



## NOTES FOR FACULTY ONLY

### The NCDC Cross-Examination Workshop

January 12-15, 2023,

At the Royal Sonesta in DuPoint Circle,  
2121 P St NW, Washington, DC 20037

#### Memorandum

To: All Workshop Faculty  
From: The Deans  
Re: Faculty Notes to the Problems and Drills

First, we are grateful to each of you for teaching at the NCDC Cross-Examination Workshop. We know that teaching with us involves taking valuable time away from your practice and personal life. What the College will do here for the participants in pursuit of helping them to be better and braver defenders is extremely important and is a direct extension of Deryl Dantzler's vision and life's mission. The College could not do this without you. Thank you so much!



## NOTES FOR FACULTY ONLY

### Overview

The lectures and case problems have been designed to help participants improve their cross-examination skills and to become more effective and confident cross-examiners. The three rules of cross will be the foundation of what we teach at the workshop. Participants come to us at various skills levels. Yet, you will find that some beginners will pick up the three rules of cross quickly while some more experienced defenders will have trouble breaking old habits. Whatever the case with your group, above all please, please, please do your best to make sure ALL of the participants can formulate questions and chapters using the three rules.

Beyond the three rules, we can all agree there are many, many skills that go into making one a great cross-examiner. We want every participant to gain more skills. In 2019, we used the visual below to encourage the faculty and participants to think about cross-examination skills that build upon each other. We expect that most of these are self-evident to NCDC faculty members. The most foundational skills are listed at the bottom with the more nuanced skills listed at the top (but again, there are many, many ways to conceptualize this). We expect teach (or at least touch upon) most or all of these skills during the three workshop lectures.

## NOTES FOR FACULTY ONLY

<b>Adaptability</b>	Being nimble enough to take advantage of words the witness throws in turning them to the advantage of the defense narrative.
<b>Language Choices</b>	Use of sensory language for storytelling, choice of theory-based transitions, etc.
<b>Performance</b>	Voice inflection, body language, eye contact with witness and jury, use of space, pauses, silence
<b>Witness Theory and Approach</b>	Verisimilitude, absorption of the witness, who the witness is and how the examiner approaches
<b>Impeachment Rules</b>	Recommit, Accredit, Confront/Implausibility/Omission, etc.
<b>Chapter Structure, Transitions, and Sequencing</b>	Different ways to structure a chapter incl. General to Specific, Storytelling, Mirror Image Comparisons, Transition Sentences, Sequencing
<b>Witness Control</b>	Most important control technique is asking a good question under the 3 rules. Other control techniques include Repeat Q, Repeat more slowly, Use name, my question was, so that is a yes, reverse Q, Physical tactics – the hand, turning back, sitting down
<b>The 3 Rules</b>	Leading questions only, One new fact per question, Chaptering towards a single theory-centric goal (often general to specific)

The case problems were designed to challenge the participants to execute the skills taught in the lectures presented by the faculty. The feedback you provide to the participants should evolve with each of the skills they acquire during the program but you should continue to correct the basics, throughout.

This year, we welcome Brian Voelker to our workshop faculty for his expertise in performance. Brian is an actor and an improviser who has worked with attorneys on performance work in the courtroom for nearly a decade.



## NOTES FOR FACULTY ONLY

### Lecture 1: Content and Control:

The goal of this lecture is to review the basic principles of 1) identifying the content of your cross and 2) how to execute a controlled cross. Point number one requires thinking through the theory of the case and how the examination of this witness drives the theory of your case. It should also answer the question of who is the witness in the story you are telling (digging deep to understanding your witness) and being creative (pushing past the paper and thinking creatively). Point two should review the form of the question (short, leading, one fact questions), what to avoid (characterizing and concluding; open-ended), how to chapter (what it is and how to formulate a single-goaled, tight question). This can include a chapter title: "I want to jury to think, believe, understand that....", sourcing, transition sentence, the set of questions. Also, consider chapter construction. There should be a discussion of techniques to control the difficult witness (repeat the question, apologize, use the hand, etc.) The lecturer might touch on the structure of a cross chapter – the basic broad to narrow and the idea of storytelling or scene setting through cross.

### Thursday Night Breakout Session (Ice-Breaker)

After the initial lecture, we will all head into the breakout rooms that we are assigned to for the next morning. We will have an hour for



## NOTES FOR FACULTY ONLY

an icebreaker/cross warm-up. Have the participants pair up and spend a few minutes (ten or so) with each other, learning a bit about each other. Then, suggest that they gather the information grouped in some kind of way (ie: personal life/work life; or interests/family/goals). Have each pair perform a short cross examination of their partner that reveals the partner's background information via cross chapters, using the basic rules of cross. (This will help everyone in the group get acquainted and also allow for a warm-up of leading questions, one new fact per question, no tags, no conclusions, etc.) For example, a cross might go like this:

- *Your name is Anna*
- *You live in Atlanta*
- *You are an attorney*
- *A private attorney*
- *You do criminal defense*
- *You have practiced for 20 years*
- *You have three children*

If you have time, do one group cross that answers one of these questions:

- A) Show why the witness hates Starbucks;
- B) Show why the witness hated gym in elementary school;



## NOTES FOR FACULTY ONLY

- C) Show that the witness is prepared for the weather;
- D) Show that the witness wants to get better at trial skills.

You can have the group brainstorm four small chapters and let two people take each chapter or just make them get in a line and do three questions each (and maybe throw in transition questions) with you as the witness.

Leave ten minutes at the end of the breakout session to get the participants started on thinking through Problem 1 for tomorrow. Tell them that they need to be prepared to do Problem 1 in the morning and that they should be very familiar with the Impeachment Drills and Problems 2-4 for the afternoon.

When the participants return to the lecture room they will meet Brian and he will introduce them to some basics of performance work. He will call some of the participants to come up and so the cross they did in the small breakout with their partner. They will share the differences in the "performance" and what they did in the breakouts.



## NOTES FOR FACULTY ONLY

### Problem 1 – State v. Bryan Taylor

This problem allows the participants to consider the following: what is the theory of the case and the theory of the witness; what should go into this cross; how to control the witness, how to break the cross into small, discrete chapters and how to order the chapters.

The theory of the case is something like: The extremely white and racially insular town of Tiverton, RI, created an unsafe environment for young Bryan Taylor to exist. Matthew Baker unwittingly made a terrible mistake when he incorrectly identified Brian Taylor as the man who robbed him.

After all, he really did not get a good look at the perpetrator. What he did see was the shirt the robber was wearing and the fact that he was a young black man. Given his lack of exposure to black features, hair styles, etc., he conflated (and assumed) the young college athlete he saw in the pizzeria (with the same, ubiquitous RWU hawks T-shirt) was the man who took his things. (Remember to ask the participants to articulate the theory of the case and the theory of the witness.)

## NOTES FOR FACULTY ONLY

### Chapter ideas

- Opportunity to observe broken down into:
  - the whole event happened in seconds;
  - the CW had no reason to be paying attention to the robber (he was tired, distracted (on his phone) and did not expect to be robbed);
  - he didn't see the robber's face during the approach or the grab of his bag; or when the robber left
  - he did see the shirt;
- The event was stressful.
- He was tired, after completing a 10-hour shift
- His description to police was generic (and lacked details consistent with client).
- The percentage of the population that is black is nearly non-existent/ the CW has likely limited exposure to POC, their features, etc.
- All of the young men in the Pizzeria at the time of the ID were wearing the T-shirt, including client
- T shirts are sold in the bookstore ( so they are not so unique)
- What happens when he observes Taylor in the Pizzeria; his actions when the police come, his thoughts when the Taylor runs. (other reasons why he might have run.)
- A setup chapter for the cross-racial identification expert (i.e. he lives in a virtually all white world, etc.)



## NOTES FOR FACULTY ONLY

- A setup chapter for the unconscious memory transference issue (i.e. these men frequent the pizza parlor and Baker could have seen him in the past)
- It is also important to discuss the order of the chapters (though this will be covered in a later lecture and some of the other exercises) because the order will impact on the story you want the jury to hear.

### Lecture 2: Impeachment in All Its Glory

The goal of this lecture is to explain the basic forms of impeachment (highlighting those in the problems) and teaching skills to execute those impeachments. These include perceptual defect, prior inconsistent statements (R-A-C) (recommit, accredit, confront) and omissions, prior convictions or bad acts, interest (motive, bias) in the outcome of the case, learned treatise, inconsistencies with other evidence in the case (other testimony or other physical evidence or other evidence you can establish at trial ie: a video, the weather, etc.). Finally, we have one problem in the material that challenges the participant to impeach by implausibility (showing how one can be impeached by inconsistencies with common sense (or how the world works) which requires a consideration of tone, and not just saving it for closing!) Some discussion of how to think through these chapters

## NOTES FOR FACULTY ONLY

and how to execute should be discussed.<sup>1</sup> Beyond discussing the skills, we hope the students take away some tips on how to make the most of impeachment for the listener (using tone, word choice and emphasis). Finally, we would like the participants to consider some of the performative aspects of cross and how they can be useful to make a more effective impeachment.

This lecture will also focus broadly on theory of the witness. We are hoping to help the participants develop a more nuanced approach to understanding and interacting with the witness. The lecture will talk about empathy and the importance of understanding where the witness is really coming from (which of course encompasses their motives but also their true emotion about the case, their role in it, their relationship with your client, with other witnesses in the case, etc.). Attention will be paid to the examiner's interaction with the witness on the stand and the awareness that the audience is observing that interaction. The appropriate tone and being responsive to the emotional reaction of the witness on the stand (a crying witness, an angry witness; a belligerent witness etc.) will also be discussed.

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<sup>1</sup> This problem is optional since it is likely that there is sufficient time to complete it.



## NOTES FOR FACULTY ONLY

### Impeachment Drills:

We have included some impeachment drills before the harder problems so the participants can practice with simple problems before incorporating the impeachment into a slightly longer or more involved cross. (Not every participant needs to perform each of these problems – it is a just a way to get folks comfortable.) Remember to ask: What is the theory of the case and what is the theory of the witness.

#### Drill 1 – Matthew Baker

This drill is included as a very straight forward prior inconsistent statement impeachment. It is a chance to practice RAC. We ask the participants to imagine that Bryan Taylor is actually an extremely light complected black man and then at trial Matthew Baker’s testimony has migrated to “light to medium complected” when his original description was simply medium complected. We also include that Mr. Baker’s original description was written out and signed by him on the night of the incident. There are a lot of great doors to close in this simple exercise.

#### Drill 2, Officer Richards

This is another impeachment by prior inconsistent statement/omission (based on the arrest report). It is an

NOTES FOR FACULTY ONLY

embellishment type of prior inconsistent statement and provides the opportunity to build some questions around motive as well..

Arrest Report	At Suppression Hearing
I observed him place his hand near his waist. A subsequent search resulted in the recovery of a loaded .380 caliber firearm.	I observed him adjusting his waistband in a very obvious way. He grabbed the handle of the weapon and pushed it downward. That's when I approached him.

The credit should include an attempt to close the door on the likely response from Officer Richards that his current testimony is more specific and that the report was a summary of what he observed. The report was completed the same day as the incident.

Drill 3, Part A

This is a straightforward impeachment by prior inconsistent statement (contained in his grand jury testimony under oath) with his current, in court statement. The credit should anticipate some excuse like, "I said 'I think' back then but now my memory is much clearer".



## NOTES FOR FACULTY ONLY

### Drill 3, Part B

This is a prior omission/inconsistent statement contained (his line-up report). The credit should anticipate the excuse that he just forgot to fill those two questions out (even though that is an amazing coincidence).

### Drill 4 – Ms. Jones

This is a series of prior inconsistent statements by the witness contained in her sworn grand jury testimony, her statements to a police officer, and her statements to a defense investigator.

The following are the three Impeachment problems (Problems 2-4) that require group brainstorming.

## NOTES FOR FACULTY ONLY

### Problem 2 State v. Taylor

Here, we will return to Problem 1 and challenge the participants to cross Officer Smith based on his his conduct during the arrest of Mr. Taylor, challenging his likely suggestion that Mr. Taylor running from the scene was a result of consciousness of guilt evidence, his claim that Taylor fell down during the arrest which resulted in his injuries, using the prior internal affairs sustained complaints and civil suits in connection with use of force. Finally, they should impeach Smith by omission (or prior inconsistency) using his claim that client “confessed” by saying Taylor said, “I’m sorry, I shouldn’t have robbed that man” when he actually apologized for running.

### Problem 3 – People v. Sanders

There a few challenges in this brief problem. First, there are numerous impeachments (by prior inconsistent statements) so the participants have to decide if they want to take them all on or if they want to focus on particular ones. Secondly, there are so many inconsistencies and they are present throughout his very brief testimony which requires choices in how to structure the cross. Finally, Sidney Shapiro is a sweet and likeable guy so the choice of tone is important.

Some suggestions:

## NOTES FOR FACULTY ONLY

Maybe do a set up chapter about the Diner and where people sit after ordering; ie: at tables or the counter.

Maybe do a set up chapter on what a ninja is (someone wearing all black) Maybe do a set up chapter on his relationship with Det. O'Neill (known him for years; sees him at the Mission; soup kitchen)

### Impeachment One

- o Sidney says on direct that he went there to get lunch (mac and cheese – they make it like his mama made) and that he ordered it and was eating his food.
- o In fact, he was homeless, spending time at the mission where he received food from the soup kitchen. He was in the restaurant asking for leftovers. (Police Report)
- o Or he was in the kitchen asking for coffee. (Statement to Investigator)

### Impeachment Two

- o Sidney says on direct he hit the floor because he has seen shooting before and he knows better than to stick his head up when there is shooting going on.
- o In fact, he heard a loud commotion, started to look around and heard a real loud bang. He said that he “ain’t never seen or heard anything like that before”. (Statement to Investigator)

## NOTES FOR FACULTY ONLY

### Impeachment Three

- o Sidney says on direct that he got a real good look him when he first came in (and is one hundred percent sure its Larry)
- o In fact, he got a glimpse of the guy with the gun who had black clothes on  
(Statement to Investigator) o Was interviewed by the police right after and gave no description at all (Police Report) o Never told the police that he could identify anyone (Police Report)

### Impeachment Four

- o O'Neill did not come until two weeks ago
- o This incident happened two (or one) years ago o First time ever, shown photo array o It was in color
- o Picked the only person in black

### Problem 4 - People v. Murphy

This problem presents both an impeachment by omission and some aspects of a storytelling and implausibility cross. Take some time to talk through why it is implausible that our client would admit to the drugs and if he did, why the cop would not write that down in his report (especially since other people are in the car and he would need to explain why he was arresting your guy). Helping the participants move from understanding what is implausible to



## NOTES FOR FACULTY ONLY

then drafting chapters that communicate the absurdity is the challenge. Finally, the case problem challenges participants to impeach on things not done.

### Problem 5 – People v. Lambone (Time Permitting)

The participants will be impeaching Shavon Mitchell about the implausibility of her version.

Your theory is that Frank, your client, is not a stranger to the complainant but the brother of her ex-boyfriend and someone who she has met several times. After a bad breakup with Vinnie, Shavon buzzed Frank into the building and then let him into her apartment. Once he asked for some of Vinnie's belongings, she lost it and grabbed a knife. In an attempt to wrestle it away from her, Frank ended up in a tussle. Shavon's young son was scared for his mom and stabbed Frank in the back. Shavon did not report this because she blamed herself and she was worried her son would get in trouble. Once the police were involved, she had no choice but to create this ridiculous story.

Points of implausibility:

- o Frank could not have broken into this fortress of an apartment.
- o They definitely know each other (and she

## NOTES FOR FACULTY ONLY

hates Vinnie). o She had to know her son stabbed him in the back.

- o She had to have done something with the knife when the cops came to her house.
- o The physical evidence in the apartment is inconsistent with her story.

### Problem 6 – People v. Hines – An Exercise in Brainstorming (Time Permitting)

This problem responds to the many questions we have received over the years about what to do when someone is called to the stand for whom they have no paper. We wanted to convince participants and even without paper, they can use their deductive powers to come up with a theory advancing cross.

They must think about the theory of the witness and identify areas of cross to bring out motive, interest, and implausibility that the witness would remember these events independently (without prep or talking to the other witnesses), especially since these officers engage in identical activities every day. Do a little thin blue line type stuff. The two officers rely on each other and therefore likely compared notes and she is essentially just here to back up the partner.



## NOTES FOR FACULTY ONLY

### Lecture 3: Crossing The Snitch and Beyond Chaptering

The goal of this lecture is to show the participants that chapters are only the building blocks to more advanced ways to thinking about structure. It will introduce how a chapter, or a series of chapters can be a mini-story or a vehicle to tell set the scene or describe a moment. The lecture will also discuss how in good narrative, you are always thinking about the right structure to tell a persuasive story. Therefore, thoughtfully ordering the chapters is one of the most important things you do as put the arc of the cross together. This lecture will also discuss how you can use structure and language to embed motive (and thoughts and feelings) of the witness so the jury can have “aha” moments during the cross instead of waiting for closing. The lecture will also touch on how to use thematic vocabulary in cross and, again, identifying the right place in the cross to introduce that that theme; and then where and how to repeat it.

### Problem 6: United States v. Quinton Rivers

Here, we are looking for participants to consider the theory of this witness, the best way is to approach the impeachment of him as a witness who has an interest in the outcome of the case and who has made different statements in the past. We really want them

## NOTES FOR FACULTY ONLY

to consider this as a story they are telling and using some of the techniques discussed in the lecture (theory-driven headlines, thematic vocabulary and embedding thoughts and feelings of the witness.) The story of this witness is that he was caught red handed after the robbery of the Waffle House. Cooperating is his only choice if he wants to avoid spending the rest of his life in prison. His fear, self-interest, anger at your client is all part of his thought process. Furthermore, the only person in the world that can release him from this fate is the prosecutor. The judge does not have the power to help him if the prosecutor does not. He doesn't even have the right to appeal, or file a habeas at a later time. The problem is written as a federal cross although the skills are universal. Consider painting Quinton as a person whose reluctance to cooperate may stem from the fact that the real second robber is his brother. It is a great discussion piece to determine what strategy to employ as to that.

### Suggested Chapters:

- o His decision to rob the good folks at the Waffle House (for personal gain/he is driven by what is good for himself regardless of whether it is scary or hurtful to others)
- o He is dead to rights
- o His first statement after being caught he "swears" that he knows nothing about the other robberies

## NOTES FOR FACULTY ONLY

- o Receives an attorney – attorney would have explained how much time he is facing, but participants should be careful to phrase such that it does not draw an objection in re privilege (i.e. after you were appointed an attorney, you met with your attorney, you learned that you were facing 157 years on gun counts alone)<sup>1</sup>
- o He doesn't want to spend any years in prison
- o Things he will miss if he is in prison o Keisha o Baby o Family
- o The horrors of prison life
- o To avoid prison, first thing he tried was a motion to suppress – unsuccessful
- o Then he was heading for trial Sept 18
- o Last minute decision to plead/cooperate o All the rights the plea agreement has taken from him o Who has the power (the prosecutor)
  - o Has to “tell the truth” but the truth according to the prosecutor
  - o Judge cannot help him o Appellate Courts cannot help him
  - o Habeas cannot help him
- Knowing Quinton Rivers

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<sup>1</sup> Even if he goes down on only three of the robberies, that is at least 57 years on gun counts alone.

## NOTES FOR FACULTY ONLY

- o Resentment for Rivers walking in the previous case or totally understand that the government controls both of their lives and he has no other choice
- o Pete (the brother)
- o Jail Call

### Problem 7: People v. McDonald

This problem combines all of the skills we have been working on in the past two days, with special attention to identifying the dominant emotion of this witness, showing empathy and giving credence to her truthiness, but also the consideration of telling a thoughtful story what happened here.

Get them to talk about the theory of the case and the theory of the witness. Ask them to identify how the witness will be feeling about being in court and about being examined by you. How does she feel about testifying (and crossed) with her parents in the room. Think through the chapters and the order of the chapters. Perhaps ask them to identify a scene of significance and to tell the story of that scene which, perhaps, could become the first chapter of the cross.

## NOTES FOR FACULTY ONLY

Other possible chapters:

- o Living with her parents sucks
- o She loves her parents and doesn't want to disappoint them
  - o Her old man would kill her if she was having sex with a guy in the apartment (lends truth to client's statement if he should testify)
- o Stephanie is lonely
  - o She met George at the bar before
  - o The bar is mostly older folks
  - o She would flirt with him at the bar
- o There is no way a stranger would know to take the victim to the area under the staircase
- o The area under the staircase is a great place to "hang out"
- o The testing at the hospital suggests she wanted free treatment (STD and Plan B)
- o She told George that her father would kill her so he had to leave