

2005 NDSAA SUMMER MTG  
PRESENTED BY JAMES PUNTOW  
ADA - WICHITA, KS

## **NATIONAL COLLEGE OF DISTRICT ATTORNEYS**

### **"THE CONCEPT OF CROSS-EXAMINATION"**

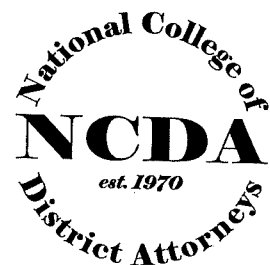
by

**James M. Dedman III**  
**Director of Academics**  
**National College of District Attorneys**  
**National Advocacy Center**  
**Columbia, South Carolina**

**Reprint permission granted by the**  
**National College of District Attorneys**

Points of view or opinions stated in this publication are those of the author and do not represent the official position of the National College of District Attorneys.

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical including photocopying, recording or by any information storage and retrieval system, without permission in writing from the National College of District Attorneys.



# NATIONAL COLLEGE OF DISTRICT ATTORNEYS

Presentation On

## The Concept of Cross-Examination

By

James M. Dedman  
Director of Academics  
National College of District Attorneys  
National Advocacy Center

### DISCUSSION NOTES AND DETAILED OUTLINE

This presentation will focus on how cross-examination operates both strategically and mechanically, and will illustrate the National College of District Attorneys Approach Point Cross-Examination method.

---

“Personal magnetism is, perhaps, the most important of all the attributes of a good trial lawyer. Those who possess it never fully realize it themselves and only partially, perhaps, when under the influence of a large audience. There is nothing like an audience as a stimulant to every faculty. The cross-examiner’s questions seem to become vitalized with his knowledge of the topic of inquiry and his own shrewd discernment of the situation of the witness and the relation which the witness’ interest and feelings bear to the topic. His force becomes almost irresistible, but it is a force in questions, a force aroused in the mind of the witness, not in the voice of the questioner. He seems to be able to concentrate all the attention of his hearers upon the vital points in the case; he imparts weight and solidarity to all he touches; he unconsciously elevates the merits of his case; he comes almost intuitively to perceive the elements of truth or falsehood in the face itself of the narrative, without any regard to the narrator, and new and undreamed-of avenues of attacking the testimony seem to spring into being almost with the force of inspiration.” Francis Wellman, **The Art of Cross-Examination**, p. 180.

“Cross-examination is generally considered to be an art and, therefore, is basically a matter of individual style. Some cross-examiners attack with the sweeping stroke of the broad sword, while others employ the more subtle cut of the scimitar.” Jay Ziskin, **Coping with Psychiatric and Psychological Testimony**, Second Edition, p. 304.

---

### PRESENTATION

#### I. Understanding the operation of cross-examination

- A. We are all experienced arguers from our interactions with siblings, family, friends, and others.
- B. We engage in cross-examination somewhat in our interactive arguments.

**Consider:**

Person A: "My Honda Accord is better than your Jeep Wrangler".

Person B: "Oh, yeah? WHY?"

Person A: "Because,  
The Accord has a real top, not canvas.  
The Accord doesn't have four wheel drive and gets better gas mileage.  
The Accord will actually seat three adults in the back seat.  
My windows roll up—not zip up."

Now consider, this same "argument" done as cross-examination

Person A: You have a vehicle?

Person B: Yes.

Person A: It's a Jeep?

Person B: Yes.

Person A: In fact, it's a Jeep Wrangler, isn't it?

Person B: That's correct.

Person A: It has four wheel drive?

Person B: Yes.

Person A: Four wheel drive doesn't get as good gas mileage, does it?

Person B: No, it doesn't.

Person A: You have windows?

Person B: Of course.

Person A: But they are different, aren't they?

Person B: Different?

Person A: They don't roll up, do they?

Person B: No, they don't.

Person A: In fact, you have to zip them up, don't you?

Person B: Yes.

Person A: You have a back seat?

Person B: Yes.

Person A: Its small, isn't it?

Person B: I wouldn't say that it was small.

Person A: You can't comfortably get three adults in your back seat, can you?

Person B: No, that's true.

Person A: Then would you say that it is smaller than a back seat that would get three adults in the back seat more comfortably?

Person B: Yes, I would say that.

Person A: Thank you, no other questions:

Person A: [To Jury]. Ladies and Gentlemen, the Honda Accord is better than the Jeep Wrangler for a number of reasons, and many of these reasons have come from the Jeep witnesses, themselves. From their testimony we know about the gas mileage, the canvas tops, and the smaller back seats..."

C. While it is something of an oversimplification to say that the cross-examination questions grow easily out of the "Because" part of an argument, it is clear that when one gets to "Because", it is often to provide the documentation or the proof upon which the argument is based.

D. The difference between direct and cross-examination.

1. During the direct examination process, the trial lawyer asks the witness a question, and the witness provides an answer.

2. Essentially, *the lawyer is telling the witness to provide a fact for the jury* which then becomes a building block for the case theory.

Lawyer: [Give me a fact about your name]

Witness: My name is Betty Jackson.

Lawyer: [Give me a fact about your age].

Witness: I am 47 years old.

Lawyer: [Give me a fact about your address]

Witness: I live at 209 Rolling Fields Circle

Lawyer: [Give me a fact about the city and state]

Witness: Ardmore, Oklahoma.

3. In cross-examination, the *fact can be provided by the trial lawyer*, and the witness has an opportunity to affirm, deny, and/or explain.

Lawyer: Your name is Betty Jackson?

Witness: Yes.

Lawyer: And you are 47 years old, aren't you?

Witness: That's correct.

Lawyer: You live in Oklahoma, don't you?

Witness: Yes.

Lawyer: Ardmore, Oklahoma?

Witness: Yes.

Lawyer: And your address there is 209 Rolling Fields Circle, isn't that correct?

Witness: Yes, it is.

4. While leading questions may include fact points, the cross-examiner must not use cross-examination as a way of *testifying*. "In this regard, our supreme court recognized long ago that prejudice may result from the question, irrespective of the answer. In Entzminger v. Seigler, the court noted "[t]he probable and, no doubt, logical result of improper questioning is to give the jury the impression that the facts assumed actually exist, and that the reason why the opposite party objects to the questions is that he is trying to keep such facts from the jury." 186 S.C. 194, 195 S.E. 244, 246 (1938). See also State v. Pee Dee News Co., 286 S.C. 562, 336 S.E.2d 8 (1985).” State v. Sierra, 523 S.E.2d 187 (SC 1999)

E. Facts and Their Consequences

1. When a fact is provided by a witness, or when a fact is presented to a witness who then either affirms or denies that fact, there are consequences to one or both case theories.
  - a. An offered/accepted fact may conflict with or contradict another fact or witness in the trial.
  - b. An offered/accepted fact may lead toward an improbability in the case theory.
  - c. An offered/accepted fact may create a problem of credibility with other facts or witnesses.
2. There are communication consequences with facts also.
  - a. The jury must apply what the witness says to the question posed by the trial lawyer. The jury must also attempt to understand that question and answer in light of everything which has happened in the trial up to that point.
  - b. Each question and answer is an opportunity to compute a “subtotal” of the evidence for purposes of persuasion.
  - c. The jury is also interested in the demeanor of the trial lawyer and the witness.

- d. The jury may be affected by other distractions in the courtroom; outside the windows, or by evidence or other video/audio stimuli within their presence.
  - e. The jury may be affected by fatigue or the level of interest they have in the facts being presented to them.
3. **Bad habits** by trial lawyers can impact jury communication.
- a. **Compound questions** with single element answers may make no sense to the jury, the record, or anyone else.

**Consider:**

Lawyer: So, you picked up that loaded gun and drove over there in that green truck?

Witness: No.

What are all the possibilities which would affect a truthful "No" answer?

Whether the gun was "picked up" or not.

Whether it was loaded or not at the time.

Whether this witness did the driving.

Whether it was in a truck or some other vehicle.

Whether the color of the vehicle was green.

- b. **Long questions** which require long answers can lose the jury in the communication process. The jury must compartmentalize the long question, and oftentimes the witness has begun the answer before the jury can digest the question. [NOTE: There may be times when long questions requiring long answers are tactically prudent.]
- c. The trial lawyer may have the bad habit of not listening carefully to the witness' response to the question.
  - 1. The witness may attempt to *deflect* the question by changing the meaning of the question in the answer; or by answering an unasked question different from the one asked by the trial lawyer.

**Consider:**

Lawyer: How many drag sled tests have you conducted, Dr.?

Witness: We do them on a regular basis. I would say that we did close to a hundred just last year.

In this situation the trial lawyer asked about the Dr.'s personal experience with drag sled tests, but the Dr. replied about the company's experience instead of his own personal experience.

**Followup:**

Lawyer: Excuse me, Dr., perhaps I didn't ask that question very well. Of those tests done last year, how many of them did YOU do?

Witness: Two.

2. The witness may attempt to *evade* answering the question.
  - a. The answer may be no answer at all.
  - b. The witness may attempt to provide a narrative response to the question.
  - c. The witness may respond with a question of his/her own.
  - d. The prosecutor has to evaluate the response in light of the question—something the jury is attempting to do also. The jury may not understand that the witness has evaded the question and may never realize that unless and until the prosecutor makes them aware that the witness is not cooperating.
3. The witness may provide a descriptive word or term which is much better for the trial lawyer's case theory than the one which the lawyer was using.

**Consider:**

Lawyer: And his reaction was "surprise", wasn't it?

Witness: I would say he was a little bit *wild* there.

Lawyer: And you noted that surprise, didn't you?

4. In the example above, the word *wild* may have been a much better word for the trial lawyer than the word surprise, but the lawyer did not take the opportunity to adopt the better word in place of "surprise" or in addition to it.
5. The use of the word *wild* instead of *surprise* by the witness may carry consequences for the opposing case theory, *but only if that use is highlighted by the trial lawyer doing the cross-examination.*
6. What is the witness really saying? Is it an answer, a qualification, or a deflection?

Q: Could you have made a mistake?

Expert: (Alternative answers)

A1: No.

A2: Not in my conclusion, no.

A3: In my whole life? Of course.

A4: I've done everything I could do to avoid error.

A5: While anything is possible, a mistake is so remote that the possibility is negligible.

-or-

Q: Are you a [area] expert?

Expert (Alternative answers)

A1: Yes

A2: In the [area], yes.

A3: I am a {job title}

A4: I have testified as an expert many times.



A5: That is up to the court to decide.

Stephen C. Mckasson and Carol A. Richards,  
**Speaking as an Expert—A Guide for the  
Identification Sciences From the Laboratory to  
the Courtroom**, 174

d. One consequence of cross-examination can be the sudden loss of “momentum” by the questioner because the questioner did not know when to stop a series of questions

a. From the 1880 murder trial of Robert Butler in Britain. The defendant represented himself.

“Such as the evidence was, Butler did little to shake it in cross-examination. His questions were many of them skilful and pointed, but on more than one occasion the judge intervened to save him from the danger common to all amateur cross-examiners, of not knowing when to stop.” H. B. Irving, **A Book of Remarkable Criminals**, (1918)

b. “Mr. [Francis] Wellman is famous for following this precept himself, and with one eye significantly cast upon the jury, is likely to lead his witness a merry dance until the latter is finally ‘bogged’ in quagmire of absurdities. Not long ago, shortly after the publication of his book, the lawyer had occasion to cross-examine a modest-looking young woman as to the speed of an electric car. The witness seemed conscious that she was about to undergo a severe ordeal, and Mr. Wellman, feeling himself complete master of the situation, began in his most winsome and deprecating manner:

‘And how fast, Miss, would you say the car was going?’

‘I really could not tell exactly, Mr. Wellman.’

‘Would you say that it was going at ten miles an hour?’

‘Oh, fully that.’

‘Twenty miles an hour?’

‘Yes. I should say it was going twenty miles an hour.’

‘Will you say it was going thirty miles an hour?’  
inquired Wellman with a glance at the jury.

‘Why, yes, I will say that it was.’

‘Will you say it was going forty?’

‘Yes.’

‘Fifty?’

‘Yes, I will say so.’

‘Seventy?’

‘Yes.’

‘Eighty?’

‘Yes’, responded the young lady with a countenance absolutely devoid of expression.

‘A hundred?’, inquired the lawyer with a thrill of eager triumph in his voice.

There was a significant hush in the court-room. Then the witness, with a patient smile and slight lifting of her pretty eyebrows, remarked quietly:

‘Mr. Wellman, don’t you think we have carried our little joke far enough?’

Arthur C. Train, *Courts and Criminals*, (1910)

F. Facts or attacks on facts/witnesses most often flow from *vantage points*.

1. Every witness speaks from a vantage point.

a. A witness may possess information based on perceptions by the five human senses.

1. A witness may see something
  2. A witness may hear something.
  3. A witness may touch something.
  4. A witness may smell something.
  5. A witness may taste something.
- b. A witness who testifies based on perceptions by the five human senses can be challenged on:
1. The proximity of that vantage point to the sensory perception, and
  2. The witness' competency for the human senses involved.
  3. The witness' ability to recollect the perceptions.
  4. The witness' ability to communicate the perceptions.
- c. An *opinion* witness may possess information based on another type of vantage point:
1. A witness may have specialized knowledge based on training.
  2. A witness may have specialized knowledge based on education.
  3. A witness may have specialized knowledge based on experience.
- d. As with the witnesses who testify from the vantage points and competency of their five human senses, these other vantage point witnesses may be attacked on:
1. The competency of their training, education, and/or experience
  2. Whether the training, education, and/or experience was applied correctly to the situation which is the basis of the examination.
- e. A witness may testify from a vantage point which may be influenced by *thoughts* of:

1. Relationships with a party or other witnesses
  2. Personal beliefs
  3. Possible interest in the outcome of the case
- f. Typical vantage point jury instructions (emphasis supplied):
- “In deciding what testimony to believe, consider the witness’ **intelligence**, the **opportunity** the witness had to have seen or heard the things testified about, the witness’ **memory**, any **motives** that witness may have for testifying a certain way, the **manner** of the witness while testifying, whether that witness **said something different** at an earlier time, the **general reasonableness** of the testimony, and the extent to which the testimony is **consistent** with any evidence that you believe.”
- g. “A witness is more or less valuable based on perception, memory, expression, and veracity. It is an article of adversary system faith that every witness should be tested on these four elements.” Mike Tigar, **Mike Tigar on Examining Witnesses—The Way You Tell It Makes All The Difference**. [Excerpted and modified by the “Lectric Law Library from **Examining Witnesses**, by Mike Tigar, ABA, 1993. <http://www.lectlaw.com/files/cr123.htm>]
2. For a witness to testify from his/her vantage point, that vantage point information must be *relevant* to the matters of the trial.
  3. A witness delivering relevant information from a vantage point may well have information which is beneficial to the case theory of the cross-examiner.
    - a. The witness may be able to place the defendant in town on the day of the crime and at the time of the crime.
    - b. The witness may be able to place the defendant at or near the scene of the crime during the time frame of the crime.
    - c. The witness may be able to verify such things as:
      1. Appearance features

2. Habits, customs
3. Possessions
4. Condition
5. Quotations or statements
6. Relationships
7. Knowledge

4. Cross-examination may extend beyond the scope of the direct if the questions go to the *credibility* of that witness.
  - a. In determining the credibility of a witness, the jury may consider the *reasonableness* of that witness' testimony.
  - b. The reasonableness can extend to the *conduct* of that witness after acquiring the information upon which the testimony is based.
    1. Is what the witness did once this significant information was obtained reasonable in light of the meaning of that information?
    2. Some states may restrict prosecutors' inquiry into why witnesses did not bring defense case theory information to the prosecutor or the police because the burden of proof is on the prosecutor to prove guilt; not upon the defendant to prove innocence.
  - c. The cross-examiner can use the *reasonableness* of the testimony and the witness' conduct to advance the case theory by obtaining concessions which bolster and advance that case theory from this witness.
  - d. Since both the prosecution case theory and the defense theory cannot be "true", concessions which advance the prosecution case theory should make the defense case theory less reasonable.
  - e. When faced with the objection "Beyond the scope of direct examination", the reply can be "This goes to credibility because it focuses on the reasonableness of this testimony in light of the other evidence."
  - f. Some states follow the English system where there is no restriction limiting cross-examination to the scope of direct examination.

g. “Goes to credibility” may require non-leading questions.

1. **FRE 611(c)** “Leading questions.

Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony.

**Ordinarily** leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.”

2. **Notes to FRE 611(c)** “The rule also conforms to tradition in making the use of leading questions on cross-examination a matter of right. The purpose of the qualification “ordinarily” is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the “cross-examination” of a party by his own counsel after being called by the opponent (savoring more of re-direct) or of an insured defendant who proves to be friendly to the plaintiff.”

h. If the defendant calls a police officer or another witness sympathetic to the prosecution’s case to the stand, can the prosecutor be prevented from using leading questions during the cross-examination? “The trial court is vested with broad discretion in controlling the mode of examining witnesses. *State v. Chapman*, 645 A.2d 1, 2 (Me. 1994). When the witness is biased in favor of the cross-examiner, the court may prohibit leading questions. *Field & Murray*, *Maine Evidence* § 611.4 at 298 (4th ed. 1997)”. **Ricci v. Delahanty**, Maine Supreme Judicial Court, <http://www.courts.state.me.us/98me231r.htm> (1998)

G. Concessions vs. Impeachment

1. A witness who must admit or accept a fact beneficial to the opposing case theory makes a *concession*. It may be that the witness’ failure to make the concession erodes that witness’ credibility in the eyes of the jury by making the witness appear foolish, lying, or mistaken.

2. Some advocacy texts seem to suggest that concessions are distinct from impeachment, but that is not always the case. A witness may concede him/herself into a credibility problem.
3. A concession may be made about:
  - a. The substance of the testimony (the facts of the testimony)
    1. Powers/abilities of perception
    2. Prior inconsistencies
    3. Inconsistent conduct
    4. Improbability
  - b. The credibility of the witness (the witness him/herself)
    1. Criminal convictions ("ask-ables")
    2. Bias
    3. Prejudice
    4. Sympathy
    5. Disagreement in the area (Treatise)
4. The prosecutor must be patient in seeking concessions

The following example is from the 1879 murder trial of Charles Peace in Britain. The witness being cross-examined by the prosecutor is the wife of the victim.

"Mr. Lockwood fared better when he came to deal with the relations of Mrs. Dyson with Peace previous to the crime. Mrs. Dyson admitted that in the spring of 1876 her husband had objected to her friendship with Peace, and that nevertheless, in the following summer, she and Peace had been photographed together at the Sheffield fair. She made a vain attempt to escape from such an admission by trying to shift the occasion of the summer fair to the previous year, 1875, but Mr. Lockwood put it to her that she had not come to Darnall, where she first met Peace, until the end of that year. Finally he drove her to say that she could not remember when she came to Darnall, whether in 1873, 1874, 1875, or 1876. She admitted that she had accepted a ring from Peace, but could not remember whether she had shown it to her husband. She had been perhaps twice with Peace to the Marquis of Waterford public-house, and once to the Star Music Hall. She could not swear one way or the other whether she had charged to Peace's account drink consumed by her at an inn in Darnall called the Half-way House. Confronted with a little girl and a man, whom

Mr. Lockwood suggested she had employed to carry notes to Peace, Mrs. Dyson said that these were merely receipts for pictures which he had framed for her. On the day before her husband's murder, Mrs. Dyson was at the Stag Hotel at Sharrow with a little boy belonging to a neighbour. A man followed her in and sat beside her, and afterwards followed her out. In answer to Mr. Lockwood, Mrs. Dyson would "almost swear" the man was not Peace; he had spoken to her, but she could not remember whether she had spoken to him or not. She denied that this man had said to her that he would come and see her the next night. As the result of a parting shot Mr. Lockwood obtained from Mrs. Dyson a reluctant admission that she had been "slightly inebriated" at the Half-way House in Darnall, but had not to her knowledge been turned out of the house on that account. "You may not have known you were inebriated?" suggested Mr. Lockwood. "I always know what I am doing," was Mrs. Dyson's reply, to which an unfriendly critic might have replied that she did not apparently know with anything like certainty what she had been doing during the last three or four years. In commenting on the trial the following day, the Times stigmatised as "feeble" the prevarications by which Mrs. Dyson tried to explain away her intimacy with Peace.

In this part of his cross-examination Mr. Lockwood had made it appear at least highly probable that there had been a much closer relationship between Mrs. Dyson and Peace than the former was willing to acknowledge. H. B. Irving, **A Book of Remarkable Criminals** (1918)

5. Not every opposing witness will so kind as to make the desired concessions, and the trial lawyer may have to introduce additional information through other witnesses or evidence for the jury to understand the impeachment.
- H. For the jury to appreciate the concession or the impeachment, they must be able to understand it. For the jury to better understand the significance of the concession or impeachment, the process used by the trial lawyer may require several steps. A witness who catches onto the impending concession or impeachment may be able to "wiggle off the hook" before the concession/impeachment process "matures".
- I. Just how big a "concession" can it be?

**Consider:**



The evidence clearly shows that the truck was blue but the witness claims that it was a red truck. The prosecutor could lock the witness in on the factual discrepancy.

Lawyer: You said that the truck was red, isn't that right?

Witness: Yes, it was a red truck.

While it may appear that this witness is "locked down" on the color discrepancy, the color is just one descriptive element for the truck. The witness may well understand that she/he can't make the color stand later on and may volunteer something such as:

Witness: You know, the more I think about it, that truck could have been blue, under those lights and all.

The trial lawyer may want to expand this single descriptive variable into an attack on the entire vantage point.

Lawyer: Now, you were out there?

Witness: Yes, right there.

Lawyer: So, you were in a position to see things there?

Witness: Yes, I was.

Lawyer: You weren't so far away that you couldn't see?

Witness: I could see.

Lawyer: And it got your attention?

Witness: I watched it, yes.

Lawyer: You watched it pretty carefully, would you say?

Witness: Well, yeah.

Lawyer: The truck was just one of the things there that you saw?

Witness: Yes.

Lawyer: There were other things going on besides the truck being parked there?

Witness: Yes.

Lawyer: And you saw them as well as you saw that truck?

Witness: Yes.

Lawyer: And you say the truck you saw was red?

Witness: Yes.

For the witness to "wiggle off the hook" now, the witness would have to retreat from "got your attention" and "watched it pretty carefully"—a much more difficult undertaking.

- I. The witness will probably never agree to the ultimate conclusion you want to offer to the jury.

Lawyer: You couldn't really see anything, could you?

Witness: That's not true.

Because the witness will probably never agree to the ultimate conclusion you want to offer to the jury, it is probably not a good idea to give the witness an opportunity to deny that ultimate conclusion, as in the example above.

The ultimate conclusion is then handled in argument.

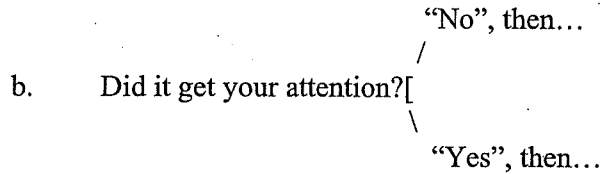
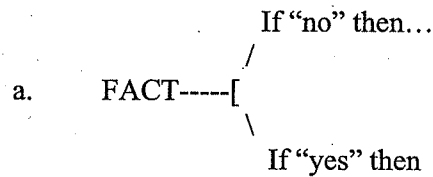
Lawyer: The witness claims that the event "got his attention" and that he paid "careful attention" to it. You know he got the color of the truck wrong. Do you think he might not have really seen much of anything out there that night?

J. By locking the witness down on the manner in which the truck was seen rather than merely what the color of the truck was, you may have secured the cooperation of the witnesses in his own undoing.

1. The witness desires to "sell" the testimony.
2. It is advantageous for the witness to have the jury believe that his vantage point was enhanced by his "attention" and that he watched the events "carefully". To the extent that the witness believes you are assisting in the "sell" process, the witness will go along with it.
3. If the witness accepts the consequences of these facts, the error of the color will taint larger chunks of the testimony.
4. If the witness denies that the vantage point was enhanced by "attention" and "care", then that vantage point has been weakened by that concession.
5. The "lock-in" is very important and must be done to prevent the witness from regaining lost ground. Remember the *Mobster's Guide to Cross-Examination*
  - a. Take the witness to the wharf.
  - b. Put the witness' feet in the concrete.
  - c. *LET THE CONCRETE HARDEN.* [Lock-in]
  - d. Push the witness off the wharf.
6. If you don't do the third step of the guide, the witness will "swim away" and regain the lost ground.

K. Plotting the consequences of facts.

1. Knowing that the witness' "yes" response carries consequences for one or both sides of the case; and that a "no" response carries consequences for one or both sides of the case, the trial lawyer may want to "test" these consequences by using a simple decisional tree for certain facts.
2. Using the decision tree:



3. The decision tree doesn't need to be used with every fact presented to the opposing witness, but it works well with exploratory cross-examination where the lawyer is uncertain of what the actual response is going to be.
4. The decision tree can be used to maneuver a witness into a position where the consequences of either answer are bad for the opposing case theory.

L. Assembling the facts to use in cross-examination.

1. National College faculty member John Tierney suggests that the collection of the assembly of facts to present to opposing witnesses can be likened to what is learned by watching a videotape.
  - a. A crime may be committed at one or more "scenes".
  - b. In crime scene investigation, the police look for things brought to the crime scene; things taken from the crime scene; and things disturbed at the crime scene.

- c. Tierney, in advising lawyers to think about “what must be true?” about their cases asks “If our crime were committed in the middle of a video tape, and based on what we know to be reasonably true about the crime scene, what would you expect the video to show *before* the crime was committed or *after* the crime was committed?”
  - d. The National College, through its *Analytical Advocacy*<sup>SM</sup> training, offers a similar approach:
    - 1. If what our witnesses say is true, then what else must be true?
    - 2. If what their witnesses say is true, then what else must be true?
  - e. What both sides say can’t be true
  - f. If a defendant is traveling on a narrow, winding, rural road, after dark, at 60 m.p.h. after having several beers, what must be true about his reaction time and these conditions?
  - g. If a defendant who does not keep a loaded gun in his truck has one at the scene of a shooting, what must be true about his getting that gun?
2. The collection of the facts can also come by working back from the reasonable inferences and argument.
- a. You may consider that a potential opposing witness may be biased in favor of the opposition because that witness is a “close neighbor” of the opposing party.
    - 1. Just what do you mean by “close neighbor”?
    - 2. A “close neighbor” may be inclined to be biased toward the opposing party.
    - 3. Isn’t “close neighbor” actually a conclusion if you are not just talking about the distance between their houses?
  - b. The lawyer may be back to the “Because” aspects of the argument. There are “facts” which lead a reasonable

person to believe that a neighbor may be biased because of "closeness". What are those facts?

**Consider:**

Lawyer: You consider yourself a friend of the defendant, don't you?  
Witness: I do.  
Lawyer: And you don't want to see your friends suffer, do you?  
Witness: I would rather not.  
Lawyer: And you would do anything to keep that friend from suffering, wouldn't you?  
Witness: I wouldn't lie for him, if that's what you're asking.

Does the jury perceive this *friend* to be a *close friend* if it has no basis for determining what that *closeness* means?

**Now consider:**

Lawyer: You live near the defendant?  
Witness: Yes.  
Lawyer: In fact, your house is just two houses from the defendant's house, isn't it?  
Witness: Yes.  
Lawyer: And, it's not just that the houses are near each other, but you often visit the defendant's house, don't you?  
Witness: Yes, we socialize.  
Lawyer: And the defendant visits your house often also, isn't that correct?  
Witness: Yes.  
Lawyer: You have children of similar ages?  
Witness: Yes.  
Lawyer: And those children play together, don't they?  
Witness: Yes.  
Lawyer: In fact they have played together ever since you moved into that neighborhood just two houses from the defendant, haven't they?  
Witness: Yes, that's true.

[Etc.]

Here the lawyer is showing the jury that the witness and the defendant are *close neighbors* and/or *close friends* *BECAUSE* of all these facts which the witness must concede.

In this sequence of questions, it may be tactically advantageous for the lawyer to repeat the buzzwords “close”; “two houses away”; and “together” in the questions so that the jury has a steady diet of the nexus which is the focus of the of the later argument against the witness’ credibility.

- c. Done properly and effectively, there is no need for the lawyer to ask whether the witness is so “close” that the witness would consider stretching the testimony, the jury will perceive that closeness and will be more receptive to the argument because they know the underlying facts.
  - d. The lawyer must remember that cross-examination is not done in a vacuum—it is done as a comparison and contrast of preceding testimony of this witness, and against the backdrop of all preceding testimony and evidence.
3. The collection of facts to present to this witness can come from considering such things as:
- a. The scene(s)
  - b. Time-motion studies (How long would it take...?)
  - c. Necessary preparation
  - d. Available items
  - e. Conditions of people, weather, lighting, etc.
4. The lawyer is then asking herself/himself, “Given the scene, the distances, and the time frame, what must be true about this event...?”
5. The same analytical question is asked about the opposing version. By carrying the analytical question out one or two steps, it may be possible to easily demonstrate the improbability of the opposing case theory.
6. A good example of “if what this witness is saying is true, then it is reasonable that...” can be seen in the impeachment of a state witness in the rackets trial of Charles “Lucky” Luciano in New York in the 1930s. Prosecutor Thomas Dewey put a prostitute, Nancy Presser, on the stand to testify that she would often go to

Luciano's Waldorf Towers suite where she would be paid just to talk with Luciano. If the witness had been there it would be reasonable that she could describe the hotel and the suite. On direct examination she gave a rather detailed description of these things.

"When [defense attorney George Morton] Levy began his cross-examination, however, it was apparent that Nancy Presser had not done her homework as well as she could have, or should have. Her description of Luciano's apartment proved faulty; she was not sure about the couches or chairs or colors....

"Had she been shown pictures of the suite? Levy asked.

"No—well, perhaps. She couldn't remember.

"Then Levy attacked her on her description of the Waldorf Towers itself... When Levy asked her to describe the hotel itself, she was unable to do so, unable to say where the entrances were, unable to describe the location of the elevators or what they were like, and, it turned out, she wasn't even sure where the Waldorf Towers was, other than somewhere on the East Side around Park Avenue. "

Martin A Gosch. and Richard Hammer, *The Last Testament of Lucky Luciano*, p. 211.

M. "Closing doors" on the opposing witnesses.

1. Remember that facts carry consequences. A witness may admit or concede a point on the fifth question which carries a consequence for a much later question without realizing what has been done.

**Consider:**

There is good proof that later in the evening the witness was wearing a denim shirt. Earlier in the evening, the store was robbed by a person in a denim shirt just like the one the witness was seen in later. The witness denies being part of the robbery, but may have difficulty with the later identification of him in the denim shirt after the robbery.

The lawyer may be tempted to test the fact "there was a change of clothes" on the decision tree and consider the consequences of both a "no" and a "yes" answer. However, this question would surely tip the witness to where the lawyer was going. Can the lawyer

“shut the door” on the witness later claiming that he had a “change of clothes” before being seen in the denim shirt after the robbery?

What would have to be true for the witness to be able to easily change shirts, particularly if the witness were not at home? The witness would have to have the extra shirt with him, and have an opportunity to make the change. If the witness could be walked through the details of the evening including what all he had at hand without tipping him off that the denim shirt would be an extra item; and the witness stated there were no extra items; then the “change of clothes” door is closed when he tries to get out that way.

Later, when the witness tries to add the details of having an extra shirt and changing into it, it appears to the jury for what it really is—retrenching in the face of a fact dilemma.

2. In order to “close” escape doors, the lawyer may have to engage in exploratory cross-examination where the lawyer asks questions to which she or he doesn’t know what the response will be by the witness
  - a. Professor Irving Younger, in his Ten Commandments of Cross-Examination, advises lawyers to *never* ask a question to which they don’t know the answer.
  - b. Former California prosecutor Leo Himmelsbach advises that there are times when the lawyer does ask a question to which she or he doesn’t know what the response will be. Himmelsbach suggests that whether you ask that type of question is largely a determination of the status of your case when you feel the need to ask that question.
  - c. In the denim shirt example, if the questioning can be abstract enough to rule out “extra items” without mentioning the shirt, the witness will not be on guard. If the witness begins to become guarded, the line of questions is simply abandoned without the jury knowing what the lawyer was trying to do. If the witness says he didn’t have “anything else”, that would include a shirt. If the witness lists several things but doesn’t mention the shirt, the inference is that he didn’t have an extra shirt
3. Escape doors which may need to be closed can be discovered in the “If this is true, what else must be true” questioning. By engaging in this analysis, the lawyer may finally conclude “The



only way out for him is to claim a 'change of clothes'. The lawyer then begins working on closing that door before the witness realizes that it may exist at all.

- a. If the witness excludes "extra items" (such as the shirt), then a later claim that there was a shirt becomes an *inconsistency* which becomes an arguable point.
- b. If the witness lists "extra items" but fails to mention a shirt, then that becomes an *omission*, which becomes an arguable point.
- c. In many cases the witness never realizes that he has been caught with the doors closed until the argument is made to the jury.

**Example:**

Lawyer: So, you didn't go out there to rob some place, you only went out to talk to Bobby?  
Witness: Yes.  
Lawyer: Did you take anything to talk to him about?  
Witness: Take anything?  
Lawyer: Take something to talk about. Say, "We need to talk about this".  
Witness: I didn't take anything.  
Lawyer: You didn't take anything at all extra?  
Witness: No.  
Lawyer: Did you have any other plans for the evening?  
Witness: Not really.  
Lawyer: So you didn't have anything extra for any extra plans?  
Witness: No.

4. Timing the *Lock-in*

"Much depends upon the *sequence* in which one conducts the cross-examination of a dishonest witness. You should never hazard the important question until you have laid the foundation for it in such a way that, when confronted with the fact, the witness can neither deny nor explain it." Francis L. Wellman, *The Art of Cross-Examination*, 4<sup>th</sup> Ed., p. 115.

5. The lock-in must begin much earlier in the cross

“With the witness who is going to tell the truth with reluctance, the prime success for the interrogator is to extort from him what he did not want to say. This can only be done by questioning which starts a long way from the point. He will then give answers which he does not think harm the Cause; later on, he will be led from a number of admissions to the point when he cannot deny what he does not want to say. For, just as in a formal speech we often gather together trivial Arguments, which in themselves seem to do the defendant no harm, and then prove the case against him by their cumulative effect, so a witness of this kind should be interrogated about many points, both preceding and following the events in question—places, times, persons, and so on—so that he is trapped into some answer and then must either admit what we want or contradict his previous statements.” Quintillian, *The Institutio de Oratoria Book V, Chapter 7, Witnesses* (Loeb Classical Library pp. 343-345) [Thanks to Bob Dekle for this quotation].

N. Cross-examination question formats.

1. There are *three question formats* for witness examinations.

a. *Interrogatory questions.*

1. The interrogatory question is the classic “Give me a fact” question. Unless limited in some fashion, the witness may be free to provide a speech instead of a controlled answer.
2. Interrogatory questions are often referred to as “open ended” questions.
3. The “open-endedness” of the question can be limited through the use of words, phrases or clauses, providing the lawyer with more control over the response of the witness.

**Example:**

“When you got in the car, what happened to...”  
“While you were at the apartment, when did...”  
“As you walked up the front steps, did you...”

4. The use of modifiers in words, phrases or clauses does not remove the danger of the open-ended

aspects of the interrogatory question, but they do better limit your exposure.

b. *Accusatory questions.*

1. The accusatory question provides the most witness control, because it tends to “lead” the witness by suggesting the answer. The witness is essentially left to say “yes” or “no”.
2. The accusatory question is the classic “Let me give you a fact, and you tell me yes or no” question.
3. The clear advantage (control) of the accusatory question format is also its disadvantage (may appear unfair from so much control).

**Example:**

*“You had the gun, didn’t you?”*

*“You knew she would be there, didn’t you?”*

*“You were still going to go over there, weren’t you?”*

4. The accusatory question is essentially a (short fact) plus (question tag line [“..., didn’t you”, etc.])
5. The careless inclusion of words such as *since* and *because* can convert the accusatory question into a very dangerous open-ended question permitting a damaging speech by the witness. *Since* and *because* are *summary* words and may well permit an explanation in the answer. Other first words in questions which may invite an explanation are: *So*, *therefore*, and *now*.

c. *Anticipatory questions.*

1. The anticipatory question is so named because it appears to *anticipate* one answer but gets another.

**Example:**

Lawyer: And, *of course*, Dr., you are board certified in that area, aren't you?

2. The use of the words *of course* creates an anticipation that the response will be "yes". When the witness responds "no", the jury would be surprised because of the construction of the question.
3. In this example, the anticipatory question goes straight to the impeachment—qualifications and credibility.
4. The anticipatory type question can be used effectively as a form of transition. Suppose the lawyer wanted to focus on the witness being a *close neighbor* with the defendant.

**Example:**

Lawyer: I would like to ask a few questions about where you live. Of course, you and the defendant are *close neighbors*, aren't you?

Witness: I wouldn't say we were *close neighbors*.

The lawyer can now list all of the *because* facts which the witness must concede and which would reasonably constitute a "closeness" as neighbors. The lawyer might end this sequence of questions, after gaining the concessions of the *because* points, by repeating the initial anticipatory question.

Lawyer: You and the defendant really are *close neighbors*, aren't you?

5. **NDAA National Prosecution Standard 77.2**
  - a. A trial lawyer should not ask a witness a question which assumes facts not in evidence.
  - b. A trial lawyer should not ask a witness a question which includes a factual predicate

for which the lawyer has no *good faith basis* for believing is true.

- c. **Standard 77.2. Improper Questioning.**  
*Counsel should not ask a question which implies the existence of a factual predicate which he knows to be untrue or has no reasonable objective basis for believing is true.*
- d. If an opposing witness' vantage point was from in front of a crack house, and there is nothing anywhere in the file about the witness having any connection with crack cocaine, it would be improper for the lawyer to ask the witness, "You were over there to get some crack, weren't you?"

6. **NDAA National Prosecution Standard 77.5**

- a. Lawyers should keep in mind the announced purpose of cross-examination.
- b. **Standard 77.5. Purpose of Cross-Examination**  
*The purpose of cross-examination is a good faith quest for the ascertainment of truth and should be conducted pursuant to this purpose.*
- c. "Guilt by association" cross-examination is improper. In **Commonwealth v. Anthony Pagano** (98-P-1477, 1999, <http://www.socialaw.com/appslip/98p1477.html>), the defendant testified that his nickname, Eric Wright, came from the name of a gangster rapper. The prosecutor's cross-examination about that nickname was held improper.

**Prosecutor:** "And Eric Wright is a rapper, you say, right?"

**Defendant:** "Yes."

**Prosecutor:** "He's a gangster rapper, or least he was; isn't that right?"

**Defendant:** "Yeah."

**Prosecutor:** "He died of AIDS back in 1995?"

**Defendant:** "Yes, sir."

**Prosecutor:** "[H]e and Doctor Trau and all those people started NWA; isn't that right? And made gangster rap popular, isn't that right?"

**Defendant:** "Yes, they did. Yes, they did."

**Prosecutor:** "And all his songs and all their songs talked about shooting police and having guns or robbing people --"

**Defense Counsel:** "Objection."

**Prosecutor:** "Isn't that right?"

**The Court:** "Sustained. The jury will disregard."

**Prosecutor:** "Is Eric Wright the same Eric Wright that showed up on the Arsenio Hall show wearing a ski mask?"

**Defense Counsel:** "Objection."

**The Court:** "Sustained."

d. "Guilt by association". "When, in the prosecution of a defendant, counsel for the government indulges in unfair and improper cross-examination, the only purpose of which is to degrade the defendant and to prejudice the jury against him, the government upon appeal, will not ordinarily be heard to say that the methods which were used did not have the effect which they were obviously intended to have." **United States v. Roy Lee Crawford**, 438 F.2d 441 (8<sup>th</sup> Cir. 1971)

Q. Mr. Crawford, have you at any time sold narcotics, transferred narcotics to either Geraldine Parker or Sam Parker?

A. No, I haven't.

Q. Have you ever in your life had occasion to handle in any way -- for profit or otherwise -- narcotics?

A. No.

Q. Have you ever in your lifetime been convicted of a crime?

A. No.

Q. Mr. Crawford, do you know any people who are either drug addicts or who have been convicted of selling drugs, or do sell drugs?

- A. No. I know some people. Whether they sell drugs or not, I don't know.
- Q. Well, do you know Samuel Parker?
- A. Yes, I know Sam Parker.
- Q. And has Sam Parker ever been at your house?
- A. Yes.
- Q. Do you know Geraldine Parker?
- A. I met Geraldine Parker in (pause)
- Q. But you do know her?
- A. Yes, I know her.
- Q. Now, I am sure you are aware that Samuel Parker has pled guilty to the possession of narcotic drugs?
- A. No.
- Q. Do you know that Sam Parker has indicated and petitioned the United States Attorney indicating that he is a drug addict and requesting that he be committed to Lexington, Kentucky?
- A. I do now. I didn't then.
- Q. You heard Geraldine Parker admit that she was a drug addict?
- A. Yes.
- Q. You heard Geraldine Parker admit that she sold drugs?
- A. Yes.
- Q. Do you know any other drug addicts or people who sell drugs?
- A. \* \* \* I know some other people, but as far as their drug addiction, I have no knowledge of it.
- Q. Do you know a man named Freddie Golden?
- A. Yes, I know Freddie Golden.
- Q. You know that Freddie Golden -- has he ever been at your house?
- A. Yes, he has been at my house.
- Q. Do you know that Freddie Golden about six weeks ago one court room over was convicted of selling drugs?
- A. No, I didn't know that.
- Q. You didn't know that. Do you know a man named Joe Tanksley?
- A. Yes, I know Joe.
- Q. Has he ever been at your house?
- A. No.

- Q. Now, do you know that Joe Tanksley about two weeks ago pled guilty in the United States District Court in St. Paul for the sale of drugs?
- A. No, I didn't know that.
- Q. Do you know a man named Carl Boyd?
- A. Yes, I knew Carl Boyd.
- Q. Do you know that Carl Boyd has a record for usage of drugs?
- A. No.
- Q. Did you know that he was convicted in 1952 for the sale of heroin in the United States District Court?
- A. No, I didn't.
- Q. Mr. Crawford, do you know a man named Bobby Bannarn?
- A. Yes, I know Bobby Bannarn.
- Q. You know he has got a record for possession of narcotic drugs?
- A. No, I didn't.

7. **NDAA National Prosecution Standard 77.6;  
Standard 77.1**

- a. Lawyers should understand the relationship between the cross-examiner and the witness being cross-examined. The powerful position of the cross-examiner can place even a truthful witness at a serious disadvantage.

b. **Standard 77.6. Impeachment and Credibility**

*Counsel should not misuse the power of cross-examination or impeachment to ridicule discredit, undermine, or hold the witness up to contempt, if counsel knows the witness is testifying truthfully. The credibility of any witness may be alluded to by a showing of any prior conviction.*

“By contrast, the defense, lacking the resources to conduct a thorough investigation, had to rely on the defendant, who was a dreadful witness. Frenchy sometimes seemed to understand English; at



other times, he claimed not to understand questions even after they had been translated into his native dialect. He consistently denied killing Old Shakespeare [Carrie Brown], but the prosecution (Francis Wellman later wrote in *The Art of Cross-Examination*) 'badly tangled' Frenchy 'time and time again upon cross-examination.' Frenchy was convicted of second-degree murder and, on July 10, 1891, sentenced to life imprisonment in Sing Sing.

Nearly 11 years later, in 1902, Gov. Benjamin B. Odell received a pardon application for Frenchy, based on new evidence. Apparently, a man who matched the description of [Frenchy] had worked for several weeks in the spring of 1891 at Cranford, NJ, about 15 miles from the city. He had been absent from Cranford on the night of April 23, 1891, and disappeared entirely several days later. Among the objects left in his room were a brass key bearing a tag with the number '31' and a bloody shirt. The key matched the keys to the East River Hotel. After all, the murderer had locked the door to Room 31. No evidence ever connected Frenchy to the key.

Moreover, Jacob Riis submitted an affidavit based on direct observation. When he had visited the hotel on the morning after the murder, before the coroner's arrival, he had not found blood on the door of either room or in the hallway. The Governor inferred from the affidavits of Riis and the other observers that the bloodstains, which had been found by the police only on the day after the murder, had been made at the time of the visit of the coroner and the crowd of reporters when the body was examined and removed. Even the police had testified that there was no blood on or near the lock or knob of the door to Room 31, which presumably the murderer had unlocked, opened, closed and relocked. Yet Frenchy's

guilt was premised on evidence suggesting he had passed out of Room 31 dripping blood on the floor, wearing bloody socks, and then smeared blood on the door, floor and bed of Room 33.

Between the weakness of the old evidence and the strength of the new, the Governor's mind was made up. On April 16, 1902, after an imprisonment of 10 years, nine months and 10 days, Frenchy was ordered released." William Bryk, *Old Smoke*, NY Press, Vol. 14, Issue 9, [www.nypress.com](http://www.nypress.com).

- c. **Standard 77.1. Fair Examination**  
*The examination of all witnesses should be conducted fairly, objectively, and with due regard for the reasonable privacy of witnesses.*
- d. **ABA Standards for Criminal Justice – Prosecution Function, 3-5.7 (a)**  
*The interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily.*
- e. Example of privacy-relevance from **State v. Hauptmann**, where the defense was attempting to suggest by *innuendo* that the child's nurse had connections with gang activity in Detroit. (trial transcript, pp. 280-281)
  - Q:** Did you associate with any young men in Detroit?
  - A:** I did.
  - Q:** Can you give me some of the names?
  - Prosecutor:** Oh, I object to that, if your Honor please.

**Q:** Cross-Examination.

**Prosecutor:** It is not cross-examination to find out whom a person associated with all his life unless there is some definite knowledge in the questioner's mind as to a particular individual for the purpose of this case. In which case, I take it, he points out the person. Now, I don't believe, if your Honor please, that an ordinary fishing expedition into the life of a witness, just because the lady is a witness, is material, and because it is not material, I object to it.

O. "One of the criminal [questioner's] grossest derelictions from duty consists in his simply throwing the witness the question and in permitting him to say what he chooses. If he contents himself in that, he leaves to the witness' conscience the telling of the truth, and the whole truth; the witness is, in such a case, certainly responsible for one part of the untruthful and suppressed, but the responsibility for the other, and larger part, lies with the [questioner] who has failed to do his best to bring out the uttermost value of the evidence, indifferently for or against the prisoner...Patience is necessary above all while taking evidence. A great many witnesses are accustomed to say much and redundantly, and again, most criminal [questioners] are accustomed to try to shut them off and to require brief statements. That is silly. If the witness is wandering on purpose, as many a prisoner does for definite reasons of his own, he will spread himself still more as he recognizes that his examiner does not like it. To be disagreeable is his purpose. He is never led by impatience beyond his introduction, and some piece of evidence is lost because almost every accused who speaks unintelligibly on purpose, says too much in the course of his speech and brings things to light that no effort might otherwise have attained to. Besides, whoever is making a purposely long-winded testimony does not want to say anything superfluous, and if he actually does so, is unaware of it. And even when he knows that he is talking too much (most of the time he knows it from the impatient looks of his auditors), he never can tell just what exceeded the measure. If, then, he is asked to cut it short, he remains unmoved, or at most begins again at the beginning, or, if he actually condescends, he omits things of importance, perhaps of the utmost importance. Nor must it be forgotten

that at least a large proportion of such people who are brought to court have prepared their story or probably blocked it out in the rough. If they are not permitted to follow their plans, they get confused, and nothing coherent or half-coherent is discovered. And generally those who say most have thought their testimony over before. Those who merely have to say no more than 'yes' and 'no' at the trial do not reduce the little they are going to say to any great order; that is done only by such as have a story to tell. Once the stream of talk breaks loose it is best allowed to flow on, and only then interrupted with appropriate questions when it threatens to become exhausting." Hans Gross, *Criminal Psychology: A Manual for Judges, Practitioners, and Students*, From Section 4b, 5c, translated from the Fourth German Edition by Horace M. Kallen. (1910).

## II. Witness Credibility

### A. Remember the Concepts Found in Typical **Credibility** Instruction Language which have been mentioned earlier: (Emphasis supplied)

"In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe **all** of what a witness said, or only **part** of it, or **none** of it."

"In deciding what testimony to believe, consider the witness' **intelligence**, the **opportunity the witness had** to have seen or heard the things testified about, the witness' **memory**, any **motives** that witness may have for testifying a certain way, the **manner** of the witness while testifying, whether that witness **said something different** at an earlier time, the **general reasonableness** of the testimony, and the extent to which the testimony is **consistent** with any evidence that you believe."

"In deciding whether or not to believe a witness, keep in mind that people sometimes **hear or see things differently** and sometimes **forget** things. You need to consider therefore whether a contradiction is an **innocent misrecollection or lapse of memory** or an **intentional falsehood**, and that may depend on whether it has to do with an **important fact** or only a **small detail**."

"You should judge the testimony of the defendant in the same manner as you judge the testimony of any other witness."

### B. The concepts contained in the typical instruction language relate to *vantage point* and *conduct*.

#### 1. Vantage Point

##### a. intelligence

- b. opportunity
- c. memory
- d. motives

2. Conduct

- a. manner (conduct on stand)
- b. said something different (earlier conduct)
- c. reasonableness of statements or conduct
- d. intentional falsehood

C. The Sixth Circuit's *Ask Yourself* Credibility Instruction ("Ask yourself" highlighted.)

1.07

**Credibility of Witnesses**

(1) Another part of your job as jurors is to decide how credible or believable each witness was. This is your job, not mine. It is up to you to decide if a witness' testimony was believable, and how much weight you think it deserves. You are free to believe everything that a witness said, or only part of it, or none of it at all. But you should act reasonably and carefully in making these decisions.

(2) Let me suggest some things for you to consider in evaluating each witness' testimony.

(A) *Ask yourself* if the witness was able to clearly see or hear the events. Sometimes even an honest witness may not have been able to see or hear what was happening, and may make a mistake.

(B) *Ask yourself* how good the witness' memory seemed to be. Did the witness seem able to accurately remember what happened?

(C) *Ask yourself* if there was anything else that may have interfered with the witness' ability to perceive or remember the events.

(D) *Ask yourself* how the witness acted while testifying. Did the witness appear honest? Or did the witness appear to be lying?

(E) *Ask yourself* if the witness had any relationship to the government or the defendant, or anything to gain or lose from the

case, that might influence the witness' testimony. *Ask yourself* if the witness had any bias, or prejudice, or reason for testifying that might cause the witness to lie or to slant the testimony in favor of one side or the other.

[(F) *Ask yourself* if the witness testified inconsistently while on the witness stand, or if the witness said or did something [or failed to say or do something] at any other time that is inconsistent with what the witness said while testifying. If you believe that the witness was inconsistent, *ask yourself* if this makes the witness' testimony less believable. Sometimes it may; other times it may not. Consider whether the inconsistency was about something important, or about some unimportant detail. *Ask yourself* if it seemed like an innocent mistake, or if it seemed deliberate.]

(G) *And ask yourself* how believable the witness' testimony was in light of all the other evidence. Was the witness' testimony supported or contradicted by other evidence that you found believable? If you believe that a witness' testimony was contradicted by other evidence, remember that people sometimes forget things, and that even two honest people who witness the same event may not describe it exactly the same way.

(3) These are only some of the things that you may consider in deciding how believable each witness was. You may also consider other things that you think shed some light on the witness' believability. Use your common sense and your everyday experience in dealing with other people. And then decide what testimony you believe, and how much weight you think it deserves.

**USE NOTE:** Bracketed paragraph (2)(F) should be included when a witness has testified inconsistently, or has said or done something at some other time that is inconsistent with the witness' testimony. It should be tailored to the particular kind of inconsistency (i.e. either inconsistent testimony on the stand, or inconsistent out-of-court statements or conduct, or both). The bracketed failure to act language should be included when appropriate.

D. Credibility of the **Expert Vantage Point**

1. Sixth Circuit Instruction

7.03

**Expert Testimony**

(1) You have heard the testimony of \_\_\_\_\_,  
an expert witness. An expert witness has special knowledge or  
experience that allows the witness to give an opinion.

(2) You do not have to accept an expert's opinion. In deciding how  
much weight to give it, you should consider the witness'  
qualifications and how he reached his conclusions.

(3) Remember that you alone decide how much of a witness'  
testimony to believe, and how much weight it deserves.

2. Tennessee Pattern Instruction on Expert Witnesses (Concepts are  
Highlighted.)

**T.P.I. -- CRIM. 42.02  
EXPERT WITNESS**

During the trial, you heard the expert testimony of  
\_\_\_\_\_, who was described to us as an expert in the  
field of \_\_\_\_\_.

The rules of evidence provide that if scientific, technical or other  
specialized knowledge **might assist the jury** in understanding the  
evidence or in determining a fact in issue, a **witness qualified** as  
an expert by reason of **special knowledge, skill or experience**  
may testify and state [his] [her] opinions concerning such matters  
and give reasons for [his] [her] testimony.

Merely because an expert witness has expressed an opinion does  
not mean, however, that you are bound to accept this opinion. The  
same as with any other witness, it is up to you to decide whether  
you believe this testimony and choose to rely upon it. Part of that  
decision will depend on your judgment about whether the witness'  
**background or training and experience is sufficient** for the  
witness to give the expert opinion that you heard. You must also  
decide whether the witness' opinions were **based on sound  
reasons, judgment and information.**

You are to give the testimony of an expert witness such weight and  
value as you think it deserves along with all the other evidence in  
the case.

E. Arguing Credibility (Sample Arguments)

1. *Four keys to witness credibility*

"I believe that you can boil down the question of believability of a witness to four simple questions. These four questions are important and the answers you give will be very useful to you. The questions are;

1. How did the witness look?
2. How did the witness act?
3. What did the witness say?
4. Why did the witness say it?

Each witness can be tested by these four questions, and I suggest that there is a framework for the use of those criteria.

Each one of us realizes that this courtroom is among the most formal places, other than church, that any of us normally encounters. Each of us feels observed and certainly the people here in the center of the courtroom are in a 'fishbowl' atmosphere. There is a judge sitting there in robes; there is a jury observing every movement; there are lawyers asking questions; most of the people are well dressed. It's normal in this type of situation for people to be on their best behavior. Therefore, we must always keep in mind that a witness' demeanor may not always tell us how that person really might act when they are not being observed and when they are not acting on their best behavior. You understand that the information you use to answer the four questions is based on observations in a very formal setting with witnesses on their best behavior. Your task is then to imagine what that person actually did or said out in the real world when he was free from the scrutiny of the judicial process. Viewed in this light, small flare-ups and indications of anger under questioning can indicate a more explosive character or more combative character than we actually see in the courtroom. Small nuances of behavior observed in the courtroom may be seen to indicate much more about the person's true character than what he actually testifies to on the stand. Ask yourself the four questions: How did the witness look? How did the witness act? What did the witness say? Why did the witness say it." Argument of Kenneth Lerner, Portland, Oregon. Ray Moses, *Jury Argument in Criminal Cases—A Trial Lawyer's Guide*, 2<sup>nd</sup> Ed., Sec. 5.11, p. 5-507 (1996)

2. "From a tactical standpoint, counsel's final argument attacking witness credibility rests upon the strengths of the impeachment evidence and the quality of its presentation. One must be wary of



arguing facts that don't appear to impeach. The natural sympathies of the jury often rest with the witness. Thus, unsupported arguments attacking the witness may be resented by the jury. Experienced lawyers caution against bluntly calling a witness a liar. It is not necessary to assume the burden of proving that opposition witnesses intentionally lied. It may be enough if they are sadly mistaken or dead wrong. Even in those cases where the witness is shown to be a bald-faced liar, the credibility argument may be couched in tactful subtle tones. Jurors may be resistant to return a verdict that constitutes a public finding that a person is a liar." Ray Moses, *Jury Argument in Criminal Cases—A Trial Lawyer's Guide*, 2<sup>nd</sup> Ed., Sec. 5.11, p. 5-506 (1998)

### III. Improbability

- A. If the prosecution case theory is correct, then the defense case theory is *improbable*. Will the jury understand that what is improbable to the prosecutor is clearly improbable to them also?
- B. "The picture of Luciano that his lawyers tried to paint was of a rather romantic fellow, a man about town, a generous spender—but the boss of a prostitution racket, never! Luciano took the stand with apparently complete assurance. He swore he had never taken a cent from prostitution. He said that he was a successful gambler. He admitted that when he was eighteen years old he had peddled narcotics. Dewey took him in hand and brought up the fact that, long before, Luciano had betrayed another dope peddler in order to save himself. 'You were a stool pigeon then', observed Mr. Dewey.

Dewey recalled Luciano's delightful record of brushes with the police. The witness confessed that he had obtained pistol permits under false pretenses. He said that had carried two pistols, a shotgun, and forty-five rounds of ammunition in an automobile 'to shoot birds with'.

'What kind of birds?' asked Dewey.

'Peasants', said Luciano, who was rattled, though he may not have been above taking a pot shot at a peasant, at that.

'Shooting pheasants? In July? With a pistol?' asked Dewey. The courtroom smiled, and Luciano was uncomfortable. Luciano continued to deny his own intimates; Dewey produced records of telephone calls to such gangsters as Louis Buchalter (the great Lepke) and Ciro Terranova, once the 'Artichoke King.' Luciano's showing on the stand, taking it all in all, was hardly successful." Stanley Walker, *Dewey—An American of This Century*, pp. 55-56.

- C. “In evaluating the testimony of a witness, you should analyze whether the testimony comports with probabilities based on human knowledge and experience. Aristotle stated that ‘probability is never detected during false testimony’. Therefore, one area of analysis and examination when preparing the cross-examination is to determine whether the evidence proffered by the witness comports more with probability or improbability.

While evaluating the testimony offered by the opposing witness in terms of probabilities, you should also examine the testimony in light of common sense. One of the great strengths of our jury system is that the collective sense of the jury is a highly effective testing ground for evidence. This is more true now than ever before, since so much of current litigation is predicated upon the testimony of dueling experts; experts hired by each side offer highly sophisticated and technical testimony on which the theory of the case or defense is predicated. Frequently, an appeal to the collective common sense of the jury during cross-examination of such an expert will serve as an extremely valuable tool in disarming the hired gun, since a common sense argument is much easier for a jury to accept than highly technical theories.” Howard L. Nations, *Cross-Examination.*, published speech.

D. Arguing Improbability

1. Defining terms

- a. By definition, probability (covering over half the times or circumstances) and improbability (half or less of them, let us say) are contradictory. TheLogician.net  
*FUTURE LOGIC* , Avi Sion, 1990 (Rev. ed. 1996)  
[http://www.thelogician.net/2\\_future\\_logic/2\\_chapter\\_14.htm](http://www.thelogician.net/2_future_logic/2_chapter_14.htm)
- b. Because probability (more than half the times) and improbability (half or less than half the times) have such ranges, people tend to describe probability and improbability in terms of degrees—a *high probability*, etc.

2. Classic Philosophical Argument Structure

- a. If an event is of sufficient improbability, one is justified in saying it probably didn't happen by chance.
- b. [This event] is of sufficient improbability.
- c. Therefore, one is justified in saying that [This event] did not happen by chance.

3. The difference between the two formulations lies in the unexpressed premises behind them. Proof of uniqueness was demanded in *Collins* [**People v. Collins**, 68 Cal. 2d 319, 438 P.2d 33, 66 Cal. Rptr. 497 (1968) (*en banc*) An attempt to prove identity of the defendant by a statistical calculation of probabilities based on the variables involved in the case.] because it was assumed as a starting point for the mathematical analysis that defendants were no more likely to have committed the offense than anyone else in the "suspect" population. The same assumption in our hypothetical case implies that the print evidence merely places defendant among a group of one hundred persons any one of whom is equally likely to be guilty. The probability of defendant's guilt remains small, though increased a thousand-fold (from one in a hundred thousand to one in a hundred) by the print evidence. The tacit assumption in *Collins* of no advance knowledge is inconsistent with the way we ordinarily view evidence. We tend to see a case as a whole; our appraisal of any bit of information depends on the rest of the testimony and our life experience. Guilt is determined by a "cumulation of probabilities." Slight additional evidence in support of an event about which we already have persuasive evidence is given considerable weight, while evidence which would otherwise be highly compelling is discounted if it does violence to our prior beliefs. Michael O Finkelstein, and William B. Fairley, *A Bayesian Approach to Identification Evidence*, 83 HVLR 489, 497 (1970)

E. Typical "improbability" jury instructions:

"You are instructed that you are the sole judges of the credibility of the witnesses and of the weight and value to be given to their testimony. In determining such credibility and weight you will take into consideration the character of the witness, his or her demeanor on the stand, his or her interest, if any, in the result of the trial, his or her relation to or feeling toward the parties to the trial, ***the probability or improbability of his or her statements*** as well as all the other facts and circumstances given in evidence."

F. FRE 401. Definition of *Relevant Evidence*

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action ***more or less probable*** than it would be without the evidence.

G. "Are not the improbabilities of a race horse, impossibilities for the draft horse?" Argument by the lawyers in the *Howland Will Case* 1867

1. In the Howland Will case, a mathematician, Professor Benjamin Peirce of Harvard, applied the product rule to strokes of authentic and disputed signatures and concluded that their similarities were a phenomenon which could occur only once in the number of times expressed by the thirtieth power of five. "This number," he testified, "far transcends human experience. So vast an improbability is practically an impossibility. Such evanescent shadows of probability cannot belong to actual life. They are unimaginably less than those least things the law cares not for." Michael O Finkelstein, and William B. Fairley, *A Bayesian Approach to Identification Evidence*, 83 HVL 489, 517 (1970)
2. The courts decided that such testimony was improper in establishing the "truth" of the case.

H. Improbability attacks, whether on the improbability of the facts (and the attendant conclusions) or on the credibility of that witness can approach ridicule.

1. Remember that the standards prohibit unnecessary harassment or the invasion of the reasonable privacy of a witness.
2. However, ridicule can be an effective tool.  
  
"[Some cross-examiners] effectively employ ridicule while others are more effective in a systematic and methodical weakening or destruction of the witness' testimony... The attorney who is adept at ridicule can easily convert the material to his purpose." Jay Ziskin, *Coping with Psychiatric and Psychological Testimony*, 2<sup>nd</sup> Edition, p. 304.

#### IV. The National College of District Attorneys Approach Point Cross-Examination Method.

- A. A number of years ago the National College developed a method or process for organizing cross-examination.

1. The focus of the organization is on advancing the case theory.
2. Cross-examination of defense witnesses comes after the entire prosecution case has been put before the jury. Natural erosion of memory has begun setting in on the jurors.
3. The trial lawyer cannot stop the trial and give a refresher opening statement so that the jury will keep the salient facts of the prosecution case theory in mind for the rest of the trial.
4. Through the defense witnesses the jurors are receiving a competing case theory, and they may have trouble compartmentalizing the competing facts for purposes of distilling the truth.
5. When the trial lawyer is "impeaching" an opposing witness, it necessarily involves "repeating" some of the opposing case theory in order to eventually illustrate why it is not credible or why it is improbable. The jury is then hearing the telling and possible retelling of the opposing case theory while forgetting significant points of the prosecution case theory.
6. When a defense witness takes the stand and becomes available for cross-examination, the trial lawyer should remember that it is an opportunity to advance his/her case theory.
7. It is difficult to get a person to shake hands with you if you first slap that person in the face. The same principle is true with cross-examination. It is easier to get concessions *before* any stinging impeachment.
8. Sometimes, the value of the concessions received outweighs the need to do any impeachment. Remember, the jury will not remember everything as well as the lawyers do. Some of your fears may be unfounded.

B. The lawyer in trial is always working toward closing argument.

1. Argument can be broken down into several components.
  - a. Attention step (the first minute or so to get their attention)
  - b. Core argument
    1. Relevant Instructions
    2. Facts-to-law or Law-to-facts

- c. Motivational segment and/or exit line.
- 2. The structure of the core argument follows traditional argument format as we follow it with family, friends, etc.

Main Argument Point 1

Topic/Subject Point 1

Details proving Topic/Subject Point 1

Topic/Subject Point 2

Details proving Topic/Subject Point 2

Topic/Subject Point 3

Details proving Topic/Subject Point 3

Main Argument Point 2

[Etc.]

- 3. The trial lawyer must also remember that two things are being argued before the jury about the facts.
  - a. “My case theory wins because...” (Facts prove the defendant guilty of the charge—**primary argument**) Note that factual concessions by opposing witnesses are used to prove the prosecution case theory and would go in the primary argument.
  - b. “Their case theory is incredible and not worthy of belief” (Facts prove that the defense case theory is full of holes; not *reasonable*—**rebuttal argument**) Impeachment concessions attacking the witness or the witness’ facts would be part of the rebuttal argument.
- 4. Communication studies indicate that listeners who hear an arguer who fairly mentions the opposing view believe that arguer is “fairer”—perhaps some rebuttal could be anticipated in the primary argument for that reason.
- 5. However, wholesale shifting back and forth between primary argument and rebuttal argument could cause confusion, and confusion may equal *reasonable doubt*.
- 6. Looking at the Argument Structure above, we can remember that the “details proving” Topic/Subjects are essentially the *because* facts.
- 7. In direct and cross-examination, we are trying to present those “facts” or “points” which permit us to approach the desired

argument. For cross-examination, we take these approach points and make them into a question; we organize them under Topic/Subjects to prevent confusion; and every Topic/Subject group of facts leads down to the ultimate argument.

**Consider:**

Ultimate Argument—Not credible because of bias

Topic/Subject 1—*close neighbors*

Approach points proving “close neighbors”

Topic/Subject 2 —*working buddies*

Approach points proving closeness of working together

8. Remember, it is generally not safe to ask the ultimate argument question to the witness in front of the jury.

Lawyer: You’re biased, aren’t you?

Witness: I am not.

Lawyer: Yes, you are.

Witness: No, I’m not.

- 9; In addition to getting a worthless exchange such as this, you are now stuck with the witness’ answer to your question.

10. It is safer to ask the ultimate argument question rhetorically to the jury in closing argument.

Lawyer: Folks, do you think some bias may be entering that witness’ view of this event? Let’s look at what we know...

- C. The National College designed an organizational system for use in both brainstorming for cross-examination and conducting the cross-examination.

1. The system combines brainstorming forms with an organizational form which can be used to conduct the actual cross-examination.
2. The brainstorming forms.
  - a. You can begin the brainstorming with the form which compares and contrasts the opposing assertions with the actual situation the opposition has. This form has the word “Situation” at the top for you to label which situation you are comparing/contrasting, and the rest of the page is a two

column form where you can compare “What would have been reasonable or logical in this situation?” against “What actually happened or occurred?”

1. Your case theory and the opposing case theory cannot both be true. If your case theory is true and grounded in the evidence, then, at some point, the opposing case theory must depart the evidence and head toward improbability. By looking at what actually happened, you can compare that action against what “should have” happened or would reasonably/logically be expected to happen for the opposing case theory to have merit.
2. Use this Situation form to think your way through the entire opposing case theory to develop the weaknesses and the credibility problems.
  - b. One of the brainstorming forms is actually a diagram of possible cross-examination areas. The diagram has a circle in the center labeled “Witness” which is surrounded by things to consider when thinking about what that witness must say to defeat you or what that witness has actually said. As you consider the possible or actual evidence by this witness, look at all the possible areas of cross-examination to see which ones can be used to construct the cross-examination.
  - c. Take the ideas you have developed with the comparison/contrast form and the brainstorming diagram and organize these thoughts by witness using the Brainstorming Ideas form. This form has a line where you can add the names of the opposing witnesses. The form has a two column design in case you wish to develop a comparison-contrast cross-examination showing the ideal situation you might reasonably expect based on the opposing assertions and the less than ideal situation the opposition actually has. You may have several pages for each witness.
3. Organize the witness ideas onto the Approach Point form by breaking up the ideas into separate Topic/Subject areas. The Approach Point form has a separate box at the bottom for “ARGUMENT TO THE JURY”.



- a. Here you would put the *main argument point* you will make to the jury—bias, improbability, etc.
  - b. It is set off in a separate box as a visual reminder to you that you probably don't want to ask the witness about this directly.
4. The box at the top of the form has a section entitled "Topic/Subject Area of Cross-Exam:".
- a. Actually this section is where you would write the Topic/Subject for the item you wrote in the "Argument to the Jury" box.
  - b. In the example where you would argue to the jury that the witness is biased because of being a *close neighbor* and because they are *working buddies*, on one Approach Point worksheet you would have bias as the "Argument to the Jury" with a Topic/Subject of *close neighbors* for that sheet; and you would have a separate worksheet with bias as the "ARGUMENT TO THE JURY" and *working buddies* as the Topic/Subject g for that sheet.
  - c. Below the Topic/Subject box at the top of the worksheet is one large box entitled "Fact Points". Here you would list all those facts—such as the *because* facts—which prove the Topic/Subject and lead you to the ultimate argument point at the bottom of the page.
    1. In listing the fact points, do not write out complete questions.
      - a. It takes too much time.
      - b. You will tend to read the question as you have written it rather than being spontaneous.
      - c. It is simple to turn a fact into a question by adding a tag line.
      - d. Indent fact points which follow other fact points for visual organization and better flow of the questioning.

**Consider:**

## FACT POINTS

Went in the truck....*becomes*

You went out there in the truck, didn't you?

2. Also in the FACT POINTS box is a place where you can reflect the *source* for the facts or an *exhibit* which assists in making the point.
  - a. A fact may relate to line 7, page 3 of a prior statement of that witness. Making that reference on this worksheet, reduces the problem of finding it later.
  - b. You may have developed fact points based on what you saw on a diagram or in a photograph. You can reflect which diagram or which photo for easy recall later.
3. You need a separate worksheet for each Topic/Subject. You may have two Topic/Subjects under Bias for this witness (*Close neighbors* and *Working buddies*)
  - a. Under *close neighbors* you may have too many fact points for one page, and the form contains a "Page \_\_\_\_ of \_\_\_\_" at the top so you can keep your runover pages straight.
  - b. You can write the witness' name on the top of the form, or you can keep the worksheets in a separate file folder for each witness.
4. You would also have separate worksheets for each ultimate argument point you want to make.
  - a. You might have two for bias, and you may have others for other argument points.
  - b. The key is to "group" them by Topic/Subjects.
5. Also included below the "ARGUMENT TO THE JURY" box is the box labeled "ARGUMENT THEME FOR THESE FACT POINTS"

- a. This theme is not like the theme you chose for Opening Statement where you may have said something like "Rape is a secretive crime"; "Greed is what brings us into this courtroom today"; or "If he couldn't have her, no one would have her".
- b. The purpose for the "ARGUMENT THEME FOR THESE FACT POINTS" is to make you begin to think about how you are going to argue this Topic/Subject to the jury. Taking the time to think about a theme may produce other fact points or affect your choice of words in your questions. The theme for the questions would be a description or characterization of that set of questions or the reasonable inferences to be drawn from it.
- c. Perhaps, in the case of a Topic/Subject such as "long time friends", a theme for the facts which you are going to produce could be "they go back a long way together".
- d. The theme could become a transition/anticipatory question as the beginning of these fact points.

**Consider:**

Lawyer: You and the defendant go back a long way together, don't you..."

- D. The Approach Point form is both an organizational tool and an execution tool.
  1. It takes a bit of getting used to.
  2. It works best if you begin to use it and the other brainstorm forms as you read through the file.
  3. While many defendants may never testify on their own behalf, the defendant is always a potential witness and you should prepare one for the defendant.
  4. While you may not know *who* a witness might be, you may know *what type* witness you will encounter (alibi, etc.)
  5. Develop the habit of establishing one point at a time to insure that the answer can be digested and the witness cannot give a literally true response which is different from what you meant the answer to be.

## BILLY BOB'S TALE

Billy Bob and Joe Earl have been rivals ever since Joe Earl won the junior calf roping contest years ago. They were rivals in school, in sports, and, later, in their ranching operations. There has never been any love lost between them. Most folks in town always wondered when they would have the final showdown.

About a year ago Billy Bob fell in love with Linda Lou, recently crowned barrel racing champion at the Travis County rodeo. He and she went out together for six months. Then she seemed to lose interest in him and quit returning his calls. Billy Bob became depressed and began to drink more than normal. He became more depressed and angry when he heard that Linda Lou was seen stepping out with Joe Earl. Billy Bob heard Joe Earl was bragging that he took Linda Lou away from him. Billy Bob was then heard to say things like "The sun don't shine on the same dog's ass every day" or "He'll get his comeuppance someday."

On the night in question most of the town was at the Broken Spoke to hear their favorite western swing band, Frieda and the Firedogs. Joe Earl's bright red duallie with the custom license plate #1COWBOY was parked right at the front door. Billy Bob arrived late. He saw Joe Earl dancing the cotton eye joe with Linda Lou. He approached them on the dance floor and asked to cut in. Joe Earl laughed and said "No, she don't dance with no broke-ass losers." Everybody on the dance floor heard and saw this.

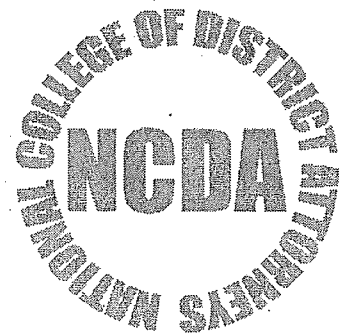
Billy Bob went to the bar and ordered a Lone Star beer. When the dance ended Joe Earl went to the bar to get a refill. There Billy Bob began to argue with Joe Earl. After about a minute Billy Bob pulled his venerable .45 Colt automatic out from underneath the back of his jean jacket and shot Joe Earl twice in the heart. When he was corralled by the crowd Billy Bob said "I thought he was going for something and I had to defend myself." Joe Earl was found to have a folding Buck knife in a leather holster on his belt and a silver cell phone clamped onto his heavily starched jeans.

**National College of District Attorneys**

**Cross-Examination Formbook**

**Approach Point  
Cross-Examination  
Planning and Organizational  
Forms**

*Organizing Your Fact Points  
to Approach the Persuasive  
Arguments*



## Cross-examination as the “because” part of typical argument structure

### Typical “People-Argument”

You forgot about our anniversary.

Because...

You say that it is a “special day”.

It’s easy to remember because it is four days  
from your birthday.

You have a calendar on your desk.

You could write it down on that calendar.

It wouldn’t take much effort to write it down.

You didn’t do that.

Argument  
Point

Supporting  
Facts

So...

It must not be very “special”.

You forgot it.

Argument  
Point

## Same “argument” as cross-examination

You have an anniversary?

Same date every year?

It is close to your birthday.

It is four days from your birthday.

You remember your birthday?

You have a calendar?

That calendar is on your desk?

You are at your desk every day?

You note things on that calendar?

Things you want to remember?

Special things?

It’s not hard to make those notes?

You didn’t make a note about the anniversary?

Cross-examination  
is the typical  
argument done in  
reverse order. The  
supporting facts are  
presented while the  
witness is on the  
stand, and the  
“argument point” is  
made in closing.

WITNESS: \_\_\_\_\_

PAGE \_\_\_\_\_ OF \_\_\_\_\_

**TOPIC/SUBJECT AREA OF CROSS-EXAM:**

(Add here the the topic which covers these fact points)

**FACT POINTS**

**SOURCE/EXHIBIT**

(List the short facts here which help you make the desired argument above. You do not have to write out questions. Each fact can be made into a question by the addition of a "tag line" such as "didn't you", "wasn't it", "isn't it a fact", etc.

(List here the source of the fact point or the particular exhibit which will help you with this set of fact points)

Think of a good transition fact which can be used to set up these facts. You may want to depart from these facts if the witness gives you a better fact direction)



**ARGUMENT TO THE JURY:**

(Add here the argument you will make to the jury about this witness)

**ARGUMENT THEME FOR THESE FACT POINTS:**

(Add here a persuasive theme or description for these fact points)

**TOPIC/SUBJECT AREA OF CROSS-EXAM:**

Incomplete analysis by witness

**FACT POINTS****SOURCE/EXHIBIT**

Accident reconstruction is physics

Physics is "hard science"

Laws of physics are applied to automobile wrecks

Laws of physics are well known

This case is about a wreck

A two car wreck

Head-on collision

There was damage to both cars

damage=evidence

There was damage to road surface

damage=evidence

There were skid marks

skid marks=evidence

There were injuries to the people

injuries=evidence

There were witnesses to the wreck

witnesses described wreck

descriptions could corroborate scientific analysis

Police were on the scene

on the scene within minutes

saw the cars

saw the road surface

saw the skid marks

saw the injuries

photographed all this "evidence"

made measurements

did triangulations

outlined the debris field

Police talked to witnesses on the scene

could determine witness vantage points

could evaluate witness vantage points

took witness statements from place where witness saw wreck

for better orientation and recall

You didn't go to scene with Officers (list them?)

You didn't go to scene with Witnesses (list them?)

*Example of making "questions"*"There was damage to both cars,  
wasn't there?""That damage is evidence,  
isn't it?"**ARGUMENT TO THE JURY:**

Can't believe their expert; not follow scientific method; unreliable

**ARGUMENT THEME FOR THESE FACT POINTS:**

We didn't get our money's worth





WITNESS: \_\_\_\_\_

PAGE \_\_\_\_\_ OF \_\_\_\_\_

TOPIC/SUBJECT AREA OF CROSS-EXAM:

FACT POINTS

SOURCE/EXHIBIT

 Then this must be true  
**Point,** and if this is true   
Then this must be true

**Additional points can be added above  
and below current points by consider-  
ing reasonable, logical progression,  
or reasonable, logical cause and effect.**



ARGUMENT TO THE JURY:

ARGUMENT THEME FOR THESE FACT POINTS:

TOPIC/SUBJECT AREA OF CROSS-EXAM:

FACT POINTS

SOURCE/EXHIBIT

## Setting up a comparison/contrast cross-exam

The defense theory without weaknesses is persuasive.  
 But the defense must make concessions about weaknesses.  
 We can compare/contrast the defense theory as alleged with  
 the defense theory as it actually is.

### EXAMPLE 1: Didn't follow scientific method.

Scientists follow scientific method.  
 Accepted approach to validating theories.  
 Accepted approach produces reliable results.  
 Didn't follow scientific method.  
 Didn't follow accepted approach.  
 (Argument: Results less reliable)

### EXAMPLE 2: Impediments to vantage point.

Saw a person.  
 Said "not defendant"  
 Lighting important to see  
 Very dim light  
 Distance important to see  
 Across the parking lot  
 Cars in the way



ARGUMENT TO THE JURY:

ARGUMENT THEME FOR THESE FACT POINTS:

**Situation:**

**What would have  
been reasonable or  
logical in this situation?**

**What actually  
happened or  
occurred?**

**The Ideal**

Expert Witness

Use Scientific Method

Follows accepted formats

Wants complete investigation

complete facts

recheck facts?

want first hand accounts

want all documentation

Consider source of facts

Not reject any hypothesis

Conduct exams fairly

follow procedures

keep log, journal (precise)

confident in work

not be afraid of findings

write report showing signi-

ficance

Reasonably compensated

**Less Than Ideal**

Defense Witness

Not follow exact method

Deviated from formats

Incomplete investigation

didn't have all facts

rechecked facts?

did not have first hand

did not have all reports

Did not consider all hypotheses

Does not have notes

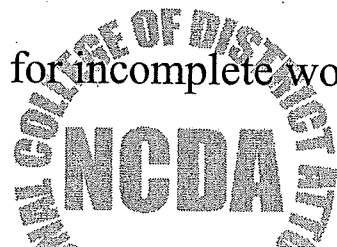
Did not write report

Did not provide prosecution

with results till testimony

Full price for incomplete work

**Typical Compare/Contrast Cross**



## TOPIC/SUBJECT AREA OF CROSS-EXAM:

## FACT POINTS

Use Scientific Method  
 Follows accepted formats  
 Wants complete investigation  
     complete facts  
     recheck facts?  
     want first hand accounts  
     want all documentation  
 Consider source of facts  
 Not reject any hypothesis  
 Conduct exams fairly  
     follow procedures  
     keep log, journal (precise)  
     confident in work  
     not be afraid of findings  
     write report showing significance

**SOURCE/EXHIBIT**  
 “Now, Doctor, you consider yourself a scientist, don’t you?”

“And a scientist would follow the scientific method, isn’t that correct?”

Lock the witness in on the reasonable or accepted facts before introducing the contrast.

Not follow exact method  
 Deviated from formats  
 Incomplete investigation  
     didn’t have all facts  
     rechecked facts?  
     did not have first hand  
     did not have all reports  
 Did not consider all hypotheses

“But you didn’t quite follow that method exactly, did you?”

## Simple Expansion of Concept

*Ideal--Scientific Method*

*Ideal Result--More Reliable*

*Concession--Not follow Scientific Method*

*Concession Result--Unreliable*

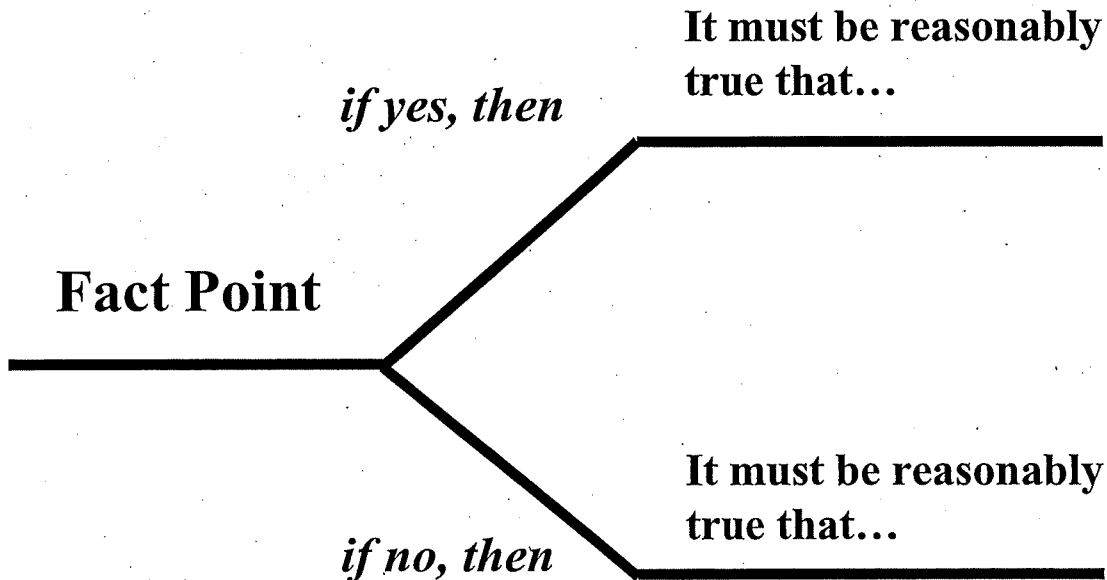
Does not have notes  
 Did not write report  
 Did not provide prosecution with results till testimony

## Typical Compare/Contrast Cross

## ARGUMENT TO THE JURY:

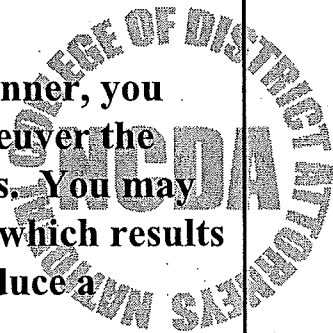
## ARGUMENT THEME FOR THESE FACT POINTS:

**Edit your fact point questions by considering the inferences which would flow from either a yes or no answer.**



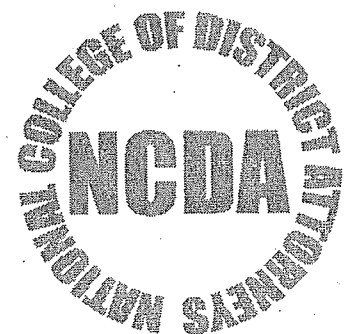
**Testing your fact point questions by using the yes/no decision tree can help you determine whether you want to present that fact or whether you need to refine the wording of the fact point in light of the possible answers and their reasonable impact on both the prosecution and defense case theories.**

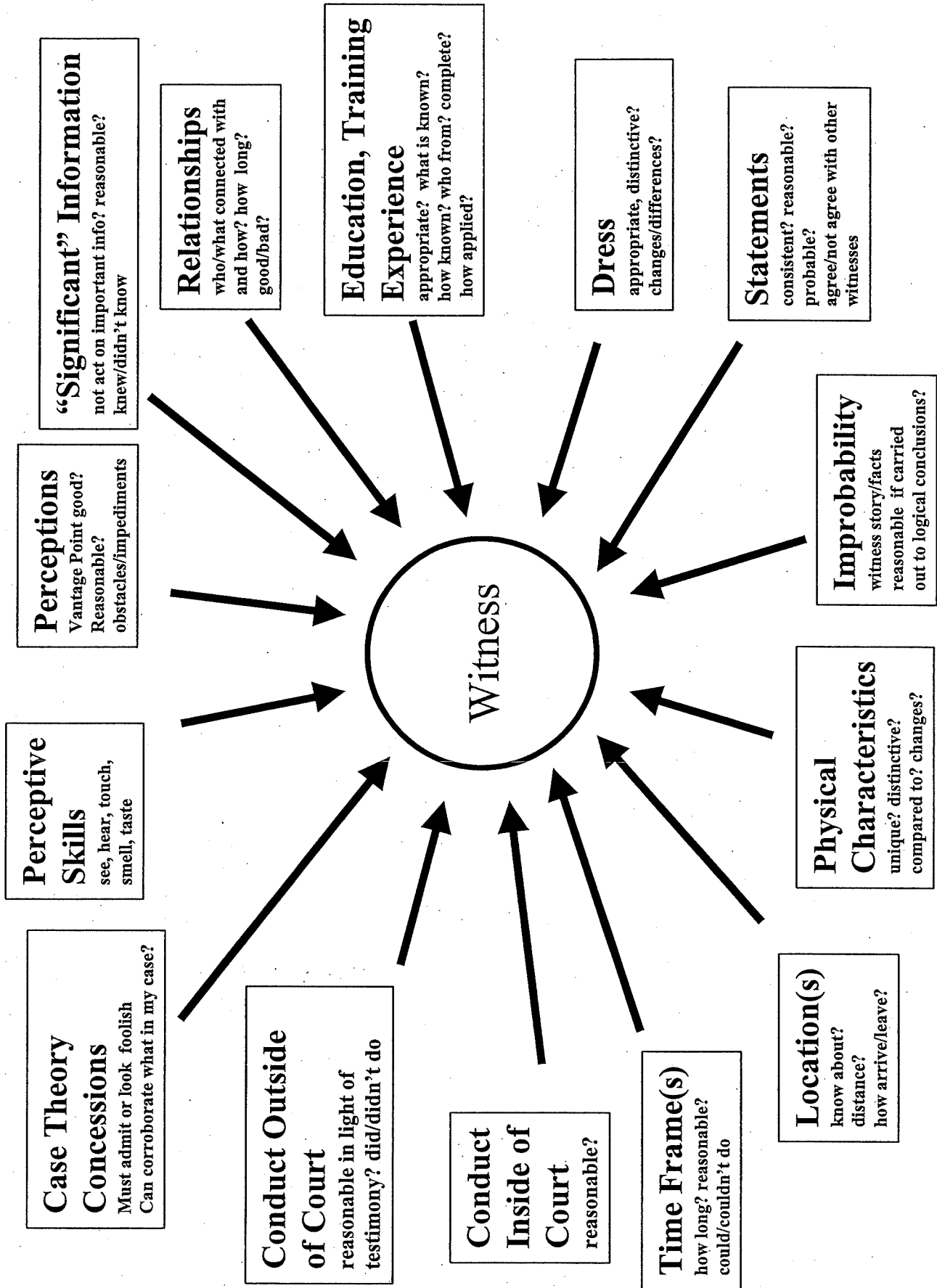
**By testing your fact points in this manner, you may be better able to surgically maneuver the witness toward the desired inferences. You may also be able to construct a fact point which results in yes or no answers which both produce a favorable inference in argument.**



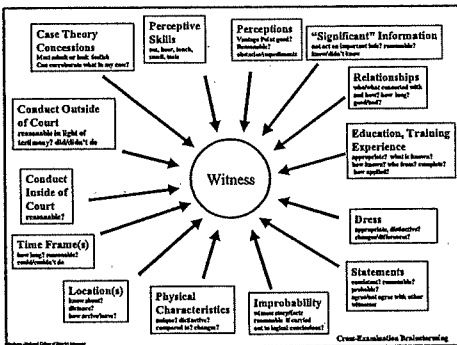
**Situation:**

<b>What would have been reasonable or logical in this situation?</b>	<b>What actually happened or occurred?</b>





## The National College of District Attorneys Approach Point Cross-Examination Process



2

List the possible concession ideas on the Brainstorm forms.

[illegible]

①

Use the Brainstorm Diagram to find the concessions the witness must make that advance your case theory or undermine the witness or the defense theory.

The image shows two identical sample brainstorming idea cards side-by-side. Each card has a header section with the title "Brainstorming Ideas" in a rounded rectangle and a page number field "Page \_\_\_ of \_\_\_". Below the header, the name "John Smith" is written in the "Witness" field. The main body of the card is filled with horizontal lines for writing ideas. On the left card, the word "Topic 1" is circled in the first line. On the right card, the word "Topic 2" is circled in the first line. Both cards have a large, dark, irregular shape on the left side, possibly representing a shadow or a sticker.

3.

Look over your list of concession points and see if you can break them down into topic areas

WITNESS CATEGORY	PAGE	WITNESS CATEGORY	PAGE
<p><b>TOPICALITY: AREA OF CROSS-EXAM:</b> Incompetent analysis by witness</p> <p><b>FACT POINTS:</b> Accident reconstruction is physics Physics is "hard science" Laws of physics are applicable to automobile wrecks Laws of physics are well known This case is about a wreck A few car wrecks Head-on collision There was damage to both cars damages/evidence There was damage to road surface damages/evidence There were skid marks damages/evidence There were injuries to the wreck witness described wreck descriptions could corroborate scientific analysis Police were on the scene on the scene within minutes saw the cars saw the road surface saw the skid marks saw the injuries photographed all this "evidence" made measurements outlined the debris field Police talked to witnesses on the scene could determine witness vantage points could evaluate witness vantage points took witness statements from place where witness saw wreck for better orientation and recall You didn't go to scene with Officer (fill that?) You didn't go to scene with Witnesses (fill that?)</p> <p><b>ARGUMENT TO THE JURY:</b> Can't believe their expert; not follow scientific method; unreliable ARGUMENT FOR THESE FACT POINTS: We didn't have money's worth</p>	<p><b>SOURCE/DEBMIT</b></p>	<p><b>TOPICALITY: AREA OF CROSS-EXAM:</b> Palmer his opinion</p> <p><b>FACT POINTS:</b> Racine policy from University Racine fees as witness Racine fees for investigation Racine fees for testifying Racine fees are paid Racine fees are uncollectible, not hired Income from these sources percentage of income from witness fees If so, not used much as witness If high, "professional witness?" landed off consistently have "favorable opinion"</p> <p><b>SOURCE/DEBMIT</b></p>	<p><b>ARGUMENT TO THE JURY:</b> Seems to always have the desired answer ARGUMENT FOR THESE FACT POINTS: The go-to expert</p>

4

Using a separate Approach Point form for each topic, organize your short concession points onto the Approach Point forms. When you finish each form, look over the points and see if there is a descriptive, persuasive theme or characterization for those points which you can use in argument as you summarize these points

Topic leads to this  
argument in closing

Optional theme or description  
of these concession points



## Brainstorming Ideas

Page \_\_\_\_ of \_\_\_\_

Witness \_\_\_\_\_

[illegible]

**WITNESS:** \_\_\_\_\_

PAGE \_\_\_\_\_ OF \_\_\_\_\_

**TOPIC/SUBJECT AREA OF CROSS-EXAM:**

## FACT POINTS

**SOURCE/EXHIBIT**

### ARGUMENT TO THE JURY:

**ARGUMENT THEME FOR THESE FACT POINTS:**