

TENNESSEE DISTRICT ATTORNEYS GENERAL CONFERENCE

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Presentation On

"Building a Pro-Active Cross-Examination"

PRESENTATION AND OUTLINE¹

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DISCUSSION NOTES AND DETAILED OUTLINE

My view of the job of a prosecutor in the courtroom is that when boiled down to its basic elements, the prosecutor acts as a salesman. However unlike a normal salesman, our prospective buyer (the defendant) has no genuine need for our product (prison time). In the business world the buyer says "no" to the sale and that is the end of it. In our line of work, we have the unique ability to continue the process.

Unlike a normal salesman, when the buyer says "no" to a sale, we get the opportunity to sell it to a third party, the JURY, on defendant's behalf. The beauty of that is that if they say so, he buys it - whether he likes it or not. How great is that???

It is in preparation for that ultimate sales pitch that we create and formulate our strategies and theories for our case and how the presentation of the proofs and evidence will support those theories. In many ways the most crucial part of the pitch is when we prosecutors cross-examine the defense witnesses. It is at this critical point in the process that we must emphasize our selling points to the jury by reinforcing our case theory while simultaneously rendering any opposing viewpoint as "just plain wrong." To accomplish this goal, the theories must be considered, defined and planned well in advance so that the theory will definitively lead the jury to force the defendant to buy our product against his/her will.

This process, as it applies to cross-examination, is discussed in this outline in the context of cross-examination as a prepared, planned and thoughtful component in the pretrial process of creating and developing the state's Case Theory and the destruction of the defendant's Case Theory.

¹ Many of the ideas and tactics referred to in this outline were developed by former Tennessee Assistant District Attorney General Jim Dedman, Director of Training for the NCDA and former Senior Training Counsel for the NCDA, Ron Clark. I have listened and talked to them both so many times over the years that I now have trouble distinguishing between what is mine and what is theirs. A special thanks also to Mike Rogers, formerly of the Cook County State's Attorney's Office, whose opinions and tactics I agree with, mostly because they are similar to mine, and whose ideas are also incorporated in this outline and presentation. Thanks for your friendship and the sharing of your ideas gentlemen.

OUTLINE OF PRESENTATION

I. Pretrial Planning

A. Know where you are and where you are going. According to Ron Clark cross-examination has two purposes. They are:

1. To bolster the cross examiner's case theory; and
2. To impeach

This outline and presentation will examine both purposes with an emphasis on pro-active cross-examination the purpose of which is to bolster the case theory.

Prosecutors often feel that they cannot prepare for the cross-examination of defense witnesses, regardless of the witness type: **fact, character, expert** or other. Nothing could be further from the truth. Prosecutors should take a page from the more ethical and better defense attorneys who do not make things up or level false accusations at investigators or witnesses. What they do is ask questions about what is **not** there...What is missing from the case.... What investigators failed to do during the investigation. Prosecutors can and in my opinion should do the same thing because they know more about the case and consequently can utilize this technique more effectively.

B. At the beginning of their careers Prosecutors are indoctrinated with two falsehoods. This early and incorrect indoctrination must be overcome. Both are equally false but we shall focus on the first of these "truisms." They are as follows:

1. Cross-examination of defense witnesses cannot be planned; it is strictly a reactive and situational approach; and
2. A Closing Argument can only be prepared after the case is over and all the evidence and testimony is in

Cross Can and should be planned

- Cross is **not** a separate entity
- It does **not** stand alone
- It must be viewed as part of the bigger picture (case theory)
- It should be constructed in a manner that helps develop your case theory and/or attacks the defense case theory
- Therefore, the only way to structure cross is to **pre**-plan your approach to the defense witnesses or prospective witnesses.

- The first time you think about cross of a particular witness **CANNOT** be when that person opens his/her mouth in court.
 - Even if you are experienced, shooting from the hip can get you in trouble and more importantly, get the jury lost. At a minimum you will forget to cover areas that you needed to cover in order to make a convincing and compelling case to the jury at the end of the case.
- C. To truly know where you are and where you need to go you must do the following:
1. Develop a case theory
 - Legal theory (the crimes charged)
 - Factual theory (facts coupled with motive that satisfy the *legal* theory)
 2. Closing argument outline
 - Look to this to assist you in your approach to cross
 - Know what it is you want to say when the time comes
 - What human values do you want to discuss?
 - What arguments must you make to support your case theory?
 - What arguments (if any) do you wish to make to detract from defendant's Case Theory?
 - Develop a process to obtain some of these points in your cross of the defense witnesses
 3. Construct a cross-examination
 - One which highlights and reasserts your case theory
 - One that detracts from or destroys the defense case theory
 4. To do all these things you must also construct a method of **communication** that will help convey your case theory and detract from the defense case theory in a subtle manner
 - Present your case theory in a manner that is easy for the jurors to understand
 - Present your case theory in a manner that strikes home with the jurors
 - Present your case theory in a manner that compels them to agree with you and convict the defendant

- D. Even in instances where discovery from the defense is *less than complete*, general areas of cross-examination can be considered and planned, only to be fine-tuned later when the specific humans and their specific failings (bias, criminal history, etc...) are made known to the cross-examiner. This can be done because defenses are limited

There are **ONLY** Three General Defenses to any Crime

1. **I didn't do it**
 - Alibi
 - Somebody Else did it
 - Prove it
 - Reasonable Doubt
 - Etc...
 2. **I did it but I was allowed to do it (legal excuse)**
 - Self Defense
 - Entrapment
 - Duress
 - Etc...
 3. **I did it but I was not responsible for my actions**
 - Insanity
 - Diminished Capacity
 - Passion Provocation
 - Other weasel hybrids (Twinkie eating, gay rage, urban combat syndrome, black rage, Facebook syndrome, sleep walking, etc...)
- E. Simply knowing which of these general defenses is going to be used tells you where you are and where you need to go. How you get there, depends on the theory of your case, the specifics of the defense used, the personality of the witness(es) (if known) and/or the witness-type confronting you. All will have a bearing on the manner of execution as well as the development of the approach that will best reinforce your Case Theory through your cross-examination of the defense witnesses.
- F. Set realistic goals

This is not TV or the movies. While it ***might*** happen once in your career if you are lucky, witnesses and defendants do not, as a rule, break down after 3-6 minutes of improper, but as usually portrayed, brilliant questioning, by the cross-examiner into a drooling, crying, pathetic mass of humanity and confess their sins and beg forgiveness for having committed the crime.

1. Assess your case theory v. the defendant's case theory
 - a. the ground between the two is fertile for exploitation
 - b. to assert their position in a manner that contradicts your Case Theory there are things they must say and therefore things they must agree to when asked or risk sounding like the liars they are
 - c. based on their positions (at the risk of making Thomas Jefferson roll over in his founding father grave) certain truths (or in the case of defense witnesses, lies) are self-evident
 - d. therefore, the approach should be one that begins with these self-evident points, which should be approached in a concession-based cross-examination. That process is the **Approach Point Method**.

PROACTIVE CROSS EXAMINATION

- II. The Approach Point Method applied to Theory Based Cross-Examination
 - A. The entire process stems from the idea that the trial prosecutor must continually ask him/herself the same question repeatedly when conducting an analysis of the Case Theory. That question is **"If what this witness says is true, what else must be true?"**
 - By asking this question ... " the prosecutor can develop an expansion of the reasonable inferences, often to the point of improbability, which can be used to point out the flaws in the defense Case Theory."²
 - "The assembly of the inferences into short, concise facts, becomes the framework for the 'Approach Point' method."³
 - B. In developing the questions for the defense witnesses the prosecutor must determine in what manner each defense witness can bolster the state's Case Theory?
 - To facilitate that process the prosecutor should continually ask additional questions. The primary one is... **"What must this witness concede about the state's Case Theory?"**

² "Approach Point Cross Examination" by James M. Dedman, pg. 1

³ Id.

- What do they risk if they fail to concede the point?
 - Appearance of bias
 - Sound like a Liar
 - Look Foolish
 - All of the above
- Do I even care which answer they give?
- Whether it is a "yes" or "no" response where am I going next?

C. In many cases concessions from defense witnesses prove more convincing than direct evidence presented by the prosecutor.⁴

- Concessions are easier to obtain from your adversary's witnesses than admissions of lying or culpability
- For that reason they should be obtained before any attempt at impeachment
 - A witness attacked at the outset is not a happy one
 - It is difficult to get in the face of a witness, earn their scorn (especially if you score and make them look silly), and then ask them for even simple concessions.⁵

D. Organization is the key. So, the areas to be covered should be planned and listed on work sheets that should include

- Your argument to the jury
- The theme
- The heading (topic)
- Fact points listed
- The source for those fact points
- Exhibits relating to those points⁶

E. These areas should also be developed in a manner that allows for different answers to the same question and a set of questions to follow each option.

As Ron Clark describes it, these topics take the form of “*trees*”

- An answer of "yes" to a question leads you to questions on one branch
- While an answer of "no" to the same question leads to questions on a different branch

⁴ Id.

⁵ Id., at pg. 4

⁶ Id., at pg. 4

- F. All of these factors must be considered within the overall framework of the Case Theory for both the state and the defense

When reduced to the short and concise facts or “*fact chunks*,” this method allows the prosecutor to get information that supports his/her Case Theory and detracts or destroys the defense Case Theory thereby approaching the ultimate argument.

III. Execution of the plan

- A. Many things must be considered before execution of the method

1. How many witnesses are there and of what type?

- a. **Witnesses of same type:** If they are all fact witnesses then a repeat of your method and manner with the first witness may be successful technically but runs the risk of alienating the jury who may get bored or think you are a one-trick-pony
- b. **Method of approach:** Vary your method of approach to suit the witness or vary, at least in part, some of the content so as to avoid becoming monotonous
- the approach should depend upon the witness’ point of view- hostile, friendly, somewhere in between.
- c. **Voice and Demeanor**
 - Your voice is a tool, an asset in trial, use it, vary it.
 - No one tone (angry, nice, sarcastic or professional) is appropriate for all witnesses.
 - Each witness is different and since your approach and questions vary, so should your demeanor
 - Speak to a witness as the jury thinks you should
 - Try and read them. You do not want to score points by beating up a witness only to look over in triumph and see them shaking their collective head at you in disgust (*I know, I have been there*)
- d. **Exhibits:** a good way to vary approach and other style elements is to use exhibits, especially if you can manage to use different exhibits with each witness. This technique can assist immeasurably if you have multiple witnesses of the same type and are bound by your facts to approach in the same manner.
- e. **BREAK IT DOWN///BREAK IT DOWN///BREAK IT DOWN///BREAK IT DOWN///BREAK IT DOWN!!!!**

Regardless of the witness, his/her demeanor, knowledge or value, an absolute “**must**” in this process is to break down your questions to almost ridiculously small fact chunks. Do not underestimate the power of multiple consecutive "yes's" or, occasionally, "no's" from a witness in winning over the jury and even a hostile witness by what seems to be sheer force of personality when in reality it is just planned questioning

- Never be satisfied with just one question on a topic
- Ask **four** (4) questions where you think **one** (1) will do
- Repetition brings home the point and you are not allowed to ask the same question twice so break it down and include the answer and/or your previous fact chunk in the next question (see section IV for examples)
 - This will help the jury to understand your point(s)
 - This will help the jury to follow your lead and begin to anticipate your questions and begin to look for answers from the witness that make sense.

IV. Witness Types:

A. **The Big Three:** It has been my observation over my career that witnesses, particularly defense witnesses come in three basic flavors

1. Fact Witnesses

- Say they saw what happened
- Participated in what happened
- Saw the aftermath
- Present when discussion occurred before the crime
- Saw defendant elsewhere at time of crime
- Spoke to defendant and knew what was on his mind
- Etc.....

2. Expert Witnesses

- Not present at the crime
- Monday morning quarterback
- Scientific models etc... to follow
- Ethical considerations
- Written opinions
- A background to examine
- A body of work to examine
- Etc.....

BRING IT BA-BEE!!!

3. Quasi-Expert Witnesses (personal favorite)
 - Not present at crime
 - No specific expertise or degree
 - Usually not law enforcement personnel
 - Trying to testify about things in a case generally, that they have no business testifying about
 - Etc.....

NOTE: Demand statements or investigator notes or reports with regard to defense witnesses.

- Where no statements or reports exist, demand proffers of their testimony
- you are entitled to this
- Always interview these witnesses before they take the stand, even if it is outside the courtroom right before they take the stand.
- Do not be afraid to send your detectives to speak to defense witnesses even if they are defendant's family.
 - If they speak to your detectives, you have **information**,
 - if they refuse to speak to your detectives, you have **ammunition**.

B. Approach Point Examples

Fact Witness: [Example of series of "no's"] Gratuitous comment by relative of D that juvenile witness was questioned outside presence of his mother despite evidence to contrary and because statement was damaging to D.

- He gave a statement?
- His signature at end?
- His initials on each page?
- **A: the one you say he gave when he was 16 and without his mother being there**
- Did you just say without his mother being there?
- **A: Yes**
- Were you there?
- **A: I was on my way home by then**
- Were you in the police station?
- **A: No.**
- Were you there when he arrived?
- **A: No.**
- Were you in the room when they spoke to him?
- **A: No.**
- Were you there when the detectives interviewed him?
- **A: No.**

- Were you there when the detectives took this? formal statement from him?
- **A: No.**
- Were you there when people went in and out of the room?
- **A: No.**
- Were you there when he was given the opportunity to review the statement?
- **A: No.**
- Were you there when he signed the statement?
- **A: No.**
- Etc...

Fact Witness: Mom and an alibi (Many of us are told to never cross Mom. I say that is ridiculous...exploit the obvious)
 - she won't admit she is lying, so probe her bias.

How *not* to do it:

- You are the defendant's mother?
- You love him very much don't you?
- You would lie for him, wouldn't you?
- You would do anything to see him walk out that door, wouldn't you?
- No further questions!!!

AWFUL!!!

An example of a better approach by breaking it down:

- D is your biological son?
- Cared for him when he was a baby
- Nursed him when he was sick or hurt
- Took care of him when he was sad
- Made him feel better when he was scared
- Loved him through all of it
- Single Parent most of D's life
- All of his raising was on you
- You lived with your son
- Your mom was there too
- But it was you that raised your son right?
- Helped him with his homework
- Helped him with his problems
- Took him to his sports practices
- Took him to his games
- Watched his games

- Protected him from people and problems as best you could
- Helped him when things went wrong
- Did all you could because you love him

- As he got older, you taught him things
- Good v. bad
- right from wrong
- did all you could but like kids will do, he did not always listen
- did not always follow what you taught him
- he got into trouble
- you still loved him
- you did what you could for him
- forgave him and moved on
- he is your son after all

- Even as an adult you are very much involved in his life
- You are still close
- Fair to say you two are very close
- You help him care for his child
- He depends upon you
- Even in this case, you spoke to police on his behalf
- You spoke to old teachers and coaches on his behalf
- You have tried to help him through this
- You are his Mom and love him no matter what
- ...**He... relies** upon your... **help** and **support when he needs it**

[What is she going to say? “No?”]

Better, because now you can make mom a good person and hero while calling her a liar!

Alibi Witnesses

In most jurisdictions there are rules regarding a requirement for notification of this defense in advance of trial. But if your jurisdiction is like most others, then you know that is more of a “guideline” than a rule. One way to deal with the defense is to send your investigators to meet with the witnesses. Arm them with questions that you want posed to the witnesses. If they agree to speak to the cops, great, you get insight into their demeanor, manner of speech and the extent of their knowledge in some detail. If they refuse – even better.

When attacking them for refusing to speak, there are no hard and fast prohibitions. However, when attacking for failure or delay in earlier reporting of the alibi, some states have restrictions:

- W must be shown to have been aware of the nature of the charges;
- W must have had reason to know he/she possessed exculpatory information;
- W had reasonable motive to act to exonerate D;
- W familiar with means to make information available to law enforcement;
- W not silent on advice of D counsel.

NOTE: These factors may have to be established in 104 hearing prior to cross examination.

W Will Not Speak to Cops & Delay in Reporting of Alibi

- You spoke to police when they first came to your home one year ago
- You spoke to police several times after that when they contacted you to speak to your son
- You contacted the police on your own on occasion to check on the progress of the case
- You wrote the county prosecutor complaining that no one had spoken to you about this case even though you had already spoken to
 - Ptl. Smith
 - Det. Jones
 - Sgt. Brown
- You spoke to all three on more than one occasion but wrote a letter complaining that no one spoke to you.
- You knew that police were investigating the crime b/c you spoke to them.
- You knew how to get in touch with them b/c you called them on more than one occasion.
- You knew your son was home on the night he was accused of committing this crime.
- You didn't want your son charged with this crime.

- You tried to help him by talking to police and the Prosecutor's Office on several occasions.

-
- One month ago you signed an affidavit claiming your son was home at the time of this crime
 - One week before trial, when this information came to the State, detectives came to your door to speak to you to find out what information you had to support your son's alibi
 - To find out what information you had to show your son could not have committed this crime
 - You had been talking to the police for a year
 - You had written a letter complaining that police had not spoken to you
 - A week ago, your complaint was addressed when police came to your home to speak to you
 - But when they came to your home last week you did not speak to them did you?
 - In fact, you refused to speak to them
 - You then called them and said you would get back to them
 - They did not hear from you for several days and called you back right?
 - And when they reached you on the telephone, you told them a SECOND time that you were not going to speak to them didn't you?

Defendant On Alibi

Check your rules because in some places the notice of alibi by the defendant can only be used in certain circumstances. When the defendant takes the stand, any failure to name the person he/she claims to be the alibi in the original notice should be fair game for cross-examination

- Just a few minutes ago you said that "Born" was the person you were with on Friday, January 5, 20xx.
- You said here that he was with you for several hours, correct?
- And that you were drinking and playing pool.
- That you left his place and went to a bar and hung out together.
- You have known him for a long time.
- You two are friends
- You are good friends
- This night stands out in your mind
- It is clear and unquestioned to you
- No mistakes about times or who you are with
- Certain!

- Let me show you what has been marked S-49 for identification – this is your affidavit in support of your alibi notice for the evening hours of January 5, 20xx is it not?
- It consists of 9 paragraphs correct?
- Your signature is on the last page correct?
- And if you take out the first couple of paragraphs and the last one, there are about 6 paragraphs that deal with where you were that night correct?
- Go ahead and count them – 6 right?
- In those paragraphs you say where you were
- You say who you were with
- You say what you did
- There are even two names listed in those paragraphs aren't there?
- A "MyGod"
- And "Flirt"
- You signed your name to this taking an oath that what you wrote in it was the truth, correct?
- Is "Born's name in paragraph 3 - yes or no
- Is "Born's name in paragraph 4 - yes or no
- Is "Born's name in paragraph 5- yes or no
- Is "Born's name in paragraph 6 - yes or no
- Is "Born's name in paragraph 7 - yes or no
- Is "Born's name in paragraph 8 - yes or no
- "No"? *Where* in this document does his name appear?

Character Witnesses

Attack them on their lack of knowledge of the crime itself or how the defendant acts outside their presence.

- The D works for you correct
- You do not socialize right?
- You have never been to his home for dinner have you?
- You have never had him to your home for dinner?
- He has never met your children
- He has never met your husband
- You do not know nor do you have any basis of knowledge as to how he acts late at night after drinking because you have never been with him correct?
- You do not know nor do you have a basis of knowledge about what he would do in that circumstance or what he is capable of doing in that circumstance do you?
- Your assessment of him and belief of his reputation is based upon what he acts like when he is at work and nothing more, isn't it?

Defendant's Criminal Record

Take the opportunity to not just list his/her crimes, but explore the thought process of D's actions:

- You were convicted of the crime of possession of narcotics on May 10, 200X
- The illegal substance you possessed was heroin correct?
- Now back on May 10, 200x you knew it was illegal to possess heroin correct?
- You knew that it was **WRONG** to do that correct?
- Yet, knowing that it was wrong to possess heroin didn't stop you did it?
- You understood that it was illegal to possess the heroin but you did it anyway, correct?
- You had a choice to make and when given the opportunity to choose right over wrong, you chose "wrong". correct?

Expert Witness:

Some prosecutors try to become the expert. I am not that bright nor so quick a study as to be able to do that. Therefore I subscribe to my own method which is to **not** do battle on their ground but on mine. I cannot trade psych terms and meanings with a psychiatrist even if the Doctor is an idiot from my perspective. Consequently, I cross them on what I know better than they do; **the facts**.

Interestingly, even Francis L. Wellman in his classic book *The Art of Cross-Examination* seemed to agree with this method. In a section of the book where he replicated witness cross-examinations that he admired, he printed one cross of an expert that he himself conducted when he was a prosecutor and in the preamble noted that with the expert confronting him, he could not "joust" with him in his area of expertise so instead approached him on more familiar ground; the facts of the case. By cross-examining the expert on the facts of the case, Wellman realized that he had exposed the expert's lack of intimacy with the case. This in turn, undermined the expert's credibility. Since his knowledge of the facts of the case was suspect and they were the foundation for his opinion, by extension his opinion became suspect as well. In that case, the expert acknowledged as much.

Example of cross of an **expert**: Psychiatrist for schizophrenic and delusional defendant who pulled out knives in a post office and stabbed his sister 33 times and claimed insanity

Not this way:

- Dr. you say that b/c the defendant when he stabbed her did so while saying he would see her in the “Cosmos” as well as his history of schizophrenia and delusions and his claim to be possessed by a judge at the time makes him legally insane?
- That’s it?!!!! (said with anger and disgust)
- You maintain that position even though he carried the knives in his pocket for 45 minutes before that?
- No further questions (even more anger and disgust)

An acceptable approach by breaking it down:

- Dr. you say that the defendant was suffering an acute schizophrenic episode and was operating under a fixed delusion when he stabbed his sister right?
- That his fixed delusion was that a judge possessed him and ordered him to kill his sister right?
- That this fixed delusion was “unshakable”, that was the word you used, and therefore he was legally insane in that he could not control himself and did not know right from wrong, correct?
- He couldn’t control himself right?
- He was compelled to do what he was told

- This acute episode did not begin at the place where he stabbed his sister right?

- He actually said the judge possessed him in his apt. prior to his sister's arrival correct?
- This was some time before the actual attack downtown at a post office wasn’t it? At least an hour right?
- It was in the apt. *after* the judge possessed him that he went into the drawers and pulled out the two knives that he eventually killed her with correct?
- It was in the apt. before her arrival but after the judge possessed him that he took the knives from the drawer correct?

- ... **but** upon her arrival there he **did not** stab her, did he?
- No, he secreted them in the pockets of his winter coat correct?
- Despite the acute attack of schizophrenia as you described it and suffering from the fixed, unshakable delusion of being possessed by the judge and compelled to kill her, he did not stab her on the way down the stairs did he?
- He did not stab her on the way out the door of the building did he?
- He did not stab her on the way to the car did he?
- He did not stab her in the car while she was driving him downtown did he?
- He didn't stab her as they got out of the car did he?.....
- He didn't stab her when the post office was full of customers did he?
- No, he stabbed her when all the customers but one elderly woman had left correct?
- He stabbed her after he raised an ongoing argument with her about her insisting on having the baby she was pregnant with and after she refused to get an abortion and abandon her fiancée, whom he did not like b/c he was an illegal alien, correct?
- It was then that he pulled out the knives and attacked her correct?
- It was then that he stabbed her correct?
- He was operating under that unshakable, fixed delusion - compelled to move forward?
- You said he could not control this because of his delusion correct?
- He was compelled to do it and could not tell right from wrong at this point correct?
- People banged on the windows and the clerk begged him to stop but he didn't right?
- Despite multiple attempts by people to distract him he stabbed his sister again and again and again right?

- **But...** when a man ran into the office, identified himself as a cop and threatened to blow his head off – *despite* this “**fixed delusion**”, he stopped and dropped the knives didn’t he?
- He responded to the order of a police officer didn’t he
- The police officer was real and not a delusion correct Doctor?
- The threat by the police officer was real and not a delusion correct Doctor?
- Etc.....

Psychologist on Insanity

- Your assessments of a crime are based on the information you are provided – the discovery, correct?
- But to determine the state of mind of the D at the time D committed that crime, you must speak to the D, correct?
- You tell D who you are and that you are there b/c D’s attorneys asked you to evaluate him and that your opinion is for Court pertaining to his charges, correct?
- And they you speak to him and from that time together talking, you make conclusions regarding his state of mind at the time of the crime, correct?
- To make a proper assessment, you need the D to answer the questions honestly and hold nothing back, correct?
- It is important that D tell you the truth, correct?
- In your personal and professional life people have lied to you, correct?
- Sometimes you have realized they were lying, correct?
- Sometimes you have not realized they were lying, correct?
- Persons you have evaluated over the years have lied to you as well, correct?
- Even though you told them the importance of frankness?
- You have not always known when persons you were evaluating were lying to you, did ya?

Addiction Evaluation “Expert” [similar approach]

- Addiction Evaluation is not an exact science is it?
- I mean, if I say my leg is broken, a medical doctor can take an x-ray or a MRI and objectively determine with hard science that it is broken or it’s not right?
- If I feel ill and think I may have an infection, a Medical Doctor can take my blood, do a test and tell if I have an infection or not right?
- If I tell you I am addicted to Blue Popcicles a Medical Doctor cannot prove that in the same way can he/she?
- No x-ray will confirm that I am addicted to Blue Popcicles
- No MRI will confirm that I am addicted to Blue Popcicles
- No blood test will confirm I am addicted to Blue Popcicles
- No urine test will confirm I am addicted to Blue Popcicles
- Similarly, assuming for argument sake that I am addicted to Blue Popcicles, no test or x-ray can determine the “extent” of my addiction can it?
- Your determination about addiction is not based on such medical or scientific tests correct?
- Your determination is based upon your analysis of information provided to you about the subject’s addiction, correct?
- Accurate information is important, correct?
- If a subject gives you exaggerated, incomplete or false information it would necessarily adversely affect your opinion correct?
- Bad in, Bad out, right?
- Essentially, in this case, the basis of your analysis was information obtained from *one source and one source only*, correct?
- ... (drum roll please)
- That source is the D correct?
- The same D who is on trial and charged with possessing 1.5 ozs of cocaine with intent to distribute
- The same D who hired you to testify as an expert in this case on his behalf right?

- The same D who knew when you interviewed him, because you told him, that the purpose of the interview was for him to provide you with information so you could evaluate him and offer an opinion as to whether he was addicted to cocaine and if so, to what extent, right?

D Forensic Pathologist: Find the common ground between D's expert and your Medical Examiner and have the D affirm as much of the ME's findings as possible and then emphasize that only one of them actually had the body to study.

- Doctor, you read the report of the ME, Correct?
- You agreed with the ME that:
 - The victim had bruising on her face, arms, legs, buttocks area and neck
 - The victim had ligature marks around her neck
 - The victim had corresponding hemorrhaging in the tissue under the marks
 - The victim had no evidence of injury to her breasts or vaginal area
 - No evidence of sexual activity – consensual or otherwise
 - That the cause of death was asphyxia due to manual strangulation combined with manual blunt force trauma to the head and face causing subdural hematomas contributing to her death
 - You agreed with him on all these findings, correct?
- You wrote in your report that the ME's report was "thorough," correct?
- The ME concluded and you agree that the manner of death was homicide, correct?
- NOW, you were not there 3 years and 2 months ago when the ME performed the autopsy, correct?
- You were not in the room, didn't see the body, didn't touch or examine the body, correct?
- Not present when photos were taken?
- Not present when items were secured from her body?
- Not present in the removal of her clothing?

- Not present and did not participate in external examination?
- Not present and did not participate in internal exam?
- Did not participate in dissection of her throat or examination of the actual tissue?
- You did not request or perform your own autopsy back then, correct?
- And you did not ask to or actually examine the victim's body 6 months ago before you wrote your report, correct?

D witness – I never said that, the cops wrote those words

Utilize the language of the statement itself, the word choices and phrasing – read it word for word where appropriate.

Q: You testified that the answers in this statement were not given by you, that the police wrote that language in there, that you didn't answer any of those questions correct?

A: Yeah

Q: Look at the second question and answer on page three. It reads as follows: "Question, who lives in your house...Answer, me, my cousin, my mom, my aunt, my grandmother and sometimes my cousin's baby

Q: The cops made that up?

A: Yeah

Q: Look at this question and answer on page 4 of this statement, which reads as follows: "Question, what kind of gun did you see your cousin with that day...Answer a 'Desert Eagle'"

Q: The cops made that up...they chose to put a gun in your cousin's hand and picked a "Desert Eagle"?

A: Yeah

Q: See a lot of those around the City of Chattanooga, Do ya?

A: [Who cares?]

Crossing on Criminal Record

- Don't just throw it out there
- Take your time, *savor it*

D Witness

- You have a criminal record sir do you not?
- You have been convicted of a criminal act haven't you?
- In fact you have been convicted of several criminal acts correct?
- In fact you have been convicted of several criminal acts on several occasions have you not?
- (Think about asking them to list it – then “remind” them of those they forgot)
- On January 14, 199x you were convicted on Ind. No. xxx for the crime of *Immoral mayhem upon a cat* correct?
- You received 5 years in prison as a sentence for that correct?
- Etc...

The Quasi-Expert: Public Defender Investigator examining a crime scene:

No:

- You examined the scene and *you* (ha, ha, ha) found it to have been inadequately documented and diagrammed?
- *You* were never a cop were you?
- I didn't *think* so (utter disdain)
- I'm done wit dis witness Judge

Yes:

- You said you are an investigator for the state, dincha?
- But you don't work for the State Attorney General's office Criminal section do you?
- You don't work for any part of that office do you?
- You don't work for the Prosecutor's office, do you?
- You don't work for the municipal police department do you?
- You are not a law enforcement officer at all are you?
- you have responded to what?, 100 or more crime scenes at the time the crime was reported?
- 50 crime scenes when the crime was reported?
- 10 crime scenes when the crime was reported?
- Okay then you just reported to this one crime scene when the crime was reported?
- No, well then you went there the day after?

-a week later?
-a month later?
-six months later?
-a year?
- Etc.....

Flight by the D

- After the victim was hurt, you did not stay there did you?
- You did not wait around to see what would happen next?
- You did not wait to see if help would arrive?
- You did not wait to see if the police would arrive?
- You did not hang around nearby did you?
- You did not stay within a block of two did you?
- You did not stay within several blocks did you?
- You did not even stay in the same town where this happened did you?
- In fact you went to a different state didn't you?
- You went to Florida didn't you?
- You went there that very night didn't you?

The shooting was accidental

- You were out with the victim all day long
- You did not have a gun during any of that time
- You gave the victim drugs
- You expected payment for those drugs
- The V kept delaying your payment of those drugs
- She drove you all over Hamilton County that day
- After about 6 hours, you still had not been paid, nor had she agreed to give you her car to use correct?
- You were not angry at that point?
- You were not annoyed at that point?
- You were not ready to force the issue?
- Didn't you feel as if she was "playing" you at that point?
- After 6 or so hours you were back in Chattanooga, correct?
- You asked her to stop off at your home correct?

- You went inside of your home then.
- Before leaving your home, you got the gun
- You had not had it with you all day but now you took it with you correct?
- You put it in your pocket correct?
- You didn't tell her you had it did you?
- You then got back in the car
- You got in the back seat
- You told her to drive to the lot
- You gave her directions as she drove through the streets
- You told her to turn into the dirt lot
- You pulled out the gun
- You had the gun in your hand
- No one touched you or the gun when it was fired
- You had your finger on the trigger when the gun was fired didn't you

I wanted no part of this

- You say you wanted no part of this crime?
- You live in Millington
- You were with your girlfriend
- Your Co-D called you
- He said he wanted you to go to Memphis with him
- He said he wanted you to help him take care of some business
- You said you knew that what he meant was shooting someone
- You agreed to go
- You knew he was planning on shooting someone and wanted you to go with him and help and... you went anyway.
- You knew he was going to participate in a crime, the shooting of a person, and wanted your help and you agreed
- You didn't just agree to go, you actually went
- When he got to your house, you didn't say you changed your mind
- You didn't make up some excuse about a sick relative or friend or that you yourself were ill and could not go did you?
- No, you went.

- You traveled with him from Millington to Memphis
 - You met with other people
 - The person who was to be shot was described
 - You were told where the V could be found
 - You didn't leave then did you?
 - You didn't call a cab then did you?
 - You didn't call a friend for a ride away from all that did you?
 - You didn't just up and leave the house and walk away from the whole idea did you?
 - You and three others got in a car
 - You drove to the area where you were told the V could be found
 - You got out of the car
 - You didn't leave then did you?
 - You didn't look for an excuse to not participate then did you?
 - You were handed a gun
 - You were handed a .45 semi-automatic handgun
 - You were handed a loaded .45 semi-automatic handgun
 - You did not say "no" I don't want it did you?
 - You did not put your hands in your pocket and refuse to hold it did you?
 - No, you took it and walked with the others in the direction of the V
 - You and the others walked to the area where you were told the V could be found
 - You had the gun in your hand
 - These are the actions you admit you took
 - These are the decisions you admit you made
 - Etc...
-

REACTIVE CROSS-EXAMINATION:

Realize that there is no clear-cut separation between conducting a proactive cross-examination and a reactive cross-examination. It is not as if a whistle is blown and the judge yells out "time" and you change tactics on that signal. The use of Reactive cross-examination techniques may never be necessary or even appropriate with some witnesses and with others; it is all you will do because the proactive techniques prove fruitless.

Definition: The NCDA defines reactive Cross-Examination as the technique for listening to and reacting to the testimony of the witness or reacting to the witness him/herself.

- I. **What are you reacting to?** The focus on what you are reacting to will determine how and what you will do.
 - A. The content of the testimony that the witness has delivered
 - B. The Witness him/herself

Reacting to the Content: ask yourself some questions

- Did this witness say anything that mattered?
- Did the W say anything that hurt my case or legal theory?
- Did they throw me a curve or go down a rabbit trail?
- ...why was it put to the jury?
- ...even though a rabbit trail, is it worth pursuing to its ridiculous end in hopes it will render the W incredible
- Do I have Ws or evidence to contradict this testimony
- ...if so, should I bother with impeachment or rebuttal
- ...etc...

1. Hurtful information

a. **More than one story from different witnesses:**

Info that contradicts or casts doubt on a fact necessary for your case theory. This you must combat

- if no prior statement exists to hurt this witness decide whether this story jibes with other defense witnesses or what D has said or you believe will say.
- This can be just as valuable
- If contradictory to other defense witnesses ...draw it out and let it finish

- In closings point out that as a group the D and/or his Ws not only lie but they don't even do it well
- In short... two, three, four or more different stories all, if true individually and corroborated, might hurt you but when presented by the defense collectively... all it can do, if you point it out, is hurt them and their credibility.... Negation.

b. **One story by one witness:** You have done your homework on this W and thus you know whether you can impeach this W with a prior inconsistent statement or contradict him/her with rebuttal testimony.

Impeachment: be careful to not be so slick with an impeachment that only you notice it. (been there)

Make a show of things... lead up to it with fact chunks and use style elements to underscore it

- Tone of voice
- **Dramatic pauses**
- Inflection on words
- All of these and more will help highlight your point
- If they give it to you, **EMPHAZISE** unconditional language!!

c. **The Buildup:** Be careful here not to give the W a technical out from your question by incorporating poor conditional language in your question. (You are already fighting your adversary, the defendant, his/her Ws and sometimes the Judge)...no need to assist them with careless words or phrases such as:

- “You mean to tell me.... (Yup!!)
- “Are you telling this jury...” (Sure amYup!!)
- “You expect this jury to believe that.....” (‘course, ... otherwise I would not be saying it...!!!!’)
- ...and the rest....

Make sure the jury does not miss the point. Compare the following two impeachment buildups

Build up ex.:

Version #1 [no build-up]

Q-You just testified that you were certain that you were with D at 9 p.m. on Sunday, March 17, 200x, St. Patrick's Day, one year ago?

A-Yup

Q-Didn't you give a statement to police two days after the event about that time?

A-Yup

Q-your memory about that event was better then than it is now?

A-I guess

Q-And in that statement, pg. 3, you say you didn't know where D was at 9 P.M. on that day *dincha*?

Version #2 [build-up]

Q:-You just testified that you were **certain** you were with D at 9 p.m. on Sunday, March 17, 200x correct?

A – Yeah

Q – On March 19th of last year you were at the Germantown police station?

A – Yeah

Q – You were picked up at your home by Detective Beckworth?

A – Yeah

Q – She drove you to the department?

A – yeah

Q – she was nice to you during the ride, she even spoke to you about your dog “Nic” and her dog “Jake?”

A – yeah

Q – when you got there she got you a cup of coffee and asked you if you needed to use the bathroom?

A – yeah

Q – you were made comfortable, decent chair...in a room with a window?

A- well...yeah, as comfortable as you can be in a police station

Q – The Detective asked you questions and you answered them and then you gave a formal statement?

A – Yeah

Q – This is the 4 page statement you gave to police marked S-26 for id?

A – (Pretending to read)... Yup

Q- That is your signature at the end and your initials on the bottom of each page? Your coffee stain on page 3?

A – a...yeah

Q – when you gave this statement, the D, your friend, had not yet been charged with a crime?

A – (quietly) no

Q – you had no reason to lie that day?

A - (quieter) no

Q – your memory of the events of March 17, 200x were better two days after it occurred then it would be a year later now?

(Who cares what he says?)

A –Yeah, I guess

Q- On page two, would you read this answer, *your* answer to Det. Beckworth's question of whether you knew where

D was as 9 p.m. on the 17th, St. Patrick's Day...what does it say? Read it out loud so the jury can hear it!

A – 'Well Detective, I had been drinking Guinness and Bourbon since 8 in the morning and by 9 at night, I barely knew who I was, never mind where I was or where D was.... I couldn't even tell you if Leprechauns were in the room I was so drunk... in fact, I am still hung over.'

The "Build-Up", by way of pro-active cross makes it more of a show for the jury and gives them a chance to digest it all and understand that something important is coming so they stop worrying about who is going to win American Idol for 2 minutes.

- d. **Rebuttal Impeachment:** Many times you possess information such as that described in the last example but you do not use it against the witness for some reason. This can be the smarter move at times and with particular witnesses. Don't let your ego get in the way of the better strategy. (Been there, done that!)
- e. Some witnesses or their testimony are more susceptible to an indirect attack
- Those that will concede nothing, not even their name
 - Those that are very smart and can parry with you well
 - Sociopaths & Psychopaths who lie when the truth will do
 - Those who are weasels and you know by the half smile on their face that they want you to ask the impeachment question so they can explain it away

These people will not let you beat them and will look to hurt you if given the chance. In that instance do not ask the ultimate impeachment question. Instead, wait until the defense case is over and bring in Det. Beckworth to rebut and negate their testimony (besides she is a dog lover and that will score points with the jury).

2. Rabbit Trails:

Defense witnesses often lay out information that is meant to distract you or at least get you to pursue that topic instead of what is important so that the jury forgets the issues or is confused. Normally you should identify these areas and stay away from them as you would a contaminated area. However, sometimes, you can find a rabbit trail that if pursued will not only NOT confuse the jury but also blow the W's credibility out of the water.

Normally these trails are info that is closely related to what the issues are but unimportant and a lie that you can recognize.... such as:

- What D or W were doing for a living at time of crime (they say they were consultants and you know it is a lie and they were working one day a week handing out flyers for a go-go bar) Since it is a lie, you attack and spend 20 minutes crushing them on that and very pleased with yourself, you turn to register the glory of your victory on the faces of the jurors and are shocked to see them bored and the jury saying to themselves “so what?” and you can see it on their faces. (Make fun of them quickly and move on).
- Whether the W or D graduated from High School, or a particular High School
- Which bars they go to and whether they are “regulars”
- Whether they actually “learned” something in basic training.
- The list is endless

Once in a while though a topic crops up that you can follow and use to your advantage and when brought to its natural but ridiculous conclusion.... helps destroy the witness.

- W has penchant for using unconditional language such as “never”, “always” etc... (use those words against them in every day things)
- W mentions things that are too ridiculous to be believed. Such as what he was wearing on various days down to the color of the socks (pick dates out of thin air and see what he says...if he bites...keep going)
- The W that remembers with exactitude all that happened between he and D on day of crime though, he had no reason to do so – pick out some other dates and times and inquire what the W was doing and with whom the W kept company.

- How many drinks he had and of what variety in a time period where he admits intoxication (play with \$, drinks bought for him, free drinks...drinks he stole...)
- If pursued carefully and properly, not only will you not confuse the jury but also you will make them see how ridiculous the comments are and then hopefully they will ignore the W as an incredible person

C. **Reacting to the Witness: Games People Play.**

Often you will be reacting more to the witness than what they say. Be careful here to treat them properly

- Your voice, tone and inflection are all weapons and send the jury a message about what you think and what you think of the W
- This is also true for body language, movement and gestures
- Don't attack people that have not earned your wrath.... Jurors like fairness. If you brutalize too early they will dislike that and maybe you and on the other hand if the witness jerks you around, they will be rooting for you to smoke the W and leave him in red and black embers.
- **Pomposity** should be punished by bringing the W to earth
- **Control and Evasiveness**
 - Evasiveness should be punished in increments
 - The techniques should establish your control over events
 - Repeat the question
 - Repeat it again and again until answered (simple but effective)
 - Write it down and read it to them
 - Have the reporter read it to them
 - Ask them if there are words they do not understand
 - Change your posture, sit, stand, walk away, etc... and ask the question again in a disinterested manner.
 - Let the uncomfortable silence last... they don't answer...just wait, go sit, cross your legs, stare at them, twirl your pen...wait a while and ask "are you going to answer?"
 - Ask the Court to instruct W to answer or be responsive (Jurors hate it when the W ignores the judge)
- **Ramblers** should be punished subtly
 - Walk away when they keep doing it
 - Thanks for the info but would you please now answer the question I asked

- Go and sit down and when they pause ask them “if they are done yet” Good, now here is the question I asked you to answer.....

II. What am I reacting to with the Expert Witness?

The same principles apply to them but you must be much more careful about attacking on their turf. You will never know as much as they do about their field of study, even if they are idiots. So look for things you can use such as:

- their pomposity
- self importance
- puffing on the resume or credentials
- lack of knowledge of the facts
- reports or information they did not read or consider in rendering their conclusions

Prosecutor John Tierney suggests that in approaching the cross-examination of an expert witness that the cross-examiner do so by concentrating on the five (5) “E”s.

- Their Education
 - Their Experience
 - Their Esteem
 - Their Examination
 - Explanation
1. Education: don’t make fun of their education unless they took a correspondence course from Hannibal Lecter or something equally ridiculous, but point out differences or lack of credentials as compared to your expert
 2. Experience: even though they have the credentials they may be delving into an area that is unfamiliar to them. (Check out their writings, areas of study, web site (wonderful source) etc.. for ammo)
 3. Esteem: pomposity can be their downfall especially if they try to sound more important than they are, (see example below)
 4. Examination (the opinion): examine the contents and what they did and how they did it (time involved, review of materials or lack thereof related to the case)
 5. Explanation: Does it make sense? Put in all facts of case favorable to you in a hypo and let them still rattle off their opinion in the face of the obvious (avoid this technique with fact witnesses but good with experts)

Example of Pomposity Punishment

The expert has listed two offices in different states (Florida & Pennsylvania & has a fancy name for his office)

You have done your homework and know what the real deal is and now it is “Hammer Time!”

Q: Dr. I see you list two offices in two states. One in Florida and one in Pennsylvania. How big is your staff in Pennsylvania?

A: Actually I rent space there

Q: So you see patients there frequently?

A: No

Q: You see patients there occasionally?

A: No

Q: Number of employees Dr.?

A: someone takes messages for me there

Q: Do you have a home there?

A: No

Q: Do you ever go there?

A: Yes

Q: What, once a month?

A: No

Q: Once every other month?

A: No

Q: Once a YEAR?

A: About that.....

A: You have to understand my MAIN office is in the state of Florida

Q: Oh your MAIN OFFICE is in Florida...I see, let's talk about that for moment shall we; please tell us what is the size of your staff at the **MAIN OFFICE**?

- A: ahem, I am the *only* full-time employee
- Q: You are the only full-time employee of the (**INSTITUTE OF PSYCHOLOGICAL STUDIES OF THE AMERICAS**)?
- A: Yes
- Q: The same INSTITUTE the defense attorney just asked you about where she highlighted and you affirmed that you hold the title of “**DIRECTOR**”?
- A: Yes
- Q: So, in both states, you own operate and run the INSTITUTE of which you are the DIRECTOR?
- A. Yes
- Q: In neither place do you have any employees other than yourself?
- A: Correct
- Q: And even you only really work in the one office – in Florida?
- A: Correct
- Q: So **DOC**, with no employees and only one office where you and you alone work, **that** makes you what? Director of**YOUR OWNSELF?**

III. Source of Cross Examination Material

You are limited only by your imagination

- Criminal records
- Old case files (Today’s D witness more often than not was yesterday’s Co-D)
- Social organization (sports, clubs, etc...)
- Hangouts
- family
- Experts: web sites, writings, opinions in other case & trial Transcripts

IV. Endings

Always, with every witness, save a question that you are sure will get you the answer you want and that is meaningful and end with that as your **exit line** and in that way you end on a strong note.

V. Conclusion:

Try these techniques or just part of them. Take what you like and discard the rest. Just remember that you need to adapt it to your style. Be yourself, fight the good fight, have fun and Cross-Examine away.