

# Advanced Trial Skills for the Dependency Lawyer

BEYOND THE BENCH

SAN DIEGO— 2019

# Recommended Reading-Trial Skills

- ***Modern Trial Advocacy: Analysis and Practice, Fifth Ed.***
  - Steven Lubet, NITA, Original 1993
- ***The Lawyer's Winning Edge***
  - Lisa DeCaro and Leondar Matheo, Bradford Publishing, 2004
- ***Evidentiary Foundations***
  - Edward J. Imwinkleried, Lexis Nexis, 2014
- ***Trial Advocacy: Planning, Analysis, and Strategy***
  - Marilyn Berger, John Mitchell and Ronald Clark, Aspen, 2008
- ***Trial Advocacy for the Child Welfare Lawyer***
  - Marvin Ventrell, NITA, 2011

# Recommended Reading-Child Witness

1. Macgill, S. & Summers, A. (2014) Assessing the Relationship between The Quality of Juvenile Dependency Hearings and Foster Care Placement. *Family Court Review*, 52 (4) 678-685.
2. “Sunshine for D.C.’s Children: Opening Dependency Court Proceedings and Record.” *Georgetown Journal on Poverty Law & Policy*. (2010) : 79 Web.
3. Weisz, Wingrove, Beal, & Faith-Slaker. (2011) Children’s Participation in foster care hearings. *Child Abuse & Neglect*, 35 (4), 267-272.
4. Block, Stephanie D., Oran, Howard, Oran, Diane, Nikki Baumrind, & Goodman, Gail S. (2010) Abuse and neglected children in court: Knowledge and attitudes. *Child Abuse & Neglect*, 34(9) 659-670.
5. Quas, J. A., Wallin, A.R., Horowitz, B., Davis, E., & Lyon, T.D. (2009) Maltreated children’s understanding of and emotional reactions to dependency court involvement. *Behavioral Sciences & the Law*, 27 (1),97-117.
6. Weisz, Wingrove, Beal, and Faith-Slaker. “Children’s Participation in Foster Care Hearings.” *Child Abuse & Neglect*, 35:4 (2011) 267-72.
7. Pellegrini A.D. & Bjorkland, D.F. (2004) The ontogeny and phylogeny of children’s object and fantasy play. *Human Nature*, 15, 23-43

# Today's Topics

- The Child Witness
  - Child Development
  - Memory and Accuracy
  - Strategies
- Expert Witnesses
  - Direct
  - Careful Cross

# Context Within Your Case

- Trials are Stories
- Lawyers are the storytellers
- Storytelling is the conveying of events in words and images.
  - Words = testimony
  - Images = exhibits

# Context Within Your Case

## The Story of the Case

- Your job is to tell your client's side of the story.
- Be his or her persuasive voice.
  - This is perhaps the lawyer's most essential role. Many clients just want their voices heard. They want their story told.
  - Sometimes being heard is more important than the outcome to the client.
  - "Being Heard" doesn't necessarily mean testifying. It means telling their side of the story!

# Context Within Your Case

- **DANGER! PELIGRO! ACHTUNG! ОПАСНОСТЬ! PERICOLO! 危險! DANGER!**
- Children and Experts are Dangerous
- Why?
- Pros: Very powerful
- Cons: You could blow yourself up



Ka-Boom!



CHILD WITNESSES: KIDS SAY THE  
DARNDDEST THINGS!



- Gold mine or sand trap?
- What is the purpose of the testimony?
  - Considerations when determining whether to call a child:
    - Accuracy, suggestibility
    - Reliability is the degree to which different workers make the same placement decisions when presented with the same data-consistency
    - Validity is whether the measure actually measures what it is designed to measure.
- How to prepare for a child witness when
  - Your witness
  - Child witness on cross examination

- Youth have a right to attend and fully participate in all hearings.
- Each child shall have the right to have notice of the right to fully participate.
- The court shall continue the hearing if the child is not present and wishes to participate.
- Lawyers for the youth should consider the following in determining how to provide a meaningful experience for the child to participate: allowing the child to participate through the entire hearing, presenting the child's testimony in chambers, allowing the child to prepare for court in advance by visiting the courtroom, using video or teleconferencing, and/or excluding the child for harmful testimony,

## ABA STANDARDS IN REPRESENTATION

- (a) A minor who is the subject of a juvenile court hearing, and any person entitled to notice of the hearing under [Sections 290.1](#) and [290.2](#) , is entitled to be present at the hearing.
- (b) The minor and any person who is entitled to that notice has the right to be represented at the hearing by counsel of his or her own choice.
- (c) If the minor is present at the hearing, the court shall inform the minor that he or she has the right to address the court and participate in the hearing and the court shall allow the minor, if the minor so desires, to address the court and participate in the hearing.
- (d) If the minor is 10 years of age or older and he or she is not present at the hearing, the court shall determine whether the minor was properly notified of his or her right to attend the hearing and inquire whether the minor was given an opportunity to attend. If that minor was not properly notified or if he or she wished to be present and was not given an opportunity to be present, the court shall continue the hearing to allow the minor to be present unless the court finds that it is in the best interest of the minor not to continue the hearing. The court shall continue the hearing only for that period of time necessary to provide notice and secure the presence of the child. The court may issue any and all orders reasonably necessary to ensure that the child has an opportunity to attend.
- (e) Nothing in this section shall prevent or limit any child's right to attend or participate in the hearing.

## WIC § 349

- Rule 601. Competency to Testify in General
  - Every person is competent to be a witness unless these rules provide otherwise. (Federal Rules of Evidence)

COMPETENCY

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# A REVIEW OF CASE LAW

*In re Daniela G.*, (2018) 23 Cal.App.5th 1083

*In re Harley C.*, (2019) 37 Cal.App.5th 494

*In re Jennifer J.*, (1992) 8 Cal.App.4th 1080

*In re Amber S.*, (1993) 15 Cal.App.4th 1260

*In re Carmen O.*, (1994) 28 Cal.App.4th 908

# CHILDREN'S BEHAVIORS WHEN TESTIFYING

Children exhibit little emotion when disclosing abuse, both when questioned by forensic interviewers and when questioned in court.

One study found that children testifying in court tended to show little affect and over 80% failed to cry.

Even when child witnesses do exhibit emotion, those emotions could be attributable to the stressfulness of testifying as children's reactions to abuse found children's expressiveness during their testimony changed little between abuse and non-abuse topics.

Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

- (a) His demeanor while testifying and the manner in which he testifies.
- (b) The character of his testimony.
- (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.
- (d) The extent of his opportunity to perceive any matter about which he testifies.
- (e) His character for honesty or veracity or their opposites.
- (f) The existence or nonexistence of a bias, interest, or other motive.
- (g) A statement previously made by him that is consistent with his testimony at the hearing.
- (h) A statement made by him that is inconsistent with any part of his testimony at the hearing.
- (i) The existence or nonexistence of any fact testified to by him.
- (j) His attitude toward the action in which he testifies or toward the giving of testimony.
- (k) His admission of untruthfulness.

- Toddlerhood (2-3 years of age) characterized by:
  - Language development: 24 words by 24 months; 1,000 words by 3 years old by 4 years old language is well established
  - gross motor skills developing, ( walking, hopping , jumping)
  - Fantasy and pretend play is important for cognitive development. “Fantasy play is not simply a diversion. Children use fantasy to experiment with and understand their social and physical environments and expand their thinking.” (Pellegrini & Bjorkland, 2004)

Early School Age (4- 6 years of age) characterized by:

Gender identification, identification with parents, moral development, self esteem, peer play and school readiness.

# CHILD DEVELOPMENT



- Middle Childhood (6-11 years old) characterized by:
  - Friendships, skill learning, reading, self-evaluation, teams become important.
- Early Adolescence (12-18 years old) Characterized by:
  - Romantic and sexual relationships, formal operations and emotional development, membership in peer groups.

How does the abuse and trauma figure into development:

CHILD DEVELOPMENT (CONT'D)

# TYPES OF MEMORY

## Autobiographical Memory

After onset of language acquisition, child as young as 2 can remember important events that they have experienced over time, the amount forgotten decreases with age.

With young children there is a trade-off between completeness and accuracy – spontaneous statements and responses to open-ended questions tend to be accurate but sparse. Answers to leading questions tend to be more detailed, but more prone to error.



# SUGGESTIBILITY OF MEMORY

Age most important predictor, although even adults show effects. But children as young as 4 years old are able to provide informative testimony.

Suggestibility researchers contend that young children will change their answer to questions if the questions are repeated within an interview.

(Ceci & Maggie Bruck, *Children's Testimony: Applied and Basic Issues*)

Suggestibility researchers argue that preschool children are disproportionately likely to change their answers to questions such as "Did he touch you there?" merely upon repetition of the question.

# DEVELOPMENT OF MEMORY IN CHILDHOOD

Age is the most important factor in the reliability of memory.

- ❖ Infants & Toddlers (0-3 yrs): Implicit memory allows children (as young as 1 year) to recall events. Explicit memory not available pre-language.
- ❖ Preschoolers (3-5/6 years): Development of language underlies explicit memory. Children can recall and describe events, though vulnerable to “contamination.”
- ❖ School Age & Older: At ~age 6 children use strategies to aid verbal recall (e.g. rehearsal). Strategies become more sophisticated w/age. Scripts developed for familiar events, novel events may be remembered more easily.

Younger children are more dependent on context for remembering. They recall more completely when asked specific questions. However, specific questions introduce the specter of suggestibility, decreased accuracy, and erroneous detail.

Children may be asked about an event or a conversation. In a study examining criminal child sexual abuse trials in a California sample, child witnesses were asked about conversations with disclosure recipients in 100% of the cases and were asked about conversations with suspects in 92% of the cases (Stolzenberg & Lyon, 2014).

THE ACCURACY VS. COMPLETENESS  
TRADE OFF

### Re-enactment

Recreating the childhood dynamic expecting the same result but hoping for a different one. This strategy is doomed to failure because the need is in the past and cannot be resolved. Also you will interpret anything as confirmation that you have been betrayed once more.

### Loss of self-worth

Trauma survivors can swing between feeling special, with grandiose beliefs about themselves, and feeling dirty and 'bad.' This self-aggrandizement is an elaborate defense against the unbearable feeling of being an outcast and unworthy of love.

### Loss of safety

The world becomes a place where anything can happen

### Loss of danger cues

How do you know what is dangerous when someone you trust hurts you and this is then your 'normal?'

### Loss of sense of self

One of the roles of the primary caregiver is to help us discover our identity by reflecting who we are back at us. If the abuser was a parent or caregiver, then that sense of self is not well developed and can leave us feeling phony or fake.

# Impacts of TRAUMA

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### Loss of trust

This is especially true if the abuser is a family member or a close family friend.

### Loss of physical connection to body

Survivors of sexual and physical abuse often have a hard time being in their body. This disconnection from the body makes some therapies know to aid trauma recovery, such as yoga, harder for these survivors.

### Shame

Huge, overwhelming, debilitating shame. As a child, even getting an exercise wrong at school can trigger the shame. The child may grow into an adult who cannot bear to be in the wrong because it is such a trigger.

### Dissociation

Often, to cope with what is happening to the body during the abuse, the child will dissociate (disconnect the consciousness from what is happening). Later, this becomes a coping strategy that is used whenever the survivor feels overwhelmed.

### Loss of intimacy

For survivors of sexual abuse, sexual relationships can either become something to avoid or are entered into for approval (since the child learns that sex is a way to get the attention they crave) and the person may be labeled 'promiscuous.'

□ What is the purpose of having a child testify?

STRATEGIZING FOR TESTIMONY

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KIDS SAY THE DARNDEST THINGS!



- Providing a temporal structure to the question increases productivity. (Klemfuss, Cleveland, Lyon, & Quas, 2016)
- “Although it is tempting to attribute children’s poor cross examination performance to the veracity of their memory for the event in question, three recent findings suggest otherwise.” (Righarts, O’Neil, & Zajac, 2013)
- “More elaborate discussion of ground rules of an interview, or practice and feedback approaches to complex questions do seem to facilitate children’s accuracy.” (Beauscher & Roebbers, 2005)

PROVEN EFFECTIVE STRATEGIES

- Assess developmental level
  - Focus on language development & abstract cognitive abilities
- Review all data sources
  - Understand sequence of disclosure events. Who said what to whom and what was the response
- Consider interview questions carefully
  - The accuracy vs. completeness trade-off. Proceed from open-ended to specific. Formulate specific questions using info already provided by child and document assiduously.

WHAT TO DO

## (Mis)leading questions

Questions promoting speculation, pretending, or fantasy (e.g. use of puppets, “let’s pretend”)


Positive or negative reinforcement (e.g. You’re doing such a good job telling me about what Uncle Joe did.)

Confusing, compound, yes/no, or why questions. Child may endorse question that is not fully understood

Repeated interviews by different interviewers with potentially different agendas (law enforcement, CPS, forensic evaluators, therapists, parents, etc.)

# WHAT NOT TO DO . . .

# DO THIS, NOT THAT

- Don't" Who came to your birthday party
  - Do: I would like you to tell me everything you can remember about your last birthday from beginning to end
  - Practice with your witness, including cross examination.
  - Beware of multiple questions within an interview.
  - Ask the conversation questions early in the case.
  - Ask the "feel" question.
- 

# Expert Witnesses

DIRECT AND CROSS EXAMINATIONS

# Pre-Trial

## □ EXPERT WITNESSES

### □ Selecting the expert

- Expertise and communication skills

### □ Preparing the expert

- All the evidence the expert needs
- Educate expert about your theory

# Perception vs. Opinion

- Lay witness testimony is based on sensory perception
  - The fact is known via the senses
- Expert testimony is opinion
  - The opinion is formed via expertise
  - Based on analysis of facts
    - Including second hand facts
  - Evaluated using a scientific process

# California Evidence Code

- And, §§ 801 and 803 allow trial courts to evaluate the factual basis underlying the opinion, and to exclude opinions, i.e., to 'gatekeep.'
- Novel processes are subject to greater scrutiny.



# CA Evidence Code

- § 801 and §803 allow court to be the Gatekeeper.
  - § 801—Judge decides if expert’s subject matter is “beyond the common experience” and would assist the trier of fact.
  - § 803 — If the judge finds the basis of the opinion is “not a proper basis”, the testimony is excluded.
- Basically the same as Fed.

# CA Evidence Code

- § 720 — “A person is qualified to to testify as an expert if he has special knowledge, skill experience, training OR education sufficient to qualify him as an expert on the subject to which his testimony relates.” (Emphasis added)
  - Notice the “OR.” We focus too much on education and sometimes think we need ALL of these—only 1 is required.
  
- Against an objection, he must demonstrate the above in order to testify as an expert.

# Basis of Expert Opinion (California)

- Experts may base opinions on a wide variety of information. CRE § 801
- Experts can base opinion on otherwise inadmissible information, such as hearsay.
  - E.g., What she heard
  - CRE § 802 allows the expert to “state ... the reasons for her opinion and the matter [...] upon which it is based”
  - Remain alert re: unreliable facts!

# Federal Treatment

- FRE 703 is much more restrictive: Underlying factual basis comes in only if...
  - It is otherwise admissible, or
  - Its probative value in assessing the opinion outweighs its prejudice, or
  - It is inquired into during cross-examination.

# Expert Direct: Back to Basics

How Expert Direct Differs from Lay Witness Direct

# Direct Exam — Back to Basics

- Single most important part of your trial
- You build your case from direct exam
- It is the source of most of your evidence
  
- NITA – “Cases are won as a consequence of Direct.”

# Lay Witness—Direct Exam

## The Rule of Sensory Perception

- What did the witness...
  - See, hear, feel, smell, touch, do, say
  
- Do not focus on their interpretation of these perceptions
  - No conclusions

# Lay Witness—Direct Exam

## Facts, Not Opinions or Conclusions

- Tammy-Lynne Norton is a Meth addict who neglects her child.
  - CONCLUSION
  
- Tammy-Lynne Norton tested positive for amphetamines twice.
- Ms. Norton believed her son was an imposter.
- Ms. Norton locked her “imposter son” in his bedroom while she looked for her real son.
  - FACTS
- Exception: Lay witness opinion. (Rationally based on witness’s perception)



# Lay Witness—Direct Exam

## Focus on the Witness

- Prepare your witness
  - Prep, don't "coach"
  - Advise witness "how" to testify, not "what" to say
- Appearance
- Have him/her review documents, notes, reports, etc
- Practice
  - Especially if using demonstrative evidence, demonstrations, etc.

# Lay Witness—Direct Exam

## Emotion – Humanize your witness

- Adds credibility
- Don't treat your witness simply as a robot fact machine
  
- Focus on human emotion when possible
  - How did that make you feel?
- If witness is a corporation or agency, focus on individuals

# Lay Witness—Direct Exam

## No Leading

- Use open ended questions, do not lead the witness
  - Leading is objectionable
    - CA Evidence 702 requires witness to testify from memory
  - It's not persuasive
    - Let your witness shine

# Lay Witness—Direct Exam

## 3 Levels of Leading

- Leading
  - The house was filthy, correct?
  - Yes
- Suggestive (Lead-ish)
  - Was the house filthy?
  - Yes
- Open-ended
  - What was the house like?
  - It smelled horrible and someone had smeared poop on the wall.

# Lay Witness—Direct Exam

## 6 Honest Words

- Who, What, Where, When, Why, How
  - Please explain...
  - Please describe...
- Short, 1 fact, sequential, and use plain language

# Lay Witness — Direct Exam

## □ Headnotes

- “Let’s talk about Ms. Norton’s urinalysis for a moment.”
  - Not Objectionable
- Allows you to communicate with your witness during the exam.
- Get’s everyone pointed in the right direction.

# Lay Witness — Direct Exam

## □ Loop-Backs

- Allows you you to repeat really important information
- It's also a sign-post for your witness—like a headnote.
  - “Dr. Miller, you testified that Ms. Norton was experiencing paranoid delusions. Can you explain what ‘paranoid delusions’ are?”

# Lay Witness—Direct Exam

## Format of Direct

1. Introduce and Accredit your witness
  - Accreditation establishes credibility. Goes beyond foundation. Humanize the witness. Why is she believable? Could she see clearly? etc.
2. Set the scene
3. Describe the action
  - What happened



# Lay Witness—Direct Exam

## Techniques

- Use Exhibits
  - Stories have words and pictures
- Define Your Sequence
  - Order of witnesses
    - Chronological vs. by element, etc
- Sequence within each witness
  - Chronological is usually best

# Lay Witness—Direct Exam

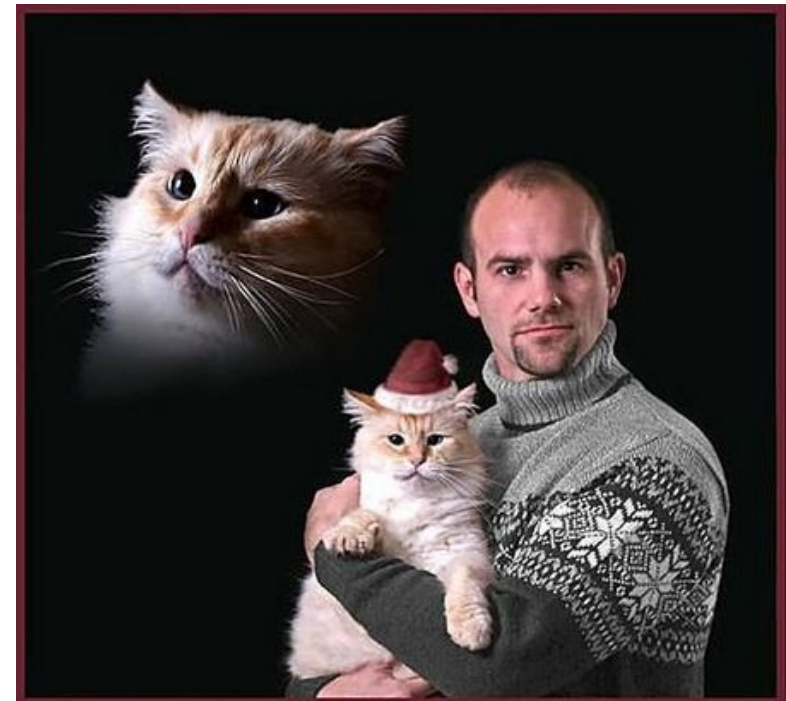
## More Techniques

- Primacy and recency
- Engage with your witness
- Consider defensive direct
  
- Redirect – don't go beyond the scope.
  - Don't save your best stuff for redirect

# Direct Exam Drill

## The Clothing Drill

- Use 6 Honest Words, Headnotes and Loopbacks.



# Expert Direct Exam

THIS IS WHERE YOU WIN YOUR CASE

# Expert Direct

- **Remember the Six Honest Words**
- Establish specific and superior expertise for your witness
- Let the witness “teach” the fact-finder
  - The kindly Professor model
  - Translate and use lay examples
  - Use demonstrative aids
- Get the relevant opinion

# Expert Direct

- Qualifying the expert, the topic and the process
  - (Foundation)
- Offering the expert (Optional)
- Offering the opinion
- Explaining the opinion
- Offering the opinion
  - Again

# Qualifying The Expert

- Evidence Code § 720: by knowledge, skill, experience, training or education
- Only one is needed, but the more the merrier
- Academics, experience, writing, training, memberships, previous qualifications, independence
- <https://www.youtube.com/watch?v=GTPUzRXozF0>
- <https://www.youtube.com/watch?v=3nGQLQF1b6I>

# Qualifying The Topic

- FRE 702: “scientific, technical or other specialized knowledge [that will help the jury] understand the evidence or determine a fact in issue”
- CA— 801. Beyond common experience.... (This usually goes without saying, unless it is a novel topic). So you won't have to do this step very often.



# Qualifying The Process

- How did you come up with that opinion?
- A very in-depth process is more persuasive than “I just compared the tire marks and they look the same.”
- George Wilbur on Direct
- [https://www.youtube.com/watch?v=W5A\\_8EdjANg](https://www.youtube.com/watch?v=W5A_8EdjANg)

# Offer the Opinion

- Elicit the opinion from the expert
- Based on the education, training and methods you have described, have you reached a conclusion (with a reasonable degree of scientific certainty)
- What is that opinion

# Explanation of Opinion

- The explanation of the opinion and the process of qualifying the topic and the methods are intertwined
  - Cart and horse problem
- Pretrial litigation may solve some of this
- The explanation must be in plain English
- The judge should reach the conclusion right along with the expert (You'll see the jury do that with Ms. Vito later).

# Opinion Again

- Elicit the opinion from the expert
  - Again
- Technically, it has been asked and answered
  - Most judges will allow it
- Using visual aids
  - Can dramatically improve comprehensibility

# Expert Direct and Foundation

- I have provided you with an example of an expert direct exam in your materials.
- Keep it!
- Put it in your trial notebook!

# Partner Up

- Partner up!
- Lay foundation of your partner as an expert in Dependency
- 5 minutes then switch. (no using the sheet!)
  - Now do it again, but use my example sheet!
  - 5 minutes then switch

# Expert Cross Exam

HAVE TO MASTER LAY CROSS EXAM FIRST!

# WHAT IS CROSS ?

- The questioning of opposing party's witnesses.
  - And sometimes your own.
- Used by both sides in both civil and criminal cases.
- It is the most common way a criminal defendant establishes evidence to support his or her theory of the defense.



# THE OPPOSITE OF DIRECT

- You are the 'director' of a direct examination and the witness is the 'star'.
- In cross-examination, you are the star.
  - You should be doing the talking.
  - The jury should be looking at you.
  - The witness is there merely to say yes or no.

# THE SCOPE OF CROSS

- Evidence Code 761: “Cross-examination” is the examination of a witness by a party other than the direct examiner upon a matter that is within the scope of the direct examination of the witness.
- The subject matter of direct examination, and matters pertaining to credibility of witnesses,
  - Such as, bias, motive and general impeachment (Evidence code 722). Also Rebut the Evidence code 720 expert qualifications.
- Court has discretion to allow additional inquiry
  - If allowed, this additional examination is treated as a direct examination
  - CA Evidence 351 “All relevant evidence is admissible.”

# NARROWING THE SCOPE

- Your cross-examination should include all the questions necessary to establish your theory of the case, and ONLY those questions.
- Pre-trial question: Can I get this information elsewhere?

# ORGANIZING CROSS

- If you need to both get information from, and attack a witness, start nice.
  - Constructive cross precedes destructive cross.
  - **You don't have to be cross on cross.**
- Remember primacy and recency
  - Use the relay team organization if possible.

# ORGANIZING CROSS

- The questions need to be written out.
- Then properly organized in chapters.
- Then the chapters must be properly organized.
- And the answer must be referenced. **(Proof Chart)**
  - If the witness forgets, or says something different, or something new, you must be able to immediately locate the witness's previous statement on that topic.

# THE DO'S OF CROSS

- Ask only leading questions.
  - The witness is allied with the opponent.
  - There is a greater need for control.
  - The best way to control the witness is to ask only leading questions.

# Leading Questions

- The light was red, correct?
  - A 'tag' at the end makes it leading.
- The light was red, wasn't it?
  - Use the verb rather than a tag.
- The light was red?
  - Use voice inflection.

# THE DO'S OF CROSS

- Ask only “one fact” questions.
  - Reduces the opportunity of the witness to say anything but ‘yes’ or ‘no’.
- Use clear and plain language.
  - You are trying to communicate with the jury, not impress them with your vocabulary.
- Listen to the answer the witness actually gives.
  - As with direct, a common mistake.

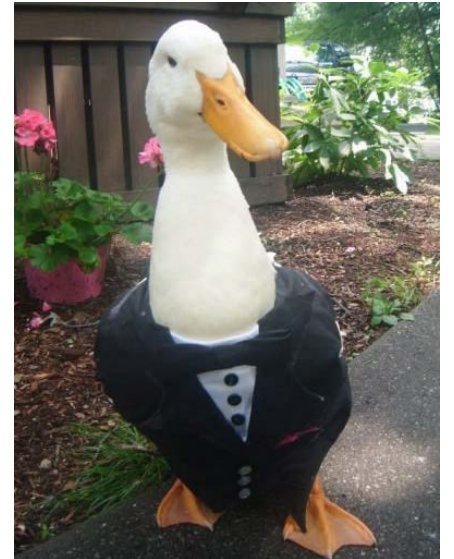


# THE DON'TS OF CROSS

- Do not ask a question if you do not know the answer.
  - Know your case inside and out. Rely on prior statements. Pretrial litigation can be crucial.
  - Often easier said than done.
- Do not attack a witness unless you have to.
  - It might be fun, but it is more often counter-productive.

# THE DON'TS OF CROSS

- Do not ask one question too many.
  - The robber ran past you very fast, didn't he? And you only saw him for a few seconds? He was wearing a hat wasn't he? And dark glasses? SO, YOU'RE NOT REALLY SURE MY CLIENT IS THE ROBBER, ARE YOU?
  - The Duck.
- Save that question for closing argument.
- And answer it yourself.



## CAN CROSS ON MATTERS AFFECTING CREDIBILITY

- Prior inconsistent statements (Impeachment)
- Contradictions with other witnesses
- Contradictions with common sense
- General bias: He hates police officers
- Specific bias: The defendant is her son
- Character for untruthfulness
- Felony convictions

# Cross Exam Drill

- **FREEZE FRAME DRILL**

- 5 - 10 Volunteers

- Used to draw attention to something small.

- Draw it out

- Show how important it is.

# Difficult Witnesses

CONTROL

# Difficult Witnesses

- **RULE #1: Good questions get good answers.**
- The most important cross-examination technique - for all witnesses – is to ask good questions.
- One fact, clear language, precise language, short questions, good pace and presentation, know the answer and where it exists.
- The judge will see if the witness is cheating.

# The “Yeah-But” Witness

- The “So your answer is ....” Technique
- The “Re-ask” Technique
- The “Reason with the Witness” Technique
- The “Hand of God” “Stop Sign” Technique
- The “Ask Mom for Help” Technique
- Move to strike non-responsive answers

# Interrupting the Witness

- Avoid it
- Be careful
- Don't talk over the witness
- Consider a passive response
  - at least at first
  - Let the witness look foolish
- Use a "measured and proportional" response
- Do not argue with a witness



# Personal Style

- Handling witnesses is largely a style issue
- The technique has to work for you
- Find your voice
  - It takes time
  - Practice
  - Self awareness

# Impeachment by Prior Inconsistent Statement

- Impeachment is the flip side of Refreshing Recollection—used with adverse witnesses
- A common method of impeaching a witness: That's not what you said before
- Make sure it is a real inconsistency, that is important, and that you can prove it
- Hearsay? Not if for impeachment only.
- The Three Cs: Confirm, Credit and Confront
- DOESN'T HAPPEN OFTEN IN DEPENDENCY

# Impeachment by Omission

- Impeaching by Omission — More Common with Social Workers
- Credit the impeachment source that would have contained the statement had it been made. (Social Worker Report)
- The key is the recognition that if what the witness is now saying were true, the statement would have been made before, presumably in the document with which you are impeaching

# Expert Cross

BE CAREFUL!

# Step 1: Get Your Own Expert!

- Trying to “out-expert” their expert is a mistake
  
- Your expert helps you **(YOU LIKELY DON'T DO THIS ENOUGH!)**
  - Understand the topic
  - Prepare cross-examination questions
  - Present opposing testimony

# Expert Cross Exam

- Do not fence with Zorro!
  - You can't out-expert the expert
- Recall the rule of lay witness cross
  - Ask only what you must and sit down
- Control with leading questions
- Be precise (1 Fact Questions)

# Topics for Expert Cross Exam

- NEW/BAD FACTS-HYPOS
- HIRED GUN
- CROSS EXPERT VALIDATION
- USE OF TREATISES
- ATTACK THE PROCESS

# New/Bad Facts and Hypotheticals

- Present the expert with new and/or different facts
  - Looks like the other side is cheating
  - May weaken the expert's opinion
  - Might change the expert's opinion
  - Expert will not be happy with their lawyer
    - Bruising case—would your opinion of inflicted trauma be different if you knew this child was severely Vitamin K deficient
    - Must prove up those facts, or at least show they are possible.
    - This needs to come from your expert.



# Hired Gun Attack (Bias)

- Isn't it true that you are being paid by the other side to be here?
  - You're being paid
  - Outrageous amounts may offend jurors/judge
  - CA Evidence Code §722 says you may inquire about compensation *and expenses* paid by the party calling the witness
- Isn't it true that you have never testified against the Agency?

# Cross Expert Validation

- Have the expert validate your expert
  - My expert is an authority
  - You reviewed her report and opinion
  - You do not dispute her methodology
  - In dependency, a lot of these people know each other—and don't like to bad-mouth each other!

# The Use of Treatises

- Cross-examination of an expert can include inquiry into the treatises upon which the expert relied.
- California Evidence Code § 721 allows the use of other treatises if the witness relied upon it or admits its reliability, or if it is already admitted, but not otherwise.
  - This comes from your expert.

# Cross: A Careful Example

- Cross of Mr. Wilbur
- Defense theory of the case at this stage:
  - Two other guys in an identical car did it.
  
- [https://www.youtube.com/watch?v=\\_vlyfzbPCqY](https://www.youtube.com/watch?v=_vlyfzbPCqY)

# What Vinny Did & Did Not Do

- Did stick with his theory
- Did not attack expert's integrity
- Did not attack expert's process
  - What about if this were a social worker?
  - Attack her process! She may not even have one!
- Did not attack expert's factual basis
- Did attempt to reduce the opinion's power
  - At this point, he doesn't have anything else—so he doesn't fence with Zorro

# USE YOUR EXPERT INSTEAD!

- Vinny's cross of the prosecution's expert is not going to win the case.
- You need your own expert for that!

# Another Kind Of Expert

- Ms. Mona Lisa Vito
  - Unusual foundation process
  - Underlying data
  - Uses plain language and examples
  - Prosecutor explores cross with George Wilbur
  - Vinny recalls Mr. Wilbur
  
- <https://www.youtube.com/watch?v=CFdJza0AbeA>

# Winning!

- Vinny does not win the case by crossing the other expert.
- He wins the case by having the better expert!



## Evidence Code 773(b)

- “The cross-examination of a witness by any party whose interest is not adverse to the party calling him, is subject to the same rules that are applicable to the direct examination.”

# Court Appointed Experts

- Sua sponte or by motion (Maybe you should start asking?). Bit of a gamble—becomes 2 against 1 for someone!
- Parties may nominate or stipulate
- Any party may call an appointed expert
- Any party may cross examine the expert
- Jury is told it is the court's expert
- California Evidence Code §§ 730 and 722

# Dr. Kristin Lulich

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# Practice Direct

- **4 Volunteers to direct Dr. Lulich**
  - 1. Foundation - Qualify the Expert.
  - 2. Offer the Opinion - Explain the Opinion
  - 3. Explain the Process & “The Why”
  - 4. Explain Why the Other Expert is Wrong
  - 5. Repeat Opinion

# Practice Cross

- **5 VOLUNTEERS**
- ATTACK QUALIFICATIONS
- NEW/BAD FACTS-HYPOS
- HIRED GUN/BIAS
- CROSS EXPERT VALIDATION
- USE OF TREATISES
- ATTACK THE PROCESS

# Advocacy Training Center

- **Thank you!**
- Be proud of what you do everyday!
- There is likely no other population in this state that needs a lawyer more than dependency parents and children!