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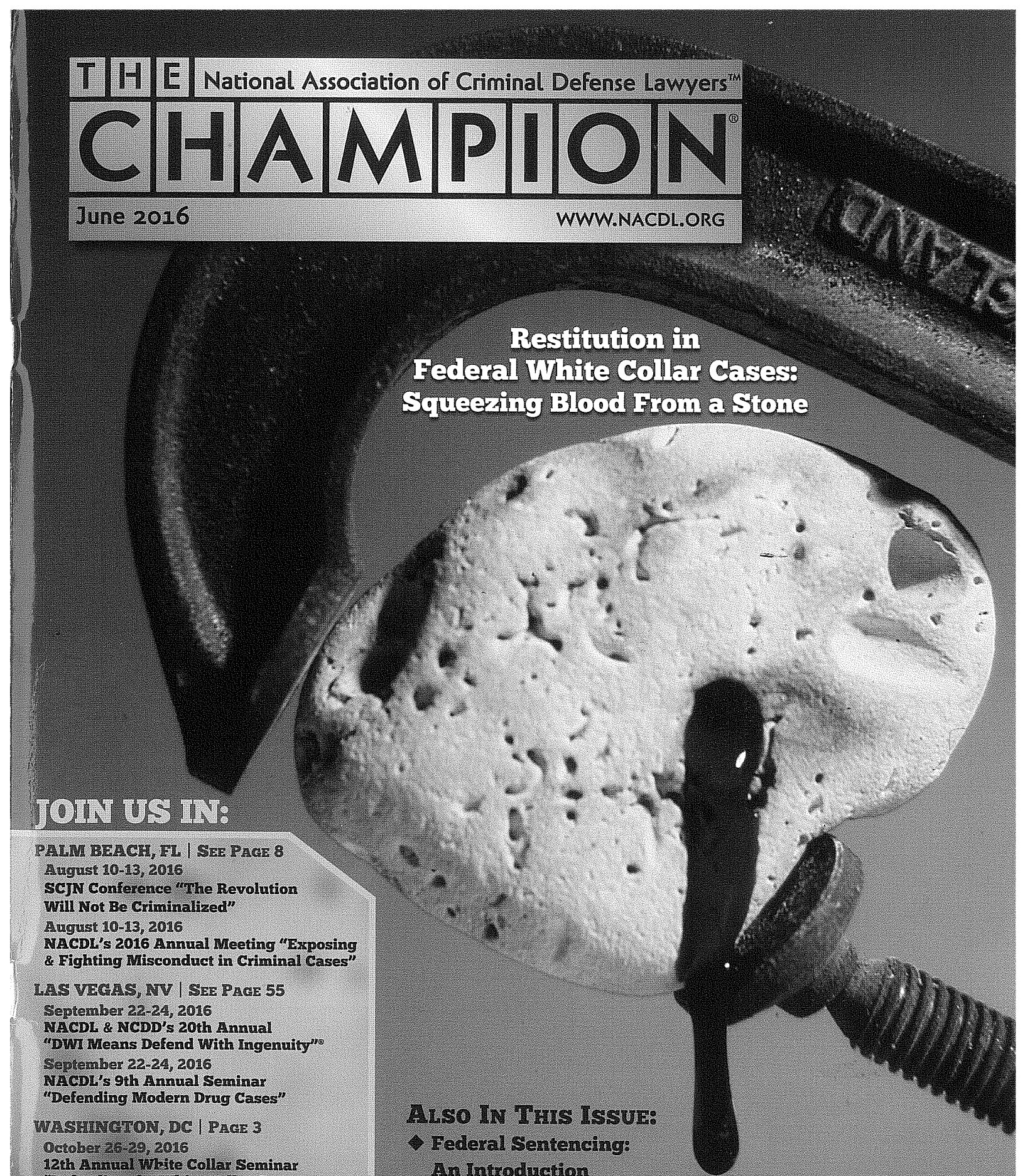

Restitution in Federal White Collar Cases: Squeezing Blood From a Stone

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Cross-Examination Principles

The art and science of cross-examination requires skill and cunning, patience and restraint, active listening and keen intuition, and most importantly, thorough preparation and a mastery of the fundamentals. It sounds like a lot; well, it is. To observe an ineffective cross-examination is painful, like watching a comedian fumbling his lines. But to observe a masterful one is symphonic, sometimes appreciated even by the witness, and certainly by the fact finder.

Over the ages, lawyers have written countless volumes of books, treatises and articles on the techniques of effective cross-examination.[1] Like any essential skill set, effective cross-examination is, at its heart, a test both of the witness and the lawyer. Although it is combat, it does not have to be combative, yet at times it can and should be. Lawyers are testing the validity of the witness and/or the content of the testimony with every question. Thus, questions should not be wasted. Each should have a purpose and advance the particular objective of the examination.

Not every witness is lying under oath.[2] In instances when the lawyer is testing the validity of the witness's testimony, the testimony might be inaccurate due to an honest mistake, such as the witness not being in a sufficient position to make a positive identification; it might have been too dark; or something blocked the witness's view. Maybe an unduly suggestive lineup influenced the witness. The witness might suffer from memory deficits. Perhaps the witness made an inconsistent statement in a prior proceeding (whether or not under oath) and the defense attorney can impeach the witness with it. The testimony may be implausible: *"Were these magic grits? I mean, did you buy them from the same guy who sold Jack his beanstalk beans?"*[3]

The defense is also testing the credibility of the person who is the witness. The witness might be lying for some motive or self-interest. In criminal cases it happens every day. People cut deals to cut time, with that being their sole reason for testifying. Or the witness might have a criminal record that is admissible for impeachment under Federal Rule of Evidence (FRE) 609. Any bias or interest must be explored and exposed. Expert witnesses charge significant money in civil and sometimes in criminal cases. Even lay witnesses can have financial interests or other biases, such as a bias in favor of the company she works with or against the company that fired her.

Because they connect directly to the theory of the defense, cross-examinations should mirror the opening statement and closing argument, which necessarily contain the defendant's theory of the case. It is often not enough, in either a civil or criminal case, for the defendant's theory of defense to be that the plaintiff simply cannot carry its burden of proof. While the defense cannot take on the burden, jurors expect more from the defense than a simple stonewall approach. Defense lawyers need to advance their theory of defense from voir dire though jury instructions. Most of the time defense lawyers have a story to tell, and they tell it through carefully crafted cross-examinations. More than any other sector of trial law, cross-examinations win or lose most criminal trials.

BY RICHARD S. JAFFE

Ten Principles of Cross-Examination

1. Thoroughly prepare each cross-examination.

Some lawyers are exceptionally intuitive and swift on their feet. There is no substitute, however, for extensive preparation. Every prior proceeding in which the witness has testified should be studied for the information that could be used to confront the witness, or when appropriate, brought out to support the theory of defense. If a witness testified at a preliminary hearing, the defense lawyer needs immediate access to the page number (and the line number). Jurors do not tolerate disorganized lawyers who fumble through their notes and waste time. The background of a witness is crucial and often contained in public records (see below on crossing snitches). Social media has burst doors open due to the prevalence of irresponsible and reckless postings. The more information the defense attorney learns pretrial about the witness, the more the attorney will know about the approach to take when cross-examining him.

The defense lawyer must think through and know why she is crossing a witness, and she needs to know what she wants to accomplish because that will determine the organization and structure of the cross. All cross-examinations must be goal-directed and advance the defense theory of the case. Cellphone records, texts, cell photos, Facebook posts, and emails are now part and parcel of almost every case. Computer-savvy private investigators have apps that enable them to learn information that lawyers normally would not discover on their own.

2. Intimately know the Rules of Evidence.

Lawyers will never be effective at cross-examination if they do not master the Rules of Evidence. These rules are easy to read, but counsel must understand not only the rules but the case law and commentaries behind the rules. Effectively impeaching a witness requires understanding how to confront him with a prior inconsistent statement (FRE 613), a prior criminal conviction (FRE 609) or a business record, such as a bank application or statement made to a treating physician. If defense counsel does not understand the difference between refreshing the recollection of a witness (FRE 612) and a past recollection recorded (FRE 803(5)), counsel will become confused and lose credibility. A case can be won or lost based on whether counsel knows how to utilize a learned treatise (FRE 803(18)) or knows what the hearsay exceptions are. These examples demonstrate that the Rules of Evidence must be mastered in order to effectively cross-examine a witness. Judges expect lawyers to know these rules when they are in play; some judges even want lawyers to cite the rules.

3. Mostly use leading questions containing one point or subject per question.

Leading questions allow the lawyer to gain greater control over the witness. Questions that contain more than one subject are often met with the objection that the question is a compound one. To avoid this objection, one should formulate cross-examination questions utilizing simple language that makes one point at a time. Simple questions also leave the witness with less wiggle room. This question contains multiple subjects: "You were not wearing your glasses when you were standing in line to make a purchase of beer at the store on Saturday night at midnight?" These facts are best established by asking separate questions for each fact contained in that compound question. For example, consider the following series of simple questions that clearly make a point:

Q: You made a statement to Agent Smith?

Q: At your home?

Q: About a week after your arrest?

Q: He took notes of what you said?

Q: He wrote up a statement?

Q: He gave it to you to read?

Q: This is the statement?

Q: You read it?

Q: You made changes to it?

Q: The changes are in your handwriting?

Q: You signed the statement?

Q: In your signed statement, you said that Mr. Good was not in the car?[4]

Leading questions are necessary to help counsel pin down a witness. In addition, simple undisputed questions that a witness must confirm can serve to "train" the witness. When the witness understands that the lawyer knows facts that cannot be disputed, the witness is more likely to continue to agree with the lawyer as he asks additional questions to advance his points. This is particularly true when a lawyer is able to impeach the witness with prior inconsistent statements. The net effect is that the examiner is actually the person testifying, and the witness is agreeing. The witness may appear to be evasive if he does not answer these simple questions. However, cross-examination should not be constructed within the confines of rigid rules. Carefully crafted open-ended questions can often give a witness more than enough rope to hang himself, especially when the answer works to undermine him or his testimony.

4. Listen carefully to the answers the witness offers.

Lawyers must be focused not only on the purpose of the exam and the questions designed to accomplish that purpose, but they must also focus on the witness's demeanor, body language, and tone of voice. This takes intense concentration. Often lawyers miss gems and jewels blurted out by the witness because they are too focused on notes, checklists, and questions written out on a legal pad. Even when lawyers ask leading questions, witnesses will want to explain and defend their answers. Lawyers should be prepared to take advantage of the unexpected. Some attorneys rarely take notes when they cross-examine a witness. When they do take notes, the notes are in the form of quick points that must be made before the cross-examination ends.

The best cross-examinations are often fluid conversations with a built-in or established rhythm. Sometimes opposing counsel will object simply to interrupt the flow. That is often a sign the examination is going well. Skilled cross-examiners simply pick up the examination after the court rules, as if the interruption was unnecessary or inconsequential.

5. Make sure the cross-examination has a specific goal and purpose.

Every cross-examination endeavored must advance the theory of defense. For example, the theory of defense in a criminal or civil assault case might be self-defense. If the witness saw the altercation, the lawyer would want to know, among other things, (1) where the witness was positioned when the altercation occurred, (2) if the witness had a

particular relationship with the person assaulted, and (3) if the witness was distracted in any way. Defense counsel would ask questions designed to show that the alleged victim was the aggressor in that case. The point is that the examination should be targeted and purposeful. If the witness has potentially helpful information to support the defense, typically counsel will want to elicit that information at the beginning of the cross-examination and then decide whether and to what extent to attack. If some of the direct examination was helpful, defense counsel should bring out the points that support the defense theory. This is a way to neutralize the witness or even make that witness a defense witness.

It has been said that there are three times when a lawyer testifies: the opening, cross-examinations and closing.[5] During the cross the lawyer wants the witness to know that he knows the facts better than the witness does. This encourages the witness to defer to the lawyer as the cross progresses. After the cross, the lawyer wants the jury to know he was careful, honest, and fair. The lawyer wants the jurors to see him as their guide through the disjointed web of facts they must untangle, and he wants them to know that they can trust him to help them navigate through the trial.[6]

Lawyers should ask themselves these questions before preparing any cross-examination:

Q: What is the specific purpose of this cross-examination?

Q: How does that specific purpose affect how I approach this specific witness?

Q: What do I want to accomplish with this cross-examination?

Q: Am I keeping the promises I made in the opening statement?

6. Organize the cross-examination.

Many great cross-examinations end up as fluid conversations because the examination is organized with a structure in mind. The structure is driven by the purpose of the cross-examination.[7] A very valuable book on cross examination is *Cross Examination: Science and Techniques* by Larry Posner and Roger Dodd.[8] They recommend that lawyers organize the examination into chapters.[9] They define a chapter as "a sequence of questions designed to accomplish a goal."[10] The goal of a chapter may be to highlight a fact, to dispute or weaken a fact, to introduce a new fact, to affect either positively or negatively the credibility of a witness (not necessarily the one being questioned),[11] and always to generate an emotional response from the jury. A goal can be a literal fact — but also can create a feeling about a fact, if it advances the theory of the case.[12]

A well thought out logical structure prevents the examinations from turning into rambling, disjointed exchanges, while at the same time keeping counsel, the witness, and the jury focused. However, no matter what structure is employed, it must not hamper the flow of the cross and distract the examiner from valuable and subtle information extracted from the witness, including body language. A carefully planned series of questions logically organized by chapters can serve as a powerful model for the cross-examination.[13]

7. Save the ultimate point for the summation.

Young lawyers are taught that they should not try to win cases at a pretrial proceeding. Instead, lawyers should use that examination to set up defenses, tie the witness to a story, and set up the witness for later impeachment or to be otherwise discredited. In criminal cases, the preliminary hearing may be the first real chance the defense has to obtain information about the case, given the restrictive discovery process in most states. In a civil case, a deposition is part of the discovery process.[14] When cross-examining a witness at trial, more experienced lawyers know better than to play Perry Mason and to expect that any single question will win their case. Instead, they are sketching a picture as well as setting the framework for their summation. In summation they utilize the salient points of the cross-examinations to tell the story that hopefully will lead the jury to the desired verdict. A well-tailored cross itself can tell a story with feeling that advances the overall theory of defense.

Even the most experienced lawyers might ask "one question too many," thereby offering a savvy witness a chance to change what was a favorable and valuable answer or even explain it away. Thus, each question must be carefully calculated. It is a painful experience when the lawyer wishes, even as the question is actually flowing from his lips, that he could retrieve it with a net before the witness gets to answer it.

When the ultimate point is clear and yet saved for summation, the lawyer is letting the jurors know that he trusts their intelligent ability to figure it out. That ultimate point then can become each juror's and serve as a powerful one during deliberations.

8. Decline to cross when questioning will have no benefit.

If there is no real identifiable purpose, sometimes the best cross is no cross. Some less experienced lawyers think that every witness has to be laboriously cross-examined. Many inexperienced or less skillful lawyers tragically and weakly simply repeat the direct testimony. Simply put, if a witness has not hurt the defendant's case and cross-examining will not help advance the defense theory, "no questions for this witness" may be the most effective approach. In fact, not asking questions of a witness could telegraph to the jury that the witness was not relevant to the case. Thus, jurors may give more credence to more important examinations. While cross-examination serves as the most powerful and effective weapon for the defense, it can be turned against the lawyer in the worst way at any time. Many questions contain ticking time bombs.

9. Aggressively attack only with permission.

Attacking a witness should only be done when the lawyer knows the jurors have tacitly given their permission. The best trial lawyers are always aware of the jury's presence, with acute sensitivity and almost a sixth sense. Jurors are actively watching and studying every move made by the lawyers, parties, witnesses, judge, and even the spectators. There is an ever-changing moment-by-moment feel to the atmospherics of the courtroom in every case.

Jurors naturally relate to and identify with witnesses. In contrast, jurors often distrust the lawyer. A defense lawyer must earn each juror's trust by demonstrating competence, professionalism, and sincerity. Thus, a full-frontal attack against the witness can backfire unless the witness has angered the jurors by obviously lying to them. When jurors are ready to strangle the witness for trying to intentionally deceive them, one can sense a subtle shift in the atmosphere of the courtroom. On these relatively rare occasions, the jurors not only expect the lawyer to deliver a killer cross-examination, but they also want her to do it, as if they are yearning for a catharsis. The lawyer must be judi-

cious and sure before engaging the witness in this manner. The best lawyers attack a witness through skillful questions and subtle tones rather than escalating the volume too loudly.

10. Be yourself.

Jurors can easily detect a fake. A trial lawyer must be herself at all times during the trial, including during cross-examination. One can learn from the styles and techniques of great cross-examiners, but emulation is not nearly as effective as authenticity. Jurors do expect lawyers to be confident, competent and comfortable, but not cocky.

Lawyers adapt their persona in each trial to the client, the court, opposing counsel, and to the particular circumstances required by the dynamics of the case. A lawyer would not approach the defense of a drug case with the same persona as she would approach the defense of a violent crime case or a white collar corporate fraud case. She would not cross-examine the alleged victim of a sex crime in the same manner as she would cross-examine an FBI agent. In each of those instances, however, she is going to be herself. Therefore, an effective trial lawyer should never lose sight of her core self in any case.

Challenges to Effective Cross-Examination

1. Controlling the witness

Cross-examination is the defense lawyer's most powerful weapon, yet it is replete with challenges. Controlling some witnesses can be daunting and confusing with regard to which techniques to employ. Some lawyers prefer to engage the judge's help; others prefer to avoid taking that route.

Some lawyers occasionally will hold up their hand to signal "stop" to a rambling witness. Sometimes the lawyer may use silence and let the witness meander to the point where the evasiveness is obvious, and then repeat the question. A lawyer might simply ask the witness if he is now ready to answer the question, after an evasive answer, or ask what was unclear about the question posed. Many more ways exist to manage a witness who is difficult to control.[15]

Lawyers are taught not to ask a question unless they already know the answer. While that is a useful guidepost, experienced lawyers break that rule when they develop the confidence to take a calculated risk and be poised for the unknown. The rule does not apply

when lawyers ask a question that contains an answer that does not matter, regardless of its content.

2. The expert witness

Cross-examining an expert presents particular challenges because lawyers are playing on the expert's field of expertise. Judges routinely give the expert much latitude to pontificate, expound, and explain. Lawyers must know the subject intimately and then make choices as to which portions of the expert's testimony they want to confront. Extensive investigation, study, and preparation are crucial in order to successfully cross-examine any expert. The defense team should obtain prior transcripts, prior opinions that mention the witness, prior media appearances, if relevant, and learned treatises of those in authority in the field. In addition, the defense expert can help defense counsel prepare his cross of the opposing experts. Rule 17(c) subpoenas can also be utilized to obtain raw data from labs that conduct scientific testing. The defense must study experts' websites and review any articles they have written or available materials of any presentations they have made. Some greatly exaggerate or fabricate in their CV's or when they advertise. It is not uncommon, for example, for an expert to list hundreds of articles he claims to have published, when in fact he contributed practically nothing to them.

3. Snitches

When the prosecutor calls a snitch as a witness, he is asking jurors to believe that this criminal is telling them the truth and uses the language in the plea agreement to support that myth. It is defense counsel's job to expose the snitch for the rat he became because he would lie for the most precious commodity in the world — freedom. Snitches will testify against lifelong friends, spouses, siblings, business partners and, in some cases, even their kids. Consequently, the defense team must investigate every aspect of their lives in order to destroy them as witnesses.

As stated earlier, utilizing a computer-savvy investigator can net extraordinary information. A simple credit report can lead to fraudulent loans, false credit applications, and evidence of mortgage fraud. Employment applications and terminations can yield much false or damaging information. School records can reveal disciplinary actions, lies, and other misconduct. Jail phone calls can reveal statements of horrific prison conditions and expressed pressures by prosecutors for the snitch to flip for a reduced sentence. Jail or prison records can also provide extraordinarily useful information, including an institution's visitor list.

The prosecutor may have made some statements of great value (FRE 801 party admissions) in prior proceedings involving a witness who later becomes a snitch. For example, at detention hearings the prosecutor often makes statements that the future snitch is a dangerous person or a flight risk. Transcripts of all hearings involving the snitch must be obtained. The notes of the prosecutor and his agents may contain *Brady/Giglio* material, as could the notes of the snitch's lawyer taken during proffers. With a proper showing, a judge might review the notes in-camera and seal them for the record for appellate review, if not turned over. Communications between the snitch's lawyer and the prosecutor are not work product since they have been disclosed to a third party, and they are not subject to the attorney-client privilege. The snitch's story almost always evolves to conform to the prosecutor's case against defense counsel's client, and is often therefore *Brady/Giglio* material. The initial proffer is rarely the final product, especially after the prosecutor prepares the witness for trial. The agents are always present and taking notes.

The prosecutor holds Damocles' sword over the head of a snitch. The prosecutor will almost always delay sentencing until after the trial. It is the prosecutor who will make recommendations regarding the sentence. He is the sole decider of whether the snitch has told the truth. "Truth" to the prosecutor is confined to how much the snitch substantially assisted against others. The snitch is motivated to please the prosecutor and reduce exposure to prison. There can be no greater motivation to lie than the incentive for less prison time. A person who faces prison does not suddenly wake up and decide to tell the "truth." The snitch makes deals that trade testimony for freedom.

Conclusion

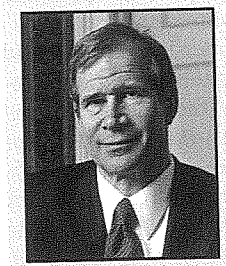
The art and science of effective and even superlative cross-examination takes years of practice and much effort. Experienced lawyers wear the battle scars of cross-examinations that flopped, and they relish those times when preparation contributed to the stars aligning for the unforgettable ones. It takes thoughtful and meticulous preparation, command of the rules of evidence, and mastery of the fundamentals. Known as the law's most powerful engine to obtain the truth, cross-examination is truly the ultimate test — not just of the witness, but of the lawyer.

Notes

1. See F. Lee Bailey & Henry Rothblatt, Cross-Examination in Criminal Trials (1978); Larry S. Pozner & Roger J. Dodd, Cross-Examination: Science and Techniques (2004); Irving Younger, American Bar Ass'n: The Section of Litigation Monograph Series, No. 1, The Art of Cross-Examination (1976).
2. Michael E. Tigar, Persuasion: The Litigator's Art 133 (1999).
3. My Cousin Vinny (20th Century Fox Home Entertainment 1992).
4. Philip Kushner, *On Cross-Examination*, The Champion, June 2009 at 59.
5. James W. McElhaney, McElhaney's Trial Notebook 443 (4th ed. 2005).
6. *Id.* at 447.
7. Michael E. Tigar, Persuasion: The Litigator's Art 135-36 (1999).
8. Larry S. Pozner & Roger J. Dodd, Cross-Examination: Science and Techniques (2004).
9. *Id.*
10. *Id.* at 189
11. *Id.*
12. *Id.* at 209.
13. *Id.* at 197-212.
14. The same dynamic exists in criminal cases for preliminary hearings. While the rules do not allow the hearings to promote discovery objectives, in practice that is exactly what they do because, in most cases, probable cause is a foregone conclusion.
15. Larry S. Pozner & Roger J. Dodd, Cross-Examination: Science and Techniques (2004).

About the Author

Richard S. Jaffe is certified as an NBTA Criminal Trial Specialist. He is a presenter at seminars throughout the United States, and he is serving his fourth term on the NACDL Board of Directors. Jaffe is the author of *Quest for Justice: Defending the Damned.*



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