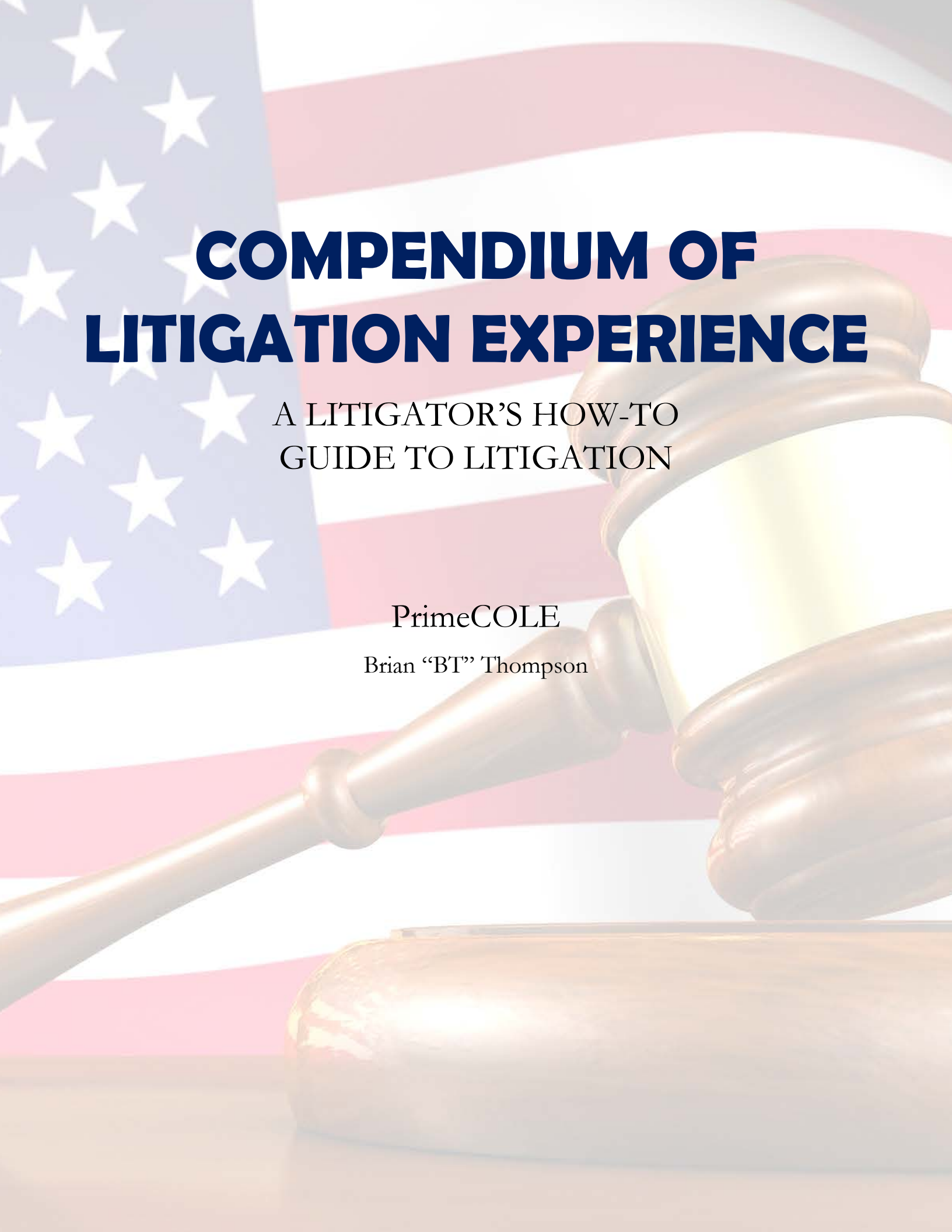

COMPENDIUM OF LITIGATION EXPERIENCE

A LITIGATOR'S HOW-TO GUIDE TO LITIGATION

PrimeCOLE

Brian "BT" Thompson

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To Tom, Mom, and Don …

… and KT, AJ, and Z …

… and to Jen, Kate, Gerald, Jeremy, Brent, Grethe, Kirk, Tom, Ben, Adam, Jason's, Ben, Joe, Brian, Matt, Josh's, Mary's, Sarah, Jacob, Shawn, Jeff, Mark, Rebecca, Brad, Trent, Rachel, Stephanie, Dane, Pete, Eric …

… and to all other JAGs, and former JAGs, young and old, who were in the trenches with me, and who are there now, fighting the good fight every day for not nearly enough recognition. Thanks!

WORDS TO LIVE BY

Every JAG a Litigator – Any Case, Any Place, Any Time

- PrimeCOLE

It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood, who strives valiantly; who errs and comes short again and again; because there is not effort without error and shortcomings; but who does actually strive to do the deed; who knows the great enthusiasm, the great devotion, who spends himself in a worthy cause, who at the best knows in the end the triumph of high achievement and who at the worst, if he fails, at least he fails while daring greatly. So that his place shall never be with those cold and timid souls who know neither victory nor defeat.

- President Theodore "Teddy" Roosevelt

Far better it is to dare mighty things, to win glorious triumphs, even though checkered by failure … than to rank with those poor spirits who neither enjoy much nor suffer much, because they live in a gray twilight that knows not victory nor defeat

- President Theodore "Teddy" Roosevelt

To each there comes in their lifetime a special moment when they are figuratively tapped on the shoulder and offered the chance to do a very special thing, unique to them and fitted to their talents. What a tragedy if that moment finds them unprepared or unqualified for that which could have been their finest moment.

- Sir Winston Churchill

FORWARD

As a litigator journeys towards the end of his or her in-court career, when more time is spent reminiscing about glorious courtroom battles than engaging in them, developing the next generation of courtroom litigators is of paramount importance. Yes, the "youngs" need to learn their lessons the same way we did—in celebrated battle, suffering the scars of defeat and occasional humiliation, while winning prestige on the backs of the triumphants. But rather than let them repeat our simplest of mistakes, let us set at least a few of them—the chosen few—on the path to outdo the "olds."

Let us give them the secrets to early success as a litigator. We have all seen young trial counsel make the same simple mistakes over and over again, just like we did. And we have likely given the same advice in feedback sessions over and over again on every aspect of trial litigation. Your advice may be different, but what follows is my "script," **the PrimeCOLE method**, repeated over and over to countless bright-eyed "youngs," with a few "war stories" thrown in to drive home the points.

KEY

Warning, war-story (read with a grain of salt nearby)

Key point—if there were to be a test ("Is there going to be a test," you ask … "Maybe," I answer), you might have highlighted this part. All pull-quotes are key points as well

NOTES

(1) **PrimeCOLE** made every attempt to be gender nonspecific in pronoun choice throughout as an individual's potential to be a successful litigator is not gender specific. Some of the quotes reproduced throughout the Compendium are from generations past when this obvious sentiment was not as widely shared—the overall message of the quotes ring true, though any exclusionary gender references do not.

(2) Though the discussions in this Compendium are tilted towards prosecution, the skills sought to be developed apply regardless of a litigator's trial role. As junior counsel in the military are most junior when they first start out, and as they first start out as prosecutors, the focus on prosecution made the most sense. I love my defense counsel brothers and sisters, with whom I use to toil together, so no disrespect meant by the prosecutorial bent of the Compendium. Plus, you all like to keep your secrets, tactics and strategies close to the vest.

ABOUT THE AUTHOR

PrimeCOLE is the pseudonym for Colonel Brian "BT" Thompson, a former civilian and senior Air Force litigator. In addition to stints working with the Metropolitan and Federal Public Defenders (Portland, Oregon), **PrimeCOLE** practiced civil law for six years, litigating dozens of trials in the practice areas of international business and corporate transactions, admiralty, and banking. **PrimeCOLE** is a veteran military litigator of more than 140 courts-martial as a junior trial and defense counsel, senior defense and chief senior trial counsel, and even one while serving as a wing staff judge advocate (not at his assigned installation). He has prosecuted (and defended) service members and a war-crimes detainee in cases ranging from AWOL to premeditated murder to capital murder, and has taught litigation skills at the Air Force Judge Advocate School and in numerous joint environments. He is the founder of the "**Center of Litigation Excellence**," which is more of an ideal than an entity and which resides primarily in his head. You can reach him for questions, comments, insults, or to book a personal appearance at primeCOLE@gmail.com

The views expressed in this Compendium are those of the author and do not necessarily reflect the official policy or position of the U.S. Air Force, U.S. Air Force Judge Advocate General Corps. Department of Defense, or the U.S. Government. At all.

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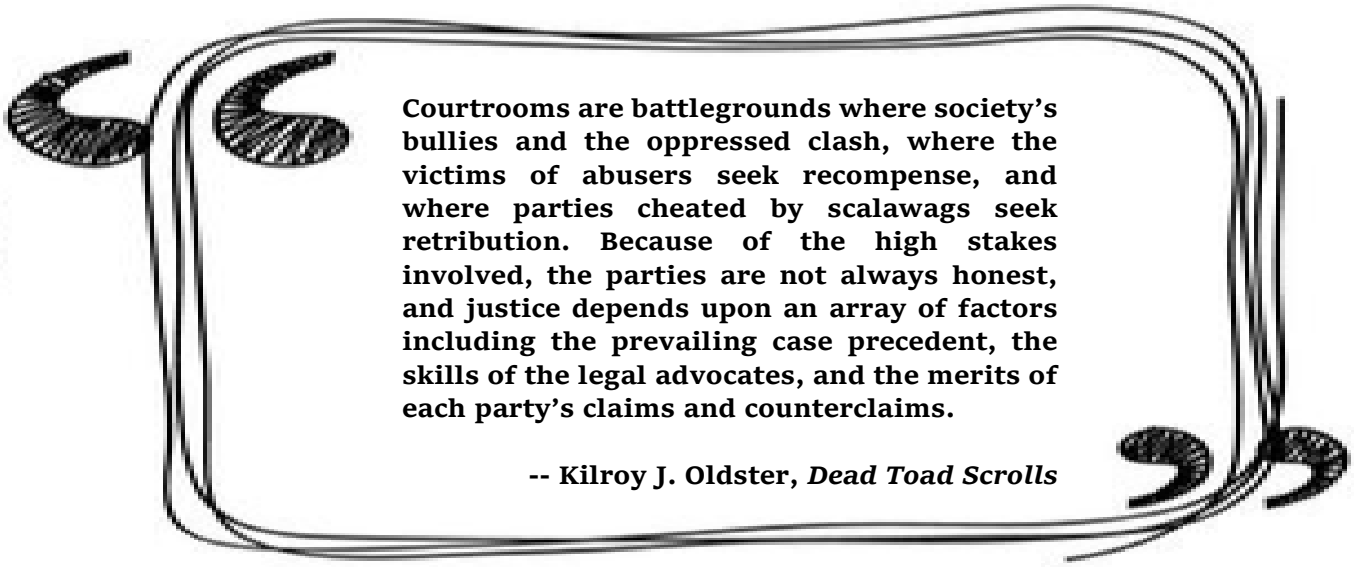
Chapter 1

A LITIGATOR'S PHILOSOPHY

Litigation, and being a quality litigator, is not about counting up wins and conveniently disappearing losses from the scorecard. Though over time a quality litigator will likely see more "wins" than "losses," whatever those words mean, wins and losses are not an appropriate measure of your worth as a litigator. Here we redefine what ***#winning*** *and* ***#losing*** *are all about and focus on the important thing--the* ***5P's****.*



Courtrooms are battlegrounds where society's bullies and the oppressed clash, where the victims of abusers seek recompense, and where parties cheated by scalawags seek retribution. Because of the high stakes involved, the parties are not always honest, and justice depends upon an array of factors including the prevailing case precedent, the skills of the legal advocates, and the merits of each party's claims and counterclaims.

-- Kilroy J. Oldster, *Dead Toad Scrolls*

Chapter 1 - A Litigator's Philosophy

#WINNING

Mastery of the facts is the key to victory. Full stop. But coming in a close second is credibility. Credibility of your witnesses and the implausibility of your opponent's witnesses determines which facts (or "alternative facts") will carry the day. That is why the jury instruction on credibility is so important. But even more important for a litigator is the personal credibility you establish (or lose) with the trier of fact.

Every action you take and word you speak at trial should have the sequential goals of establishing and then enhancing your credibility with the trier of fact. For they will drink from that well of credibility when they consider whose witnesses to believe and which closing argument is the most persuasive. So …

Do not just be organized, look organized—store your file folders in a box next to counsel table rather than strewn over it (aka "the Brent Jones rule"). Have your exhibits ready to go, but keep that counsel table uncluttered and neat—it sends a message. And it should go without saying, but project a sharp and professional image in your attire and appearance.

Move your case with purpose. Downtime that appears to be caused by your bumbling will crash your credibility. How many times have I seen the jury members or judge roll their eyes when counsel does not have copies of exhibits ready to go, or does not have their witnesses nearby the courtroom and ready to go when called, or did not set up the computer/screen for presentation or video testimony during an earlier break thus requiring another? Too many. How many times has counsel's bumbling turned a 10-minute recess they asked for into 20 minutes? Too many. Each of these bumblings weighs more heavily on your credibility than any word you speak in court.

Move yourself with purpose. Know where you are going to stand for directs, crosses, and argument and get there immediately when it is your turn. No fumbling around with a notepad, folder, glass of water, no consulting with co-counsel for a minute or two until sauntering towards your perch—get to it. Know whether you need to ask permission to approach and if you do have to ask for it, ask for it, get it, and then move with a sense of purpose. If you are going to provide (publish) a binder of exhibits to jury members, figure out before you stand up how you are going to pass them out.

All these are little things, but they all add to the Credibility Index calculus. What is that calculus? Easy: **Con+AK=Cr** [Confidence+Actual Knowledge=Credibility]. All of the above adds to the perception that you are confident in yourself and confident in your case. Now, yes, you may have to feign confidence now and again, particularly in yourself and sometimes in your case, but you need to focus on projecting it. The meek will not inherit courtroom success (though neither will the smug and arrogant). Actual Knowledge [AK] you cannot fake, and you should not try to as you will only shoot yourself by shooting from the hip. And Actual Knowledge [AK] has its own sub calculus: **AK=IC+S&P+∞Hr**, where IC=your intellectual capacity, S&P=study and preparation, and +∞Hr=infinity number of hours . . . in other words, attaining credibility is a lifetime pursuit.

The meek will not inherit courtroom success (though neither will the smug and arrogant)

Understand, however, that trying to push up your Confidence Index with the trier of fact too far, particularly in the absence of Actual Knowledge, only serves to undermine your credibility. Cockiness does not equal Confidence. It equals Jackassery. Do not act like a jackass at counsel table. No making faces, snickering at witnesses or opposing counsel, loud talking while opposing counsel is conducting a direct or making an argument. Some attorneys may think all of that is good tactics intended to distract opposing counsel or send some message to the trier of fact . . . but the message it sends to members and judges (particularly in the military) is that you are a fool, a jackass. Some may think this funny coming from me, but as I have matured as a

litigator I like to think I have (sort of) kept myself in check in this regard for the most part, usually, maybe sometimes; but more importantly, I have come to recognize this shortcoming and its importance.

With north of 90 percent of trials ending in guilty pleas, being in a litigated trial usually means both sides think the facts support them. That cannot always be true. **#Winning** in such situations, while still fact dependent, is going to come down to which witnesses and which facts resonate as the most credible to the trier of fact. Your credibility plays an intangible part in their decision-making process. Establish then enhance, do not detract from, your credibility. That is **#Winning**.

#LOSING

Litigation is not for everyone. But do not judge your performance as a litigator by the results of one particular trial. Over time, good litigators win more cases than they lose. But I have won cases I "should have" lost and lost cases I "should have" won. As much as I would like to think it was different, and regardless of exaggerating the wins and minimizing the losses, all other things being equal, my performance as a litigator likely only had positive or negative effect on the margins of a particular case. There were many more aspects of those particular cases that were more important than my brilliance or incompetence as a litigator . . . like, say, for example, the facts.

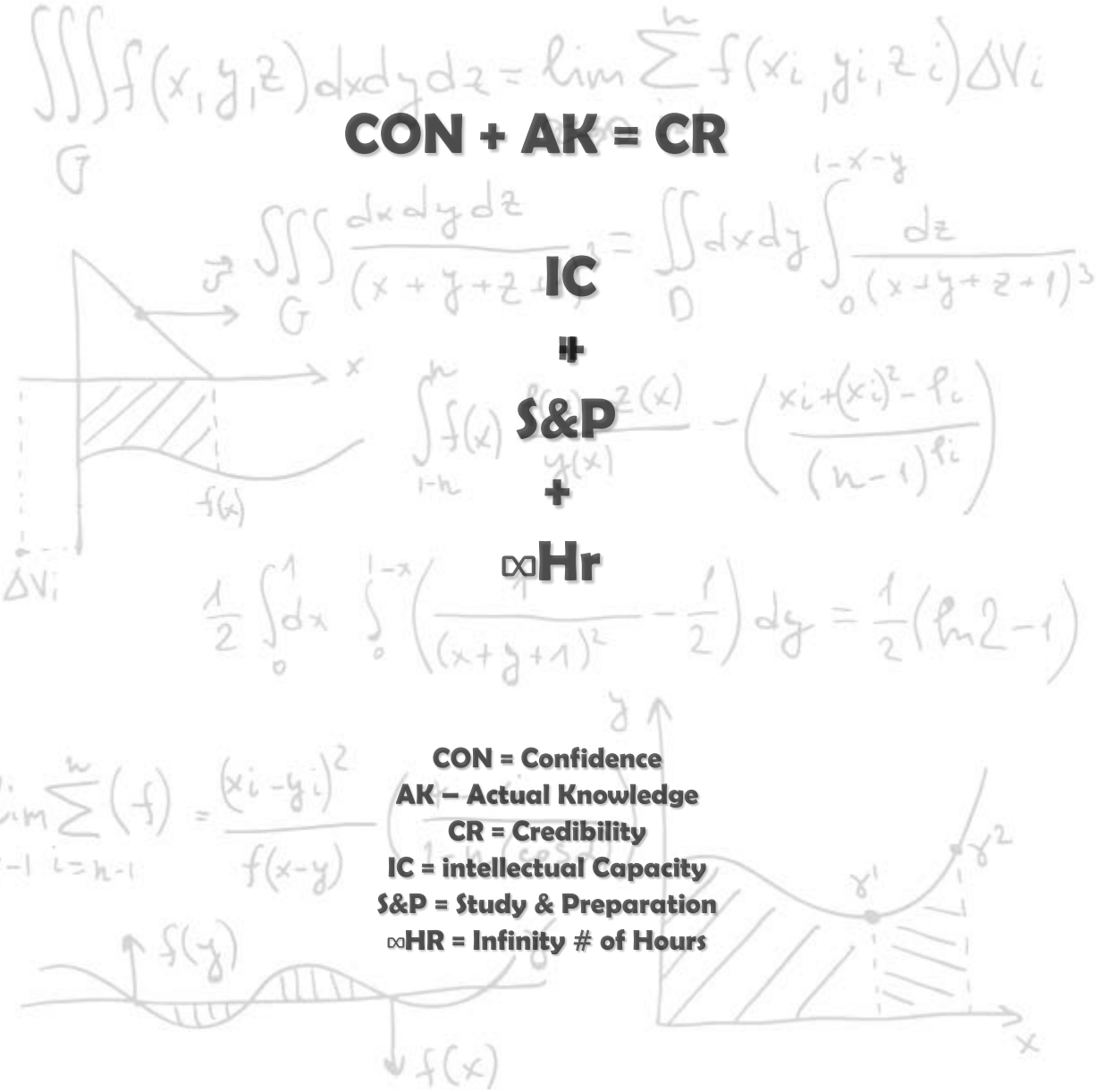
On the whole, facts win or lose cases. You of course bring to bear all your talent, energy, preparation, strategy, courtroom tactics, and credibility to the facts that you believe best support your case, assuming you have any facts on your side. But in the end sometimes members just have a different perspective on what is and is not important. As long as you have done all that you can to bring your facts to them, and advocate in a credible way (*see* **#Winning**), that is all you can do . . . the rest is left to the whims of the trier of fact.

So celebrate your victories as a reward for the hard work you put into the case, but then bring some self-assessment to what you could have done better as there always will be something. And get that not from the members, who generally only have nice things to say about counsel, but from the other participants in and observers of the trial (particularly court reporters, senior counsel and paralegals, and judges who have seen lots of trials). Mourn briefly your losses and then engage in that same self-assessment. For both, quickly flush the high or the low and move on to the next case.

> **… do not judge your performance as a litigator by the results of one particular trial**

Now, if over time you are losing more than you are **#Winning**, you might want to reassess whether litigation is your best legal

career path. But do not allow the results in one trial to make that decision for you by defining who you are as a litigator.



PREPARATION – THE 5 P's

My father, the PGA golf professional, gave me a piece of advice that has transcended my lack of golfing ability and driven much of my success as a trial litigator—the **5 P**'s ... **P**reparation **P**revents **P**iss **P**oor **P**erformance (or **P**ractice **P**revents **P**athetically **P**oor **P**erformance, they are interchangeable).

You will read this a few times throughout this Compendium, as it is the key to my litigation theory: Contrary to every briefing you have ever received at every litigation-skills course, whatever aspect of trial practice the instructor is then briefing (from *voir dire*, to opening statement, to direct examinations) is not the key to victory. Trust me, *voir dire* is not the key to victory. And neither of the two glory moments for every litigator in every case (cross-examination, particularly of the accused, and closing argument) is the key to victory. Mastery of the facts and evidence is the key to victory. Let me repeat for effect: mastery of the facts and the evidence is the key to victory.

If you do not know the facts and the evidence better than every person in that courtroom, all your litigation skills may enhance your ego and watercooler boasting, but they will not win you a conviction or an acquittal. Only knowing the facts and the evidence better than every person in that courtroom will do that.

> **Mastery of the facts and evidence is the key to victory**

And the only way to ensure you do that is through application of the **5 P**'s. This is the non-glorious tedium of pre-trial practice. This is watching every minute of the recorded interviews of the victim and the accused, and every other witness, reviewing a transcript (or creating one) as you go, and then reviewing the recorded interviews again and again until the images are seared into your brain. This is interviewing every named or potential witness, even if you have their written statement or recorded interview, and then talking to every other potential witness those interviews lead you to, and so on and so forth. This is traveling to law-enforcement's office to put eyes on every piece of evidence, even if you have pictures

or have "seen it all before." This is a tortuous slog that prepares you to meet every eventuality in court.

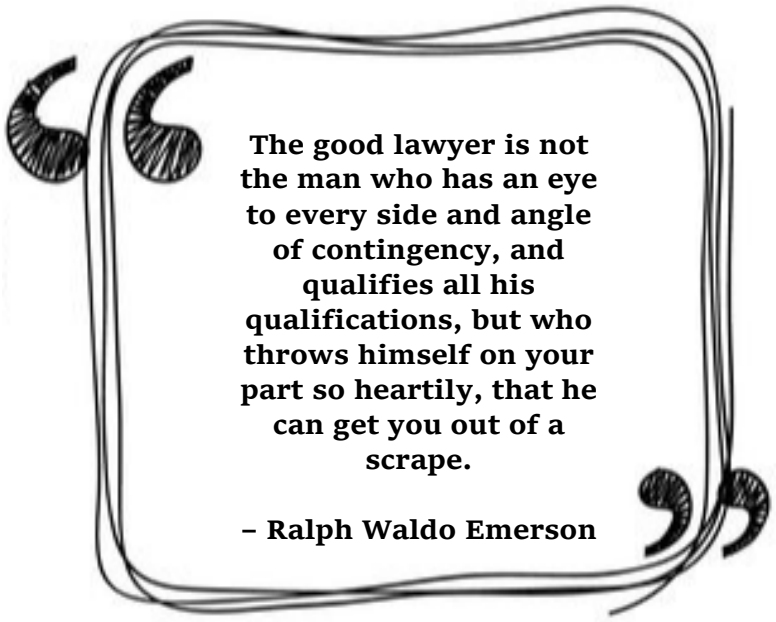
But it is not enough. The **5 P**'s also require that you distill this deluge of information into a useable form. That means not only preparing your case, your theme and theory, but preparing to meet the case your opponent is likely putting together—and then revising your case, or being ready to flex, to meet every eventuality that could be thrown your way in court by your opponent. That means not only preparing your careful *voir dire*, scintillating opening statement, pin-point directs and crosses, and crushing closing argument, that means practicing them over and over again and tweaking and adjusting (or starting over) as needed. That means having every exhibit and demonstrative aid (and copies) ready to go.

Application of the **5 P**'s will not win your case, but ignoring them will lose it. Do not be a loser.

Chapter 2

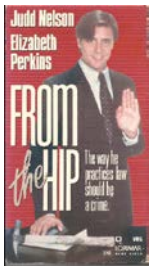
PREPARING WITNESSES

Preparing a witness to testify at trial does not mean scripting out questions and answers and rehearsing them over and over. A properly prepared witness knows what to do and where to go when called into the court to testify and has some level of comfort beyond mere panic. Here is how you to get them to that point.



Chapter 2 – Preparing Witnesses

The one person more nervous than you in that courtroom is the witness. And that is pretty nervous based on your level of anxiety (just admit it). The witnesses' understanding of the crucible of trial typically comes from movies and television and then not good examples like *My Cousin Vinny* or *From the Hip*,[1] but from over-acted, inferior procedural dramas like *Law & Order: Emoluments Clause Division*. Thus, the witness expects to be yelled at, intimidated, and tricked into confessing to crimes they (likely) did not commit. Having been a witness, and having talked to thousands of them, I can tell you for a fact that no one wants to be a witness.



Greatest Legal Movie … Of. All. Time.

Unfortunately, you do not have a lot of time to establish rapport with most, what I will call, third-party witnesses (essentially, those important but periphery characters who fill in the facts but in-and-of-themselves are not key to the success or failure of a trial, unlike the "decisive" witnesses such as the victim, an eyewitness, or the Accused). Fortunately putting these third-party witnesses "at ease," or at least more at ease than they initially are, is not difficult. It simply requires a concise effort to re-educate them about how trials actually work and what their role will be during it.

The one person more nervous than you in that courtroom is the witness … [they] expect to be yelled at, intimidated, and tricked into confessing to crimes they (likely) did not commit

So, the following is my script for almost every third-party witness I meet with for the first time (and most often the only time outside of court). For me as the hired gun, that first time is likely a couple days before trial as I blow in to town like a caffeine-infused derecho. For you, your first meeting with a potential third-party witness will likely be months before trial is even a twinkle in the eye of the convening authority so

[1] Google it, one of the best legal movies of all time that you have never heard of. I guarantee it.

you will need to revise this script to fit the circumstances. Whenever it is done, however, the following conversation is worth having as early as appropriate.

ACT I

Scene: A shadowy courtroom in a tomblike legal office on a late Sunday afternoon, two days before trial is set to begin. I, the gallant and dashing senior prosecutor [visualize Brad Pitt], joined by the baby-faced young trial counsel and the seasoned and salty case paralegal, absent-mindedly check our smartphones while awaiting the witness. Four chairs are pulled into a circle in the well of the court …

[Witness enters stage right, spies the empty chair, sits, painful and perfunctory introductions and stilted small talk ensues, not as painful as watching law-enforcement agents "build rapport" at the start of their interviews, but still painful, and then …]

ME: Hey before we get into it, have you had a chance to review the written statement you gave to OSI a couple months ago?

WIT: No sir.

ME: No!?!? Well that's crazy. Here [*handing witness their written statement*], read this over and then we can talk about it.

[Witness reads their statement … when they are done …]

ME: Done? *[Witness nods]*. So anything in there that you need to correct or think needs more explanation? Sometimes people remember things after being interviewed that they had forgotten during the interview.

WIT: Nope, this is about it.[2]

ME: Great. Alright, guessin' that you're a little nervous about testifying at trial this week?

WIT: Yes sir.

ME: Also guessin' that it's your first time testifying at a trial?

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[2] Go read *United States v. Giglio,* 450 U.S. 150 (1972) and its progeny (like *United States v. Green*, 37 M.J. 38 (C.A.A.F. 1993)) for how to handle this situation – spoiler alert, if a witness that makes a statement that is inconsistent with a previous statement or is otherwise has potential impeachment value, that information "favorable to the accused" must be turned over to the accused, just like *Brady* material. That is why I like to call repeated interviews of witnesses, after they have given their statements, to include written ones, *Giglio* interviews as invariably that one-too-many interview will result in something inconsistent with a past recitation of events and that will require a *Giglio* notice.

WIT: Yes sir.

ME: Probably feel like the weight of the trial is on your shoulders, I'm guessing.

WIT: A bit.

ME: Sure, that would make me nervous as well but what I want you to understand is that the weight of this trial is not on your shoulders, it's on ours. Let me explain, let's see if we can't put your mind at ease a bit about what's going to happen. Have you ever seen a trial on TV or in a movie?

WIT: Sure …

ME: Well good, forget all about that. Real trials are not nearly as exciting as they make them out to be on TV. Trials are just about letting people who know something about what happened tell other people, in this case a jury, what they know. Because there are always at least two sides to every story, the prosecutor and the defense counsel want to make sure that all those facts, not just the facts that help one side or the other, are presented to that jury. And to do that, the prosecutor and the defense counsel get to ask the witnesses questions to make sure all those facts get to the jury. Easy enough?

WIT: Ah … I guess?

ME: I can tell you're not convinced that this isn't going to be a terrible experience. So let me tell you how the process works to make sure the jury gets all those facts. My guess is that you are worried that you are going to be tricked into saying something that hurts or helps one party or the other. First, don't worry about whether your testimony helps or hurts one side or the other. Though we are calling you as a witness, I don't want you to think that you are on "our side" *[air quotes]* or on "our team" *[air quotes]*. You're not on anyone's team, just like the witnesses the defense calls are not on their side or their team; you're all just there to tell what you know and answer the questions we or the defense counsel or the members of the jury or the judge ask you. Second, the process of testifying is set up so you can't be tricked into saying the wrong thing and if you do say the "wrong thing" *[air quotes]* by mistake, like you meant to say the stoplight was red but by mistake you said the stoplight was green, there is a process in place to fix that mistake.

So we're going to call you to testify. Can't tell you when that will be exactly, but you'll be waiting in the conference room, in your service dress, and the bailiff or paralegal will come get you when it's time. They will bring you in here and you'll walk up to here *[pointing to a spot near witness chair]*, where you'll stop and face me and I'll swear you in. Now on that, would you rather swear to God or affirm, either one is fine, whichever you're more comfortable with?

WIT: I think I'll go with affirm.

ME: Got it, I'll have you raise your right hand and I'll say "Do you affirm that the testimony you are about to give in the matter now in hearing will be the truth, the

whole truth and nothing but the truth?" And you'll say "yes, sir," and then you can sit right down. Easy enough so far?

WIT: Yes, sir.

ME: Great. Let's practice that one time so you'll know exactly how it works *[practice it, then back to the interview … leave witness in the box, stand where you are going to stand when you do the direct and continue]*. So when you sit down you'll see the court reporter sitting here *[pointing]* recording the proceeding, the judge up here *[pointing]*, the defense counsel and the Accused sitting there *[pointing]*, and the jury crammed together in that little box over there *[pointing]*. Everyone will be in service dress and though we don't know exactly who will be on the jury, you can expect it to be anywhere from five to 10 officers, anywhere from first lieutenants to colonels. Couple things to remember while you are testifying. See this microphone? *[Tapping microphone in front of witness]*. It only records, it does not amplify your voice so remember to talk loud enough so you can be heard in the back. In a few minutes when we go through your story we'll have SSgt Green sit way back there to make sure you can be heard everywhere in the courtroom. Also, remember, I know what happened, so when I ask you a question and you give the answer, you don't give the answer to me, you give it to them *[pointing to the jury box]*. So go ahead and look at me and listen to my question, but then turn to them when you give the answer … just like when someone talks to you, you want to not just hear them you want to "see" what they say so you can read their body language not just hear the words, we want the jury members to "see" what you are saying so they can see what a credible witness you are. Any questions about that?

WIT: Nope, makes sense.

ME: OK, now that you're all sworn in, time to get started. What I'm not going to do today is give you a script or detail the questions that I am going to ask you or the answers that I expect you to give when you testify, likely on *[insert best guess]*. Because when you testify on direct examination, when I am asking you questions, I just want you to tell your story to the members. I'll help it along with a more specific question if I think you need to clarify something or if we skipped over part of it, but for the most part my questions to you will be some variation of "what happened next." Once you get to the end of your initial testimony, I'll likely loop back and focus on an area or two, but for the most part you just need to focus on telling the members what you know. What I don't want is for you to be thinking to yourself "what was I supposed to say," or "what was the next question going to be." That make sense?

WIT: Sounds good sir.

ME: Now when I'm done with you the defense counsel is likely going to ask you some questions and I'm pretty sure that's what makes you the most nervous. Every witness is worried about cross-examination. Don't be. These questions will be a little different, they are going to sound like statements and only require you to answer "yes, ma'am" or "no, ma'am" or if you don't know or don't remember answer that way as well. Sounds simple right?

WIT: It does …

ME: Well, it's not. The problem is going to be that you are going to want to explain your answer because you'll think that your answer is only part of the story. Or you're going to want to argue because you feel like they are trying to make you out to be the bad guy. Or you're going to get confused because the question was so badly worded that you answer "yes" when you mean "no" or testify that "the light was red" when you meant to say "the light was green." I've seen it a thousand times; you gotta fight that urge, you gotta just answer the question put to you, don't worry about if you're being led down a particular path or are cut off from giving an explanation. Now if the defense counsel asks you a question that allows you to answer more than "yes" or "no," feel free to give a short answer, but for the most part just answer the yes or no question with a "yes" or a "no."

WIT: OK, but I'm worried that they'll trick me into saying something that isn't true.

ME: Not to worry, because military trials are different than trials you see on TV. We don't play those gotcha games because cross-examination is not the end of your testimony. After the defense counsel is done, I get another chance to ask you questions to clarify or emphasis something you said or weren't allowed to say on cross. So if you accidentally said "the light was red," I may ask you "I want to confirm, what color was the light at the time of the accident?" And you'll get to clarify that it was green and explain why you were confused during cross-examination. Or if you answered "yes" to a question but that answer really needs explanation to make sense, I'll ask you "when you weren't allowed to answer the question about [whatever], what did you want to explain to the members?" And we go through that process of cross-examination by the defense counsel and what we call re-direct examination by me until everyone, the attorneys, the judge, even the members—who can ask questions as well—are satisfied that they got everything they need out of you. Make sense?

WIT: Yes sir.

ME: That's why you should understand that the weight of this trial is not on your shoulders. Like I said, you're not on either team, you aren't expected to read a script or guess why a certain question is being asked or why we are not focused on something you think is really important. All of that is on us. All you have to do is answer the questions asked to the best of your ability. If you're asked a question on cross-examination that you think needs follow up but on re-direct I don't follow up on it, it's not because it is not important in the grand scheme, it just may be that that question is a red-herring or something better left for another witness to testify about, or just something that isn't important for this trial. But I get paid the big bucks to make those decisions, you don't have to. You just have to answer the questions, truthfully of course, to the best of your ability. Can you do that?

WIT: Yes, sir.

ME: Great, now let me give you one more tip about answering questions to the best of your ability, OK? *[Witness nods head]*. I understand that this crime occurred a long time ago and you only witnessed part of it and only for a couple minutes. That memory in general terms may be seared into your mind like it happened yesterday. But it may

not. Or parts of it may be fuzzy. Or maybe there are parts of it that you simply don't remember. It is perfectly acceptable and actually expected that you are not going to have a crystal-clear memory of everything that happened. Frankly if you did the members would probably think your testimony was scripted and they are less inclined to believe you—and like I said we are definitely not going to script your testimony here today. So it is perfectly fine to answer a question, "I don't know" or "I don't recall" if you truly don't know or don't recall. It's human nature to fill in gaps with speculation or conjecture, and then to give an affirmative answer to something you are really just speculating about. So don't do that. If you don't know the answer to a question, that doesn't make you a failure, that makes you human. Answer that you don't know or you don't recall. Remember, we can ask you questions around whatever you don't remember to get to what you do remember and it's what you do remember that we want the members to hear. OK?

WIT: Yep, that makes me feel much better, thanks sir.

ME: Also, there may be times when the defense counsel objects to a question I ask you or I object to a question they ask you … and if things were for some reason to get unnecessarily argumentative on cross-examination rest assured the judge will put an end to that or I'll object and ask her to. But when you hear someone object, remember that you need to stop talking and allow the judge to decide whether your answer to whatever question that generated the objection is appropriate. Maybe it is, maybe it isn't, but you don't need to worry about that. You just do what the judge says. The judge says "sustained" that means you don't answer the question; the judge says "overruled" you can answer the question. But don't worry, if you are ever unsure whether you can or cannot answer the judge will let you know. Just remember to stop when you hear that word "objection." Got it?

WIT: Yes sir.

ME: Great, then I think you're ready. Why don't you just tell me what happened on the night of 23 June 2017.

ACT II

[This is where you "practice" the direct, and forecast a potential cross-examination, for however long it takes until you feel comfortable that the witness is ready and you feel that the witness feels that he or she is ready. Stand where you will stand during direct and put your assistant trial counsel and case paralegal in the jury box. Get the witness comfortable to listening to your question and turning, naturally, to give the answer to the members. If you have a quiet talker, have the case paralegal sit in the furthest reaches of the courtroom and have the witness remember to talk loud enough so that the paralegal can hear them. Another article will talk about how to structure

this part of the interview, but for now think "getting the witness comfortable" as your goal for Act II].

ACT III

ME: OK, that about does it. How ya' feeling about all of this?

WIT: Fine, bit nervous still but not as worried.

ME: OK, then. You're almost done. I understand that you have an interview with the defense counsel next. Couple things about that. The first question the defense counsel is likely to ask you is "what did the prosecutor ask you during your interview." You should feel free to tell them everything that we talked about in here today. No secrets. We don't play gotcha in our system. If they want you to describe everything we did, or summarize everything I told you, or even repeat the questions that I asked of you for the last hour to them, no problema, go right ahead. Remember, you're not on a team, your job is simply to testify truthfully about what you know. And along those lines, after you're done with that interview, give SSgt Green a quick call. She's just going to ask you how the interview went and if there was anything discussed that we might want to know about, particularly if it was about something we did not discuss here together.

WIT: OK.

ME: And the other thing is that the defense counsels are going to treat you right while you're over there for their interview. They are going to be nice, they are going to be friendly. Now I can't promise they will be as nice and friendly during cross-examination, but that's their job, nothing personal. And since you're testifying truthful, and just telling what you know, not worried about whether you're helping or hurting one side or the other, cross-examination is nothing to worry about. Now, of course you aren't a prisoner over there just like you weren't a prisoner here today. No witness should be treated poorly and no witness who is being treated poorly has to sit there and take it. This won't happen, but if you feel like you are being treated poorly, you can stop the interview and leave. Give SSgt Green a call to let her know that that happened and we'll deal with it, but again, I really doubt that that is going to be a problem. I've been doing this a long time and it's only happened a couple times and those were just misunderstandings that we were able to resolve when we spoke lawyer to lawyer. So nothing to worry about or to expect, but just stick it in the back of your mind if things go off the rails. Got it.

WIT: Yes sir.

ME: Great, then we'll see you next at trial.

[fin]

Before summing up, a note about letting the witness review their prior statement before interviewing them/preparing them to testify. There is nothing legally or ethically wrong with that and for the life of me I cannot figure out why so many young trial counsel are so reticent about doing it. Maybe it is the misunderstanding that the refreshing recollection evidentiary rule applies at trial, not at a pretrial interview. Frankly, you are unnecessarily setting your witness up for failure if you do not allow them to review their earlier statements (but certainly not statements from other witnesses). If you do not allow them an opportunity to review their earlier statements, you are going to create inconsistent statements that are not the result of any motive to fabricate, but the result of faulty memory for a witness for whom the underlying event is a historical artifact that they have not been obsessing over for months like you and the rest of the parties to the case have been doing. Maybe they do not need to be refreshed; maybe they do. Maybe everything they know about what happened is in the statement; maybe it is not. Maybe the statement is error-free; maybe it is not. Regardless, figuring all of this out prior to having a conversation is better than breaking midstream to clarify something and preparing your *Giglio* notice—setting your witness up for failure is not going to help you establish rapport with them and without rapport you are going to have trouble putting them at ease. A nervous witness will not appear to the members to be a credible witness.

In sum, there are a number of benefits with this re-education approach, but in the end it comes down to credibility … as should everything at trial. Though you told the witness that they are not on your team, and while that is technically true, at least subconsciously the members are going to think of witnesses you call as your witnesses, as your "team." Because your witness is prepared, to a degree at ease, understands their role and comports themselves accordingly, and talks for-the-most-part in an unscripted way to the members (rather than eyeballing you the entire time), they will appear credible regardless of what their testimony is (of course, that testimony itself can destroy that credibility but the facts are the facts, nothing you can do about that). And because you have followed some version of this script, you have enhanced your credibility with your witness and thus your rapport. You put them at ease, they appear at ease, they appear credible, and you have a leg up with the members when they later

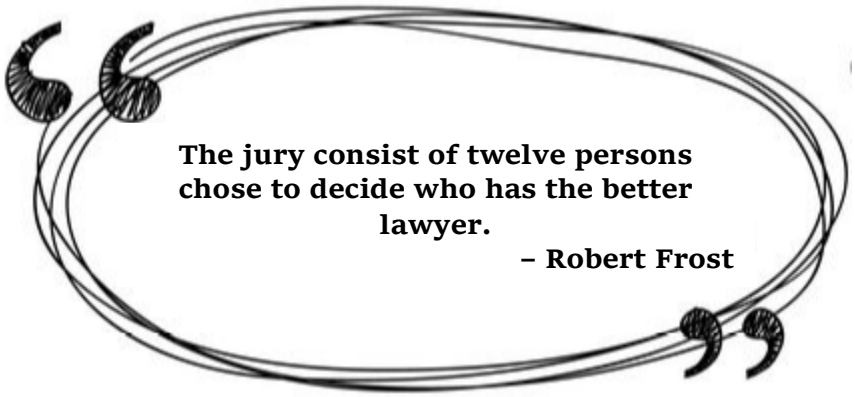
deliberate and decide which witnesses' testimony they are going to credit and which testimony they are going to discount—who was more credible.

> **Setting your witness up for failure is not going to help you establish rapport with them and without rapport you are going to have trouble putting them at ease. A nervous witness will not appear to the members to be a credible witness**

Chapter 3

VOIR DIRE

Voir dire … not a fan. But if we have to do it, we should do it in a way that does not tank our credibility with the members. Voir dire should not be a competition to see who can ask the most questions, or the "cutest" ones. You are not going to "win" a case in voir dire so relax and let the PrimeCOLE Hippocratic Oath guide your efforts.



Chapter 3 – Voir Dire

Voir dire is terrible. And on the whole we are terrible at it, particularly the "youngs" but also many of us "olds." But relax, *voir dire* is also not the key to victory. You may have heard this before—mastery of the facts and evidence is the key to victory.

Too often, unfortunately, *voir dire* is the key to crashing counsel's credibility with the members. Particularly in the military, *voir dire* is awkward. We invite (order) a group of senior military members into an unfamiliar process, make them dress up in their least comfortable uniform, seat them in a tiny box, and then as soon as they first enter the courtroom stare them down like caged animals at the zoo. Awkward.

Then the first time counsel, typically a nervous junior officer, interacts with these senior members he or she starts by probing them, asking them unexpected questions about their background and their beliefs. Also awkward. And then usually that *voir dire* quickly goes off the rails—counsel repeats, with or without minute variation, the judge's earlier questions; or engages in a seemingly endless series of obvious, yes/no-answer, "would you all agree the sky is blue"-questions in a thinly-veiled, and untimely, effort to argue their case; or calls on a particular member in a painfully awkward and usually unsuccessful attempt to "start a dialogue"; or actually starts a dialogue and once unmoored from their written questions bungles it so badly that the judge has to interrupt to save counsel from their own bungling to un-pollute the pool. Or more likely, a little bit of all of the above.

That is not just awkward, it all undermines counsel's credibility for little, if any, gain. The members' data sheets and the judge's initial questions to them provide 90 percent of the fodder for either requesting individual *voir dire* or exercising challenges. Never in feedback with

> **Never in feedback with members has one ever remembered the *voir dire* process for anything good—they either have no recollection of it (most often) or remember some credibility-crushing thing counsel did**

members has one ever remembered the *voir dire* process for anything good—they either have no recollection of it (most often) or remember some credibility-crushing thing counsel did (*see* "**staring**" below).

So relax. During *voir dire*, be guided by the PrimeCOLE *Voir Dire* Hippocratic Oath—"first, do no harm." For the prosecutor, get in and get out as quickly as reasonably possible. This will sound crazy when your colleagues are bragging about the 80+ question *voir dire* they cut-and-pasted together, but for the normal case, the non-murder cases, limit your *voir dire* questions to a no-more-than 15-question, and frankly I prefer, a 10-question limit. And these 10 to 15 questions should be laser focused on drawing out actual bias relevant to the key issues in your case. If you have experts in the case, ask a question related to members' knowledge and experience in the expert's field. If interpretation of technical details is important to your case, ask a question related to the members' scientific backgrounds and familiarity with the subject matter. If there is a victim in the case that went through (allegedly) a traumatic event, ask a question related to the members' experience, directly or indirectly, with such a traumatic event.

Limit your *voir dire* questions to a no-more-than 15-question, and frankly I prefer, a 10-question limit

Even if the judge allows it, do not attempt at all or at least at length to secure the members' agreement to your theme and theory (the "Would you all agree the sky is blue" questions). Without context of the facts of the case, the members are not going to be swayed at this stage of the trial. Nor are they going to feel like they have made a "deal" with you that they can't later break during deliberations, after being presented with facts that add nuance to their earlier agreement, facts they were not contemplating when they shook their heads up and down answering your obvious-answer question during *voir dire*. Save the "argument," the theme and theory development, for opening statement when the members start paying attention.

One exception to this rule: You get one theme or theory *voir dire* question to loop back to during closing argument. It is a sign post to the members that offers a tantalizing clue about something coming out in the evidence that you believe they need

to pay attention to. That *voir dire* question thus serves as the foundation for the line in your closing argument that starts, "remember when in *voir dire* we talked about X and you all agreed Y." Maybe it is something creative that highlights how powerful circumstantial evidence can be, or the importance of direct evidence—seeing or hearing to believe (if you are lucky enough to have audio or video evidence), or one of my favorites, factors which enhance or detract from credibility.

Or one of my other favorite arguments—the effect of trauma. In closing argument in a sexual-assault case I often take on the potentially "bad" fact that the victim acted "counter-intuitively" during the criminal act, *e.g.* "freezing" and not verbally or physically resisting the attack. During *voir dire*, I will often ask the theory question, the obvious-answer question, "Do you all agree that every person is different, and that individuals can react differently to the same type of traumatic event?" The members all shake their heads up and down in agreement with my obvious-answer question. The members are then on notice that perhaps they should not draw a conclusion about a victim's reaction during the attack the first time that they hear about that victim "freezing"; perhaps they will actually wait until deliberations, as they are supposed to, before thinking about what it means that the victim "froze" during the attack. That allows me to persuade them during closing argument with something along the lines of the following, looping back to their agreement during *voir dire*:

You get one theme or theory *voir dire* question to loop back to during closing argument

> We all think we will be heroes when the time for heroic action comes. We all believe that when the opportunity presents itself we will run into that burning building to save the puppy, or single-handedly fight off a dozen insurgents on the battlefield, or beat back the intruder in our home.
>
> But remember when in *voir dire* we talked about how everyone is different and you all agreed that individuals can react differently to the same type of traumatic event. You don't know until confronted with that burning building, or insurgent on the battlefield, or intruder in your home how you will react. You don't know whether you will fight, or whether you will take flight. And you don't know whether you will freeze. And you certainly don't know how, when a person you trusted, a person you were intimate with, who you loved and respected and

> who you thought loved and respected you, who is much stronger physically than you, ignores your "no," ignores your "stop" and starts to take by force what is not theirs to take. You heard from [victim testimony]. You heard from [expert testimony]. . .. So when confronted by this sexual assault you might expect [Named Victim] to punch and kick and scream and fight until she was bruised and bloody, and we all probably hope we would have, but you can certainly understand in this case, in these circumstance, [Named Victim] did not.

Maybe it works, maybe it does not. Members have told me that it has. But regardless, hopefully it forces the members, who agreed during *voir dire*, that perhaps someone could react to a traumatic event differently than they would have or how they would have expected someone to react, to think about it a little more deeply. Maybe it changes a mind, maybe it starts a discussion in deliberations. If so, you have actually accomplished something in *voir dire*! Congratulations.

For your other nine, or 14 questions, good luck. Lean heavily on the rest of your trial team to bring that laser focus to your questions. If you are lucky enough to have a forensic psychologist on the team, take advantage of their jury-consultant expertise. Remember, your expert is a scientist in the realm of human psychology, you are not. That is one of the reasons you hired them. You might, and I emphasize might, be able to bring some commonsense to the discussion, but your expert brings years of experience and training in this field and is much better positioned to offer questions that will help spot those members who may not be receptive to your theme and theory. But in the end, trust your litigation instincts. Remember, experts advise, counsel decides.

I will leave you with one definite no-no, the number one complaint members have with counsel:

Do 👏 Not 👏 Stare 👏 At 👏 Them 👏

They are not animals at a zoo and you are not an expert in body language. You are not gathering anything by staring them down as they enter the courtroom, or while they listen to the judge's initial instructions, or while they answer the judge's questions. They hate it. It's creepy, they notice it and they complain about it all the time because it makes an awkward situation even more awkward. Casual but respectful indifference

is the key to successes where success is defined as not creeping out the members at the very start of trial.

**"PrimeCOLE *Voir Dire*
Hippocratic Oath:
First, do no harm"**

MORE *VOIR DIRE*

Now that you have efficiently exercised your obligations under the **PrimeCOLE *Voir Dire* Hippocratic Oath**, and done no harm to your credibility, you get a second chance to do just that—individual *voir dire*. To avoid doing that, the best approach is to ask the judge, in a pretrial session, in your most pleading voice: "You're going to handle individual *voir dire*, right? … please."

If that does not work, then either tread lightly or lower the hammer. For the prosecution, more often than not "no thank you" is the most appropriate response to the judge's invitation to question a member. The characteristics of military members generally work in favor of the prosecution … sorry defense. So unless a member has answered a question in group *voir dire* that makes you pretty sure they will not give your case fair consideration, be the potted plant.

And just because a member has answered a group *voir dire* question in a manner that suggests they may have some implied bias, there is no requirement that the prosecutor be the one that fleshes that out in individual *voir dire*. Some junior counsel have been taught to do this as a matter of routine in what appears to be a misguided effort to "protect the record." Protecting the record is fine, but peruse the appellate cases that have reversed on member-selection issues and you will see just how obvious the defect has to be (*i.e.,* unresolved actual, or approaching actual, bias) before a conviction will be overturned. The problem with the go-first, protect-the-record approach is that junior counsel interrogates every member, poorly, trying to suss out some implied bias, and in the process invariably insults their intelligence or integrity, but fails to uncover enough to have any members excused for cause. They then can only dump one irritated member with a preemptory challenge, while the rest remain, scarred by the "attack" during *voir dire*. Record protected; credibility shot.

So let the defense do the work at the outset. Then you can decide whether to try to rehabilitate or let the member go if the defense has been able to demonstrate sufficient question about the member's fitness to serve. Either protects the record (and not fighting for a lost cause is not going to hurt your case or your credibility with the judge). If you are going to try to rehab, have ready your versions of the standard questions: *e.g.,* Can you put aside anything you learned [or heard] in Situation X and decide this case solely on the evidence presented in this courtroom and the instructions given to you by the judge? Was there anything so monumental about Situation X that would prevent you from engaging in active deliberations with your fellow members of the jury? Do you have any doubts about your ability to be fair and impartial based on Situation X? And when you then argue against excusal, document those things the cold record will not reflect (*e.g.,* member's tone, "body language," lack of negative emotion).

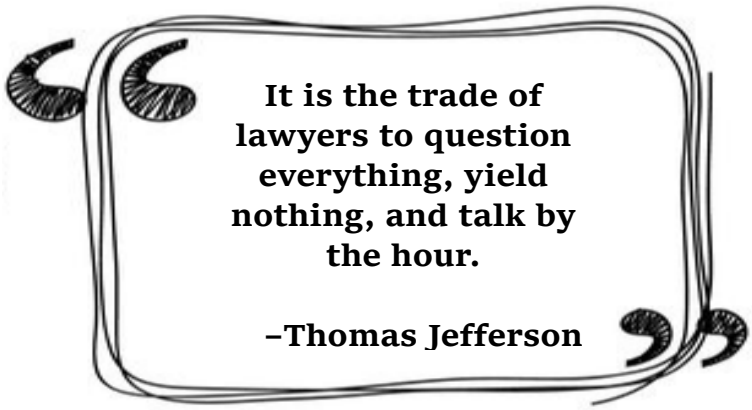
If you have to go after a member, go for it, but remember the wisdom of Omar Little (*The Wire*): "You come at the king, you better not miss." (Ralph Waldo E. said something like that as well). Be careful, the member is going to know you are coming after them, no matter how respectfully you do so, and they will be defensive (usually forgetting they could get out of "jury duty" if they just played along). Sympathetic and apologetic in tone is the best way to get you where you are going. And then it has to be leading questions, noting how the member would have a "tough time," or be "challenged," or "would have difficulty" with whatever (*e.g.,* compartmentalizing an emotional event). When you argue for excusal, also document any non-obvious perceptions (*e.g.,* pauses in answering, palpable distress). And most importantly, always keep one round available (your preemptory challenge) in case your first shot (with the judge) goes wide. Little worse for your psyche then getting stuck with a member you went after and missed in individual *voir dire*.

So, overall, for *voir dire*: Good luck; less is more; and first, second, and third, do no harm.

Chapter 4

OPENING STATEMENT

Opening statement is crucial. Not only should it foreshadow the facts to come, but it foreshadows the trial competence of counsel presenting it. A little show-and-tell, or tell-and-show, on how to do it best.



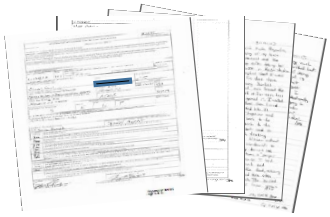
Chapter 4 – Opening Statement

As important as opening statement is, the lack of attention we tend to give it is troublesome. Opinions vary, but opening statement is often the most important aspect of trial litigation … after the facts of course, and pretty close to the importance of closing argument. But rather than recognize that and devote one of the top members of our trial team to opening statement, and have that litigator actually detail why our side will win the case to come, opening statement often becomes an afterthought. We send the most nervous, most inexperienced young on our trial team out to bumble through an instantly forgettable 3-5 minute monotone flyby that often devolves into a poor preview of closing argument. Let's not do that anymore … yes, let's send out the youngs, but let's arm them with the tools to engage and persuade.

Opening statements are boring. That is bad. The selected members have sat through the awkward *voir dire* process and won a coveted front-row seat for the opening day production of *United States v. Airman Smith*. They have some expectations at this point, usually not from real-life experience but from watching courtroom dramas on television. Yes, they know from the judge's instructions and common sense that this is a serious, real-world event to be taken seriously; that the trial is not being presented for their entertainment. But in the back of their minds they expect if not to be entertained with trial theatrics at least not to suffer in boredom.

Opening statements are boring usually for a number of reasons; first because counsel usually does not use props. Rather, it is a speech, likely delivered from notes, from a counsel anchored to a podium. Counsel stares at their notes, the members stare at counsel, no one leaves satisfied.

If I was on the panel of a murder case, I would expect to see the prosecutor waving the murder weapon around during opening statement (carefully). That is interesting; hearing about it but not seeing it not quite as interesting. Maybe your case is not as high-profile as that, but show me the sample bottle the accused peed into that



came back hot for methamphetamine. Use whatever you have and whatever you intend to use at trial. Let me see the security-camera video, let me hear the audio of the accused's incriminating statements, show me pictures of the crime scene or of the cast of characters I am going to be introduced to over the course of the trial. Or if you just have documents, display an extract of the accused's statement on a screen (or blown up on a poster board if you want to go old school), or the digital signature on a fraudulent travel voucher, or the forged signature on a doctor's note.

Besides livening up the presentation, my explanation of the "why" of using evidence during opening statement likely will not come as a surprise to you if you have been following along—it will enhance your credibility with the trier of fact (members or judge). A basic competence of trial lawyering is proficiently handling actual evidence. When you demonstrate this basic competence to the trier of fact, by weaving physical evidence into your oral presentation, you enhance your credibility. When you offer the trier of fact an opening statement that is interesting, you enhance your credibility. And then when your opening statement is delivered with passion and purpose, and reminds the members of the soaring oratory and commanding presence of *[insert your favorite fictional attorney character, e.g., Atticus Finch]*, you enhance your credibility. Come closing argument, you can hopefully trade those credibility chits earned in opening statement, and then over the course of a trial, for persuasion points during closing argument and into deliberations.

> **Opening statements are boring. That is bad. … counsel usually does not use props [or] counsel overly relies on developing a "cute" theme and theory, and then bashes the members over the head with it over and over again [or] counsel dispenses with any 'argument' and just recites facts**

The "how" to use evidence in opening statement introduces my favorite pre-trial motion—the Motion to Pre-Admit. My experience is that counsel do not use evidence during opening statement because they do not realize they can, if they do it right. A judge is not going to allow you to show something to the members that you intend to become a piece of evidence during trial until that something has actually been offered and

admitted as a piece of evidence. But there is no law that says you have to wait until trial to have a piece of evidence admitted. Quite the contrary, the interest of judicial economy, and the rules (*see* Appendix B—Example Motion to Pre-Admit), favor resolving issues such as admission of evidence in a pretrial session when feasible.

Doing so is particularly feasible when the effort is tacked on to resolution of a motion to suppress—when the motion to suppress is denied, most evidentiary objections to admission of the subject matter of the motion (*e.g.,* the evidence seized during a search of the accused's home or vehicle, the audio or video of the accused's "confession") are resolved and pre-admitting it at that point become perfunctory. Then, you can dramatically wave the murder weapon around during your opening statement, or play snippets of the accused's incriminating statements to enhance your presentation. If you can figure out how to have pictures of all the witnesses admitted (it is possible), you can put faces to names for the members early and sear in their minds what you want them to believe about these witnesses when they see them again during trial, then face-to-face.

Understand, however, that counsel's definition of "judicial economy" might not be the same as the judge's. It seems like it was never the same as mine. Particularly in short trials, such as your typical random urinalysis, drug-use case, the judge may ignore your pleas to litigate admissibility during a pretrial hearing and will elect to address admissibility during your case in chief. But do not let that stop you from preparing and offering the motion to pre-admit. Though a judge may not want to litigate admissibility pretrial, few judges will refuse to admit evidence pretrial when the parties agree, or at least there is no objection from opposing counsel. And the process of listing all the evidence you want admitted, and detailing the foundation, basis of admissibility, and relevance of each item (*see* Appendix B), helps define which evidence the opposing party may object to.

For example, in what was going to be a long murder trial (that ended up resolving through pretrial agreement on the eve of trial), we offered a motion to pre-admit that listed more than 70 pieces of evidence. Some had been the subject of unsuccessful motions to suppress; many were self-authenticating documents with the appropriate certification from the records custodian; many were items to which the

defense had no objection; and many were items that on further discussion with the defense we were able to amicable resolve preliminary objections and move those items into the "no objection" category (or we removed them from the list). In the end, we did not need to litigate admissibility during a pretrial session; rather the pretrial session simply confirmed the lack of objection (or overruled objections based on the outcome of previous motions to suppress) and powerful pieces of evidence came available for us to use during an equally powerful, not boring, opening statement.

Opening statements are also boring when counsel overly relies on developing a "cute" theme and theory, and then bashes the members over the head with it over and over again. Just because you have settled on a theme and theory for your case (and you should as it helps focus you and your team on what is important about your case), does not mean that you have to bludgeon the members with it.

You get seven seconds at the start and end of your opening statement to stray into argument (or "signposting" if you prefer)—no more, less is fine. Not only would you and should you draw an objection if you exceed this totally-not-arbitrary time limit, you will lose credibility with the trier of fact by doing so. The members know almost nothing about the case. They do not know who the witnesses are or what the witnesses are going to say or what the evidence is going to show and the judge has just told them that they need to keep an open mind until presented with all the evidence and that opening statements is intended to lay out the parties' versions of that evidence for them. And then counsel stands up, and after bumbling around for a moment getting organized, tries to demonstrate how their robbery case is like Goldilocks and the Three Bears, and the accused is Goldilocks, and the victims are the Three Bears, and the accused chose a house to break into that was not too hard or too easy but just right, and how … who knows at this point, the opening statement has veered so far from reality that the members give it as much credit as the fairy tale is based upon. Credibility crashes.

You get seven seconds at the start and end of your opening statement to stray into argument (or "signposting" if you prefer)—no more, less is fine

At the other extreme, opening statements are also boring when counsel dispenses with any "argument" and just recites facts, prefaced with "The evidence will show …" or "The witness will testify …" over and over and over again, without a coherent or interesting narrative that tells their story of the case. Somewhere, likely in law school from a professor who has not seen the inside of a courtroom in decades, the idea has taken hold that in order to properly present an opening statement and avoid objection, every sentence uttered by counsel must be prefaced with the phrases "The evidence will show" or "The witness will testify." Frankly, it is a dumb technique as it will not magically convert an opinion statement into a fact statement; the sentence "The accused is a pig" is not made better for opening statement by stating it as "The evidence will show that the accused is a pig." It is still opinion/argument, it is still objectionable (though prefacing it with "The evidence will show …" may temporarily confuse an inexperienced opposing counsel), and it is not going to impress the members who are expecting at that point to get a preview of facts on which they later can decide for themselves whether the accused is a pig or not.

Show rather than tell may work better to emphasize these points. A couple examples of opening statements—you chose which is better …

Example 1

Judge: Trial Counsel, do you wish to offer an opening statement?

TC: Yes your Honor, thank you.

[Counsel walks to the podium pre-positioned three feet in front of jury box, binder and glass of water in hand, sets water down, sets binder down, opens binder, takes note pages out, sets them at different places on podium, applies a white-knuckled death grip to the edges of the podium, looks up and says after this awkward 15 seconds of silence…]

TC: Mr. President, members of the panel, this is a case about broken glass, broken promises, and broken dreams. On February 2nd the accused *[pause, turns, points robotically at the accused]* began a rampage that started by breaking through a glass window at Jane Doe's house and ended with her dreams of a peaceful life likewise shattered. The accused's violent attack that evening broke a promise …

DC: Objection your Honor, I thought this was supposed to be opening statement, not closing argument.

Judge: Sustained, though Defense Counsel in the future state your objection more succinctly. Trial Counsel, please focus on the evidence to be presented in this case.

TC: Yes your Honor. *[Shuffles through notes for an extended period]*. Members, the evidence will show that on February 2nd the accused broke a window at the house of Jane Doe. Jane Doe will testify that she knew the accused from work. She will also testify that she had rebuffed advances the accused had made to her. The evidence will show that the accused had been drinking during the day of February 2nd. Witnesses will testify that he was at a party that evening and asked Jane Doe's friends where she was. Members, the evidence will show that he left the party at about 11 p.m. …

NOTE: I will spare you the rest at this point and jump to the end. It is too painful to continue typing "The evidence will show" and "The witnesses will testify" over and over again.

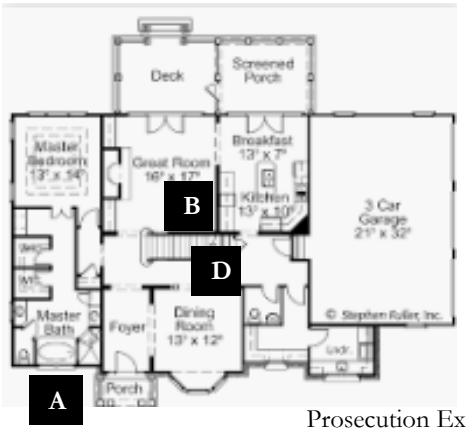
TC: … Broken glass, broken promises, and broken dreams. Mr. President, members, based on the evidence at the end of this case the only decision you can make is that the accused is guilty beyond a reasonable doubt.

Example 2

Judge: Trial Counsel, do you wish to offer an opening statement?

TC: *[Nods, stands up at counsel table and faces the members]*. On February 2nd, the accused struck Jane Doe in the head with a rock, leaving her bloodied and bruised on the kitchen floor in her home. *[Walks to spot in front of members, grabs evidence bag with rock in it on way, a pre-admitted picture of a broken window comes up on the courtroom drop-down screen]*. Late that night, the accused came to Jane Doe's house with bad intentions and this rock, Prosecution Exhibit Number 12, dressed all in black, black shoes, black pants, and a black sweatshirt with a hoodie pulled over his head. On arriving at her home, he took this rock and used it to break through a pane of glass in the back door of her home, a picture of which is shown here on Prosecution Exhibit 8. He reached through the broken pane, unlocked the deadbolt lock, and opened the door.

Prosecution Ex 8



Prosecution Ex 32

TC: Jane, who had been in bed asleep, had been awakened by the noise of the glass breaking and, not knowing what the noise was, walked downstairs to investigate. *[Floor plan of home replaces picture of backdoor on drop-down screen, TC walks over to screen]*. Thus, as the accused was coming through this back door, here at the spot marked "A" on Prosecution Exhibit Number 32, Jane had come down these stairs, marked here as "B," entered the kitchen and confronted accused here at the spot marked as "D." Though it was approaching

midnight and thus dark, the oven's night light here at spot "E" was on. Jane saw the accused in her house. Heard the crunch of broken glass as he stepped toward her. Felt the cold wind from that harsh winter night blowing through the open door. She yelled at the accused: "Get out my house!" He stepped toward her. She could see his eyes, wide with anger. Her breath caught, her heart pounding almost out of her chest. Out of the corner of her eye she sees a shadow coming toward her, pain explodes at her temple, her vision narrows, everything goes dark, she falls to the floor, unconscious, blood pouring from her head. The accused turns, runs through the door, drops the rock, escapes into the cold darkness. *[TC heavily places rock, with an audible "thud," on the ledge in front of jury box]*

TC: *[Picture of Jane Doe's head taken when paramedics arrived comes up on drop-down screen]*. After laying unconscious on that cold kitchen floor, Jane awoke, blood pouring from this deep gash to her left temple, shown here on Prosecution Exhibit Number 5. Slowly coming to her senses, knowing she needed medical assistance, she crawled to the phone and dialed 9-1-1. Paramedics arrived at 12:15 a.m., stopped the bleeding and transported her to the hospital, where she required 12 stiches to her temple, was diagnosed with a Stage 2 concussion and spent three days in a hospital bed recovering, hoping hour by hour that her head would stop throbbing.

TC: How do we know that it was the accused who struck Jane Doe in the head with this rock? Well, Jane recognized him, his height, his build, his eyes. More than that, a subsequent search of the accused home retrieved black shoes, black pants, and a black sweatshirt with a hoodie. *[Discussion of additional evidence, you should get the idea by now]* …

TC: Why did he do this? Why was he there that night? Why did he take this rock *[retrieving it from the edge of the jury box]* and smash it against Jane Doe's head? She had recently spurned his sexual advances and he stewed about this perceived humiliation, his anger growing, confessing to friends who knew of her rejection that she "would get what she deserves" *[uses air quotes]*. At a party at Frances Green's house earlier in the evening of February 2nd, a house only three blocks from where Jane Doe lives, he drank and drank some more, hurling invectives about Jane Doe's sexuality at Jane's friends who were at the party. And then he disappeared, no one can account for his whereabouts after 11 p.m. *[Discussion of additional evidence on this point, which is corroboration of identity though it sounds like motive … always nice to provide evidence of a motive even when it is not an element of the charged offenses]* …

TC: The evidence and the witnesses will tell you this story. It is a story that ends with you finding him *[gesturing]* guilty of burglary and aggravated assault.

/fin/

If you have not figured it out by now, Example 2 is better than Example 1. It does not bash the members over the head with theme or theory, or require them to

draw a flowchart to follow the analogies and metaphors a "cute" theme and theory of presents. It crosses into argument here and there, but not excessively (or for more than seven seconds). It drops the unrequired repetition of the affectation "Mr. President" or "Members" every time you start talking to the members and then sprinkled throughout the presentation (counsel who constantly preface statements with these affectations always sounds like used-car salesmen, trying to ingratiate themselves with a customer by repeating the customer's first name throughout a conversation—once is polite, best at the start of *voir dire*, thereafter it is overly indulgent). Example 2 tells an interesting and compelling story, concisely, presently dramatically from the start, and weaves in pre-admitted evidence—it shows as well as tells. It previews evidence and testimony without devolving to a bulleted list of "The evidence will show …" or "The witness will testify …" sentences. It is not boring. And thus the counsel who delivered it has gone far to establish credibility with the members. Counsel who delivered Example 1, not so much.

You can persuade without resort to (overly) argumentative language. A strong opening statement persuades without obviously arguing, but by presenting an "argument" through effective story telling. If you are effective, and have the facts on your side, the members will subconsciously know after your opening statement that they will bring back a conviction or acquittal not because you told them to do so, but because the evidence as you eloquently described it will require them to do so.

In a sense, you are making the members a promise with a more robust opening statement. You are promising them that the evidence will support the compelling story you have just told them. You should not be afraid to forcefully make that promise. You should have prepared to the point that you know the facts and evidence better than every person in that courtroom and so there is little risk in making promises about what is to come. These promises are not detailed, line-by-line assertions about what a particular witness is going to say. Rather, they are the narrative that tells the compelling story of the case—not at the treetop level, not at the 30,000 foot level, but at a level of detail between these extremes that allows you to explain why the evidence will demand the result you will ask for in closing argument.

Do not be afraid. Though you will sometimes hear the caution to under promise during opening statement in the hopes of over delivering during the course of trial, this is bad advice if taken to mean that an instantly forgettable 3-5 minute monotone flyby is an appropriate format for an opening statement. Under promising (though often appropriate for defense counsel opening statements) will leave the members unsatisfied and disappointed, will squander an opportunity to prepare the battlefield, and will fail to take advantage of an opportunity to build credibility with the members. "Under promise/over deliver" will cost you more than it will earn you. Make a robust promise (by telling the members in opening statement a story about what the evidence will show), deliver on that promise (by presenting that evidence), and then reap the benefit of promises kept (in closing argument and into deliberation)

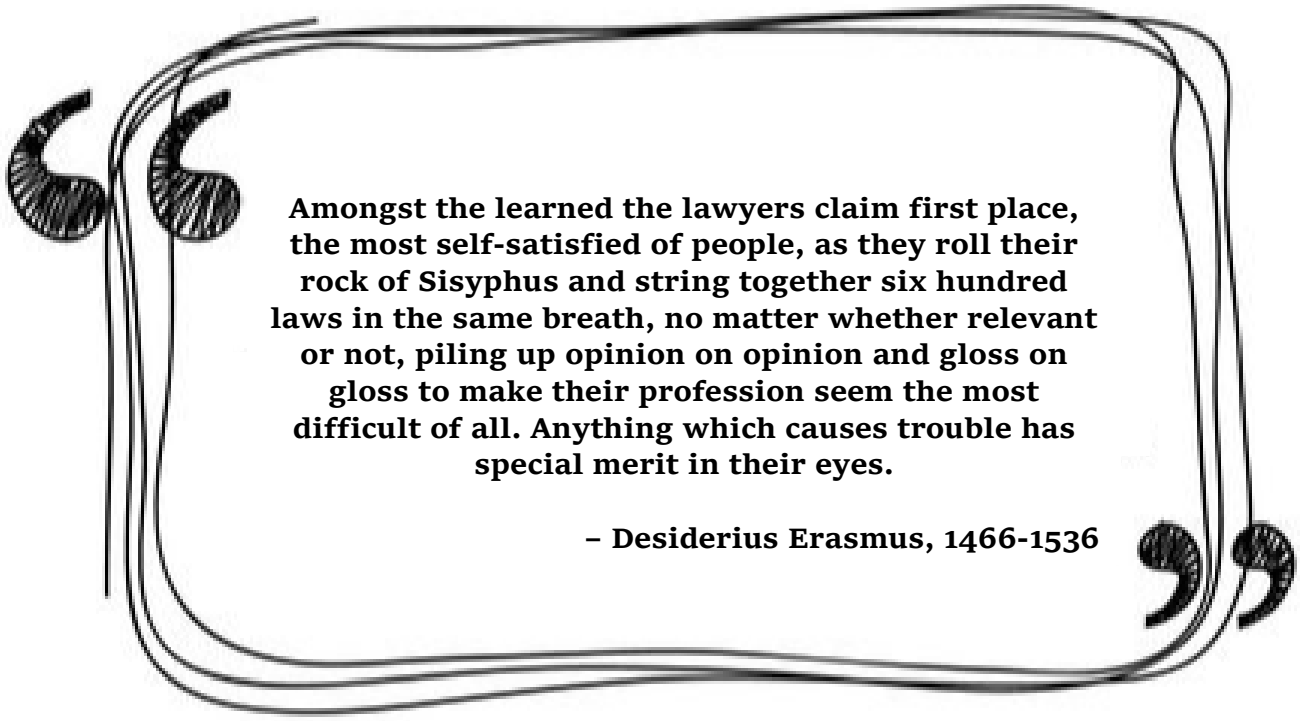
.

A basic competence of trial lawyering is proficiently handling actual evidence. When you demonstrate this basic competence to the trier of fact, by weaving physical evidence into your verbal presentation, you enhance your credibility. When you offer the trier of fact an opening statement that is interesting, you enhance your credibility. And then when your opening statement is delivered with passion and purpose, and reminds the members of the soaring oratory and commanding presence of Clarence Darrow, you enhance your credibility. Come closing argument, you can hopefully trade those credibility chits earned in opening statement, and then over the course of a trial for persuasion points during closing argument and into deliberations.

Chapter 5

DIRECT "EXAMINATION"

Direct examination, really direct "conversation," is not about crafting a questions-and-answers script that counsel and the witness practice over and over in anticipation of a perfect presentation at trial. Unsurprisingly, that perfect plan never materializes. Direct "conversation" is about your role in guiding the witness through their testimony, a journey that may not be, and need not be, a straight line. Direct "conversation" emphasizes your role in the presentation, embrace it.



Amongst the learned the lawyers claim first place, the most self-satisfied of people, as they roll their rock of Sisyphus and string together six hundred laws in the same breath, no matter whether relevant or not, piling up opinion on opinion and gloss on gloss to make their profession seem the most difficult of all. Anything which causes trouble has special merit in their eyes.

– Desiderius Erasmus, 1466-1536

Chapter 5 – Direct Examination

Direct examination is the right field of trial practice. For those unfamiliar with the analogy, in Little League baseball right field is where the team parks their least talented player and hopes the other team does not hit a ball to him (or her). I am a right-field veteran. I can recount many an innings where my one hope was the same as my coach's—please don't hit the ball to right field.

But real-life trial practice is the major leagues. There is no "Little League" right field to hide liabilities at this level. And as the key to "winning" at trial is the facts, and as direct examination is 75 percent of the mechanism by which those facts are developed (cross examination being 24 percent of the rest, with various evidentiary mechanisms—*e.g.,* judicial notice, the remaining 1 percent), it is important that direct examination be done right.

Done right, direct examination is a delicate dance between counsel and witness. Counsel leads with the question, but the witness decides how to follow with their answer; it is controlled but improvisational, counsel and witness are in harmony, listening to each other, reacting to each other's moves. Google "what is a tango," you will get the idea.

Thus, to do direct examination right, dispense with the idea that counsel conducting direct examination should be the high-school-dance wallflower of the courtroom. Too often trial counsel take this wallflower analogy to an extreme, believing they should do everything possible to recede into the background and let the full spotlight fall on the witness. The result is that these counsel over prepare their witnesses and script their testimony in the hopes that the witnesses' in-court testimony will flow as smoothly as planned. And the result of that is a stilted presentation in which the question "what happened next" is repeated to nausea (*ad nauseam* to my Latin scholars).

Or even worse, as no plan survives first contact with "the enemy"—and "the enemy" here is not your opponent, but the reality of the unpredictability of trial practice—when the witness goes off-script counsel is not flexible enough to adapt and overcome. Witness and counsel talk past each other. But counsel, who is wedded to their script, and nervous, focuses on preparing to ask their next question rather than listening to the answer to their last. Thus, some version of the following occurs:

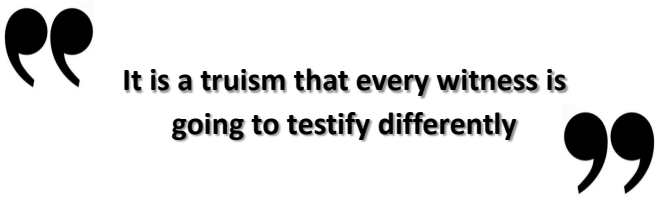
Q: What did you see?
A: I saw a green dog.
Q: And what color was the dog?
A: It was a green Chihuahua.
Q: And what kind of dog was it?
A: [*rolls eyes*] Ugh, hello, I just said it was a Chihuahua.

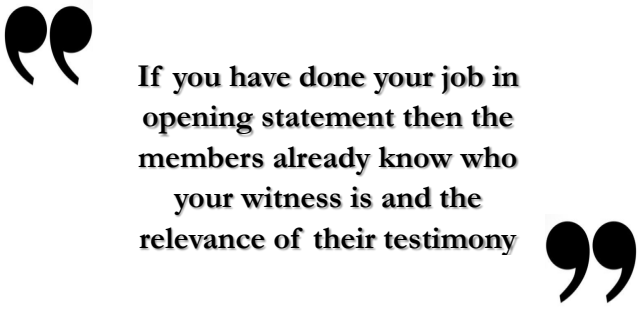
And that occurs again, and again, and again. Counsel goes one direction, the witness goes in another. Direct examination devolves into a disjointed mess. It irritates the members and the witness, and crushes counsel's credibility. It is a Little League error.

Testifying is the witnesses' journey; your role as the guide is to make sure that the journey arrives at the right destination, [it is] a guided journey, a conversation, that gets the witness from A to Z, but it need not hit each letter in between in "perfect" sequence

So let's build a major league right fielder. The key to being an effective litigating right fielder, to conducting an effective direct examination, is the same key as any other part of trial litigation—knowing the facts and evidence better than every person in that courtroom. This will give you the confidence to be flexible, to adapt and overcome. When you knows the facts, you are not worried about going off-script; in fact, you are not worried about having a script at all. In direct examination, when you know the facts and evidence better than every person in that courtroom, you are the guide rather than the wallflower. Testifying is the witnesses' journey; your role as the guide is to make sure that the journey arrives at the right destination. In direct examination, it is both the journey and the destination that are important. It is a back-and-forth, it is a conversation, not an "examination." It really should not be called "direct examination"; it should be called "direct conversation."

Practically, this means do not write out all of your direct-examination questions. Rather, prepare a checklist of facts you want to pull from the witness and group those facts under a transition/topic sentence/question. For example, recall the Example 2 opening statement in the "**Opening Statement**" article … the one hopefully you just read and which totally changed your life. Picture trial counsel standing up to conduct the direct examination of the victim, Jane Doe. Here is a peek at what trial counsel's notes should look like:





DIRECT EXAM: JANE DOE

INTRO:
Q: Pls state name for the record
Q: What happened to you in the early morning hours of Feb 2d?
A: Tim Blue broke into my house and hit me in the head with a rock.
Transition: Ok, let's talk about the details of that, first …

TOPIC: Relationship w/Accused
__ Met at work August 2017
__ On same tiger team/late nights what/Picture?
__ Other mbrs (F.Green)
__ Made sexual advances/rebuffed
__ "you're ho" - "I want to kiss you"
__ Pushed him away
__ "Not appropriate/not interested"
__ Complained to supervisor
__Jan 2018 moved to different team
__ Passed in hall="dirty looks"

TOPIC: Layout of the House [Ex 32] breathe
__ Bedroom Location[A]/stairs [B]
__ Kitchen Location [C]/backdoor [D]
__ Stove/Night light [E]
__ Path from bedroom/kitchen

TOPIC: Frances Green's Party [Ex 13]
__ 3 blocks from her house
__ Invited to party
__ Knew ACC invited/stayed home
__ ID Girlfriends [who were at party]

TOPIC: Assault
__ Bed at 10pm
__ Heard crash/unsure

__ Slippers on/walked down to kit
__ Stove light on
__ Saw ACC
__ Shoes/pants/hoodie
__ Looked "angry"
__ Crunch of glass
__ Cold breeze
__ "Get out of my house"
__ Stepped toward her
__ Heart beating/catch

__ Shadow toward her head
__ Pain/Vision narrows/goes dark

TOPIC: Wake up hospital/injuries
[more bullets … excised for space]

TOPIC: Identify ACC
Q: Is the person who broke into your home and struck you with this rock in the courtroom today? [ID for record]

Without having every question scripted out, this approach might seem a little scary at first. It might feel like walking a tightrope without a safety net [*I know, I know, lots of analogies in this chapter*]. But remember the goal—direct examination is a guided journey, a conversation, that gets the witness from A to Z, but it need not hit each letter in between in "perfect" sequence. As the guide for that journey, the moderator for that conversation, it is incumbent on you to allow the witness to find their own way, standing by to get them back on track if they stray too far. If you overstep that role, and dictate the path the journey takes (through scripting out every question and demanding adherence to preset answers and preset sequence of answers), the direct examination will come across as stilted, inauthentic, and frankly, boring.

So, in the above, the transition to the series of questions about the assault could start like this: "What happened after you had gone to bed that night." Then Jane Doe tells her story, talking about how she was asleep, some noise woke her up, and she walked downstairs to investigate. You check off each of these bullets on your list, not panicking that she missed a couple. Maybe she takes a breath at this point and it seems like a good opportunity to ask a question to fill in some of the blanks, to check off some of the bullets/details she did not address: "That noise you mentioned, what did you think it was?" Answer; check. Or "What did you have on your feet when you walked downstairs?" Answer; check.

Or maybe not. It may be (and probably is) too early to interrupt the flow and loop back to fill in details so soon after starting the journey. Maybe you just nudge the journey forward: "Once you got to the bottom of the stairs, what did you see [where did you go] [what did you hear] [what did you feel]?" And then Jane Doe tells the rest of the story of her attack, her pace increasing to match the stress of the memories, maybe she is crying, maybe she forgets to mention a number of details as her testimony pours out. No worries, just loop back to these details in a sequence that seems natural once she has reached the end. If she just got through testifying about the rock hitting her head and the intense pain, but did not mention seeing the shadow out of the corner of her eye or earlier in her testimony did not mention that the stove light was on, which fact is probably best to pull out at that moment? If you guessed "the shadow," good job: "Did anything catch your eye before he hit you in the head with the rock?" Little

push; answer; check. Maybe she also forgot to mention hearing the crunch of broken glass: "When you saw the Accused standing there in your kitchen, did you hear anything?" Little push; answer; check.

It is a truism that every witness is going to testify differently. You might get the opposite from the steam-of-consciousness Jane Doe. You might have a witness who you prepared the best you could to be comfortable in court, but who freezes up spelling his last name. No worries. You have your outline of what you need from that witness and you can just work through the "little push-answer-check" mechanism: "What time was it when you heard this noise?" "What did you do after you heard this noise?" "What did you think at the time the noise was?" "What did you do after you heard the noise?" Little push; answer; check. At some point the witness will settle down, settle in, and the conversation will flow more freely. Or, worst-case, you may have to ask a couple dreaded "What happened next" questions just to keep things moving along.

Your direct-examination notes may look different. You may want to write out transitional questions to start the conversation for each topic.  I always write out the introductory and concluding questions, though by the time I get to trial I know how I want to start and finish and rarely read them verbatim. But it is your product, design it in a way that is comfortable to you … as long as it does not resemble a script!

Next, I want you to go to whatever template you are using for crafting a direct examination, probably the standard version of your office's script, and cross out the template "introductory" direct-examination questions that have become rote in courts-martial. You know what these are, some version of the following:

> TC: The Government calls Airman First Class Jimmy James to the stand.
> *[Airman James enters courtroom, walks to witness box, remains standing, trial counsel swears him in …]*
> TC: Please be seated. Airman James please state your name for the record and spell your last night.
> JJ: My name is James Little James, J-A-M-E-S.
> TC. And Airman James, are you a member of the United States military? *[Note: Amn James is in uniform]*
> JJ: Yes sir.
> TC: And what branch of service are you with?

JJ: The Air Force.
TC: And what is your rank?
JJ: I am an E-3, Airman First Class.
TC: Where are you assigned?
JJ: I'm assigned to the 345th Aircraft Maintenance Squadron.
TC: And that's here at Jones Air Force Base, correct?
JJ: Yes sir.
TC: Airman James, do you know the accused in this case, Staff Sergeant Greg Smith?
JJ: Yes sir.
TC: Can you point him out here in the courtroom? *[Amn James points at SSgt Smith]*.
TC: Proper identification of the accused. Airman James where were you on the night of …

Wow, how exciting! I am not sure if this approach is a warped sense of "protecting the record," or whether the drafters of the templates have adopted it because of a lack of faith in trial counsel's ability to establish these factual issues on their own at appropriate points in a competent direct examination, but this approach is boring. It is particularly boring and ineffective for those key witnesses whose testimony has been highly anticipated since your scintillating opening statement—this approach simple sucks the life, the theater, out of what should be a dramatic moment.

Here is a better example, taken with some poetic license from the murder trial of *United State v. Staff Sergeant Sean Oliver*. There, who had committed the murder was in dispute; the Government believed it was SSgt Oliver (obviously), the defense pursued a variety of theories, included SODDI (Some Other Dude Did It). Thus, when the Government called Army Private Tom "SODDI" Jones, under a grant of immunity to testify on Day Ten of the trial, the members already had heard plenty about him and knew exactly what the relevance of his testimony would be. Here is the introduction from his direct examination:

TC: The Government calls as its next witness Army Private Tom Jones.
[Private Jones enters courtroom, walks to witness box, remains standing, trial counsel swears him in, he sits …]
TC: Private Jones, who killed [the Victim]?
TJ: Sean Oliver killed him sir.
TC: How do you know that?
TJ: I was at the apartment when it happened, I saw the body, and he told me he killed him.

[Momentary pause—to allow the courtroom to take a deep breath]
TC: OK, let's unpack that a bit. Tell us about ...

Boom! By that point in the trial, if we had allowed any member of the jury the opportunity to conduct the direct examination of Private Jones, those are exactly the first two questions they would have asked of him. That is what they wanted to know, and by asking it for them, without the rote personnel-record buildup, we satisfied their expectation. Whenever you satisfy the members' expectation, no matter how small, you enhance your credibility. And as I have mentioned *ad naseum* by now and will continue to do, credibility is the key. The more credible you are to the members, the more likely they are going to credit your presentation and arguments to them over the course of trial.

You have permission to be more than a wallflower during direct examination

This is not to say the Government failed to address those foundational, personnel-record and identification questions during Private Jones' direct examination. We did. We just did it at more appropriate times. We discussed Private Jones' rank and service when we discussed how he knew SSgt Oliver (they worked together in a joint environment). And we saved the identification for the end, to close the direct examination with a bit more theater:

> TC: Private Jones, it is probably obvious by now, but for the record, is the person who killed [the Victim] in this courtroom today?
> TJ: Yes sir?
> TC: Who is that and where is he?
> TJ: *[pointing at the Accused]* He's sitting right there. Sean Oliver killed [the Victim].
> TC: For the record, Private Jones has pointed out the Accused, SSgt Sean Oliver, as the person who killed [the Victim].

The form of those questions potentially objectionable? Yep. Objections? Nope. At this point we were just restating the obvious, theatrically, and the defense objecting would have made them look silly in the eyes of the jury. And did we "script" the introductory questions and closing questions with Private Jones? Of course we did; we did not tell him what to say, but we certainly let him know exactly what we were going to ask and allowed him an opportunity to practice his answers before this in-court presentation.

Defenders of the rote likely would argue that the personnel-record questions allow the witness (and young trial counsel) an opportunity to quell those testifying (and performance) jitters and ease into a conversation. But if you have prepared your witness as suggested earlier (*see* **Preparing Witnesses**), that is not necessary. Nor is it necessary to introduce the witness to the members in this fashion. If you have done your job in opening statement then the members already know who your witness is and the relevance of their testimony—thus, you can get to those personnel-record issues at a more appropriate time in the direct, most likely when discussing the relationship between the witness and the Accused (or when just discussing the witnesses background in a subtle effort to bolster their credibility—*e.g.,* their law-enforcement background).

But big picture, you have permission to be more than a wallflower during direct examination. There are a multitude of other techniques that I use to ensure the direct examination is more conversation than examination. But if you consider the direct examination to be a journey, a conversation, during which you play an important role, you will figure out how best to conduct a direct conversation rather than a direct examination. Or at least you can give it a major-league effort.

> **Testifying is the witnesses' journey; your role as the guide is to make sure that the journey arrives at the right destination. In direct examination, it is both the journey and the destination that are important. It is a back-and-forth, it is a conversation, not an 'examination.' It really should not be called 'direct examination'; it should be called 'direct conversation.'**

PREPARING WITNESSES

Act II

Remember back in Chapter 2 – **Preparing Witnesses** I left out Act II (the actual-practicing-testimony bit) and promised that another article would talk about how to structure that part of the pretrial interview? Well I did. And guess what? Unless you skipped ahead you just read it, Chapter 5 – **Direct "Examination."**

"But wait," you respond perplexed, "that Chapter was about testifying in court, what about getting ready to do that?" There you go, that's the trick. Your approach to Act II should be the same as your approach to in-court testimony. No script, just a guided conversation that will allow the witness to become more familiar with the process of telling their story in their words, unrehearsed.

Familiarity will generate comfort. As the witness gets accustomed to sitting in the witness stand and telling their story, with you guiding them along when necessary, their comfortable level will grow. They will be used to just telling their story, rather than robotically anticipating the next question and giving the same answer to it they have every time you have "practiced" it. Thus, once the witness enters the courtroom to testify, that conversational process will be second-nature to them and the confidence it inspires in them will shine through on the witness stand, enhancing their credibility with the trier of fact (that is the plan of course, and you know what I have said about best-laid plans and "the enemy"). So treat Act II just as you would a direct examination.

You will need to do a couple of additional things in Act II. This is your chance to preview expected cross-examination. That cross examination should be written out in advance and delivered aggressively, preferably by a different counsel than the one planning on handling the direct. Based on the witnesses' performance, counsel should then coach them on format of answers (short) and demeanor (respectfully calm, unless indignation is called for). While you should craft an effective cross-examination (one that controls the witness), it is also important to prepare the witness for a bad cross-examination (one that unintentionally allows them to provide answers other than "yes" or "no"). Though you should not tell them what say, you absolutely can discuss what an appropriate answer to a particular topic would be if given the chance to explain. If, surprise surprise, the cross examination defies the odds and is effective, the witness still may need to explain something on redirect so this preparing to do so during Act II will get them ready to do just that on redirect.

Logistically, it is probably best to talk to the witness about what they intend to wear to court and what they should and should not bring (basically nothing, and certainly not anything with them to the stand). I also like to talk to them about anything that could distract them from their testimony (*e.g.,* work issues, child care, other appointments), with a goal of seeing if there is anything we can do to alleviate that additional stressor. A comfortable, prepared, and undistracted witness will do wonders for your case.

Chapter 6

OBJECTION CREDIBILITY

Remember this from A Few Good Men –
Jo: "Your Honor, we re-new our objection to Commander Stone's testimony. …" Judge: "The objection's overruled, counsel." Jo: "Sir, the defense STRENUOUSLY objects …." Judge: "Noted." There may be a better way to object, even strenuously. Though this is an old article, written when ***PrimeCOLE*** *was merely a young pup, the guidance remains true now that he is an old dog.*

Chapter 6 – Objection Credibility

My first objection in my first jury trial was less than eloquent. Realizing the State's witness was reading from some unidentified piece of paper before answering every question, I jumped up to object based on lack of personal knowledge. For some reason, it just did not come out that way; "Your Honor, um, I noticed that the officer seems to be reading from something, huh, she shouldn't be allowed to do that." Properly chastised by the judge for being unable to form a valid objection, I quickly sat down.

In one fell swoop, I lost what credibility I had with the judge and came across as a bumbling fool to the jury. Of course, as a 23-year-old, third-year law student interning at the local public defender's office, I did not have much credibility to begin with and actually was a bumbling fool. Luckily, in spite of his attorney (his Rule 9 intern), the jury acquitted my client and I lived to fight another day having learned an important lesson—object properly.

Objecting properly means avoiding "speaking (rambling) objections." Combine courtroom inexperience with a dash of nervousness, and new attorneys tend to have difficulty translating their knowledge of the rules of evidence into intelligent objections. "Objection, hearsay," becomes "objection, this witness doesn't know that, he's not a proper witness, he is just repeating what he heard …" and on and on without the buzzword "hearsay" ever escaping counsel's lips. Somewhere between the brain and the lips, three years of legal education evaporates.

> **Somewhere between the brain and the lips, three years of legal education evaporates**

Being able to re-establish that connection has numerous benefits. In the heat of battle, you have precious little time and few opportunities to establish credibility with the judge, members, or even opposing counsel. Being able to confidently and succinctly object tells

all the participants that you know the rules, are prepared, and are a force to be reckoned with. It allows you to appear more experienced that you may be and results in the participants taking you more seriously as a litigator. This has at least three benefits:

- The judge will consider your arguments to be more persuasive, perhaps even the marginal ones
- Opposing counsel may not attempt to make their own marginal arguments if they suspect that you are knowledgeable enough to call them on it
- More importantly, the members will have more respect for you, which should work in your client's favor when you stand for closing argument

Not only is properly objecting important for these "stylistic" reasons, it is required by the rules. Military Rule of Evidence 103(a)(1) requires that objections state "the specific ground … if the specific ground was not apparent from the context." This means your objections should be lodged "succinctly, without excessive argument."[1] For defense counsel, if you fail to object with specificity and clarity, you run the real risk of waiving objections for appeal: "Rule 103(a)(1) has taken a 'very expansive view of waiver,' indicating that defense counsel must pose specific and timely objections to inadmissible evidence or face waiver on appeal."[2]

Sometimes, however, a "speaking objection" is tactically appropriate. Sometimes an objectionable question or answer may require you to "educate" the members why the question or answer is so heinous, especially if simply striking and instructing will not "un-ring the bell." And sometimes opposing counsel's question will just sound wrong but you are not sure of the proper objection. Jump to your feet and engage in a colloquy with the judge about your discomfort with the question or the answer; perhaps you will think of the proper objection while you are on your feet, perhaps the judge will bail you out. In any event, it is better to do something than remain a potted plant.

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[1] Thomas A. Mauet, TRIAL TACTICS 467 (5th ed. 2000).

[2] Stephen A. Saltzberg, Lee D. Schinasi, David A. Schlueter, MILITARY RULES OF EVIDENCE MANUAL 21-22 (4 ed. 1997). The authors go on to note that the "plain error" doctrine can save an otherwise waived objection. But counsel should not consider the "plain error" doctrine as a safety net for inadequate trial performance.

But strive to always be prepared to properly object to objectionable questions or answers. In this regard, experience, confidence, and real-world familiarity with the evidence rules will help you object properly. To get to that point, try the following:

- STUDY: Mastery of the rules of evidence is the lifeblood of a trial attorney, so do all you can to know them cold. Read them, read them again, and then start over reading them the next day. Make yourself an objection "cheat sheet" or buy a commercial equivalent. Periodically review appellate decisions for real-world applications of the rules of evidence. Check with you state bar association for their schedule of continuing legal education events focused on evidentiary issues.

- OBSERVE: Every question asked at trial is potentially, theoretically at least, objectionable. Sit in on courts and think of potential objections to every question asked. Too bad you "youngs" do not have CourtTV available to you—that's how I watch the OJ Simpson trial start to finish. But you do have YouTube and just search "cross examinations" and that will link you to plenty of real-life courtroom dramas to practice against.

- PRACTICE: Aside from actual trials, of course, moot courts are an invaluable tool. The National Institute of Trial Advocacy (www.nita.edu) hosts numerous moot-court programs across the county. And even better, shall we play a game? The next chapter of this Compendium will give you a chance to practice your objection skills in the simmering heat of a mock murder trial … very exciting, good luck.

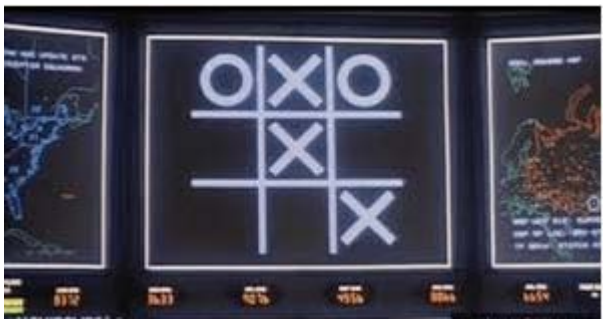
Ultimately, your credibility in court is based on your knowledge of the rules of evidence, and your ability to stand up and translate that knowledge into concise and intelligent objections. Distinguish yourself from your peers by objecting properly.

Experience, confidence, and real-world familiarity with the evidence rules will help you object proper, [but] in any event, it is better to do something than remain a potted plant

Chapter 7

THE OBJECTION CHALLENGE

"Shall we play a game?"



Chapter 7 – The Objection Challenge

My assumption is that after three years of law school you have at least a passing familiarity with the rules of evidence and can apply them practically. Let's test that theory. What follows is a question-and-answer, direct- and cross-examination session with a witness in a hypothetical murder case. Your role is not trial or defense counsel; rather, you are über-counsel, simply deciding whether a particular question (or answer) is objectionable and the basis for the objection. The focus is not on substance or strategy—don't ask yourself "should I object?" Ask yourself "is the question or answer reasonably objectionable?" I usually conduct the Challenge in a live setting where the participants are only allowed a second or two after the question (or answer) to decide whether they should object and, if so, the basis. In this format, the Challenge is self-paced, but I encourage you not to linger after reading the question (or answer) as you decide whether the question (or answer) is objectionable—the faster the better.

Patty Peacock

Scenario: On the night of 2 February there was a party at the palatial estate of Patty Peacock, a wealthy socialite and estranged wife of the mayor, Sam Peacock. Patty and Sam have lived apart for a number of years, but have not divorced. Patty supported Sam's opponent in the last election. Sam was at the party that night.

Sam's "secret" newest girlfriend is Stacey Scarlett, who also happens to be Patty Peacock's lifelong friend. Though a "secret," the relationship has recently been the main subject in the local rumor mill. Stacey Scarlett was at the party that night.

Professor Peter Plum was also at the party that night. He and Patty Peacock are in a relationship that has grown very serious … in fact, they recently visited a lawyer to discuss moving the Peacock divorce forward—Patty also changed her will, insurance, and property holdings to now include Professor Plum as beneficiary.

The party was well attended and continued until early morning … with alcohol flowing freely. During the party, all the relationships came to a head and there was much drama, yelling and screaming, and threats. At 2 a.m. the party came to an end and the guests began to leave—including Sam Peacock and Professor Plum. At approximately 2:10 a.m. there was a scream from a back bedroom and a number of the staff cleaning up the library and the kitchen ran to the other side of the house to investigate. They threw open the bedroom door and saw Stacey Scarlett sitting on the floor, holding the limp body of Patty Peacock—Patty had blood all over her head and was not moving, but it appeared that Patty was saying something to Stacey … then Patty died.

Mayor Sam

The police investigated and determined that Patty had died from blunt-force trauma. Through scientific analysis they determined that she had been stuck by a pipe wrench, though a pipe wrench was never found. They did discover an unlocked tool box in the bed of Professor Plum's truck, but there was no pipe wrench in it. Stacey told the police that she heard the scream, came running and found Patty lying on the floor covered in blood; she scooped Patty up in her arms and tried to revive her; Patty leaned in and whispered to her "it was him" … and then died. Stacey said a side door to the bedroom was open and she saw a figure in the dark running away, someone about 5'10" tall and 170-190 pounds, but could not identify who it was—a description that matches both Sam Peacock and Professor Plum. A moment after seeing that person disappear she heard tires squeal and saw a truck leave the area at a high speed. She could only remember the first four numbers/letters of the license plate "1A43." Professor Plum's truck's license plate was "1A98 RRR."

Professor Plum

Professor Plum is accused of killing Patty Peacock with a pipe wrench in the bedroom.

Judge: "Government, call you first witness."
Government: "The United States calls Ms. Stacey Scarlett"

Stacey Scarlett

Q#1: Please tell us your name as told to you by your parents.
OBJECTION: YES NO BASIS: _____
A#1: My parents named me Stacey Joan Scarlett.

Q#2: What is it that you do for a living?
OBJECTION: YES NO BASIS: _____
A#2: I am an actress; and I also model.

Q#3: How much money do you earn as a model?
OBJECTION: YES NO BASIS: _____
A#3: I don't know for sure, enough to live comfortably.

Q#4: Can you tell us some of the movies that you have starred in and magazines that you have modeled for?
OBJECTION: YES NO BASIS: _____
A#4: There are too many to list, I've been very successful.

Q#5: Do you consider yourself to be a truthful person?
OBJECTION: YES NO BASIS: _____
A#5: Yes I do.

Q#6: Did you know Patty Peacock?
OBJECTION: YES NO BASIS: _____
A#6: Yes.

Q#7: What was your relationship with her?
OBJECTION: YES NO BASIS: _____
A#7: She was my friend for more than 20 years, we were best friends since high school.

Q#8: When was the last time you saw Patty Peacock alive?
OBJECTION: YES NO BASIS: _____
A#8: At a party at her house on 2 February.

Q#9: So you attended a party on 2 February at which the Accused brutally murdered Mrs Peacock?
OBJECTION: YES NO BASIS: _____
A#9: Yes, I was at the party.

Q#10: What time did you arrive at the party?
OBJECTION: YES NO BASIS: _____
A#10: I left work, drove over, and arrived at Patty's at about 8:30pm.

Q#11: Tell us everything that happened at the party
OBJECTION: YES NO BASIS: _____
A#11: There was a lot.

Q#12: Well, can you describe the layout of Mrs. Peacock's house?
OBJECTION: YES NO BASIS: _____
A#12: Sure, it is a very large house all on one floor. The master bedroom is in the back left corner; the library is in the front right corner and the kitchen is adjacent to the library. There is a huge side yard outside the library and a large driveway/parking area on the other side of the house.

Q#13: How long did the party last?
OBJECTION: YES NO BASIS: _____
A#13: It ended at exactly 2am because that was Patty's rule.

Q#14: Do you know how many people attended the party?
OBJECTION: YES NO BASIS: _____
A#14: If not sure, I'd guess about 50.

Q#15: Do you know the Accused, Professor Plum?
OBJECTION: YES NO BASIS: _____
A#15: Yes, he's a liar and an evil person.

Q#16: When did you first meet the Accused, Professor Plum?
OBJECTION: YES NO BASIS: _____
A#16: I was one of his students at the University about 10 years ago, I first took a class from him and later became his assistant.

Q#17: Was your relationship with him ever more than professional?
OBJECTION: YES NO BASIS: _____
A#17: Yes, but it ended badly and I left the University to become an actress. I've hardly spoken to him since then.

Q#18: Did you have a sexual relationship with him to get better grades?
OBJECTION: YES NO BASIS: _____
A#18: Of course not.

Q#19: What was Professor Plum doing before he arrived at the party?
OBJECTION: YES NO BASIS: _____
A#19: I have no idea.

Q#20: Who else attended the party?
OBJECTION: YES NO BASIS: _____
A#20: Lots of community leaders and political types, including Patty's husband Mayor Peacock.

Q#21: Did anything interesting happen at the party?
OBJECTION: YES NO BASIS: _____
A#21: I don't know what you mean.

Q#22: Did you observe any interaction between Mrs. Peacock and the Accused during the party?
OBJECTION: YES NO BASIS: _____
A#22: I did.

Q#23: What did you observe?
OBJECTION: YES NO BASIS: _____
A#23: I saw them in the corner having a very animated conversation … I could not hear it.

Q#24: Was Mrs. Peacock mad at Professor Plum during that conversation?
OBJECTION: YES NO BASIS: _____
A#24: Yes.

Q#25: How do you know that she was mad at Professor Plum during that conversation?
OBJECTION: YES NO BASIS: _____
A#25: Later she told me that she intended to end the relationship with him and that she had told him that and he called her a bunch of names and said she would regret that decision … and that that made her mad at the time.

Q#26: Let me ask you this to clarify, when she told you this, what was her demeanor?
OBJECTION: YES NO BASIS: _____
A#26: She was calm, matter-of-fact about it; she laughed about it.

Q#27: So let me ask again, what did she tell you about her conversation with Professor Plum?
OBJECTION: YES NO BASIS: _____
A#27: Just like I said a minute ago.

Q#28: Did you observe Mrs. Peacock interact with her husband during the party?
OBJECTION: YES NO BASIS: _____
A#28: Yes, but I don't remember any specifics, only that I saw them talking a few times.

Q#29: How long have you known Mayor Peacock?
OBJECTION: YES NO BASIS: _____
A#29: About as long as I've known Patty.

Q#30: Are you and Mayor Peacock an item?
OBJECTION: YES NO BASIS: _____
A#30: That's none of your business.

Q#31: Where in the house was the party taking place?
OBJECTION: YES NO BASIS: _____
A#31: Mainly in the library, which is very very large, and for a while out on the deck just outside the library.

Q#32: What were you doing during the party?
OBJECTION: YES NO BASIS: _____
A#32: Same as everyone else, listening to the band, talking with friends, eating and drinking.

Q#33: What kind of drinking?
OBJECTION: YES NO BASIS: _____
A#33: Mixed drinks and wine … there was an open bar and most everyone was taking advantage.

Q#34: How much did you have to drink that night?
OBJECTION: YES NO BASIS: _____
A#34: A lot, but I don't think I was drunk.

Q#35: Was Professor Plum drunk?
OBJECTION: YES NO BASIS: _____
A#35: I'm not sure what you mean.

Q#36: How much alcohol did you see Professor Plum drink that night?
OBJECTION: YES NO BASIS: _____
A#36: I don't remember.

Q#37: Were you able to observe him over the course of the night
OBJECTION: YES NO BASIS: _____
A#37: Yes.

Q#38: Did he appear drunk to you?
OBJECTION: YES NO BASIS: _____
A#38: Probably.

Q#39: Were you able to interact with Mrs. Peacock during the party?
OBJECTION: YES NO BASIS: _____
A#39: Yes, we chatted now and again and she and I worked with the staff to ensure that the party was a success.

Q#40: Did you notice anything unusual about her demeanor that night?
OBJECTION: YES NO BASIS:
_____
A#40: Yes, she seemed like very nervous all night.

Q#41: Was she afraid of the Accused, Professor Plum?
OBJECTION: YES NO BASIS: _____
A#41: I think so.

Q#42: Did she tell you that she was afraid of the Accused, Professor Plum?
OBJECTION: YES NO BASIS: _____
A#42: Yes she did.

Q#43: How did the party come to an end?
OBJECTION: YES NO BASIS: _____
A#43: Patty announced that it was 2 am and she was going to bed, she thanked everyone for coming and told them to drive safe.

Q#44: Did you see where she went?
OBJECTION: YES NO BASIS: _____
A#44: She left the library, I assume she went to her bedroom like she said she was going to do.

Q#45: Did you see Professor Plum leave?
OBJECTION: YES NO BASIS: _____
A#45: No.

Q#46: Where was Professor Plum at this point?
OBJECTION: YES NO BASIS: _____
A#46: I don't know.

Q#47: What was he doing?
OBJECTION: YES NO BASIS: _____
A#47: He was killing Patty.

Q#48: What did you do as everyone was starting to leave?
OBJECTION: YES NO BASIS: _____
A#48: I had told her that I would stay for a bit and make sure the staff was cleaning up the mess. About 10 minutes after everyone left I went to her bedroom to let her know I was going to leave.

Q#49: What happened next?
OBJECTION: YES NO BASIS: _____
A#49: I heard what I thought was a scream and then a door slam.

Q#50: What did you do?
OBJECTION: YES NO BASIS: _____
A#50: I continued to her bedroom and knocked on the door; there was no answer so I knocked again; when she didn't answer I opened the door and looked in.

Q#51: What was Professor Plum doing at this point?
OBJECTION: YES NO BASIS: _____
A#51: I can only guess.

Q#52: What did you see when you looked into the bedroom?
OBJECTION: YES NO BASIS: _____
A#52: The lights were on and I saw Patty laying on the floor and blood coming from some kind of head wound.

Q#53: From what you observed, tell us what was medically wrong with Mrs Peacock.
OBJECTION: YES NO BASIS: _____
A#53: I assumed she was bleeding to death.

Q#54: What else did you notice about the room?
OBJECTION: YES NO BASIS: _____
A#54: A side door to the bedroom was open.

Q#55: What else can you tell us?
OBJECTION: YES NO BASIS: _____
A#55: What do you mean?

Q#56: What did you do next?
OBJECTION: YES NO BASIS: _____
A#56: I rushed over, dropped to the floor and took her in my arms; I saw the cut on her head and pressed a towel that was laying nearby to stop the bleeding.

Q#57: How did Mrs Peacock receive that injury to her head?
OBJECTION: YES NO BASIS: _____
A#57: I assume Professor Plum did it.

Q#58: Looking through that open door, you saw Professor Plum running away.
OBJECTION: YES NO BASIS: _____
A#58: Yes.

Q#59: What happened next?
OBJECTION: YES NO BASIS: _____
A#59: Patty was trying to say something so I put my ear to her lips.

Q#60: What did she tell you?
OBJECTION: YES NO BASIS: _____
A#60: She whispered, "He killed me"; and then she died.

Q#61: Who was the "he" she was referring to?
OBJECTION: YES NO BASIS: _____
A#61: Clearly Professor Plum, the murderer.

Q#62: What effect did your best friend's death have on you?
OBJECTION: YES NO BASIS: _____
A#62: I've never recovered from losing her.

Q#63: What happened next?
OBJECTION: YES NO BASIS: _____
A#63: Some of the staff arrived at that moment and also at that moment I heard tires squeal and saw a truck leave the area at a high speed.

Q#64: Did you see the license plate number?
OBJECTION: YES NO BASIS: _____
A#64: Yes, part of it.

Q#65: What were the numbers you saw?
OBJECTION: YES NO BASIS: _____
A#65: I don't remember.

Q#66: Isn't it true that the numbers you saw were "1A43"?
OBJECTION: YES NO BASIS: _____
A#66: If you say so.

Q#67: Did you tell the police that the numbers you saw were "1A43"?
OBJECTION: YES NO BASIS: _____
A#67: If you say so.

Q#68: Is there anything that might refresh your memory about the license plate numbers that you saw?
OBJECTION: YES NO BASIS: _____
A#68: Yes, I wrote them down on a piece of paper and handed that paper to the police officers who came to the scene.

Q#69: Your Honor, Government offers Prosecution Exhibit 1 for Identification, the piece of paper, into evidence as Prosecution Exhibit 1.
OBJECTION: YES NO BASIS: _____
A#69: --

Q#70: On the other hand, Ms Scarlett, I am going to show you that piece of paper, now marked as Appellate Exhibit I, and ask you to look at it, read it silently to yourself, and then look up at me and I'll take it back ….
OBJECTION: YES NO BASIS: _____
A#70: --

Q#71: Now that I've taken Appellate Exhibit I back from you, did looking at it refresh your memory about the license plate numbers that you saw?
OBJECTION: YES NO BASIS: _____
A#71: No.

Q#72: Your Honor, Government offers Prosecution Exhibit 1 for Identification, the piece of paper, into evidence as Prosecution Exhibit 1.
OBJECTION: YES NO BASIS: _____
A#: --

Q#73: On the other hand, Ms. Scarlett, did you write the license plate numbers down on the piece of paper when the memory of those numbers was fresh in your memory.
OBJECTION: YES NO BASIS: _____
A#73: Yes.

Q#74: Were the numbers correct when you wrote them down to your best recollection?
OBJECTION: YES NO BASIS: _____
A#74: Yes.

Q#75: Were the numbers you wrote down "1A43"?
OBJECTION: YES NO BASIS: _____
A#75: Yes.

Q#76: Your Honor, Government offers Prosecution Exhibit 1 for Identification, the piece of paper, into evidence as Prosecution Exhibit 1.
OBJECTION: YES NO BASIS: _____
A#76: --

Q#77: Let me move on to another issue … while in the bedroom did you see anything that you believe may have been a murder weapon?
OBJECTION: YES NO BASIS: _____
A#77: I did not.

Q#78: So in your opinion, based on what you observed in the bedroom, how was Mrs. Peacock killed?
OBJECTION: YES NO BASIS: _____
A#78: Professor Plum killed her with a bat.

Government: No further questions your Honor.
Judge: Defense Counsel, do you wish to question this witness?
Defense Counsel: Yes, your Honor.

Q#79: You previously testified under oath that you are a model, correct?
OBJECTION: YES NO BASIS: _____
A#: Correct.

Q#80: You are also a Wiccan right, you follow that religion?
OBJECTION: YES NO BASIS: _____
A#80: Yes, so?

Q#81: But someday you hope to become a lawyer?
OBJECTION: YES NO BASIS: _____
A#81: Maybe, I don't know.

Q#82: That night, Mrs. Peacock did confront you about being in a relationship with her husband, Mayor Peacock?
OBJECTION: YES NO BASIS: _____
A#82: We talked about it.

Q#83: Come on, that's a lie, you argued about it.
OBJECTION: YES NO BASIS: _____
A#83: We talked about it.

Q#84: So if Colonel U.S. Mustard comes in to court and says he saw you two arguing loudly he would be lying?
OBJECTION: YES NO BASIS: _____
A#84: Yes.

Q#85: Let me ask that another way, you know Colonel U.S. Mustard, correct?
OBJECTION: YES NO BASIS: _____
A#85: Yes.

Q#86: You appeared in a movie together last year.
OBJECTION: YES NO BASIS: _____
A#86: Yes.

Q#87: You would describe your relationship as friendly but not necessarily friends.
OBJECTION: YES NO BASIS: _____
A#87: Yes.

Q#88: No animosity between the two of you.
OBJECTION: YES NO BASIS: _____
A#88: No.

Q#89: He was at the party.
OBJECTION: YES NO BASIS: _____
A#89: Yes.

Q#90: You know that he is not a drinker.
OBJECTION: YES NO BASIS: _____
A#90: No he's not.

Q#91: You are not aware of any motive he would have to fabricate testimony against you.
OBJECTION: YES NO BASIS: _____
A#91: No I am not.

Q#92: You were drinking at the party.
OBJECTION: YES NO BASIS: _____
A#92: Yes.

Q#93: In fact, you drank a lot that night.
OBJECTION: YES NO BASIS: _____
A#93: I don't know what you mean by a lot.

Q#94: You're an alcoholic.
OBJECTION: YES NO BASIS: _____
A#94: No!

Q#95: When you drink, it effects your behavior, correct?
OBJECTION: YES NO BASIS: _____
A#95: I don't think so.

Q#96: Scientific studies say that people don't think as clearly when they have had too much alcohol to drink.
OBJECTION: YES NO BASIS: _____
A#96: If you say so.

Q#97: Have you ever drank so much alcohol that you don't remember what happened while you were drinking?
OBJECTION: YES NO BASIS: _____
A#97: No.

Q#98: It's true that when you drink you feel less inhibited.
OBJECTION: YES NO BASIS: _____
A#98: Maybe to a small degree.

Q#99: It's true that when you drink you are quicker to anger.
OBJECTION: YES NO BASIS: _____
A#99: No.

Q#100: It's true that on the Fourth of July last year, while drinking at a party at Mrs Peacock's home, that you were asked to leave because you had gotten into a heated argument with another guest.
OBJECTION: YES NO BASIS: _____
A#100: I left for my own safety

Q#101: Isn't it true that you confessed to your psychotherapist that you killed Mrs Peacock?
OBJECTION: YES NO BASIS: _____
A#101: Absolutely not!

Q#102: Mrs Peacock and Mayor Peacock are married.
OBJECTION: YES NO BASIS: _____
A#102: Yes.

Q#103: But you were in a relationship with Mayor Peacock.
OBJECTION: YES NO BASIS: _____
A#103: Yes.

Q#104: In fact, when we say you were in a relationship, you were having sex with him on a regular basis.
OBJECTION: YES NO BASIS: _____
A#104: We were in an adult relationship.

Q#105: You were trying to keep that relationship a secret.
OBJECTION: YES NO BASIS: _____
A#105: Yes.

Q#106: In fact, you and Mayor Peacock talked that night at the party and he told you to keep the relationship a secret.
OBJECTION: YES NO BASIS: _____
A#106: I don't recall.

Q#107: Regardless, you wanted that relationship to continue.
OBJECTION: YES NO BASIS: _____
A#107: Yes.

Q#108: And Mrs. Peacock threatened to expose it to the world
OBJECTION: YES NO BASIS: _____
A#108: No she did not.

Q#109: Well that's convenient, she's dead so she can't refute your lies.
OBJECTION: YES NO BASIS: _____
A#109: You're crazy.

Q#110: You agree that Mrs. Peacock left the party exactly at 2 am and went to her room.
OBJECTION: YES NO BASIS: _____
A#110: Yes

Q#111: According to your testimony you found her lying on the floor at 2:10 am.
OBJECTION: YES NO BASIS: _____
A#111: Yes.

Q#112: So you had 10 minutes in which you could have killed her and hid the murder weapon.
OBJECTION: YES NO BASIS: _____
A#112: No.

Q#113: You've been in trouble with the law before.
OBJECTION: YES NO BASIS: _____
A#113: What do you mean?

Q#114: Twelve years ago you were arrested for shoplifting.
OBJECTION: YES NO BASIS: _____
A#114: Yes.

Q#115: And when you were in junior high school you were arrested for punching a classmate.
OBJECTION: YES NO BASIS: _____
A#115: Yes.

Q#116: You were interviewed by the police after they arrived at the scene.
OBJECTION: YES NO BASIS: _____
A#116: Yes.

Q#117: You told the police that you did not know who you saw running away from the bedroom.
OBJECTION: YES NO BASIS: _____
A#117: I don't think so, it was him.

Q#118: You know that the official police report directly contradicts your description of the events that occurred at the party?
OBJECTION: YES NO BASIS: _____
A#118: I doubt that.

Q#119: Your testimony a few minutes ago on direct was that you saw Professor Plum running from the bedroom.
OBJECTION: YES NO BASIS: _____
A#119: Yes.

Q#120: So that is your under oath testimony about what you saw that night?
OBJECTION: YES NO BASIS: _____
A#120: Yes.

Q#121: That's what you believe you saw.
OBJECTION: YES NO BASIS: _____
A#121: Yes.

Q#122: You remember giving a statement to the police that night about what happened.
OBJECTION: YES NO BASIS: _____
A#122: Yes.

Q#123: They told you it was important that you tell them everything you saw.
OBJECTION: YES NO BASIS: _____
A#123: Yes.

Q#124: And to be truthful.
OBJECTION: YES NO BASIS: _____
A#124: Yes.

Q#125: You were truthful.
OBJECTION: YES NO BASIS: _____
A#125: I was tired, I was upset.

Q#126: You didn't lie.
OBJECTION: YES NO BASIS: _____
A#126: No I did not lie.

Q#127: The night of the crime, immediately thereafter when the events were freshest in your mind, you told them "I saw a figure in the dark running away, someone about 5'10" tall and 170-190 pounds but could not identify who it was."
OBJECTION: YES NO BASIS: _____
A#127: I saw Professor Plum, I'm sure it was him.

Q#128: Not my question, did you speak those words to the police that night?
OBJECTION: YES NO BASIS: _____
A#128: Can I see my statement?

Q#129: Is it your testimony now that you do not recall what you told the police on that night?
OBJECTION: YES NO BASIS: _____
A#129: Yes.

Q#130: Your Honor, the Defense offers Defense Exhibit A for Identification, the witness' statement to police on 3 February which the Government provided to us, as Defense Ex A.
OBJECTION: YES NO BASIS: _____
A#130: --

Q#131: You made another statement to police about your involvement in the events of 2 February, correct?
OBJECTION: YES NO BASIS: _____
A#131: When?

Q#132: After your polygraph examination you gave another statement.
OBJECTION: YES NO BASIS: _____
A#132: No, I just answered the same questions.

Q#133: It's true that you are a violent person?
OBJECTION: YES NO BASIS: _____
A#133: No

Q#134: You were married and once hit your spouse and told him you were going to kill him.
OBJECTION: YES NO BASIS: _____
A#134: No, that never happened.

Q#135: Two weeks after your friend's death you were working on a comedy movie.
OBJECTION: YES NO BASIS: _____
A#135: Yes.

Q#136: Mrs. Peacock didn't know she was going to die when she allegedly whispered in your ear.
OBJECTION: YES NO BASIS: _____
A#136: I think she did.

Q#137: Your testimony on direct a few minutes ago was that she said "He killed me."
OBJECTION: YES NO BASIS: _____
A#137: Yes.

Q#138: I want you to read the highlighted portion of Defense Exhibit A out loud.
OBJECTION: YES NO BASIS: _____
A#138: "Patty leaned in and whispered to me "it was him."

Q#139: You were the only one who heard this alleged statement.
OBJECTION: YES NO BASIS: _____
A#139: Yes.

Q#140: Even then she didn't name her killer, assuming it wasn't you.
OBJECTION: YES NO BASIS: _____
A#140: I guess now that I look at my statement.

Q#141: In fact, she didn't even use the word "killed."
OBJECTION: YES NO BASIS: _____
A#141: I guess.

Q#142: Why did you kill your friend Patty Peacock?
OBJECTION: YES NO BASIS: _____
A#142: I didn't.

Whew! Good job. Or was it??? At the end of this Compendium, after the Glossary, you will find Appendix A with an Answer Key. Check your answers against mine. You may have more objections than I did; you may have less. You may have objected to a question on different grounds. I may be right, you may wrong; you may be right, I may be wrong. The destination, however, is not as important as the journey. The skill the Challenge is supposed to sharpen is not your knowledge of the rules of evidence. Rather, the skill being sharpened is your ability to apply that pre-existing knowledge to "real-world" questions (and answers) and recognize questions (and answers) that are objectionable, even if you are not totally sure why.

Chapter 8 – CASE STUDY: Cross Examination I

Mention the court-martial of *United States v. Lt Col James Wilkerson*[1] and you are likely to generate strong opinions. This relatively straightforward, but high-profile, sexual-assault prosecution of an F-16 pilot and Chief of Safety at Aviano Air Base blew up the military-justice system.

From an error-filled, self-published book on Amazon ineptly attacking the *Wilkerson* prosecutors and prosecution, to Congress eviscerating convening authority clemency powers and substantially rewriting and rebalancing the military-justice system,[2] to the tumultuous retirement of the 3-star Third Air Force Commander,[3] the collateral consequences of the successful prosecution of Lt Col Wilkerson, and eventual set aside of that conviction, reverberated far and wide. And the *Wilkerson* ripples continue to be felt as Congress and the Department of Defense work to further modernize the Uniform Code of Military Justice. Someday, undoubtedly, the whole sordid affair will birth a movie-of-the-week.

But lost in the political storm of post-trial *Wilkerson* is a focus on the trial tactics which secured the hard-fought sexual-assault conviction. Thus, to inaugurate a series of articles demonstrating how the theories of litigation can expertly be put into "battlefield" practice we start with a review of the key cross examination from *United States v. Lt Col James Wilkerson*—that of Beth Wilkerson, the Accused's spouse.

Theory

Before the practice, the theory. I have mentioned it before but it deserves repeating, *ad nauseum*: Contrary to every briefing you have ever received at every

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[1] *United States v. Lieutenant Colonel James H. Wilkerson*, ACM 38284 (tried October 26 to November 3, 2012 at Aviano Air Base, Italy).
[2] *See* National Defense Authorization Act of Fiscal Year 2014, Pub. L. No. 113-66, § 1702, 127 Stat. 672, 954–58 (2013).
[3] *See* Nancy Montgomery, *Air Force general at center of sexual assault controversy to retire*, STRIPES.COM (8 January 2014), http://www.stripes.com/news/air-force-general-at-center-of-sexual-assault-controversy-to-retire-1.261037.

litigation-skills course, whatever aspect of trial practice the instructor is then briefing (from *voir dire*, to opening statement, to direct examinations) is not the key to victory. Trust me, *voir dire* is not the key to victory. And neither of the two glory moments for every litigator in every case (cross-examination and closing argument) is the key to victory. Mastery of the facts and evidence is the key victory. Let me repeat for effect: mastery of the facts and evidence is the key to victory.

If you do not know the facts and evidence better than every person in that courtroom, all your skills may enhance your ego and watercooler boasting but they will not win you a conviction or acquittal. If you know the facts and evidence better than every person in that courtroom, however, skillfully advancing your theory of the case through a pointed, controlled, and structured cross-examination is more likely to get you closer to conviction or acquittal than most other aspects of trial practice.

Now, every litigator has a different approach to constructing an effective cross-examination. Mine is right, of course, but take what works for you using as many examples as you can observe first hand or read in transcripts. But all "good" cross-examinations have commonality: They are short and to the point, they have a limited number of set goals (one almost always being to undermine the witness's or another witness's credibility), they control the witness without arguing, they in the end make the most sense during closing argument when the questions and answers are strung together in a narrative (aka theme and theory), they are structured and paced in a way that keeps the witness off balance, they are delivered with confidence, and they start and end strong. You will see all of that in the coming snippets.

I can judge the competence of my opponent by the first three questions of their first cross examination of my witness

And one other point most importantly to our young but, surprisingly, to some of our more seasoned litigators as well—do not repeat the direct. Again for emphasis—do not repeat the direct. Everyone says they know this novel idea, but my courtroom experience says otherwise. I can judge the competence of my opponent by the first three questions of their first cross examination of my witness. If that cross-examination starts, "So on direct you testified that . . . , is that correct," and then again, and then again, without an

impeachment punchline anywhere in sight—and about 70% of my opponents' cross examinations in the many, many litigated cases I have prosecuted start this way—I know immediately that the verdict is not going to be the result of me having been out-lawyered by opposing counsel. So stop doing that.

And with that, on to the cross examination of Beth Wilkerson.

Background[4]

In March 2012, Lt Col Wilkerson and other high ranking male members of the 31st Fighter Wing attended an on-base event where they met a group of women which included the Victim, a civilian physician's assistant new to Aviano Air Base. Eventually, the two groups combined and drove to Lt Col Wilkerson's home off the installation to continue socializing. Beth Wilkerson was home and for the next few hours the group mingled, ate, and drank. After a series of events, all visiting members of both groups left except for the Victim who was effectively abandoned at the Wilkersons' home by her otherwise distracted friends. Late at night, without transportation back to the base, Beth Wilkerson offered to let the Victim sleep in an extra bedroom. Without another option, unable to get ahold of her friends, the Victim accepted that offer and went to sleep in that bedroom.

Early in the morning hours of March 24, 2012, Lt Col Wilkerson entered that bedroom, got into the bed, and digitally penetrated the Victim's vagina. While this was occurring, Beth Wilkerson entered the room, turned on the lights, and reacted, telling the Victim to leave immediately. In the ensuing chaos, the Victim left the Wilkersons' home on a chilly Italian night, on foot, without her shoes, unsure of where she was. Luckily she ran into a group of Americans who told her where she was, so she called a co-worker who came and gave her a ride back to the base. She arrived at her billeting room around four that morning and sought out medical care a couple hours later. She attempted to make a restricted report of sexual assault, but was unable to do as a she was a civilian.

[4] Information for this article comes from the Record of Trial (herein "R.") in *United States v. Lt Col Wilkerson* (on file with the author; editorial revisions made for readability and to protect the personal identification of certain witnesses and individuals) and from interviews with the trial-counsel team of Major Ben Beliles, Major Vy Nguyen, and Colonel (ret) Don Christensen over various dates.

The Cross

Lt Col Wilkerson spoke to OSI agents and denied that he entered the bedroom, climbed into the bed, or sexually assaulted the Victim. At trial, he chose not to testify in his own defense but offered his wife who testified about the events of that night and the next day.

The defense theory was that the Victim was simply lying about what happened that morning; that Beth Wilkerson originally allowed the Victim to borrow a bedroom for the night; that later that morning, the Victim was being too noisy so at three in the morning Beth Wilkerson told her to go to sleep or leave; that the Victim left on her own volition; and that neither the Victim nor the Accused was drunk that night. This was essentially Beth Wilkerson's testimony on direct examination.

But this was something of a surprising defense theory. During the investigation prior to trial, the Wilkersons appear to have conspired to paint the Victim as intoxicated and confused. So, standing up to conduct his cross-examination, trial counsel had the following goal: undermine Beth Wilkerson's credibility (and by proxy that of the Accused's) by pointing out her various contradictions, implausibility, and motives to lie while demonstrating that the Victim had no such ulterior motives.

That effort started by pointedly noting that Beth Wilkerson's trial testimony was inconsistent with her statements to investigator about the level of the Victim's intoxication. Notice how trial counsel controls the examination, refusing to allow the witness to explain away her damaging answers:

> Q. Now, the way you described [the Victim] – well, first, was she intoxicated that night?
> A. When I first encountered her, when I spoke with her when she was sitting on the stairs, yes, I thought she was intoxicated. She slurred some of her words some, and so I could tell that she had been drinking.
> Q. Well, in fact, you believed that she was very intoxicated, didn't you?
> A. I did write in my statement that she was very drunk.
> Q. Well, in fact, you went to great length in your statement, you described at the beginning, "These three women were very drunk," correct?
> A. I did write that.
> Q. And then at the end, you said, "One last thing is that she was very drunk," correct?

A. I did, but I also . . .
Q. Did you write that?
A. Yes, Sir.
Q. Because that's the question. Did you write that?
A. Yes, Sir.
Q. And you put that at the end of your statement to the OSI, correct?
A. Yes, Sir.
Q. And you wanted to make sure, I mean that was one last thing you said, "She was very drunk." Correct?
A. Yes, Sir.[5]

Next, an extended examination of why the Wilkersons canceled a barbeque they had planned to host at their house the day following the assault. Beth Wilkerson's testimony on direct examination was that the cancelation was the result of a particular couple not being able to attend. But the prosecution's theory was that Beth Wilkerson had caught her husband assaulting the Victim, was upset and traumatized by the same, and that was the more reasonable explanation for her actions the next day in cancelling the barbeque. Notice how trial counsel controls the pace (breaking up the questions over different topic areas), allows the witness to explain when the explanation is irrelevant or useful, and pointedly confronts the witness with contrary evidence:

Q. Now the next morning, what time did you wake up on the 24th?
A. At 9 o'clock.
Q. You woke up at 9 o'clock?
A. Yes, Sir.

Two pages later [after returning to the level-of-intoxication issue]:
Q. All right, so I just want to make it clear, okay, so you had a barbeque scheduled for that day, and because you had gone to bed about four…
A. Yes, Sir.
Q. . . . and awakened around nine . . .
A. Yes, Sir.
Q. . . . you were tired, right?
A. Yes, Sir.
Q. And because the [Smith's] canceled, you didn't want to go through with this?
A. Yes.

Another short diversion to a different topic and then return to this line of questioning:

[5] R. at 740-41.

Q. All right. And so we've talked about what he was doing that day, what did you do after you woke up?
A. I cleaned the kitchen. I made all the beds. I organized the house and the [visiting] children's stuff. [Joan] was to be coming by that evening to pick the kids up, so I got their book bags together, I packed up their suitcase, made sure that I went through the house and that I had all of the [visiting] children's belongings so that when their mother came, I would have everything ready for her.
Q. Sounds like you had a full day, too?
A. Well, no – well, [Alexa] came over and we actually sat outside and talked.
Q. All right, so you had a friend over; you took care of the house; you took care of the children; a full, typical Saturday for you?
A. Yes.
Q. And other than being tired, you felt fine?
A. Yes, I did.
Q. Do you remember sending a text to [AR] on the morning of 24 March?
A. I did.
Q. And in that text, you told [AR], "Hey, I'm sorry, but we have to cancel today," correct?
A. I did.
Q. And you said, "I am very sick this morning," didn't you? Is that true?
A. Uh-huh.
Q. "And not getting any better." Isn't that what the text says?
A. Yes, it does.
Q. "Not sure what is wrong, but I was up to 5 AM." That's what the text says, correct?
A. Yes, that's correct.
Q. "And I can't keep anything down," is what the text says, correct?
A. Uh-huh.
Q. "Sorry, we'll have to try again soon." Is that what it says?
A. Yes, Sir.
Q. Was that a lie?
A. It was a story just to cancel . . .
Q. Was that a lie?
A. . . . the barbeque.
Q. Was that a lie?
A. Yes, Sir.
Q. So you lied to your friend, and you told her details about being very sick, correct?
A. I did.
Q. You lied to your friend and said you couldn't keep food down, correct?
A. Yes, Sir.
Q. You lied to your friend and said you were up until five in the morning, correct?
A. Correct.[6]

[6] R. at 743, 745, 747-48.

Trial counsel exemplifies knowing the facts and evidence better than every person in the courtroom and using one witness to undermine not only their credibility but the credibility of another "witness." Counsel uses Beth Wilkerson to demonstrate that either the Accused lied during his interview with OSI or she was lying during her direct examination, or more likely a bit of both.

> Q. Now, how was your husband feeling that day?
> A. He was—he said he was hung over.
> Q. Okay, hung over. Did he describe anything else?
> A. No, he was hung over and but for being hung over, he did an awful lot that day.
> Q. Yeah, what did he do that day?
> A. He got up early with the children, when they first woke up, and he went down and he made a big breakfast for them. And when I came down at 9 o'clock, he was preparing for the barbeque. We had not decided at that point we were going to cancel it. I had not talked to [Alexa]. And he went ahead and prepared the ribs to go into the smoker, and the brisket, and then he went to—he took the kids to Burger King to have lunch.
> ****
> Q. All right. So they are going to JWs end-of-the-season basketball gathering, and they're going to have lunch there, correct?
> A. Correct.
> Q. All right, so go on. Sounds like Colonel Wilkerson is a busy little bee, but go on. What else is going on?
> A. After they had lunch and the end-of-season basketball party, he met up with Major [Jones] and his children, and they went and played baseball.
> Q. Okay, and then after they played baseball, what did he do?
> A. He came home.
> Q. And what did he do when he came home?
> A. [Alexa] was over at the house, and her and I were sitting outside. It was a beautiful day, and he came in and he sat down next to me, and the three of us talked.
> Q. All right.
> A. And the kids were running around, playing.
> Q. The kids ran around and played, and about what time did you go to bed?
> A. That night?
> Q. Yeah.
> A. I went to bed at like 9:15-9:25.
> Q. And how about you husband?
> A. He was minutes behind me.[7]

[7] R. 745-47.

Unfortunately for her diminishing credibility, Beth Wilkerson did not seem to know what the Accused had told OSI about how he felt that day—the Accused's statements were recorded during the OSI interview and the prosecution presented clips of them to the members. According to the Accused, he felt "horrible" and Beth Wilkerson knew that: "What I will tell you is I felt unbelievably F'd up the next day." . . . "I don't, but I know I mentioned to my wife that, 'I feel horrible, horrible.'" . . . "I remember—I'll tell you what I remember that first set me off was that morning, the pancake mix was under the lower cabinet, and I almost fell over—forward as I went to get it out of the cabinet. I was having trouble focusing." Whether true or concocted, the cross-examination highlighted these inconsistencies and contradictions and undermined the credibility of both, and certainly the defense's theory of the case.[8]

This impeaching by contradiction continued, with trial counsel continuing to control the witness when necessary.

> Q. Ah, now then—the next morning, you weren't mad at your husband?
> A. I was mad at my husband. I was mad—I wasn't mad at my husband; I was mad that I was up all night.
> Q. Yeah, but you didn't ask him to help, right?
> A. Help what?
> Q. With [the Victim]; you didn't ask him to help with that situation.
> A. No.
> Q. Okay, so you, on your own, were the one who stayed up, right?
> A. I did.
> Q. And it wasn't your husband's fault that those people came home, right? I mean you blame Colonel [DO], right?
> A. I don't blame Colonel [DO]. [Accused] asked him to take them and go and it somehow came about that they were going to come in for one drink.
> Q. Ma'am, I really need you to listen to the question I ask. Okay?
> A. Yes.
> Q. That's a simple yes or no; do you blame Colonel [DO] for the women coming over there?
> A. It's his fault that the women came to our house that night.
> Q. Yes, so your husband had done nothing wrong on Friday night, right?

[8] R. 431, 449.

A. No, he did not.
Q. So there would be absolutely no reason for you to be angry with him on Saturday morning, correct?
A. Correct.[9]

Unfortunately, again, this was different from what the Accused had told OSI about Beth Wilkerson's feelings that next day: "my wife, I know for a fact that night, because she was pissed off at me the next day . . . for bringing them home—pissed off at me."[10]

At another point, it was important for the prosecution to highlight discrepancies between Beth Wilkerson and the Accused about when and why the Accused went to bed the night of the assault. According to the Accused's self-serving statements to OSI during his interview, his wife told him to go to bed and he did so before Victim went to her borrowed bedroom: "My wife asked me to go to bed, and I go to bed." . . . "My wife said, 'You need to go to bed.' And I said, 'You got it.' . . . "[Victim] is not there when my wife says, 'Time for you to go to bed.' I think I walk in and let the other girl outside, whatever—the Captain, she is—I don't know her name. I go back in and she (wife) said, 'You need to go to bed.'" . . . "My wife tells me, 'Hey you've had enough to drink. It's time to go to bed.'" . . . "She said, 'You go to bed." And I said, 'I'm going to bed.'"[11] Again, it appears Beth Wilkerson was unaware of these facts (the following just part of a longer discussion on this topic):

Q. Do you often send your husband up to bed? I mean are you the one that tells him when it's time for him to go to bed?
A. Ah, no.[12]

That the Victim left the Wilkersons' home on a chilly Italian night, at three in the morning, on foot, without her shoes, not knowing where she was, generated another textbook example of impeachment by contradiction. The prosecution theory, supported by the Victim's testimony, was that the Victim's sudden departure from the home during the chaos of Beth Wilkerson walking in on the Accused sexually assaulting her was the reason she left without her shoes (that is, she could not find

[9] R. 761-62.
[10] R. 412.
[11] R. 396, 429, 468.
[12] R. at 760.

them in the rush to leave the house and escape the Accused). The Victim leaving without her shoes, leaving into an area of Italy she was unfamiliar with, when according to the defense theory of the case she was not intoxicated, undermined the argument that her leaving was voluntary or uneventful. If the next day Beth Wilkerson did not know that the Victim's shoes were still at her house, she would not have known that fact would undermine the story she and the Accused concocted about the Victim's departure. She did not know.

> Q. Now your testimony is, and I want to make sure you're one hundred percent clear on this, your testimony is the OSI came to your house, correct?
> A. Yes, they did.
> Q. You offered the shoes to the OSI, correct?
> A. I did.
> Q. And they refused to take them into evidence, correct?
> A. Yes, they did—or they did not take them.[13]

Juxtapose that testimony with the contradictory rebuttal testimony from an OSI agent:

> Q. Do you ever remember her offering you a pair of shoes that would have been owned by [Victim]?
> A. No, Sir.
> Q. Did she ever offer you a pair of shoes?
> A. No, Sir.
> Q. Do you have any doubt in your mind?
> A. No.
> Q. Did you, in fact, ask her if she had those shoes?
> A. Yes we did.
> Q. Did you, in fact, ask her if she knew where those shoes were?
> A. Yes, Sir, we did.
> Q. And, did she express any knowledge of those shoes?
> A. No, Sir she didn't.
> Q. Do you typically decline evidence at any point in your career as an OSI agent?
> A. No, Sir.[14]

While there are many other examples of pointed, controlled, and structured cross-examination, the foregoing gives a sense of the practical application of the various litigation theories on how to conduct an effective cross-examination. With one more—finish strong:

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[13] R. at 758.
[14] R. at 818-19.

Q. You treated [the Victim] with nothing but hospitality that night, correct?
A. Yes, I was hospitable.
Q. You were friendly to her, correct?
A. Yes, I was.
Q. You didn't try to steal from her?
A. No.
Q. You didn't in any way yell at her?
A. No.
Q. [Approaching witness.] You did absolutely nothing to give her a reason to falsely accuse your husband of putting his finger in her vagina?
CIV DC: Your Honor, I object to him approaching the witness like this. I think it's intimidating and improper. He can step back, but I believe that this is an improper use of the courtroom.
MJ: I'll overrule the objection, and you may continue.
Q. Did you hear the question?
A. My husband did not do that.
Q. That was not the question. The question was do you know of any reason why she would falsely accuse your husband of putting his finger in her vagina?
A. Ah, no, I don't know of any reason.
TC: Nothing further.[15]

Closing Argument

There was no "Perry Mason" moment when the witness confesses to the crime—that rarely happens. That would be cool, but the pointed, controlled, and structured cross-examination of Beth Wilkerson fed a persuasive closing argument. Over 53 minutes, trial counsel persuasively argued from that cross examination and the rest of the evidence presentation that the Victim was the most credible witness at that trial, that she had no motive to lie, that the Wilkersons concocted a story of events that night to cover the Accused's assault, that the Wilkersons' actions (and contradictory words) the days after the assault demonstrate the falsity of their cover story, that Beth Wilkerson had a motive to lie, and that she acted on that motive over and over again.

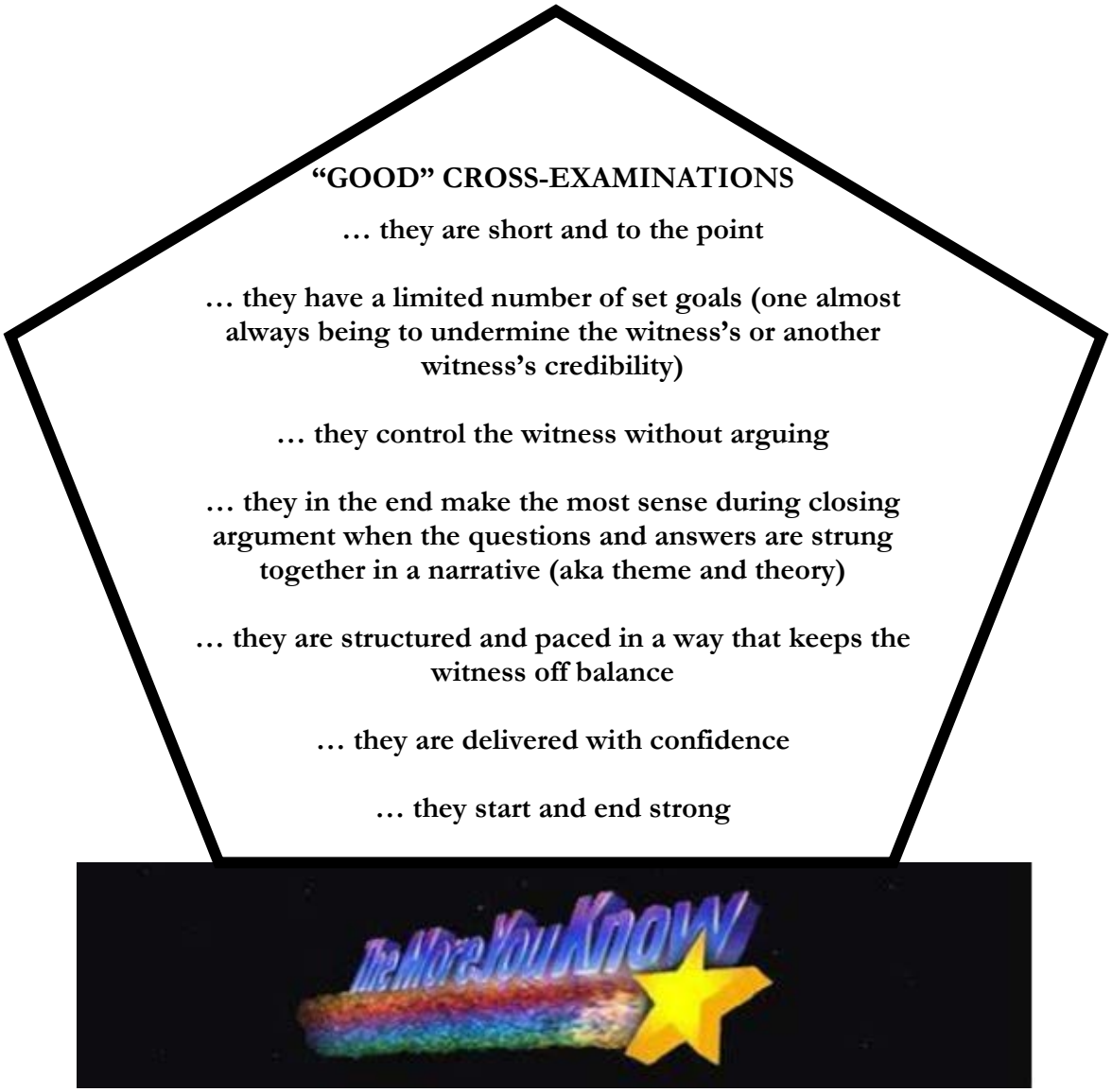
So where did all of this lead? To trial counsel's last words to the members before they deliberated, the encapsulation of the prosecution's theme and theory:

> Now, when you go back and deliberate, I know you will return a verdict of guilty. And the reason I know that is because as you sit here now,

[15] R.766-67.

> you know in your minds, you know in your hearts, and you know in your very soul that the Wilkersons' lied. And you know in your hearts, and you know in your minds, and your very soul that [the Victim] told you the truth.[16]

Three hours later the members convicted Lt Col Wilkerson of sexual assault and later sentenced him to one year of confinement and a dismissal. The rest is history, but in that history the litigation skills which secured an all-too-rare sexual-assault conviction of an Air Force senior officer should not be forgotten.



[16] R. at 1023.

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.[1]

[1] 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.

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

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 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 invariable 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[2]

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

[2] 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.[3]

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?

[3] 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.
***
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. [4]

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. [5]

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

[4] R.E. at 1-2.
[5] 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.
> ***
> 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.
***
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. [6]

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

[6] 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. [7]

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

[7] 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.
***
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. [8]

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?

[8] 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]
***
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. [9]

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.

[9] 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.
***
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. [10]

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?

[10] R.E. at 42-45.

A. No.[11]

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?

[11] 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. [12]

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. [13]

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?

[12] R.E. at 9-10.
[13] 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. [14]

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

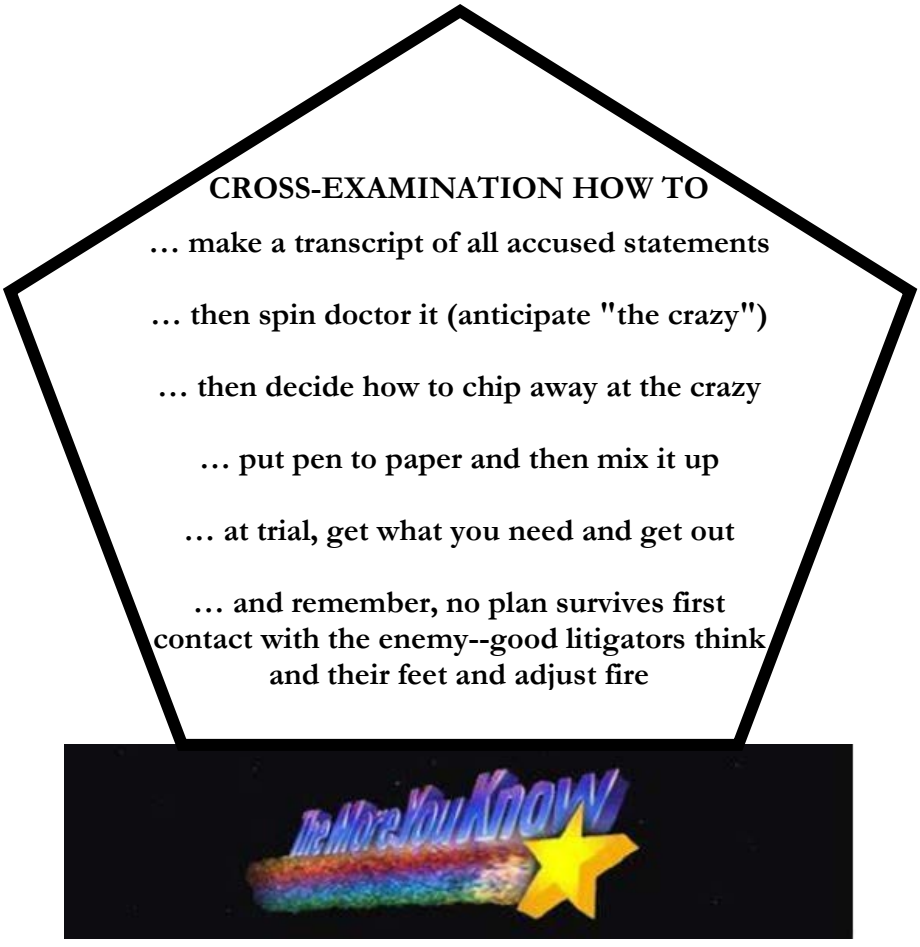
Closing

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.

[14] R.E. at 45.

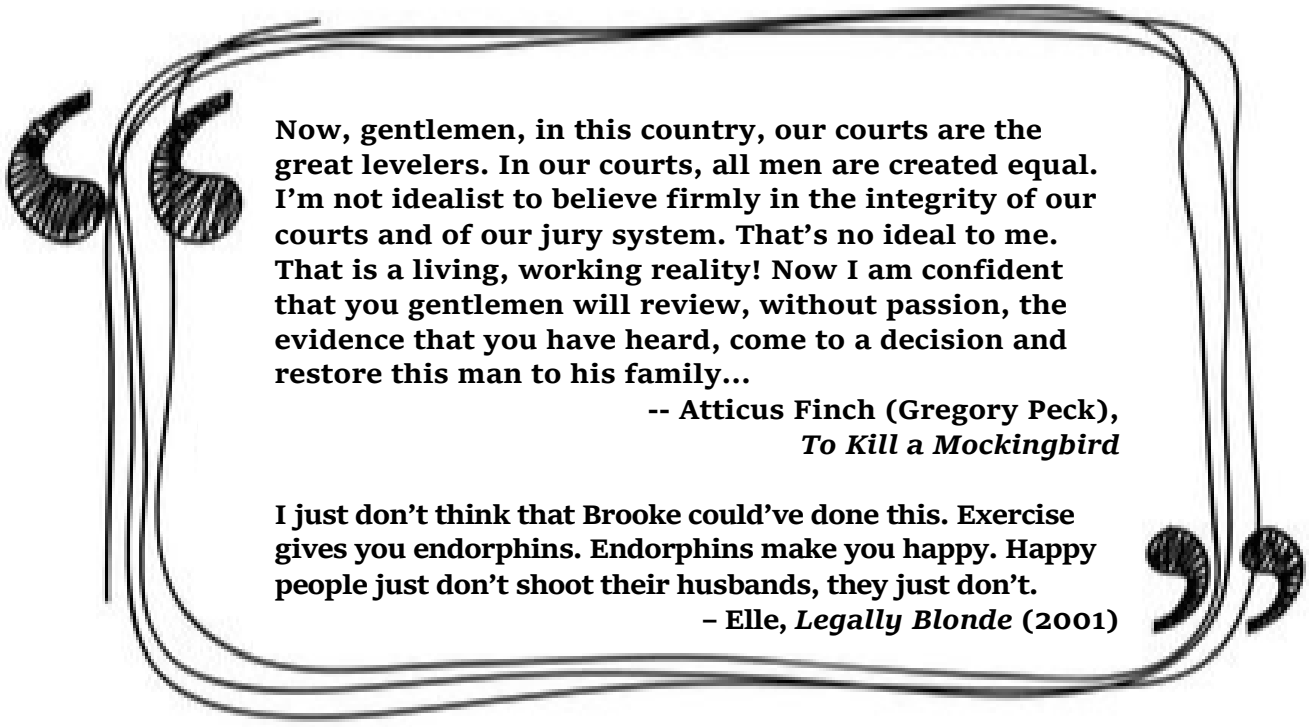
Nine years after raping SSgt DK, leaving her bruised and bloody, he was unable to explain it all away. Lt Col Briggs was convicted of rape by force, confined, and dismissed from the Air Force. Justice was served.



Chapter 10

CLOSING ARGUMENT

It's showtime! U*nless you are eight years old, Ringling Bros and Barnum & Bailey Circus is not THE GREATEST SHOW ON EARTH®. No, when you stand up to give your closing argument in your hotly contested trial, <u>you</u> better be THE GREATEST SHOW ON EARTH®. Not the clown, not the strongman, not one of the trained animals, not the trapeze act … though those all sound like awesome jobs. But the ringmaster … and maybe a bit of a juggler.*



Now, gentlemen, in this country, our courts are the great levelers. In our courts, all men are created equal. I'm not idealist to believe firmly in the integrity of our courts and of our jury system. That's no ideal to me. That is a living, working reality! Now I am confident that you gentlemen will review, without passion, the evidence that you have heard, come to a decision and restore this man to his family…

-- Atticus Finch (Gregory Peck),
To Kill a Mockingbird

I just don't think that Brooke could've done this. Exercise gives you endorphins. Endorphins make you happy. Happy people just don't shoot their husbands, they just don't.

– Elle, *Legally Blonde* (2001)

Chapter 10 – Closing Argument

After cross-examination of the accused or of the alleged victim, closing argument is the top "glory" moment for any litigator worth their salt. Remember the Churchill quote way back at the start:

> To each there comes in their lifetime a special moment when they are figuratively tapped on the shoulder and offered the chance to do a very special thing, unique to them and fitted to their talents. What a tragedy if that moment finds them unprepared or unqualified for that which could have been their finest moment.

That moment at trial is closing argument. It is the moment when you cash in all that credibility you have built up from the moment the members laid eyes on you. It is your chance to persuade those members that your facts are the true ones, the ones they should focus on in reaching their decision.

In that moment, do not let the perfect be the enemy of being persuasive. I have never given a "perfect" closing argument. Ever. I have given lots of good ones (and a few bad ones), and been close to perfect once or twice, but I have never given a "perfect" one. After each I have always felt like I left something on the table, kicking myself for forgetting to argue something I wanted to argue or phrase something the way I envisioned phrasing it. But that is silly and I am sure a psychologist would have a field day with the implications of focusing on the disappointment of failing to achieve perfection.

Do not let the perfect be the enemy of being persuasive … Perfect is not the goal of closing argument, persuasion is

Perfect is not the goal of closing argument, persuasion is. You will not be persuasive if you are worried about perfect delivery of every big-and-small argument you planned to make or perfect phrasing each of those arguments. You will only be persuasive if you, as the most credible counsel in the courtroom, are confident, conversational, and if not entertaining at least not boring.

So my rule #1 for closing argument—shoot for 80-90% and be happy with 75%. And no more. Remember, just because you forget to make an argument you wanted to make does not mean it is legally waived. The members during deliberations are usually smart enough to stumble upon whatever argument/interpretation of the facts you were going to suggest and, if not, then your argument/interpretation was probably too convoluted anyhow. There are no cameras in the courtroom and no one is really going to care that during your watercooler boasting you claimed you turned a cute phrase when you actually intended to do so but forget to do so. Go ahead and exaggerate your performance a little—that is a time-honored custom of old-timey litigators everywhere … just make sure there are no witnesses around who heard your actual closing argument.

The problem with shooting for perfection is you lose the persuasiveness of a closing argument that feels organic, that comes across as conversational rather than rehearsed. This is so because, in the search of perfection, counsel write out their closing argument, word for word, and then practice and practice it until it is memorized, word for word. They then delivery it, word for word, with the passion of Siri reading driving directions to the local grocery store.

When you watch these counsel deliver their uninspired and inauthentic closing arguments, you can literally see them mentally accessing their next memorized line in the moment after delivering the previous one. Or more likely at some point they will have an access problem, stumble and bumble for a few moments, and then give up and just resort to rapidly reading the rest of their argument, eyes glued to their notes. It is so painful to see. The thing is, such an argument might be "perfect" in the sense that every carefully crafted phrase and argument travels from counsel's lip to the members' ears. But such a "perfect" closing argument is immediately forgettable and lacks any persuasive flair. It perfectly squanders the opportunity, squanders counsel's "moment."

Which leads to **my rule #2 for closing argument—generally, do not murder board it before trial**. Think about it, talk about it with your colleagues, jot down some potential themes, roundtable and red team those, start building some slides, even put a draft outline together, but do not prepare a complete closing

argument in anticipation of subjecting it to a murder board prior to the start of trial. I understand that this is contrary to common practice, but the benefit of the excessive investment of time in preparing a closing argument for a murder board, and the utility of a pre-trial murder board for a closing argument that is not likely to survive first contact with the actual facts of trial, are far outweighed by the negative effect of all of this effort.

It drives exactly what the pursuit of perfection does—completely, word for word, written out closing arguments (and attempts at a degree of memorization). In those crucial last few days before trial, counsel is immersed in a process of becoming completely comfortable and confident with their mastery of the facts of the case. Forcing them to divert their attention from this by spending time preparing a closing argument interrupts that process. As they are not as confident in their mastery of the facts at that point, but are expected to have a somewhat polished product for the murder board, the natural result is to write out a complete closing argument and then, so as to not look bad in front of their supervisors and colleagues, spend time memorizing and practicing it.

Besides the hours wasted in this pursuit, hours better devoted to mastering the facts, this tends to lock trial counsel into a closing argument that thematically may not be appropriate for the facts as they actually develop at trial—in other words, this murder board closing argument likely will not survive first contact with the enemy (here the "enemy" being the reality that trial never unfolds as expected). But human nature being what it is, no one wants to reinvent the wheel they have spent so long inventing. So rather than tossing a draft closing argument that has been overcome by actual trial events, counsel will nibble at the edges and attempt to tweak when trashing and starting from scratch is the better course. The result—a closing argument that makes an argument, but an argument that does not fit the actual facts as well as it should and is not as persuasive as it could be.

And realistically, when I roll into bases where my junior co-counsel has prepared a closing argument for an upcoming murder board, my question is always the same, "why?" … followed by "my friend, hello, glory moment, sorry but I'll be handling closing argument and yours is not the one I'm going to give." Which is

another reason for **rule #2**—with a more senior counsel on the case, the chance of junior counsel handling closing argument is between slim and none with the latter more likely than the former.

All this being said, maybe in the simplest of (likely) one-day special courts-martial, where there is little chance that the facts presented at trial will differ from those expected before trial, maybe then a pretrial closing argument murder board is useful. Maybe. Or if junior trial counsel really wants to do the closing argument, their boss believes they have the ability to do so, and preparing a closing argument for a murder board will not divert their attention from mastering the facts of a case, then maybe a murder board is useful (and then only as an audition for the when the senior counsel rolls into town).

But even then, no surprise here, **my rule #3 for closing argument (really rule #1a and #2a)—do not write out your entire closing argument**. Here is what you do:

> (1) Write out word for word the attention-grabbing, theatrical introduction that you intend to land like a heavyweight punch;
>
> (2) Memorize that section so you can present it word for word;
>
> *-- This will get you off to a strong, confident start --*
>
> (3) Outline the rest of your argument, write out the transition/topic sentences if you must, bullets for the substance under each topic;
>
> *-- This will get you in structured conversational mode --*
>
> (4) Write out word for word the hard-hitting, inescapable conclusion that neatly, and hopefully dramatically, ties up your argument;
>
> (5) Memorize that section so you can present it word for word.
>
> *-- This will ensure you end with a flourish --*

Bullet (3) is the one that gets me the most pushback from junior counsel, who really like the permission to write out and memorize their introduction and conclusion, but also really want permission to write out and memorize their entire argument. "But

my style is more formal, conversational is not me." Nope. Until you have at least a handful of litigated trials under your belt you do not know what your style is. Once you do you will realize that if you are any kind of litigator your style is going to be some version of conversational. It may be more formal conversational, more professorial in approach, or it may be more informal, more chit-chat in approach, or somewhere in between, but to be successful it needs to be some version of conversational. The tone needs to be as if it was counsel's side of a conversation with the members, not a regurgitation of written words flung at them. It needs to appear to the members as if it comes from a place of confidence, not from a piece of paper. The delivery needs to be authentic. The deliverer needs to be believable and no member is going to put a lot of belief in a delivery that is merely reading to them or sounds like something is being read to them (because it has just been written down and then memorized).

And the thing is, most junior counsel have the ability to be conversational and just do not realize it or believe it. They just need a push into the deep end to realize that, yes, they can swim. I love to push them right in. At litigation courses and in murder boards (opening, and the rare closing argument ones) invariably the written/partially memorized presentation is stilted, inauthentic, and unpersuasive. So I will take counsel's notes away and ask them a series of questions. The trick is that when stitched together this series of questions is really an outline of the presentation they should be giving. For example, "Give me your elevator pitch, your one minute argument why should you win this case?" "What was the relationship between the Accused and the victim" "What happened in the house that night?" "Why is the victim credible?" "What about the argument that the victim did not disclose the attack until years later?" "What was important about the Accused's testimony and the cross examination?" "Which of the judge's instructions should the members pay special attention to?" "And tell me again why you should win this case." This question-and-answer approach invariably produces a presentation that is conversational, authentic, and persuasive. Rarely has the consensus from those observing this been anything other than that the presentation that resulted from the question-and-answer approach was leaps and bounds better than the written and memorized version that counsel

started with. So if you are an instructor, colleague, or supervisor of a junior trial counsel at a murder board or training session and it is not going well, feel free to use this push-into-the-deep-end-of-the-pool approach to put them on the right track, the conversational one. Or if you are the junior trial counsel, jot down the questions you want to answer for a particular case and then have a conversation with yourself (internal monologue probably best if you are in doing this in a crowded location).

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As for the content of the closing-argument conversation … well that is determined by the facts of your case. But there are consistent aspects of all good closing arguments, which leads to **my rule #4 for closing argument—make sure it is loopy**. Just as you use the looping technique in direct examination to subtly highlight (argue) key points of the witnesses' testimony, you do the same in closing argument for all those key moments you saved to the end to highlight for the members' consideration.

Voir Dire: During voir dire you had the members commit to your one theme or theory question. Now is your chance to hold them to the bargain: "Remember when in *voir dire* we talked about X and you all agreed Y."

Opening Statement: Remember the robust promises you made in your opening statement about how the case would unfold? Remind the members that you kept your promises. Or if the actual evidence did not exactly match your implicit promises, spin that evidence (within reason) to argue it was even better for your case than you expected (as otherwise defense counsel will argue you broke your promise).

Member Questions: If one of the members asked a question during trial, find a way to explain why that was an awesome question and why the answer to it seals the win for your side (without pandering too obviously).

Cross Examination: Remember your pointed, controlled, and structured cross examination of the Accused or main witness? Remember how you had a limited set of goals and were laser focused on just those? Remember how you controlled the witness

without arguing? Remember how the structure kept the witness off balance? Remember in all of this how you got what you needed to argue the case and did not belabor a line of questioning in an effort to drive the point home? How you fought the urge to ask that one question too many and prematurely tie the pieces of the cross together, like Tom Cruise in *A Few Good Men* when inexplicably in the middle of the cross examination of the doctor he turns to the jury and starts arguing the importance of a particular answer [love that movie, but jeez, some of it crosses the border into science fiction]. In closing you can stitch that cross examination into a more coherent narrative, putting those pieces together, highlighting particularly important questions and answer: "Remember when I ask the witness [X]? Remember when he said [Y]. Now you can understand why that exchange is so important because the evidence actually shows [Z]."

Gratuitous *A Few Good Men* insert

Instructions: The judge is going to give the members a roadmap to guide their deliberations—the instructions. Next to you, the judge is the most credible person in that courtroom. Why not trade on the judge's credibility by publicly thanking him or her, indirectly, for giving the members a set of instruction that, when applied, wins you the case. "As the military judge instructed you, you must [A]. Works for me because the evidence establishes [does not establish], beyond a reasonable doubt, [B]." The [A] varies, but it usually will be the instructions on the elements and definitions, credibility, and for the defense, the burdens.

There are other opportunities to loop (*e.g.,* reloop in closing the looping you did in direct … if a particular point was important enough to highlight with the looping technique it probably is important enough to mention in closing). You cannot go wrong by referring back to something that actually happened during the trial. If you are credible the members will buy what you are selling during closing, but they will pay even more if you bring the receipts (receipts being of course reference to the actual evidence).

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They will literally be throwing dollar bills at you if in addition to conversational in closing argument you are entertaining or at least not

boring [okay, maybe I have taken this metaphor too far at this point, but I needed an entertaining transition]. Sure, you can be not boring in language and in tone and you should strive for that every single time. But you can also look for those opportunities to be not boring in actions during closing argument as well, to give the members the respectful show they expect and deserve. So **my rule #5 for closing argument—just don't tell, but show**.

In this day and age, every closing argument (particularly in military courts) must take advantage of widely available and relatively easy-to-use presentation technology. Whether it is the basic PowerPoint (or Apple's Keynote), something more advanced like Prezi or TrialPad for iPad, or the more sophisticated (and expensive) programs like Sanction, or TrialDirector, or OnCue, you must aim to appeal to those members who are more visual than auditory learners … and give them all something to stare out rather than just you the whole time you are up there.

This deserves an entirely separate chapter, but a few points on courtroom technology:

> (1) Know how to use it (duh), practice with it as if you are using it in an actual trial, and assume it or something within it will fail when you need it the most and thus have a backup. I often use a clicker to advance slides, but also have co-counsel sitting near the computer in case something goes wrong—I also practice with them so they know when to advance the slides so I do not have to break my narrative with the monotonous "next slide," "next slide," "next slide," "oops, back one slide."
>
> (2) DO NOT just splash words up on a slide and then read the slide to the members. Bulleted lists are one thing; reproducing your outline is another. Timelines, Venn diagrams, snippets of transcripts, videos, and pictures of exhibits are better uses of the technology. They provide a good backdrop to your conversation, whereas reproducing your outline is a distraction, particularly as the members can read it to

themselves faster that you can read it to them so you are essentially just repeating something they have already "heard."

(3) Simplicity always trumps complexity in design. Unless you are an expert with the software, avoid complicated builds on slides or animation in video. Refer back to the truism of (1) – technology will always fail and the more complicated the use the more likely the failure. Do not hesitate to become an expert, just do not debut your expert skills until you actually are a time-tested expert and, as noted in (1), always have a backup. Simplicity includes tidiness. Fewer but bigger pictures per slide. Big-picture versus granular timelines. Fewer words, bigger fonts. If you go below 24-point font size to fit everything on your slide your slide is probably too wordy. In the same vein, if the oldest person in your office cannot "read" the slide from the furthest corner of the courtroom (glasses or not), it is too busy, too cluttered. Keep it simple or it will be distracting and a distracted member is not paying attention to your glorious argument.

(4) Learn how to "mute" a slide or the presentation when you move on to the next topic. Use the [B] button when in PowerPoint to make the presentation go black, or insert a blank/black slide when you move on to your next point but are not ready for the next slide. Getting to a slide too early or leaving a slide up when you are done talking about it is only going to distract. I see this almost every time junior (and even some senior) counsel uses courtroom technology. Distraction is bad.

It is also acceptable to be respectfully and passionately theatrical in a closing argument, the "show" to amplify the "tell." As long as it is organic to whatever argument you are making, and does not come across as forced, your passion in the theatrical action will further enhance your credibility with the members.

Look for those opportunities to be not boring in actions during closing argument as well, to give the members the respectful show they expect and deserve

Thus, it is acceptable to detach from the podium and move around the courtroom during your argument (as long as you are moving with a purpose and not just pacing back and forth). Just as in opening statement, it is acceptable to grab a piece of evidence and wave it around (though maybe do not point the murder weapon directly at the members, even if it is not loaded). It is acceptable to bang on a table as you … Make.Your.Important.Point. There are so many ways to "show" in a closing argument.

For example, I have had a couple cases where defense counsel focused on the amount of time available for a particular offense to have occurred, arguing the amount of time (let's say a minute) was not long enough. I have stopped in the middle of my closing argument on this point, drawn the members' attention to the clock, and stood silently as a minute clicked off. A minute of silence in a tense courtroom feels like an eternity, certainly feels long enough to commit almost any crime. That minute of silence was worth more than the 100 words that otherwise would have filled up that time.

Or in a murder trial, when the Accused testified and suggested an alternate and accidental way by which the strangulation occurred, I had two of my co-counsel come to the well of the courtroom and act as my props as I explained why the Accused's explanation was implausible and then how the evidence showed the strangulation actually occurred. Seeing is believing.

Or when I was a defense counsel and had a case in which the government failed to call to testify what I characterized as "essential" witnesses, I grabbed the witness chair and plunked it in the middle of the courtroom to symbolize the prosecution's missing witnesses—my empty-chair defense. [Teachable moment: probably best to let the judge know you are going to re-arrange furniture before you do so … Judge Pavlik let me do it but I could tell, and he mentioned afterwards, he almost stopped me.]

There are others, but you should get the idea. "Show" and "tell" during closing argument is better than just the "tell." Look for the opportunities to do both.

Now this may seem like a lot of "stuff" to deal with in closing argument, which leads to my next rule, which also answers the question I always get from junior counsel: "how long should a closing argument take?" The answer, and **my rule #6 for closing argument—it'll take as long as it takes, but only half as long as you think**. I have given 10-minute closing arguments (assault, drug possession cases). I have given 2-hour closing arguments (murder case with lots of video playback). The facts and a narrative retelling of them drive the length of closing argument in each of those cases.

Closing argument is not a line-by-line survey of all the testimony and all the other evidence offered at trial. This becomes repetitive and boring. As the name suggests, closing argument is an argument, an attempt at persuasion, which highlights the evidence that supports it and discounts the evidence that does not. Too often, closing arguments are too long because counsel forgets that the narrative should drive the argument, with the evidence weaved in to support it. Rather, counsel gets bogged down in that repetitive, hyper focus on a line-by-line survey of every piece of evidence with the narrative becoming disjointed and muddled.

Let the narrative (your point) drive the presentation and use only what you need of the evidence to support. Like this: "The evidence is overwhelming that the light was red and you know that because witness [A] told you that, witness [B] told you that, and witness [C] told you that."

Do not let the evidence bury the narrative (your point). So not like this: "Remember how witness [A] testified that he was out driving with his wife, stopped at *Krispy Kreme* for a chocolate donut, at then parked at the corner of 2nd and Main as they were on their way to a doctor's appointment. As they were crossing the street, they noticed that the light was red for northbound traffic. And remember how witness [B] testified …. And remember how witness [C] testified …. Thus all of these witnesses testified that the light was red." Perhaps that level of detail is unnecessary to establish your point. Certainly if a witnesses ability to perceive that the light was red is in question, go into detail of why the witness is credible but even then start with the narrative (your point) and weave in the specific evidence that supports it.

> **Closing argument is an argument, an attempt at persuasion, which highlights the evidence that supports it and discounts the evidence that does not**

This approach ensures that your argument remains just that, an argument, provides a more forceful structure than a mere line-by-line recitation of the evidence does, and streamlines the presentation by forcing focus on the "important" facts. The members have been paying attention, they have likely been taking copious notes, and they are focused on that facts just like the judge told them to be. They have been waiting to understand why all these facts matter and the time for them to learn why is closing argument. If you just repeat the facts to them during your closing, they are not going to be satisfied. Not satisfying a member is not good for your case. Don't do that. Satisfy them by placing the important facts, the operative facts, within a narrative that persuades them that they should find in your favor. Trust that they are not going to forget some fact or discount some fact just because you do not dwell on it in your closing argument.

Finally, no discussion of closing argument is complete without dealing with rebuttal. To the extent the defense case still has one, rebuttal is the dagger plunging into its still beating heart. To be effective, however, it needs to be short, non-repetitive, and purposeful. Which leads to **my rule #7 for closing argument—"liar, liar, pants on fire" is not an effective rebuttal argument.**

The members have likely been listening to arguments for at least 90 minutes by the time you get back up for rebuttal. When the judge turned to you and said "Counsel do you wish to present rebuttal argument?" many of the members likely said to themselves "please say no, please say no," and mentally sighed when you said "yes your Honor." That is unless, of course, you have fully incorporated the **PrimeCOLE** method of litigation, then they said to themselves "awesome, let's hear it superlawyer."

But assume they are a little tired of listening, even to the best of closing arguments. Keep it brief. A long rebuttal is a sign of weakness, sending a message that the defense made substantial headway in their closing argument. Rebuttal is a dagger, not a Band-Aid (or tourniquet) to stop the bleeding in your case. If your case is dying as you reach rebuttal, nothing you say is going to take it off life support—remember,

facts decide the outcome, not the arguments of counsel. If you "must" argue in rebuttal for more than 3-5 minutes, you are in trouble. If you can argue everything you need and want to argue within 3-5 minutes, you are golden.

Do not waste that 3-5 minutes countering every factual misstatement you believe defense counsel made … you are so wrapped up in the battle that you will believe that not a single thing defense counsel argued accurately stated the facts and 3-5 minutes will not be nearly enough time to counter all the perceived misstatements. Pick the most egregious and argue that for no more than about a minute: "What you just heard was what defense counsel had hoped the evidence in this case was going to be, not what it was. I trust that you paid close attention to all the testimony in this case and will be able to separate that fantasy from the reality of the evidence before you. But do recall that witness [X] actually testified [A] and witness [Z] testified [B]. That's an inescapable reality." [And yes, I know that is not a "de-personalized" argument (see Chapter 14 – **Civility**), but like I say there I am not perfect].

> **To the extent the defense case still has one, rebuttal is the dagger plunging into its still beating heart. … [It is] not a Band-Aid (or tourniquet) to stop the bleeding in your case. If your case is dying as you reach rebuttal, nothing you say is going to take it off life support**

And do not waste that 3-5 minutes repeating verbatim the arguments you already made in your closing or rambling through an unprepared repackaging of that closing. You should have a specific purpose in rebuttal and that purpose is to make three points, exactly three. The first is the factual rebuttal as phrased above. The second and third, which you prepared at the same time you prepared your closing, are the primed repackaging of your two knockout punches. These are the two most powerful arguments for why the members should convict. Delivery them in phrasing differently than you have before, but deliver them just as forcefully, and then sit down, your work is done.

Closing argument is your moment. It is the culmination of all the effort you have put into developing the case and the credibility you have earned from the opening moments. Follow the rules above and rise to your moment, and earn the glory that you so richly deserve.

CLOSING ARGUMENT RULES

#1 – Shoot for 80-90%, and be happy with 75%

#2 – Generally, do not murder board it before trial

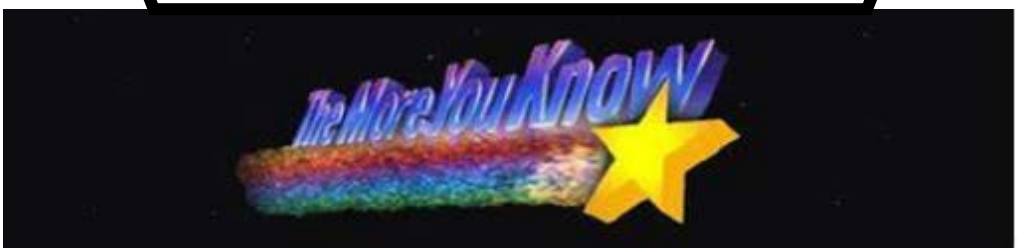
#3 – Do not write out your entire argument

#4 – Make sure it is loopy

#5 – Just don't tell, show

#6 – It'll take as long as it takes, but only half as long as you think it should

#7 – "Liar, liar, pants on fire" is not an effective rebuttal argument



MY PERFECT F#$*!@G CLOSING ARGUMENT

[Warning: Adult Language and Themes ahead --
"bad" words repeated repeatedly]

Remember when I said that I had never given a "perfect" closing argument? That was not exactly true. This one time, long ago, when the stars aligned and inspiration overtook commonsense, I gave the most perfect fucking closing argument of all time.

A little backstory. One of the many things I did in my pre-JAG life, literally in the previous century, was work as a staff attorney for the Washington State Court of Appeals. Day after day (*i.e.*, ad nauseam), I drafted opinions for my judges. There were bright spots. One opinion I drafted involved an implied consent/driving-under-the-influence defendant who claimed that his retort "bullshit" to the officer who was trying to secure his consent to a breath test was not an "unequivocal refusal" (which is bad under Washington state law) but simply his way of expressing his confusion about what the officer was asking of him (which would have been better for him).

Thus, I decided I had to address the meaning of the word "bullshit" and wrote the following in the draft opinion:

> *As to the "confusion" defense, WB's counsel asserts that WB's particular rejoinder "clearly exhibited that he did not believe or understand the consequences of refusal." Though the argument may have had some force if the rejoinder "bullshit" had been uttered but once, it loses validity after being uttered for the fifth time in response to direct questioning.*
> ****
> *[footnote] At the risk of glorifying its utility, we take judicial notice of the fact that the word "bullshit" has acquired an arguably unfortunate prominence in this country's vernacular. Depending, of course, on whether WB intended to use it as a noun or an adjective, the word "bullshit" is generally defined as "nonsense: esp. foolish insolent talk—usu. Considered vulgar." Webster's Third New Int'l Dictionary at 249. It is often derisively chanted at sporting events to express disagreement with official rulings. It is often derisively chanted at protests to express displeasure with a point of view or official demand to disperse, often followed by the famous melody "Hell no, we won't go." Its use pervades all facets of exclamation: some utter it with disdain when required to perform an act they would rather not; some utter it with disbelief when confronted with a peculiar statement; some utter it in disagreement with a repugnant suggestion; some utter it as a critique of an outlandish prevarication; some utter it to express displeasure with a condition or situation; some even utter it with disgust when presented with arguments devoid of merit. But it is not uttered, over and over again, to express confusion with a pointed query. To argue otherwise strains every ounce of counsel's credibility (i.e., it is "bullshit").*

My written eloquence did not carry the day and the "ode to bullshit" did not survive into the final opinion. But my day would come.

It happened at an indecent-language/indecent-assault special court-martial at Cannon Air Force Base in 2002, when I was but a baby JAG and brand-new Area Defense Counsel. My client was alleged to have said "fuck you" to the woman he alleged had just indecently assaulted. Here is part of my closing (written out and memorized, contrary to my current practice (A) because I was young and nervous; and (B) figured I probably should say it exactly as written given the "adult" subject matter):

Language is important, words have meaning and that meaning is often determined by circumstances and context--that is no truer than it is here. Take for example the worst of the words uttered by Airman Jones--*fuck you*. Trial counsel read you half of the definition of indecent language, let me read you the rest:

> Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts; that is, a lustful, lewd, or salacious connotation, either expressly or by implication from the circumstances under which it was spoken. The test is whether the particular language employed is calculated to corrupt morals or incite libidinous thoughts, and not whether the words themselves are impure.

Yes, context is important. If you'll indulge me for a moment, the word "fuck" is fascinating. Out of all of the English words it is one of the two immediately identifiable by its first letter--the F-word. It's the one magical word. Just by its sound it can describe pain, pleasure, hate, or love.

In English the word falls into many grammatical categories. Clearly it has a sexual component to vulgarly describe a sex act, such as Johnny fucked Shirley, or Shirley fucks.

But more importantly, its use does not always have a sexual component. For example, it can be used as an adjective (as in *Johnny is doing all the fucking work*), as part of an adverb (*Shirley talks too fucking much*), as an adverb enhancing an adjective (*Shirley is fucking beautiful*) or as a noun (*I don't give a fuck*). And it is also very versatile outside its sexual component. It can be used to describe being defrauded (*I got fucked at the used-car garage*), and to express dismay (*fuck it*), trouble (*I guess I'm really fucked now*), aggression (*Don't fuck with me, buddy!*), difficulty (*I don't understand this fucking question*), inquiry (*Who the fuck was that?*), or dissatisfaction (*I don't like the fuck what is going on here*), and on and on all outside the sexual context.

Most importantly, it can be used, and was used here, to express anger--"fuck you," or "go to hell." While it might have been rude, while it might have been vulgar, it was not "calculated to corrupt morals or incite libidinous thoughts." To argue to the contrary, well, is un-fucking-believable.

The content was not original to me; I stole it from the Internet and was inspired to craft it by a similar scene in the movie *From The Hip* (Greatest Legal Movie … Of. All. Time.) in which Robin "Stormy" Weathers was arguing admissibility of the word "ass." This was one of those times I actually gave the judge a head's up that the content of my argument would have an "adult-theme" based on the language in the charge, and in the end my recollection (maybe clouded through the lens of time) was that Judge Pavlik thought it was great. Not that counsel's arguments win cases, the facts do, but the members acquitted on the indecent-language charge … not so much on some of the other charges.

Thus, I was back up in sentencing and continued the theme: "Don't worry, I am not going to drop any more F-words on you, though I certainly could to express dismay at the unreasonable and unbelievable sentence requested by trial counsel." Maybe I had gained a little credibility with the members from the creativity of the closing argument … I'll take the fact that the sentence was only hard labor and a reprimand as some proof of that. That perfect fucking closing argument was just what the facts of that case called for … and it was a classic litigation moment--when else do you get to drop the F-word that many times in a court-martial and not then face your own.

Chapter 11

THE COLE TRAIN INTERVIEW SERIES
Lt Col Matt Neil

One of the best ways to become a good litigator (besides devouring this Compendium) is to learn from good litigators. In 2015, Joint Base Charleston was able to corral one of the Air Force's top litigators for a wide-ranging, question-and-answer training session. Here is the wisdom of Lt Col Matt Neil (now the Ft Meade Staff Judge Advocate, after attending Air Command and Staff College in residence). If you do not know Lt Col Neil, read his answers at hyperspeed and you'll get the idea (he's a fast talker).

Chapter 11 – The COLE Train Interview Series
Major Matt Neil

PrimeCOLE: So Major Matt Neil, thanks for joining us. ADC at Minot, and then a long and stellar career at JAJG, first as STC, then Special Victims STC, and then a little different than some folks you came back to JAJG and did some appellate work for some time and now you're also one of the new Chief Regional, Senior Trial Counsel Central Region… that's not exact … we'll call you King of the Central. And don't let it go to your head, but you're very successful … do you think the appellate experience has helped you as a litigator?

Matt Neil: Absolutely sir I believe it has. I've always been a scholar of the law, I've always loved to read cases, even before I was in the appellate shop, one thing I loved about law school was reading cases. Being in the appellate shop gave me a different perspective. Not just by reading cases but also advocating for those cases and identifying what the appellate shop was always screaming about when I was out trying cases, like protecting the record and things like that that are important on appeal. It helped me understand the importance of protecting the record when I went back into the courtroom.

PC: For the young counsel out there that don't have the opportunity to be appellate counsel, what can they do to gain that same type of experience?

MN: A couple things. One is they can talk with counsel who are at the appellate shop and get that experience from them. The folks up there at JAJG, and I know it from my time at the appellate shop, we live vicariously through the trial counsel out in the field. Call up, talk to them about your cases, they love to do that, they love to answer questions, and they love to identify those concerns that they might have in records that come up to them. The other big thing I have, and probably the number one piece of advice I have for junior counsel out there is read. Read cases. Go to the Court of Appeals for the Armed Forces website, go to each of the Service courts' websites, and read the cases that come out. Know the law, because that's the most important thing you can do going into a court-martial.

PC: OK, that nerdy stuff is great, but I know you're a fantastic litigator, world renowned litigator, I know you've worked some big cases, the *Cron* murder case out there in Korea, a couple other cases like that, tell us why you like litigation.
MN: My entire life I've been an athlete, I've been in competition, it's one of the things I strive for in life is competition, one of the things that lights my fire, keeps my engine going and for me litigation is the closest thing I come to competition in sports. So when a judge comes in and sits down and calls the court to order, that's like the referee blowing the whistle and starting that competition. It is an adversarial process, certainly it's a truth-finding process, but it's adversarial, both sides are advocating for a position, and we're advocating either to a judge or a panel of members and it's that exhilarating experience that I love so much and which keeps pulling me back to litigation.

PC: Obviously you have a good appellate background and love of the law, but are there other things tactically that make you successful as a litigator?
MN: What I've always been good at and pride myself on is a complete understanding of the rules, the rules of evidence and the law that applies in a court-martial. That allows me to control the battlefield in court and understand exactly what evidence comes in, why it comes in, and what evidence doesn't come in and why it doesn't come in before the members and thus be able to control that battlefield. I think that's what's assisted me in being a good litigator over the course of the years.

PC: Not asking you to name names, but what do you see young litigators or even more experienced ones having the most trouble with it terms of really being able to be good at their jobs?
MN: Piggyback on the same discussion we just had about the rules, it's been somewhat astonishing to me to see some of the lack of understanding of the rules at times in court-martial, particularly in cross examinations. A lack of understanding of prior-inconsistent statements, or refreshing recollection and attorneys not knowing how to lay the proper foundation for that and getting hung up in front of the members and when they are up there doing that and they can't lay the proper foundation and they keep having objections sustained it undercuts their credibility in court significantly and it shows that one side does understand the rules and the other side potentially does not. And that was the same experience I had as a defense attorney, trial counsel not understanding those rules from prior consistent and inconsistent statements and refreshing recollection.

PC: You've got a good reputation out there too, you're certainly a bulldog, well deserved, I think that's a good moniker, because I also think you're considered civil, a person who can work with all parties to the case, obviously

that's important, particularly in the JAG world where we go back and forth between prosecution and defense. How do you deal with an aggressive personality while maintaining an appropriate level of civility?
MN: It's difficult because as I said, I'm an athlete, it's a competition, so everyone wants to win. But that can also be a bad thing. That's one of the things I think sometimes counsel lose sight of. They take things personally, they ultimately come into court and they're trying to win and they put winning above everything else, win at all costs and that can be a detractor, that can be a significant negative because you lose sight of the big picture, you lost sight of what the purpose of a court-martial is and that's doing justice. And yes I'm willing to go into court, and yes I think one of my OPRs used the word "bulldog" when a military judge called me that, and when I go into court I'm aggressive, I'm probably one of the more aggressive attorneys that you'll see on the record. However, when the court is adjourned, when we are recessed, you have to be able to work with the other side and you have to be able to leave that aggressiveness in the courtroom, leave anything that may have happened there, you have to understand, one, what the big picture is and, two, what the other side of that picture is. Sometimes when you get too aggressive on something you have to keep it in check as you'll only see one side of the big picture, that aggressiveness puts blinders on you, and you have to be able to maintain that big picture look and not put blinders on when advocating a position. The biggest challenge for me is understanding that. But if you can understand that you can make sure that doesn't happen and that's how you maintain that civility.

PC: Is it tough for you to work with young counsel that do not have the confidence or experience that you do and they're not aggressive? How do you work that dynamic?
MN: That dynamic is not as challenging to work as you'd think. It's actually tougher for me to work with someone who is as aggressive as I am. For instance, right now I'm working a big case with a colleague of mine, certainly not lacking for experience, in fact I think he's more experienced than me, much to my chagrin, but he doesn't have the same tactics as I do, I think our tactics play off each other very well. I've learned a lot from him and honestly he's one of the best litigators that I know, it would be hard pressed to name anyone who's a better litigator than him, and certainly he doesn't have that same aggressive personality. But what everyone has to remember and something that I've always understood and tell junior counsel is that everybody has to pick what works for them, being aggressive, being the bulldog as I've been identified works for me, it doesn't work for everybody. Some people have to be more reasonable, some people do the bumbling idiot routine and it works for them and it works for them in court, but everyone has to find what works for them. I actually think one of the things my aggressive personality and my confidence in court does for those more junior or experienced counsel, they don't necessarily have

to be as aggressive as I am but what they can do is gain some of that confidence and it helps them and I try to pass that on to them. That's the biggest thing, build up their confidence, not necessarily making them aggressive, but build up that confidence for them.

PC: When you do deal with new trial counsel do you have a general approach to getting them involved in the case or getting them past problems you see young counsel dealing with in every trial?

MN: I do. First off, I like to be detailed to a case as early as possible. Sometimes that doesn't work. If I'm detailed at the ground floor I like to get them involved in discussions with me about the case. And one of the big reasons for that is that they have other things taking their attention away, they've got other responsibilities, but I will impress upon them how important this case is. I want to get them involved in trial strategy decisions. One thing I always tell every junior counsel that I think lets them feel that ownership part of the case, let's them feel invested in the case, is "hey, this is a team and I want your input and opinion on trial decisions." Ultimately as the lead counsel I am going to make those decisions in the end but your input matters and I want to show them that that input matters. And so I don't like to make decisions without going to that junior counsel and asking them what they think. One, as a sounding board to know if I'm sounding crazy, which sometimes happens, and two, so they feel like they're input ultimately does matter. Because to me it does. I learn by talking things out with people and for my own trial strategy decisions, I make decisions by talking them out, so it's helpful for me but it's also helpful for them because they feel like they're part of that process. I think one of the things that junior STCs do that's probably not so great, and it's just a learning curve, is they go in there and they are lead counsel and they just go in there and make the decisions and they do it without consulting their junior counsel, their assistant trial counsel, and then that assistant trial counsel just feels like they're just a potted plant or they're just the admin guy or the admin girl for the case and so they don't feel like they are part of the team, part of the case, and I think it's important early on that they feel invested in it.

PC: We'll drill down on particular aspects of a case in a minute, but let's talk real tactically about what young trial counsel can do in the well better, whether it's movement or tone, what are they usually lacking.

MN: Big picture they should focus on a couple of things. Knowing the rules that govern what you do in the well. That is to me even more than half the battle. You know the rules and you know what rules are going to come into play and you are going to gain that confidence in the well. It's going to transfer to what you are doing in the courtroom, you're going to understand it and then you are going to be able to control the battlefield. For me the most the biggest part in the courtroom is that

confidence. Perception is everything and even if you don't necessarily feel like you know what you are doing and you might not know it, but if you look like you know what you are doing the members are going to believe you know what you are doing. And so knowing the rules is more than half the battle to getting yourself there. And then beyond that it's always moving and doing things with a purpose. Why? Ask yourself that question "why?" Why am I asking this question, why am I moving this way, why am I standing over here, those are all questions I ask myself beforehand. Where am I going to stand when I do a cross examination, where am I going to stand when I do a direct. How am I going to move when I do a closing argument. Because those things are the things that the members pick up on. And those are the things I don't think junior counsel are thinking about. The question of why. Why am I doing this. What is my purpose for doing it and if you answer that question and you have a purpose in mind it's going to pay dividends down the road.

PC: That raises another issue. How should young counsel work with witnesses to get them ready to be in the courtroom?

MN: The way I do it with witnesses and I think this is a good tactic to have and frankly every junior counsel should be doing it, should be talking to the witnesses frequently. Particularly when talking about victims in the case. That doesn't mean you have to ask them substantive questions about everything that happened, or interview them over and over, but you need to make sure you are keeping in touch with them to keep that rapport going, to make sure they understand what's going on, and answering the questions they have. Because that's going to make them feel much more comfortable. And then I bring every witness into the courtroom, show them the courtroom, they should sit in the witness chair and I think they should understand how to answer questions from that witness stand. I tell them exactly where I am going to stand when I ask my questions, and I also tell them where I think defense counsel is going to stand, because that's how I did it as a defense counsel and why defense counsel might stand there so they understand that coming in. I also explain to them defense counsel are doing their job for their client, their job is to try to get a rise out of that witness so I want to make sure that they are ready for that, understand the type of questions they are going to get, and the way those questions will be asked, and what the purpose of asking those questions so they understand that so they're ready for it when the other side asks their questions. Also make sure every witness understands that even though the other side is going to be able to ask cross examination questions, we always get to get back up and have them explain everything. So making them understand that process and having them see the courtroom … I've testified as a witness in a court-martial before, as a senior trial counsel I had to testify, and it was nerve racking. I was nervous. Midway through the trial it was a 39a and I thought to myself "how did I get to this point" because it is such a nervous experience for me and that wasn't anything substantive about the

case. So understanding that's how every witness feels coming into court, it's not a pleasant experience, making that as comfortable as possible is the most important thing.

PC: Let's talk about some things that folk do well or poorly at various stages of trial and tips you can provide. Let's start at the start, *voir dire*.
MN: Biggest thing is thinking about the questions you are asking. Tailoring your *voir dire* to the case that you're actually trying. Too many times people used canned *voir dire* … quick example that I use. I won't name names but I got a call from a STC who told me "hey, I've got this big *voir dire* you did for a case" that they had pulled off of a Sharepoint site "and I'm going to ask these questions about Goldilocks and the Three Bears but I was really wondering why you ask those questions." So I asked him "where did you get those questions from" because I did not remember ever asking Goldilocks and the Three Bears *voir dire* questions. It turns out, an instructor from the JAG School had pulled the original *voir dire* down from the Sharepoint site to use it for one of the mock cases they were doing and had changed some of the questions and then had unknowingly edited the original document on Sharepoint, then someone pulled down the edited versions and said "OK, we're going to use this for our *voir dire*" and they were going to ask about Goldilocks and the Three Bears! Crazy. So think about the questions you're asking. And with *voir dire*, the main thing for me, the biggest thing for me is not to lose credibility with the members, you want to connect with them and not lose credibility, it's your first opportunity, your first experience to talk with them and you don't want to lose credibility with them so make sure you are asking questions that actually have a purpose and questions that are simple, not lawyer questions.

PC: It's always my advice to trial counsel that they follow the doctors Hippocratic Oath and first do no harm. That is no more true for trial counsel than in *voir dire*. That's your opportunity to lose all credibility with the members…
MN: My advice from the government side is the biggest thing you always want to do is avoid putting your foot in your mouth in front of the members and losing that credibility and if you do that you can count that as a win in *voir dire*.

PC: How about opening statement?
MN: Opening statement you want to tell a concise yet compelling story. And you want to make it a story, not a rote recitation of the facts that they are going to hear. Often times when I get the initial opening statement in the case, the initial draft, it's a lot of "the evidence is going to show" this or "the witness is going to say" this. I don't like this. I like it to be a story, a story about the facts, a very concise story, it shouldn't be too long, a concise story and compelling story, and the biggest thing for

me is not to oversell your case. Because the one thing I like to take from opening statement when I stand up in closing argument is I like to be able to say "members, think back to opening statement, we kept every promise we made to you." And I want to be able to say that in every case. And that's the biggest advice I can give for opening statements; concise, compelling story that doesn't oversell the case.

PC: I often see theme and theory sort of jammed down the throat of members during opening statements. I think theme and theory is important and I like to carry a general theme and theory from the start to the finish, one that works from the start to the finish, but how do you get that across to the members without hammering it, without being too cute?

MN: Probably no surprise I'm not a big cutesy theme and theory guy I don't like that for a couple of reasons, one I think the members get tired of hearing the repetition of that, it's forced, and it can be turned around against you these cutesy theme and theories. For opening statement, you begin with it and you end with it. And as long as your opening statement isn't too long, that's enough. But you want it to be a central fact of your case to use as a theme and theory, a quote, sensory details about an event, things that can really resonate with the members, things that ultimate are going to be the central aspect of your case rather than trying to come up with a contrived theme and theory. Just come up with a short, concise recitation of the fact of your case that really summarizes everything. And use that as your theme and theory and then it's not going to come across as forced, that you're trying to hammer down on everyone's head. Junior counsel are being trained that you have to come up with a cutesy theme and theory for every case, contrived, and then you have to say it over and over again in opening statement. I'm not a big fan of that.

PC: What are your thoughts on how young trial counsel particularly since they are doing a lot of the directs, can do that better?

MN: Sometimes crosses are easier because you are asking a yes and no question. In directs you're asking open-ended questions and you don't always know what you are going to get or get what you expect you're going to get. The biggest thing I see with trial counsel as a failure is that they don't listen to witnesses' answers. They've got their questions written out, and I'm never telling them don't write questions, but listen to your witnesses answers. Because a lot of times they answer that next question and then trial counsel asks them about it again, and then you can see the quizzical look from the members when the question is asked to the witness that they just answered and it's because counsel wasn't listening to what their witness said. So the biggest advice I can give to junior counsel is to listen to your witnesses and use those answers, loop them in as you're asking the next question.

PC: Right, cross examination can be easier because your control of that. Give us your thoughts on that.

MN: Can be easier but when I see it done poorly is when counsel get up and they give this long cross examination that simply restates the direct. When I do a cross examination, you will hardly ever hear me ask a question that was asked on direct unless I'm confirming the answer so I can then impeach them. You should not just be reiterating the direct of the witness. When I was a defense counsel, particularly when there wasn't a STC on the case, I'd call my client to testify, even in sentencing because I knew the government was going to get up, that they didn't prepare for it, that they were going to get up and just reiterate the direct which was going to do no harm to my case. And where I think that comes from is that I think a lot of people don't think about the cross examinations before trial. I prepare my cross examinations, I ask myself what direct would I ask this witness if I was calling them and then I prepare a cross examination and I know what I want to get out and I keep it concise to that. Because a lot of the times if you make it too long, ultimately you're going to lose the point you were trying to make, the members are going to lose it. So you keep it short, you get out the points that you want, you keep it tight, and you don't reiterate the direct. Those are the biggest tips I have for cross examination.

PC: Closing argument.

MN: Closing argument, the best part of trial. I imagine most litigators will tell you that closing argument is probably their favorite part of trial. It certainly is mine.

PC: Why?

MN: Because that's really where I get to get up and sell my position to either the military judge or panel of members. It is my show at that point and I'm pulling everything together. All the work that I've done in preparation before trial, the witness interviews, the evidence review, knowing the rules, getting the evidence out there during trial is all leading up to that moment. It's that moment before I hand it over to the finder of fact to make their decision … I think we know from studies that it is not as important as you think it is but we still think that it is as litigators and approach it that way, that it'll destroy our egos if it isn't as important as we think. It really is that culminating moment of all the work you've done that you get to put into closing argument and that's what the most exciting aspect of trial.

P

C: And generally in sentencing what are you seeing folks doing or not doing that catches your eye?

MN: The biggest thing is that there's not a lot done on sentencing, particularly in litigated cases. We put so much work into findings, we have our foot on the gas for findings, and then the members come back with guilty, whew, it's a sigh of relief and then you'll usually see these three or four day findings cases and then you'll see an

hour of sentencing. We're not going out and actually doing the investigation for sentencing and understanding what evidence can come in sentencing. Certainly sentencing evidence is somewhat restricted for the government versus the defense but we need to do a better job of actually putting together a sentencing case for the members so they understand why the sentence we ultimately recommend is an appropriate sentence. Why that is so important is if you look at findings instructions in the case you're going to see 10-15 pages of findings instructions, for sentencing the judge essentially tells them you can go from no punishment to the max, good luck, have fun. So it's important that we actually do that investigation, consider sentencing beforehand rather than just focusing only on findings and then basically almost ad hoc sentencing after we get the verdict from the members. So the preparation beforehand and identifying sentencing evidence is the biggest thing I think counsel need to do out there in the field.

PC: I expect it's tough for you to give up closing argument to a young counsel. So what can a young counsel do to convince you that they are ready to take the next step and do something more substantive than maybe they have done in prior cases?

MN: There's a couple things they can do … though in the interest of full disclosure, it hasn't happened in my career as a litigator, but what counsel can do, first, it's not something that I am going to go and offer them. So the first step is they have to ask for it. They have to want it. They have to come to me and say "I want to do closing argument." Ok, that's the first step. Second step is that they have to be able to prove to me that they can do it. And that's through preparing a closing argument, and actually giving it for me, giving it in front of a murder board, and I don't mean the night before closing, they need to have that prepared before trial, at least in a form they can give it as it'll change during the course of trial as the evidence comes in, but they have to be prepared to give it. They also have to have their boss on board, the SJA at the base, I will always talk to the SJA if they want to do closing and find out "what do you think?" If the SJA says "no, she can't do it," that's usually going to be a veto power for them. But they have to have the desire to do it, the ability to do it, and be able to demonstrate that ability. And even then, I will say, there are some cases where what we're asking for, what we're advocating for, given the consequences that finding could have, where someone who's just out of JASOC with three ribbons, might be a lieutenant or very junior captain, just doesn't necessarily have the credibility to stand in front of a military panel and make that argument. So even then, sometimes, most times, I'm probably still going to give that closing argument. But those are the things that they have to do, ultimately, to demonstrate that they can.

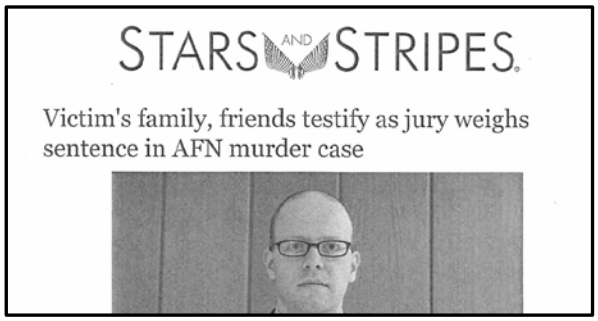
PC: Do you have a favorite case that you've worked on?
MN: Yes, *United States v. Cron.* It was one of the more complex cases I've done, a premediated murder case that originally was capital and then a pretrial agreement was approved. And it, you know, sometimes we as litigators lose sight of exactly why we're doing what we do. But in that case one of my main responsibilities, it was a case down at Kadena, and I was one of the stateside STC, I was the family liaison. And getting close to that family, and getting to know them gave me a new perspective and still touches me even to this day. I'm still in communication with the family, every time I go up to DC I meet with the family, and we still communicate very frequently. That cases still sticks with me, and just the challenging aspects of it both from the emotional aspect and the legal aspect of it, so that would have to be the case I'd identify as my favorite.

Chapter 12

CASE STUDIES: Litigation Theory to Practice

Sentencing Argument

Sentencing is about maintaining the momentum of findings and then, for the prosecution, continuing the strategy (the theme and theory) that got you to that point. And again, public review of an actual case—sentencing on a murder conviction.


STARS AND STRIPES

Victim's family, friends testify as jury weighs sentence in AFN murder case

Chapter 12 – CASE STUDIES: Sentencing

On a cold night in December 2013, Air Force Staff Sergeant Sean Oliver strangled to death Navy Petty Officer Second Class (PO2) Dmitry "Chep" Chepusov. That murder might have gone unsolved had not chance intervened. A local Polizei patrol randomly pulled SSgt Oliver's car over while he was on his way to dump Dmitry's body in a wooded area outside Kaiserslautern Germany and discovered Dmitry's lifeless body strapped into the passenger seat.

Petty Officer 2nd Class Dmitry Chepusov, a military broadcaster, was found strangled to death in the passenger seat of a car during a traffic stop in December 2013.

The twists and turns of the ensuing multi-nation investigation and then murder trial of *United State v. Staff Sergeant Sean Oliver* had all the makings of a made-for-TV movie: a cast of colorful characters of service members from the Armed Forces Network (AFN); a torrid affair involving SSgt Oliver and PO2 Chepusov's wife; disturbing pre-murder discussions of the financial "benefit" to his estranged wife from Dmitry's death; allegations of involvement in the murder by another AFN colleague, an Army Private; a plan to kill a potential witness to the murder, another AFN colleague, an Air Force Staff Sergeant; an elaborate effort to create a ready alibi for when Dmitry's body was eventually discovered in the woods; discovery of a previous strangulation/assault (not death) committed by SSgt Oliver; and the strange circumstances of the discovery of the murder.

After a three-week trial in January 2015, SSgt Oliver was found guilty of, among other things, PO2 Chepusov's unpremeditated murder. While the hard-fought case presented many excellent examples (from both the prosecution and defense) of how the theories of litigation can expertly be put into battlefield practice, the focus of this article is on sentencing—in particular, the prosecution's case.

Theory

Truth be told, the sentencing case is all too often treated as the "red-headed stepchild" of trial practice. Unless it is a guilty plea and all you are "litigating" is the sentence, the vast majority of both parties' energies at trial is devoted to their ultimate goal of conviction or acquittal (or somewhere on each parties' side of that spectrum). Once that is achieved, the momentum built up during findings tends to wane and particularly prosecution sentencing cases often fall flat. [Of course, once the defense goal--acquittal--is achieved that momentum does not need to be preserved for a sentencing case and can be translated into a post-acquittal celebratory beer.]

But even in cases of conviction, the defense community is much better at maintaining and accelerating their findings momentum. Prosecutors too often seem to assume the facts will speak for themselves and alone guide the fact finder to the "right" sentence. This manifests itself in primarily paper presentations, failure to call useful witnesses, passing on cross-examination of defense witnesses, meandering arguments, and general lack of "vectored passion"™ for the requested sentence. Yes, the facts dictate the outcome, but how you present those facts can nudge the outcome in your preferred direction. Now, "poor sentencing efforts" could certainly describe some of this author's sentencing cases back in the day, but you younglings are better and you can do better.

Know generally what you are eventually going to want as a sentence. But not only know what you want, as that is not the hard part, but know why you want it.

You can do better if you contemplate your eventual sentencing case when you first sit down to consider a strategy for your entire case. Know generally what you are eventually going to want as a sentence. But not only know what you want, as that is not the hard part, but know why you want it. If you do that, then you can craft a theme and theory for your case that works not just for findings, but also translates well into your sentencing presentation. A consistent narrative enhances your teams' credibility with the fact finder and often credibility of counsel, just like credibility of witnesses, helps carry the day. In sentencing, this hopefully manifests itself by the fact finder giving more credence and consideration to your sentence ask during deliberations.

You can also do better if you hew closely, but not slavishly, to the sentencing instructions in constructing your argument. Members, even if they are not pilots, love to have checklists or "official" guidance on how to proceed. They get this from the one person in the court who has inherent credibility—the judge. Pander a little by parroting some of the judge's instruction and maybe some of that credibility will wear off on you as it is not just "the prosecutor said" back in the deliberations room, now it is "the prosecutor and the judge said." At a minimum, referencing the sentencing instructions will give your argument some structure and thus make it smoother and more persuasive; it will help you answer the "why" your requested sentence is appropriate.

Remember, in every sentencing case the judge is going to instruct the members (or remind himself or herself), of the five principles of sentencing that they "should" consider:

Do not oversaturate your argument canvas by mixing in every instruction from the palette, but chose a few that fit your overall case theme and theory

> There are several matters which you should consider in determining an appropriate sentence. You should bear in mind that our society recognizes five principal reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of his/her crime(s) and his/her sentence from committing the same or similar offenses. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion.

And that their sentence determination should take into account three, big-picture concerns:

> [Y]ou alone are responsible for determining an appropriate sentence in this case. In arriving at your determination, you should select the sentence which will best serve the ends of good order and discipline, the needs of the accused, and the welfare of society.

And that they "must give due consideration to all matters in mitigation and extenuation, as well as to those in aggravation . . .." Do not oversaturate your argument canvas by mixing in every instruction from the palette, but chose a few that fit your overall case theme and theory.

You can also do better if you do not just anticipate what your opponent's sentencing case is going to be solely for preparing to argue against it, but anticipate it to prepare to meet it aggressively with your own evidence presentation (during findings and sentencing), and through careful cross-examination of your opponent's witnesses. "Careful," of course, because that cross-examination will be of the crying and distraught, and thus sympathetic, spouse, or parent, or even child. These cross-examinations require a light touch. But a "light touch" is not a "phantom touch" and you should not be afraid to ask a crying spouse a question that is going to help your later argument—though again you need to do so carefully, sympathetically, and apologetically. Even start that way: "Ma'am, I am so very sorry that you have been put in this position, but [whatever you need, e.g. am I correct that your son did not tell you about his arrest]." There is a great reluctance to cross-examine family defense witnesses for the fear of "turning off" the members by appearing cold-hearted or downright mean. Get over yourself, you are not as intimidating as you think you are, find a way to cross the right way to advance your case. Indeed, you can even explain to the members in your argument why you needed to ask those questions of that witness—after all, if you did not have a reason to ask a particular question, you should not be asking it. But if you have a reason, ask the question and tell the members why it was important.

The prosecution's sentencing case in *United States v. SSgt Oliver* illustrates these key concepts. Brought onto the prosecution team with a primary focus on sentencing, Major Grethe Hahn's masterful sentencing strategy, presentation, and tear-inducing argument secured a life sentence for SSgt Oliver.[1]

Background[2]

In 2012, while on leave in Ohio, the Accused let himself into his then ex-wife's house in order to catch her in bed with another man. He attacked that man, placed

[1] The author extends special thanks to Major Jeremy Gehman, Major Grethe Hahn, Major Marisol Salviejo, and Major Nathan Royer, for their outstanding work at the trial of *United States v. SSgt Sean Oliver*, and their contributions to this article.

[2] SSgt Oliver's appeal was denied in full on 27 January 2017 by the Air Force Court of Criminal Appeals in an unpublished decision. You can read the opinion, to include additional facts at *United States v. Oliver*, 2017 CCA LEXIS 59 (A.F.C.C.A., January 27, 2017)(unpublished). References are to the Record of Trial (herein "R") on file with the author; editorial revisions made to enhance readability and protect identification of witnesses and individuals.

him in a strangle hold, and squeezed until his victim could not breathe and continued to squeeze until his victim started to turn blue. Only at the urging of his ex-wife and another roommate in the home did SSgt Oliver release his hold and did so only after his victim promised not to call the police.

The next time SSgt Oliver strangled someone, he did not release his hold until his victim was dead.

STARS AND STRIPES

Sailor assigned to AFN found dead in Kaiserslautern

Stars and Stripes
Published: December 17, 2013

A sailor assigned to American Forces Network-Europe was found dead in a privately owned vehicle Saturday in Kaiserslautern, Germany, according to U.S. European Command.

U.S. Navy Petty Officer 2nd Class Dmitry Chepusov, 31, of Edgewater, N.J., was found unresponsive and subsequently pronounced dead by German medical authorities called to the scene, EUCOM said.

That victim was PO2 Dmitry Chepusov. The two worked together at AFN in Germany. Dmitry's marriage was, at his insistence, coming to an end and SSgt Oliver graciously agreed to take Dmitry's wife off his hands. Dmitry frankly did not care and thus SSgt Oliver and the estranged wife began a relationship that became sexual while Dmitry was out of the country visiting Ukraine. When he returned, SSgt Oliver invited Dmitry out to drink with a group of friends from the AFN community, which they did on December 13, 2013.

As the evening ended, Dmitry along with several others returned to a fellow AFN member's apartment, Army Staff Sergeant S. At some point, SSgt Oliver and Dmitry were in the kitchen while the others were in the living room. While it is unclear what *exactly* happened in the next few moments, the evidence was that SSgt Oliver attacked Dmitry, Dmitry fell to the ground with a badly cut ear, and SSgt Oliver then climbed on top of him and strangled him to death with his hands over the next few minutes. SSgt Oliver then dragged Dmitry's dead body to SSgt S's bathroom. At one point SSgt Oliver had a discussion with Army Specialist K, one of his AFN colleagues who was present at the apartment that night, which another AFN colleague, Air Force SSgt P, who was also present, overheard. During that conversation, SSgt Oliver confirmed that Dmitry was dead, "dead dead" in his words. SSgt P did not overhear the rest of the conversation in which SSgt Oliver and Spc K briefly contemplated killing SSgt P as well, to tie up the loose end.

SSgt Oliver immediately began concocting an alibi and covering up the murder. He left Dmitry's body in the bathroom and went home to send "fake" text messages to his AFN friends and Dmitry's estranged wife about where he was and what he had been doing that night (including that he was going to go to sleep). He also logged into his computer to surf adult websites so that if there was ever a search of his computer (which there was) it would appear that he had been at home rather than with Dmitry at the time of death. He then grabbed some household cleaner, returned to SSgt S's apartment, cleaned the blood up in the kitchen and bathroom, dragged Dmitry's beaten and bloodied body down the stairs into his car, buckled Dmitry into the passenger seat, set his GPS for a destination out of town, and started driving to the woods to dump the body.

STARS AND STRIPES

Video shows airman implicating himself in death of AFN broadcaster

By Matt Millham
Stars and Stripes
Published: January 14, 2015

RAMSTEIN AIR BASE, Germany — A panel of officers and enlisted personnel watched video evidence Wednesday in which Air Force Staff Sgt. Sean Oliver changes his story and implicates himself in the death of Navy Petty Officer 2nd Class Dmitry Chepusov, whom he is charged with killing.

There is a saying about the cruelty of karma, and it applies to SSgt Oliver. A German Polizei patrol just happened to spot him out driving at about 2 a.m., nearly out of Kaiserslautern proper, and given the late hour the Polizei pulled him over to check if he had been drinking. When they realized Dmitry was not breathing and had a bluish coloration, the officers began to suspect he was not just passed out drunk as SSgt Oliver had claimed. The officers pulled Dmitry's body out of the car and attempted life-saving efforts to no avail, all while SSgt Oliver looked on and feigned shock, to include fake tears (as he later was forced to admit on cross-examination at trial).

Subsequently, SSgt Oliver was arrested by German authorities and ultimately lied repeatedly and inconsistently trying to explain how he had a dead body in his car. He lied first to the German police, then to agents with the Office of Special Investigations once the Germans released SSgt Oliver back to military control, and ultimately to the members at his trial.

The Government charged SSgt Oliver with aggravated assault for the Ohio strangulation and premeditated murder for PO2 Chepusov's death, as well as obstruction of justice and making false official statements for his many, many lies and

an effort to cover-up his crime.[3] Surprisingly SSgt Oliver elected to testify in his own defense—it was not a wise decision. The members did not believe his ever-changing stories of what had happened that night and convicted him of murder.

Sentencing Case

With 29 German and American witnesses, a month of trial, almost a dozen experts, hours and hours of video, hundreds of pages of exhibits, and the intrigue and drama of the colorful cast of character involved, it was important for the prosecution to focus on a simple theme and theory to which they could anchor the case from start to end. Not hard to figure out here. Essentially it was that SSgt Oliver was a violent, calculating killer who, as such individuals typically are, was also a "lying liar who lies."[4]

STARS AND STRIPES

AFN murder trial: Pathologists agree that sailor Chepusov died of strangulation

By Matt Millham
Stars and Stripes
Published: January 21, 2015

RAMSTEIN AIR BASE, Germany — American and German autopsies came to the same conclusion about the death of Dmitry Chepusov, the American sailor whose body was found in an automobile during a traffic stop in Kaiserslautern, Germany, in December 2013: He was strangled.

As to the violent-killer aspect, the prosecution was unsurprisingly consistent—leading with it at the start of the findings case, ending the findings case with it, and importantly continuing the theme at the start of the sentencing argument:

> OPENING: Colonel M., Members, with malice in his heart, and forethought in his mind, Staff Sergeant Sean M. Oliver wrapped his hands around Petty Officer Dmitry Chepusov's neck and squeezed with all his might. He continued to squeeze even after the loss of oxygen caused Petty Officer Chepusov to fall into unconsciousness. He continued to squeeze for another 5 minutes while Petty Officer Chepusov lay on the cold kitchen floor immobile. He continued to squeeze for minutes and minutes after that until the lack of blood and air to the brain resulted in Petty Officer Dmitry Chepusov's death. He squeezed until Petty Officer Chepusov was dead and then for good measure, to celebrate his accomplishment, in an action to show he was the victor, he got up and kicked Petty Officer Chepusov's lifeless body. That is premeditated murder. . . . This is Dmitry Chepusov [showing

[3] The issue of joinder of the two strangulation-related charges was hotly contested in pretrial motions, with the military judge denying the Defense motion for severance. The military judge did impose substantial limitations on the order of proof to guard against spillage and provided the members detailed instructions to not conflate the two strangulation incidents. Failing to sever was not challenged on appeal and only in sentencing argument, and then only briefly, were the two strangulations referenced together.

[4] Trial Counsel applied this description to one of the witnesses in the case during findings argument, which drew a prosecutorial misconduct claim on appeal (which was denied). The description also applies to SSgt Oliver given the evidence presented at trial.

> photo on Smart board], known as Chep, a Petty Officer Second Class of the United States Navy. He is dead. Murdered.[5]
>
> CLOSING: For the minutes, the minutes that the accused had his hands wrapped around Petty Officer Dmitry Chepusov's neck and squeezed with all his might, he had a choice to make. As the seconds ticked off the clock and the minutes ticked off the clock, he had a choice to make. As Chep passed from consciousness to unconsciousness, he had a choice to make. And as death approached, he had a choice to make. He could have stopped. He could have reflected on what he was doing and made the choice to stop. He could have put aside his anger at Chep. He could have put aside his relationship with Chep's wife. He could have put aside his fear of getting in trouble with Command, and he could have put aside his belief that she and he would be better off financially and emotionally if Chep was dead.[6]
>
> He had the ability. He had the time. He was able to think. He was able to contemplate. He was able to make the right decisions. He didn't do that. He didn't choose life. He chose death. That day with his hands wrapped around Chep's neck, squeezing with all of his might for minute after minute, he chose death. He killed Chep. He killed him "dead-dead." With malice in his heart and forethought in his mind, he committed murder, premeditated murder. You should find him guilty of that and every other charge in this case.[7]
>
> SENTENCING: In 2012, the accused stormed into [his ex-wife's] apartment, lunged at [her paramour], wrapped his hands around his neck and he squeezed. He squeezed until he turned blue and he didn't stop until [a roommate] pulled him off. In 2013, the accused stormed into [SSgt S's] kitchen, lunged at Dmitry Chepusov, wrapped his fingers around Dmitry's neck and he squeezed. He squeezed and he squeezed, but this time he didn't stop. He squeezed until he murdered Dmitry Chepusov.[8]

Nor did trial counsel shy away from asking for the members to take their "pound of flesh," to punish harshly for punishment's sake for the act itself. First, though, she borrowed some of the judge's inherent credibility by echoing his instructions, while bringing focus to those that best advanced her theme:

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[5] R. at 736.
[6] R. at 2494.
[7] R. at 2495.
[8] R. at 2764.

> There are many different reasons why we punish criminals once we found that they have broken the law. That might not be something that you think about often, but the judge talked to you a little bit about that yesterday. There are things that are called facts in aggravation. Aggravating facts about the crime itself that make it so bad. What is it about this murder that makes it worse than your "average" murder? What is it about this assault that makes it worse than your "average" assault? And we're going to get into that.
>
> After we're done arguing the judge is going to tell you that you need to consider three things; the effect on good order and discipline, the needs of the accused, and the welfare of society. And so we're going to talk about those, too. And then yesterday the judge talked to you about different principles of sentencing. . . . Well, I'm going to highlight two of them for you. One is general deterrence and the other is retribution, but members, as we go through all of these you will see a prevailing pattern and that is all signs point to life without parole.[9]

Trial counsel then supported the ask for that "pound of flesh" (punishment for punishment's sake) by demonstrating the aggravated nature of the offense--focusing directly on the accused's heinous acts:

> When the accused had his hands around Dmitry's neck, was Dmitry struggling? Well, forensically speaking, it looks like he had some defensive wounds, but did Dmitry know, as the accused was choking him that his coworker Sean Oliver was murdering him? We never know these . . . we may never know . . . may never have the answers to these questions, but we do know this members: We know that the manner of death [by] which he killed Dmitry Chepusov. He killed him by manual strangulation.
>
> Take a moment and think about that. Think about the intimate manner in which he killed another human being. We're not talking about some impersonal way of killing like firing guns from 50 feet away or hiring a hit man to do your dirty work for you. We're talking about hand[s] in the face of your victim, close and personal, and squeezing. Members, you remember the demonstration in court where Major Gehman got on top of Captain Royer and remember how uncomfortable it was even just to watch it and see how close he was, even if his arms were fully extended we're talking inches away from his victim. Maybe he was looking into Dmitry's eyes as his veins were exploding due to the increasing pressure to his head. Maybe he was excited. Maybe he was scared. Maybe he was just plain angry.

[9] R. at 2764-65.

> But we do know this, [] he squeezed until he murdered Dmitry Chepusov in the most intimate way he could murder another man and that's with your bare hands. And that is a fact in aggravation.
>
> Now, it's just not the gruesome manner in which he killed Dmitry, it's how he treated Dmitry after he had just murdered him. We have the accused squeezing his for [at least] a minute until he decides he's good and dead, "dead, dead." And what does he do? He stands up tramping over his victim and he gives [him] two quick kicks just for good measure. What contempt. What disrespect for the lifeless vulnerable corpse of your victim …
>
> This isn't a sarcastic comedy like *Weekend at Bernie's*, members. We're talking about a real person, a human being, Dmitry Chepusov, and he treated him like garbage and what do you do with garbage? You throw it out. And that is exactly what the accused was going to do. He was going to drive him to some woods, kick him out of his car and hope that the elements or maybe the animals would get to him. He treated his body like garbage and that is a fact in aggravation.[10]

Though in a sense the violent-killer theme was self-evident in the nature of the offense and "easy" to tie to the sentencing instructions, pursuing the other theme—that SSgt Oliver was a "lying liar who lies"—required trial counsel to more creatively weave that theme into the other instructions.

It helped this process that charging decisions made relevant SSgt Oliver's penchant for lying at literally every opportunity in failed efforts to deflect responsibility to others. It also helped this process that the volume of lies SSgt Oliver told, presented in detail through the prosecution' case-in-chief, oriented the members to SSgt Oliver's character for untruthfulness long before he took the stand and long before he cried his crocodile tears in sentencing.


STARS AND STRIPES

Prosecution concludes case in AFN killing with testimony on earlier assault

It also helped this process that, again, the judge instructed the members that the lying from the witness box to them was relevant for their sentencing deliberations—the mendacity instruction, aka "the prosecutor's best friend":

> The evidence presented and the sentencing argument of trial counsel raised the question of whether the accused testified falsely before this court under oath. No person, including the accused, has a right to seek

[10] R. at 2765-66 (emphasis added).

> to alter or affect the outcome of a court-martial by false testimony. You are instructed that you may consider this issue only within certain constraints. First, this factor should play no role whatsoever in your determination of an appropriate sentence unless you conclude that the accused did lie under oath to the court. Second, such lies must have been, in your view, willful and material, meaning important, before they can be considered in your deliberations. Finally, you may consider this factor insofar as you conclude that it, along with all the other circumstances in the case, bears upon the likelihood that the accused can be rehabilitated. You may not mete out additional punishment for the false testimony itself.

"The mendacity instruction, aka 'the prosecutor's best friend'"

By the time trial counsel presented her argument there was an overabundance of evidence (more than can be catalogued in this article) that SSgt Oliver was not credible primarily because of his pathological inability to tell the truth. Thus, she catalogued the most glaring of those lies and tied them to SSgt Oliver's lack of remorse, which she argued undercut the anticipated defense argument that the SSgt Oliver possessed rehabilitative potential:

> The judge told you the mendacity instruction yesterday. And that instruction tells you that no person, including the accused, has a right to seek or alter the [outcome] of the court-marital by false testimony, which is exactly, exactly what the accused did. He had a year to go through all the evidence. He had the weeks in court to see the [perceived] holes and then he crafted, he tweaked his story to try to make it better for him, because it's all about him . . .. His tears were so obvious and self-serving. His tears were so clearly fake and yet he expected you to swallow that garbage.[11]

And throughout, trial counsel focused her argument on how SSgt Oliver's "remorse" could not be trusted and how a person without true remorse for committing such a heinous act should not be credited with rehabilitative potential:

> Next, let's talk about the accused's lack of remorse. He's not sorry Dmitry's dead. Let's go way back to December when he got called into OSI. What did he tell [the Special Agents]? And we have that up on the screen for you to read along. He says, "That's another reason why I feel really bad, because I really don't have a lot of remorse about him being dead. It's all just fear, all fear about what the fuck is going to happen to me." That is another recurring theme you're going to see,

[11] R. at 2769.

members. It's all about Sergeant Oliver. It's not about his victim. It's not about the man that he just murdered. He's not sorry. . . . He wasn't sorry because he wanted him dead. He got up here yesterday in his unsworn statement and he said things like "I can never apologize enough." Well, that is true, he can't. "But I'm filled with regret and I am truly sorry."

Members, there is a difference between being sorry because you have a guilty conscience about what you did and being sorry because you got caught. There is just no way around it. The accused is only sorry because he got caught and you didn't believe his lies [when he testified]. This is what he is sorry about. He has no remorse. He is not sorry he is dead, because he wanted him dead, which is why he killed him.

And the lies, the lie after lie after lie. [Two pages describing the lies]. Members, he straight up lied to you, he lied to you. He took the stand . . . just seven days ago, raised his right hand, swore to tell you the truth and he lied, he lied to reduce his criminal liability. He hoped to pull the wool over all your–over all your eyes and get away with it. And guess what? Not even the accused gets to lie. . . . [His lies] show you how little regard he had for his victim, how little remorse he felt and how he has absolutely no rehabilitative potential. . . . A person with no rehab potential does not deserve a second chance at freedom, which is why the accused deserves life without parole. It's as simple as that.[12]

Trial counsel also anticipated a standard defense sentencing argument. SSgt Oliver had three young children. While it was not difficult to anticipate that the thrust of the defense's plea for leniency would revolve around imploring the members to "think of the children," counsel effectively anticipated that line of argument and prepared to meet it by her own evidence presentation and through cross-examination of the defense's witnesses. First, she delved deeply into the effect of the crime on Dmitry's family, including this exchange with Dmitry's Ukrainian mother (who also testified that she referred to Dmitry also as "her Mita," a Ukrainian pet name):

Q. And where was the funeral held at, ma'am?

A. The funeral was in New Jersey. We buried him with all military honors in the cemetery where my father is laying. Of course, nobody prepared for this, so we didn't have any other best ideas. We had to bury Dmitry, so we buried him over there. And because he was dead for so long, I couldn't recognize him. I couldn't hug him or kiss him.

[12] R. at 2767-70.

What can I tell you; that's all.

Q. Ma'am, I want to show you a photograph. Does Dmitry have any grandparents that are still alive?

A. Yes, from all set of four grandparents only one babushka, grandmother.

Q. And where does she currently live?

A. She lives in Odessa, Ukraine, where originally we came from.

Q. Does Dmitry go and visit her?

A. Yes, many times. He was very close to her. He loved her very much. She -- she doesn't know he passed. She doesn't know he murdered. The family decided to not tell her. She still cries at the death of her son Hugo, who died from cancer two years before Dmitry. And they decided to not tell her about Dmitry's passing, because it would just kill her. So she -- they told her he's on a lengthy overseas deployment and he just cannot call you.[13]


STARS AND STRIPES

Victim's family, friends testify as jury weighs sentence in AFN murder case

During the defense sentencing case, SSgt Oliver's ex-wife and mother of his children testified. She had ham-handedly created a video in which she appeared to have coached the children to cry on cue as each of them told the camera how much they loved and missed their daddy. Trial counsel honed in during cross-examination, carefully and sympathetically in tone (notice the non-directive form of the questions), on a point she would then use to great effect in her argument:

Q: Ms. Oliver, during the time that Sergeant Oliver has been in pretrial confinement, have you had an opportunity to speak with him?
A: Yes.
Q: To speak with him on the phone?
A: Yes.
Q: Have you had an opportunity to write him letters?
A: Yes.
Q: And does he write you back?
A: Yes.
Q: And how about the kids, you mentioned that there was a letter that he had sent to one of the children. Have they had an opportunity to write him letters?
A: Yes.
Q: And has he had the opportunity to write them all letters?

[13] R. at 2682.

A: Yes.
Q: You also mentioned that they had met [him] when he was out for the deposition at Wright Patterson. You had a couple chances to meet with Sergeant Oliver during that deposition [time], correct?
A: Correct.
Q: I think you also made arrangements to have his mother meet with him during this time?
A: Yes.
Q: Into the future is it your intent that the children will try to maintain a relationship with Sergeant Oliver?
A: Yes.
Q: And, therefore, to the extent it's possible and [he's] accessible, will you make efforts to ensure that he has an opportunity to meet with his children?
A: Yes.
Q: And to talk with them on the telephone?
A: Yes.
Q: And to write them letters?
A: Yes.
TC: Thank you, ma'am.[14]

From all of this, trial counsel drove home two points in her argument to undermine the argument she had expected, and got, from the defense. The first point that SSgt Oliver losing his family was his own fault and second that Dmitry's family's loss was so much worse than the loss SSgt Oliver's family suffered. Counsel began by a full-throated challenge to the video:

> And let's talk about his kids for a bit. He has three beautiful children and he played a video of his three kids talking about their daddy and that video should make you think . . . feel two things. First, just utter sympathy. These are innocent children and it's not their fault that their father's going through this.
>
> But you should've felt angry, too. Angry that the accused would put his kids through that. Putting a camera in front of their face and saying "kids go ahead and cry. Your tears really sell well, so ham it up for the camera. Daddy needs to get out of jail." He's using his children as a pawn to try to manipulate you into feeling sorry for the kids and thus giving him a pass in his punishment. It is not his kids' fault that he strangled [his ex-wife's paramour] until he turned blue. It is not his kids' fault that he strangled Dmitry Chepusov until he died. And it's not your fault that you are called upon to give him the appropriate sentence that he deserves for these criminal actions and that includes

[14] R. at 2732-34.

life.[15]

Then trial counsel compared the two families' losses:

> Yes, he will play a small role in his children's life when he is in jail, absolutely. But they'll still get to call him. They can still write him letters. They can still visit him. Where does Dmitry's family go when they want to visit him? . . . A graveyard in New Jersey. What number do they call when they want to talk to their brother or their son for just five minutes?[16]

And then towards the end of her argument trial counsel re-emphasizes the devastating effect of the murder of their loved one:

> You heard from his grieving family. You heard from his mother. The devastating loss. The gap that would never be filled. The hole in her heart. She is never going to go a day, a day without thinking of her Mita. Her own son. They haven't even had the heart to tell his 97-year-old babushka that he's dead, let alone murdered, because they think the news might kill her.[17]

Finally, to tie it all together, to return to her requested sentence, to re-focus the members on the principle of retribution, the "pound of flesh," the punishment for punishment's sake, Major Hahn closed with this:

> He's a person, members. He is Dmitry Chepusov. Dmitry Chepusov will never be a Chief Petty Officer. He will never be a father. He will never be anything, but dead. Dead dead, because of this accused. And so when you think about your pound of flesh, members, you think about Mita. You think about Dmitry Chepusov and you give him that pound of flesh. You sentence Sean Oliver to life without parole, because that's what he deserves. . . . [T]he facts in aggravation in this case, for every factor you must consider; all signs point to life without parole. Do the right thing. Now is your time. You go in there, you come out and you give the sentence that we all know he deserves, life without parole.[18]

"Discerning what carries the day with members in their sentencing deliberation delves into the realm of voodoo science"

This is the "why" that supported the "what"—the "what" being life imprisonment. Based primarily on the family plea, the Defense suggested a sentence of no more than 25 years

[15] R. at 2171-72.
[16] R. at 2171-72.
[17] R. at 2171.
[18] R. at 2776.

confinement. Though discerning what carried the day with members in their sentencing deliberation delves into the realm of voodoo science, this consistent approach to theme, tied to the judge's sentencing instructions, assuredly buttressed the prosecution's and trial counsel's credibility with the members.

In no small part, the resulting sentence was assuredly the product of Major Hahn's excellence in converting litigation theories into practice. This was a "big" case and the egregious facts dictated some obvious strategic decisions. But there are no "small" cases, only "small" litigators. While the facts of a case will in the end dictate your strategy (your theme and theory), you must develop one. And take a lesson from Major Hahn, one of the finest, in how that can best be done.

Only three hours after closing the court for deliberations the members sentenced SSgt Oliver to life with the possibility of parole.

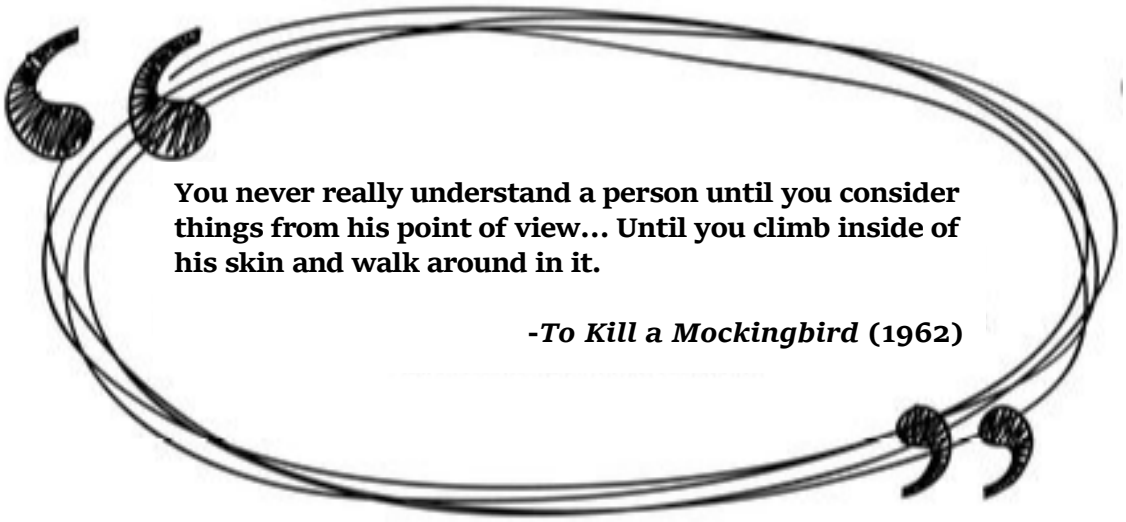

STARS AND STRIPES

Oliver sentenced to life with parole for killing of AFN broadcaster

Chapter 13

CIVILITY

"Can't we all just get along?" No? Well then at least don't be a jackass about it. Credibility and civility are not mutually exclusive qualities. In fact, they are co-dependent—you cannot be credible if you are not civil. In the rough-and-tumble world of trial litigation, it can feel like remaining civil is an impossible goal, but it is not. Here are some thoughts, some of them random, on how you can exercise civility even in the face of harsh personal attacks.



Chapter 13 – Civility

Trial

Take it from me, you do not need to act like a jackass to be an effective litigator. … *[pause … laughter eventually dies down]*. Ok, ok, ha ha, very funny. So yes, maybe given my own sorted history of professional-responsibility complaints (all unsubstantiated, barely), appellate assertions of prosecutorial misconduct (all denied, mostly), and poor-filter/big-mouth reputation (undeserved, sort of), it may seem odd that I am pontificating about the virtues of not acting like a jackass when operating in the military-justice system. But who would you rather have teach you to fight a shark; someone who has actually done it, or someone who was the shark's lunch?

I have tangled with a boatload of "sharks," jackass counsel, in my litigation career (sharks are jackasses of the sea). The thing about a jackass is that the jackass does not realize the thing that everyone else does—that the jackass is being a jackass. These jackass counsel are the ones who attempt to use bullying and intimidation and empty threats to cow junior counsel into giving them what they want (*i.e.,* letting them run roughshod over the rules and process of a court-martial). They are the ones who scream and yell and hyperventilate in court about every perceived slight and have as their only strategy asserting opposing counsel has acted unethically. They know not the facts nor the law so they resort to pounding on the table to make their points. The best way to deal with a jackass counsel is to relax and not take the bait, do not sink to their level.

I know, I know, easier said than done. To do that, you must not give the jackass ammunition. Failure to treat military justice and your upcoming court-martial as job

#1 will invariably provide ammunition to opposing counsel. This usually manifests itself in needless discovery disputes, which poison the well, with continuing acrimony and distrust effecting all subsequent trial encounters. Defense counsel shoulder some of the blame for this by filing increasingly long, boilerplate discovery requests seeking information that, even if produced, will have no meaningful impact on their trial preparation or defenses. Defense counsel then make it worse by sending email after email berating trial counsel for failing to respond immediately (and yes I understand there are time limits for discovery responses). A tailored request and some patience on the margins of a large discovery request would go far to setting the trial-counsel/defense-counsel relationship up for success.

> **Failure to treat military justice and your upcoming court-martial as job #1 will invariably provide ammunition to opposing counsel**

But most of the blame for needless discovery disputes lies at the feet of trial counsel and, sorry, deservedly so. We have all been there. Back in the day, and hopefully to this day, the refrain at JAG training was that "military justice is job #1." But then as the brand-new first lieutenant at a base legal office you quickly learned that "everything is job #1" … and legal assistance seemed to be "job #1+." And then, though detailed to a court-martial with the promise of senior-counsel support for trial down the road, that brand-new first lieutenant finds himself or herself handling discovery on their own, likely never having dealt with an actual discovery request in their short legal careers. If these counsel are lucky they have military-justice experienced bosses, but it is more likely they do not; thus the result = paralysis and procrastination.

My philosophy as a litigator and then as a Staff Judge Advocate was to give the defense whatever they want, within reason. I like to think my junior co-counsel and legal-office captains felt unburden with this permission to de-emphasize silly discovery battles, battles that often focus on the "principle" of a particularly legal point rather than the practical non-effect of just giving up the discovery. I have never been burned by giving up "too much" to the defense. Frankly, as a new JAG you have better things to do with your time preparing for trial than waging "principled" battles with the

defense about what they are or are not "entitled" to. You could, but better not to apply the narrowest definition of "relevant" or "material" when examining a defense discovery request. Apply the broadest one.

And do not dawdle. Give what you have immediately, and then also immediately go get everything else that is requested (even if you are not sure you will provide it in the end). Drop everything else you have to do and do all that you can do at that moment to retrieve whatever information the defense requests. If you are going to miss a deadline, advise opposing counsel in advance (and it is not bad practice to set a calendar reminder to give opposing counsel a weekly update on progress on outstanding matters). If you need something from a third-party (which typically turns out to be the sticking point), ask for it immediately and give a reasonably short suspense. Tell them that it is the "court-martial rules," not you, that has set the short suspense and that there are "consequences" for failing to meet the suspense. If they interpret that to mean the judge is demanding it, as long as their mistaken impression gets you what you need then no harm done (and eventually the judge might get involved so the mistaken impression really is not necessarily mistaken and thus is bordering on accurate). Then give that third party one more short chance to make it right when they blow your suspense and if they do not comply then elevate the issue to your bosses to unstick what is stuck.

Of course, this is all caveated by the "within reason" qualification. But it has to be a really good reason not to collect and provide what is requested, and it needs to be something other than the requested item is irrelevant. Or it needs to be something other than "that's a lot of stuff and it'll be a pain for X agency to pull it together" (more often than not this is just an excuse X agency uses to try to put off trial counsel and avoid putting forth a little bit of not "unduly burdensome" effort).

Privilege that the holder will not waive is the typical sticking point and even then you need to at least discuss the pros and cons of waiver with the holder, with a bias towards waiver if at all possible. "Tradecraft" is another common sticking point; but please, I have never seen any law-enforcement "tradecraft" information that was not something anyone who watches procedural dramas on television does not already know and it is never anything that is going to undermining on-going investigations

(and if it did, the question is why we brought charges in this case before all the investigations to which the particular secret "tradecraft" relate were complete). Pushback hard on these "tradecraft" objections.

In the rare case when you are going to decline to provide the requested information, run that decision by your bosses and senior counsel, advise defense counsel as soon as possible, provide a reason, and then go about your business. If defense counsel wants to file a motion to compel, that's fine, that's how the system is supposed to work, don't fear it. If defense counsel wants to amend their request, that's fine, quickly consider it and respond accordingly. But there is no need to get into a motions hearing by email where you and defense counsel go back and forth, arguing about the basis for your refusal to provide the information. Those jackass counsel I mentioned love to fire off emails demanding explanations, demanding legal authorities. But I have checked—there is no legal requirement that you respond to every email opposing counsel sends you. I give you permission to ignore the obnoxious email demands, or to just provide a simple response: "Yes sir, I understand that you disagree, it may be worth you filing a motion to compel so we can address our stated legal basis in the appropriate forum." Nine times out of 10 a motion to compel will not be forthcoming as the jackass counsel's obnoxious and demanding emails rarely translate into reasoned legal arguments that will overcome your well thought out objection, and they know it.

You have to work through the 'inexperience paralysis' and move out proactively and aggressively at each stage of trial preparation

But you are going to have to be on top of your obligations, discovery and otherwise, to exercise this permission-to-ignore approach. You have to work through the "inexperience paralysis" and move out proactively and aggressively at each stage of trial preparation consistent with the mantra that "military justice is job #1." Do not put off military-justice tasks, prioritize them, do not procrastinate, and especially do not be afraid to ask early and often for help and advice—we know that you are new at this,

no true leader is going to fault you for asking for help early and often (if one does, find another one to talk to).

The accommodating approach to discovery can get the trial-counsel/defense-counsel relationship off on the right foot, but should not to be taken as direction to roll over at every seeming impasse prior to trial. If the trial-counsel/defense-counsel relationship is jackass-free and you can resolve resolvable issues without hindering the effectiveness of your case, that is awesome, more power to you. Frankly, no criminal-justice system can function efficiently without plea agreements and a bit of give-n-take between cooperating counsel. But because of this, and because of gospel of attaining a mythical level of "civility" at every juncture of every case preached early and often in a young JAG's career, junior counsel have been conditioned to believe that failing to resolve an issue prior to trial is a personal and professional failure. Thus, young counsel on both sides, particularly in the military-justice system where over a career trial roles are fluid, work too hard to get along, to get to "yes," and thus resolve issues "informally" (they roll over) when litigation is more appropriate. That is the wrong mindset. Let me make this clear—it is not a personal attack to file a motion, or suggest filing a motion, if you and opposing counsel cannot agree on the resolution of a particular issue. You and opposing counsel have not "failed" if you cannot agree on resolution of an issue and end up in court advocating for your positions. It is the way an adversarial system is supposed to work. Adversarial is not unprofessional or unfriendly—you can agree to disagree without slashing each other's throats.

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There is an easy fix to this civility-at-all-costs mindset that will actually help enhance civility (and your trial preparation generally)—both sides should assume, and should prepare their respective cases on the assumption that there will be no agreements to anything; that there will be no pretrial agreement, that if there is a possible motion to be filed, it will be filed, that opposing counsel will object to each witness called and piece of evidence offered, and that an agreement will only be made if that agreement has a manifestly positive impact on your case. That is the default. If

you go into the case expecting and preparing to litigate everything, then actually doing so will not seem like a failure. If something gets worked out along the way, great, an unexpected event but not one that you needed (and "needed" because you were busy with other things and were willing to roll over to free up some time). Junior counsel need all the trial practice they can get so litigating issues in front of judge is not a bad thing. Sure, it will require more work on your (and the judge's) part, but remember "military justice is job #1" and everything you invest into a particular case will pay dividends to your overall litigation skills.

Once you are in the cauldron of the courtroom, however, maintaining civility can be a challenge. It is the nature of the competitive environment and the drive to "win" that can drive even the most well-meaning counsel to slip into jackassery at times (been there, done that). Maintaining civility will be a challenge even with counsel with whom the pretrial relationship has been professional, and if you are stuck with one of those jackass counsel … well good luck. Some tips to help you maintain your composure …

The PrimeCOLE corollary to Goodwin's Law--The more contentious a trial becomes, the probability of one of the counsel accusing the other of unethical behavior approaches 1

Do not assume bad faith on the part of your opponent for anything, and certainly do not argue that opposing counsel has acted unethically (or engaged in "prosecutorial misconduct" unless you are using that phase as a legal term of art and even then don't). It is the PrimeCOLE corollary to Goodwin's Law[1]: The more contentious a trial becomes, the probability of one of the counsel accusing the other of unethical behavior approaches 1. Even if you believe it to be true, uttering the word "unethical" does nothing to improve your underlying argument. Quite the opposite. Do so and you will lose all credibility in the eyes of the judge, who will simply smell desperation in the accusation. Use your words, your better words, to make the point that there has been

[1] "As an online discussion grows longer, the probability of a comparison involving Nazis or Hitler approaches 1."

a rule violation and there should be a consequence. Even if there was intent, you do not have to label the intent as "unethical" to describe its maliciousness.

If actions in court raise true professional-responsibility concerns, address them out of court after a long discussion with your bosses or some other dispassionate third party—your perspective as litigation combatant is skewed enough that you cannot credibly decide whether a particular act was ethical or unethical. Having been accused of acting "unethically" by opposing counsel (usually civilian counsel), and never having actually acted unethically in court (in my totally unbiased opinion), I have never seen the uttering of the word impress a judge during an argument. In fact, each and every time counsel has thrown that accusation at me during trial it has undermined their argument and I have always won the day, either directly or with a consequence for a mistake that was not as severe as it would have been if opposing counsel had simply made their argument without the "unethical" hyperbole. Thus, if you are the recipient of the accusation, know that it may hurt your feelings but the only damage it is actual doing is to the argument of the counsel injecting into the discussion.

Try also to de-personalize your arguments when countering those of opposing counsel. Attack the message, not the messenger. I freely admit that I am not good at this, but if you can learn it and exercise early in your career it will become "muscle memory" and then second nature down the line. So rather than "Captain Smith's [or defense counsel's] argument that the victim lacks credibility fails because …," try "The argument that the victim lacks credibility fails because …," or even better just the positive spin "The victim in this case is credible because …." Maybe a bridge too far, but rather than "The prosecution [or the government] has failed to prove beyond a reasonable doubt …," try "The evidence before you is woefully short of reaching that high standard of proof beyond a reasonable doubt …." You can do the same thing in arguments to the judge, dropping the reference to the identity of the proponent of the argument you are countering (as that is obvious anyhow) and just addressing the argument.

Adversarial is not unprofessional or unfriendly—you can agree to disagree without slashing each other's throats

It seems like a small point, but you "win" by contrast here. The more a counsel

subconsciously or intentional starts every argument focused on "identity litigation,"™ ("Captain Smith [or "the government" or "the defense"] is wrong …," "Captain Smith [or "the government" or "the defense"] wants you to believe …," "Captain Smith [or "the government" or "the defense"] has failed …."), the more it will appear to the members (or judge) that the argument is more focused on opposing counsel personally than the point of the argument. You will come across as petty, vindictive, and generally boorish and this will lose you credibility. On the other hand, if you can avoid the personalization, and be seen as above-the fray and focused on the substance without the constant reference to opposing counsel, you will enhance your credibility.

More importantly for the current topic, this de-personalization puts you in the right civility mindset. It has the subtle effect of focusing you on the argument and moving you away from subconsciously treating trial as a winner-take-all, to-the-death battle of counsel. And when opposing counsel does not feel personally attacked by your argument, as you have not expressly called them out in front of the members, the civility index at trial tends to rise. It is a small matter, one you probably have not thought about before (and even most seasoned counsel have not thought about it), but one that will now be glaring obvious to you the next time you are in trial or watching one. Not even knowing the substance of an argument, the de-personalizing counsel always seems more credible than the personalizing one. Guaranteed.

During trial, do not let jackass counsel distract you. Do not argue with jackass counsel when he (or she) makes some long-winded, law-free, snotty objection. Stand there stoically (no eye rolling, do not even turn to look at counsel), and wait for the judge to solicit your opinion—more often than not the judge will overrule the objection without the need for you to engage. Then proceed; your unflappableness will enhance your credibility with the judge and the members. Thus, when you hear the word "objection," your mantra should be "I am a statue, I am unmoving and unmoved, I will not sway with the hot air blowing my direction." Or something like that.

I am a statue, I am unmoving and unmoved, I will not sway with the hot air blowing my direction

I have mentioned this before, but it bears repeating as it was way early in this Compendium: Cockiness does not equal Confidence.

It equals Jackassery. Do not act like a jackass at counsel table. No making faces, snickering at witnesses or opposing counsel, loud talking while opposing counsel is conducting a direct or making an argument. Some attorneys may think all of that is good tactics intended to distract opposing counsel or send some message to the trier of fact … but the message it sends to members and judges (particularly in the military) is that you are a fool, a jackass.

Most of your interactions with opposing counsel will be professional and civil, with only occasional fits of animosity and wanderings into jackassery, by both sides. But you will get stuck litigating against a jackass counsel and the more you litigate the more this will happen. And you will definitely want to counter-attack once attacked, if for no other reason than to satisfy your fear that failing to do so makes you seem "weak." But understand that you will never get the satisfaction of having jackass counsel admit that you bested them. When the jackass counsel "wins" a case, which can happen despite their antics, it is because of what they misperceive as their take-no-prisoners approach to litigation (their approach is really just being obnoxious). When they "lose" a case … well, they never lose a case, the case was lost because the other side cheated, or the judge was an idiot, or … something.

It is trite, but Mark Twain had it right: "Never wrestle with a pig--it gets mud all over you and the pig likes it." True, there is very little else worse than remaining civil in the face of personal attacks from a jackass counsel and then "losing" a case. But understand the momentary despair of such a loss will quickly dissipate and the "loss" itself will soon be forgotten (and not placed on you by those in the know anyhow as those in the know know that facts and evidence win or lose cases, not the performance of counsel). What will remain in the short and long term is your reputation—do not get that dirty by wrestling with jackass counsel. I have done it in the past, maybe slipped into jackassery myself on occasion, and to this day that dirtiness has hurt my reputation with some folks.

Civility will go a long way to enhancing your credibility in court and your reputation outside of it. By avoiding pointless personal battles, you can focus on the important skills of litigation detailed *ad nauseum* in the preceding couple hundred pages. In that and in many other ways civility really is its own reward.

Post-Trial

Chapter 14

"MILITARY JUSTICE" TO ENGLISH TRANSLATOR

The military-justice system has a language unique to itself, that sometimes when one is starting in that system can be confusing. Some of the major terms, tied somewhat loosely to the civilian equivalent, follow.

Chapter 14 – Translator

The "civilian equivalent" or shorthand definition used below to explain unique military and military-justice terms are not precise, formal definitions … I picked them in the hopes that they will help you navigate through your initial contacts with this foreign system … in no particular order:

UCMJ: "Uniform Code of Military Justice." Military criminal code (and big-picture procedural rules). This is Federal law, passed by Congress and signed (or vetoed) by President ... it is located at 10 U.S.C. §§ 801-946. When we reference a "section" of the UCMJ, we call it an Article, starting with 10 U.S.C. Section 801 which is "Article 1." So Section 920 would be "Article 120."

Punitive Article: The actual crimes. With the UCMJ, Articles 77 to 134 are the crimes … from murder (Article 118) to drugs (112a) to sexual assault (120) to dereliction of duty (92) and everything else.

RCM: "Rules for Courts-Martial." Guide to trial procedure. These are the details of how you operate a criminal-justice system, hundreds of pages of how to do all the little things to move a case through the system from start to finish. The President issues them through Executive Order and they change often.

MRE: "Military Rules of Evidence." These are the rules that the judge applies to determine whether a certain piece of evidence/testimony should be admitted at trial. They are very similar to the Federal Rules of Evidence … the rape-shield rules (412), relevance (401), expert witnesses (700 series) are the same.

MCM: "Manual for Courts-Martial." It is our big/self-contained rulebook, which contains the UCMJ, the RCMs, the MREs, and a variety of handy appendixes with scripts and analysis. Currently it is a big red book, but a new version should be released soon.

Charge: This is the punitive Article of the UCMJ that the Accused is alleged to have violated--the named crime. E.g. "Violation of Article 120" would be the Charge for a sexual assault … "Violation of Article 104" would be the Charge for Aiding the Enemy.

Specification: This is narrative description of what the Accused is alleged to have done … the military follows notice pleading so the narrative has to have just enough information to put the Accused on notice of the what, when, where, and how he or she allegedly committed the crime.

OSI: "Office of Special Investigation." The Special Agents of OSI are the Air Force's primary investigators for serious crimes.

NCIS: "Naval Criminal Investigative Services." The Special Agents of NCIS are fictional actors on a TV show … and the Navy's primary investigators for serious crimes.

CID: "Criminal Investigation Command." The Special Agents of CID are the Army's primary investigators for serious crimes

Search Authorization: Search Warrant. A military magistrate in the military (as opposed to a judge in the civilian arena) has authority to authorize investigators to search a place/person and seize evidence of a crime on a showing of probable cause. Military magistrates can only issue search authorization for places under military control; if the place to be searched is not under military control (*e.g.* search a member's home in Summerville and seize computers or other digital devices on the basis of probable cause that they contain child porn), then a civilian judge will have to issue a search warrant (OSI, NCIS, or CID, in consultation with the JAG, work this process).

Subject: Suspect. During the investigation, the person suspected of committing the crime is referred to as the "Subject" … once that person is charged with a crime (once Charge(s) and Specification(s) have been preferred) they are referred to as the Accused. Strangely, even after that person is convicted we still call them "the Accused." Law enforcement will use the term "Subject" and JAGs will use the term "Accused."

Accused: The person against whom a charge under the UCMJ is preferred (and then later referred).

SVC: Special Victims' Counsel. These are JAGs whose full-time job is to represent the interest of victims (primarily sexual-assault victims) in the military-justice process. They work for a separate chain of command to ensure independence. They can appear in courts-martial in those situations when the Crimes Victims' Rights Act (Article 6b of the UCMJ) gives the victim a right to be heard, such as rape-shield discussions or discussions about mental-health records.

DCFL: "Defense Computer Forensics Laboratory." The lab in Maryland that does most of the extraction and forensic analysis of images in DoD child-pornography investigations.

USACIL: "United States Army Criminal Investigations Laboratory." The lab in Georgia that does most of the scientific testing of evidence (*e.g.* DNA).

AFDTL: "Air Force Drug Testing Laboratory." The lab in Texas where samples are tested for a panel of common controlled substances.

CDI: "Command Directed Investigation." Not to be confused with CID. These are investigations conduct at the unit level, not by law-enforcement investigators, and generally related to misconduct that will be punished administratively.

ROI: "Report of Investigation." The document that is the result of an OSI, CID, or NCIS investigation.

15-6: The Army uses this term to refer to the process and the document which results from an investigation, typically an investigation at the unit level.

Article 15/Captains Mast: This is "non-judicial punishment" or "NJP." The Navy calls it "Captain's Mast." It is a process by which minor offenses can be punished administratively rather than by court-martial. The commander offers to handle the misconduct in this process, the member accepts or rejects (if the member desires he or she can "turn it down" and put to the commander the decision whether to prefer court-martial charges), and if the member accepts the NJP forum, then the commander decides guilt or innocence (based on review of evidence, written response from the member, and a personal appearance from the member, if requested), and if guilty decides the punishment. Punishment limits depend on the rank of the commander, and of the accused, but generally include reduction in grade, forfeitures of pay, and extra duties for enlisted members (officers cannot be reduced in grade through this process).

Pretrial Confinement: PTC. There is no "bail" in the military-justice system--this is the closest equivalent. If there is probable cause to believe that a member has committed an offense under the UCMJ, and on a finding that that member is a risk of engaging in additional substantial misconduct or is a flight risk, and there are no lesser restraints that will limit such risk, then the member can be placed into PTC until resolution of the eventual court-martial.

Prefer: Bring or Accuse. Any person subject to the UCMJ can prefer a charge against another member. Almost always, the member's commander prefers the charge. Essentially, the JAG drafts the charge and then in the commander's office the commander tells the member what they are being accused of. It starts the formal court-martial process.

Refer: Send. When the Convening Authority decides that preferred charge(s) and specification(s) warrant trial, he or she sends them to one of three types of courts-martial for resolution. At that point, the case is in the hands of the members (jury) or a military judge if the Accused elects to be tried by judge alone.

SPCMCA: "Special Court-Martial Convening Authority." Usually the O-6 Wing commander, the SPCMCA is the person with the power to refer charge(s) and specification(s), which were preferred by the unit commander, to a Summary or Special Court Martial. The Summary Court is the lowest court-martial, the Special Court Martial is the next highest (at which the maximum punishment can be 12-months confinement and a Bad Conduct Discharge ... somewhat equivalent to a civilian misdemeanor court). The SPCMCA can also send the case to an Article 32 hearing to determine whether it should be elevated to the GCMCA to decide whether it should be referred to a General Court-Martial.

PHO: "Preliminary Hearing Officer." This is the independent JAG who presides over the Article 32 preliminary hearing. This JAG is independent in that he or she generally does not work at the legal office from which the charge(s) and specification(s) are going to be prosecuted.

Article 32: Preliminary hearing. This is a process where an independent JAG (the PHO) evaluates the particular charge(s) and specification(s) and determines whether the evidence meets the probable cause standard. It is a formal hearing, but does not follow court-martial/trial rules. The Accused is entitled to attend, but the evidence

does not have to be from live witnesses--it often is a paper process with perhaps a law-enforcement investigator testifying to give a broad overview of the investigation and the evidence. The PHO submits a report about the case and his or her probable-cause determination for consideration by the GCMCA. The Accused receives a copy of this report.

GCMCA: "General Court Martial Convening Authority." Usually a 2- or 3-star Air Force General, the GCMCA is the person with the power to refer charge(s) and specification(s), which were preferred by the unit commander and investigated at an Article 32 hearing, to a General Court Martial. The General Court Martial is the highest-level court-martial (our felony-level court).

SCM: "Summary Court Martial." Petty-crimes court. There is no punitive discharge (Bad Conduct or Dishonorable Discharge) available at this "court." There is also no jury for this level of court, it does not require a legally-trained judge, and it does not court as a "criminal conviction" in the civilian world. The Accused can refuse to be prosecuted at a SCM and demand trial by SPCM. Thus, the SCM is usually reserved for plea bargains where the Accused agrees to plead guilty in return for his or her case being resolved in this minor forum (30-days confinement maximum).

SPCM: "Special Court Martial." Misdemeanor court. This is a full trial--judge, jury, prosecutor, defense counsel, bailiff, court reporter. If the Accused elects to be tried by members (if enlisted , the Accused can request one-third of those members also be enlisted members), then there must be at least three members on the panel (*i.e.* jurors). The maximum punishment in a SPCM is capped at 12-months confinement and a Bad-Conduct Discharge.

GCM: "General Court Martial." Felony court. The maximum punishment allowed for the particular crime is the maximum available in this court, all the way up to the death penalty for murder cases. These are the courts where most serious offenses are tried--child pornography, sexual assault, murder.

Members: Jurors. The officers and, if requested by an enlisted Accused, enlisted members who serve as a military jury.

Expert Consultants/Witnesses: Both the Government and Defense are entitled to assistance of those with specialized knowledge to help develop and explain typically scientific evidence. This includes psychologists, toxicologist, computer forensic examiners, medical examiners. An expert remains a "consultant" until they are identified as a potential witness--at that point, the opposing side has the right to interview the expert witness to learn what his or her testimony will be. Typically, one party's expert consultant is involved in the interview of the opposing party's expert witness.

TC & STC: "Trial Counsel" and "Senior Trial Counsel." Prosecutors. These are the JAGs who present the Government's case. TC are usually the junior JAGs from the particular base; the STC is a senior prosecutor who travels from base to base to assist on serious, complicated courts (typically GCMs).

DC & SDC: "Defense Counsel" and "Senior Defense Counsel." These are the JAGs (but also hired civilians) who represent military members against whom charge(s) and

specification(s) have been referred. They work for a separate chain of command to ensure independence and zealous representation of Accuseds. The DC at the base is called the Area Defense Counsel and the SDC is the senior defense counsel who travels from base to base to assist on serious, complicated courts (typically GCMs).

PTA: "Pre-Trial Agreement." Plea bargain. An Accused can offer to the Convening Authority to plead guilty for some benefit, usually a limitation of punishment and agreement to have the military judge decide what the sentence should be (*i.e.* waive trial by members). Interestingly, the military judge does not know what the "deal" is, only that the Accused has agreed to plead guilty. The military judge considers all the evidence on sentencing and decides what he or she believes an appropriate sentence should be. If that is less than the "deal," the Accused gets what the judge decides; if it is more, the Accused gets the "deal." PTAs are usually negotiated at the last minute.

Chapter 4: This is like a PTA, but instead of a trial, the Accused agrees to be administratively discharged (with a negative characterization) in lieu of trial by court-martial.

Article 39a: There are no sidebars in the military system. When the parties have something they want to talk to the judge about outside the presence of the members, rather than approach the bench and whisper, the court goes into an Article 39a session where the members leave and the parties hash things out. For example, if during the testimony of an expert there is an objection to some testimony that is going to take some back-and-forth to resolve, the court will go into an Article 39a session and the members will be sent out while the parties resolve the issue.

Preemptory: The military does have a voir dire process where prospective court members are questioned about their fitness to serve (as jurors). At the end of this process, each party can challenge as many as necessary "for cause," but after that process each party gets one preemptory challenge. Essentially, each party can remove one member for any reason or no reason (except no racially motivated preemptory challenges allowed). TC must be careful in this process to ensure that the number of members remaining after all challenges are exercised does not fall below the quorum (3 for a SPCM; 5 for a GCM)--if that happens, the trial is put on hold while the Convening Authority details additional members and the process begins anew.

Findings: Verdict. This is what the members decided in their closed-session (secret) deliberations. As they vote on specification(s) and then the charge(s) this can be a cumbersome process to announce so the court provides the members a findings worksheet and that worksheet is read in open court.

NDAA: "National Defense Authorization Act." This is the legislative bill that passes Congress (and signed by President) every year--it is also the vehicle by which changes to the UCMJ are made.

CVRA: "Crimes Victims' Rights Act." This is federal law (and most states have a version) which gives victims of crime various rights in the criminal-justice process--such as the right to information, consultation, notice, to be heard at various stages. In 2014, Congress through a NDAA extended the CVRA to the UCMJ and it became Article 6b. The implementation of Article 6b is proceeding slowly as it amounts to a

fundamental change in the way courts-martial have been handled over the past century. The SVC's are at the forefront of bringing full implementation of Article 6b to the military-justice system.

Clemency: After the court-martial, the findings and sentence are in a way just recommendations to the Convening Authority. In the past, the Convening Authority had great power to reduce the sentence (and even set aside verdicts) on request of the Accused. In recent years Congress has substantially reduced the power of Convening Authorities to set aside findings and reduce sentences.

AFCCA: "Air Force Court of Criminal Appeals." Pronounced "af-ka." Each Service has a similar court. It is the first appellate court--the judges are senior JAGs and they have the power to review court-martial results for factual and legal sufficiency. They would be the equivalent of a federal court of appeals.

CAAF "Court of Appeals for the Armed Forces." Some think of this as the military-justice Supreme Court (which is not completely accurate as an Accused can appeal to the actual US Supreme Court to review their case after an adverse CAAF decision). CAAF is a 5-member (all civilian) court, the judges of which are appointed by the President with the advice and consent of the Senate, for 15-year terms. Accuseds who lose at the Service court of criminal appeals (AFCCA) can appeal to CAAF.

Appendix A

THE OBJECTION CHALLENGE

"ANSWER" KEY

[THERE ARE NO "RIGHT" ANSWERS, EXCEPT MINE]

1. No [MRE 804(b)(4)].
2. No.
3. Yes. *Relevance.*
4. Yes. *Relevance/Compound.*
5. Yes. *Bolstering.*
6. No.
7. No.
8. No.
9. Yes. *Assumes Facts/Argumentative/Calls for a conclusion.*
10. No.
11. Yes. *Calls for a narrative.*
12. No.
13. No.
14. No.
15. No/Yes. *Answer is Non-responsive/improper character testimony.*
16. No.
17. No.
18. Yes. *Relevance; MRE 303 degrading [not MRE 412].*
19. Yes. *Lack of personal knowledge.*
20. No.
21. Yes. *Vague.*
22. No.
23. No.
24. Yes. *Speculation.*
25. No/Yes. *Answer is Hearsay.*
26. No.
27. Yes. *Asked & Answered; Hearsay, not excited utterance.*
28. No.
29. No.

30. Yes. *Vague/Irrelevant.*
31. No.
32. No.
33. No.
34. No.
35. Yes. *Speculation.*
36. No.
37. No.
38. Yes. *Vague/Speculation.*
39. No.
40. No.
41. Yes. *Speculation.*
42. Yes. *Hearsay.*
43. No.
44. No.
45. No.
46. No.
47. Yes. *Speculation/Lack of personal knowledge.*
48. No.
49. Yes. *Calls for a narrative.*
50. No.
51. Yes. *Lack of personal knowledge.*
52. No.
53. Yes. *Calls for conclusion.*
54. No.
55. Yes. *Vague.*
56. No.
57. Yes. *Vague.*
58. Yes. *Leading*/*Speculation.*
59. No.
60. Yes. *Hearsay (though likely exception).*
61. Yes. *Speculation.*
62. Yes. *Irrelevant/MRE 403 Prejudicial.*

63. No.

64. No.

65. No.

66. Yes. *Leading.*

67. Yes. *Hearsay.*

68. No [MRE 612].

69. Yes. *Hearsay/Best Evidence/Foundation/Authentication.*

70. No.

71. No.

72. Yes. *Hearsay/Best Evidence/Foundation/Authentication.*

73. No.

74. No.

75. No.

76. Yes. *MRE 803(5) only adverse party can offer as an exhibit.*

77. No.

78. Yes. *Irrelevant/Improper Lay Opinion.*

79. No.

80. Yes. *Religious Beliefs.*

81. Yes. *Irrelevant.*

82. No.

83. Yes. *Argumentative.*

84. Yes. *Improper Question.*

85. No.

86. No.

87. No.

88. No.

89. No.

90. No.

91. No.

92. No.

93. No.

94. Yes. *MRE 404(b); MRE 403.*

95. Yes. *Vague.*

96. Yes. *Improper Question/Hearsay.*

97. No.

98. No.

99. No.

100. Yes. *Irrelevant; MRE 404(b).*

101. Yes. *Privileged.*

102. No.

103. No.

104. Yes. *MRE 303; MRE 404(b).*

105. No.

106. Yes. *Hearsay.*

107. No.

108. No.

109. Yes. *Argumentative.*

110. No.

111. No.

112. No.

113. Yes. *Vague.*

114. Yes. *Improper Impeachment/Lack of Notice/Improper Character.*

115. Yes. *Improper Impeachment/Lack of Notice/ Improper Character.*

116. No.

117. Yes. *Hearsay/Improper Impeachment.*

118. Yes. *Hearsay/Best Evidence Rule.*

119. No.

120. No.

121. No.

122. No.

123. No.

124. No.

125. No/Yes. *Answer unresponsive.*

126. No.

127. No/Yes. *Answer unresponsive [question also is argumentative to a degree].*

128. No/Yes. *Answer unresponsive.*

129. No.

130. No.

131. No.

132. Yes. *MRE 707.*

133. Yes. *Improper character evidence.*

134. Yes. *MRE 504 Husband-wife privilege for statements; MRE 404(b) for act.*

135. Yes. *Irrelevant.*

136. Yes. *Speculation.*

137. No.

138. No.

139. No.

140. Yes. *Argumentative.*

141. No.

142. No.

Appendix B

Motion to Pre-Admit Evidence

Referenced in **Chapter 4 – Opening Statement**, an example Motion to Pre-Admit Evidence follows. Reminder—it is an example, not a template, you should use it as a jumping-off point in crafting your own motion, but you should not copy it slavishly. Who knows how old and out-of-date it will be by the time you read this. But I have had some success with a version of this and it facilitates the important use of props during opening statement, so put together something like it.

---------- **TEMPLATE** ----------

DEPARTMENT OF THE AIR FORCE
USAF TRIAL JUDICIARY

UNITED STATES v. SECOND LIEUTENANT [redacted]	GOVERNMENT MOTION TO PRE-ADMIT [DATE]

The Accused faces charges of aggravated sexual assault under Article 120, UCMJ. During the investigation, he made incriminating statements while talking with the Vitim in a "pretext" telephone conversation. The Government intends to offer a recording of that pretext telephone conversation, and verbatim transcript of the same, in its case-in-chief. As such, the Government request pre-trial admission of this evidence under M.R.E. 102, 104 and R.C.M. 906(b)(13).

FACTS:

1. On [redacted], [redacted] ("Victim") and [redacted] ("Accused") participated in a phone call. That phone call was recorded and coordinated with the Air Force Office of Special Investigations (AFOSI) 11 Field Investigative Service. Special Agent (SA) [redacted], SA [redacted], and SA [redacted] acted on behalf of AFOSI.

2. On [redacted], the Victim contacted the Accused three times. The first time, the Accused answered but did not have time to talk. The second time, the Accused's phone went to voicemail. The third time, the Accused and the Victim had a conversation that lasted approximately 28 minutes. The recording includes a privacy statement from the Victim, and each participant identified himself or herself. The recording itself is the complete and accurate recording of their conversation. No additions or deletions have been made. The recording device was capable of recording, and the operator of the equipment was competent, as evidenced by the existence of the recording.

3. The call was recorded using the Callyo technology. Callyo technology allows a three-way phone call to be recorded. The case agent, in this instance SA [redacted], initiates and controls the call. Once the phone call is initiated, the software saves the recording on a web-based platform. Each OSI office has a Callyo login. The agent can then log into the website and download the file, burning an evidence copy of the disc.

LAW & ARGUMENT

4. M.R.E. 104 empowers the military judge to make determinations of "the admissibility of evidence." R.C.M. 906(b)(13) contemplates a pretrial hearing to resolve these issues, in the interest of avoiding "unjustifiable expense and [trial] delay." M.R.E. 102. Therefore, the Government requests that the military judge hold a hearing under Article 39a, U.C.M.J., to resolve any objections to and rule on the admissibility of the following evidence:

a. **Prosecution Ex. 1**: Recording of phone call, dated [redacted]

(i) Description: P.E. 1 is a compact disc containing the audio recording of three phone calls between the Victim and the Accused on [redacted].

(ii) Foundation: SA [redacted] would testify that the recording device was capable of recording; that the operator was competent; that the recording is authentic and correct; that no changes, additions, or deletions have been made; that the recording was properly preserved; that the speakers were identified; and that the statements were voluntarily made. The Victim would testify that the recording is authentic and correct; that no changes, additions, or deletions have been made; that the speakers were identified; and that the statements were voluntarily made.

(iii) Basis of admissibility: M.R.E. 901(b)(6).

(iv) Relevance: Corroborates sexual intercourse between the Accused and the Victim between on or about [redacted] and on or about [redacted].

b. **Prosecution Ex. 2**: Transcript of recording of phone call, dated [redacted]

(i) Description: P.E. 2 is a 21-page document. It is a verbatim transcript of P.E. 1.

(ii) Foundation: SA [redacted] would testify that the recording device was capable of recording; that the operator was competent; that the recording is authentic and correct; that no changes, additions, or deletions have been made; that the recording was properly preserved; that the speakers were identified; and that the statements were voluntarily made. The Victim would testify that the recording is authentic and correct; that no changes, additions, or deletions have been made; that the speakers were identified; that the statements were voluntarily made, and that P.E. 2 is a true and accurate transcript of the converation. SSgt [Paralegal] would testify that she prepared the transcript, had trial and defense counsel review it and identify errors, corrected all identified errors, and that the end product, P.E. 2, is a verbatim transcript of P.E. 1.

(iii) Basis of admissibility: M.R.E. 901(b)(6); see also United States v. Craig, 60 M.J. 156 (C.A.A.F. 2004).

(iv) Relevance: Corroborates sexual intercourse between the Accused and the Victim between on or about [redacted] and on or about [redacted].

RELIEF REQUESTED

The United States respectfully requests that the Court approve its request for a pre-trial session under Article 39a, U.C.M.J., to address those issues of pre-admission to which the Defense may object.

Respectfully submitted,

//Signed//
[redacted], Capt, USAF
Assistant Trial Counsel

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It takes a village to raise an idiot … or something like that. I want to thank the members of my village who helped this idiot bring this project to fruition. Your feedback, criticisms, ideas, comments, and professional-grade proof-reading of my sloppy drafts made this possible. **PrimeCOLE** and the readers of this Compendium owe you a great debt:

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Capt Willis Brown
Capt Nicole Provo
Capt Jeff Sullivan
Capt Marcelina Rivera-Chambers
Col Jason Robertson
Lt Col Christopher Baker
Mr. Ben Beliles
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Colonel (ret) Don Christensen
Mr. Jon Bradford Stanley
Mr. Robert Beyler
Major Jeremy Gehman
Major Kasey Hawkins
Lt Col Matt Neil
Mr. Brent Jones
Capt Mechel Tyson
Major Michael Graves
Major Grethe Hahn
Major Marisol Salviejo
Major Nathan Royer
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Mr. William Haston