

Concession Based Cross Examination

Advanced Trial Advocacy Course

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- I. Cross Examination has changed over the years.
 - A. Professor Irving Younger established the Ten Commandments of Cross Examination
 - B. Cross Examination is an Art
 - 1. This makes it seem that only those who conquer the art are good at cross examination
 - 2. The art is only developed by frequent use.
 - C. Development of the Concession (Approach) Based Cross Examination Model
 - 1. The NCDA initiated a project which enables anyone willing to try to become competent they are able to do it.
- II. Where do I begin?
 - A. Planning and preparation must accompany cross-examination just like any trial skill.
 - B. Who will probably testify? Will the defendant testify? If they testify, what will they probably say?
 - 1. The police report will help determine what some witnesses may say.
 - 2. Always prepare as if he defendant will testify. If you think he won't, he will.
 - 3. Ask the defense attorney who he plans on calling. Demand even handedness, after all you will tell him your witnesses.
 - 4. If the defense attorney is hesitant, use the pretrial conference to request that the court require him to state who he will call.
 - 5. With defense attorneys you work with regularly and have a good relationship, ask what the defendant/witness intends to testify. Get rid of the gamesmanship
 - C. Know the facts!

1. There is nothing more important in being able to trip up the witness than knowing the case well enough to catch the inconsistencies in the witness' testimony.

D. Learn from your past cases. Some are repetitious (e.g., speeding, some domestic violence cases).

E. Know the rules of evidence.

III. The Theory of Cross Examination

A. Attack the credibility of the witness.

1. You don't want the jury to believe him, so discredit him.

B. Add to your case.

1. Get admissions that coincide with your witnesses or theory.

2. Even small admissions help, e.g., he bought the gun, loaded it, drove the car, pawned the stolen property, etc.

IV. Your First Question.

A. Should I Cross Examine?

B. There may be reasons not to cross examine.

1. The witness didn't hurt me.

2. I can't gain an advantage by cross examining. The witness may be too emotionally appealing to the jury and a cross will only reestablish that in the mind of the jury.

3. Did the witness present totally incredible testimony or did he shoot himself in the foot?

C. There are some occasions when you will have to cross examine.

1. If the defendant testifies, the jury will want to see you confront his veracity.

2. If someone poses an alibi, you will have to attack it. Caveat: be careful with "mom". Ex: "And you claim to be defendant's mother?"

3. The witness who corroborates key elements of the defense case.

V. Now that I have decided to cross examine, what do I do?

A. Ask the question: What is my goal in this cross examination?

1. Before you cross examine anyone, you have to have an objective in mind?
2. The objective might be known prior to trial through your preparation or it might only become apparent during direct examination.
3. If you don't have an objective, don't cross examine.

B. Types of goals.

1. Attack the credibility of witness.
2. Show the bias of the witness.
3. Show that the witness could not have heard or seen what he claimed.
4. Use the witness to discredit another defense witness.
5. Add or reinforce facts that are beneficial to your case (presence of persons, time, conditions).

C. Discussion

1. Attack the credibility of witness.

a. Impeachment by prior inconsistent statements.

1. Foundation required: Direct witness' attention to the time, place and to whom the statement was made.
2. If the witness denies making the statement or cannot recall it, extrinsic evidence may be used to prove it. It's helpful to show the witness the statement to try to refresh his recollection. If the witness admits, no extrinsic evidence is needed, you've got the statement you want.

b. Impeachment by prior convictions.

1. Rule 609 of the Utah Rules of Evidence provides for impeachment if the conviction is of a crime involving punishment by death or imprisonment of more than one year. If the witness is the accused, the court must weigh the probative and prejudicial values of the conviction.

2. A conviction involving dishonesty or false statement can be admitted without regard to punishment or use of the weighing test.
 3. The conviction may be shown by the oral testimony of the witness or by court record properly authenticated.
2. Show the bias of the witness.
 - a. Generally involves the relationship of the witness to the defendant.
 3. Show that the witness could not have heard or seen what he claimed.
 - a. Witness was not in a location to observe, or some conditions existed that resulted in his inability to observe, e.g. darkness..
 - b. Witness had some deficiency; (poor eyesight or hearing).
 4. Use the witness to discredit another defense witness.
 5. Add or reinforce facts that are beneficial to your case (presence of persons, time, conditions).

VI. You've decided to cross examine and got your goal, now the nuts and bolts.

A. Styles ala Jim Dedman.

1. Float like a butterfly, sting like a bee.
2. Get 'em like white on rice - smother them.
3. Kill them all, let God sort it out.
4. Do the hokey pokey and then you turn yourself around.

B. Control: You want to maintain control of the witness through various techniques including:

1. Your physical presence.
2. The pace of your interrogation.
3. Using leading questions.

C. Questions: There are several types of questions and each may be used at some time during your cross.

1. Interrogatory. Invites an open ended response. "Did you hit the man?"
2. Accusatory. It suggests fault. "You hit the man, didn't you?"
3. Anticipatory. It anticipates the answer to the question. "And you hit the man, before he said anything to you?"

D. Types of witnesses and suggestions.

1. Expert.

- a. Nothing is more important than preparation.
- b. If possible talk with someone who has cross examined the witness, and obtain a copy of the transcript.
- c. Contact prosecution organizations for help. APRI.
- d. Consult your own expert to better understand the subject area.
- e. Who hired him and for how much.
- f. Get the background materials and the opinion prepared by the expert. See if you can interview him prior to the trial. Always take an investigator with you.
- g. Avoid the "why" question. Try to get the expert to answer with short statements, not dissertations.

2. Alibi.

- a. Once you receive notice, if you do, have your investigator go immediately out and interview all witnesses to the alibi.
- b. Question as to relationship to the defendant and bias.
- c. How does the witness remember the exact date and time.
- d. When was the witness first asked to testify.

e. The failure of the witness to come forward with the information. “And once you learned that defendant was charged, you immediately went to the police or my office, didn’t you?”

f. Go into detail with the witness about all the events of the day in question.

3. Child Witness

a. Be careful, you don’t want to appear to be beating up on a child.

b. Use appropriate language that the child can understand.

c. Gently probe the bias of the child or their ability to perceive.

d. Be brief, don’t leave the child on the stand too much.

4. Evasive Witness

a. This witness doesn’t want to answer questions or wants to give a long narrative.

b. Realize that the witness may cut his own throat with what he says. His narrative may even lend itself to use the why question if he continues to do poorly.

c. If he doesn’t answer the question, ask it again. If he fails to again, say “Perhaps you misunderstood the question,…” and ask it again. It may even require asking the judge to direct the witness to answer the question.

Approach Point Cross-Examination

By Jeffrey L. Sauter

A. You can prepare for cross-examination.

Some lawyers want us to believe that cross-examination is an art, suggesting that it requires a natural talent acquired at birth. Those lawyers often wrote books on the topic that reinforced this myth to sell their books. The books showed examples of their own cross-examination success, but did not offer any method to prepare for or conduct cross-examination.

Fortunately, the National College of District Attorneys (NCDA) teaches a method that can be used by all lawyers to prepare and conduct cross-examination. This method, if followed, will make you a better cross-examiner, regardless of the natural talent you bring to the courtroom.

B. Contrast – the typical approach

Most of us feel anxious about cross-examination. We have good reason to be anxious because we've never had a method to help us prepare for that part of a trial. So, what have we done? Well, the books written by the cross-examination "experts" contain winning examples of how the expert destroyed the witness. And, most television and movie depictions of trials show the cross-examiner also attacking and annihilating the witness.

So, typically, our plan was to attack the witness. Unfortunately, because our plan was unfocused, it rarely worked. Desperate to score points, we often went back over the witness's testimony on direct. But that strategy rarely resulted in anything other than repeating or replaying the defense testimony.

If, like me, you've experienced that situation, then you also likely remember whimpering "no further questions, your honor", and retreating to your table, all the while desperately trying to convey the appearance that you scored secret points to be revealed later.

C. What is the NCDA method?

The NCDA method has been alternately called "concession based cross-examination" or "the approach point method" of cross-examination. The first name reflects the goal of seeking concessions from the witness that will either strengthen our own case or weaken the defense. The second name, "the approach point method", indicates that we seek concessions to approach the point that we want to argue in summation. Regardless of which name is

used, the NDCA method allows you to prepare for cross-examination much as you prepare for other stages of the trial.

D. How do I use the NDCA method?

Remember our goals. We either want to gain admissions that strengthen our case or gain admissions that weaken the defense. We only attack the witness if these two goals cannot be achieved through concessions.

Strengthen our case: Instead of focusing on what the witness wants to testify about, consider what facts in the case that this witness must concede. In this way, you may gain valuable admissions to facts, (even elements of the offense) that strengthen our case.

Weaken the defense: Applying logical deduction, contrast the facts of the case and the anticipated testimony of the witness. You may also use this approach to evaluate the entire defense theory in the case. Logical deduction is applied by asking: "If what the defense witness (or defense theory) says is true, then what else must be true?"

Alternatively, if you believe that the witness acted unreasonably, you can contrast what a reasonable person would have done with what the witness did.

Flaws and even gross improbabilities will be revealed if you logically extend the defense assertions or theory. Then, make a list of the inferences that are logically compelled by the defense testimony or theory.

Assemble the inferences that you have drawn from the defense theory into short concise statements of facts. These short statements become the framework for your cross examination.

Your points should be organized rather than random or scattered. Cross-examination should be organized because jurors need time to hear the question and answer, and understand their meaning. An organized approach helps jurors understand the significance of the point. Moreover, a scattered-question approach is extremely difficult to do well. Finally, even if technically effective, the jurors may conclude that you are scoring points unfairly.

First, find the areas where the defense witness can be used to bolster the prosecution theory or weaken the defense case. Generally, you should begin your examination seeking concessions, since they are easier to obtain than impeachment points.

E. Use the Approach Point Worksheet to organize your preparation.

Identify the ultimate argument that you want to make about this witness or group of witnesses.

From the ultimate argument, establish one or more sub-topics and a theme if you can use one.

Organize the list of inferences under the appropriate sub-topics. Break down each inference into bite-sized thoughts to control the witness, emphasize your point, and assist the jury's understanding. These bite-sized questions help pin the witness down by avoiding compound assumptions of facts. They also allow you to approach the point that you want to make in summation without giving the witness the chance to quarrel.

F. Simplify the style of your questions.

Suggest the short statements of fact to the witness as a question. It is the easiest style of questioning to learn and use. It is effective in gaining concessions, the jury can understand your points, and it also effectively controls the witness without you adopting an aggressive attitude with the witness.

Avoid talking like a lawyer. Your job is to communicate. My advice is simple: unless you've heard a non-lawyer use the word, avoid using it yourself. Examples: *vehicle*; *subject*; *credibility*; *corroborate*; *submit*; *plethora*.

Avoid phrasing your questions with a tag, like "*isn't it true*"? It may be a common style, but what does the question, "*is not it true*" literally mean? Another variation, "*is it not true*", is worse. The question asks the literal opposite of what is usually intended. What does a yes or no answer mean?

F. Adjust your approach to fit the type of witness. You will not likely approach a defense expert the same way that you examine a character witness or an alibi witness. But, the approach point method allows you to make a specific plan for these different witnesses.

G. Cross-examine only when you need to.

In other words, make sure that your examination is effective in adding to the prosecution theory or weakening the defense.

Do not rehash the defense witness' testimony and do not chase side issues that only lead away from your theory of the case.

Do not attack a witness without a need. You may conclude an attack and believe that it was a successful cross-examination, but the jury may see it differently. Jurors may not see an exchange between an attorney and a layperson as a fair fight.

We can obtain many concessions favorable to our case with the NDCA method and avoid an unfriendly exchange with a witness.

H. What about those commandments?

Of the books written on cross-examination, the most famous is "The Ten Commandments of Cross-Examination" by Irving Younger. Unfortunately, this book did not offer a method to prepare your examination, it simply told lawyers to prepare. And, it gave advice in the form of rules. Offering advice is one thing, but announcing these concepts as rules has done a disservice to new lawyers. You may find that a challenging situation becomes impossible when you try to apply those rules in court.

In fact, the author prefaces his commandments with this ominous warning:

"If you violate these commandments, you will instantly regret it. The question will blow up in your face."

Really, how does "***Be brief***" and "***Avoid one question too many***" even constitute useable advice? Let's examine a few and see if they deserve being called "commandments".

Never ask anything but a leading question. We have already shown that it is an effective style of examination if we develop short statements of facts and then suggest them to the witness. But to absolutely never ask an open-ended question defies common sense. Some witnesses are obviously lying. Others show a love for exaggeration. Why not let those witnesses talk?

Professor Younger compounded the pressure that he placed on lawyers when he observed: "***The hallmark of an effective cross-examination is when a witness never says anything beyond 'yes' or 'no'***". This goes beyond advice, and it doesn't help anyone prepare for cross-examination. Can we really measure the effectiveness of a cross-examination without knowing what was asked?

Prosecutor: You are a defense witness?

A: Yes.

Q: Your testimony places the defendant four hundred miles from the scene of the crime at the time that it occurred?

A: Yes.

Q: If you are telling the truth, he must be innocent of the crime?

A: Yes.

Q: Are you lying?

A: No.

Apparently, Professor Younger would be pleased with that exchange, since the witness yielded only 'yes' or 'no' answers. But it is doubtful that anyone else would be impressed.

Ask only questions to which you already know the answers. As a commandment, it's nonsense. And, aside from encouraging preparation, it isn't even good advice. No lawyer has the luxury of knowing everything beforehand. Every lawyer must explore unknown territory. As advice, it would be better to say that *you should evaluate the risk of asking a question to which you don't know the answer, before you ask it.* Example: In a paternity trial, the defendant denied that he was the father of the child because he and the plaintiff "practiced birth control". The young prosecutor, following Younger's advice, did not ask what method of birth control. It was only after the verdict for the defendant, that the prosecutor learned that the couple had used the "rhythm method" of birth control!

Never permit the witness to explain anything. Again, Younger goes too far. The attorney should control the examination, but a jury may perceive that a lawyer is being unfair if he or she never permits the witness to explain anything. As we noted above, that explanation may help our case.

Vincent Bugliosi, the Charles Manson prosecutor, says that once he gets a witness to commit that their behavior differed from reasonable behavior, he asks them, "why"? He calls it the most natural question in the world. And, since he first got the witness to commit to the facts needed to ask the question, it is the witness who struggles with the open-ended question.

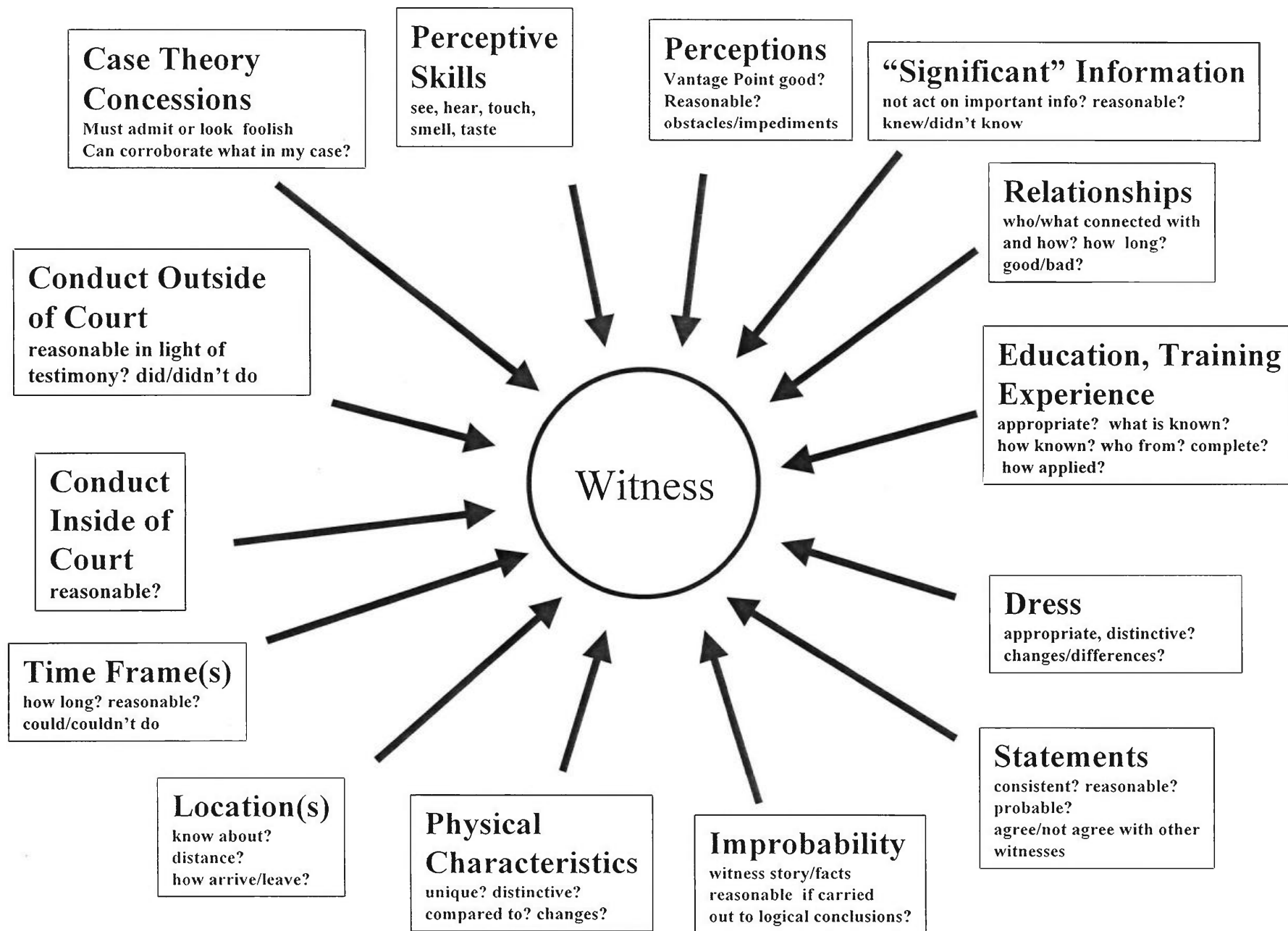
I. Conclusion

Reject the myth that cross-examination is an art and approach it as another trial skill to improve. The NCDA method allows you to prepare for cross-examination as you would for any other part of the trial. Moreover, the NCDA has given you a method to conduct the cross-examination effectively, no matter what level of natural talent that you bring to the courtroom.

Brainstorming Ideas

Page _____ of _____

Witness _____



The National College of District Attorneys Approach PointSM Cross-Examination Process



2

List the possible concession ideas on the Brainstorm forms.

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.

Witness John Smith

3

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

4

Using a separate Approach PointSM form for each topic, organize your short concession points onto the Approach PointSM 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

Brainstorming Ideas

Page _____

Witness **John Smith**

TOPIC 1

TOPIC 2

TOPIC 3

Brainstorming Ideas

Page _____

Witness **John Smith**

TOPIC 1

TOPIC 2

TOPIC 3

WITNESS **John Smith** FACTORY UNIT _____ PAGE 1 OF 4

TOPIC 1

FACTS

SOURCES

Facts supporting this topic

WITNESS **John Smith** FACTORY UNIT _____ PAGE 2 OF 4

TOPIC 2

FACTS

SOURCES

Facts supporting this topic

Topic leads to this argument in closing

Optional theme or description of these concession points

WITNESS: _____

PAGE _____ OF _____

TOPIC/SUBJECT AREA OF CROSS-EXAM:

FACT POINTS

SOURCE/EXHIBIT

ARGUMENT TO THE JURY:

ARGUMENT THEME FOR THESE FACT POINTS:

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)

WITNESS: _____

PAGE _____ OF _____

TOPIC/SUBJECT AREA OF CROSS-EXAM:

FACT POINTS

SOURCE/EXHIBIT



Then this must be true

Point, and if this is true



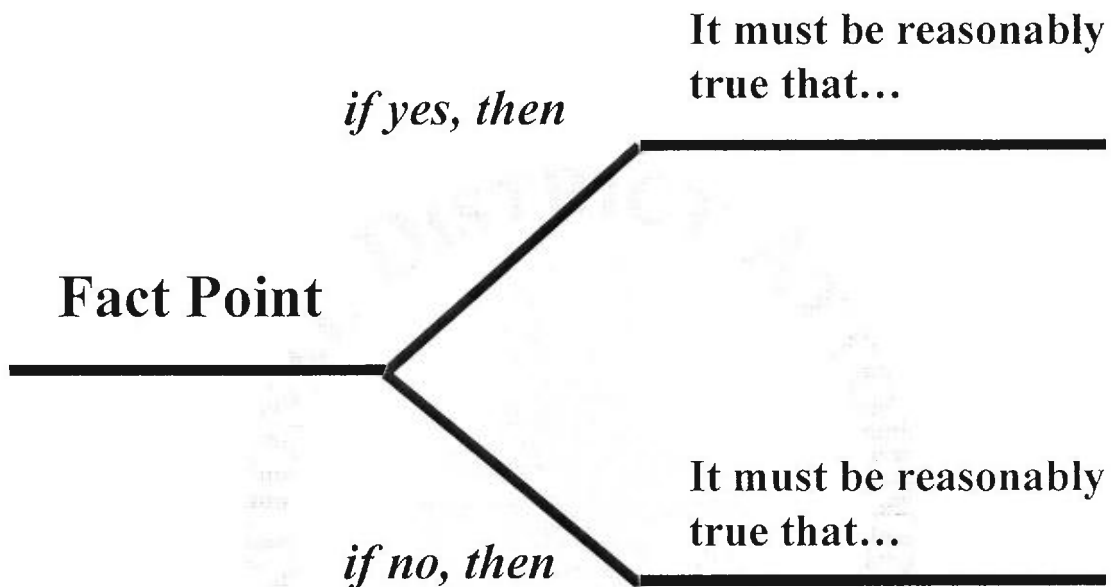
Then this must be true

**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:

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.

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.

So...

It must not be very “special”.

You forgot it.

Argument
Point

Supporting
Facts

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.

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

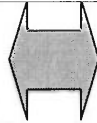
Situation:

What would have been reasonable or logical in this situation?	What actually happened or occurred?

TOPIC/SUBJECT AREA OF CROSS-EXAM:

FACT POINTS

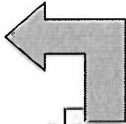
Use Scientific Method
 Follows accepted formats
 Wants complete investigation
 complete facts
 recheck facts?
 want first hand accounts
 want all documentation
 Consider source of facts
 Not reject any hypothesis
 Conduct exams fairly
 follow procedures
 keep log, journal (precise)
 confident in work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



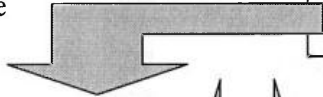
SOURCE/EXHIBIT

“Now, Doctor, you consider yourself a scientist, don’t you?”

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

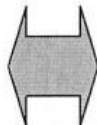


Lock the witness in on the reasonable or accepted facts before introducing the contrast.



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

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



“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

Typical Compare/Contrast Cross

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	Less Than Ideal
Expert Witness	Defense Witness
Use Scientific Method	Not follow exact method
Follows accepted formats	Deviated from formats
Wants complete investigation	Incomplete investigation
complete facts	didn't have all facts
recheck facts?	rechecked facts?
want first hand accounts	did not have first hand
want all documentation	did not have all reports
Consider source of facts	Did not consider all hypotheses
Not reject any hypothesis	
Conduct exams fairly	Does not have notes
follow procedures	Did not write report
keep log, journal (precise)	Did not provide prosecution
confident in work	with results till testimony
not be afraid of findings	
write report showing significance	
Reasonably compensated	Full price for incomplete work

Typical Compare/Contrast Cross

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:

Reminders for Cross-Examination

1. Prepare
 - a. Use the Approach PointSM form
 - b. Work toward your closing argument.
 - c. Save argument for argument.
2. Avoid objections.
 - a. Avoid argument--ask for facts
 - b. Have a good faith factual basis
 - c. Do not harass unnecessarily
3. Have a purpose but don't telegraph it. Remember your case theory.
4. Don't chase the defense theory unnecessarily.
 - a. Avoid strict chronology of the defense theory.
 - b. Determine the role of this witness to the defense theory.
5. Don't chase "rabbit trails" which lead nowhere.
6. Ask questions in short fact points whenever possible.
7. Be careful about "over controlling" the witness.
 - a. Witness conduct can be better than answers.
 - b. Note troublesome conduct for argument.
 - c. Think of a characterization for troublesome witnesses
 - d. Don't go to the court for help until the jury sees the witness conduct.
 - e. Switch to accusatory formats when control is a problem.
8. Listen to the answer.
 - a. Is it an answer to the question? Was it the *truth*; the *whole* truth; and *nothing but* the truth?
 - b. Did it provide better material than you had already?
 - c. Incorporate good points into the next question.
9. Prepare an impeachment predicate section for your trial notebook.
10. Avoid multi-fact or multi-element questions. The answers may mean nothing.
 - a. Be careful of "fact-lusions"--concepts which appear to be facts, but are really conclusions: *angry, upset, concerned*, etc.
 - b. Adjectives, adverbs and some nouns can expand concepts
 - c. Words such as "since" and "because" in questions can give a witness room to run. ("And you did that *because...*")
11. Secure concessions early and often. What must this witness concede which will advance your case theory or, to the contrary, make the witness less credible?
12. Keep your demeanor consistent with what the jury would find reasonable for this point in the trial. Don't change demeanor just because it is cross-examination.
13. Lock witnesses down before introducing inconsistencies.
14. Use transitions to help the jury follow you.
15. Avoid nit-picking cross-examination.
16. Avoid interrupting or overriding the witness' answers.
17. Avoid negatively worded questions.
18. Have a plan for when to quit, but keep listening for a better one than your plan.

Witness Control Factors

by John Tierney, National College Faculty

- Use leading questions beginning with:
 - “Do you/did you”; “Can you/could you”; “Will you/would you”; “Have you/had you”; “Are you/is it”; “Was it/were they”
- Make the witness agree with a short, simple thought
- Be patient. Make progress in short steps
- Select the proper form and tone of the question
- Work from specifics to generalities. Start with a single fact and add additional single facts in building block fashion.
- “Yanking the leash”
 - Repeat the question
 - Ask the witness to repeat your question
 - Ask the witness if the question was heard; if so, ask the witness what the question was
 - Provide the answer yourself
 - Q: Did you see the car? A: Ramble, ramble, ramble.
 - Q: Did you hear my question? A: Ramble, ramble, ramble.
 - Q: Then your answer is ‘yes’”
 - Enter into an agreement with the witness
 - Q: I’m going to ask you some questions which can be answered yes or no. If you cannot answer my question yes or no, please let me know and I will rephrase the question for you.
 - Challenge the witness on the rambling.
 - Q: Did you see the car? A: Ramble, ramble, ramble.
 - Q: There is something which prevents you from answering yes or no? A: Not really.
 - Q: Then are you ready to answer my question yes or no?
 - Allow them to run in a small area and challenge them on it.
 - Q: Did you see the car? Ramble, ramble, ramble
 - Q: Is there anything else you want to tell us about that? A: Ramble, ramble.
 - Q: Anything else? A: Ramble, ramble.
 - Q: Anything else? A: Ramble.
 - Q: Anything else? A: No.
 - Q: Now let me ask you again, did you see the car?