



CROSS EXAMINATION

SCIENCE &
TECHNIQUES



The goal of cross is to obtain
truthful testimony



IN ORDER TO CONTROL THE WITNESS, WE MUST FIRST
CONTROL OURSELVES

Great Cross TEACHES





Story telling through Cross

BENEFITS OF A PREDOMINANTLY SCRIPTED CROSS EXAMINATION

- ▶ Risk Minimization
- ▶ “Maximum gain” questions sequences
- ▶ Bolster/advance your theory first
- ▶ Undermine opponent’s theory second
- ▶ Use the witness as a conduit of truth
- ▶ An opportunity to build and teach your case

The 3 Rules of Cross

Leading
(Statements)
Questions Only

One New Fact
Per Question

Break Cross into
a Series of
Logical
Progressions





THEORY OF THE CASE

Theory of the Case

- ▶ A SHORT ARTICULATION IN STORY FORM OF FACTS AND LAW THAT WOULD LEAD THE JURY TO CONCLUDE THAT YOUR CLIENT HAS BEEN WRONGFULLY ACCUSED. THE THEORY MUST INCORPORATE/DEAL WITH/SURVIVE ALL FACTS BEYOND CHANGE AND BE CONSISTENT WITH your chosen DOMINANT EMOTION.

Pozner's definition of theory of the case

Our Theory of the case is a cogent statement of our position on what happened. Our description simultaneously leads to the inference that our client is deserving of the relief we seek. How would we describe the case to a friend. Our theory is not cast in the words of the law but in words that we say to ourselves as we describe our case.

Your theory drives everything that happens in the courtroom and **pretrial investigation**

- ▶ Voir dire
- ▶ Opening
- ▶ Cross-examination
- ▶ Direct
- ▶ Jury instructions
- ▶ closing





HOW TO DEVELOP YOUR THEORY

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WHY – STORMING

Timelines

Character development

Identify themes

Identify facts beyond change (fbc's)

Facts Beyond Change (FBC's)

Facts beyond change are the “givens” of a lawsuit that will be believed by the jury as fair, accurate, and highly relevant regardless of any party’s best efforts to dispute or modify them.” Pozner and Dodd, Section 3.14.

A successful theory can never contradict a fact beyond change . . .

Identifying FBC's



Conclusions are not facts

Avoid “wiggle” words

Fact-busting and “Good fact/bad fact” analysis

Non-critical fact gathering

FBC's IN JERRY WEST CASE

- ▶ Windshield has two bullet holes
- ▶ Cell phone video shows Jerry pointing gun at Kyle while Kyle is sitting in car
- ▶ Jerry does not live at the house where this happened
- ▶ Kyle was invited to come over by Jean
- ▶ Jerry's mother told Jerry to check on Jean when Jean had swelling and discoloration around her eye.

First Draft of Theory of Case

Jerry West

- ▶ After Jerry West's father died, his ailing mother relied on him as the Go-To person for making family decisions. Jerry's siblings respected him the same way when it came to decisions about their mother's care, and the family home on the Choctaw reservation. They all deferred to him even though he was the one sibling who had a house of his own. Jerry was a leader, a provider, and a protector.
- ▶ One day Jerry went to pick up his mother to go grocery shopping. She told him that he needed to look in on his sister. When he saw a big black and blue bruise surrounding her left eye, he knew that her boyfriend was responsible. He confronted the boyfriend, and eventually banned him from the family home. A few weeks later, Jerry went to the family home again and saw the boyfriend's car parked in the drive. After telling him to leave several times with no success, Jerry told him that he was going to shoot up his car if he did not leave. And that is what Jerry did. He shot up the car because Kyle would not leave. He is not guilty because you cannot assault a car.

Second Draft of Theory of Case

Jerry West

- ▶ Jerry West's ailing mother, and his siblings relied on Jerry as the GO TO person after Jerry's father died. He made the calls when it came to taking care of Mom, and the family residence.
- ▶ When Jerry saw his sister Jean had a big black and blue bruise surrounding her swollen eye, Jerry confronted Kyle, Jean's boyfriend and father of Jean's child. Jerry forbade Kyle from ever coming to the house again. Last June, Jerry saw Kyle's car parked in the driveway. He told Kyle to leave or Jerry would shoot up Kyle's car. Kyle refused to go and Jerry started shooting the car. He kept shooting until Kyle left. Jerry did not assault Kyle, and no one can assault a car.

Third Draft of Theory of Case

Jerry West

- ▶ You can't assault a car. Jerry West shot up a car that belonged to his sister's abuser. A man who refused to leave the West's family residence after Jerry told him to go. Jerry's family relied on Jerry to call the shots. This time, Jerry shot up Kyle's car. He did not assault Kyle. And no one can assault a car.

The 3 Rules of Cross

Leading
Questions
(Statements)

One New Fact
Per Question

Break Cross into
a Series of
Logical
Progressions



- **Leading Questions (Statements) Only**

You become the Teacher

Use Short, Declarative Statements

Avoid Enemy Words that give Control to the Witness

Word Selection



Leading Questions Only (Demo)

How was the lighting that night (BAD)

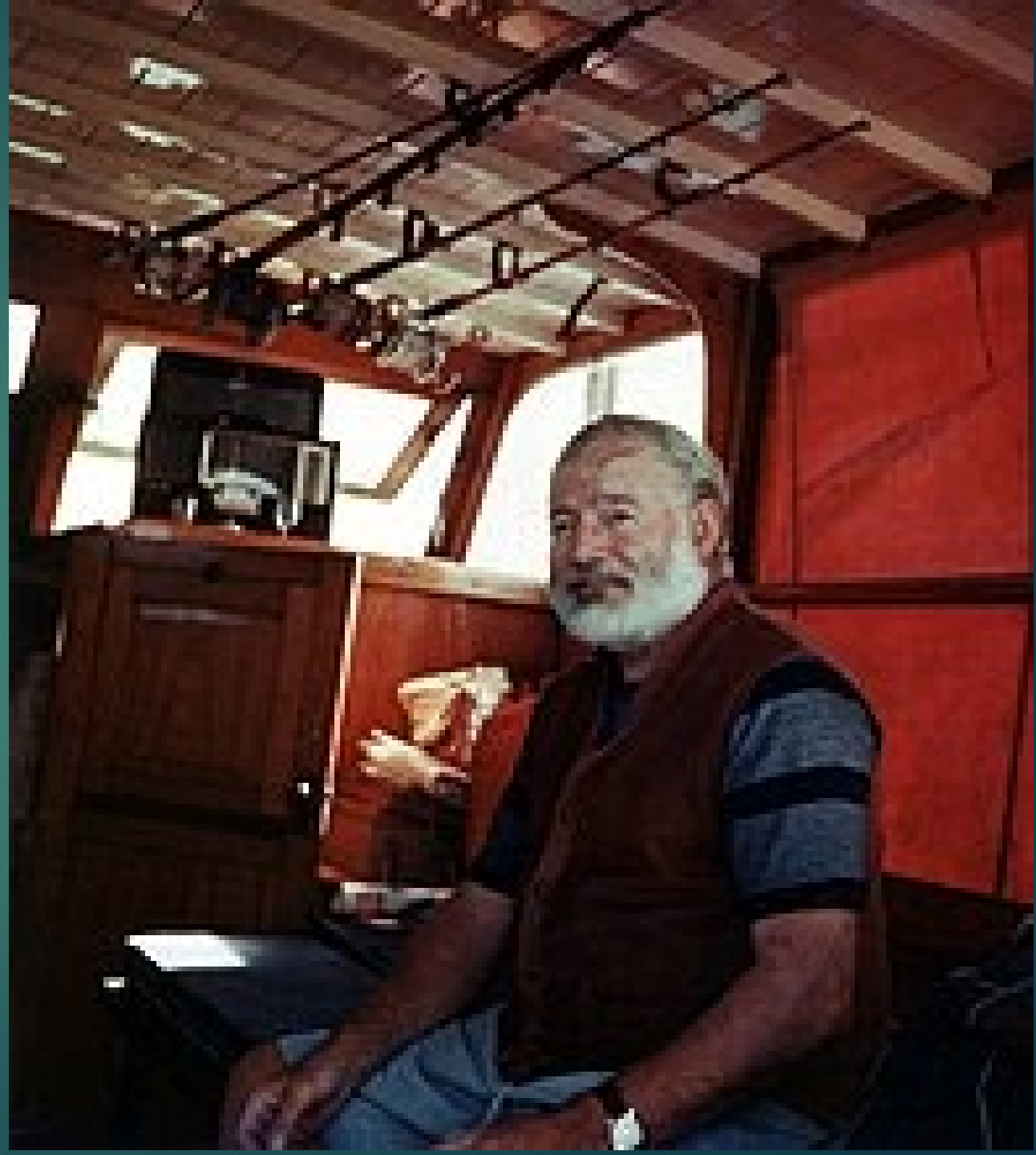
Was the lighting bad (BAD)

You were standing on the corner of 5th and Main (GOOD)

There was one streetlight (GOOD)

That streetlight was broken (GOOD)

Short, Declarative Statements



Enemy Words

- ▶ Who
- ▶ What
- ▶ When
- ▶ Where
- ▶ How
- ▶ Why
- ▶ Explain



One New
Fact Per
Question

Break Cross into a Series of Logical Progressions

- ▶ General To Specific
- ▶ The More Difficult the Witness, the more general your starting point
- ▶ Seeking the No Answer to Marginalize the Witness

The chapter method

- ▶ A chapter is a group of leading questions (statements) designed to accomplish a goal. The facts within a chapter are presented through the leading questions in a logical sequence.
- ▶ Each chapter must advance our theory of the case.



Chapter bundle

A grouping of related chapters that need to be used together in order to create a full picture of a topic.

Chapter bundle – Sloppy police work

DID NOT SECURE THE CRIME SCENE

DID NOT COLLECT EVIDENCE

DID NOT INTERVIEW WITNESSES

DID NOT TAKE PICTURES



Questions beginning with “So...”

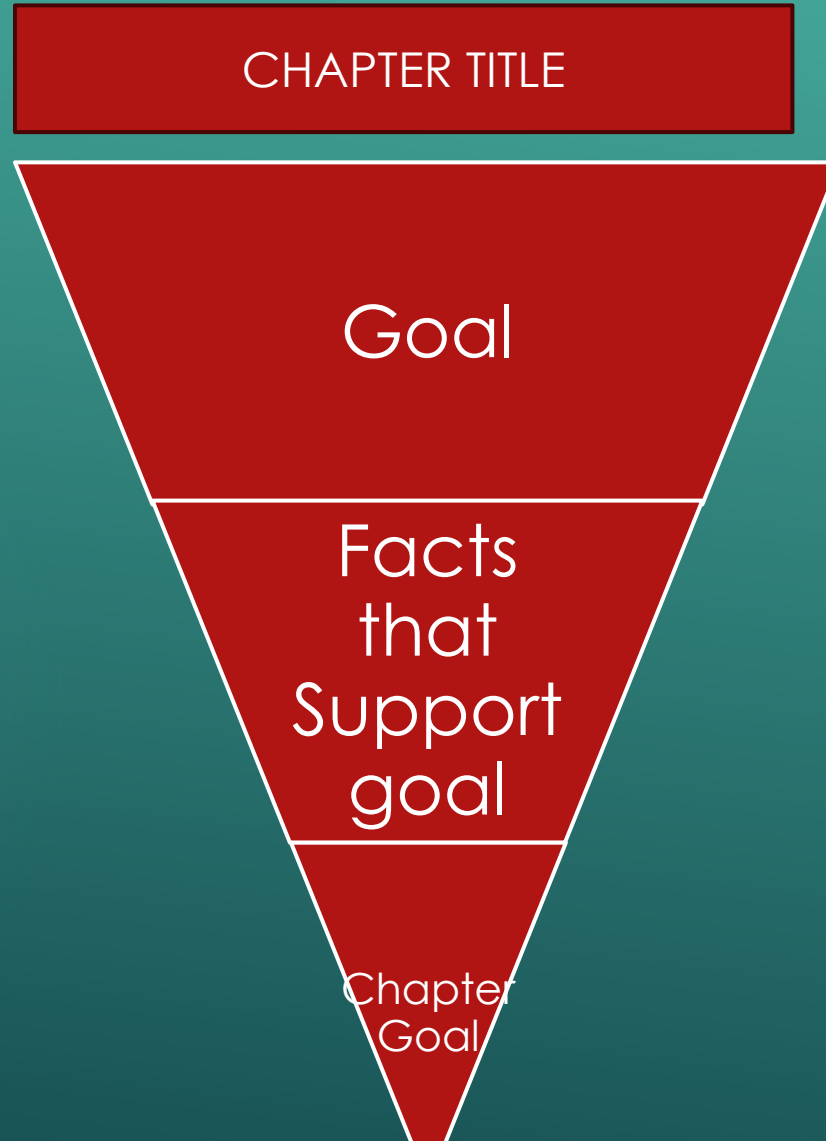
- ▶ Always written, never spoken
- ▶ Perfect headings for a chapter
- ▶ It's the conclusion that you want the jury to reach without telling them
- ▶ Remember So = St. Fu (ST. FU)

THE CHAPTER METHOD

- ▶ The Chapter Method Gives Us Control of the Topics of Cross
- ▶ The Chapter Method Aids in Witness Control
- ▶ Chapters Build Support for Our Theory
- ▶ Establishing Helpful Facts in Cross Reduces the Testifying Burden on Our Witnesses
- ▶ Think of Chapters as Creating an Image

DRAFT CHAPTERS BACKWARDS

DRAFT CHAPTERS BACKWARDS



Questions beginning with “so...”

- ▶ Always written, never spoken
- ▶ Perfect headings for a chapter
- ▶ It's the conclusion that you want the jury to reach without telling them
- ▶ Remember St. Fu

Choosing a Template for Drafting Chapters

- ▶ Name of Witness
- ▶ Title of Chapter (The “So...” Statement)
- ▶ Source
- ▶ One Chapter Per Page

Example of Template for Chapter

Witness – Officer James Friendly	
Chapter: FAILURE TO PROPERLY DOCUMENT CRIME SCENE	
SOURCE	FACT BEYOND CHANGE
GOV 43	“took photo of crime scene”
GOV 56	Does not include clothes on floor Does not include second bag Does not include....

Charting Multiple Statements of a Single Witness

- ▶ Divide and number W's story into chronological sequence of events
- ▶ Title a draft chapter for each event
- ▶ Move segments of W's statement into draft chapters titled for each event
- ▶ Reuse the sequence



The RAC Method of Impeachment

Recommit **A**ccredit **C**onfront

Recommit

You testified on direct
that

Accredit

Declarative questions
that establish that the
out-of-court
statement was more
credible or trustworthy
than the in-court
statement

Confront

And on that day you
(stated, testified,
reported) . . .

RAC DEMO

- ▶ Q: You testified on direct that you were sitting in your car when Mr. West fired the shots that hit your windshield?
- ▶ A: Yes
- ▶ (Date and time of offense)
- ▶ (Talked to police – conditions under which statement given)
- ▶ (Motivated to be accurate)
- ▶ (Other indications of credibility)
- ▶ Q: And in your statement, you stated, “I was standing by the car when Jerry fired two shots into the windshield.”



Theory of the Witness