplied to the expert in court by the evidence usually through a hypothetical question; or
 - Facts about a fatal accident made known to the expert at trial despite her lack of personal knowledge.
 - “Assume Dr. Grosse that the following facts are true.” All of the facts in the hypothetical question must have been admitted into evidence

Expert Opinion

- An expert may base his opinion on facts (1) that are not within the personal knowledge of the expert and (2) that are not in evidence in the case as long as the facts are of a type that experts in the field would reasonably rely upon in making out of court professional decisions

Expert Opinion

- Hypo: Doctor hired to testify for P in a personal injury action based his opinion in part on a radiologist's report of what P's x-rays revealed. The witness doctor had never seen the x-rays. Neither the x-rays nor the radiologist's report are in evidence. May the doctor give his opinion? Yes. Doctors rely on radiologist's reports all the time in making out of court professional decisions.

Expert Opinion

- 705: Disclosure of facts or data underlying expert opinion
 - An expert need not give the reasons for her opinion on direct examination. However, she may be required to disclose such information on cross-examination

Expert Opinion

- 704: Opinion on ultimate issue
 - 704(a): An expert witness may give an opinion on an ultimate issue
 - Example: Testimony as to whether a testator had sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty would be a permissible area for expert opinion.

Expert Opinion

- But what if the expert is asked, “In your opinion, did the testator have legal capacity to make a will?” This would not be a proper question. Even though it goes to an ultimate issue, it goes well beyond what is permissible b/c it snatches the issue away from the jury. An expert cannot be asked to directly state whether the testator had legal capacity to make a will

Expert Opinion

- 704(b): Limitation on an expert's ability to give an opinion on ultimate issues in criminal cases
 - Severe limitation
 - An expert may *not* give an opinion as to whether a criminal defendant did or did not have a particular mental state constituting an element of the crime charged or a defense thereto

Expert Opinion

- Example: Murder case and the defendant pleads not guilty by reason of insanity. An expert witness may not be asked, “In your opinion, do you think that D was insane at the time of the killing?”

Expert Opinion

- Learned Treatise
 - Hypo: P sues D for damages claiming serious injury resulting from negligence of D. Injury is that P has extra hole in his head. “Gray’s Anatomy” on page 22 states that such a hole is bad news.
 - Q1: May P start out by reading text to jury? No

Expert Opinion

- Q2: May text be used to *impeach* contrary opinion by defense expert (that it is “normal” for a person to have more than one hole in his head)? Yes

Expert Opinion

- A learned text, treatise or article concerning a relevant discipline is admissible as an exception to hearsay if:
 - Testimony of your own expert that the learned text, treaty or article is authoritative,
 - Authoritativeness for a learned treatise is established by (1) expert testimony or (2) by judicial notice
 - It's the standard in the field: “Gray’s Anatomy is authoritative”

Expert Opinion

- Your own expert actually relied on the text or treatise that you want to put into evidence on direct or it was called to his attention on cross-examination,

Expert Opinion

- Admission on cross-examination of your opposing expert,
 - “Dr. Adams, are you familiar with Gray’s Anatomy? Do you consider it authoritative?”
If he answers “yes,” then you can use it

Expert Opinion

- Q3: May the text be offered for its truth? Yes, under FRE it is admissible for its truth as an exception to the rule against hearsay

Expert Opinion

– Limitations

- Expert must testify (at trial or deposition) unless judge takes judicial notice
- Treatise is admitted by being read to the jury. Text itself is n/ received as evidence unless offered by the adverse party

What does this mean for us in the courtroom?

- More motions before the trial.
- More questioning of expert witnesses.
- Real research into the science and the expert.

Challenging the expert

- Whether it's about their qualifications.
- The actual “expertise” they claim.
- Use MOTIONS - You may not stop the expert from testifying, but you can limit what they say.

Don't ignore investigating and challenging the expert

- Question their qualifications.
- There are three kinds of experts:
 - Highly trained,
 - Experienced on-the-job,
 - Questionable training or area of expertise.

Strategy Considerations



Preparing to Question the Expert

- Learn about the field
 - Inbau & Moensens, Scientific Evidence in Criminal Cases
- Use the phone
- Get TRANSCRIPTS
- Do some research
 - Check college textbooks
 - Read everything the opposing side's expert has written



Interview the Expert Yourself in the Presence of your Investigator.

Experts and Language

- Understand their language.
- Learn how to explain things clearly and concisely for the jury. When you can take a complicated concept and distill it into its simplest, most essential form, you turn confusion into clarity. While some might argue that oversimplifying information strips away important nuance and compromises its integrity, I see it as a way to make knowledge more accessible.



Experts and Language

- For example, I marvel at how astrophysicist Neil deGrasse Tyson can explain the universe to a broad audience by using clear analogies, breaking down complex concepts into simple terms, and highlighting the wonder of scientific discovery to foster understanding and appreciation for the cosmos.
- Avoid sounding condescending.

Basic Principles

- Regular cross-examination rules apply.
- Thorough preparation is important.
- Only ask leading questions.
- One fact for each question.
- Never ask a question if you don't already know the answer.
- Create a method that works for you.

Special Problems When Witness Is an Expert

- The expert knows more than you do.
- It's harder to control an expert than a regular witness.
- The expert will likely be well-educated and articulate.
- Expert is experienced at giving testimony in court.

Examples of Cross-Examination of Experts

- Forensic Pathologist in State v. Morehead
- Radiologist in State v. Carey
- Shaken baby syndrome experts in State v. Carey

Forensic Pathologist

- State v. Morehead (client accused of strangling grandmother)
 - The defense argued that the grandmother died from heart failure
 - Cross-examining the medical examiner was crucial to the outcome of the case
 - Examples of managing the witness and understanding the terminology

Experts on the Shaken Baby Syndrome

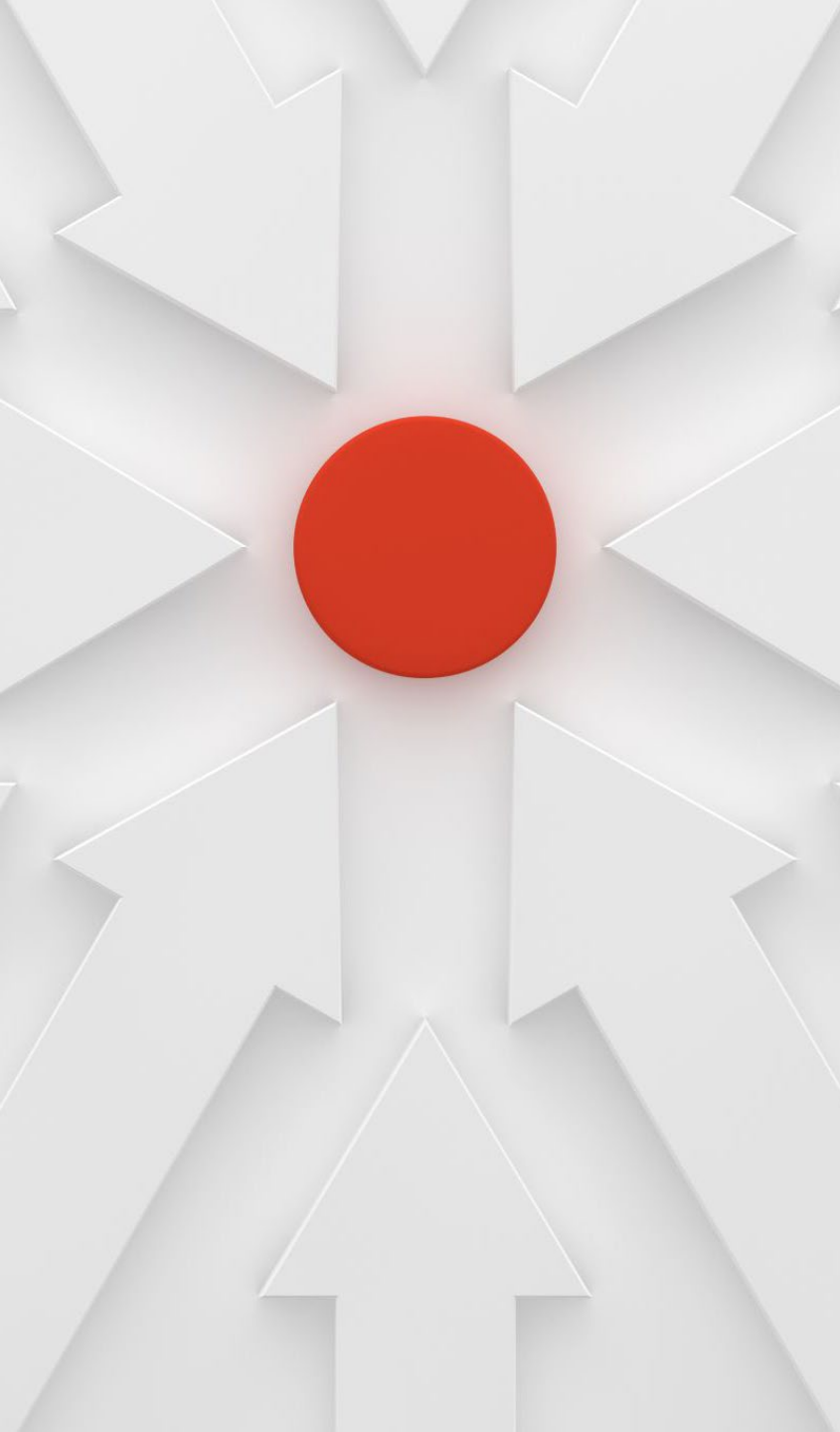
- State v. Carey (client accused of shaking a 5-month old baby leading to brain damage)
 - Several expert witnesses testified for the state
 - Cross-examination of radiologist who reviewed the CAT scan and the MRI
 - Cross-examination of an outside expert on the “Shaken Baby Syndrome”

Cross-Examination

- How should the jury feel about the expert after you are done cross-examining him?
 - Is this reliable science?
 - Can they trust the witness?
 - Can they trust the evidence?
 - Can they rely on the evidence presented?

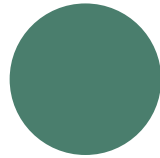
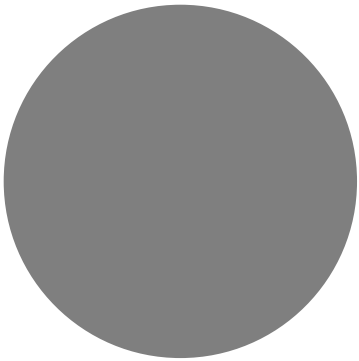
Check for Bias

- Who do they testify for?
- Follow the money trail.
- Membership in organizations.
- Personal biases they might have.

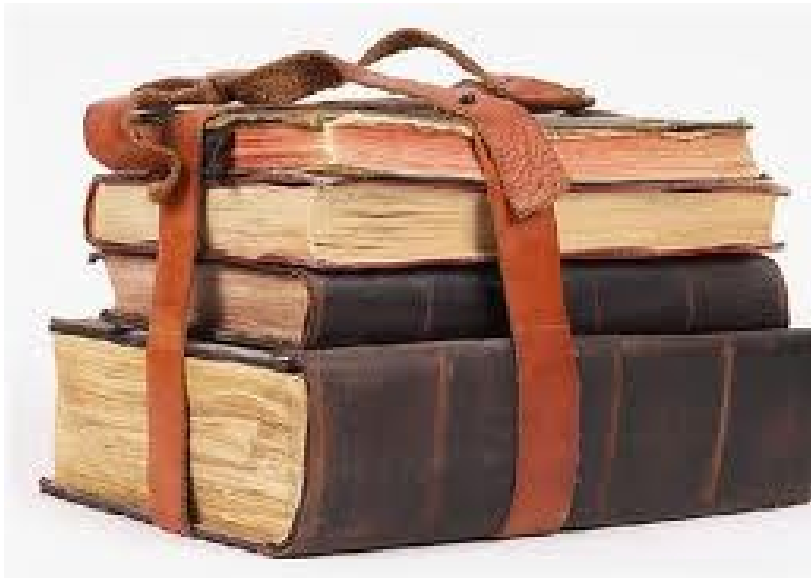
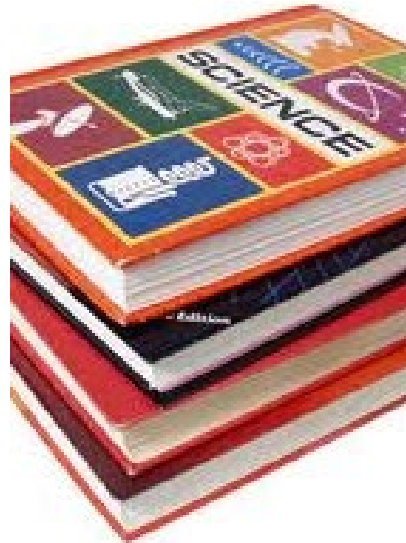


Challenging the Result

- “Things not done”
cross-examination
- Result is not OBJECTIVE
- Different levels of
certainty



Use helpful visual aids



Cross by
learned
treatise

Ten Principles for Preparing to Cross-examine an Expert

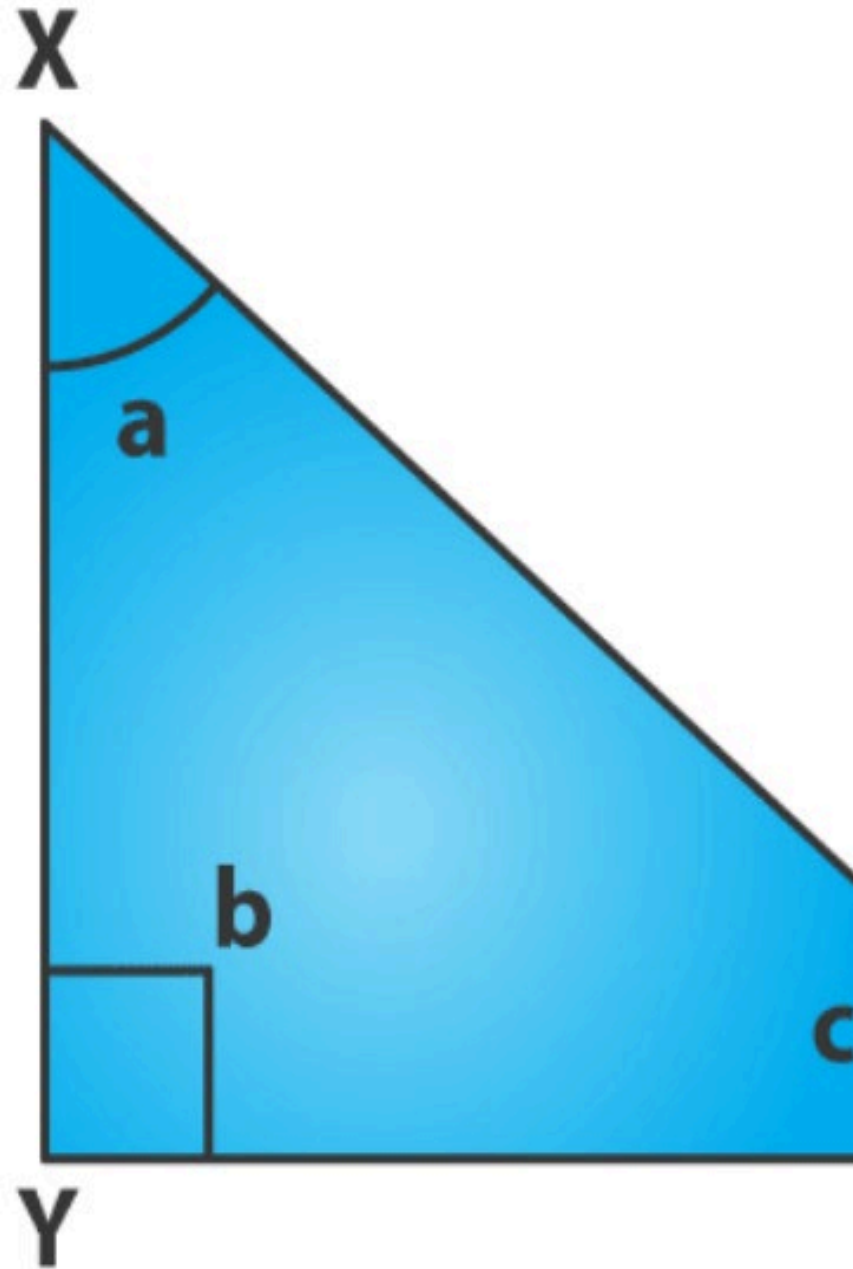
- (1) Identify opinions that need to be challenged.
- (2) Gather all necessary materials for cross-examination.
- (3) Get the complete CV of the opposing expert.
- (4) Look into the expert's past testimony.
- (5) Check for allegations of mistake or misconduct.

Ten Principles for Preparing to Cross-examine an Expert

- (6) Research relevant treatises and articles about the topic.
- (7) Hire an expert if necessary.
- (8) Meet the opposing expert before the trial in the presence of your investigator.
- (9) Learn the important terminology related to the topic.
- (10) Develop a system to organize your cross-examination (like a system based on chapters).

Cross- Examination & 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.



Cross-Examination & The Triangle

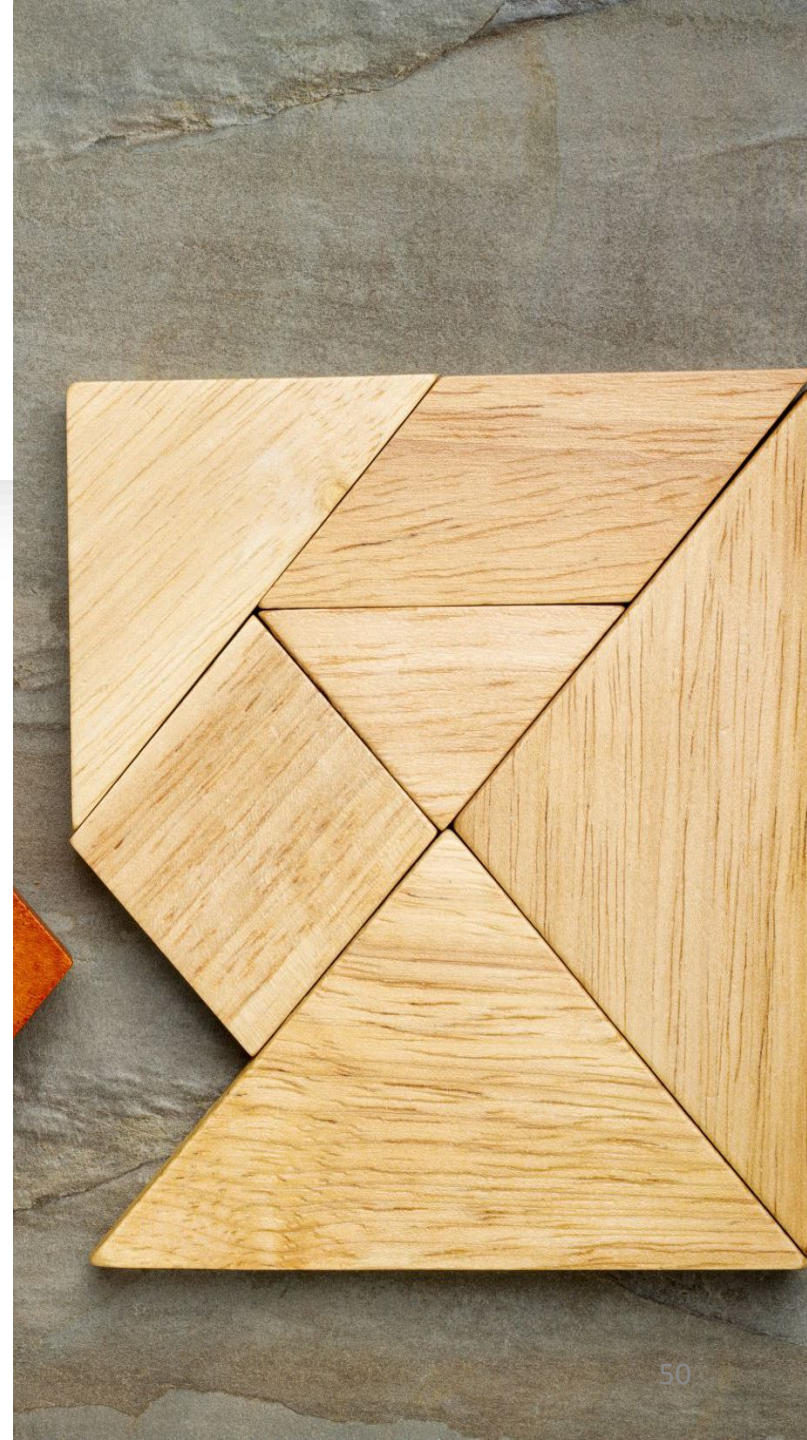
- The AUSA will usually position themselves near the jury well when conducting a direct examination so that the agent need only swivel their head ever so slightly to make eye contact with the jury.
- What can we, as defense attorneys, learn from this?

Cross-Examination & The Triangle

- 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.

Cross- Examination & The Triangle

- 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 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.



Cross-Examination & The Triangle

- 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.

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Contact Information

- Website: www.DeBlisLaw.com
- Email: MJDeBlis@DeBlisLaw.com
- Office: 973-783-7000