

January 26, 2022 -- 10 a.m. to 1 p.m.
**CROSS EXAMINATION FROM BOTH CIVIL
AND CRIMINAL PERSPECTIVES**
Live In-Person or Virtual Webinar

Host: West Virginia State Bar

Speakers/Topics:

- **Mark Neil** - *"Cross Examination in the Criminal Case Setting: Methods and Tactics"*
- **Tammy Bowles-Raines** - *"Cross Examination: Back to the Basics - The Plaintiff's Perspective"*, and
- **John McGhee** - *"What You Want Out of It Decides How You Do It - Civil Case Cross Examination from the Defense Perspective"*

Location: In-person at the State Bar Center, Large Conference Room, Charleston or via video conference.

CLE: 3 credits

Mark M. Neil is presently an independent prosecution consultant and trainer, having retired on disability in 2018 as Program Counsel for the National Association of Attorneys Generals (NAAG) after five years. During his tenure there, he was responsible for initiating, developing, coordinating, and executing both state and national-level trainings and conferences, conducting research, and writing and editing various publications. He served as an editor and writer of the *Evidentiary Foundations for Government Attorneys*, a book of predicate question and outline for the admissibility of exhibits at trial, and was the lead in the development of courses including *Trial Testimony Skills*, *Opioid Abuse: Consumer Protection and Enforcement*, and *Overdose Death Investigation and Prosecution*. Additionally, Mr. Neil served as the liaison to NAAG's Criminal Law Committee, alternate representative to the ABA Criminal Law Committee, and liaison on behalf of NAAG with various prosecution and criminal justice organizations across the country.

Prior to moving to NAAG, Mr. Neil served 6 years as a Senior Attorney with the National District Attorneys Association in the National Traffic Law Center where he conducted or participated in training conferences and seminars around the country, provided technical assistance to prosecutors, law enforcement officers and other allied criminal justice professionals, and represented prosecutors at national meetings. He served as faculty at various courses at the National Advocacy Center, including Trial Advocacy, Career Prosecutor Course, and Technology in the Courtroom.

A graduate of Vanderbilt University and the West Virginia University College of Law, Mr. Neil was a practicing attorney in West Virginia for over 24 years, 17 of which as an Assistant Prosecutor handling felony and misdemeanor matters of all kinds. He was then Traffic Safety Resource Prosecutor for the West Virginia Prosecuting Attorneys Institute for more than 3 years, and was named as the NHTSA/NAPC Prosecutor Fellow in 2006. Prior to departing West Virginia for NDAA he was a member of the West Virginia State Bar Board of Governors. Mr. Neil also served as adjunct professor at Mountain State University for 13 years, as well as an instructor at the West Virginia State Police Academy and for regional trainings throughout the State.

Mr. Neil maintains an active West Virginia law license but now resides in the Northern Neck region of Virginia near the Chesapeake Bay.

Cross-Examination in the Criminal Case Setting: Methods and Tactics

Mark M. Neil
WV State Bar CLE Presentation
January 2022

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1

1

GOAL

Enable you to more effectively and persuasively conduct cross-examination

Cross Exam To-Do List

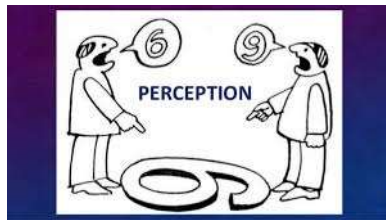
- Ask leading questions
- Don't sound stupid
- Make witness cry
- Score home run

2

2

What is the
TRUTH?

Often it is a
matter of
PERCEPTION



Psychology Today

3

3



4

Purposes of Cross

Legal

- Good faith quest for ascertaining truth

Practical

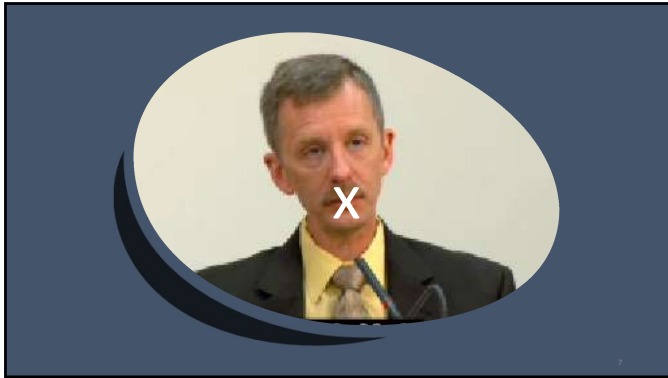
- Help ourselves
- Undermine or destroy direct testimony

5

“The commander must decide how he will fight the battle before it begins. He must then decide how he will use the military effort at his disposal to force the battle to swing the way he wishes it to go; he must make the enemy dance to his tune from the beginning and not vice versa.”

- Viscount Montgomery of Alamein

6



7

Reasons to Cross Examine

Gain Concessions

Attack Credibility

8

Primary argument

- My case theory wins because.....
- Factual concessions by opposing witnesses used to prove your theory

Rebuttal argument

- Their case theory is unreasonable and not worthy of belief because.....
- Impeachment attacking witness or facts

9

Concessions

Look for areas favorable to your case theory

- Keep focus on theory
- Additional concessions
- Repeat favorable testimony

10

10

Advanced Prep

Easily prepared

- Even with only rudimentary knowledge of what witness might say

• What must witness admit to?

• Certain things cannot be denied

11

11

Focus

Eliminate areas of dispute

- Find the common ground
- Think in terms of mini-stipulations

Makes your and jury's job easier

12

12

Concessions

Reiterating and Emphasizing Facts

13

13

Concessions

New Facts

14

14

Concessions

Alternative Facts

15

15

Concessions

Deleted Facts

16

16

Impeachment

17

17

Credibility

Look for reasons why their witness
or case theory is unreasonable and
jury should not believe it.
Or not like the witness



18

18

Not necessary to show witness overtly lied



Only that testimony is

- Questionable
- Unreasonable
- Untrue

19

19

Attack Credibility by Examining

Prejudices and Bias

Vantage point

20

20

Motive for Prejudice Bias

- | | |
|--|--|
| <ul style="list-style-type: none"> • Lay Witness <ul style="list-style-type: none"> • Relationships • Personal beliefs • Grudge | <ul style="list-style-type: none"> • Experts <ul style="list-style-type: none"> • Money • Ego • A “cause” |
|--|--|

21

21

Establish the possible bias

Not necessary to confront witness

Let jury judge the credibility

22

22

Vantage Point

- Location
- Distance
- Angle
- Lighting
- Obstructions



23

23

Vantage Point

Ability to perceive
Obstructions
Lighting
Physical
limitations

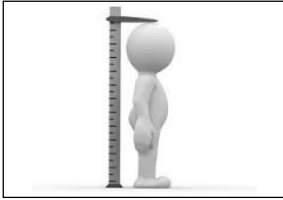
Ability to Perceive
and Remember
Understanding
Cognition
Memory

Position
Distance
Angle

24

24

Form and Style



25



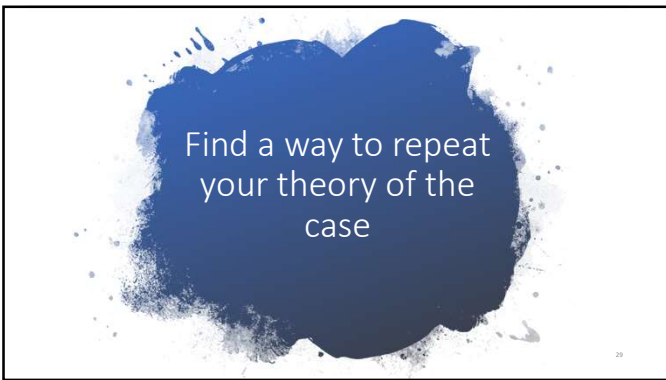
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Get the
Concession

27



28



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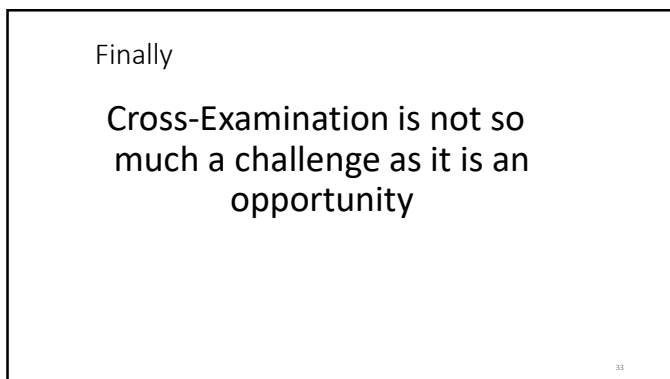
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31



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Profile

John McGhee (Johnny) is a member of the law firm Kay Casto & Chaney PLLC in Charleston and focuses his practice of law in the areas of insurance defense, products/premises liability defense, deliberate intent cases, and public utility law.

Experience

Kay Casto & Chaney PLLC

1989-Present

State and Federal Civil Defense, Federal Criminal Defense, White Collar Crime, Non-White Collar Crime, Litigation, Construction, Insurance Personal Injury – Defendants, Emergency Services Provider Defense, Product Liability – Defendants, Mediation Services, Public Utility Law.

Achievements include being listed as one of the Best Lawyers in America© for insurance law, and in 2015 West Virginia Super Lawyers in the category of personal injury defense. Earned an AV “Preeminent” rating from Martindale-Hubbell.

Education

Hampden-Sydney College

1986

Graduated cum laude from Hampden-Sydney College in 1986 (B.A., English): member of Phi Beta Kappa and Omicron Delta Kappa.

West Virginia University College of Law

1989

Received a Doctor of Jurisprudence from the West Virginia University College of Law in 1989 and is a member of the Order of the Coif. Co-Editor of the National Coal Issue of the West Virginia Law Review. He was admitted to practice law in West Virginia in 1989 and in Kentucky in 1997.

Involvement

Past-president of the West Virginia State Bar and a former lawyer representative for the United States District Court for the Southern District of West Virginia for Criminal Justice Act Attorneys.

A member and former board member of the Defense Trial Counsel of West Virginia, and an emeritus member of the John A. Field, Jr. American Inn of Court, and a member of the Claims and Litigation Management Alliance.

Achievements include being listed as one of the Best Lawyers in America© for insurance law, and in the 2015 West Virginia Super Lawyers in the category of personal injury defense. He has also earned an AV “Preeminent” rating from Martindale-Hubbell.

In the community, serves as vice-president of program on the executive board member of the Buckskin Council of the boy Scouts of America and has served as a Boy Scout Venture Area Advisor and as a district commissioner of the Buckskin Council and was actively involved in the National Scout Jamboree held for the first time at the Summit, the Boy Scouts of America’s newest high adventure base located in Fayette County, W. Va. and was camporee chair for the largest single event held to that date at the Summit outside of Jamborees. Previously, has served as a vestry member and senior warden of St. Matthews Episcopal Church, and as chancellor of the Episcopal Diocese of West Virginia. He currently serves on the Peterkin Committee and as a trustee for the Episcopal Diocese of WV. He also serves as a member of the Daywood Foundation.

**What You Want Out of It
Decides How You Do It**

**Civil Case Cross Examination
from the Defense Perspective**

John R. McGhee

January 26, 2022

In preparation of case story telling – that is –
telling of the story of the case in way that
resonates with a jury, we start with what we
want to say – in closing and build the case
around that



- In openings, we tell the jury what they will hear
- Cross exam – in addition to direct testimony – provide the nuggets of info. that shows we delivered on the promises of opening and provides the building blocks of our closing
- If I tell jury in opening that they will hear a fact, then the answers I elicit on cross may be part of how I supply that fact



- Discovery ties in to knowing what I'll have and what I can expect to hear from or get from a witness on cross- or I'll be able to show the jury that the witness changed their testimony at trial from what they've said under oath previously



- **Decisions to make**

- when to cross and when not to cross
- if cross, for what purpose – gather info. or attack credibility



Irving Younger's 10 Commandments of Cross Examination

- 1. Be Brief
- 2. Use Plain Words
- 3. Use Only Leading Questions
- 4. Be Prepared
- 5. Listen (to the witness AND how the jury hears you)

10 Commandments Cont.

- 6. Do Not Quarrel
- 7. Avoid Repetition (of what the witness said on direct)
- 8. Disallow Witness Explanation
- 9. Limit Questioning (the one too many)
- 10. Save for Summation

Get What You Can, and Move On

My Cousin Vinny clip of cross of expert

<https://www.youtube.com/watch?v=vIyfzbPCqY>

Constructive or Destructive Cross

- What is the goal?
 - To add a building block of your case
 - To attack a building block of opponent's case



Attack of Memory

- Clip from movie Class Action
- Class Action (Cross - Alexander Pavel, Competence, Recollection, Vulnerable Witness, Objections & Judge's Admonishment).mp4 - OneDrive (live.com)

On Cross Who Is Testifying (witness or lawyer)

- Control is name of the game
- Less is more (short questions beget short answers)
- Best transcript possible is series of one- word responses



Create Expectations for the Defense, Then Meet Expectations

The plaintiff will often use the theme of righting a wrong that has an appeal to justice and doing the right thing while the defense theme is often doing the right thing by rejecting an award. The jury has to be convinced that the facts support their verdict. Does your cross help supply those facts?

If Goal of Cross is to Attack...

- Does it attack the credibility of the witness
- Does it attack the credibility of the testimony
- Does it attack (or call into question) the credibility of both witness and testimony



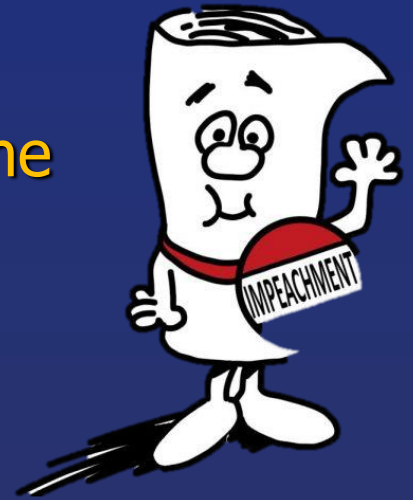
Don't always attack the person, attack the information they provide or their ability to correctly convey it (including bias)

My Cousin Vinny clip of “friendly” cross—have you ever called the witness “dear” before?

https://www.youtube.com/watch?v=wsG1_wahKVc

Knowing When to Impeach is Important

- Discuss HOW to impeach
- Is this process worth it
 - Can you do it quickly/efficiently
 - Can you do it decisively
 - Is the point/contradiction an important one
 - Deposition clip read or Video clip shown



- Rule 32 (a)(1) use of deposition to contradict or impeach witness or for any other purpose permitted by the WVRE



If Attacking the Witness...

- Can it be determined the witness was simply mistaken or is the witness looking to mislead the jury?
- The distinction sets the tone for how to cross and the result--if the witness is shown to be untruthful once, does it cast doubt on ALL testimony from that witness?

If Attacking the Testimony...

- Homework is key (homework=discovery + investigation)
- Knowing what the scene looks like or similar detail can help guide the questions



Do your homework (discovery + investigation)

My Cousin Vinny clip of cross using investigative homework

<https://www.youtube.com/watch?v=5gr3jopJmVg>

Listen and Loop

- Use series of very short questions v. one large question
- LISTEN to the answers both for the substance and for ability to loop (use answer in next question or series of questions)



Lead Jury to Make Own Conclusion

- If you showed that a witness was mistaken or deceitful, lead the questions right to the point where you don't have to finish the thought and let the jury do it
- A jury can “punish” the witness by rejecting their testimony or even the party for whom they testified—who do they like?

A Question Too Many (or you don't know the answer

- Clip from the movie The Verdict
- <https://www.youtube.com/watch?v=xp31pTNW3W4>

Jurors Are Watching and Listening With Their Own Sense of What They Think Is Important

- Finally, Juror #8 talks about why he's given a "Not Guilty" verdict. He says that he's suspicious of the lawyer who was defending the kid on trial. He thinks that the lawyer let too many things go by in his cross-examination of the witnesses. For him, the defense attorney is either incompetent or corrupt. (from the movie Twelve Angry Men)

Know what a witness has said (discovery, investigation, and listening to the answers given)

My Cousin Vinny clip magic grits

[https://www.youtube.com/watch?v= T24IHnB7N8](https://www.youtube.com/watch?v=T24IHnB7N8)

Fairness Counts

- If you attack the witness, don't miss as insinuation without proof can backfire
- The jury knows if the witness (or the lawyer) is arrogant, rude, or obstructionist



Know and Use Rules of Evidence

- 404
- 405
- 406
- 607
- 608
- 609



404 – character evidence; crimes or other acts

(a)(1) character of character
trait not admissible to prove
that on a particular occasion the
person acted in accordance with
the character or trait

(3) - Exceptions-evidence
of a witnesses' character may
be admitted under Rules 607,
608, 609

(b)(2) – evidence of a crime, wrong, or other act may be admissible for another purpose, such as providing motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident

- must provide reasonable notice of general nature and specific purpose offering evidence
- notice before trial – or during trial if court for good cause excuses lack of pretrial notice

405- Methods of proving character

- (a) reputation or opinion
- (b) specific instances of conduct – when character is essential element of claim or defense



406 - Habit, routine practice
(person's habit or organization's
routine practice) may be used to
prove that on a particular occasion,
person or organization acted in
accordance with habit or routine
practice.

607 - who may impeach a witness
-credibility of witness may be
attacked and impeached by any
party



608- witness's character for truthfulness or untruthfulness

(a) reputation or opinion evidence
- A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about the character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) specific instances of conduct –
Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to provide specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination of a witness other than the accused, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

- (1) the witness or
- (2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

609 - impeachment by evidence of a criminal conviction



CROSS EXAMINATION: Back to the Basics

The Plaintiff's Perspective in Civil Cases

By : Tammy Bowles Raines Law Office PLLC



//

SOMETIMES THE QUESTIONS ARE
COMPLICATED BUT THE ANSWERS ARE
SIMPLE

~ DR. SEUSS

//



//

A good cross exam has three steps:

1: Extricate: extract everything the witness knows that is favorable to you. Do this before you attack so the witness is less resistant.

2: Close the doors: before the witness knows what you're going to ask in step 3, close any doors through which the witness can escape.

3: Impeach: If you start with step 3, steps #1 and #2 become hard if not impossible.

//

-F. Lee Bailey, Esq.



Plaintiff's Burden of Proof in Civil Cases Requires Effective Cross Examination at Trial

- Plaintiff must convince the jury they were harmed by Defendant's conduct; that they incurred damages from that conduct; and that they deserve compensation for those damages
- Plaintiffs must sell the story they are telling
- Defendants must hold the line by using effective cross examination



PURPOSE OF CROSS EXAMINATION

- To help your case
- To not hurt your case
- To gain credibility from the jury
- To bolster support for undermining your opposition's case or witnesses
- To capture the jury's attention

PURPOSE OF CROSS EXAMINATION

To Help Your Case

Ways to help your case as the Plaintiff:

- Corroborate your client's testimony as to facts
- Corroborate your client's testimony as to damages
- Supports your witnesses and experts' positions

To Not Hurt Your Case

Ways Not to hurt your case as the Plaintiff:

- Testimony does not contradict client's testimony as to facts
- Testimony does not contradict client's testimony as to damages
- Testimony does not contradict witness or expert's positions

EXAMPLE : CLASSIC CAR WRECK CASE



Your client (Plaintiff) testifies that the Defendant ran the red light and hit his vehicle. On cross, Defendant admits he ran the red light but testifies he was justified in doing so as he was having a medical emergency. { Corroborated} But if Defendant testified that he was not sure if he ran the red light due to the medical emergency, he did not contradict your client's testimony.

Client testifies his neck was immediately hurting at the scene. Defendant testifies Plaintiff told him his neck was hurting and to call an ambulance {corroborated}. Defendant testifies he saw Plaintiff holding his neck at the scene {does not contradict}

EXAMPLE : CLASSIC CAR WRECK CASE



Plaintiff's Expert testifies Plaintiff suffered soft tissue injury requiring physical therapy which was medically necessary and reasonable. Defense expert agrees {Corroborated}. But if Defense expert disputes causation and testifies that Plaintiff's soft tissue injury required physical therapy that may not have been **solely** caused by the wreck but agrees that PT for soft tissue injuries is medically reasonable, he did not contradict the Plaintiff's damages claim.

PURPOSE OF CROSS EXAMINATION

Gain Credibility from the Jury

- The lawyer must be believable
- The lawyer must be in control of each witness
- Client's credibility

Bolster Support for Undermining Opposition's Case

- Make the witness like you
- You can catch more flies with honey than with vinegar

Examples

Credibility

- Attitude of lawyer- aggressive, nervous, unprepared, notes
- Your client reflects upon you and you are aligned with your client

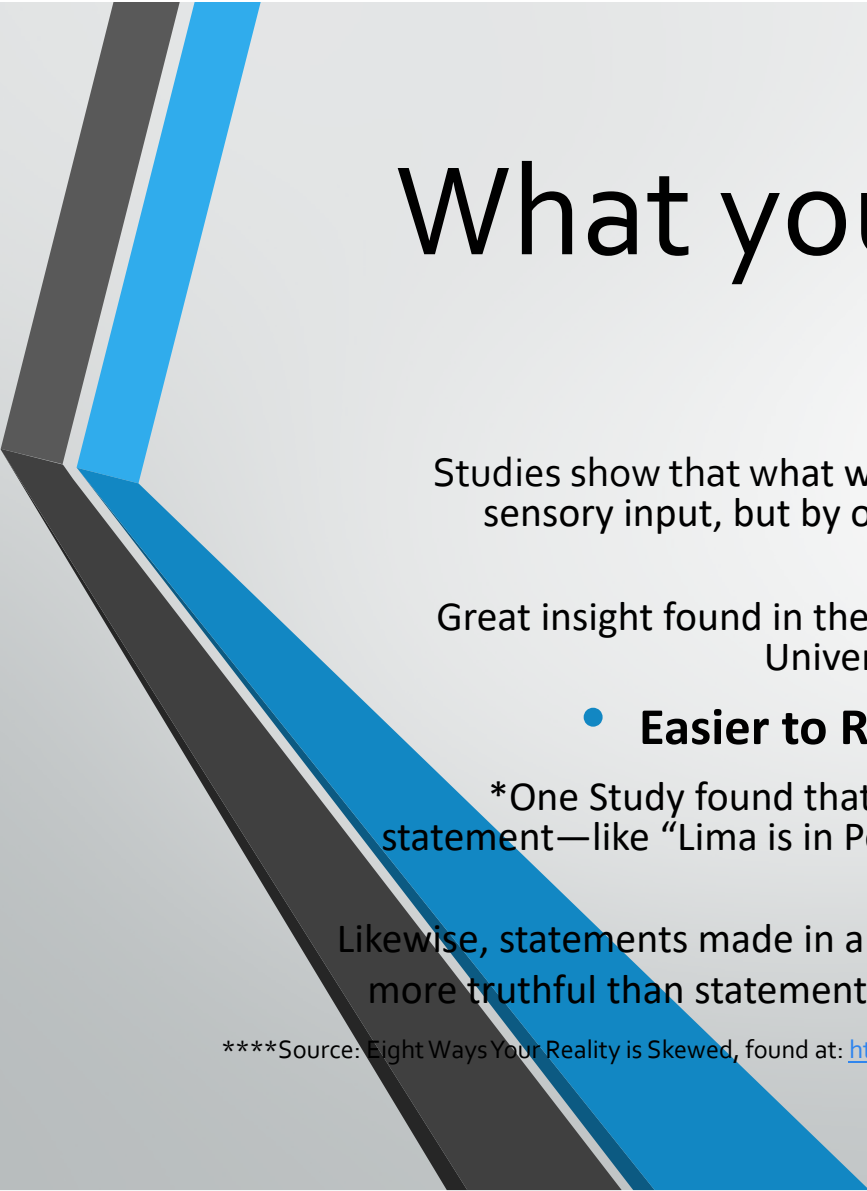
Undermine Opposition

- Use the opposition's witnesses against each other. Example: "Dr. X read all the records, reviewed the films- the other physician only met the Plaintiff once"
- If witness won't agree with facts or evidence, reach an agreement on **case theme**. Example in car wreck case: "You agree that driving safely and paying attention to the road is important in society?"
- In medical malpractice case, you agree that patients have the right to count on healthcare providers to act reasonably competent?

REALITY V. PERCEPTION

CASE THEME: MAKE THE HILL LOOK EASIER TO CLIMB





What you perceive is your reality

Studies show that what we perceive in any given moment is not only determined by sensory input, but by our personal physical abilities, energy levels, feelings, social identities, and more.

Great insight found in the book “Perception: How Our Bodies Shape Our Minds,” by University of Virginia psychologist Dennis Proffitt and Drake Baer

- **Easier to Read Statements Seem More True**

*One Study found that when participants were asked to determine the truth of a statement—like “Lima is in Peru”—written in different colors, participants agreed more with easy-to-read statements than less easy-to-read ones.

Likewise, statements made in a rhyming scheme—like “Woes unite foes” were considered more truthful than statements without a rhyming scheme—like “Woes unite enemies.”

***Source: Eight Ways Your Reality is Skewed, found at: https://greatergood.berkeley.edu/article/item/eight_reasons_to_distrust_your_own_perceptions

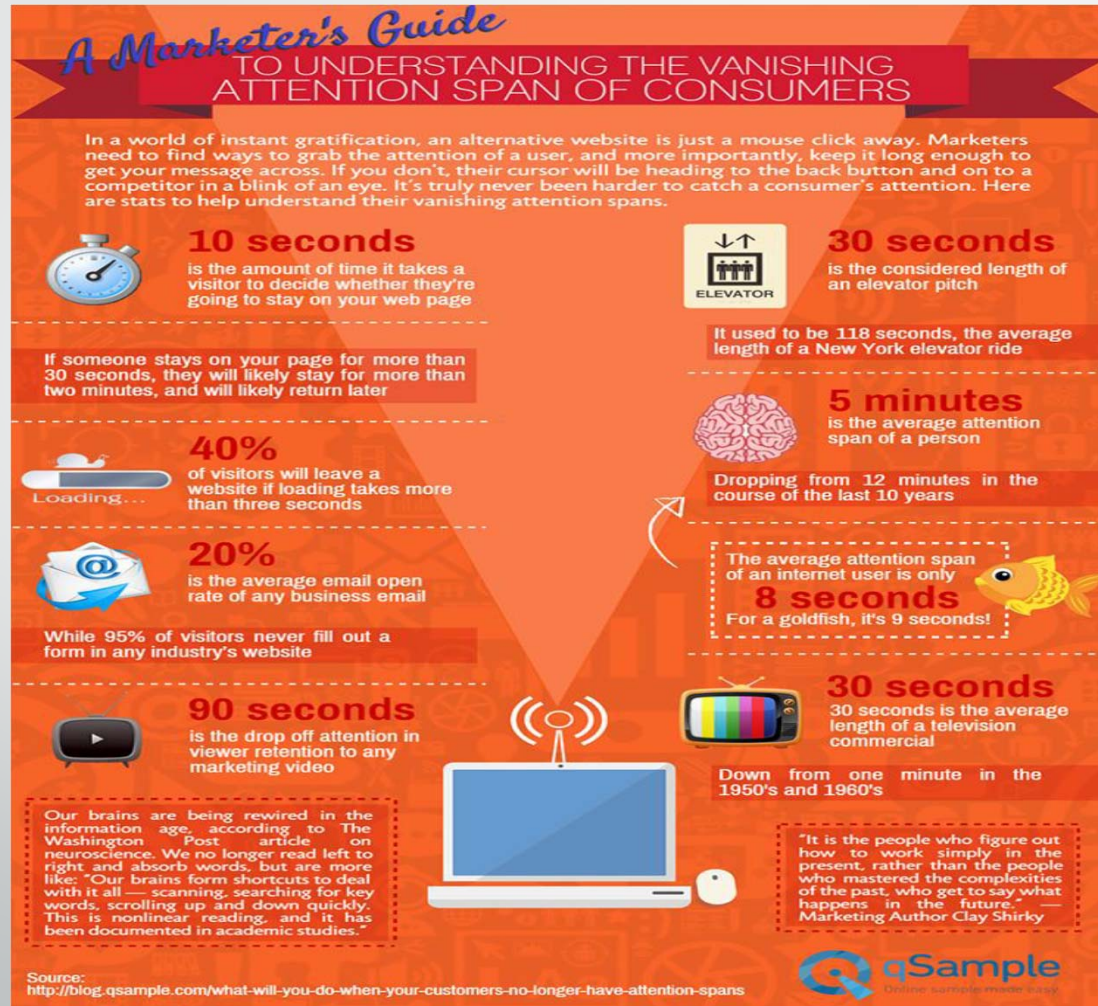
PURPOSE OF CROSS EXAMINATION

To Capture the Jury's Attention

- <https://youtu.be/iBiXoKCgrVk>
- “wake up”



Attention SPAN OF AVERAGE JUROR



*Source: Myth and Mystery of Shrinking Attention Span by K.R. Subramanian; Intl Journal of Trend in Research and Dev. Vol 5; May-June 2018



Attention SPAN OF AVERAGE JUROR

Focus: David Ball suggests that if a juror was asked what was the point of your cross examination of the last witness, the answer should be given in less than a dozen words. If not, the juror did not get what you were trying to do.

Simplify: Use words and phrases the jurors will understand. Remember the

KISS Principle: Keep it Simple Stupid



WAYS TO COMBAT SHRINKING ATTENTION SPAN in Cross Exam

- Don't be afraid to NOT Cross Examine a Witnesses – “You'll never regret something you did not say”
- Get in and Get Out- No more than 3 Main Points
- Use Key Words that Support your Case Them (i.e. “Putting Profits over Safety”)
- Use attention capturing visuals to aid in Cross

WAYS TO COMBAT SHRINKING ATTENTION SPAN in Cross Exam

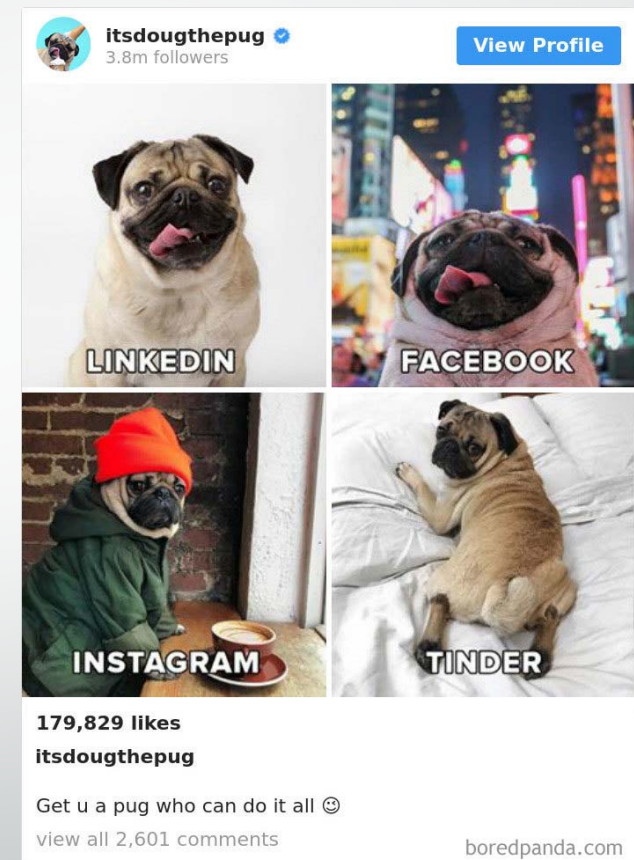
- Cross exam at trial is not the same as cross examination in a deposition
- Football field analogy: discovery is the playing field of 100 yards; evidence at trial is the 10 yard game



Types of Witnesses you will encounter on cross

You know who you are facing at trial from taking a good deposition

Check out the witness on social media i.e. Facebook LinkedIn, etc.



THE SMARTY PANTS WITNESS

Experts in Any Field or Sophisticated Defendants
(Health Care Providers or Corporate Reps)

- Best Practice: Don't try to outsmart them

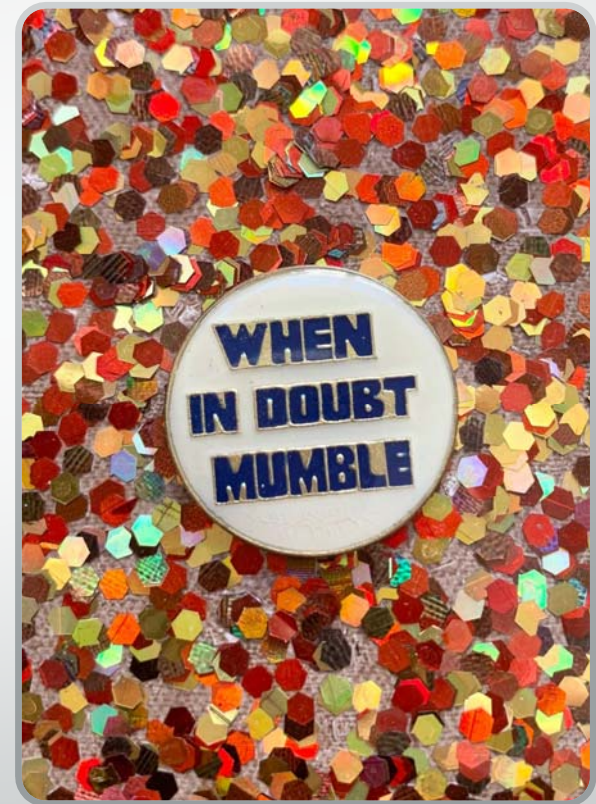


THE LOW TALKER SLOW TALKER NO TALKER WITNESS

Uncomfortable, Quiet, or Pleads the 5th



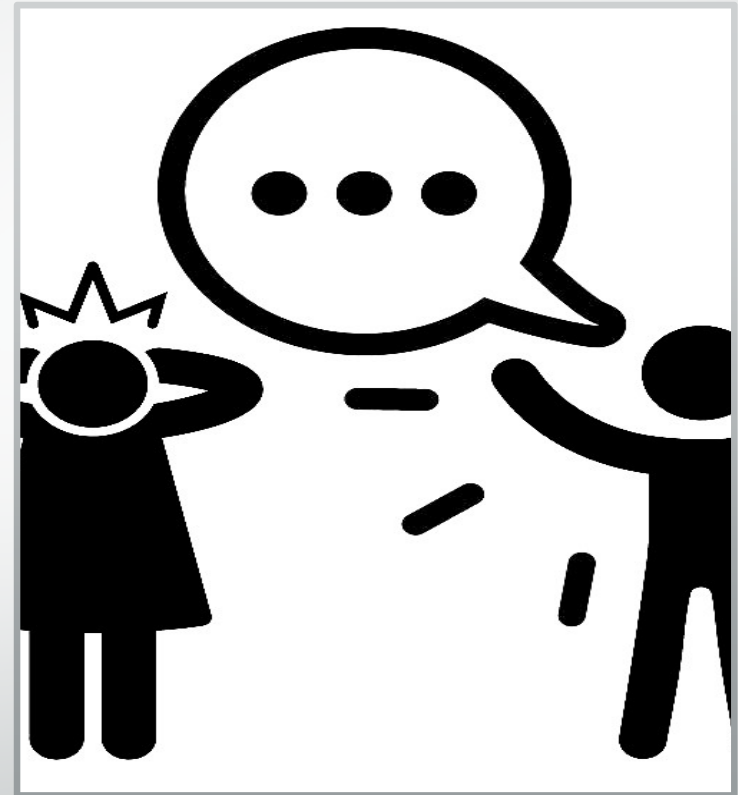
- Best Practice: Let them express themselves



THE RAMBLER WITNESS

Talks about Herself For Herself Just to Hear Herself

- Best Practice: Professionally maintain control of the witness



THE OBNOXIOUS LAWYER

Objects to Each Question, Sighs Loudly or Talks to his Client During Your Cross

- Best Practice: Professionally maintain control of your cross exam presentation



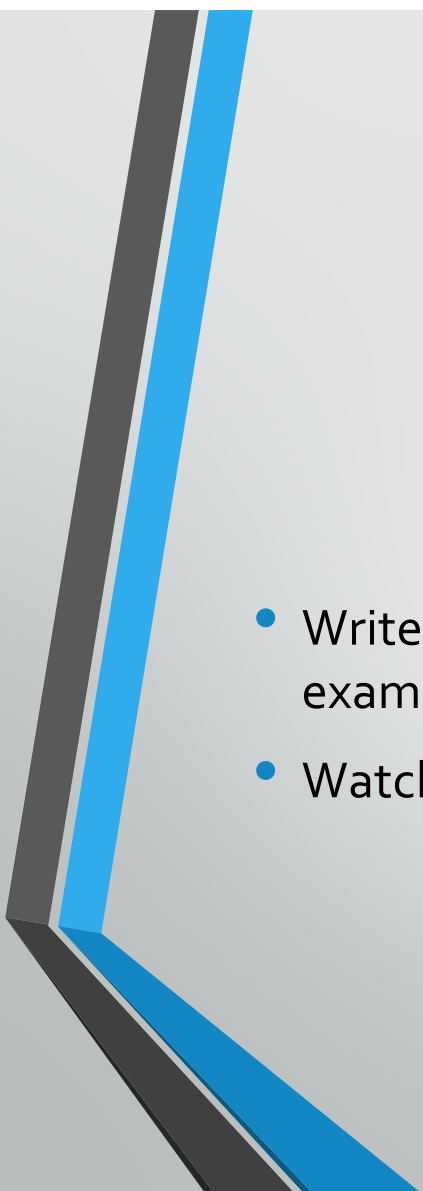
EFFECTIVE CROSS EXAM



Final Thoughts –Back to the Basics

- Jurors tend to sympathize with the witness because they experienced voir dire and understand it is an unnerving and intimidating experience to be questioned in public: 73% of people report a fear of speaking in public “glossophobia”*
- The best tool for an effective cross examination is to understand how to relate to people. Not everyone is a people person so spending some time practicing and learning new techniques is valuable to everyone

*Source: National Inst. Of Mental Health, accessed at: <https://nationalsocialanxietycenter.com/social-anxiety/public-speaking-anxiety/>



Final Thoughts –Back to the Basics

- Write down the main points you intend to make for each witness on cross examination even if you do not use notes during the cross
- Watch a lot of other lawyers (or movies) do cross examinations



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TAMMY BOWLES RAINES BIOGRAPHY

Tammy Bowles Raines grew up in rural Summers County, West Virginia. After graduating from Meadow Bridge High School in 1997, she attended West Virginia University where she earned a bachelors degree in political science in 2000, graduating magna cum laude through the University's Honors Program. She received her law degree from WVU College of Law in 2004. While attending law school, Ms. Raines was a member of the National Moot Court Competition Team in 2003. She is a recipient of Order of the Barristers Award.

Ms. Raines began her legal career in Charleston where she worked for a civil litigation firm. In 2008, Ms. Raines began working for Warner Law Offices, devoting her career to helping personal injury victims until the Spring of 2015 when she established her own private practice, Tammy Bowles Raines Law Office PLLC. Throughout her career, Ms. Raines has successfully represented hundreds of clients in various litigation matters, including wrongful death, serious motor vehicle and truck collisions, workplace injuries, medical/ nursing home negligence, employment discrimination and insurance disputes. Ms. Raines is admitted to practice before the West Virginia Supreme Court of Appeals and the United States District Courts for the Southern District and Northern District of WV. Among her many interests, she enjoys spending time outdoors, kayaking, and traveling. Ms. Raines is a member of the WV Trial Lawyers Association, the WV State Bar, and the Kanawha County Bar Association. She is an avid animal lover and has held memberships in the World Wildlife Fund, Animal Legal Defense Fund and the Humane Society.