

THEORY-BASED CROSS- EXAMINATION

Mary F. Moriarty, Mario White &
Craig Mastantuono
Wisconsin Trial Skills - 2017



Was this an effective
cross-examination?

How do you feel about
Omar?

How do you feel about the
lawyer?

Preparation

Effective Cross

- Theory-based
- Tells your narrative, breaks down theirs
- Organized into chapters
- Controlled

Theory-Based Cross

- You must have one
- How does this witness fit into my theory?
- Do I need to cross?

Tells your narrative,
breaks down theirs

What was Omar's
narrative?

What narrative did the
lawyer want to tell?

What narrative do we want
to tell with each witness?

BRICK THEORY





EVIDENCE BLOCKING

- Suppression/exclusion (Constitutional, statutory)
- Witness problems (competence, privilege)
- Evidence problems (relevance, hearsay)
- Presentation problems (foundation, chain of custody)

FACT GATHERING

- Witness motivations
- Investigation
- Preliminary hearings
- Discovery
- Motions Practice
- Pre-trial proceedings
- Client

DOES THE WITNESS
ADVANCE MY THEORY?

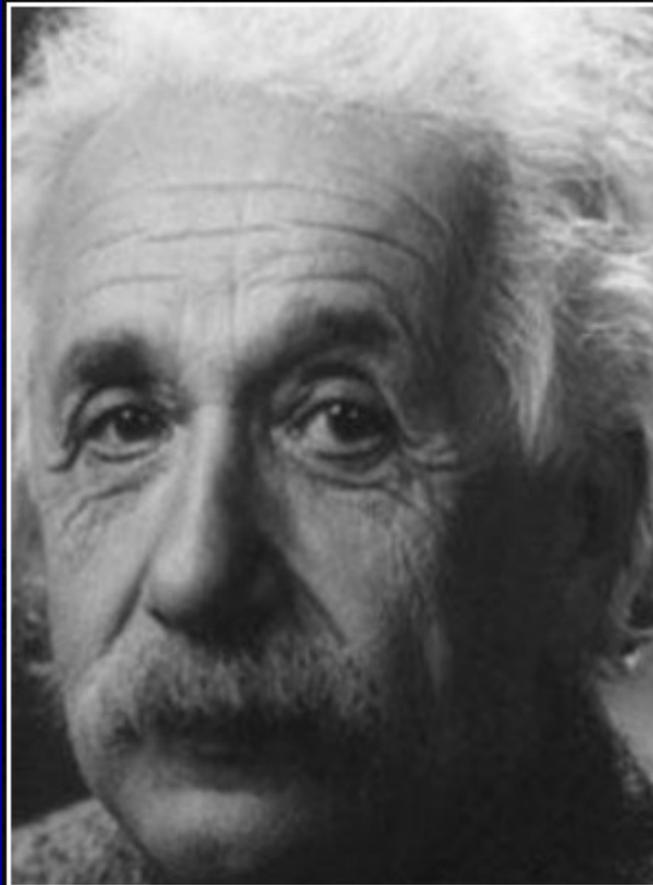


How do you want the jury to
perceive you?

You there: Fuck off. And
when you get there, fuck off
from there too.
Then fuck off some
more. Keep fucking off
until you get back here.
Then fuck off again.



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Empathy is patiently and sincerely seeing the world through the other person's eyes. It is not learned in school; it is cultivated over a lifetime.

— *Albert Einstein* —

AZ QUOTES

Just because I'm nice to
your face doesn't
mean I don't secretly
want to punch you in
it.



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Create Appropriate Images

- Visit the scene
- Vivid language - "Ruthless One"
- Looping
- Trilogies
- Themes
- Demonstrative evidence

Organization

DON'T REPEAT THE DIRECT

You're right. It's always someone else's fault that you constantly repeat the past.



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New SUPER
MARIO BROS.

BANK ROBBERY

Used to be teller and now his manager. As a teller was trained to follow orders of robbers. Trained to give them money and once they leave, lock the door and call police. Trained to look at hands to see if there are any noticeable marks. On this day, Teller working at station 1, which is directly across from the front door, about 30 feet away. She sees a man walk in, wearing a red hoodie and a bandana over the mouth/nose area. As the man walks up, she sees that he has a bag on his shoulder and nothing in his hands. He puts his hands on the counter and passes a note. When he passes the note, she sees his hands don't have any marks on them. The note says "Put the money on the counter." As she passes him the money, he grabs her wrist very tightly and says "Don't call the police." The man, walks out of the bank and when he is outside, she sees him start to run away. She describes the guy as 5'8, 170 lbs.

TOPICS

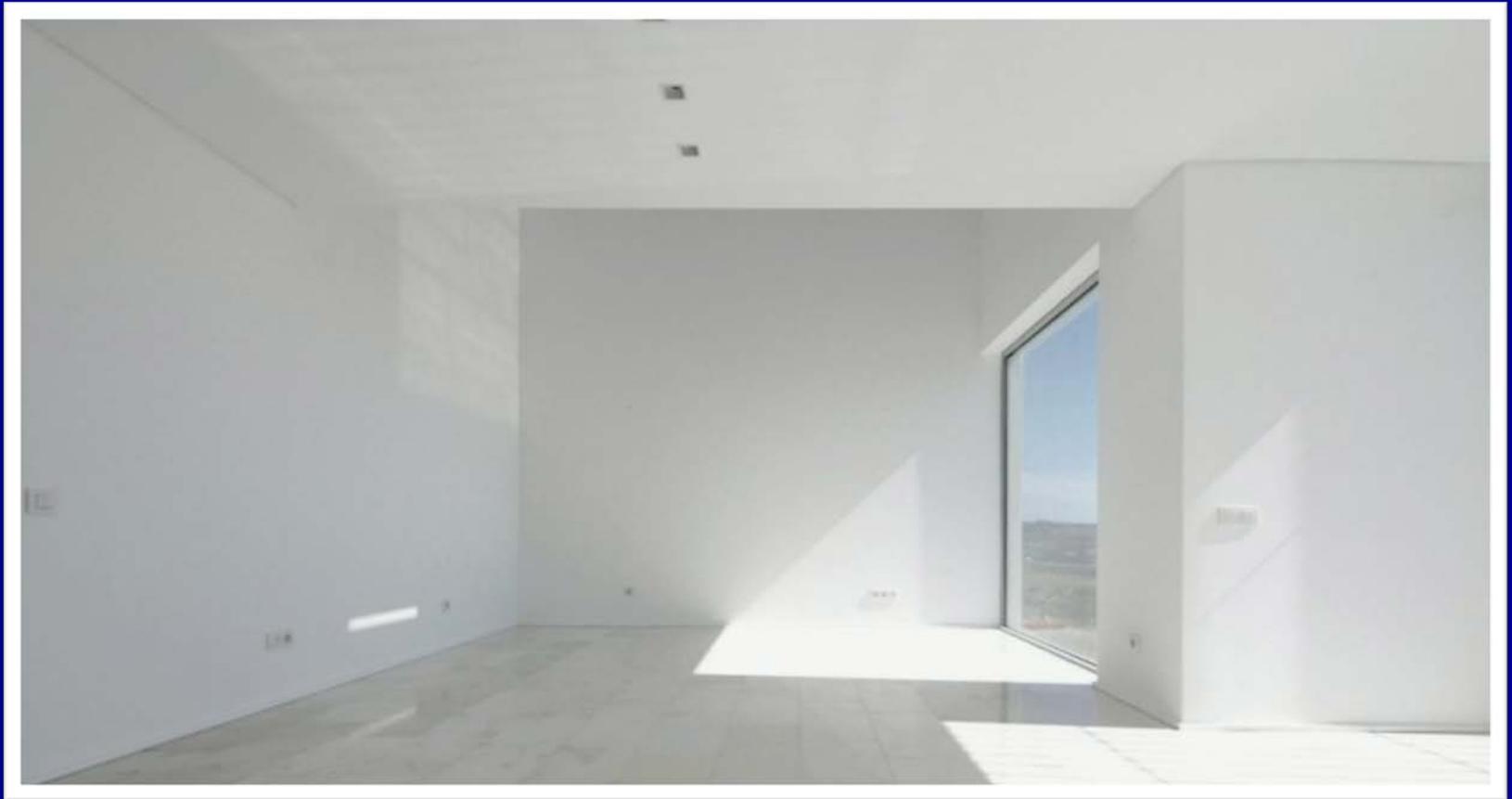
- Reliability - is the witness accurate?
(Memory & perception)
- Credibility - is the witness believable?
(Bias, prior inconsistent statements,
Prior convictions, character)

Chapters

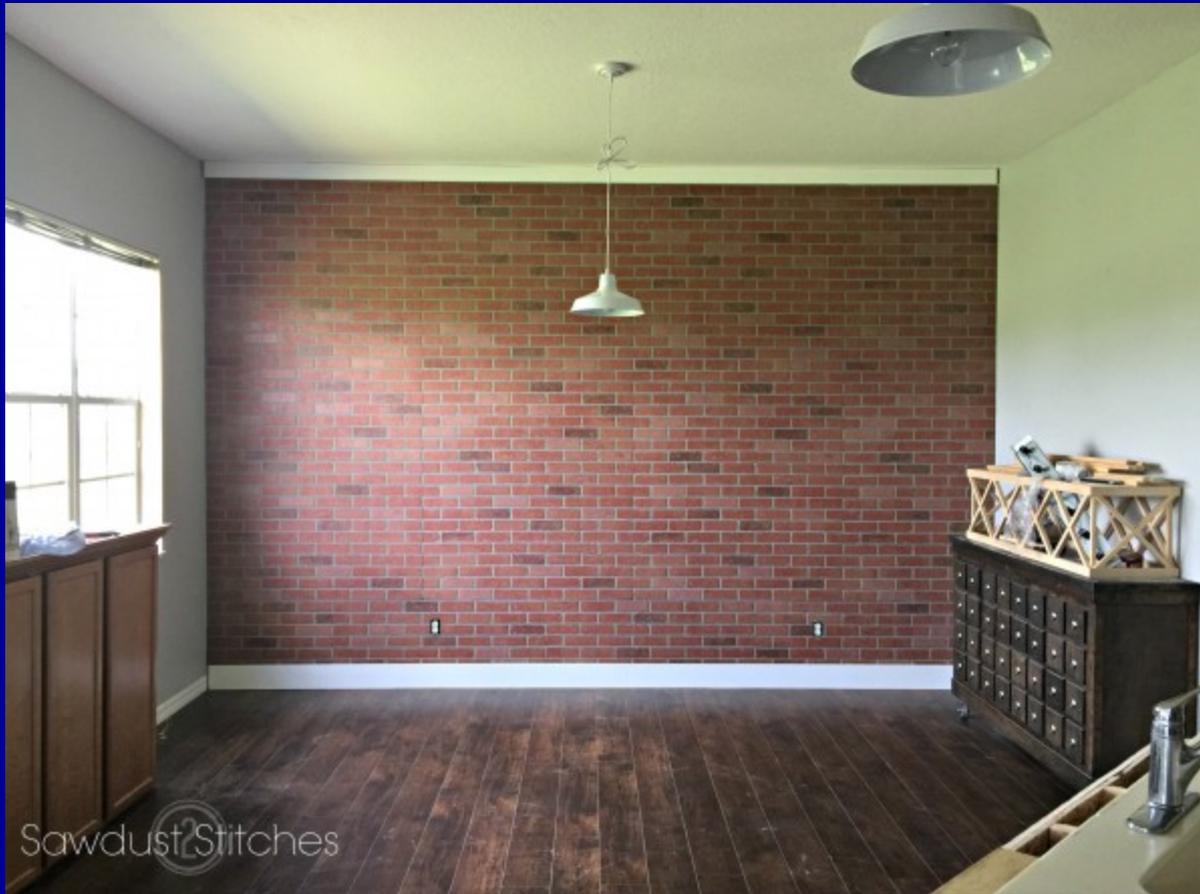
THEORY



WITNESS



Chapter



SAMPLE CHAPTER

- Topic - Michael
 - Chapter: Relationship with Melissa

CHAPTER ORDER



Primacy
Recency

The image features the words 'Primacy' and 'Recency' in a bold, stylized font. 'Primacy' is written in pink and 'Recency' in green. Above 'Primacy' are two pink arrows pointing right, and below 'Recency' are two green arrows pointing left. The text is set against a dark blue background.

TRANSITIONS

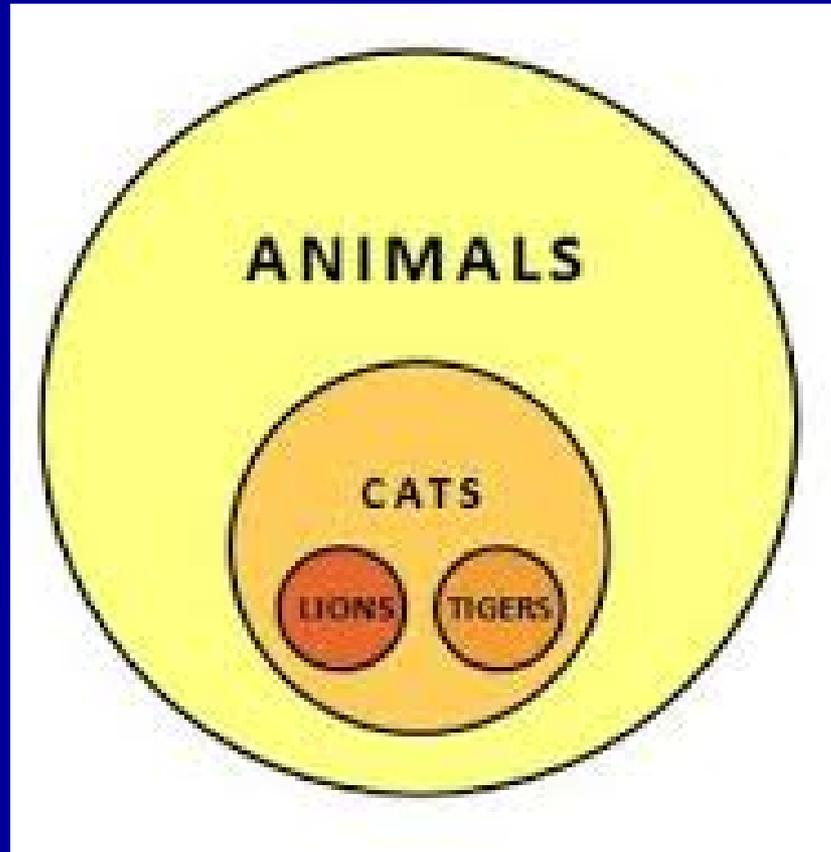


Goal





GENERAL TO SPECIFIC



Control

- Stand
- Step away from notes
- Make eye contact
- Proper inflection
- No waffling

FORM OF QUESTION

- Leading
- One fact per statement
- Eliminate tag lines
- Objective not subjective
- Save your argument for closing



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Runaway Witness



**THE FIRST
THING WE DO,
LET'S KILL ALL
THE LAWYERS**

-William Shakespeare



- Do not ask the judge for help
- Avoid the traffic cop
- Try not to cut the witness off
- Repeat the question
- Ask the witness whether they remember the question



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IMPEACH!!

Impeaching a witness

Questioning a witness or
introducing evidence to
undermine their believability.

Impeachment Modes

- Competence
- Perception
- Recollection
- Bias, interest, prejudice
- Prior convictions
- Prior bad acts, character
- Inconsistent statements or omissions

Should You Impeach?

- Inconsistent, but harmful?
- Does it matter?
- Can you prove it?

Can you find it?

Prepare

Prepare again, and
anticipate

Have at the ready

Listen to the witness

Why We Impeach:

- **Protect the Truth.** Witness is getting off the paper on something that matters, and onto better script – you need to stop that. Get in between your client and a lie.
- **Control.** Witness is messing with you. You need to stop that.
- **Enhance Your Credibility.** You are the truth leader in the room. Stop the witness from fudging the facts / stretching the truth. This is bigger than a mistake in a report.

Formats

- RAE (recommit, accredit, expose)
- ARE (accredit, recommit, expose)

THREE EASY STEPS:

1. **(Re) Commit** witness to what was said on direct
2. **Accredit** out of court statement
3. **Expose** the inconsistency, (or)
Confront the witness with the out of court statement
(Steps 1 & 2 can be reversed)

Accreditation

We show the jurors the credibility of the prior statement or process.



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Impeachment by Omission

- We want the prior statement to be accurate
- We want to close the doors
- We need to accredit the previous statement

Anticipate the response:

Officer, why wasn't that in
your report?

How do we close those
doors?



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Finishing the Impeachment

- Know when to stop – SYAD
- Save for argument and tie in voir dire discussions, cross, closing.
- Don't confuse impeachment with refreshing recollection.
- Use the common sense and emotional response to a witness who embellishes:
Common sense - this is bullshit, witness is changing their story to win.
Emotional - treachery/deceit.

And in closing, fuck off.



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