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Direct Examination





Overview

Preparation

Witness Meetings

Building Credibility as a Prosecutor

Who to Call and in What Order?

Direct Examination

Witness Attitudes and Personalities

Specialty Witnesses

Things that Work for Me that Might Work for You

Sources

- "Direct Examination and Problem Witnesses" National College Of District Attorneys James J. Gregart, Prosecuting Attorney, Kalamazoo County Kalamazoo, Michigan
- Successful trial Strategies for Prosecutors, NDAA, 2005.



Don't Sue
Me


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Do What
Works for
You

Develop your own
style

Be the best
version of yourself.

A young woman with long brown hair is sitting at a desk, looking down at an open book. Her hands are pressed against her temples, suggesting stress or frustration. The desk is cluttered with stacks of papers and a white mug. The lighting is dim, with a blue tint, creating a somber and focused atmosphere.

Preparation

Preparation

“The key is not the
will to win.
Everybody has that.
It is the will to
prepare to win that is
important.”



Witness Preparation

- 95% of the problems with the State's witnesses can be solved before they enter the courtroom!
- The best way to assess the problems is to meet with the witnesses before trial.
- The sooner you meet with them, the more time you will have to prepare for any potential issues.



Witness Meetings - Civilians



Never meet with a witness alone!



Disclosures to the Defense? *Exculpatory and Inculpatory*

Witness Meetings - Civilians

- Explain to the witness the purpose of the testimony.
- Explain the trial process and when the witness will need to be at the courthouse.
- Explain to them the testimony procedure.
 - Direct Examination
 - Cross Examination
 - Redirect?
 - Recross?
- Give them an opportunity to view the courtroom.
- Lessen the Witness's Apprehension

Witness Meetings - Civilians

- Talk about how to answer questions.
 - No shot clock
 - “I Don’t Know”
 - Answer the question and only the question.
 - Estimations
- Cross Examination
 - Give them an idea of what to expect from the defense attorney.
 - Attitude changes



Witness Meetings - Civilians

- Exhibits
 - Make sure you've shown them what you intend to admit.
 - Initials?
- Demeanor and Attire
 - Witnesses must meet the jury's expectations of how they should dress, act, or speak. Fulfilling these expectations enhances a witness's credibility.
- Avoid over-preparing
 - Can kill emotion that might be helpful in the courtroom.
 - Don't want civilian witnesses to appear canned or robotic.

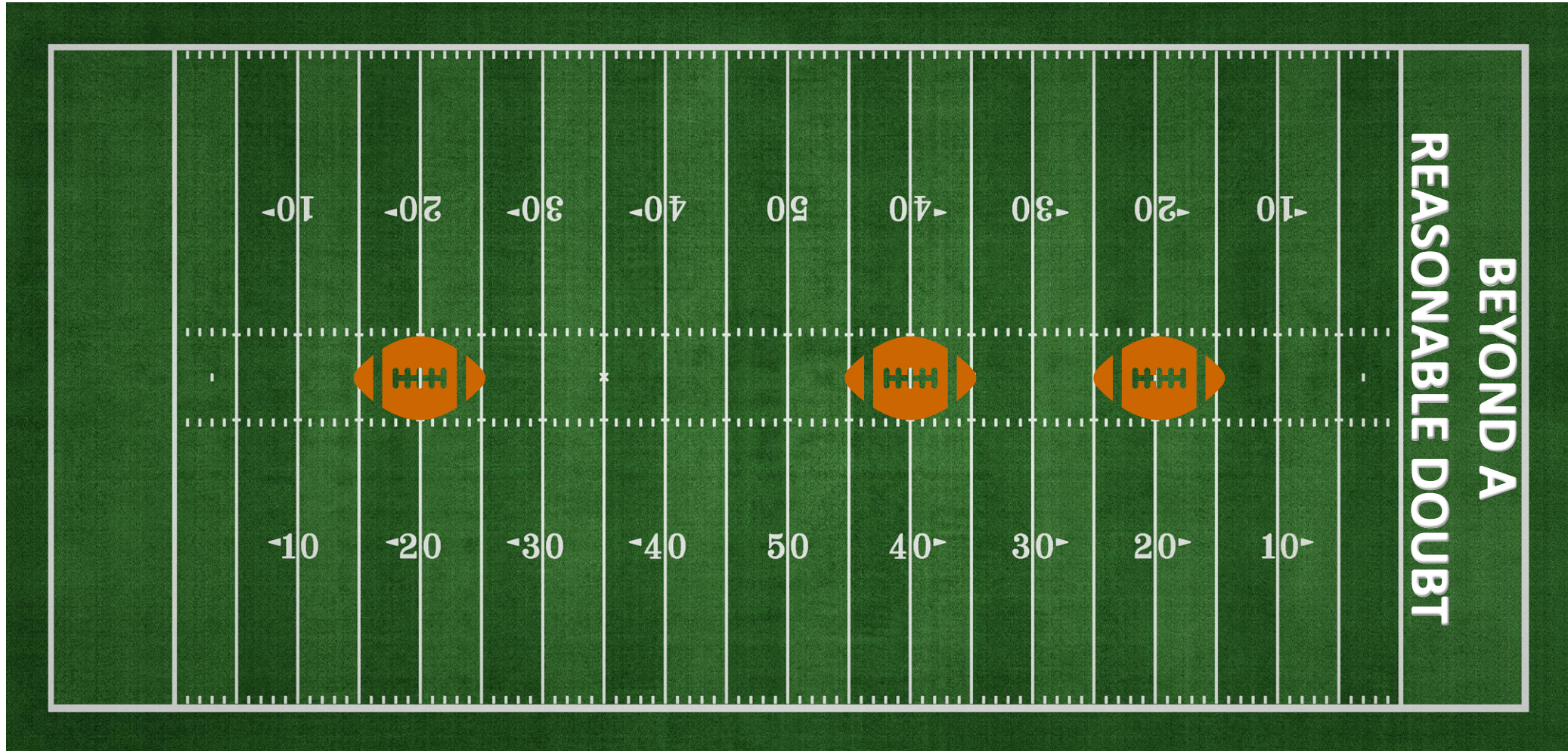
Witness Meetings – Law Enforcement

- Make sure they've read their report.
 - Can't take it on the stand.
- Go over exhibits
 - If they're bringing evidence, make sure they bring it to your office well in advance of trial.
- Talk about how to answer questions.
 - Assertive Language
 - Estimations
- Let them know what they can't say.
- Discuss Cross-Examination
- Demeanor and Attire



Building Credibility as Prosecutor

Winning A Case



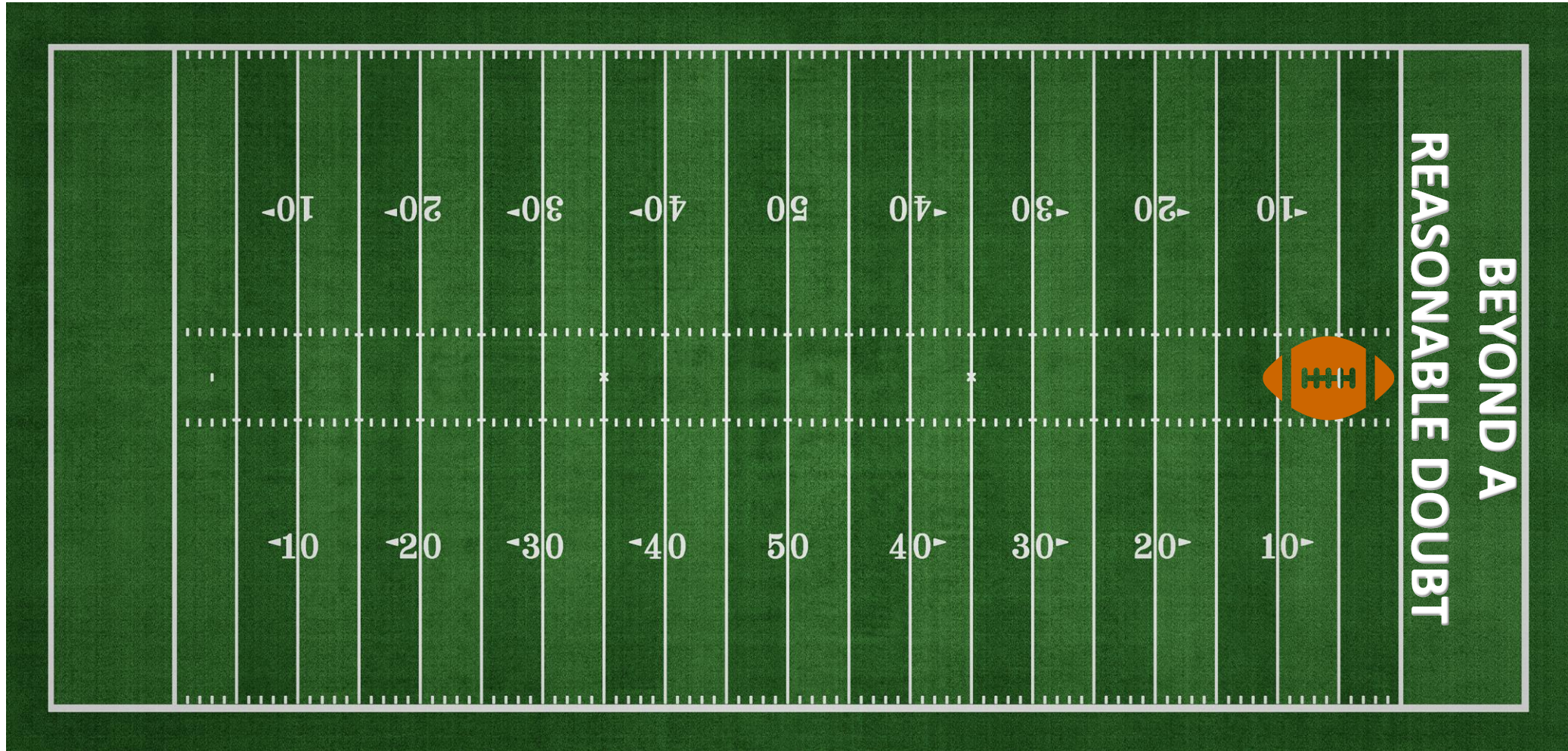
FACTS OF THE CASE

LEO
PERFORMANCE

EVERYTHING ELSE



Winning A Case



FACTS OF THE CASE

LEO
PERFORMANCE

EVERYTHING ELSE



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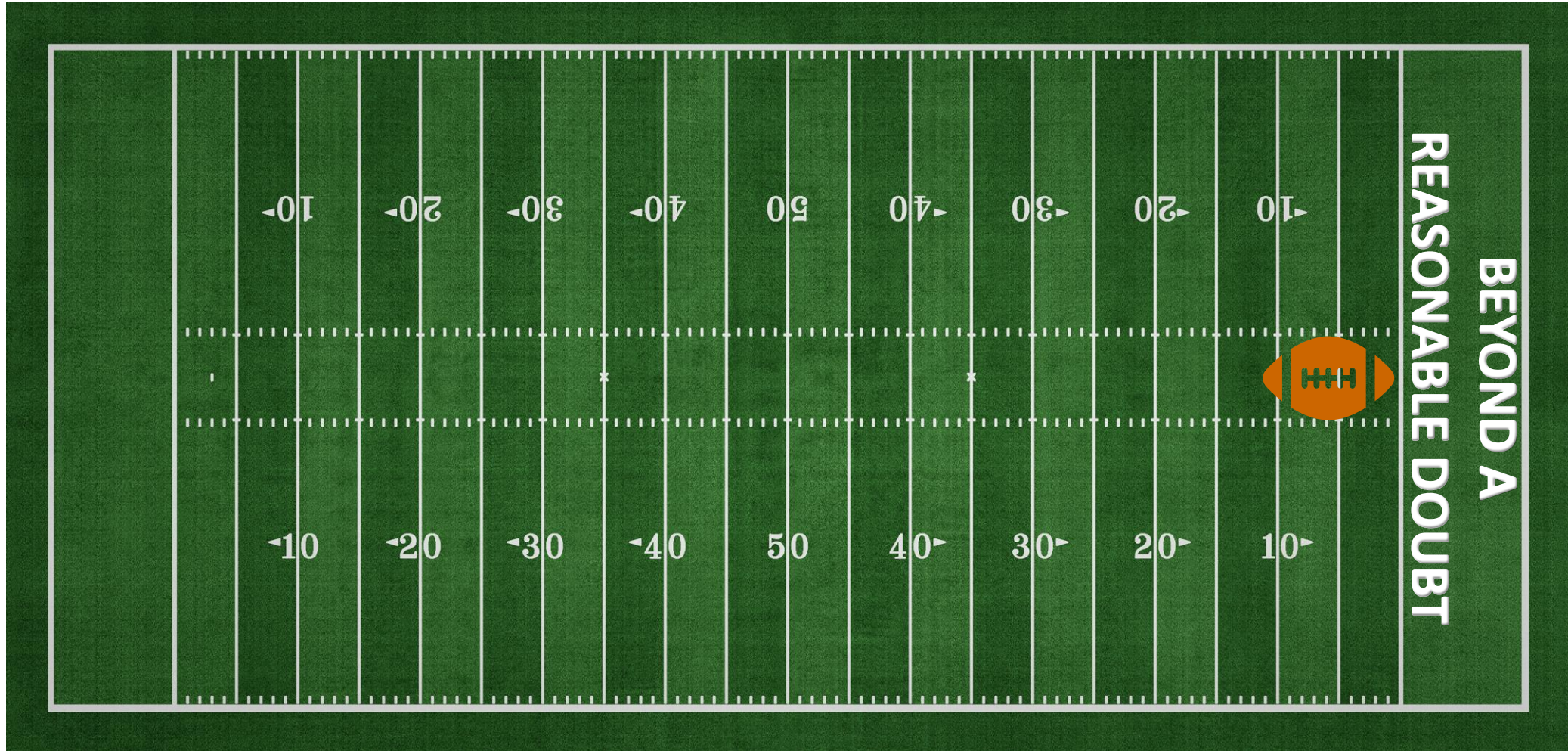
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DOUBLEHEADER
SATURDAY

Winning A Case



FACTS OF THE CASE

LEO
PERFORMANCE

EVERYTHING ELSE

Juror's Expectations of Prosecutors

- Overzealous
- Unfair
- Sneaky
- Unethical



Prosecutor Credibility

Ways to Earn It

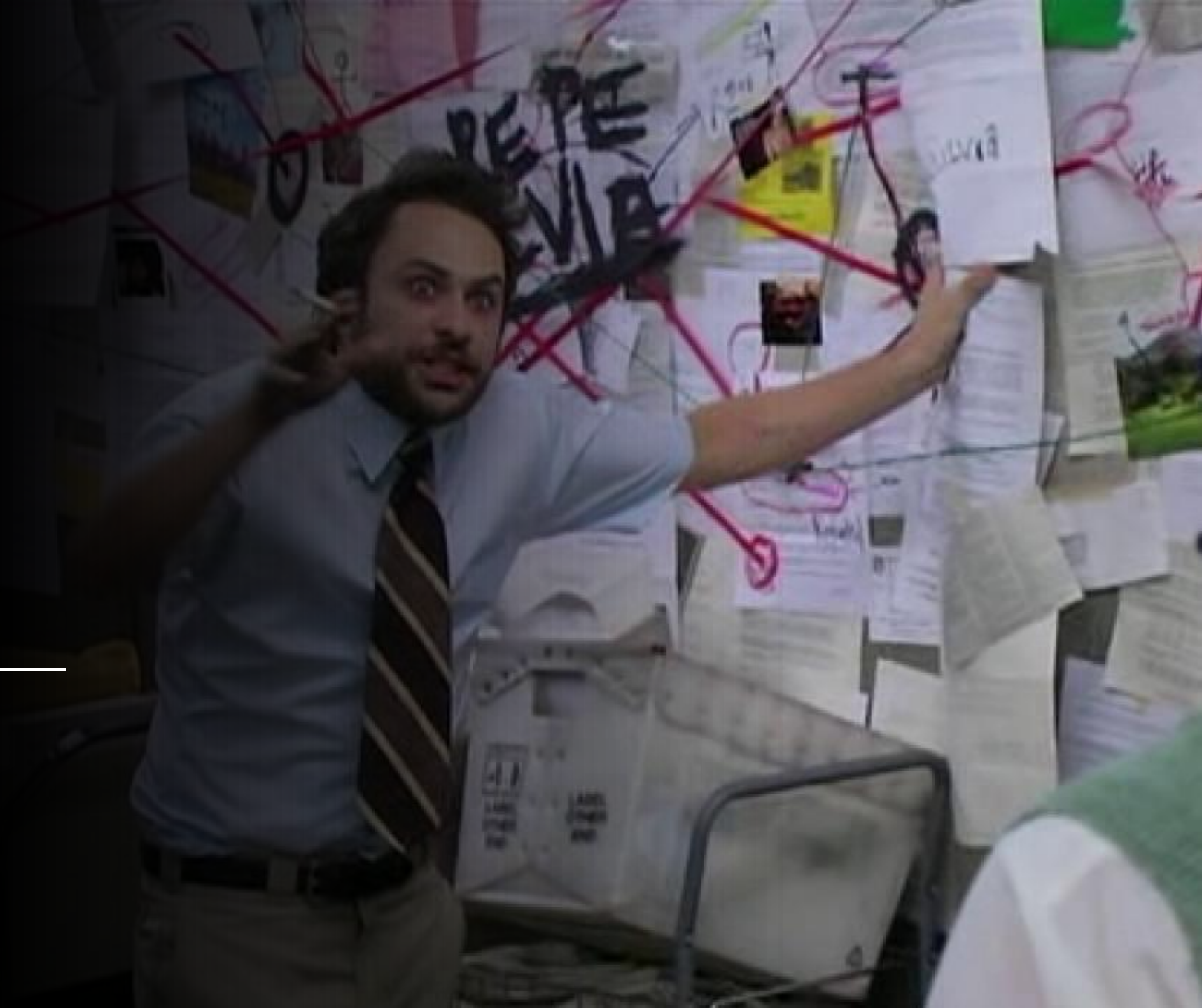
- Being Prepared
- Always be Professional
- Find Opportunities to Demonstrate Fairness
- “Be quick but don’t be in a hurry”
- Appear Human
- Judge & Court Staff treat you with respect.

Ways to Lose It

- Get scolded by the judge in front of the jury.
- Acting surprised by something that shouldn’t have been a surprise.
- Getting in the mud with the defense attorney.
- Appear rattled.
- Not handling objections well.



Who to Call and in What Order?



Who You Gonna Call?

- Jurors have fixed expectations. If you eliminate witnesses the jury expects to hear, you must explain to the jury why they weren't called.
- Consider juror attention spans.
- Be cognizant of who your last witness will be for the day.



What Order?

"Chronological"

- Most prevalent.
- It presents each witness in a logical sequence paralleling the crime's chronology.
- Each witness is called to the stand only once for Direct Examination.

"Modified Chronological"

- Order maintains a sequence, but a single witness may be recalled to the stand one or more times.
- Thus, if a witness has information regarding several aspects of the case, that testimony is delivered in pieces that parallel a strict chronological recounting of events.

What Order?

"Flashback"

- Starts with an eyewitness to the crime, who details the offense.
- Following witnesses revert back to a chronological sequence, starting with those events that led up to the crime.
- This procedure adds drama to the overall presentation.

"Confused"

- Witnesses are called randomly.
- There is no structure or sequence to their appearance.
- Generally, they appear at their personal convenience and out of logical order.
- This is most frequently practiced by soon-to-become civil practitioners.

What Order?

- Primacy/Recency
 - People tend to believe most deeply and remember longest the information they hear first and last.
 - Always present your strongest and best witnesses first and last.
- Hostile or Difficult Witnesses
 - Do you call them?
 - If you know the defense is going to call them, should you?
 - First witness after lunch?





Direct
Examination

Imprinting

- Direct Examination is one part of the total process called "imprinting. "
- The prosecutor must imprint upon the jurors' minds the truthfulness of the State's case.

Voir Dire & Opening

During your Voir Dire and Opening Statement, tell the jurors what you're going to tell them through Direct Examination.

Direct Examination

Deliver on the promises you made in Voir Dire and Opening by telling them what you told them you were going to tell them.

Closing

Convince the jurors that you have delivered on the promises and by doing so, you've proven your case BARD.

Structure to a Direct Examination

Introduction

Substance

Closing

Structure to a Direct Examination

Always begin Direct Examination with a series of non-threatening questions.

Always place the important and interesting information near the beginning and end of the testimony. Bury the boring stuff.

Remember the Perspective of the Jury

- Always remember that the jury knows little or nothing about your case when you start your Case in Chief.
- Keep Direct Examination on a basic level.
- Start at the ground floor.



Remember the Perspective of the Jury

- Jurors have a limited attention span.
- What interests you may bore them.
- Constantly monitor the jury's interest level in your case and witnesses.
- For long witnesses, create artificial breaks.

Remember the Perspective of the Jury

- Jurors are average people. They are not accustomed to deciding a person is guilty of a serious crime.
- Therefore, your Direct Examination must help them make that hard decision.



Questions

- Direct Examination has Two Parts:
 - Asking and Listening
- The jury's focus should be on the answers, not your questions.
 - Keep questions brief and let answers be informative.
- Use your own body language and inflection of voice to let the jury know when you're asking an important question.

Questions

- Never ask questions for which you do not reasonably expect a certain answer.
- “Why” is a dangerous question if you don’t know the answer.
- Applies to re-direct as well!



Questions

- Avoid Leading Questions
- Gives the jury the impression you lack confidence in your witness and need control.
 - If jurors think the lawyer lacks confidence in the witness, they will share the lack of faith.
- You can direct testimony without leading questions.
 - “Did you see the police car?”
 - “When did you get your cast off?”

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Questions

- Use Repetition of Key Testimony When Asking Questions
 - Example One:
 - Witness: “He pointed the gun at my face.”
 - State: “Now, when the defendant pointed the gun at your face, how did you react?”
 - Example Two:
 - Witness: “He **smashed** me in my face.”
 - State: “After he **smashed** you in the face...”
 - Then later:
 - State: “When he smashed you in the face, did you...”
 - State: “Since being smashed in the face, have you...”

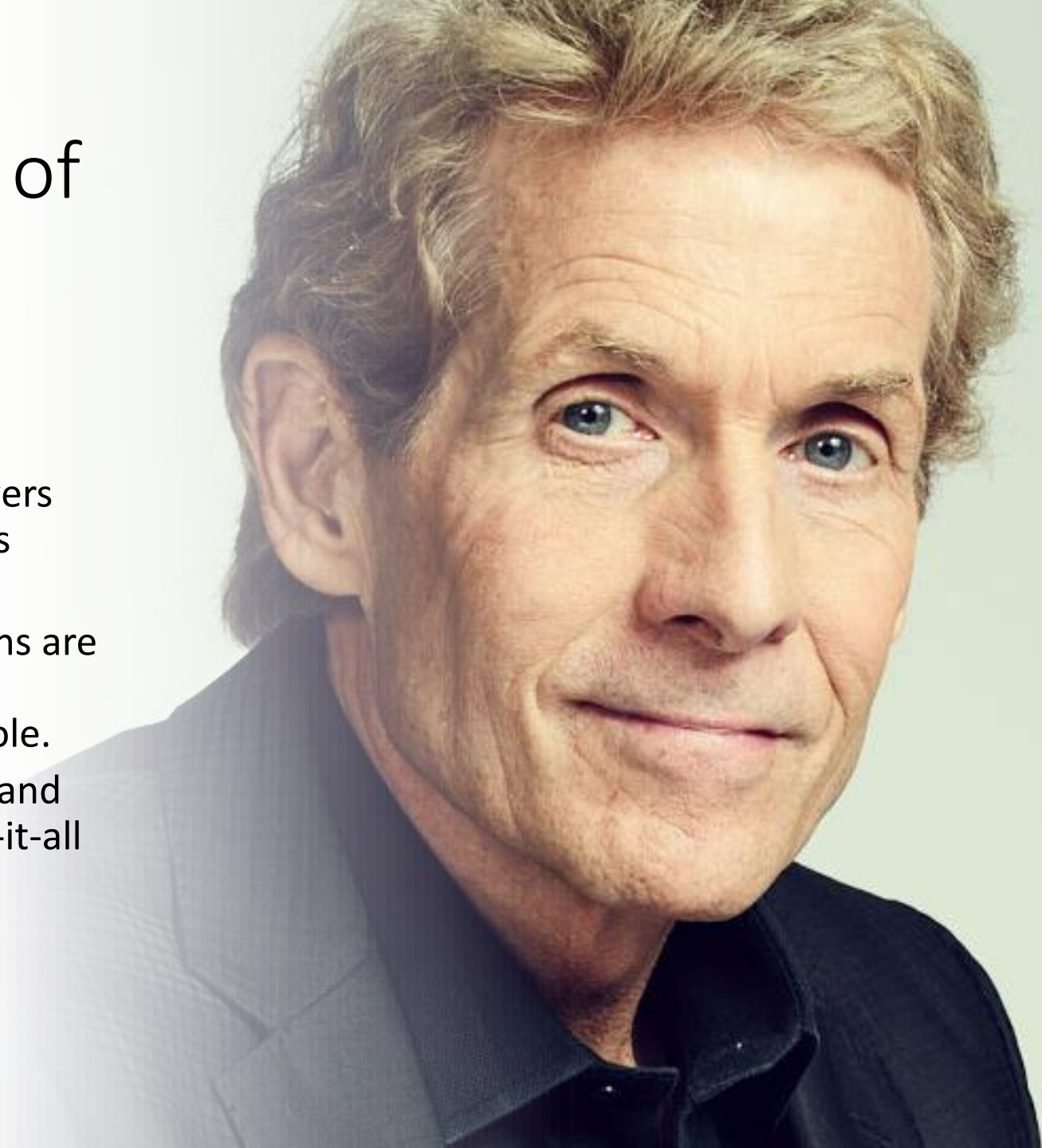


Witness
Attitudes and
Personalities



Problem Types of Witnesses:

- The Opinionated Witness
 - This person gives answers PLUS personal opinions about the answer.
 - His/her speech patterns are filled with metaphors, adjectives and hyperbole.
 - Argues with attorneys and displays a smug, know-it-all attitude.





Problem Types of Witnesses

- The Actor Witness
 - “Hams it up” on the stand.
 - His/her demeanor mimics what actors do in the movies or television. Facial expressions are dramatic or extreme.
 - The jury thinks this witness is a "phony."

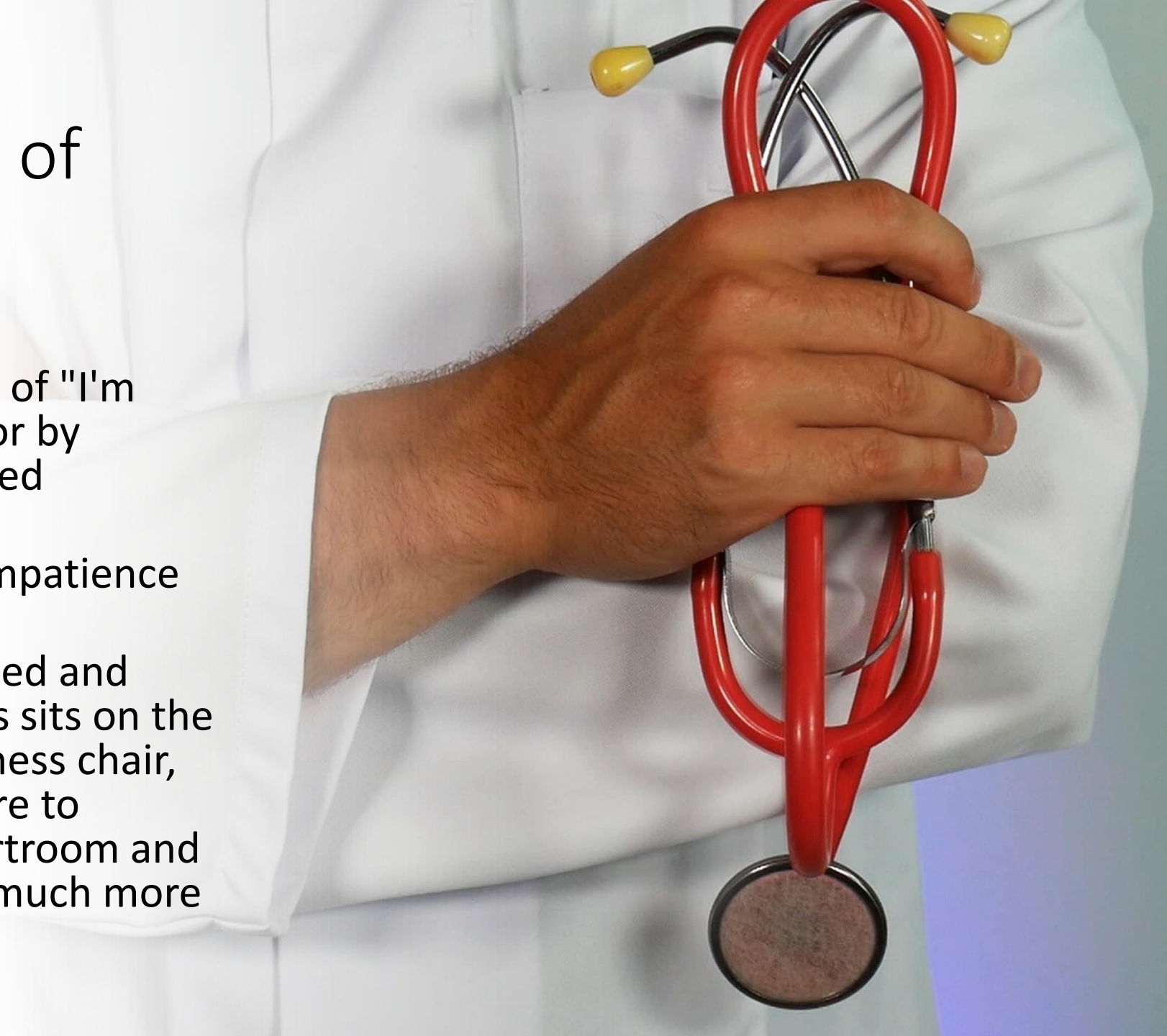
Problem Types of Witnesses

- The "Guilty" Witness
 - Looks and acts like they are the defendant.
 - Refuses to look you or anyone in the eye.
 - Answers are given in muffled tones while looking at the floor.
 - These people may honestly believe that during Cross Examination, they will be "tricked" into confessing to the crime.



Problem Types of Witnesses

- The V.I.P. Witness
 - This person's attitude of "I'm doing everyone a favor by testifying" is considered pompous by the jury.
 - Demeanor portrays impatience and arrogance.
 - The answers are clipped and terse, and the witness sits on the front edge of the witness chair, telegraphing the desire to quickly leave the courtroom and resume attending to much more important matters.



Problem Types of Witnesses

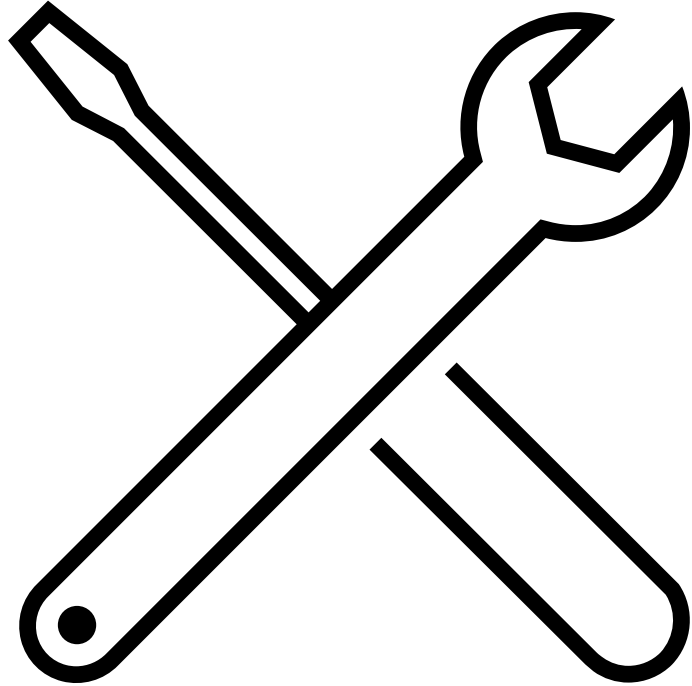
- The "Waffler" Witness
 - This witness has problems giving a definitive answer, even when asked their name.
 - These people have weak egos and personalities; they are never sure of anything.
 - An answer is always prefaced by "I think" or "As best I can recall", "To the best of my knowledge" or "It seems to me".



Problem Types of Witnesses

- The "Mr. Nice Guy" Witness
 - Compelling need to be loved by everyone.
 - Doesn't want his/her answers to offend anyone; thus, this witness can be led all over the courtroom.
 - Will respond affirmatively at the merest suggestion, and aims to please everyone, regardless of inconsistency.
 - When asked if his/her testimony is self-conflicting, this witness agrees.





Problem Types of Witnesses

- Best chance to “fix” a problem witness is during witness prep!
- Be perfectly candid and tell them the defect you perceive in their demeanor.
- Lighten the blow by explaining that the jury may misunderstand their testimony because of their “little quirk”
- The good direct examiner cannot afford the major problems created by these personalities.
- Be brutally honest.

Specialty Witnesses

Law Enforcement Officers

Police officers are supposed to be "professional" witnesses, but they can create problems because they are too self-assured and complacent.

They can get sloppy in their preparation and testimony.

A good officer can become a poor witness and fail to meet a jury's expectations.



Law Enforcement Officers

- If you have an experienced officer or one with special training, let the jury know!
- Avoid “cop talk”
- If an officer didn’t do something they should have, meet it head on.



Law Enforcement Officers

- Make sure they've reviewed their report!
- Try to avoid setting up your officer to where they need to review their report.
 - Compare:
 - "What address were you dispatched to?"
 - "On January 1, 2022, were you dispatched to 101 N. Main?"
 - Or:
 - "What was the name of the female you spoke to at the residence?"
 - "When you went to the residence, did you make contact with Jane Doe?"





Domestic Violence Victims

- Always act with compassion, even if they are hostile.
- Be ready to impeach with written statements, 911 call, body camera.
- Recognize that most jurors will understand why a DV victim doesn't want to cooperate.
- Establish the DV relationship especially if hostile:
 - Cares for the Defendant
 - Has children together.
 - Financially dependency.
 - Doesn't want to testify.

Experts

- Triple check that you've complied with discovery requirements.
 - CV and Report
- Avoid stipulating to an expert witness's qualifications.
- Remember the Juror's Perspective.
- Speak English!
- If technical language must be used, make sure you've gone over it with the witness beforehand.



Hostile Witnesses

- Never attack a hostile witness who is inherently sympathetic (senior citizen, physically handicapped, young child)
- These persons invoke natural jury sympathy and jurors won't appreciate your attacking an apparently defenseless witness.
- You become the "bad guy", regardless of the witness's inherently hostile nature.



Hostile Witnesses

- Never attack a hostile witness unless you are **convinced** that the jury shares your belief that the witness was evasive, coy, snotty or antagonistic.
- Do not attack a witness until everyone in the courtroom believes the witness is hostile.



Things that Work for Me that
Might Work for You



Cheat Sheet

- Have a signal document (one page if possible) that has all the key information that you might need at a moment's notice.

EUGENE DAVIS III
18CR28
Jury Trial

Location of Crime 11400 W 67 th Street Shawnee, KS	Number of Strikes K.S.A. 22-3412	MAKE SURE BEFORE YOU REST <input type="checkbox"/> Jurisdiction All Counts <input type="checkbox"/> Identification <input type="checkbox"/> All Exhibits Entered
Date of Crime 9/5/17		
Directed Verdict Standard When viewing all of the evidence in a light most favorable to the State, whether a rational <u>fact-finder</u> could find Δ guilty. <u>State v. Parker</u> , 282 Kan. 584, 597 (2006).		

OG-1NDF, 1-2 DF = 12
2-6 NDF, 3-4 DF = 8
7-NG NDF, 5DF = 6
Misdy = 3

ELEMENTS (Amended Complaint)

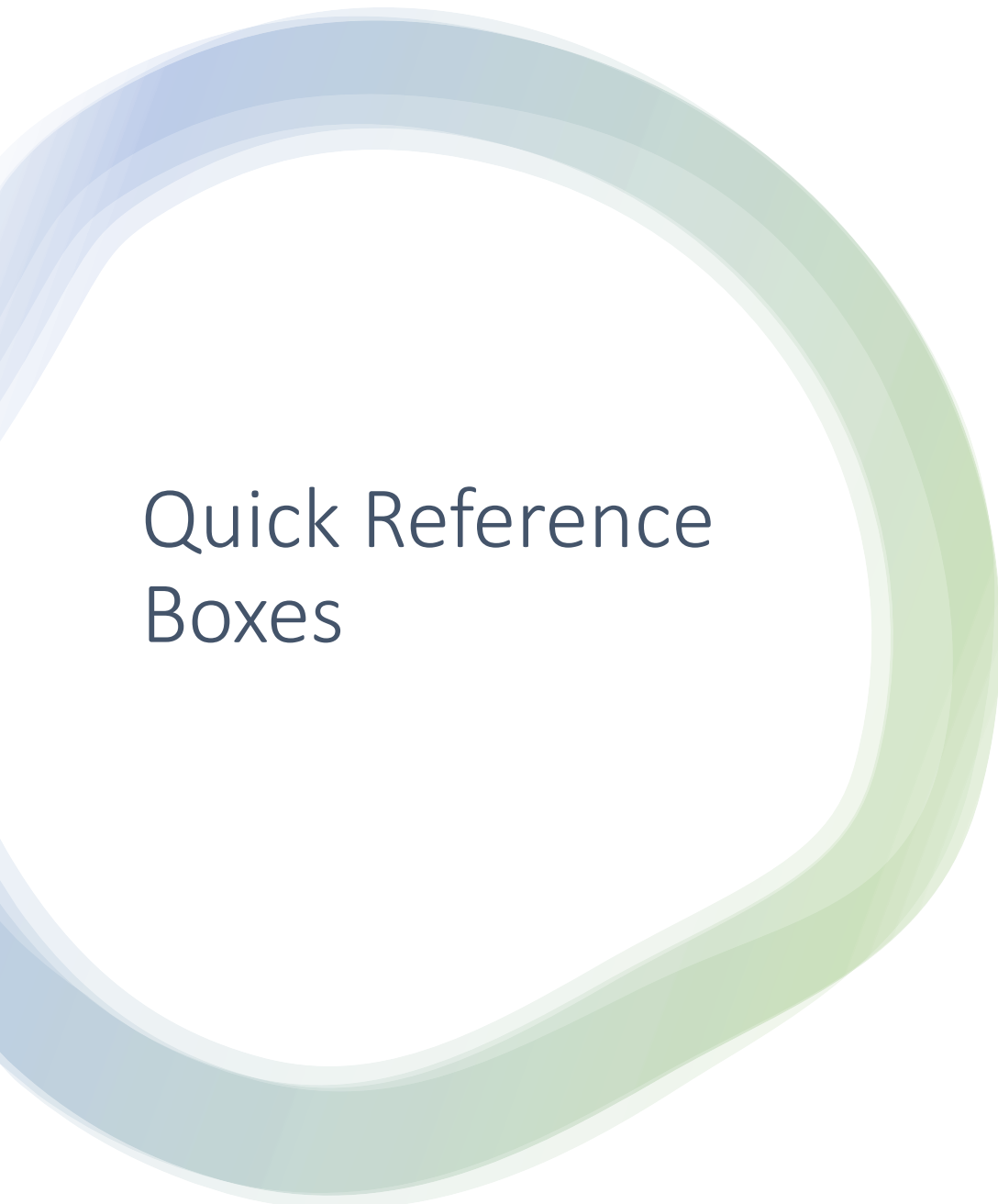
#	Charge	Lvl	Elements					
1	Distribution of MJ	3DF	Knowingly*	Possess MJ	Intent to Distribute	25-450 grams	9/5/17	JUR
2	Distribution of Synthetic Cannabinoid	3DF	Knowingly*	Possess Synthetic Cannabinoid	Intent to Distribute	3.5-100 grams	9/5/17	JUR
4	Possession of PCP	A	Knowingly	Possess PCP			9/5/17	JUR

WITNESSES

#	Name	Atty	End?	Contact #	D/T	Description/Notes
1	Officer Kasie Taulbert	WH	Y	785-727-9151	M-10	
2	Officer <u>Hashagen</u>	LS	Y			
3	Damon Dye	WH	Y		M-9	
4	Danielle Bilbrey	WH	Y		M - 2	Call and give 30 minutes up.
5	Dustin Calvin	LS	MTE			
6	<u>Mykee</u> Sellon	LS	MTE			
7	Kelly Carol McGill	LS	MTE			

EXHIBITS

#	Description	Lab#	Witness	Admitted
1	Pill bottle with Defendant's name	1	Taulbert	
2	Patrol Car Video		Taulbert	
3	Video of Phone Call		Taulbert	
4	Yellow liquid from glass vial (PCP)	4	Taulbert	
5A	Green Leafy Substance (MJ)	5	Taulbert	
5B	Green Leafy Substance (MJ)	5	Taulbert	
5C	Swabs of Clear Plastic Bag A of Green Leafy Substance	5.1.1&5.1.2	Calvin/Sellon	
6A	Green & Red Substance (K2)	6.2	Taulbert	
6B	Swab of Clear Plastic Bag w/ Green & Red Substance	6.2.1	Calvin	
7A	Gallon Sized Baggies	7.1 & 7.2	Taulbert	
7B	Swab of Gallon Sized Baggies	7.1.1	Calvin	



Quick Reference Boxes

- Has basic info that you might need during the Direct Examination on the question page itself.

Victim – Melissa Topham
Date of Crime – September 17, 2019
Address of Crime – Stone Post Ranch Apartments - 13571 Hauser St. OP Apt# 202
Dispatch Time: 09:29 p.m.
Co-Counsel – Melinda Parrish

Direct of Blake Larsen
State v. Beck
19DV1987

- Introduction
 - o OPPD
 - o Detective
 - o Working on September 17, 2019 – Notified at 10:15 pm of stabbing.
 - o Lead detective
 - o Some of the work that you did.
- Went to Scene
 - o Didn't go inside, made sure that it was secure.
- Went to hospital
 - o Made contact with Melissa Topham
 - o Interviewed her.
 - o Start with 9/17
 - o Got name of suspect
- Phone of Melissa Topham
 - o Consent to be downloaded.
 - o Det. Bilderback
- Aware that Mr. Beck was arrested?
 - o High crime area?
 - o Any evidence to suggest that the stabbing was done by anyone other than Jason Beck?
- Attempted to locate or contact Mr. Beck
 - o Call Mr. Beck twice at 12:23 on 9/18 – No answer
 - o Return call – recording

Exhibits Needed for Testimony:
53 – Phone call btw Larsen
and Beck.

- Intro
 - o Name
 - o Occupation
 - o How long have you been working as a dispatcher?
 - 8 years
- Date of incident
 - o Were you working as a dispatcher during the evening of July 13 and into the morning of July 14, 2015?
 - o Did you receive a call at dispatch regarding an armed disturbance?
 - What time?
 - o Do you remember the address where this disturbance was taking place?
- Recording
 - o Are all of the calls that are made into dispatch recorded?
 - o Was this particular call recorded?
 - o What type of device is used to record these calls?
 - o Sometimes, law enforcement will request a copy of one of those calls, correct?
 - o How long do those calls remain on your system?
- This recording:
 - o Audio
 - o Is this the 911 call you received on July 14, 2015?
 - o Time of the call?
 - o Your voice on here?
 - o How many people did you speak to during this 911 call?
 - Two men one female.
 - ID themselves
 - o Fair and accurate recording of the call?
 - o Move to admit.

(1) demonstrate that the recording device was capable of recording sound;

(2) demonstrate that the operator of the device was competent in operating the device;

(3) establish the authenticity and correctness of the recording;

(4) demonstrate that no changes, additions, or deletions have been made to the recording;

(5) demonstrate the manner used to preserve the recording;

(6) identify the speakers; and

(7) demonstrate that the statements elicited were made voluntarily without any kind of inducement. State v. Williams, 235 Kan. 485, 491, 681 P.2d 660 (1984).

Other jurisdictions that have considered the issue have adopted the standard used for admitting photographic evidence. 7-part test used to verify and admit sound recordings has been considered by some to be " 'obsolete, even for sound recordings' " and "has been abandoned in the better reasoned cases in favor of a rule holding that sound tapes like photographs are admissible when a witness testifies they are reliable representations of the subject sound. State v. Kemp, 30 Kan. App. 2d 657, 662-63, (2002); State v. Miles, 9340 P.3d 1235 (2014)(Unpublished).



Exhibit and Witness List

- Copies for the Court, Defense,
and Court Reporter

**State v. David Widmer
15CR251**

State's Witnesses for Case in Chief

1. Brandy Knight
2. Ofc. Shurmantine
3. Dustin Gerlach, Med-Act
4. Dr. Shelia Alton
5. Sheila Fogel, FACT
6. Dr. Richard Miller (Tuesday Morning)

State's Exhibit List

1. Knight in hospital bed
2. Knight's left eye
3. Knight's right eye and nose
4. Knight's left side of face
5. Knight's interior upper lip
6. Knight's exterior upper lip
7. Knight's eye after hospital visit.
8. Defendant's face after arrest
9. Defendant's right hand
10. Defendant's face when admitted to jail
11. Skull Demonstrative
12. Dr. Miller's radiology report
13. Tiffany Law Written Statement



Exhibit and Witness List

- Copies for the Court, Defense,
and Court Reporter



Write Down the
Answers!

- Forces you to be a good listener.
- Take good notes so that when you're preparing for closing later, you're not going off of memory.
- In the event you don't get an answer you were looking for, it can buy you some time without you looking rattled.



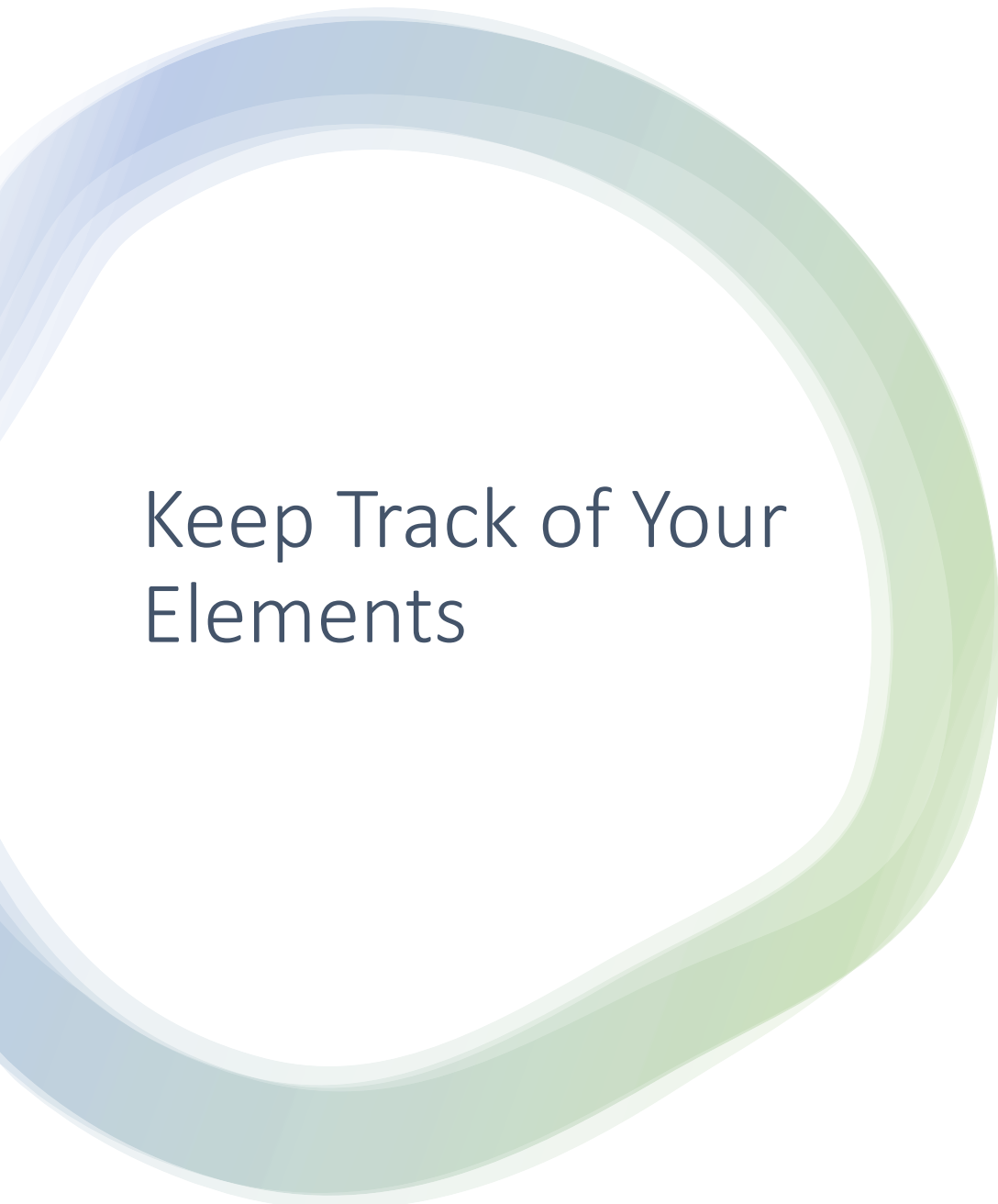
Address Bad Facts Head On

- The defense attorney isn't going to forget about it.
- Its going to sound better coming from you.
- Builds your credibility with the jury.



Re-Direct

- Be extra cautious asking questions that you don't know the answer to.
- An attempt to discredit a point made in cross-examination may backfire.
- If you are unsure how witness will respond to a question and you **HAVE** to ask it, make sure its not your last question.



Keep Track of Your Elements

- Have a checklist of elements!
 - JUR
 - ID
 - DV
 - Drugs
 - Weight
 - Value
 - Age of Defendant



Contact Info

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