

TABLE 8 PRESENTS. . .

CROSS-EXAMINATION

My Cousin Vinny: Grits



My Cousin Vinny: Pros 1 of 2

- *Testing the basis of the witness's opinion/testimony.
- *Drill down with short, clear leading questions.
- *Once get the answer you want, stop or move on to another topic and don't go back so witness doesn't have an opportunity to explain or change the testimony.
- *Try to get small concessions.

My Cousin Vinny: Pros 2 of 2

- * Get witness to agree with your theory of the case.
- * Consider the timing and chronology of questions.
- * Brevity - get in and get out.
- * Don't let the witness get away with an evasive answer.
- * Get the witness to commit to the answer.
- * Be polite.
- * Control over the witness/stay in the present.

CAUTION



**USE THE
GOLDEN RULE**

GOLDEN RULE:

ONE

FACT AT A TIME.

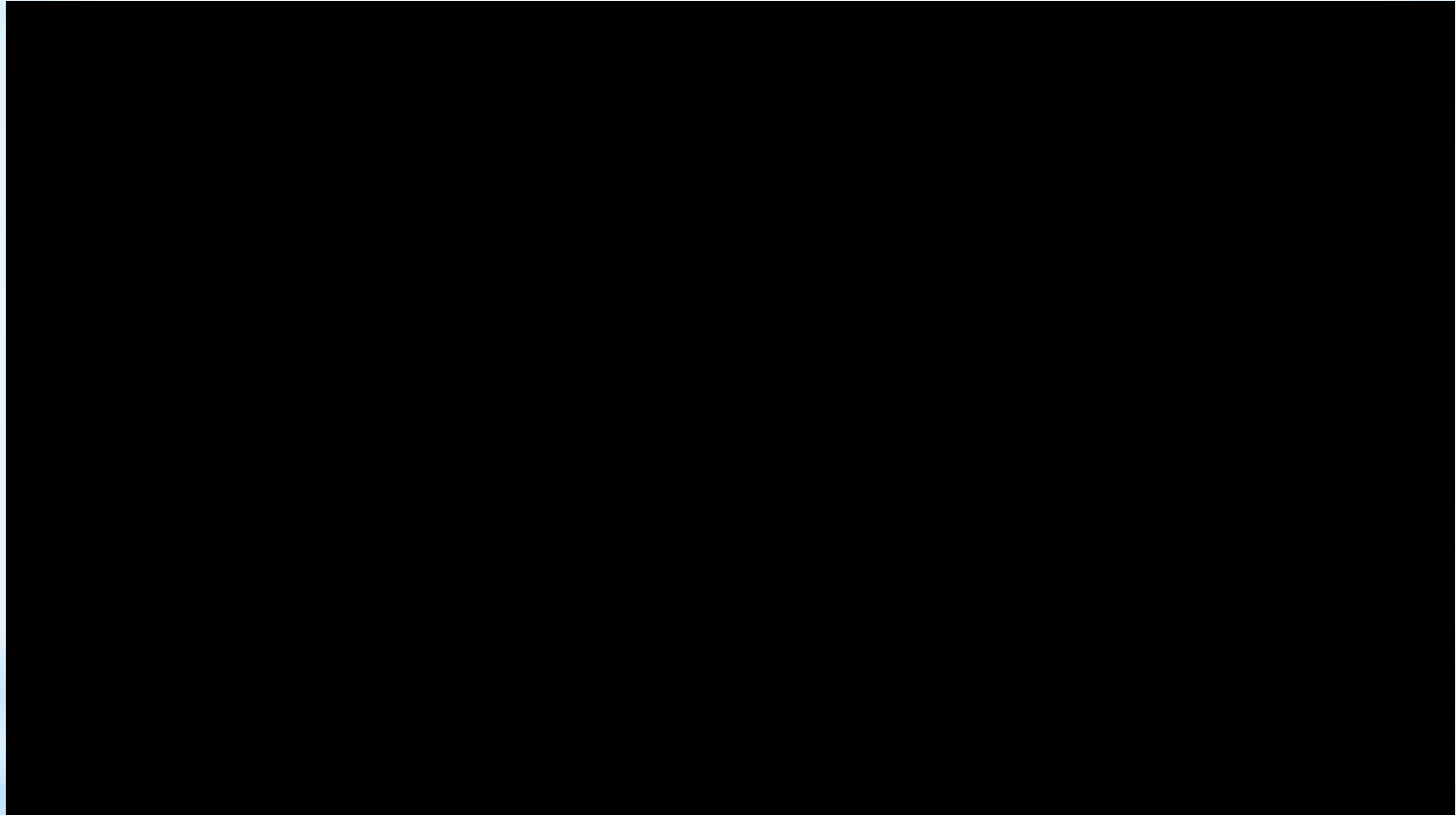
My Cousin Vinny: Cons 1 of 2

- *Too many open-ended/non-leading questions
 - in a real trial, you don't know what the witness will say and it could backfire on you
- *Try to have a document or other evidence to tie the witness to each answer

My Cousin Vinny: Cons 2 of 2

- *Don't harass the witness or be too sarcastic or argumentative
- *Some things can be saved for the closing.
- *Never be disrespectful to the judge!
- *Always be respectful of the witness and the process.

Devil's Advocate



Devil's Advocate: Pros

- * Use of cartoon exhibit.
 - laid the trap
 - was the substance important or was it just to set up the bigger topic?
- * Know and use the rules of evidence.
 - anticipated objections and prepared with bases for relevance.
- * Made his point.

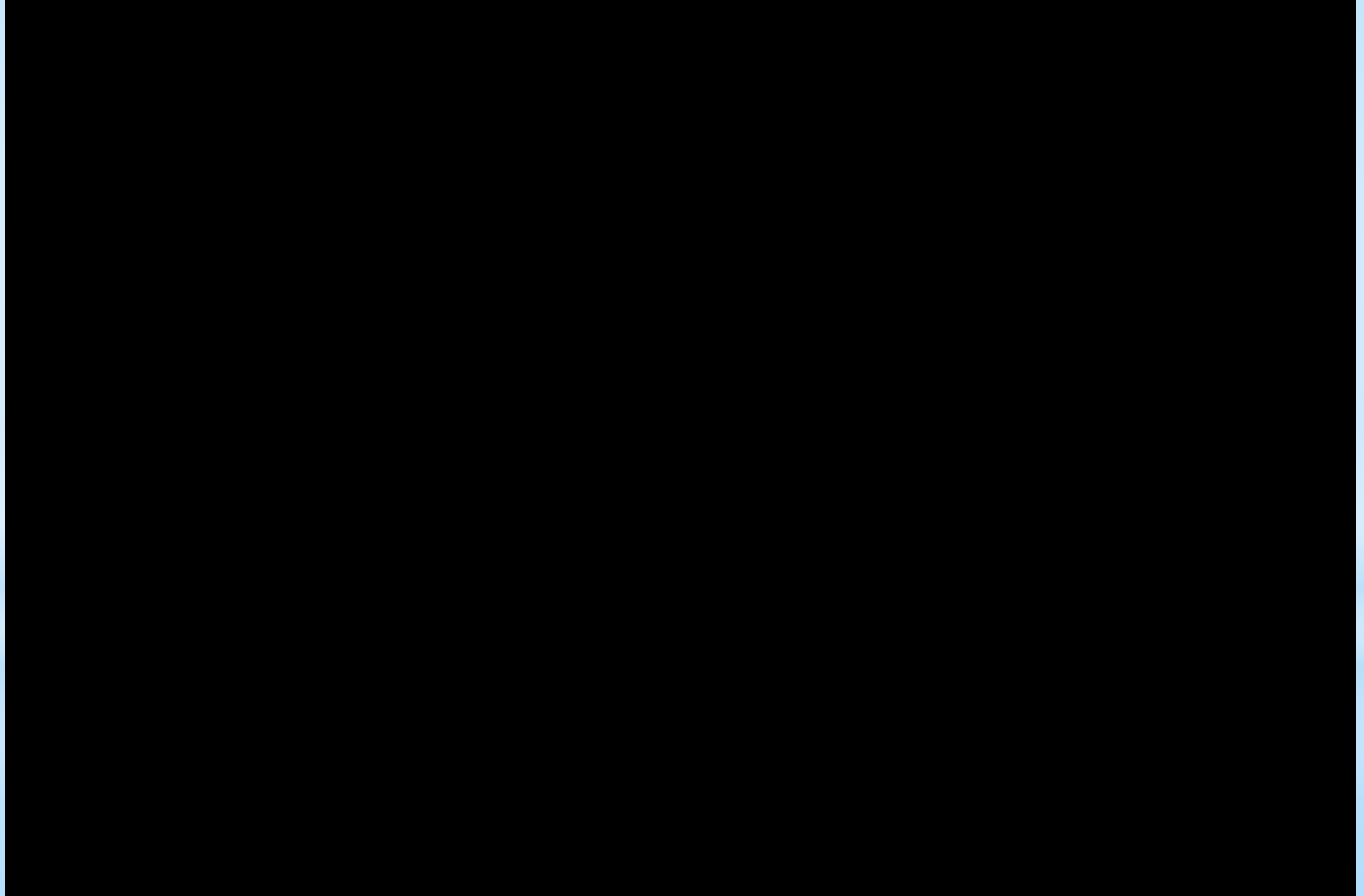
Devil's Advocate: Cons

- * Did not produce exhibit in advance - risked preclusion.
- * Aggressive.
 - don't engender sympathy for the witness
- * Attorney testimony barely disguised as questions.
- * Listen to the answers.
- * He made his point but was it actually a successful cross? "I didn't want to be the only one."

- *This is a high profile murder trial in Boston.
- *Elle is a first-year law student assisting at the trial.
- *Witness, Chutney, is the deceased's daughter.
- *Accused, Brooke Windham, is Chutney's stepmother.

***Legally Blonde**

LEGALLY BLONDE



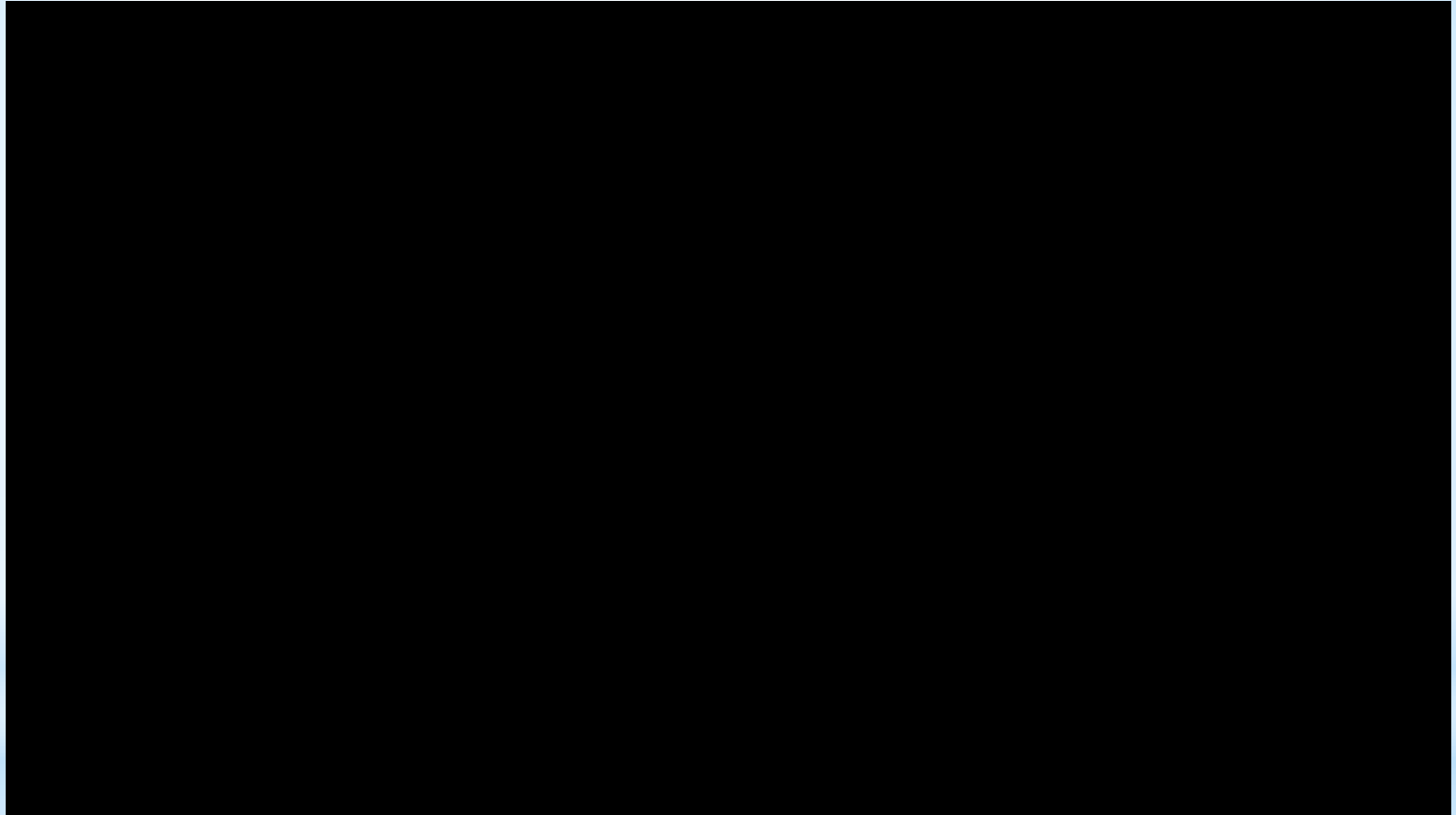
Legally Blonde: Pros

- ❖ Be who you are.
- ❖ Have confidence. Once Elle became more confident, her questions dramatically improved.
- ❖ Got witness comfortable and in a good rhythm before striking.
- ❖ Don't ignore common sense.
- ❖ Element of surprise.
- ❖ Listened to witness.
- ❖ Established timeline, but wasn't wedded to her questions.

Legally Blonde: Cons

- ☐ Attorney testifying - judge reprimands.
- ☐ Very open-ended questions at the beginning.
- ☐ Too many compound questions.
- ☐ Questions were too long.
- ☐ Lack of preparation.

A Few Good Men



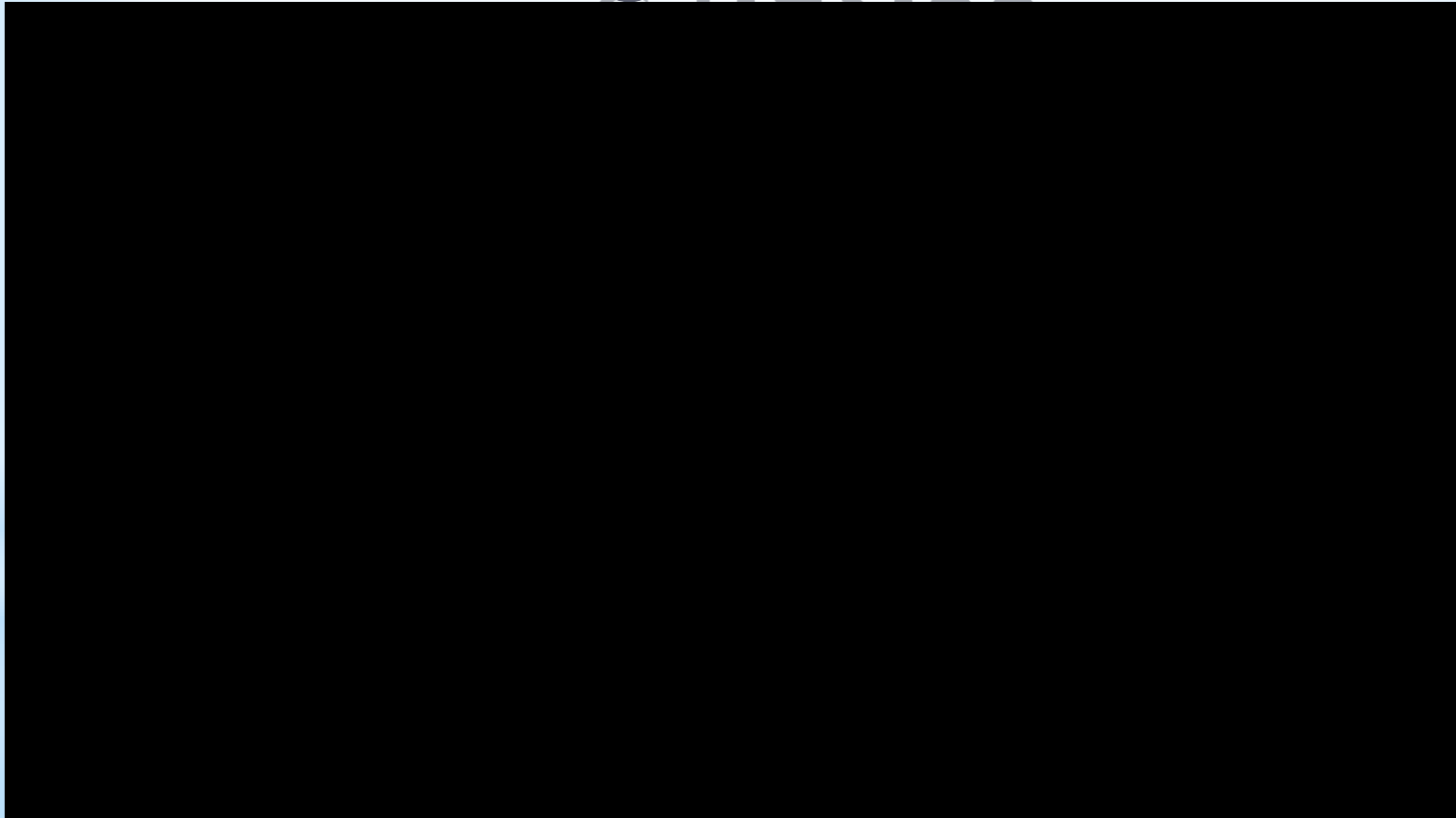
A Few Good Men: Jesse Cross - Pros

- * Good use of leading questions.
- * Persistence can pay off.
- * Did not rise to the witness' bait - kept cool (at first) and did not lose sight of goal from that witness.

A Few Good Men: Jessep Cross - Cons

- Asked more than one fact per question.
- Asked open-ended/non-leading questions.
- Yelled/argued with the witness.
- Ignored the judge.
- Let the witness ask questions (and answered them).
- Let the witness go on a long narrative.

The Verdict: Cross of Doctor & Nurse @1:29:38



The Verdict: Doctor Cross Pros

- * Short, leading, simple questions.
- * Use of cross to tee up the factual information from Nurse Costello.
 - laid the trap
- * Set the foundation for the evidence from the nurse
- * Didn't tip off the other side
 - got the admissions needed and got out.
- * Good use of witness-authored literature.
 - didn't challenge the doctors' expertise, but actually used it against him.

The Verdict: Doctor Cross Cons

- Overly emotional in the first portion
- Open-ended question - “Why is that?”
 - but if he knew the doctor would say that, then use of doctor’s own words to hang himself
 - but what if he said something different?

* The Verdict: Nurse Cross Pros

- ❖ Before we get to the cross, should Paul have stopped when he did?
- ❖ Back to the Pros - were there any?
- ❖ Themes were there but ineffective
 - Challenged memory with lapse of time
 - Pitted lowly nurse against honorable doctor
 - Did make her look hysterical at the end
 - Knew the applicable rules

The Verdict: Nurse Cross Cons

- ❖ Too many questions.
- ❖ Asked questions without knowing the answers.
- ❖ Asked open-ended questions - “Why would you do this?”
- ❖ Don’t inadvertently bolster the credibility of an adverse witness
 - referencing perjury
 - “how is it that you remember after 4 years?”
- ❖ Asked “which is the lie?” / “which is correct?”
 - allowed witness to explain and gives her an escape hatch
- ❖ Not controlling body language, facial expressions and tone, and instead signaling the significance of harmful evidence to the jury.
- ❖ Too dramatic and preachy - “ruin their lives”
- ❖ Condescending and Aggressive “Do you know what a lie is?”
- ❖ Didn’t press for evidentiary ruling before continuing questioning.

8 COMMON PITFALLS

1. Asking questions that do not advance your theory of the case.
2. Asking questions that repeat what was just brought out on direct (rehashing the other party's case).
3. Asking a question with more than one fact.
4. Asking a question to which you do not know the answer.
5. Asking the conclusion (or "BIG") question.
6. Not listening to the answer.
7. Not following up when you get a "non-answer."
8. Being wedded to asking your questions chronologically.

*“*Cross-examination* is the opportunity to elicit favorable information and expose weaknesses in a witness’s testimony.”

THOMAS A. MAUET, TRIAL TECHNIQUES (Vicki Been et al. eds., 8th ed. 2010).

*WHAT IS CROSS-
EXAMINATION?

- * **NH Rules of Evidence, Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence**
- * (a) *Control by the Court; Purposes.* The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
 - * (1) make those procedures effective for determining the truth;
 - * (2) avoid wasting time; and
 - * (3) protect witnesses from harassment or undue embarrassment.

* **SCOPE**

* **NH Rules of Evidence, Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence**

- * (b) *Scope of Cross-Examination.* A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination.

* **SCOPE**

- * **NH Rules of Evidence, Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence**
- * (c) *Leading Questions*. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:
 - * (1) on cross-examination; and
 - * (2) When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

* **Method**

2016 NHRE Update Committee Note

- *The 2016 amendment made stylistic changes to subsections (a) and (c) of the rule. Subsections (a) and (c) mirror Federal Rule of Evidence 611(a) and (c). No change was made to subsection (b). New Hampshire Rule of Evidence 611(b) generally allows for more latitude on the scope of cross-examination than does FRE 611(b). The committee saw no reason to change this practice.

*Comparison with
Federal Rule

* **Federal Rules of Evidence, Rule 611(b)**

* **(b) Scope of Cross-Examination.** Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.

* **Comparison with
Federal Rule**

* Other Rules

* 608

* 609

* 404

* Other Rules

- * Should you cross-examine the witness?
- * Ask yourself: (per *Mauet*)
 - * Can the witness help you?
 - * If the witness hurt you, can you hurt the witness?
- * Unless you answer “yes” to one of these questions, there may be little point in cross-examining the witness.

* PURPOSE

- * Ask yourself: (per *Mauet*)
 - * What is my theory of the case?
 - * What are my themes and labels?
 - * What are my closing argument points about this witness?
 - * What facts exist to support those points?
 - * What order should I bring out those facts on cross?
 - * What tone and attitude should I use during cross?
 - * What questions style should I use during cross?

* PLANNING & PREPARING

- * Favorable facts from direct
- * Favorable facts not yet mentioned
- * Attacking the witness's ability to perceive
- * Attacking the witness's memory
- * Attacking the witness's ability to communicate
- * Attacking the witness's conduct
- * Impeachment
 - * Prior inconsistent statements (N.H. R. Ev. 613)
 - * Commit (what witness said on direct)
 - * Credit (build up the source of the impeaching statement, i.e., deposition)
 - * Confront (bring out prior inconsistent statement & ask witness to admit making it)
 - * Prior convictions (N.H. R. Ev. 609)
 - * Prior bad acts (N.H. R. Ev. 608)
- * Bias, interest, and motive

* TOPICS
(per *Mauet*)

- * “A chapter is a sequence of questions designed to accomplish a goal.” *Pozner & Dodd*.
- * DRAFTING CHAPTERS: Do it backwards (per *Pozner & Dodd*)
 - * Identify any one single factual goal to be achieved in the course of the cross-examination that is congruent with the theory of the case
 - * Review cross-examination preparation materials for all facts that lead toward acceptance of that single factual goal.
 - * Draft a single chapter that covers those facts, leading to the factual goal as set out.
 - * If, while in the course of drafting a chapter an additional worthwhile goal is identified, separate that goal and its supporting material into its own chapter.

* ORGANIZATION: CHAPTERS

*SOURCING:

- * Know the answer to your question; and
- * Know where the answer can be documented.

*OBJECTIONS:

- * Anticipate objections; and
- * Prepare your response with references to rules and case law.

*SOURCE & OBJECTIONS

- * LESS IS MORE: Select 2-4 best points you can safely raise during cross-examination. (per *Mauet*)
 - * Too many points overload jurors and dilute impact
- * PRIMACY & RECENCY: (per *Mauet*)
 - * The 2 best points should be at the beginning and the end of the cross-examination.
 - * Start Big; End Big
 - * “You’re a convicted felon, aren’t you?”
 - * “All this happened in one or two seconds, right?”

* **STRUCTURE**

 See separate handout
for Case Summaries