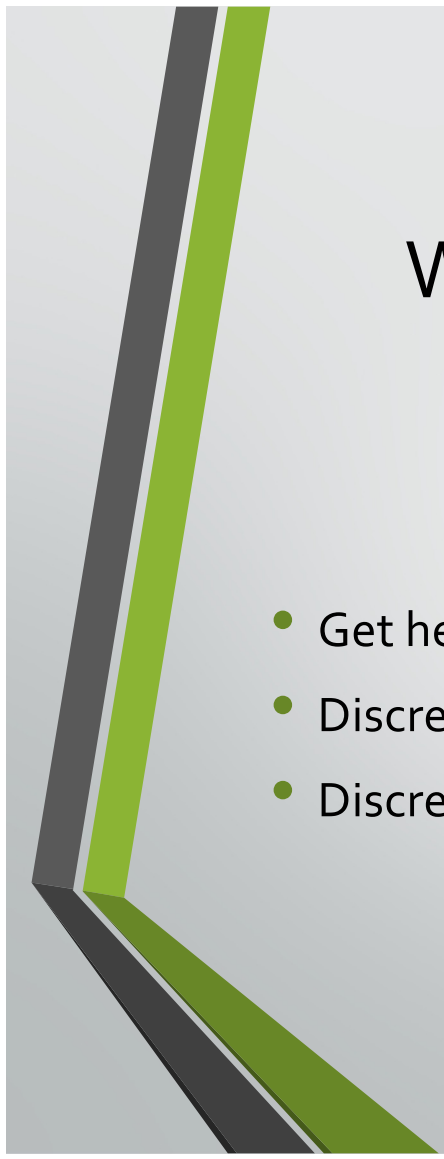




Cross Examination

Johnna Herron

Assistant Public Defender, Guilford County



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”

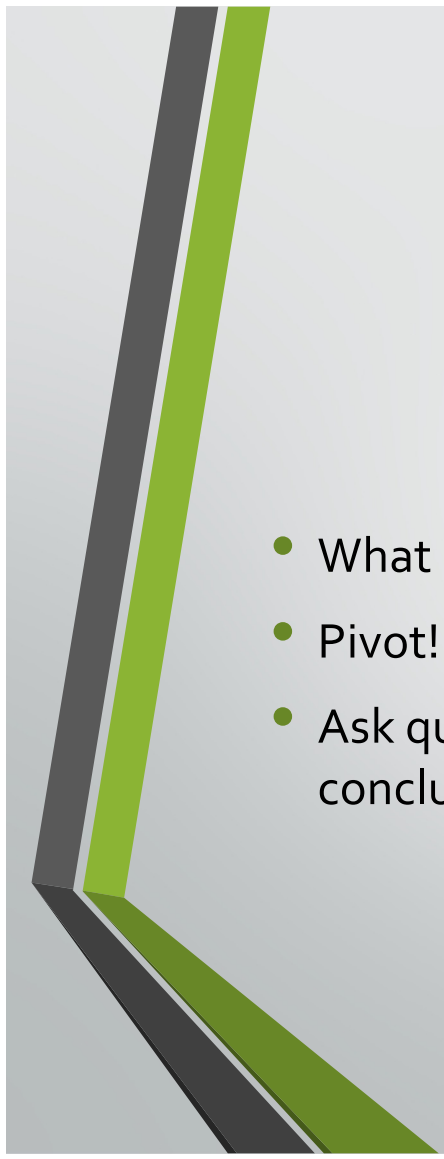
- Q: You had rice?
 - A: Yes.
- Q: You had black beans?
 - A: Yes.
- Q: You had chicken?
 - A: Yes.
- Q: You had cheese?
 - A: Yes.
- Q: You had salsa?
 - A: Yes.
- Q: You had guacamole?
 - A: Yes.
- Q: You had sour cream?
 - A: Yes.
- Q: And you put all that in a tortilla?
 - A: Yes.

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)

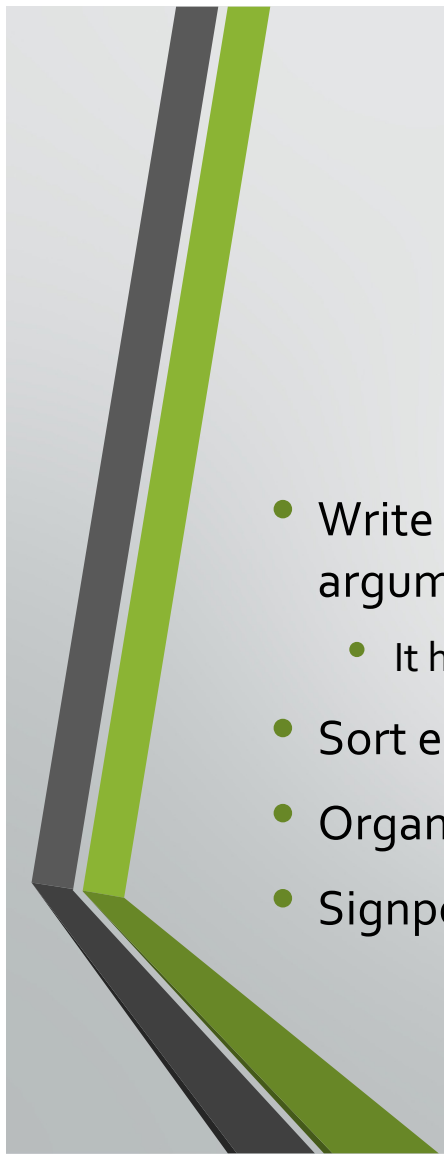
The “Burrito Question”

- 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.



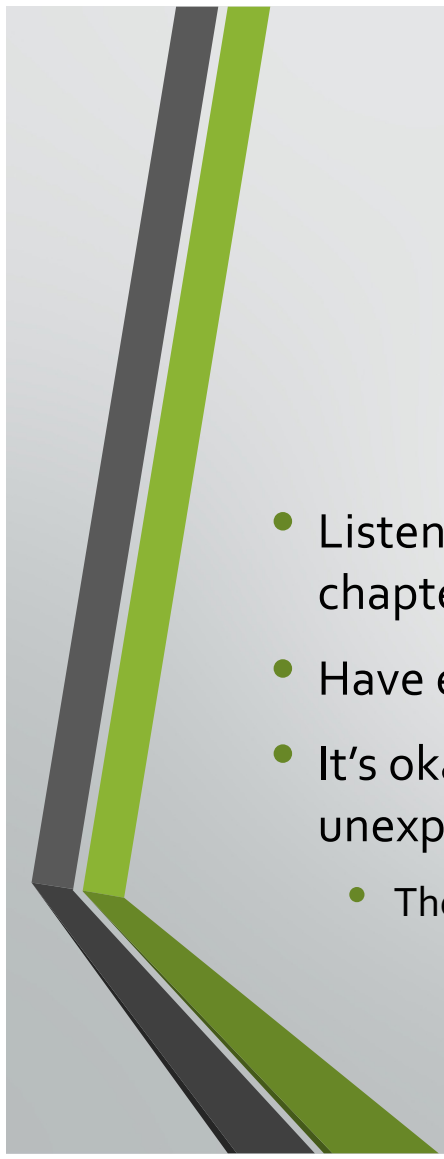
Organization

- 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



John Forbes Case

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



Demonstration



Ethics in Criminal Defense: Cross Examination



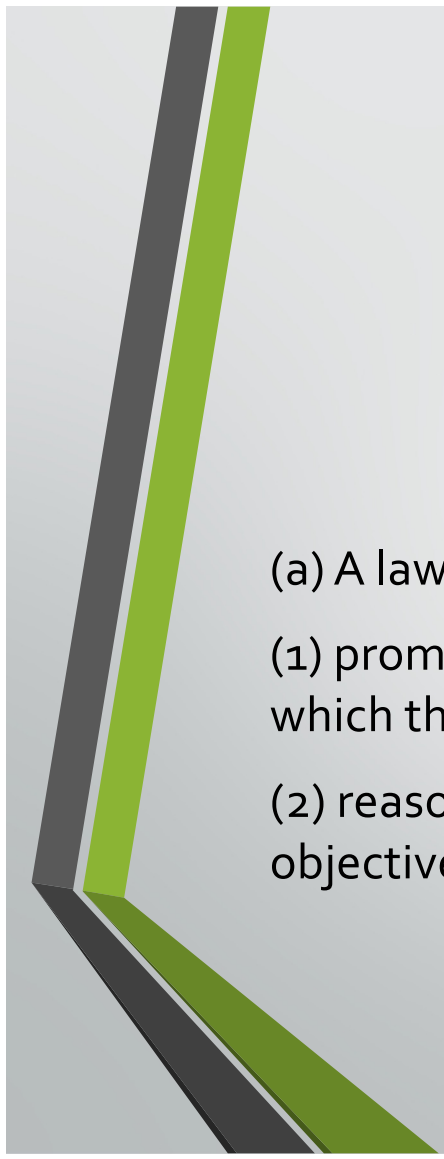
Cross Examining Darlene Hampton

John insists that you not cross-examine Darlene about her inconsistent statements or her relationship with Rollo. He says, "It will just make her all upset and stuff." What should you do?



Cross Examining Darlene Hampton

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



Rule 1.4 | Communication

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished



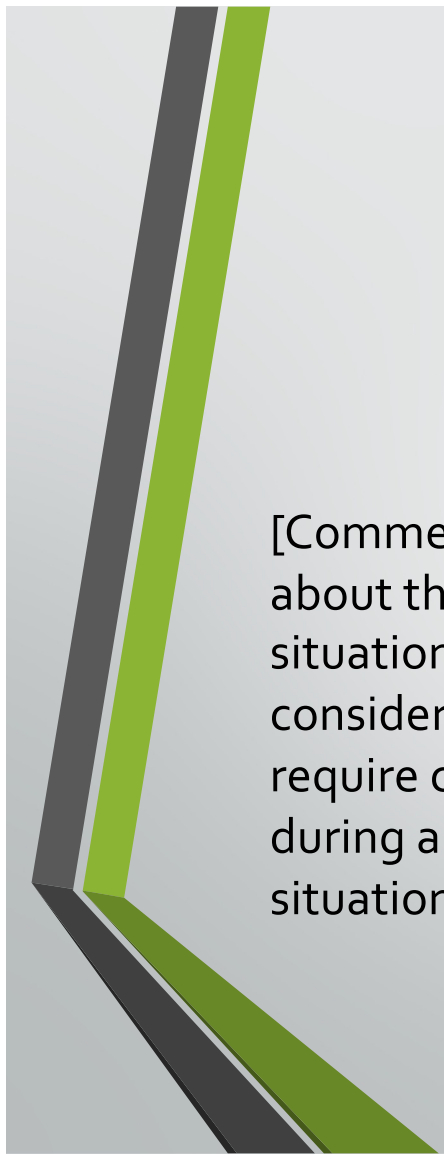
Rule 1.4 | Communication

[Comment 1] “Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.”



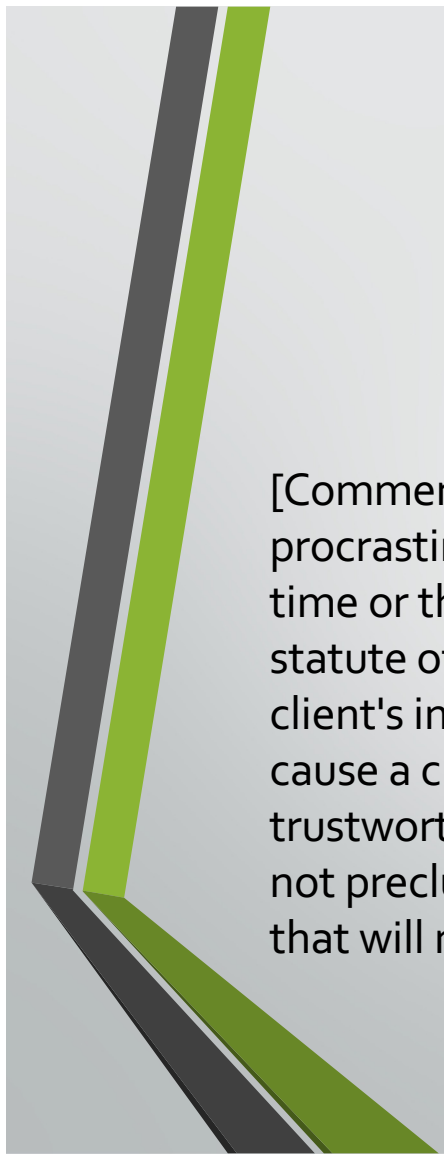
Rule 1.4 | Communication

[Comment 2] “If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client’s consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take”



Rule 1.4 | Communication

[Comment 3] “Paragraph (a)(2) requires the lawyer to consult with the client about the means to be used to accomplish the client’s objectives. In some situations – depending on both the importance of the action under consideration and the feasibility of consulting with the client – this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation”



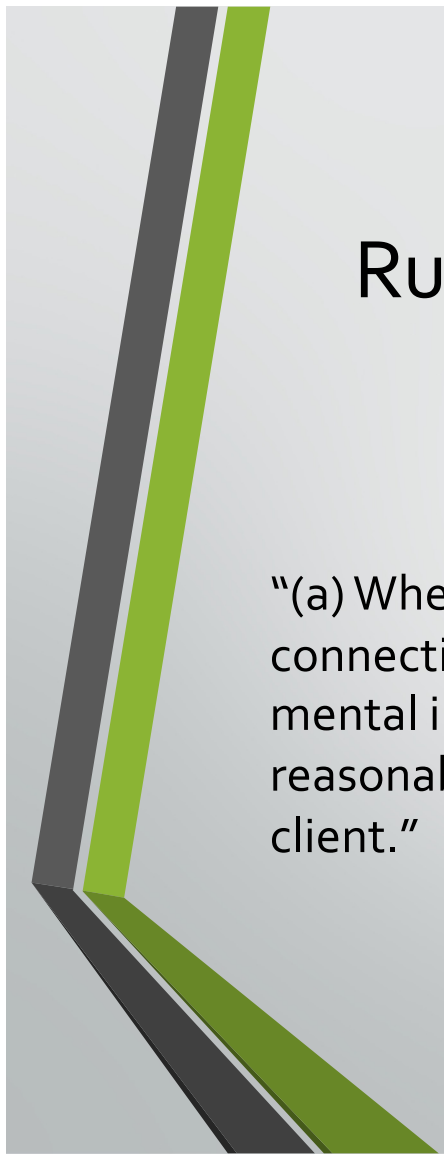
Rule 1.3 | Diligence

[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.”



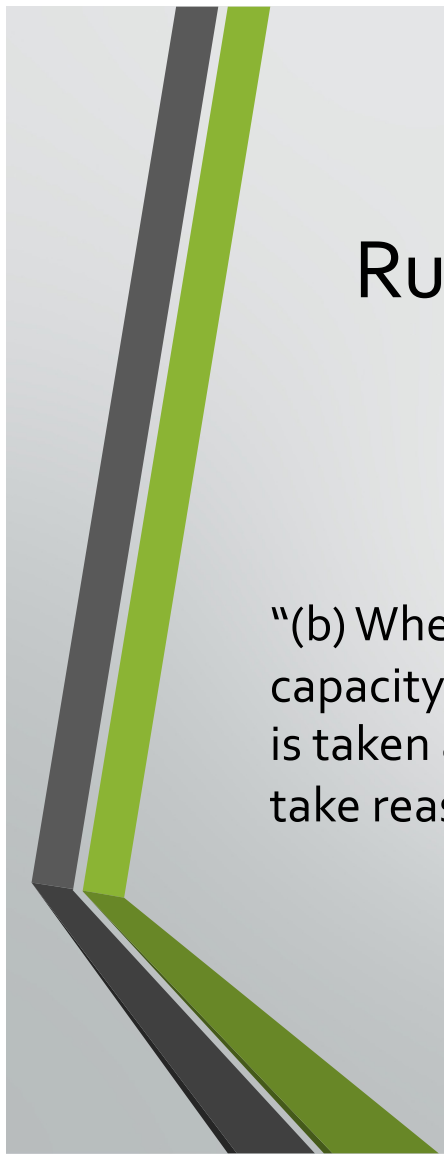
Cross Examining Darlene Hampton

- Does John's intellectual disability affect your ethical duty?



Rule 1.14 | Client with Diminished Capacity

“(a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”



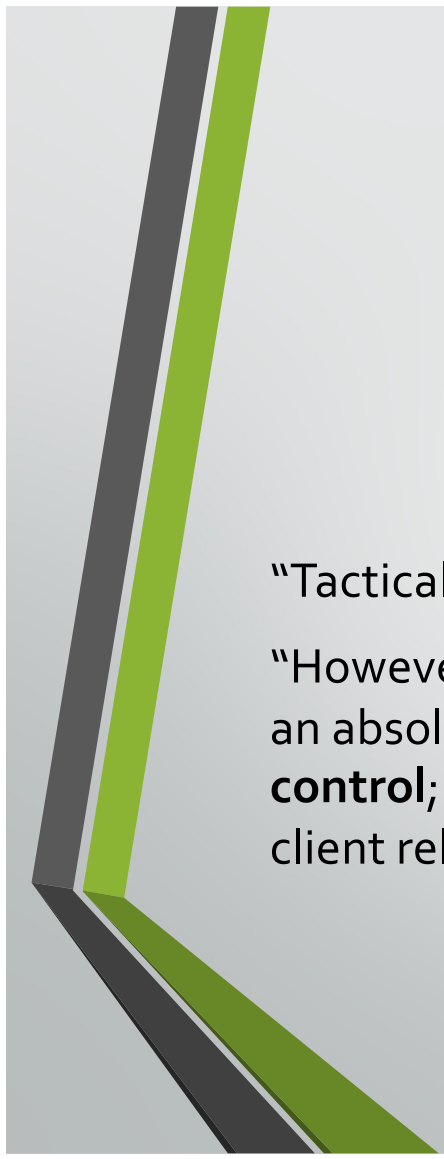
Rule 1.14 | Client with Diminished Capacity

“(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action”



Cross Examining Darlene Hampton

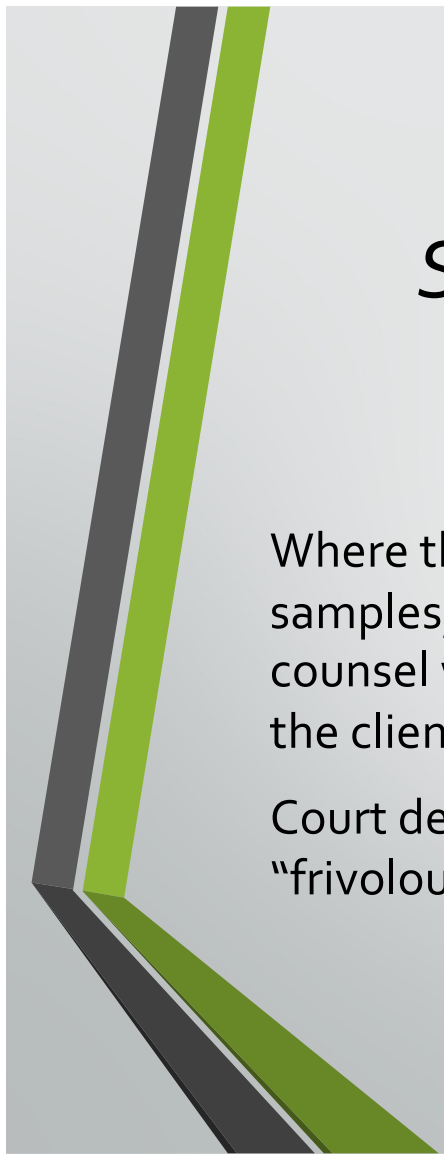
- What if you and John come to an absolute impasse?



State v. Ali, 329 N.C. 394 (1991)

“Tactical decisions . . . ‘are ultimately the province of the lawyer.’”

“However, when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, **the client's wishes must control**; this rule is in accord with the principal-agent nature of the attorney-client relationship.”



State v. Ward, 250 N.C. App. 254 (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.

Court determined impasse was not over "tactical decision" but over a "frivolous act."