

Cross Examination of Difficult Witnesses in Sexual Assault Cases



“Cross-examination is the greatest legal engine ever invented for the discovery of truth. You can do anything with a bayonet except sit on it. A lawyer can do anything with cross-examination if he is skillful enough not to impale his own cause upon it.”

– JOHN HENRY WIGMORE



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Cross Examination



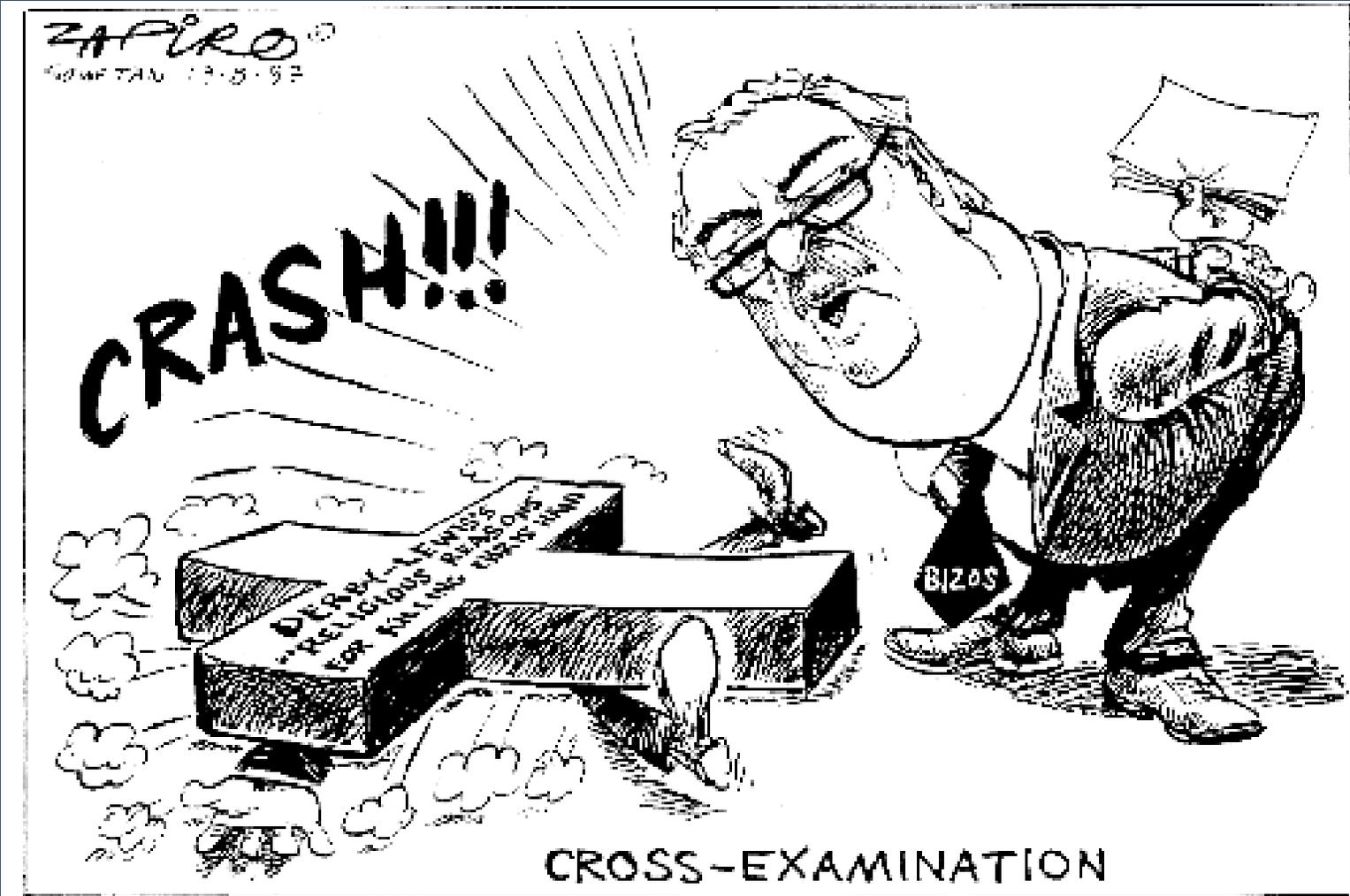
bayonet



Cross Examination



Cross Examination



14 August 1997

George Blaz represents the Haiti family at the Amnesty Hearing

Cross Examination



Cross Examination



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Cross Examination



bayonet

Cross Examination



Kill or Maim the Witness



Cross Examination





Cross Examination





Cross Examination

Kill or Maim the Witness



Cross Examination



Cross Examination



Effective Cross Examination of Difficult witnesses In Sexual Assault Cases



Cross Examination

Preparation

Different Methods of Cross- Examination

Special Considerations in Sex Cases



Preparation





Cross Examination



Preparation

**Answer the Question –
Why the Child (Complainant) is saying
what the child is saying
when the child is saying it?**

Thoroughly Investigate the case

- Reading All Reports and Reviewing All Evidence
- Getting an investigator to interview known witnesses, find potential new witnesses and investigate witnesses (be familiar with their testimony)
- Consulting Expert Witnesses
- Being Familiar with relevant law (Jury Charge issues)

Cross Examination



Preparation



Thoroughly Investigate the case

Cross Examination



Preparation



Marinate In the Family



Digging Deeper

Cross Examination



Preparation





Cross Examination



Preparation

Thoroughly Investigate the case

- **Investigate the Character of the Accuser**
- Investigate Social Media
- Speak to the accuser's friends and family members
- Obtain School and/or Work Records
- Identify Witnesses familiar with the accuser's truthfulness

What does the Witness Know

Cross Examination



Preparation

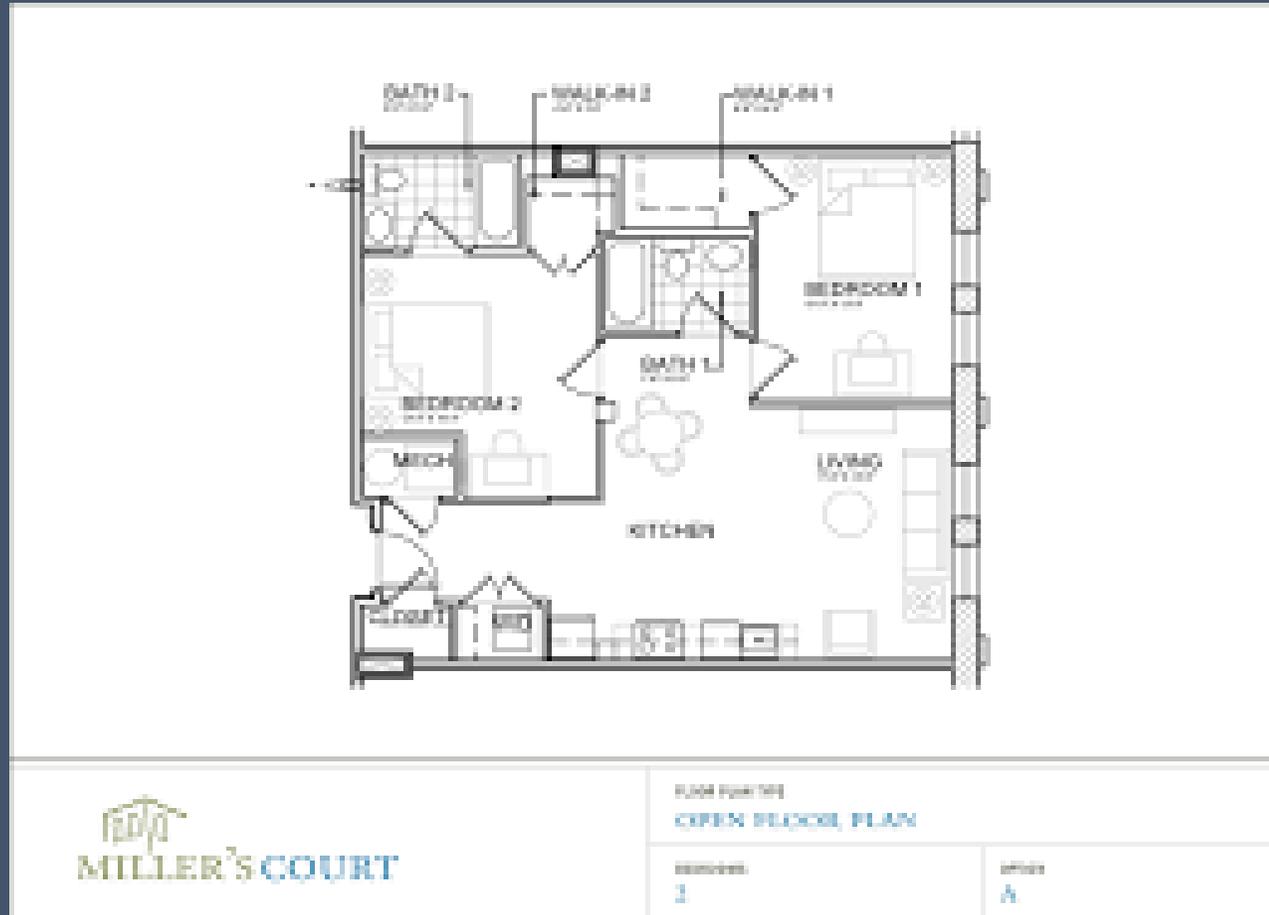


Capture the Space

Cross Examination



Preparation




MILLER'S COURT

Understand the Relationship

Cross Examination



Preparation



Investigate the Outcry

Cross Examination



Preparation



Learn your File



Cross Examination



Preparation



Lack of Evidence

Cross Examination



Preparation



Conduct Depositions of All Key Witnesses





Cross Examination

Who Would The Witness Have Told

Exploring the Interview

OTHER UNIQUE
CONSIDERATIONS



Cross Examination

Who Would the Child Naturally Have Told??





Cross Examination

How was the Child Questioned



Develop Your Theory (or theories) of the Defense

- From the investigation of the case
- Your review of the relevant law
- Consulting with experts

Cross Examination



Preparation



Identify whether.....

Cross Examination



*The child has come to believe this happened and has been influenced by others to make the allegations;

OR

*The child knows this is a false allegation and is testifying about it, intentionally, to hurt your client.

OR

*The child was assaulted by someone, just not your client (and there is a motive for her to point the finger at him).

DEVELOPING THE THEORY



Cross Examination



Preparation

**Answer the Question –
Why the Child (Complainant) is saying
what the child is saying
when the child is saying it?**

Cross Examination



Understand Rape Shield

Write Out a Theory of Defense

Cross Examination



Preparation

- Lela was never abused by anyone-she made up the story about Mr. Alimond (the same story that she heard from her cousin) after her mother caught her photographing her vagina. Her mother suggested that the explanation for her behavior was that her father touched her and she agreed – she saw this as an opportunity to get away from her house and her mother who had stopped being a true parent to her.

Develop a List of Witness you will have to potentially cross examine

Cross Examination



Preparation

- State's Subpoena list
- Investigative Reports (OR, SANE Reports, Call Slips, etc.)
- Names of people from other Evidence you receive
- Experts from the State's Expert Notice

Identify the role of each witness



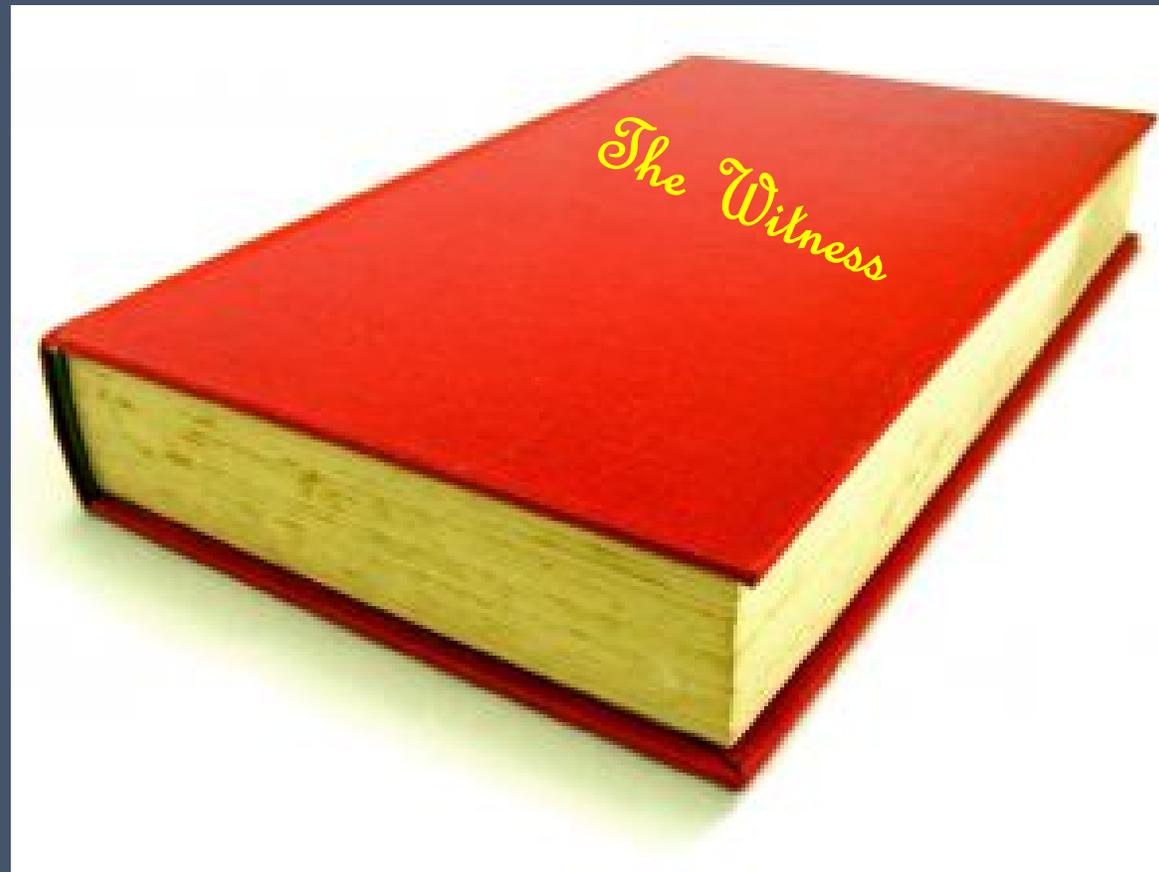
- Be Familiar with their anticipated testimony
- What part, if any, of your defense theory does their testimony support?
- Are they witnesses that you want to discredit?
- Are they witnesses that you want to ignore?

Think of Chapters (Topics/Goals)
you want to discuss or achieve with
each witness

Cross Examination



Preparation



Think of Chapters (Topics/Goals)

you want to discuss or achieve
with each witness

Cross Examination



Preparation



- **Relate the Chapters to your theory (or theories) of defense**
- Divide each witnesses' testimony into sections
- Know where the answers you seek are found in the evidence
- Create an outline of areas for cross examination of each witness and notate where the evidence is that supports the chapter (keep each chapter on a seepate page.
- Be familiar with prior statements and inconsistencies

For Example

Cross Examination



Complainant in a Child Sex Abuse Case



Chapters

The Scene (the space) / It's a heavily trafficked area

Prior Relationship with the client / How close you are to the person

Details of the Alleged Assault

Motive to fabricate

Parental Influence

Impeachment Issues

For Example

Complainant in a Child Sex Abuse Case

Chapters

The Scene

- **What about the scene supports your theory**
- **Photos taken by Investigator (or CSU)**
- **Description by officers in OR**
- **Statements from the CW about the Scene**
- **Statements by other witnesses regarding the scene**

Cross Examination



Preparation



Order the Chapters with Intention

Cross Examination



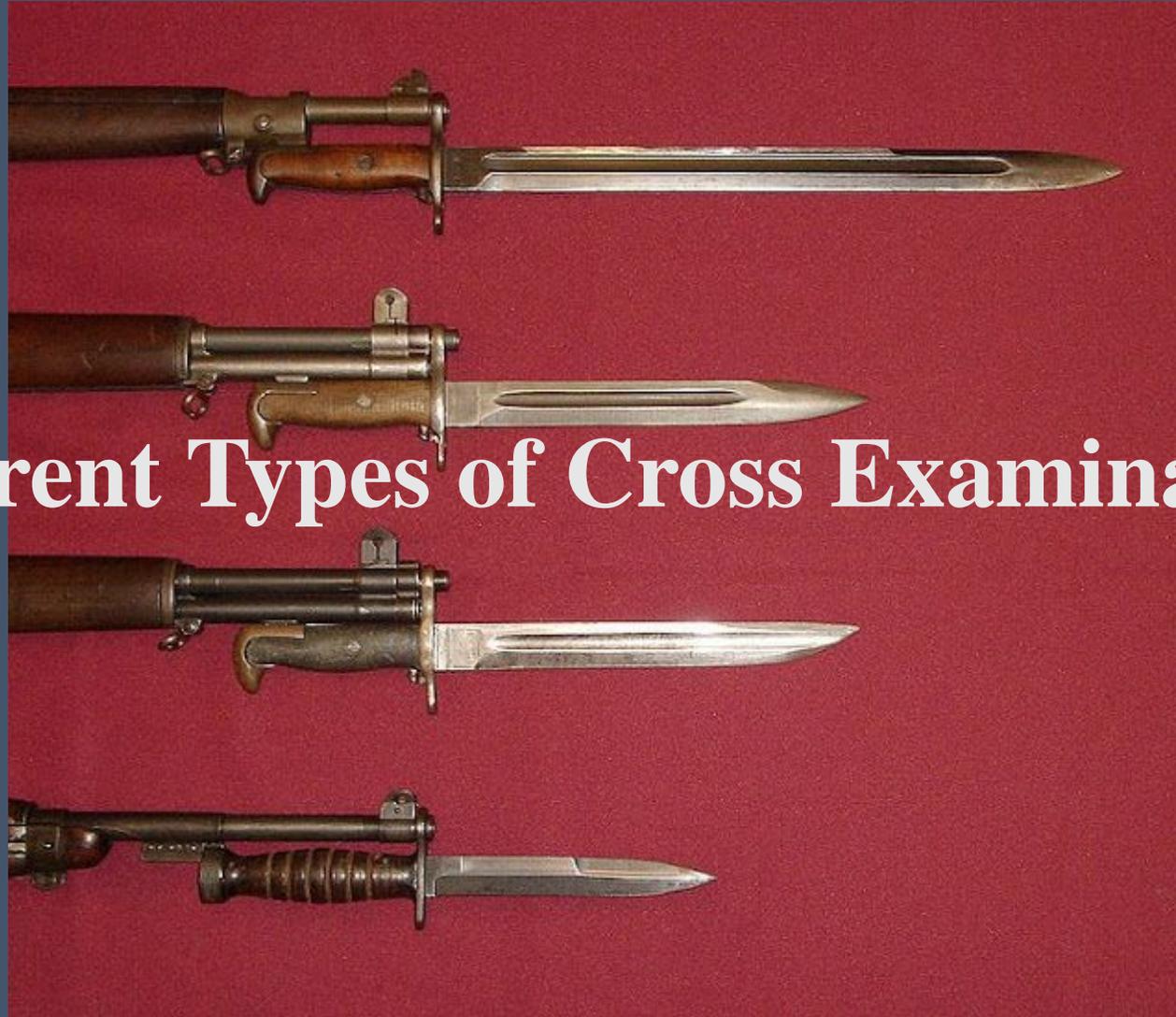
Preparation

- The cross is the story of innocence and the order matters.
- The arc you chose changes the way the listener process the information.
- Primacy and recency is important.
- Bury the hard stuff in the middle.



Cross Examination

Different Types of Cross Examination



The Constructive Cross Examination

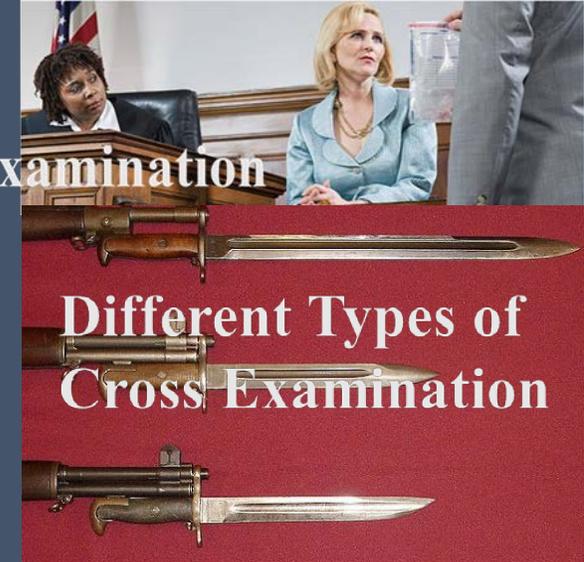
Cross examination that extracts favorable points from an opposing witness.

Start by asking what parts of the direct examination helps your client. Ask questions about these parts.

Also ask questions that corroborate parts of your theory.

Seek helpful admissions from the witness.

Cross Examination



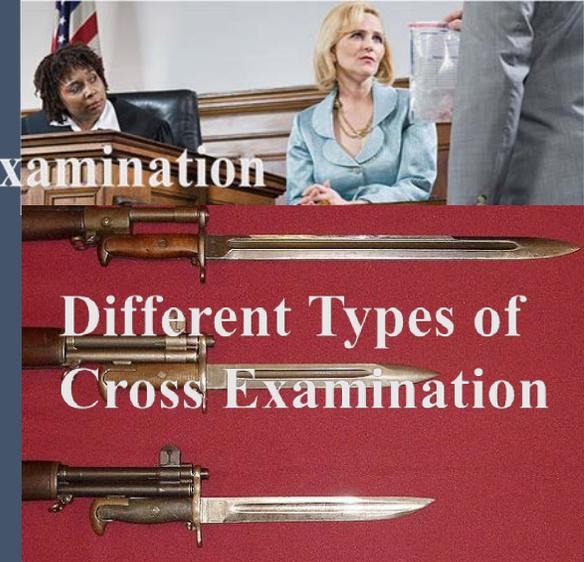
Destructive Cross

In the late 1960s Irving Younger established the gold standard for destructive cross by positing thin sliced fact statements offered as declarative statements in the form of “questions.”

- Never let the witness explain an answer and leave the final point for closing argument.
- This is “yes/no” approach permits only four answers: “yes,” “no,” “I can’t answer the question yes or no,” or “I don’t know.” Law schools teach this method and it’s the starting point for cross examination.

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Cross Examination

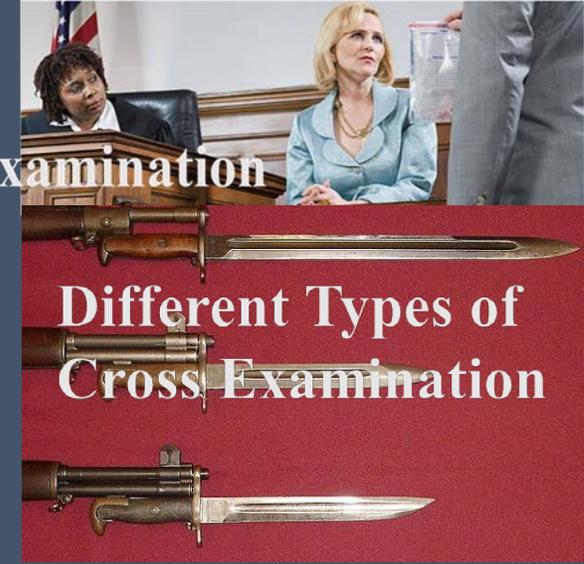


Different Types of
Cross Examination

Destructive Cross (Ten Commandments)

1. Be brief.
2. Ask short questions, use plain words.
3. Ask only leading questions.
4. Ask no question to which you don't know the answer.
5. Listen to the answers.
6. Don't quarrel with the witness.
7. Don't let the witness explain.
8. Don't rehash the direct examination.
9. Don't ask one question too many.
10. Save the explanation for final argument.

Cross Examination

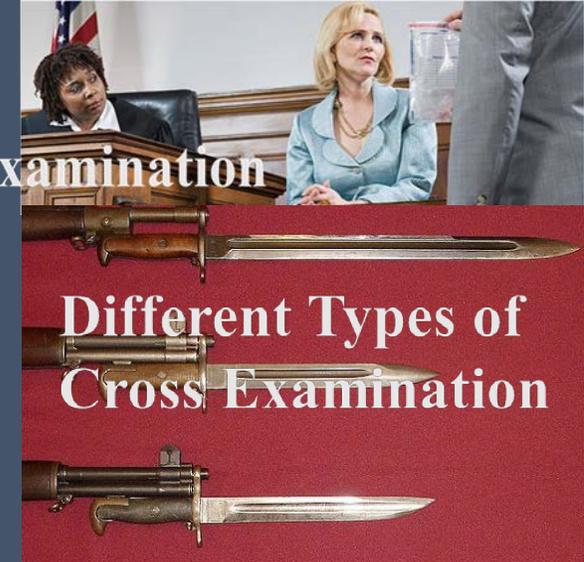


The Lawyer Accreditation Cross

Jim McElhaney in Trial Notebook, 4th ed. says: “. . . the real purpose of cross-examination is to show the judge and jury that you are the better witness.” This means that under this theory of cross examination the purpose of cross is to accredit you, not discredit the witness. It emphasizes that, while never under oath, you functionally testify during jury selection, opening, cross and closing. You merely look to corroborate your theory throughout the trial.

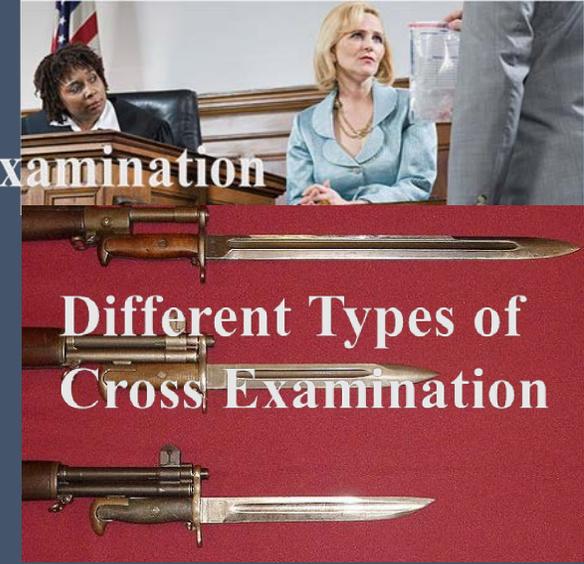
“By the time you’ve finished cross examination, you want the jury to think that you are: Careful. Fair. Honest.....And that you know the facts better than the real witness does. It makes you the guide worth following.” Credibility is absolutely essential for criminal defense lawyers during closing when arguing issues related to the credibility of witnesses, reasonable doubt and punishment.

Cross Examination



The 'Story Telling' Cross

Cross Examination



This approach views cross like every other part of the trial, it's simply another chance to tell your trial story or theory to the jury through questions. You ask questions as declaratives, seeking the witness' consent.

- Each declaration seeks to advance the story or theory.
- Each declaration conveys one fact / thought.
- Each declaration should be a fact / thought the lawyer can prove through evidence or deductions from the evidence.

Example / Illustration

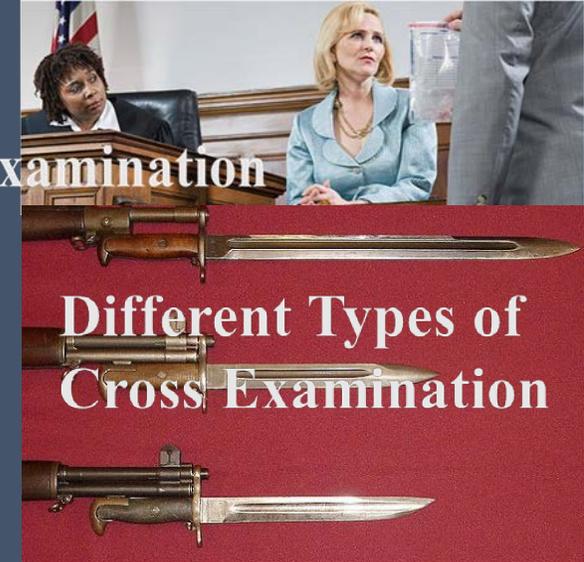
Jack and Jill

The 'Soft' or 'Compassionate' Cross

Cross Examination

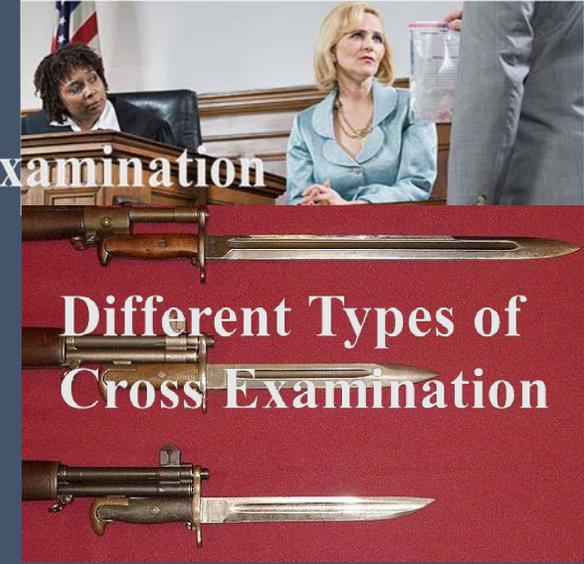
“Cross-examination is simply storytelling in yet another form. Cross-examination is the method by which we tell our story to the jury through the adverse witness and, in the process, test the validity of the witness’s story against our own. Our strategy will be to cross-examine the witness with what I call the ‘compassionate cross,’ simply a cross-examination that takes into account that this witness is a decent, ordinary human being facing a moral dilemma. We want to understand him and, before the cross is ended, to speak for him in ways he cannot speak for himself. *** It is rarely productive for a lawyer to attack the witness with an angry cross-examination. Unless the witness is truly a miserable monster, I’m not interested in trying to convert the witness into one, nor to show up the witness as some species of idiot, because in the process the magic mirror always works. Too often I will also be revealed as a cruel ruffian, and in the process of trying to display someone as an idiot, I will be seen as one.”

-Gerry Spence



The 'Soft' or 'Compassionate' Cross

Cross Examination



How to do it?

Do psychodrama: You view witnesses like onions and try to peel back the layers

Find a Universal Truth that applies to the witness, then juxtapose that truth against the witness' testimony

Example / Illustration

The Snitch



Cross Examination

What is the Proper Tone

Competence to Testify

Closed Circuit TV

STRATEGY BEFORE YOU CROSS

Try to Envision a Proper Tone

Cross Examination



Competence to Testify

Cross Examination



Closed Circuit Television

Cross Examination



Cross Examination



Techniques with difficult witnesses

Cross on the sexual acts?

Impeachment

Only leading questions?

Be Improvisational

Execution of the Cross



Expecting the Difficult Witness

- Crying Witness
- Unemotional Witness
- Angry Witness
- Talkative Witness



Cross Examination

- 1. “You can’t control a witness if you can’t control yourself.” – Sam Dennis**
- 2. Hold / Maintain your theory.**

Crying Witness

Cross Examination



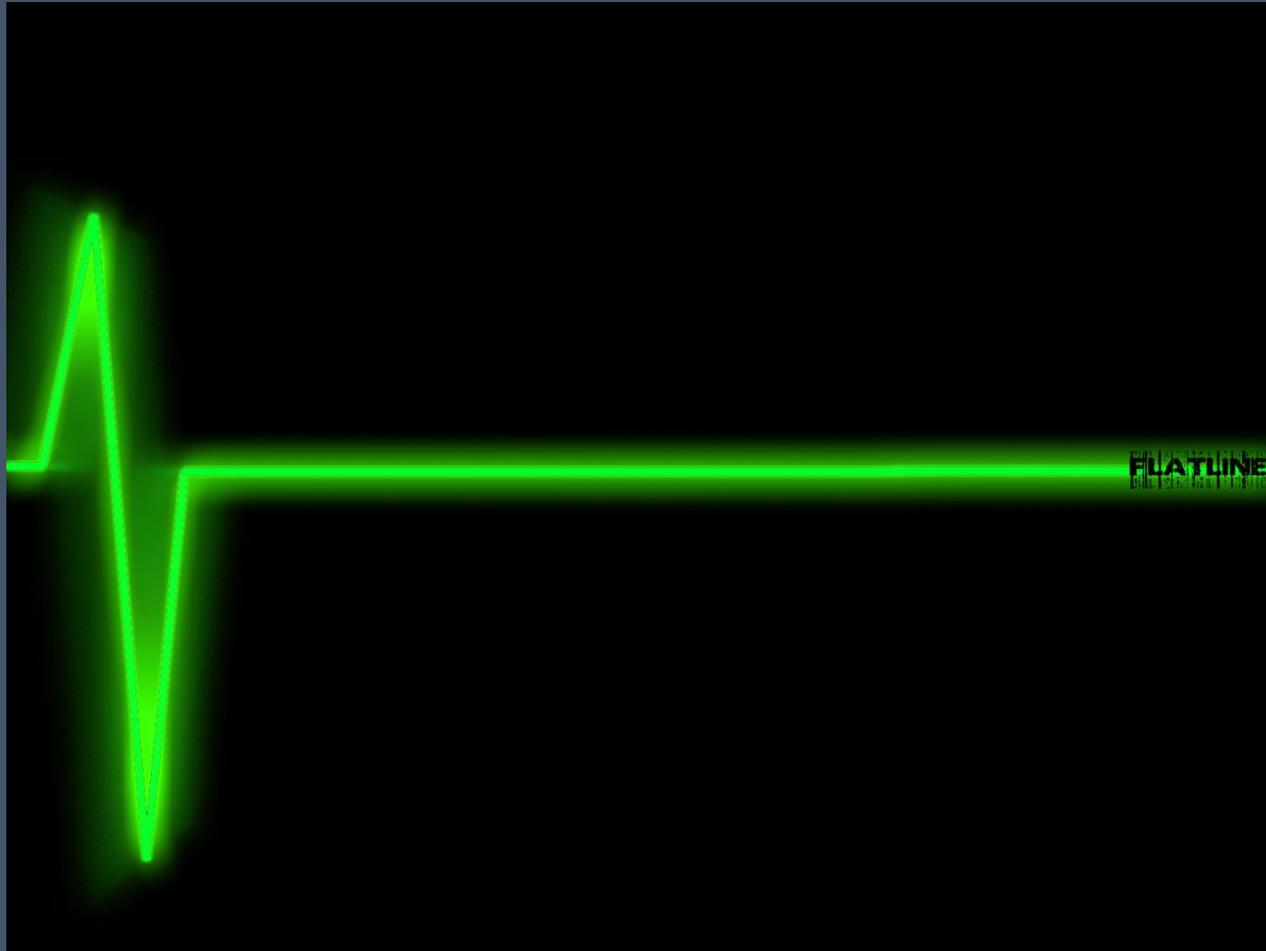
Angry Witness

Cross Examination



The Unemotional Witness

Cross Examination



Runaway Witness

Cross Examination



Should You Impeach the Witness?

Cross Examination



- Depends on your theory.
- Depends on the age of your witness
 - difficult to impeach very young kids
 - difficult to impeach on multiple acts when there is a lack of specificity
 - difficult to communicate the significance

Types of Impeachment

By Prior Inconsistent Statement

By Prior Conviction of a Crime

By Showing Bias, Interest, Motive

Reputation and/or opinion for truthfulness

Cross Examination



Impeachment



**Reputation
and/or opinion for truthfulness**

**If you have evidence of a accuser's
Untruthfulness, impeach with reputation or
opinion evidence**

Consider which witnesses to use

Peers and family members are very useful

Cross Examination



Impeachment



Should You Cross on the Sex?

Cross Examination



- Depends on your theory.
- If there are things about what she says about it that are: nonsensical; unreasonable, incredible. (Verisimilitude cross)
- Lead, control the witness, don't leave wiggle room.
- Construct your questions carefully (imagine the worst answers you can get from the witness – play it out, adjust the questions).



Cross Examination

Should You Ask Open-ended Questions?

- Can be effective at setting a witness at ease;
- Can be effective at showing that a witness has been fed vocabulary and language that they do not really know or understand;
- Can be a way to get helpful information that you know you have.



Be Improvisational

- You can plan tone but you have to be flexible to change it.
- You can plan an approach but you have to be flexible to change it.

