



CROSS EXAMINING THE DEFENDANT

Seizing the Opportunity for Justice

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Objectives

- Promote the theme and theory of your case through cross examination
- Corroborate the victim's testimony and other evidence presented in your case-in-chief
- Reveal the defendant's knowing, intentional, and predatory behaviors
- Protect the record with questions that comply with legal protections for the defendant's constitutional rights

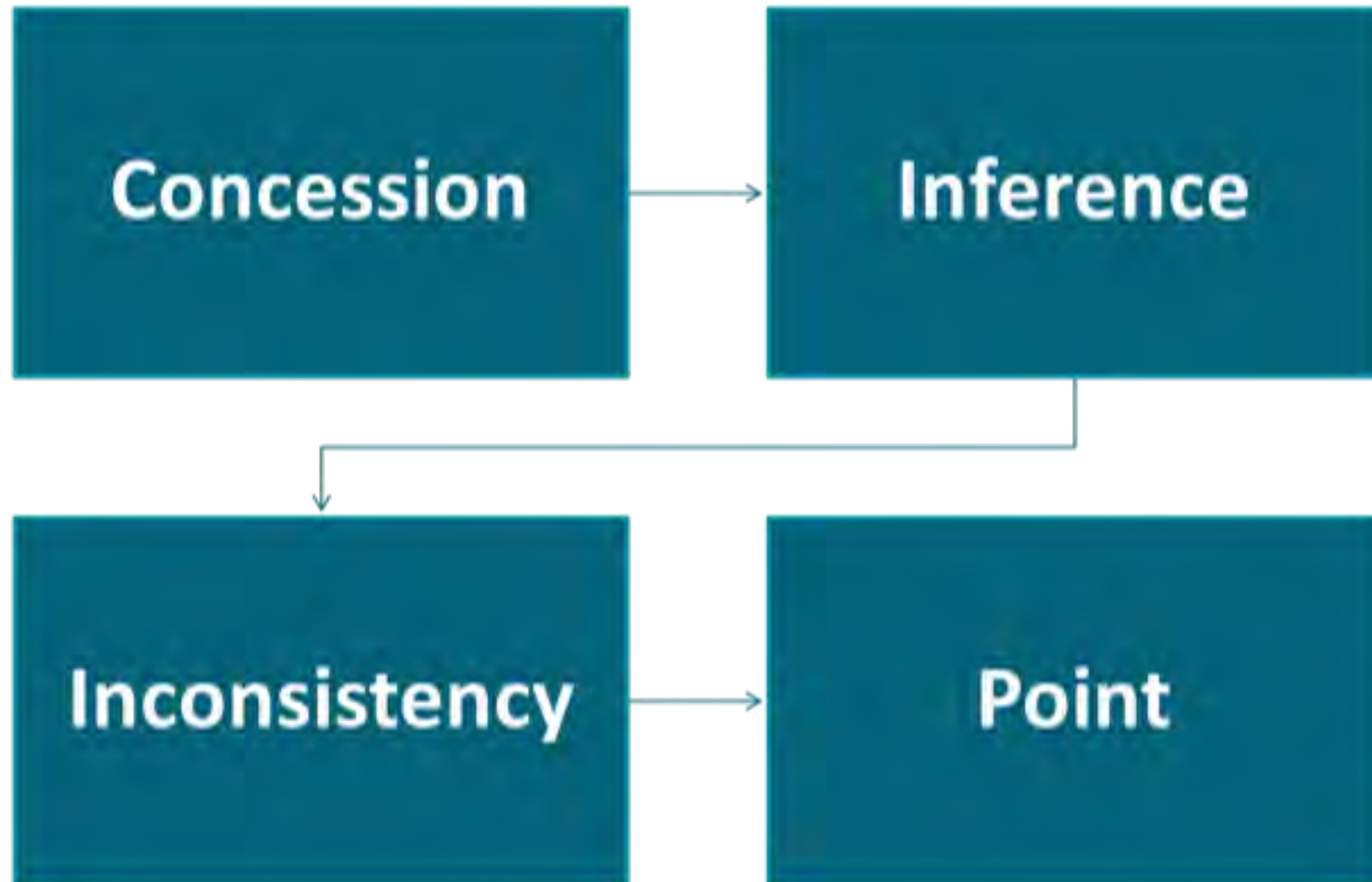
Offender-Focused

- Recognizes offenders purposefully, knowingly, and intentionally target victims whom they believe they can rape without consequence
- Employs practical strategies driven by an accurate and unbiased analysis of a case
- Protects victims while focusing on the actions, behaviors, characteristics, and intent of offenders

Preparation

- Analyze all statements / admissions
- Develop an evidence-based theory of offender accountability
- Determine how defendant's testimony furthers his/her defense
- Review anticipated defense witness testimony
- Remember defense opening statement
- Keep prosecution closing in mind

Process



Process in Perspective

- Establish every concession
 - Date, presence, contact with victim, purchase of alcohol
- Draw reasonable inferences from concessions to target area
 - You had planned to ask her out that night, hadn't you? And you purchased all of the drinks for both of you, didn't you?

Process in Perspective

- Develop inconsistency from prior statement, admission or testimony on direct
 - Earlier you stated that you bought some of the drinks, didn't you?
- Lead to a point
 - You planned to take her out, you bought all of the drinks, and you intended, didn't you, to get her drunk?

Approach

Professional

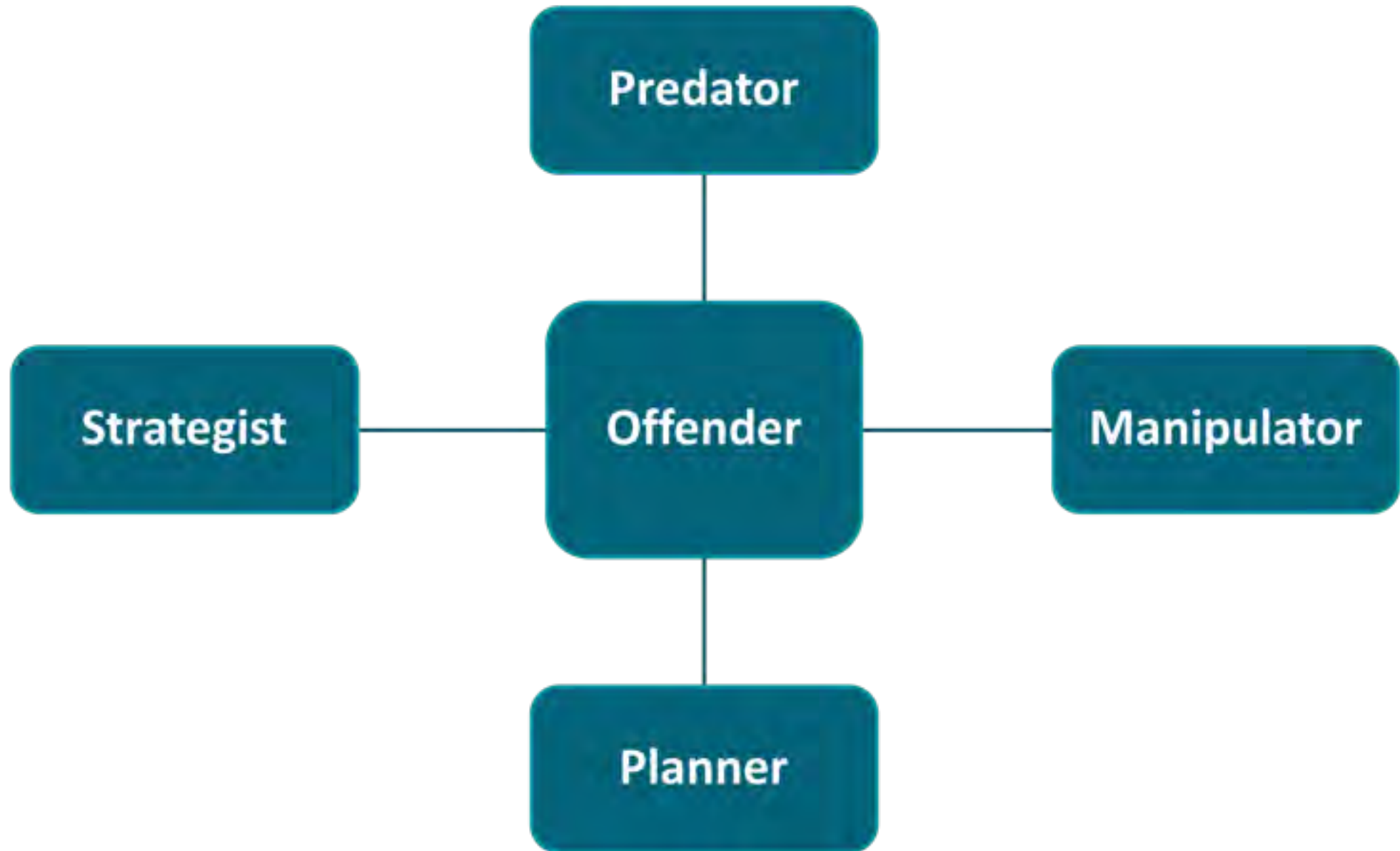
Firm

Knowledgeable

Analytical

**Global trial
perspective**

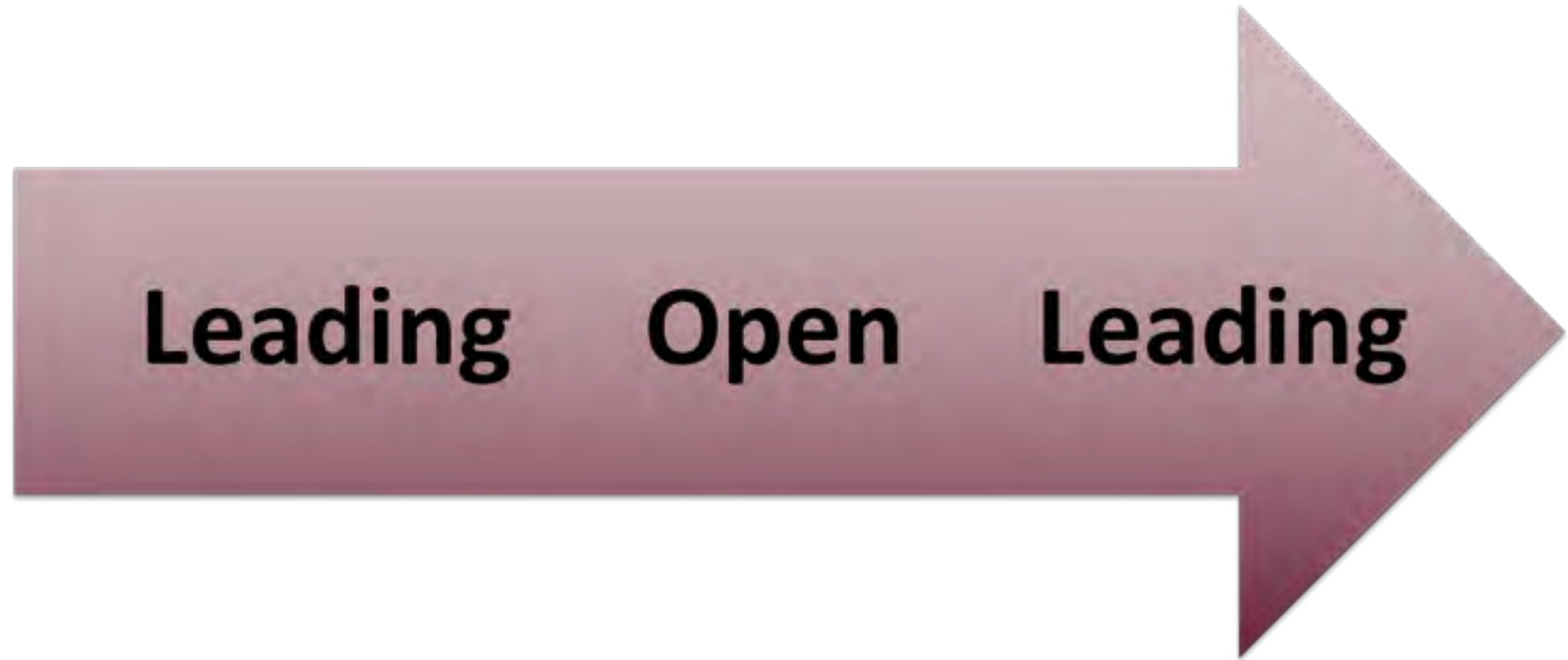
On the Witness Stand



Function of Leading Questions

- Permissible on cross-examination
- Allows questioner to control examination and organize content to meet goals
- Should be used strategically

Strategy for Leading Questions



Remember

- The questioner controls the examination, not the witness
- The prosecutor can require that the question be answered and not rely on the Court's intervention
- When asking questions, avoid the chronology of direct exam
- Questions asked on direct should not be repeated
- Begin with a strong area of questions and go from there, folding in other areas

Preparing for Cross-Examination in a Cold Case

- Review file for earlier statements or interview contact
- Determine whether defendant fled jurisdiction after the crime
- Obtain photograph of defendant during earlier time period

Considerations for Cross-Examination in a Cold Case

- If Defendant claims inability to remember events / details, be prepared to refer to earlier statement / interview or contextual information
- Look for earlier denials that may change / modify after testing of untested sexual assault kit
- Focus on recency of alibi if appropriate

Questions to Scrutinize Offender Behavior



Consent Defense: Features in a Cold Case



Details for Consent Questions

- Context and/or events leading up to the crime
- Focus on control throughout : “whose idea was it?”
- Establish offender’s awareness of victim’s vulnerability
- Defendant’s abilities and memory while claiming to be intoxicated
- Details of assault
- Defendant’s statements / admissions early on and over time
- Corroboration of peripheral details
- Focus on context as well as crime
- Premeditation / planning / advance thought

Focused Questions for Consent

Emphasize established evidence and use to challenge consent

- Crying doesn't mean consent, does it?
- When she vomited, you didn't take this as a sign of consent, did you?
- When she passed out, this wasn't an act of consent was it?

Suspect Known to Victim

- You told the detective you and the victim had a history of sexual relations?
- You also told the detective that you didn't remember a time when you forced the victim to have sex or when the victim became upset and left the house?
- Today, though, you have testified that on this date the victim consented?

Suspect Unknown to Victim

- When you spoke with the detective, you claimed you didn't know the victim, didn't you?
- And later you said that it wasn't possible to remember everyone you met years ago, didn't you?
- And today, you said that she consented to have sex with you?

Predatory Behavior: Known and Unknown Offenders

Victim selection process

Control of victim and/or environment

Isolation, invasion of boundaries

Premeditation and planning

Preying on vulnerability

Altered reality: offender is a stranger

Exit strategy and offender view of credibility

Playing to the audience

Looks for Offender's Creation or Exploitation of...



Remember Consent Defense. . .

- Admits the act
- Places defendant's credibility in issue
- Lack of consent becomes more powerful over the years: the victim never gave up

How Offenders Target Victims



Examine Predatory Behavior



Questions

- The victim was always accessible to you in your relationship / acquaintance?
- You knew the victim took the late bus home every day, didn't you?
- You knew the victim had been released from rehab recently, didn't you?
- You planned that the victim would become intoxicated didn't you?

Remember that although the defendant challenges the victim's credibility, the jury alone can decide the issue.

How Cross-Examination Becomes a Parallel to Direct of Victim

- The victim was accessible to the defendant
- He had control
- Offender set the stage for assault: isolation, coercion, use of alcohol
- Victim's vulnerability was clearly known to the defendant; used to create issues of credibility

The evidence clearly establishes, she was accessible, vulnerable, and further establishes her credibility

Using a Theme Effectively

- Select the theme from evaluation of the evidence and theory
- Be open to developing or modifying the theme during trial...or even during cross
- Weave the theme through cross exam in anticipation of closing

Themes for Cross-Examination



Developing a Theme: The Power of Cold Cases

**Time never
changed the
victim's experience**

**You met the victim
in this trial and
heard her
testimony**

**There is no
motivation but
that of seeking
justice**

**Time didn't change
unconsciousness
into consent**

Recognize Offender's Role

Delayed disclosure

- Who caused it?

Prior relationship

- He knew her, but she didn't know him

"Voluntary" intoxication

- Who needs force when you have alcohol?

An Eloquent Example from Human Trafficking

5 Q. Okay. The defense attorney asked you if you forced China to
6 have sex with men. Did you hold a gun to her head?

7 A. No, ma'am.

8 Q. Did you control her though?

9 A. Yes.

10 Q. Tell the members of the jury how it was that you were able to
11 control China.

12 A. Through her mind, putting chains on her mind, the things that
13 she was afraid to lose and what she felt like she had
14 accomplished. So long as I got the mind, I control the body.

15 Q. And did you use that strategy with all the women in your
16 stable, controlling their mind?

17 A. Yes, ma'am.

IMPEACHMENT

Challenging Veracity

Types of Impeachment

- Calling credibility into issue
- Criminal convictions
- Character
- Prior inconsistent statements
 - Highlight material inconsistencies

Preparing for Impeachment: Criminal Convictions

- Obtain certified record of criminal conviction
- Provide to the defense in discovery
- Make offer of impeachment at pre-trial
- If defendant offers stipulation, consider still presenting certified record during cross-examination

Impeachment by Evidence of a Criminal Conviction

Fed. R. Evid. 609

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

- (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
 - (A) must be admitted, subject to [Rule 403](#), in a civil case or in a criminal case in which the witness is not a defendant; and

Impeachment by Evidence of a Criminal Conviction

Fed. R. Evid. 609, Cont'd

- (B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

Impeachment by Evidence of a Criminal Conviction

Fed. R. Evid. 609, Cont'd

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later.

Evidence of the conviction is admissible only if:

- (1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and
- (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

Impeachment by Evidence of a Criminal Conviction

Fed. R. Evid. 609, Cont'd

- (2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.

Impeachment by Evidence of a Criminal Conviction

Fed. R. Evid. 609, Cont'd

(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible if:

- (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or
- (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

Impeachment by Evidence of a Criminal Conviction

Fed. R. Evid. 609, Cont'd

(d) Juvenile Adjudications. Evidence of a juvenile adjudication is admissible under this rule only if:

- (1) it is offered in a criminal case;
- (2) the adjudication was of a witness other than the defendant;
- (3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and
- (4) admitting the evidence is necessary to fairly determine guilt or innocence.

Impeachment by Evidence of a Criminal Conviction

Fed. R. Evid. 609, Cont'd

(e) Pendency of an Appeal. A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible

Witness's Character for Truthfulness or Untruthfulness

Fed. R. Evid. 608

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

Witness's Character for Truthfulness or Untruthfulness

Fed. R. Evid. 608, Cont'd

(b) Specific Instances of Conduct. Except for a criminal conviction under [Rule 609](#), extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

- (1) the witness; or
- (2) another witness whose character the witness being cross-examined has testified about.

Witness's Character for Truthfulness or Untruthfulness

Fed. R. Evid. 608, Cont'd

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

Cross-Examination of a Serial Offender

- Carefully evaluate all reports including those from investigation of crimes against other victims
- Recognize offender may have escaped detection and have confidence
- Be prepared in advance with understanding of “gaps” in time with absence from jurisdiction
- Recognize any similarity in status of victim, vulnerability, environment, use of force / threats

Cross-Examination of a Serial Offender

Cont'd

- Inquire about each victim separately
- Keep in mind the time-line of all charged offenses
- Weave in any similarities from other crimes committed against another victim(s)
- Recognize any pattern in offender's narrative of different offenses; victim blaming

Sexual Assault and Homicide

- Recognize clear link between sexual assault and homicide
- Prepare for denial / consent:
 - “We had consensual sex and someone else killed the victim”
- Work with forensic pathologist or other expert to determine time line for death and survival time for forensic evidence
- Focus on presence of defense wounds and any injuries

When Defendant Doesn't Testify

- Consider that there is usually important information in defendant's statement
- If prosecution does not offer statement, defense may still refer to law enforcement taking a statement and bring it in
- The defense may choose not to offer the statement - *What is lost?*
- Balance these considerations with not offering statement and possible defendant testimony

Going Forward

- Conduct an evidence-based theory and theme-focused cross-examination
- Establish material areas of agreement
- Cast doubt on credibility
- Elicit evidence of premeditation and control of victim
- Draw an eloquent parallel between direct of victim and cross-examination of the defendant

Justice is truth in action

~ Benjamin Disraeli





ÆQUITAS

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