

# Providing Effective Testimony in IPSV Cases



Allison L. Turkel  
Senior Attorney/Chief of Training  
NDAA-APRI's National Center for Prosecution of Child Abuse  
703-549-4253  
[allison.turkel@ndaa.org](mailto:allison.turkel@ndaa.org)  
Jan Russell

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# LAY vs. EXPERT WITNESS

- ◆ **Lay witness:** testifies as to what the witness saw, heard, felt, smelled, etc.
- ◆ **Expert witness:** renders an opinion or gives the jury information that helps them evaluate the evidence.
- ◆ **Dual or professional witness**

# SOFT AND HARD SCIENCE EXPERTS

- ◆ **Hard science:** Scientific principles that are well established.
- ◆ **Soft science:** Sociological or psychological research or theories that are more malleable.



# As a Professional

- ◆ You:
  - Should appear unbiased
  - Neutral
  - You have nothing to gain or lose from a particular case
- ◆ Which means:
  - You are more credible than a witness with an interest in the case
- ◆ You can impact the outcome
  - Especially when the victim's credibility is at issue




# DOCUMENTATION

- ◆ Details are essential
- ◆ Accuracy is essential.
- ◆ Meticulously complete any mandated forms.
- ◆ Accurately record all information.
- ◆ Quote witness statements rather than paraphrasing.
- ◆ Medical folks...clearly record information.
- ◆ Leave nothing to question.



# First Responders

- ◆ First Responders to sex cases can make or break a close case! Patrol **should**:
  - Assess the safety and immediate needs of the victim(s).
    - DV? Child Protective Services?
  - Observe and carefully document the environment.
    - Excited utterances, present sense impressions.
    - **Identify and Control the crime scene.**
    - Take statements verbatim to the extent possible!



# Patrol at the Acute Crime Scene: Your Victim's Body

- ◆ Always a crime scene. Victim must be encouraged **not** to:
  - Bathe
  - Urinate, defecate, vomit.
  - Remove, destroy clothing.
  - Brush teeth.
- ◆ Safety is first, but comfort must go second in order to ensure that valuable evidence is not lost.
- ◆ Patrol must be trained to both explain, preserve, and provide comfort until investigators arrive.
- ◆ \*\*\*\* What is in the police report....?? Jan



# Medical Witnesses: The Basics- What to Keep in Mind

- ◆ Forensic Medicine leads to court- it's an eventuality, not a possibility.
  - Forensic witnesses may be fact, expert or both.
- ◆ All duties of the forensic medical professional must be conducted with an eye toward the legal process.
  - Proper collection, documentation.
  - No interest in the outcome of the case.
  - Proper recording of all statements and demeanor of witnesses.



# Medical Witnesses:

- ◆ **Experts** in the area of physical, sexual assault/abuse.
- ◆ **Unbiased**, scientific examiners whose job it is to make medical and/or forensic evaluations about human anatomy/tissue and report on them neutrally.
- ◆ **Confident** experienced professionals with nothing to gain or lose from any particular case.



# Medical Witnesses: What You Are Not From The Legal Perspective

- ◆ **Law enforcement officers**, or individuals who are in any way answerable to or responsible to any law enforcement agency.
- ◆ **Victim Advocates** in any way except to provide care and comfort (within the medical role) to victims of sexual assault, abuse, violence and injury.



# Protocol, Documentation, Chain of Custody

- ◆ Read, know and live protocol!
- ◆ Documentation.
  - Be familiar, complete meticulously.
  - Quote rather than paraphrase information.
  - Leave nothing to question.
- ◆ Chain of Custody.
  - Are there C of C guidelines in protocol?
  - Document everything in adherence to guidelines.



# Excited Utterance

“A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.”

Federal Rule of Evidence 803(2)



# Establishing An Excited Utterance

- ◆ Was this a ‘startling event?’
- ◆ How much time has elapsed between the event and the statement?
- ◆ How will you document the “excited” state?
- ◆ Consider “rekindled excitement” if applicable.



# Present Sense Impression

“A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.”

Federal Rule of Evidence 803(1)



# Statements for Medical Diagnosis

“Statements made for the purposes of medical diagnosis or treatment and describing medical history, or past and present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.”

Federal Rule of Evidence 803(4)



# *Statements For Medical Diagnosis*

The rule is premised on the belief that we have a selfish motive to be truthful to our doctors.

Thus the declarant has to know the statement will be used in treatment and the statement must be pertinent to treating the declarant.



# **MEDICAL DIAGNOSIS CONSIDERATIONS**

**Is the description of abuse pertinent to the diagnosis or treatment?**

**Is identity pertinent?**

**What if the statement is to a hospital receptionist?**

**What if the victim doesn't understand the importance of being truthful to the Doctor?**



# Medical Diagnosis

- ◆ Statement comes in because of the presumed desire to tell doctors and medical providers the truth.
- ◆ Must know that person hearing the statement is a medical professional- how are you dressed, how do you introduce yourself?



## Is The Description Of Abuse Pertinent To The Diagnosis Or Treatment?

- ◆ Some D' argue a description of pain or other symptoms may be relevant to diagnosis but the kid's actual description of abuse is not. Most courts reject this. *e.g. Turner v. St*, 924 S.W.2d 180 (Tex. Ct. App. 96).
- ◆ The alleged victim's statement to the doctor that she had been sexually assaulted orally, vaginally, and anally were reasonably pertinent to the physician's diagnosis or treatment of the victim's wounds. However, we agree with Judge Ervin's dissent that the "assault at gunpoint" portion of the statement was inadmissible because it was not reasonably pertinent to medical treatment. *Conley v. State*, 620 So. 2d 180, 1993

# Is The Description Of Abuse Pertinent To The Diagnosis Or Treatment?

- ◆ The Court will also defer ruling on this evidentiary issue at this stage. However, the Court would note that statements made by the alleged victim to Dr. Richard Larson are the type of statements that are generally admitted at trial *if* it is established that the declarant had a motive to provide truthful information to the physician, that the statement was related to medical diagnosis or treatment, and that the statements were reasonably relied upon by the physician in any treatment rendered or diagnosis made. *United States v. Cree*, 400 F. Supp. 2d 1192, 2005
- ◆ [State v. Major](#), 2004 Ohio 1423, 2004 Ohio App. LEXIS 1277 (Ohio Ct. App., March 24, 2004)



## Is The Description Of Abuse Pertinent To The Diagnosis Or Treatment?

- ◆ It is the Court's *preliminary view* that statements made by the alleged victim to Dr. Richard Larson concerning what, when, and how the abusive conduct occurred will be admitted, but statements which relate to the identity of the abuser will be excluded *unless* an appropriate showing is made that the identity of the abuser is information reasonably relied upon by the physician and would be pertinent to diagnosis or treatment. See [United States v. Gabe, 237 F.3d 954, 958 \(8th Cir. 2001\)](#) (in general, a patient's statement describing how an injury occurred is pertinent to a physician's diagnosis and treatment, but a statement identifying the person who caused the injury would seldom, if ever, be sufficiently related).



## What About Psychological Treatment?

- ◆ *In order for a statement to be admissible under the medical diagnosis or treatment exception, the declarant must make the statement for purpose of medical diagnosis or treatment and with the understanding that giving the statement is part of the diagnostic, treatment, or therapy process. Lewis v. State, 2004 Tex. App. LEXIS 10217*



# Other Points to Consider

- ◆ Explaining the Absence of Findings May Be More Important than Explaining Findings!
- ◆ Non-genital trauma can be more important- don't overlook marks, redness, swelling, **ANYTHING** on the body.



# Are Statements to Others Admissible

- ◆ [Richardson v. State](#), 2006 Tex. App. LEXIS 5098 (Tex. App., June 15, 2006 ) Because a paramedic obtained information from an eyewitness bystander in order to treat the victim, the paramedic's testimony was properly admitted by the trial court, for purposes of Tex. R. Evid. 803(4).
- ◆ [State v. Thornton](#), 158 N.C. App. 645, 2003 N.C. App. LEXIS 1277 (N.C. Ct. App., July 1, 2003,
- ◆ Rape victim's statements to social worker were admissible, since victim made statements to social worker with understanding that they would lead to medical diagnosis or treatment and statements were reasonably pertinent to diagnosis or treatment.



# Trial Preparation

- ◆ Address errors before trial.
- ◆ Report writing: Details are everything.
  - Proofread, work on technical writing skills.
  - Assume jurors and judge will read it.
- ◆ Don't hide anything! Prosecutors are legally responsible for everything **you** know about the case.
- ◆ Eliminate surprises.



# Expert Testimony

JAN



# WHO CAN BE AN EXPERT?

- ◆ Detective specializing in sexual assault/abuse, domestic violence investigations
- ◆ Forensic Interviewer
- ◆ Psychologist/psychiatrists.
- ◆ Rape crisis/sexual assault counselors.
- ◆ Teachers.
- ◆ Social Workers/CPS.
- ◆ School Guidance Counselors.
- ◆ Docs, Nurses, SANE.
- ◆ etc



# Medical Expert Topics-Sexual Assault/Abuse

- Physical examination/positive findings/negative findings
- Degree of force
- Physiology
- Sexually transmitted diseases
- Pregnancy



# Medical Expert Topics-Sexual Assault/Abuse

- ◆ **Evidence Preservation and Collection**
- ◆ **Admit and explain colposcope photographs**
- ◆ **Introduce excited utterances**
- ◆ **Demeanor of victim**
- ◆ **Medical exception to hearsay\*\*\***  
**Important post Crawford**




# Medical Experts-Physical Abuse

- ◆ **Injuries consistent or inconsistent with history**
- ◆ **Degree of force**
- ◆ **Refute claim of easy bruising**
- ◆ **Collection and Preservation of Evidence**
- ◆ **Pattern Injuries**
- ◆ **Excited Utterances**
- ◆ **Victim demeanor**



# EXPERT TOPICS--PHYSICAL ABUSE

- ◆ Bruises
- ◆ Bite marks
- ◆ Burns
- ◆ Fractures
- ◆ Abdominal injuries
- ◆ Head injuries
- ◆ Mechanics for injury



# MORE PHYSICAL ABUSE TOPICS

- ◆ Force necessary to produce injury.
- ◆ Timing of injury.
- ◆ Clinical symptoms & progression.
- ◆ Cause of death.
- ◆ Unexplained injuries.
- ◆ Opinion based on caretaker history.
- ◆ Syndromes.
- ◆ Neglect and emotional harm.



# Non-medical Expert Topics--Sexual Assault/Abuse

- ◆ Denial of abuse.
- ◆ Delayed/reluctant disclosure.
- ◆ Recantation or inconsistent disclosure.
- ◆ Piecemeal disclosure.
- ◆ Disclosure process.
- ◆ Memory and suggestibility.
- ◆ Linguistics
- ◆ Interviewing techniques
- ◆ Emotional attachment to perpetrator.
- ◆ Age inappropriate sexual conduct.
- ◆ Post Traumatic Stress Disorder.



# MORE TOPICS

- ◆ Dynamics of intrafamilial abuse.
- ◆ Counter Intuitive responses to domestic violence
- ◆ Counter intuitive responses to sexual assault
- ◆ Behavior of non-supporting parent.
- ◆ Myths and misconceptions re: SA.
- ◆ Interviewing techniques.
- ◆ Cultural factors influencing conduct.
- ◆ Developmental/cognitive abilities.
- ◆ Victims affect.

# Psychologists And Other Soft Science Experts

- Delay in reporting - Stowers, 690 N.E.2d 881, 1998
- Child development issues
- Recantation - State v. Smith, 2005 Ohio 63 - called on rebuttal
- Victim's Mental State (Psychologist) (State v. Cripps, 1998 Ohio App. LEXIS 4174)
- Police Officer as expert - Bevil v. State, 220 Ga. App. 1, 2 (5) (467 S.E.2d 586) (1996).



# WHAT CAN BE THE BASIS OF AN EXPERT'S OPINION?





# BASIS OF EXPERT OPINION

## ◆ FRE 703

- **The facts or data in the particular cases upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.**

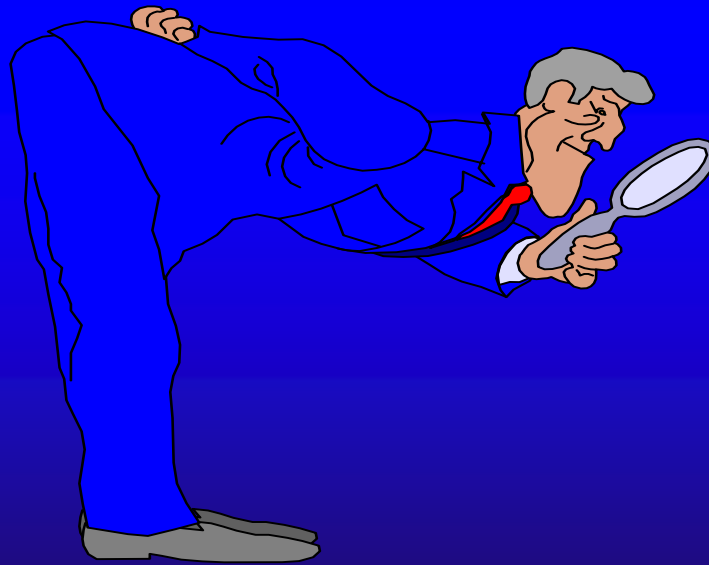


# BOTTOM LINE:

- ◆ Education or experience of expert.
- ◆ Facts perceived by expert.
- ◆ Facts made known to expert.
- ◆ Hearsay information.



# SO WHAT CAN AN EXPERT ACTUALLY SAY?





## What Experts Can't Say:

- Witness lying or telling the truth.
- Victim's behaviors are diagnostic of Abuse.
- Accused guilty or not guilty.
- Profile evidence.
- Statistics on false/truthful allegations.
- Whatever your courts disallow.
- Remember APA ethics.

# YOU MAY STATE AN OPINION ON THE ULTIMATE FACT

FRE 704

- testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.



# YOU MAY STATE YOUR EXPERT OPINION, BUT NOT THE FACTS UNDERLYING THE OPINION

## ◆ FRE 705

- **The expert may testify in terms of opinion or inference and give his reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.**

# PERMISSIBLE COMMENTS

- ◆ The evidence is consistent with. . .
  - FOR EXAMPLE...



REVIEW...

CONSIDER...

INCORPORATE...

TOTALITY OF THE CIRCUMSTANCES



# QUALIFYING AND RENDERING AN OPINION

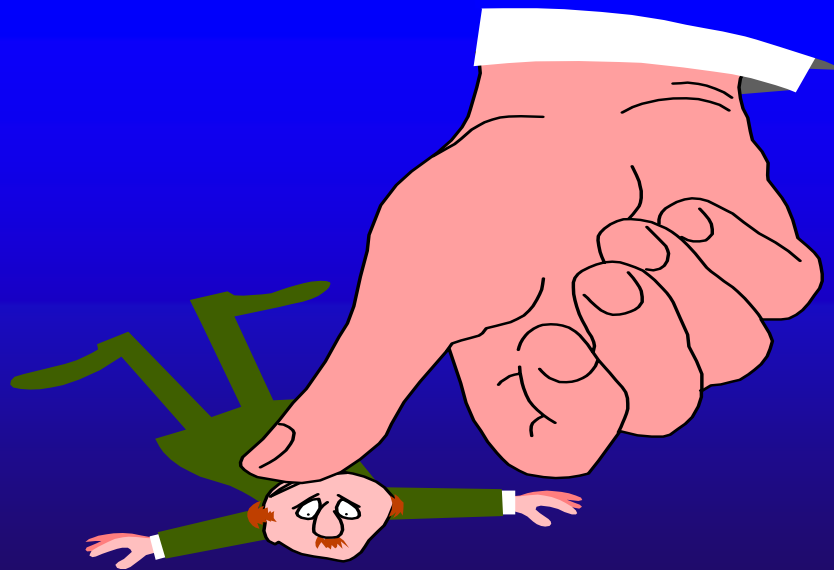


# THE EXPERT OPINION

- ◆ Did you form an expert opinion regarding the . . . ?
- ◆ What is your expert opinion?
- ◆ What do you base your opinion on?
  - **Examination**
  - **History**
  - **Experience**
  - **Continuing education**
  - **Etc.**

# SURVIVING CROSS- EXAMINATION

## DEFENDING YOUR INVESTIGATION



# DEFENSE GOALS FOR CROSS EXAM

**Make You Look Stupid!**



THE KEYS TO SUCCESS:  
11 TIPS TO TESTIFYING  
AS A SUCCESSFUL  
WITNESS



# 1. PRE-TRIAL PREPARATION


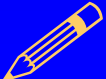





# MAINTAIN A CURRENT RESUME

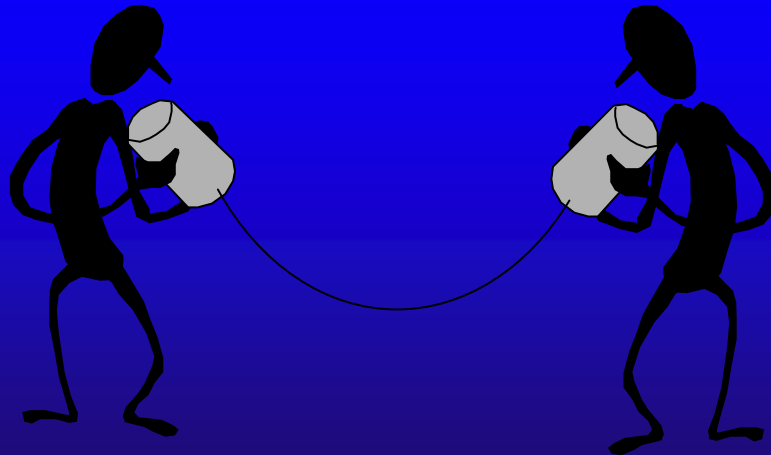
- EDUCATION, DEGREES
  - EMPLOYMENT
- NUMBER OF CHILD ABUSE INVESTIGATIONS
- SPECIALIZED CHILD ABUSE TRAINING\*
- CONTINUING EDUCATION\*
  - AWARDS
- BOARD CERTIFICATIONS/ LICENSES
- PRIOR COURT APPEARANCES
  - ADVISORY BOARDS
  - EDITORIAL BOARDS
- PROFESSIONAL ORGANIZATIONS
  - PRESENTATIONS
  - PUBLICATIONS



-  **Know your own area of expertise.**
-  **Know the adverse material.**
-  **Know the vulnerable areas.**



## 2. PRE-TRIAL MEETING WITH THE PROSECUTOR





- ❌ Discuss expectations.**
- ❌ Review potential areas of attack.**
- ❌ Acknowledge areas ripe for impeachment.**
- ❌ Discuss theme.**
- ❌ Define defense goals.**
- ❌ Review evidence.**
- ❌ Practice questions.**

# A Pretrial Conference with Defense Counsel:

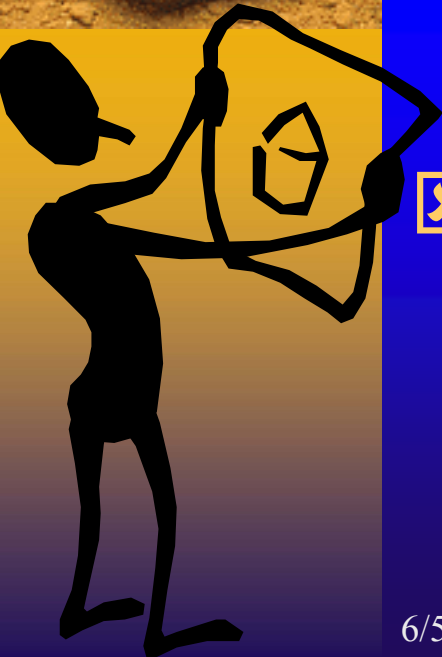
Control the meeting place.

Bring a friend!

Prepare, prepare, prepare.

Sanitize file.

Is there a court order in force or  
necessary?



# 3. THE 2 P'S:

◆ PROFESSIONAL:



◆ PROMPT:



# 4. MAKE IT SIMPLE...



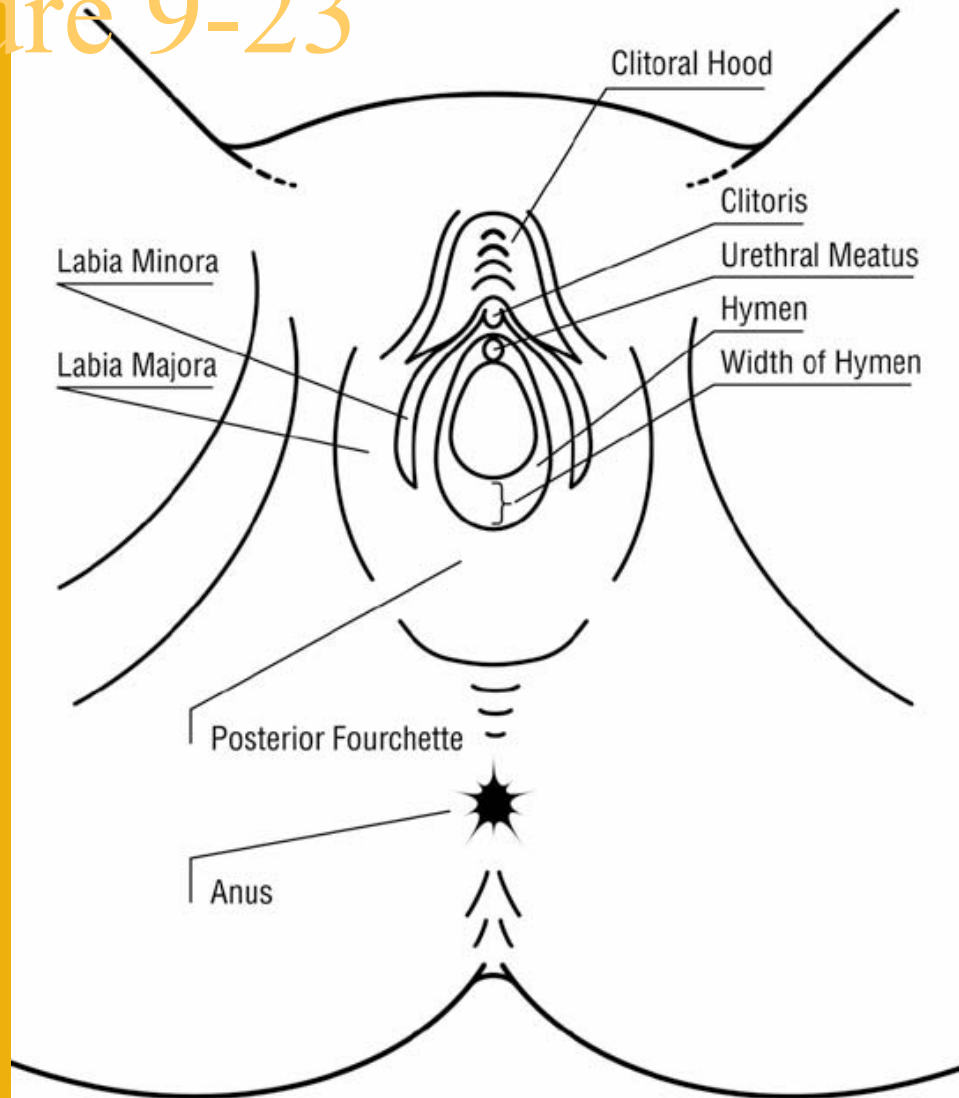


# 5. INCORPORATE DEMONSTRATIVE AIDS



Normal Frontal View

Figure 9-23





# **6. BE POLITE TO THE DEFENSE ATTORNEY**





**THERE ARE DIFFERENT STYLES OF  
CROSS EXAMINATION, BE  
PREPARED:**

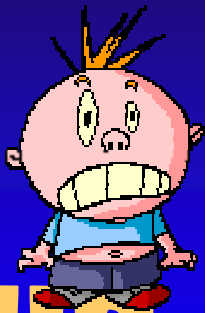
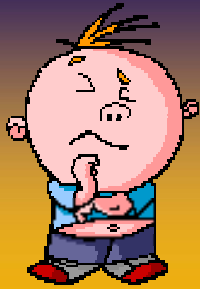
**1. THE NICE AT FIRST, THEN ALL  
HECK BREAKS LOOSE.**

**2. THE I'M JUST A GOOD 'OL  
COUNTRY BOY APPROACH.**

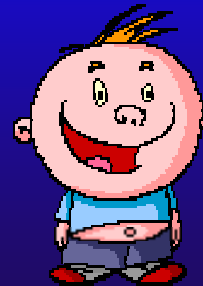
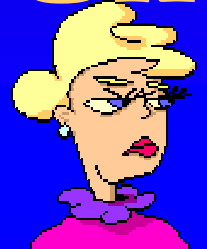
**3. THE INSERT KNIFE AND TWIST  
APPROACH.**

**4. THE HOOK, LINE AND SINKER  
APPROACH.**






# 7. BE AWARE OF YOUR BODY LANGUAGE



# 8. LISTEN TO THE QUESTION





# **MAXIMIZING CREDIBILITY DURING CROSS EXAMINATION**

**Maintain control.**

**Listen to the question.**

**Don't make STUPID mistakes!!**

**Correct all STUPID mistakes.**

**Don't ramble.**

**Don't play games.**



# **YOUR GOALS ON CROSS EXAMINATION**

- **Enhance and support the theory of the case.**
- **Demonstrate the unreasonableness or implausibility of the defendant's theory of the case.**
- **Discredit defense witnesses through personal credibility or testimonial credibility.**
- **Maximize your credibility.**

# Cross On Case Weakness

**Q: You found no physical evidence to corroborate this victim's allegations?**

**Q: There was no medical evidence of an assault was there?**

**Q: There were no witnesses to verify this victim's claims were there?**

**Q: And as a trained investigator you looked hard to try and find some additional evidence but didn't right?**



# Cross Regarding Your Bias

**Q:** The victim made a disclosure involving conduct of a sexual nature before you interviewed her?

**Q:** You were aware of the nature of that disclosure?


**Q:** You believed it to be a disclosure of sexual assault?

**Q:** Your interview was conducted because you suspected the victim had been raped?

**Q:** So you already had a prefixed idea that something had happened?



# Cross On Protocols

- 
- Q: Is there a proper “method” or “protocol” for interviewing women who make allegations of sexual assault?**
- Q: Did you follow that method or protocol in this case?**
- Q: Did you deviate at all from that method or protocol in this case?**
- Q: So it’s okay if you do your own thing because you can justify it later, right?**

# Cross On “New Information”

**Q: You’re trained to put all important information in your reports, right?**

**Q: You didn’t document several of these matters that we’ve just talked about in your reports did you?**

**Q: You selected the information you wanted to include in your report, yes?**

**Q: Why didn’t you document these other facts you now claim occurred?**



# Cross On Being Human

**Q: If you could do it all over again...?**

**Q: You would agree this was not a complete investigation?**

**Q: This wasn't done according to standard procedures was it?**

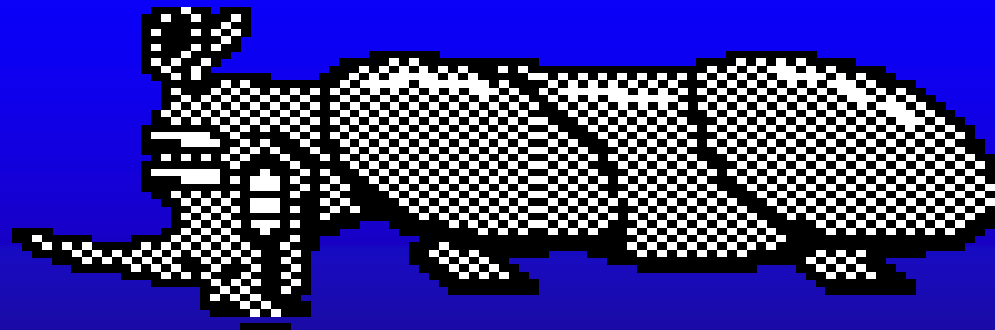
**Q: Are you not the least bit concerned that you didn't follow up on...?**

**Q: You agree it's your responsibility to conduct a competent investigation?**





# 9. BE ASSERTIVE





## THE “YES” OR “NO” QUESTION

### TAKING CONTROL OF THE SITUATION:

- I need to explain, but the answer would be...
- I’m sorry, that question can not be answered yes or no. The issue is not that simple.
- A yes or no answer would be misleading as the issue is more complicated and needs to be explained.



# **YOU WANT TO BE PREPARED WHEN THE DEFENSE ATTORNEY...**

**Stands too close.**

**Asks questions at a fast pace.**

**Uses a loud voice.**

**Asks inappropriate questions.**

**Takes information out of context.**



# 10. DON'T BECOME A TARGET





# AREAS OF ATTACK

- ◆ Six basic areas of attack:

1. **Expertise/Credibility**


2. **Conclusion**

3. **Basis of conclusion**

4. **Source of facts**

5. **Age of information**

6. **Prejudices**



**WHEN ASKED ABOUT AN ARTICLE or  
STUDY ON CROSS-EXAMINATION CONSIDER  
THESE POINTS:**

- Does the article exist?
- Are you familiar with the article?
- Is the article relevant to an issue in this case?
- Who authored the article?
- When was the article published?
- Is the information current?
- Where has the article been published?
- Has the article been peer-reviewed.
- Has the article been accepted in the field?



# HYPOTHETICAL QUESTIONS:

- ◆ **Be on guard.**
- ◆ **Take notes.**
- ◆ **Listen carefully to the elements included in the fact scenario.**
- ◆ **Ask for the question to be READ back.**
- ◆ **Note and state inconsistencies.**
- ◆ **Take your time.**
- ◆ **Discuss with the prosecutor before trial.**



# At the Courthouse

- ◆ You are ‘on’ for the purposes of your testimony from the **moment you park your car.**
- ◆ **Put on your game face!**
- ◆ **Remember: Jurors are Everywhere.**



11. DEBRIEF  
WITH YOUR  
ATTORNEY

# References

- ◆ John E.B. Myers, *Evidence in Child Abuse and Neglect Cases*, 3d ed. Chapter 5 (1997).
- ◆ Paul DerOhannesian, *Sexual Assault Trials*, 2d ed. (1998).
- ◆ Materials prepared by Victor Vieth, Brian Holmgren, Roger Canaff, Teresa Scalzo and NCPCA
- ◆ Due Deference to Renaissance Pictures; *Xena Warrior Princess*





# Call NCPCA or NCPVAW for Technical Assistance

- ◆ 703-549-4253
- ◆ We are here to help
- ◆ You are not alone