



# Cross Examination

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# What is the point of cross examination?

- Get helpful information out of the witness
- Discredit hurtful information from the witness
- Discredit the witness



# What is the point of cross examination?

- This is not the time to make your closing argument
- Get the facts you need to make your closing argument later



# Topics to Address

- Facts that support your theory
- Facts that discredit the State's theory
- Facts that attack the witness's credibility



# Cross Examination Basics

- Ask leading questions
- Ask one fact per question
- Keep questions simple and short
- Never ask the “burrito question”

# Leading Questions

- Do NOT start with “who,” “what,” “when,” “where,” “why,” or “how”
- Are NOT simply questions that require a “yes” or “no”
- Are sentences that can (but need not) end with, “right?” or, “correct?”
  - Drop the “tag” at the end and use your tone to ask the question

# Leading Questions

- Q: Why didn't you check the gun for fingerprints?
  - A: Well, guns typically have rough surfaces, and fingerprints don't stick very well to them, so we don't usually find fingerprints on guns anyway.
- Q: Did you check the gun for fingerprints?
  - A: No, it's usually not helpful to do that.
- Q: You didn't check the gun for fingerprints?
  - A: No.



# Just the Facts

- One fact per question
  - If you find yourself with multiple facts per question, break it up into multiple questions
  - Don't be afraid to break down complex or unfamiliar concepts into simple questions
- Stick to facts – not characterizations
- Never ask a question if you don't know the answer



# One Fact Per Question

- Q: You found heroin and cocaine?
  - A: No.

- Q: You found heroin?
  - A: Yes.
- Q: You found cocaine?
  - A: No.

# Characterizations

- Q: The car was going too fast?
  - A: Well, I wouldn't say that. Everyone drives that speed on that part of the road.
- Q: That was irresponsible, wasn't it?
  - A: I think it would have been more irresponsible to drive significantly slower than all the other cars on the road.
- Q: When the silver car hit the green car, it pushed it all the way up onto the curb?
  - A: Yes.
- Q: And the debris landed as far as 50 feet away?
  - A: Yes.

# Simple and Short Questions

- Q: Officer, on the date in question, did you have the occasion to come upon a white powdery substance that you suspected was (and ultimately confirmed to be) cocaine hydrochloride?
- Q: You found cocaine?



# The “Burrito Question”

- Never ask the “burrito question”
- This gives the witness a chance to explain

# The “Burrito Question”

- Q: You had rice?
  - A: Yes.
- Q: You had black beans?
  - A: Yes.
- Q: You had chicken?
  - A: Yes.
- Q: You had cheese?
  - A: Yes.
- Q: You had salsa?
  - A: Yes.
- Q: You had guacamole?
  - A: Yes.
- Q: You had sour cream?
  - A: Yes.
- Q: And you put all that in a tortilla?
  - A: Yes.

# The “Burrito Question”

- Q: So you had a burrito?
  - A: No, I had a taco.

# The “Burrito Question”

- Ask about all the facts you need leading up to that question, but stop before you start a question with “So...”
- Wait until closing argument to argue your point with the facts you’ve gathered

# The “Burrito Question”

- What should you do if you accidentally ask the “burrito question”?
- Pivot!
- Ask questions that differentiate the witness’s explanation from your conclusion (if you can)



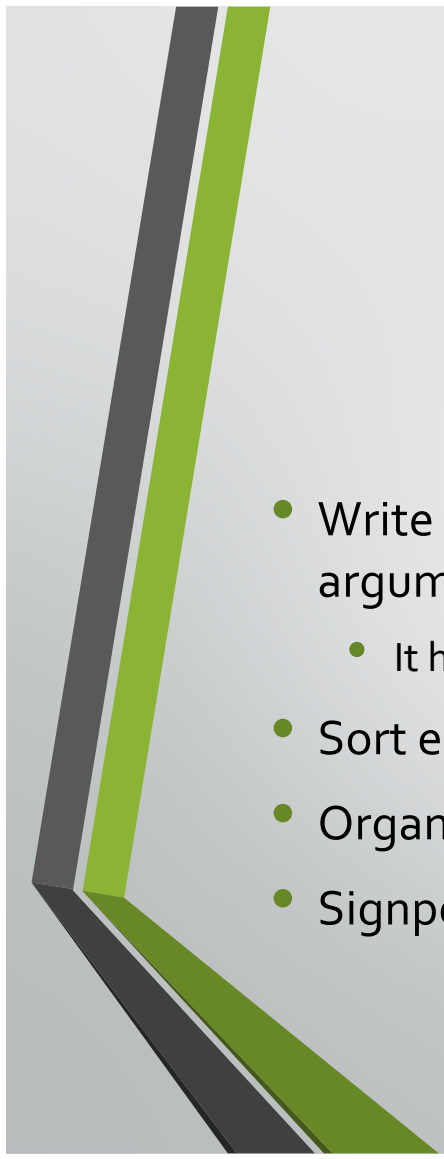
# The “Burrito Question”

- Q: So you had a burrito?
  - A: No, I had a taco.
- Q: But the tortilla was twelve inches in diameter, right?
  - A: Yes.
- Q: When you wrapped it up, you tucked in both ends of that tortilla?
  - A: Yes.
- Q: You only ate one of them as your meal?
  - A: Yes.



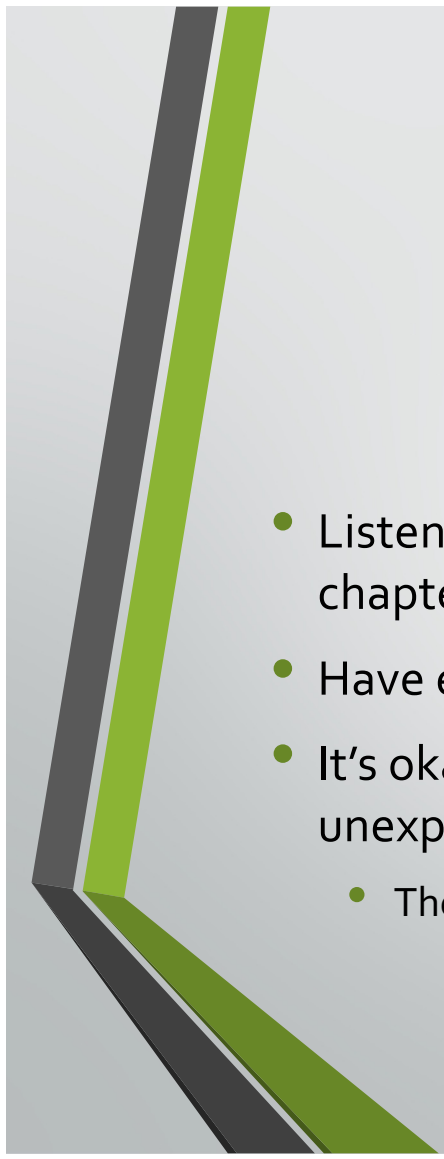
# Organization

- Use the “chapter” method
- Use signposts
- Remember primacy and recency
- Be flexible – listen to the witness and adapt as needed



# The “Chapter” Method

- Write down all the facts you need to get from the witness for your closing argument as bullet points
  - It helps to do this in a Word document so you can rearrange them
- Sort each fact into a broader topic you want to address (your “chapters”)
- Organize your chapters so that they will have the most impact
- Signposting: when you change topics, let everyone know



# The “Chapter” Method

- Listen to the direct examination and note anything you want to add to a chapter
- Have each chapter on a separate page so they can be rearranged on the fly
- It’s okay to deviate from your written points if the witness gives you an unexpected answer you need to explore
  - The written points will then help you get back on track when you’re done!

# Controlling the Witness

- Interrupting the witness mid-answer usually won't work
- Try asking easy questions first to get in the flow of short answers
- Do your best to get a "yes" or "no"
  - If the witness doesn't answer the first time, ask again
    - You can add "to answer my question" or "so that's a 'yes'" or "so that's a 'no'"
  - If you ask 3 times with no answer, move on

# Impeachment

- Refer to NC Rules of Evidence 607 through 613
- Common topics of impeachment
  - Prior inconsistent statements
  - Prior convictions
  - Bias or interest

# Prior Inconsistent Statements

- You can ask a witness if they said something different at another time
  - Remember, the prior statement is not evidence itself!
- If the witness denies the prior statement, you may use other evidence to prove it
  - Transcript of prior testimony, video or audio recording, testimony of another witness, etc.
- State is entitled to a copy of the impeaching evidence upon request
- Note: be careful of “putting on evidence” if you do not intend to do so
- Refer to NC Rule of Evidence 613



# Procedure for Prior Inconsistent Statements

- Have the witness reaffirm the statement you are impeaching
- Establish the prior statement occurred
- Build up the veracity of the prior statement
- Confront witness with prior statement
- Resist the urge to keep going!
  - You will only allow the witness to explain away the inconsistency



# Prior Convictions

- “What, if anything, have you been convicted of in the last ten years that carries a maximum punishment of sixty days or more?”
- If witness doesn’t name all convictions, follow up!
- Decide whether the witness’s record is bad enough that it’s worth asking
- Refer to NC Rule of Evidence 609



# Bias or Interest

- If the witness has a reason to lie (or err on the side against your client when they don't know), you may ask about it
- Common biases
  - Witness doesn't like client or likes alleged victim
  - Witness (or loved one) could face consequences from admitting the truth
  - Witness has a financial or other interest in outcome of case

# Other Forms of Impeachment

- You may ask about facts that contradict the witness's testimony
- You may cross examine on prior dishonest acts, but cannot prove it by extrinsic evidence
  - Refer to NC Rule of Evidence 608(b)
- You may ask experts about treatises that contradict their methods or opinions



## Some Style Points

- Use theory and theme language
- Watch out for verbal “tics”
- Don’t be a bully
- Make eye contact with jurors during important points



# Mal Davis Case

- What are some facts we would want to get out of Officer White?
- What are some chapters we would include in our cross examination of Officer White?



Demonstration



# Ethics in Criminal Defense: Cross Examination



## Cross Examining Officer White

Mal tells you a week before trial that he has seen White mistreat Black men on the streets, has heard that he consistently harasses them, and that White has had complaints filed against him for doing so. He thinks that is another reason White is saying Mal was at the scene of the shooting when he actually wasn't. He wants White cross-examined on this issue.





## Cross Examining Officer White

- Is there additional communication with Mal that is needed? If so, when?



## Rule 1.1 | Competence

“A lawyer shall not handle a legal matter that the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”



## Rule 1.3 | Diligence

[Comment 3] “Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions. In extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.”



## Rule 1.3 | Diligence

[Comment 7] Conduct warranting the imposition of professional discipline under the rule is characterized by the element of intent manifested when a lawyer knowingly or recklessly disregards his or her obligations. Breach of the duty of diligence sufficient to warrant professional discipline occurs when a lawyer consistently fails to carry out the obligations that the lawyer has assumed for his or her clients. A pattern of delay, procrastination, carelessness, and forgetfulness regarding client matters indicates a knowing or reckless disregard for the lawyer's professional duties. For example, a lawyer who habitually misses filing deadlines and court dates is not taking his or her professional responsibilities seriously. A pattern of negligent conduct is not excused by a burdensome caseload or inadequate office procedures."



## Rule 1.3 | Diligence

[Comment 6] "Conduct that may constitute professional malpractice does not necessarily constitute a violation of the ethical duty to represent a client diligently. Generally speaking, a single instance of unaggravated negligence does not warrant discipline. For example, missing a statute of limitations may form the basis for a claim of professional malpractice. However, where the failure to file the complaint in a timely manner is due to inadvertence or a simple mistake such as mislaying the papers or miscalculating the date upon which the statute of limitations will run, absent some other aggravating factor, such an incident will not generally constitute a violation of this rule."



# Cross Examining Officer White

- Is there investigation that needs to be done?



## Rule 1.3 | Diligence

“A lawyer shall act with reasonable diligence and promptness in representing a client.”



## Rule 1.1 | Competence

[Comment 5] “Competent handling of a particular matter includes inquiry into, and analysis of, the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined, in part, by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity or consequence....”





## Cross Examining Officer White

- If Mal is right about the complaints against White, what might you do on cross if you are quite certain that Mal's version about not being present is false?




## Rule 1.3 | Diligence

[Comment 4] “Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client.”



## Rule 1.3 | Diligence

[Comment 1] “A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client....The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”



## *State v. Ward*, COA16-52 (Nov. 1, 2016)

Where there was evidence that mold had formed in a freezer near and on DNA samples, but not evidence that the mold had affected Ward's DNA sample, counsel was not required to cross-examine the DNA expert about the mold at the client's insistence.