

American Bar Association Commission on Domestic Violence
Continuing Legal Education Teleconference Series
Litigation Techniques and Strategies In Domestic Violence Cases:
A Teleconference Series

CROSS EXAMINATION
Wednesday, March 31, 2006, 1:00 p.m. – 3:00 p.m. EST
Presenters: Klaus Sitte, Esq., and Kelly Gaines Stoner, Esq.

Notes	Outline
	<p>I. CROSS EXAMINATION BASICS</p> <p>A. Preparation</p> <ol style="list-style-type: none">1. Prepare Trial/Hearing Notebook<ol style="list-style-type: none">a. Develop theory of the caseb. List the elements of proofc. Use an Exhibit listd. Understand predicate questionse. Include expert checklists2. Prepare the client<ol style="list-style-type: none">a. to withstand batterer’s testimonyb. to withstand cross from opposing party3. Have client prepare you<ol style="list-style-type: none">a. batterer’s theory of the caseb. assist in gathering information

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	<p>(impeachment sources, witnesses, etc.)</p> <ol style="list-style-type: none"> 4. Gathering Information: Within Limits of Resources and Time <ol style="list-style-type: none"> a. from client b. police reports c. certified copies of prior convictions d. school records of children e. medical records f. financial records (bank statements, paycheck stubs) g. witnesses h. firearms and ammunition i. expert witness: learned treatises, articles, prior testimony j. discovery, if any 5. Exhibits <ol style="list-style-type: none"> a. Premarked [preferred] or marked by clerk: check local custom b. Timeline; graphs, charts or other tools 6. Prepare choreography and sound effects: <ol style="list-style-type: none"> a. Adopt “posture of puzzlement”

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	<ul style="list-style-type: none"> b. Decide where and how to stand c. Prepare voice modulation and volume <p>B. Basic Theories of Cross Examination</p> <ul style="list-style-type: none"> 1. Listen carefully to the Direct. 2. CX is all about control! 3. Use only leading questions. NEVER ask a question that begins with “who, what, where, how or why!” 4. NEVER ask a question when the answer is unknown. 5. The ideal witness on cross is “in a straight jacket.” 6. Use parroting and patterning to frame questions. 7. Choose issues and questions carefully. The plan is to get in, successfully make only a few discrete points that bolster the theory of the case, and then get out undamaged. 8. Never use cross to recap a direct. Be brief. 9. Never use cross to establish facts provable through other witnesses or evidence. 10. Ask questions like a human.

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	<p>11. Use declarative, bite-size statements instead of questions.</p> <p>12. Each question should cover one (and only one) discrete fact.</p> <p>13. Each question should support the theory of the case. For example:</p> <p>“Mr. Williams, let’s go back to the night of February 20, 2004.”</p> <p>“You were at the bar.”</p> <p>“Bob was with you.”</p> <p>“You shared a few pitchers of beer.”</p> <p>“You dropped Bob off at home.”</p> <p>“And you went home.”</p> <p>“Sally was home.”</p> <p>“The kids were home.”</p> <p>“The kids were watching TV.”</p> <p>“Sally called 911.”</p> <p>“You were arrested.”</p> <p>VERSUS</p> <p>“On the night of February 20, 2004, you and your friend Bob went to the bar, drank so much alcohol that you became intoxicated, and then you went home and beat your wife in</p>

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	<p>front of the kids, punched her in the face, and gave her a black eye. Isn't that correct?"</p> <p>14. Listen to the answer! Partial admissions are a win!</p> <p>15. Ask about prior convictions, firearms, and ammunition.</p> <p>16. Watch and note body language.</p> <p>17. Organize the questions: are they consistent with the "theme" of the cx?</p> <p>18. Be flexible to the unexpected: adapt</p> <p>19. Know when to stop.</p> <p>II. <u>IMPEACHMENT</u></p> <p>A. Good faith belief that the fact you are presenting is true.</p> <p>B. F.R.Ev. 613. Must ask about impeachment issue on cross unless it is a statement of a party opponent (<i>i.e.</i>, statement of the abuser if you are representing the victim).</p> <p>C. Ways to impeach:</p> <ol style="list-style-type: none"> 1. Contradictory facts 2. F.R.Ev. 609. Prior adult convictions less than 10 years old for crimes of dishonesty or false statement or for crimes punishable by one year or more of incarceration.

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	<ul style="list-style-type: none"> 3. F.R.Ev. 404(b). Other bad acts 4. Bias and interest 5. F.R.Ev. 608. Reputation for untruthfulness 6. Treatises (expert witnesses) 7. Prior inconsistent statements <ul style="list-style-type: none"> a. oral b. written c. prior testimony (depositions, hearings) d. pleadings e. omissions <p>D. Character Evidence</p> <ul style="list-style-type: none"> 1. General rule is that character evidence not permitted except regarding untruthfulness. F.R.Ev.608 2. However, character evidence is permitted when it is an essential element of the case. 3. Many jurisdictions allow character evidence in custody cases (fit parent). 4. Important in domestic violence cases to show a pattern of abuse, escalation of violence, lethality risk

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	<p>factors, etc.</p> <ol style="list-style-type: none"> 5. F.R.Ev. 405. Allows a witness to give her opinion as to the reputation of the abuser but specific examples of character may not be given. 6. On cross, a character witness may be impeached using specific instances of bad conduct. Example: in a custody case the abuser's witness states that "Bob has never been a partier." Evidence of his misdemeanor marijuana conviction, which might otherwise be inadmissible, may be introduced. <p>E. Prior Bad Acts</p> <ol style="list-style-type: none"> 1. F.R.Ev. 4040(b) permits evidence of "other crimes, wrongs, or acts" but NOT to show that the person acted in conformity with those acts. 2. Can be used to show motive, intent, absence of mistake. For example: Bob testifies that he was trying to help Sally get a can down from a top cupboard when he slipped and accidentally elbowed her in the eye. Evidence of prior acts of abuse can be introduced to rebut his "accident" story. <p>F. Contradictory Facts</p> <ol style="list-style-type: none"> 1. A batterer may be impeached by uncovering inconsistent or

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	<p>contradictory facts which make his claim unbelievable.</p> <p>2. Example: Bob claims self-defense and that Sally was the predominant aggressor.</p> <p>“You are 6 feet 5.” “ You weigh about 250.” “Sally is 5 feet 1.” “Sally weighs about 110.”</p> <p>3. When the witness changes his story (states one thing in deposition and then says another on the stand) highlight the change by phrasing the question with a “cue” statement:</p> <p>For example:</p> <p>“<i>Your story here today</i> is that Sally tried to attack you.”</p> <p>Or</p> <p>“<i>Let me see if I understand today’s version of events versus what you said at the deposition,</i> Sally was the one who tried to attack you?”</p> <p>III. CROSSING EXPERT WITNESSES</p> <p>A. Get a copy of their <i>c.v.</i> or resume</p> <p>B. Read what they have written</p> <p>C. Learn about their field</p> <p>D. Most common cross of experts is on:</p>

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	<ol style="list-style-type: none"> 1. Qualifications: education, training, relevant hands-on experience in the field 2. Bias and Interest: experts who only testifies for fathers in custody cases, etc. 3. Data relied upon: <ol style="list-style-type: none"> a. Expert is relying only on information supplied by abuser b. Expert spent minutes interviewing the victim vs. hours interviewing the abuser c. Expert was not provided with information about abuser's prior domestic violence convictions d. Expert interviewed the children in the presence of the abuser 4. Check local rules re: cx of GAL, custody evaluator or similar-status: limitations may be imposed <p>IV. <u>DEMEANOR:</u></p> <ol style="list-style-type: none"> A. Prepping the client <ol style="list-style-type: none"> 1. Tell the truth 2. Do not argue with questioner 3. Stop when an objection is raised

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	<ul style="list-style-type: none"> a. Overruled: Effect? b. Sustained: Effect? 4. Remain civil at all times 5. Request a break, if needed 6. Opposing Party: 7. What are “Trigger Points?” 8. What are the indicators? 9. How can client help? 10. How can client communicate with counsel? <p>B. COUNSEL:</p> <ul style="list-style-type: none"> 1. Be calm and professional. No “The Practice” finger jabbing and in-your-face questioning. 2. There are rarely “Aha!” moments. 3. Avoid arguing with the witness. 4. Watch tone and pacing. 5. Convey control.