

## Chapter 9

### **CASE STUDIES: Litigation Theory to Practice**

#### **Cross Examination – Part II**

*Part II continues the public review of a lengthy cross-examination in a real case, examines similar themes developed in Part I, and adds some additional practical tips on how to actually prepare a cross-examination, from start to finish.*

## Chapter 9 – CASE STUDY: Cross Examination II



Unlike *United States v. Lt Col James Wilkerson*, ask anyone but litigation-trivia enthusiasts about the court-martial of *United States v. Lt Col Michael Briggs* and you are likely to generate blank stares. There certainly are similarities between the cases—both Lieutenant Colonels in USAFE, both F-16 pilots, both with first-rate law-enforcement and judge-advocate investigation from the very start, both charged with sexual offenses (here, rape), and both convicted at litigated trials.

The cases differ, however, on the target of the decisive cross examination. To continue this series of articles demonstrating how the theories of litigation can expertly be put into battlefield practice, a review of the key cross examination from *United States v. Lt Col Michael Briggs*—the Accused himself.

### **Theory**

Before the practice, some additional theory. You may have heard this before: Knowing the facts and evidence better than every person in the courtroom is key, and crafting a pointed, controlled, and structured cross-examination allows you to exploit your mastery of both. This can be particularly challenging at the extremes—when the Accused has invoked his right to remain silent early thus leaving you with little to work with or when the Accused has tried, repeatedly, to talk himself out of trouble thus leaving you a plethora of evidence, an overabundance of self-serving but mildly incriminating, often contradictory statements. Officers almost always fall into the latter category.

There are a variety of challenges in that latter category. One is strategically encouraging the Accused to testify, as opposed to offering his or her statements in your case-in-chief. Do not assume that you will use an Accused's "confession" to law enforcement in your case-in-chief. Often, the prosecution is better served by proving the case with other evidence and forcing the Accused to take the stand if he or she

wants to repeat the mitigation/extenuation they asserted during the law-enforcement interview. And let's face it, most "confessions" leave plenty of wiggle room. Remember, once you offer part of the Accused's statement during your case-in-chief, the Defense is allowed to introduce the rest (Mil R Evid 106). Thus, when making charging decisions, think carefully about adding charges that you can only prove by introducing the Accused's "confession."



**Do not assume that you will use an Accused's 'confession' to law enforcement in your case-in-chief**



Always better, almost always, to have a witness on the stand to tell their tale—it allows focus on the heart of the matter, credibility; it requires the witness to remain consistent or explain inconsistencies (and if you're explaining, you're losing); it allows you to control the narrative, emphasize your theme and theory, and set your closing argument; and maybe it will get you that unicorn . . . that Perry Mason moment when the Accused breaks down under your withering cross and admits guilt. But do not hold your breath.

If the Accused elects to testify, the next challenge is anticipating and preparing for the "new" story the Accused will present at trial, one that likely tries to thread the needle between all his (or her) contradictory pre-trial statements. And as always, with an Accused who you know from his pre-trial blabber fest loves to talk and explain, controlling the narrative can be a challenge. A couple practical tips to help develop that withering cross-examination in such a circumstance:

Make a transcript of all Accused statements: Get a court reporter (or paralegal) to prepare draft transcripts of all Accused's recorded statements (pretext calls, OSI interviews . . . or "interrogations" as my Defense friends would say). Then sit down with the drafts and review the interview, correct errors, note time hacks for important points, and most importantly jot down notes for further investigation/follow up and potential areas for cross-examination.<sup>1</sup>

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<sup>1</sup> Once you have that corrected transcript, you can use it as an exhibit at the Article 32 preliminary hearing and, more important, as a separate exhibit at trial. See *United States v. Craig*, 60 MJ 156 (C.A.A.F. 2004) and *United States v. Miller*, 64 MJ 666 (C.A.A.F. 2007).

Then Spin Doctor It: Now read those transcripts again. And again. And again. Read them until you know them by heart or your eyes start bleeding. And do the same to the statements of the key witnesses to the case. Once you have done that . . . do it again (remember what someone brilliant just said: “Knowing the facts and evidence better than every person in the courtroom is key”). Now into the head of your opponent—assume they will see the same thing you see and will have to find a way to present an exculpatory story for their client that carefully weaves its way around all the bad facts/inculpatory statements the Accused made in his or her interviews. Ask yourself, “what crazy story could I come up with that would minimize or explain the bad stuff and offer a somewhat plausible non-criminal explanation of what happened.” Because a crazy story is what you are going to get. Once you think of one crazy story, think of another, then another.

Then decide how to chip away at the crazy: Of course, if you know the facts and evidence better than every person in the courtroom you will be able to pounce on any inconsistency—this is basic impeachment, the bread-and-butter of an effective litigator. But with the crazy story, you are unlikely to have facts at your disposal to clearly undercut the Accused’s testimony—that is why the crazy story was . . . created. You will need to be ready to chip away at the edges and demonstrate why the crazy story, in the context of the case, is not plausible or credible. When it is “she consented to the sex when she did X, Y, or Z,” with X, Y, or Z being things only the Accused or the Victim would be privy to, besides having Victim deny any such thing, you will need to highlight actions and inaction before and after the sexual event which are not consistent with a “relationship” or even a consensual hook up. Or when it is “I just told her what she wanted to hear,” explaining his admissions, you will need to highlight why doing so was the least likely of various other possible responses, and why the Accused’s inculpatory actions before and after the statements are more consistent with guilt than innocence.

Put pen to paper and then mix it up: A pure technique suggestion—others do it differently, so figure out what works for you and then just do it my way. Write out the 5-6 signposts for lines of questioning (e.g. Admitting Elements, Impeaching on X, Actions Inconsistent with “Relationship”). Then write out a full cross under each

signpost, even if you are repeating questions from signpost to signpost (e.g. Confirm-Credit-Contradict passages). Do not focus on smooth transitions between lines of questioning, you do not want that.

Chances are, whether you follow this process or prepare your cross some other way you are going to have a cross that generally flows chronologically. It is just human nature that people



**Figure out what works for you  
and then just do it my way**



want to begin something at the beginning and end at the end. This is why so many bad cross examinations tend to sound like a rehash of the direct. The direct is usually chronological and then the cross is either unprepared and similarly begins at the beginning or is prepared but nevertheless does the same thing. In either case, it allows the Accused to anticipate where questions are leading them and feel comfortable. You need to keep the Accused uncomfortably off balance.

So take your carefully crafted cross and mix it up. Start the cross with a question out of nowhere and then loop back to that point later. Move a line of questioning you stuck near the end to near the beginning. Break the lines of questioning themselves into bite-sized chunks and move them around. Yes, there will be lines of questioning that you want to keep intact so you can build to a crescendo and you certainly do not want to just stop a line of questioning in an awkward spot, but you will find that many of your lines of questioning can be broken down into sub-lines that do not need to be presented in a linear fashion. The space-time continuum is not going to implode just because you mix things up. If you are prepared, if you know the facts and evidence better than every person in the courtroom, and if you control the cross and present it confidently, no one will ever care that you jumped around between different lines of questioning.

Remember, unless you get your Perry Mason unicorn you are going to tie up all these lines of questioning in closing argument. The lines of questioning naturally will start to lay out your cross-examination themes (which are likely different than your overall theme and theory for the case as you cannot assume that the Accused is going to testify and subject himself to cross). If you do it right, the fact finder will understand that you are focusing on “Actions Inconsistent with Relationship,” or “Impeaching on


X,” or “Undermining Credibility,” but you can wait until closing argument to tie them all together. Do not get ahead of yourself in cross-examination—get what you need to argue the case and not belabor a line of questioning in an effort to drive the point home (that will invariably result in asking the dreaded “one question too many”).



**Do not get ahead of yourself in cross-examination—get what you need to argue the case and not belabor a line of questioning in an effort to drive the point home**



A couple caveats. No plan survives first contact with the enemy. Though you may get the crazy story you generally expected, if you do, it will likely be a bit different than you expected . . . and more likely it will actually be completely different. Good litigators think on their feet and adjust fire. Assume your pointed, controlled, and structured cross is just a starting point and if you are able to salvage a good portion of it you will be ahead of the game. And remember, you anticipated more than one crazy story—yes, you will need to craft a cross for each potential crazy story. Honestly, even though you will probably only be confronted with one crazy story, the process of constructing multiple pointed, controlled, and structured cross-examinations will only make your actual cross-examination better.

 And with that, on to the cross-examination of Lt Col Michael Briggs.



### **Background**<sup>2</sup>

Before that, spoiler alert: In May 2005, while TDY to Mountain Home AFB, then-Capt Briggs raped DK (SSgt DK at the time of trial). The two had no prior relationship before the TDY and did not have one after. At the time (and at the time of trial), Captain Briggs was married.

Over the years, SSgt DK told individuals in broad terms about what had happened, but never in detail and never officially. But in 2013, after the first Chief of Staff of the Air Force Sexual Assault Prevention and Response down day, SSgt DK

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<sup>2</sup> Information for this article comes from the Record of Trial, Excerpt of Accused Cross Examination (herein “R.E.”) in *United States v. Lt Col Briggs* (on file with the author; editorial revisions made to protect the personal identification of certain witnesses and individuals) and from interviews with the trial-counsel team of Major Jeremy Gehman, Captain Kasey Hawkins, and Col Brian “BT” Thompson over various dates.

realized that the Air Force was an institution that would take her allegations seriously. She made an unrestricted report of sexual assault.

Agents from the Office of Special Investigations immediately tracked Lt Col Briggs to Spangdahlem Air Base and set up a pretext phone call between him and SSgt DK. It did not go well for the Accused. At all. Though he characterized the encounter as regrettable drunken sex, the Accused had a surprisingly good memory for details and repeatedly apologized (generically) to SSgt DK. At the end of the conversation, admittedly at SSgt DK's prompting, he apologized more specifically, uttering the devastating line: "I am sorry, I have been sorry, I will always be sorry for raping you."

Immediately after the call ended, the Accused went online and Googled topics such as the statute of limitations for rape, details of UCMJ Article 120, and a number of sites related to "healing" from sexual assault. Later, when being interviewed by OSI agents, the Accused would use this "healing" language to explain that he (you are probably guessing the rest) just told SSgt DK what she wanted to hear.

For the Government case at trial, SSgt DK provided moving testimony about the 2005 rape and how she handled it over the following years. A number of individuals she made statements to about the rape testified as well (prior consistent statements). Trial counsel also offered the pretext telephone call (audio and transcript) . . . and offered, and offered, and offered it again . . . but did not introduce any incriminating statements the Accused had made to OSI agents during his interviews, leaving to the Accused the decision whether to take the stand and try to explain away his 2013 pretext statements to SSgt DK.

And he did. He admitted to the sexual interaction, claimed it was consensual; asserted another intimate encounter between the two had occurred in his billeting room approximately two days prior to the rape (read: crazy story). He attributed his feelings of "guilt," which he testified that he had really been expressing in the pretext telephone call, to having been drunk and cheated on his spouse. And of course he explained that during that call he just told SSgt DK what she wanted to hear to help her heal from what she mistakenly believed was sexual assault. That is how he tried to

thread the needle to offer an exculpatory story that weaved its way around all the bad facts and inculpatory statements.

Now, with that, parts of the cross-examination of the Accused.

### **Cross Examination Snippets**

Between the night of the purported intimate encounter and the night of the rape, the Accused piloted an incentive ride for SSgt DK, the audio of which was recorded. Though there was plenty of frivolous conversation between the two during that hour-long flight, and even though the flight occurred immediately after that purported intimate encounter, not one “intimate” word was exchanged between the two. They did not talk of a budding relationship or share regret over the encounter, nor did they plan for another encounter. There was no undue familiarity between an officer and enlisted subordinate for the entire hour. Though the entire flight was recorded, SSgt DK did not even realize that during the first 20 minutes of the flight she made no effort to steer the conversation in an intimate or inappropriate direction. During the flight, the Accused engaged in extreme maneuvers with the aircraft and when SSgt DK said “stop,” he complied. In closing, trial counsel planned to drive home the fact that his reaction when she said “stop” during the rape was different—he refused to do so. So why not start with that? First cross-examination question:

Q. Do you have any doubt or confusion about what the word “stop” means?

A. No.<sup>3</sup>

Rather than continue that line of cross, trial counsel shifted to a different line of questioning to establish the uncontested elements of the charged offense (pre-2007 rape by force) and undercut some de facto (though not legal) defenses. But really the purpose of the direct questions and direct answers was to condition the Accused to answering direct questions with direct answers:

Q. The sexual event, and for purposes of cross-examination, I’ll call that sex in the billeting room the “sexual event,” that occurred in May of 2005, correct?

A. Yes.

Q. Occurred on a TDY to Mountain Home Air Force Base?

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<sup>3</sup> R.E. at 1.



A. It did.

Q. It occurred in her billeting room?

A. It did.

Q. It involved anal or -- vaginal penetration of her with your penis?

A. It did.

Q. Anal penetration of her with your penis?

A. Yes.

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Q. You're not blaming alcohol for controlling your decision making that night, are you?

A. No. Not for controlling, no.

Q. So you were fully aware that you were vaginally penetrating Airman DK?

A. Yes.

Q. Fully aware that you were anally penetrating Airman DK?

A. Yes.<sup>4</sup>

With that out of the way, the main "theme" for the cross-examination was that the Accused's actions and inaction before and after the sexual event were not consistent with a "relationship" or even consensual hook up. More specifically, that the Accused's actions and inaction before and after the sexual event were not consistent with someone who simply felt guilty for drunken sex and being unfaithful to his spouse (as he had explained at length to OSI and on direct). First the set up (the big-picture "Confirm"):

Q. For whatever reason, every now and again that [sexual] event would pop into your brain?

A. Correct.

Q. In fact, you considered that night a turning point in your life?

A. Yes.

Q. You considered that night of consensual sex a significant point in your life?

A. Yes.

Q. That night altered your self-image of yourself, correct?

A. Absolutely.<sup>5</sup>

Trial counsel then looked for an early opportunity to demonstrate to everyone in the courtroom, particularly the Accused, that he knew the facts and evidence better than every person in the courtroom, particularly the Accused. Counsel did this by

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<sup>4</sup> R.E. at 1-2.

<sup>5</sup> R.E. at 2.

waiting for the Accused to equivocate the first time, on anything, no matter how inconsequential, and then pounced with his prior “inconsistent” statements:

Q. When you picked up that phone on 12 July 2013 and [SSgt DK] identified herself, you had a physical reaction to realizing who was calling you, correct?

A. I don't remember.

Q. Do you remember you felt your body react when she called you?

A. No, I don't. I may have.

Q. Let me ask you this question. You remember talking to agents from the Office of Special Investigations on a number of occasions?

A. Yes.

Q. Do you remember speaking to two agents on 12 July 2013?

A. Yes.

Q. Do you recall speaking to another agent on 19 July 2013?

A. Yes.

Q. And do you recall talking to that same agent again on the 16th of August 2013?

A. Yes.

Q. And during these interviews, all three of these interviews with OSI . . . were you there voluntarily?

A. Yes.

Q. Were you read your Article 31 rights during these interviews?

A. I was.

Q. Did you waive your Article 31 rights, and by that I mean did you agree to speak to the OSI investigators without a lawyer present?

A. I did.

Q. And did you intend to be honest when you spoke to these OSI agents on all three occasions?

A. I did.

Q. Have you had an opportunity to review the transcript and videos of those interviews?

A. Partially.

Q. You reviewed the transcript of the interview of 19 July of 2013, correct?

A. Yes.

Q. Do you recall when talking on 19 July to the OSI agent, telling that OSI agent you felt your body react when you knew that it was [SSgt DK] on the phone?

A. I don't remember saying that but I may have.

Q. Do you recall telling that OSI agent that you got really sweaty when you learned that it was her on the phone?

A. Yes, I think I do.

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Q. That was before you apologized to her for raping her?

A. That was at the very beginning of the call.

Q. So it was before you apologized for raping her?

A. Yes.

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Q. And in fact, you thought about this event over the years, you wondered to yourself what really happened, correct?

A. Yes.

Q. In fact, as you thought about this event over the years, you had to ask yourself "did I ever knowingly, was I so selfish and immature and young and just ready to go that I -- did I ever disregard what she said, did I ever do something that she did not want." You thought about that?

A. Yes.

Q. And it's true that it is your belief that you wouldn't have done something that she didn't want you to do, correct?

A. That's right.

Q. In fact, you've wondered whether you invented something in your brain about what happened that night?

A. Yes.

Q. You were concerned that you may have forgotten something on purpose in your brain about what happened that night?

A. Yes.

Q. You've asked yourself if rape happened and your answer to yourself was "I'm not sure, no"?

A. That is what I said, yes.

Q. Now when you re-examine that night in your brain, you do so from the perspective that you are just not the type of guy who would force a woman to have sex?

A. I'm not.

Q. But that night certainly altered your self-image of yourself?

A. It did.

Q. And you would agree that you did not listen to [SSgt DK] that night?

A. No. That's not what -- when you say that night, I did listen to her that night. I didn't listen to her over time and what she was asking from me as an individual and a friend.

Q. You told her in that pretext phone call that you did not listen to her. Three times on that call you told her you did not listen to her, correct?

A. I could count them but I'll assume the number of three is correct.

Q. And you did all of this before you apologized?

A. Yes.

Q. Before she asked you to apologize for raping her?

A. Mm-hm.<sup>6</sup>

By the time this series of questions came to end, the Accused appeared to understand that he would not be able to hide from his prior statements and would not

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<sup>6</sup> R.E. at 3-5, 11-12.

be able to do anything other than answer a direct question with a direct answer or be challenged with those prior statements. For example, later trial counsel briefly returned to this line of questioning (in between another line of questioning) to hammer home the point:

Q. This reaction, did you fear that you impregnated her back in this time of the sexual event?

A. No.

Q. Did you think that she was calling about some sexually transmitted disease?

A. No.

Q. You also didn't know that she was going to be calling you that day?

A. No.

Q. You hadn't had time to plan what you were going to say when she confronted you?

A. No.<sup>7</sup>

Keeping the Accused off balance, trial counsel looped back to the lack of intimate or unduly familiar conversation during the incentive ride:

Q: During that time between ... the movie night and the sexual event, you had not tried to re-initiate any intimacy between you and [SSgt DK]?

A: The movie night was the night in my room?

Q: Yes.

A: Okay. No there's only two days between that and us – the movie night and the night in question. There was only two days and I had not initiated anything.

Q: All right, so the answer to my question is "no," you had not tried to re-initiate ...

A: Yes, the answer is no.

Q: You two had not talked about the encounter in your room period?

A: No.

Q: You had had time though to be alone with her if you'd chosen to be, correct?

A: I could have been alone with her, yes.

Q: At a minimum you were alone in the air with her for an hour between those two events, correct?

A: Yes.

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Q: You two were certainly alone in that jet for an hour to talk about whatever you wanted to talk about?

A: Yes.

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<sup>7</sup> R.E. at 5.

Q: ... there's nothing unduly personal in the nature of the back and forth between you two during the incentive ride?

A: There was a couple of time – couple of personal questions we were talking about there but no, nothing unduly personal.

Q: In fact, it'd be the same type of conversation you'd have with other passengers?

A: Yeah, except for a couple of those at the end but yeah.

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Q: You testified on a number of occasions that the interactions between yourself and [SSgt DK] were flirtatious. What do you mean when you use the word flirtatious? *[NOTE: As there was no answer to this question which would be consistent with the observable facts of their "relationship," an open-ended question was appropriate.]*

A: You know, like, banter back and forth. Kind of maybe joking or familiarity, stuff like that.

Q: Okay. Do you mean banter of a sexual nature or banter of just a friendly nature?

A: Maybe both.

Q: Do you recall having banter of a sexual nature with [SSgt DK]?

A: I don't recall any specific comments, no.<sup>8</sup>

Trial counsel also had information that the Accused had had an adulterous affair between the rape of SSgt DK and her pretext telephone call. Counsel's cross on this point focused on the Accused's different reactions related to what he characterized as two consensual, adulterous relationships (and it appears Accused and defense counsel were not expecting this line of questioning):

Q. Is it your testimony that after she left, you did not feel any remorse or shame about what you had done with her in that room?

A. No.

Q. Did you plan on telling your wife about it?

A. I did not.

Q. Do you agree that your thinking when sober is much clearer than when you are drunk?

A. Depending on the amount of intoxication, it can be, yes.

Q. But you do agree that you had deep remorse and shame after the sexual event with [SSgt DK]?

A. Yes.

Q. The sexual event with [SSgt DK] was like you talked about a turning or a substantial point in your life?

A. It was.

Q. Something not to be repeated?

A. It was.

Q. You assert it was consensual?

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<sup>8</sup> R.E. at 31, 35-36.

A. It was.

Q. But it was a huge mistake?

A. It was.

Q. One not to make again?

A. Yes.

Q. Yet, in December of 2008 you began an adulterous affair with another woman, correct?

A. ... I did.

Q. This was a consensual sexual relationship as well?

A. It was.

Q. Who was this with?

CDC: Objection, Your Honor. [eventually overruled]

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Q. All right. This individual that you began an adulterous affair in December of 2008, was that person an enlisted member in the United States Air Force or another branch?

A. Senior Master Sergeant.

Q. All right. That relationship ended prior --

A. Yes.

Q. While that relationship was ongoing, did you disclose it to your wife?

A. No.

Q. Did you disclose [that] relationship to your wife prior to the pretextual phone call in July of 2013?

A. Yes.

Q. But prior to July 2013, that pretextual phone call, you had not confessed the 2005 sexual event with [SSgt DK] to your wife?

A. She was not aware of it, no.

Q. You had not confessed that sexual event to your wife prior to July 2013?

A. Confessed? No. I hadn't told her about it.<sup>9</sup>

Trial counsel continued the general theme with questions aimed at demonstrating the Accused's actions after the rape were not consistent with a consensual encounter:

Q. Back at Luke after the TDY, the two of you never talked about the sexual event, correct?

A. Correct.

Q. You never tried to visit her or get her alone so you could talk about that?

A. No.

Q. It's something you certainly didn't want your wife to have found out about?

A. Correct.

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<sup>9</sup> R.E. 21-22, 29-30.

Q. In fact the first time you had a conversation with [SSgt DK] about that sexual event was 12 July 2013?

A. Yes.

Q. During the sexual event or thereafter, she never demanded that you leave your wife for her?

A. She did not.

Q. Never demanded anything from you not to tell about your activity?

A. She did not.

Q. She never said she wanted to continue the consensual sexual relationship you said that you two engaged in?

A. She did not.

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Q. You didn't say anything about -- you two didn't talk about anything that this should not happen again?

A. No.

Q. But that's not what you told your friend Lieutenant Colonel [Joe Smith] recently though is it?

A. I don't remember.

Q. Do you recall telling him that you two had both said "oh that was stupid let's not do that again"?

A. I don't remember.<sup>10</sup>

Lieutenant Colonel [Joe Smith] was one of a number of witnesses who was present during the 2003 TDY who testified on the Accused's behalf. The Defense's purpose of calling him on direct was not clear and the cross-examination emphasized the fact that there did not seem to be any "relationship" or "undue familiarity" between Accused and SSgt DK either before, during, or after that TDY—again emphasizing that Accused's actions before and after the rape were not consistent with a consensual adulterous encounter. To that end, it was useful to have Accused himself vouch for the credibility of these witnesses, a standard line of questioning on cross examination:

Q. Colonel [Smith] who testified earlier in this court-martial, is he a colleague of yours?

A. He is.

Q. A friend of yours?

A. Yes.

Q. And he was there on this TDY to Mountain Home?

A. He was.

Q. Do you have any reason to believe that Lieutenant Colonel [Smith] would have a motive to fabricate any part of his testimony?

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<sup>10</sup> R.E. at 42-45.

A. No.<sup>11</sup>

Trial counsel also challenged the “reasonableness” of Accused’s testimony as how the “consensual” vaginal and anal sex occurred in 2013. Counsel challenged the reasonableness of Accused’s testimony about how he, without verbal permission or conversation, switched from vaginal to anal intercourse that night. Counsel also challenged Accused’s intermittent memory of events:

Q. Your testimony earlier was you believed you had an invitation to return to [SSgt DK’s] room on the night of the sexual event?

A. Yes.

Q. It’s true, however, again, this is the first time that you’ve ever said it to anyone else besides your lawyers that you had such an invitation from [SSgt DK]?

A. Yes.

Q. In fact, when you -- let me ask this, do you even remember how you got from your room to her room?

A. I remember how I got there. I don’t remember why I did that. Like...

Q. So...

A. ...if it... I'm sorry.

Q. No. I’m sorry for interrupting. You remember the physical act of moving from your room to her room?

A. Yes.

Q. But you don't remember why you went from...

A. No.

Q. ... your room to her room? So you didn't have a formal invitation to go over to her room that night?

A. I characterize -- I previously told OSI that I think...

Q. Did you have a formal invitation to go to her room that night?

A. Formal invitation?

Q. Did she invite you? Did she say “please come to my room” that night?

A. No.

Q. You don’t have a memory of getting back to your room after you left hers that night?

A. No.

Q. You don't have a complete memory of the nature of all the conversation you had an hour before this sexual event occurred in her room, correct?

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<sup>11</sup> R.E. at 36. Depending on the circumstances, this line of questioning can be expanded to include other characteristics of the witnesses which are relevant to their credibility, as the instruction details: “You have the duty to determine the believability of the witnesses. In performing this duty you must consider each witness’s intelligence, ability to observe and accurately remember, sincerity, and conduct in court, friendships and prejudices and character for truthfulness. Consider also the extent to which each witness is either supported or contradicted by other evidence; the relationship each witness may have with either side; and how each witness might be affected by the verdict.”



A. No.

Q. You don't have a memory of how you moved from position to position during the sexual event that occurred?

A. That's correct.

Q. Would it be accurate to say then that you don't know what happened in those periods that you have no memory of?

A. Yes.<sup>12</sup>

Towards the end of the cross-examination trial counsel focused on Accused's post-pretext Google searches to undermine the "consensual sex" argument. After demonstrating through a line of questioning that fear generated the searches for "statute of limitations for rape," and definitions of rape under UCMJ Article 120, counsel focused on what the Accused had not searched for:

Q. Did -- during your interview with OSI, did you [tell] them that you had done these internet searches after your phone call with [SSgt DK]?

A. No.

Q. In fact, in this [search history] I never did see a search for anything related to "false accusations of rape." Is it true that you didn't search terms such as that did you?

A. False accusations of rape? I don't believe so.<sup>13</sup>

Shortly after returning from the TDY, SSgt DK did tell Technical Sergeant CG, a supervisor, in general terms that something sexual had happened and that she did not want the Accused around her anymore. The Accused's response on being confronted by TSgt CG brought the cross-examination to an end:

Q. Regardless, as far as you're concerned, you two were on good terms after your first sexual experience?

A. Yes.

Q. And you consider it a consensual sexual experience?

A. Yes.

Q. But when confronted by [TSgt CG], you didn't ask him why she didn't want to see you any more, correct?

A. He told me why, so no.

Q. Didn't express any surprise that she wanted to -- wanted you to leave her alone?

A. I did.

Q. You're claiming this is consensual sex?

A. Yes.

Q. But after [TSgt CG] confronted you, you believed that you needed to go to the cops to make a statement about that night, correct?

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<sup>12</sup> R.E. at 9-10.

<sup>13</sup> R.E. at 41.

A. No.

Q. Do you recall telling OSI during your interview of 12 July 2013 that after being confronted by [TSgt CG], you asked him do I need to go to the cops?

A. I asked do I need to. I didn't feel like I needed to but I was asking him that.

Q. My question is did you tell -- ask [TSgt CG] that after he confronted you, you asked him do I need to go to the cops?

A. Yes.<sup>14</sup>

If you're explaining, you're losing. Accused was doing both at that point.

### **Closing**

Trial counsel pursued additional lines of questioning during the cross-examination of the Accused—straight inconsistencies, use/non-use of a condom, unlikelihood of the purported sexual encounter prior to the rape. When appropriate, these different lines of questioning were presented sequentially; when appropriate, these different lines of questioning were broken down into sub-lines and interspersed with each other. Sometimes counsel's question followed the textbook approach (e.g. the 3 C's: Credit, Confirm, Contradict; only short, "yes/no" questions) but sometimes diverged when the context called for a different approach. Assuredly, there were questions unasked that should have been asked and questions that could have been asked better. But in the end, trial counsel had all they needed to pound the nail into the Accused's coffin during closing:

I want to talk about the Accused. You cannot believe him. Innocent people do not find the need to make up stories like the Accused did. . . . He gets on the stand and . . . attempts to explain away all the evidence in the case. He has to explain away every line in the pretext. He has to explain why he did the research he did on the computer right after the pretextual call. He has to explain away why he said he needed to go to the cops or go to the commander. . . . He has to explain what not listening means. He has to explain what he meant by an apology. He has to explain the [TSgt GC] conversation. . . . He has to explain away his memories and why he's been thinking about this through the years; why he doesn't remember things or thinks he might not remember things correctly. There's a lot of explaining to do. He has to explain everything away.

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<sup>14</sup> R.E. at 45.

Nine years after raping SSgt DK, leaving her bruised and bloody, he was unable to explain it all away. Lt Col Briggs was convicted of rape by force, confined, and dismissed from the Air Force. Justice was served.

**CROSS-EXAMINATION HOW TO**

... make a transcript of all accused statements

... then spin doctor it (anticipate "the crazy")

... then decide how to chip away at the crazy

... put pen to paper and then mix it up

... at trial, get what you need and get out

... and remember, no plan survives first  
contact with the enemy--good litigators think  
and their feet and adjust fire



