



National Association of
Counsel for Children



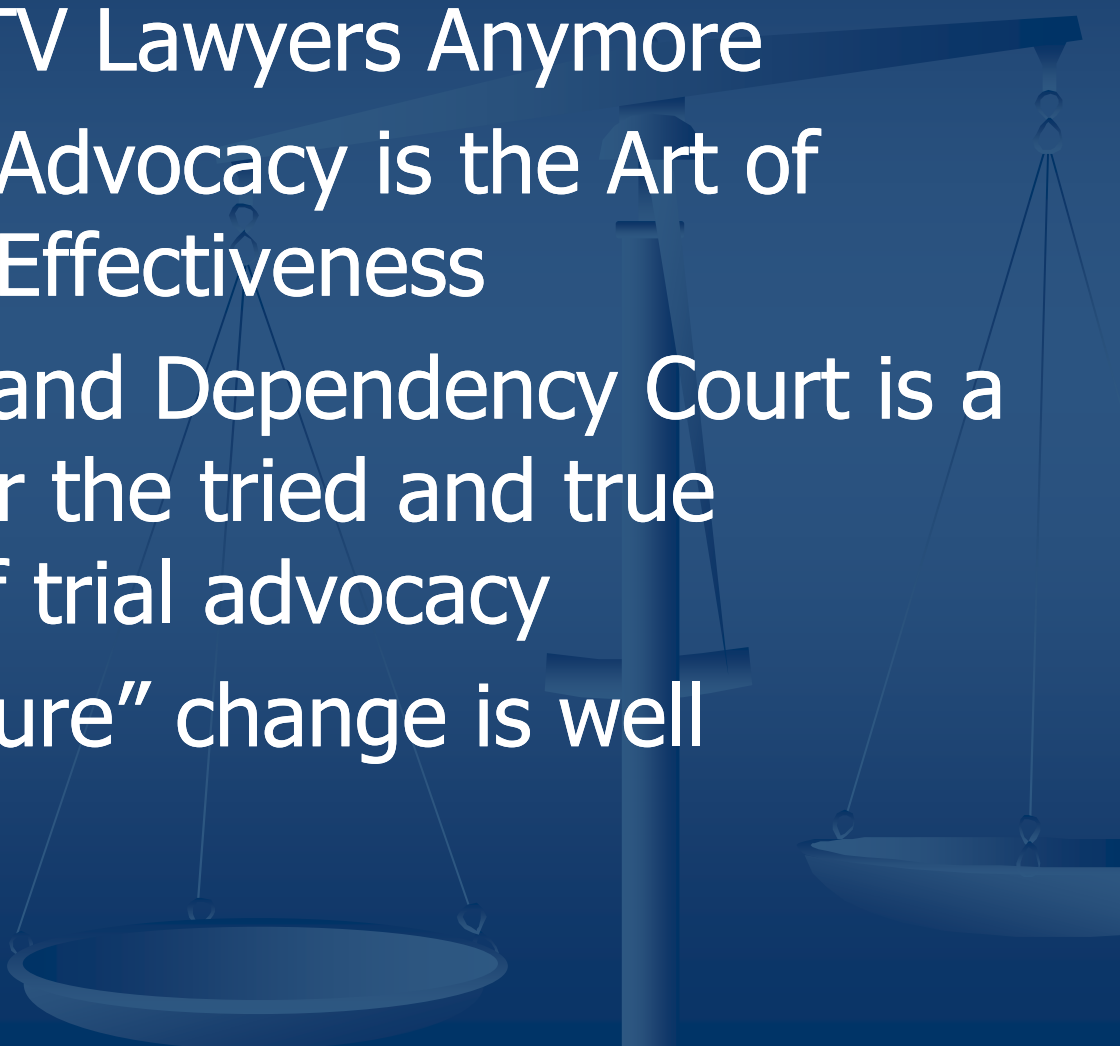
NACC

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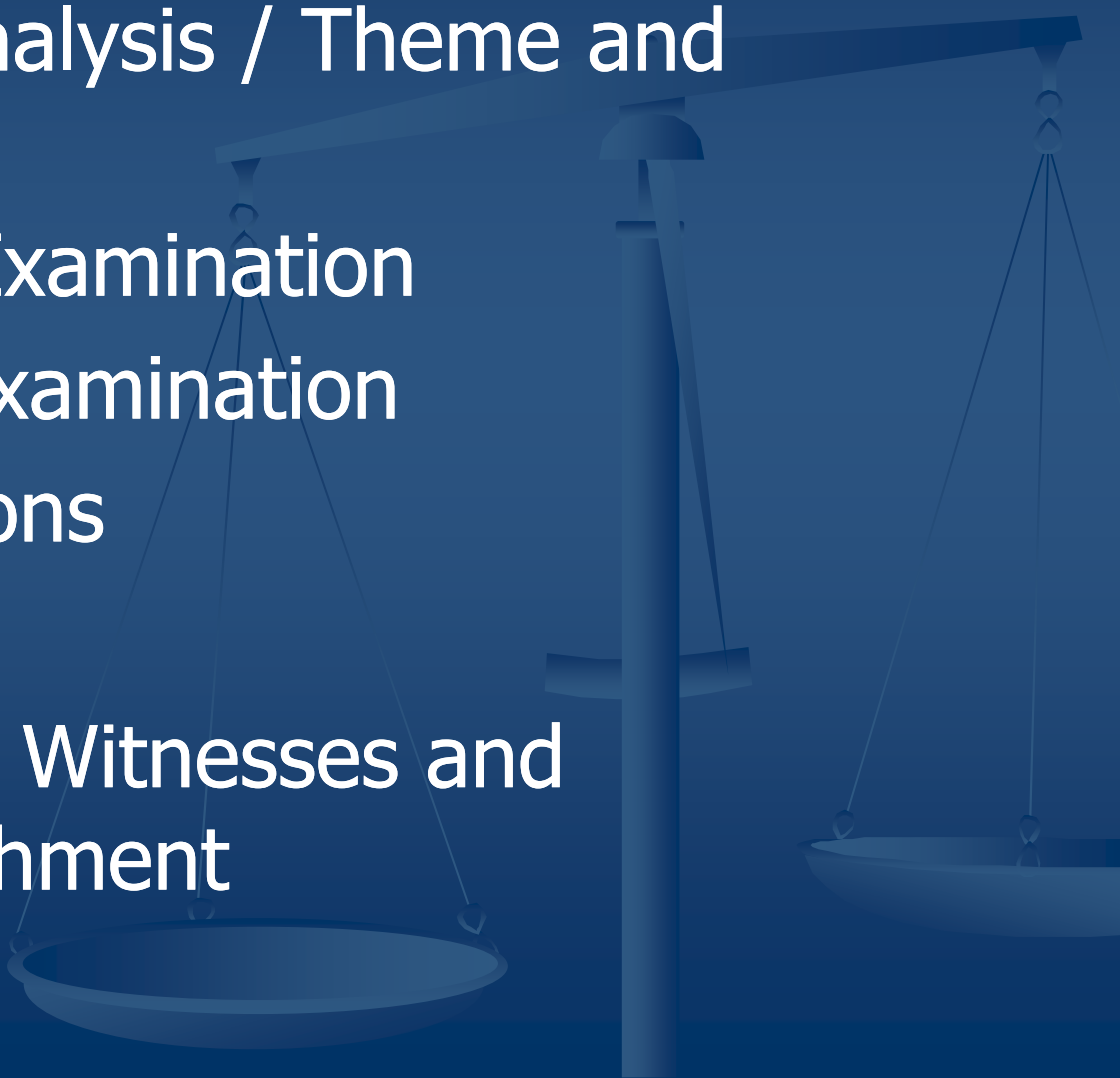
Protecting Children and Promoting their Well-Being through Legal Advocacy

JLS JUVENILE™
LAW
SOCIETY

Trial Skills for Dependency Court?

- Its not just for TV Lawyers Anymore
 - The Art of Trial Advocacy is the Art of Persuasion and Effectiveness
 - Abuse, Neglect and Dependency Court is a proper forum for the tried and true fundamentals of trial advocacy
 - This “Court Culture” change is well underway
- 

Today's Topics

- Part 1: Case Analysis / Theme and Theory
 - Part 2: Direct Examination
 - Part 3: Cross Examination
 - Part 4: Objections
 - Part 5: Exhibits
 - Part 6: Difficult Witnesses and Impeachment
- 

Part 1: Case Analysis

- CA is Development of the Case Theme and Theory based on the law and facts
- Every case is a story with a beginning and an end
- It's the lawyers job to tell the story persuasively within the structure and rules of the trial
- Be cautious about categorizing all your cases into one a couple of pre-packaged themes
 - Although "the state is stealing minority babies" is frequently part of the story

Theory and Theme



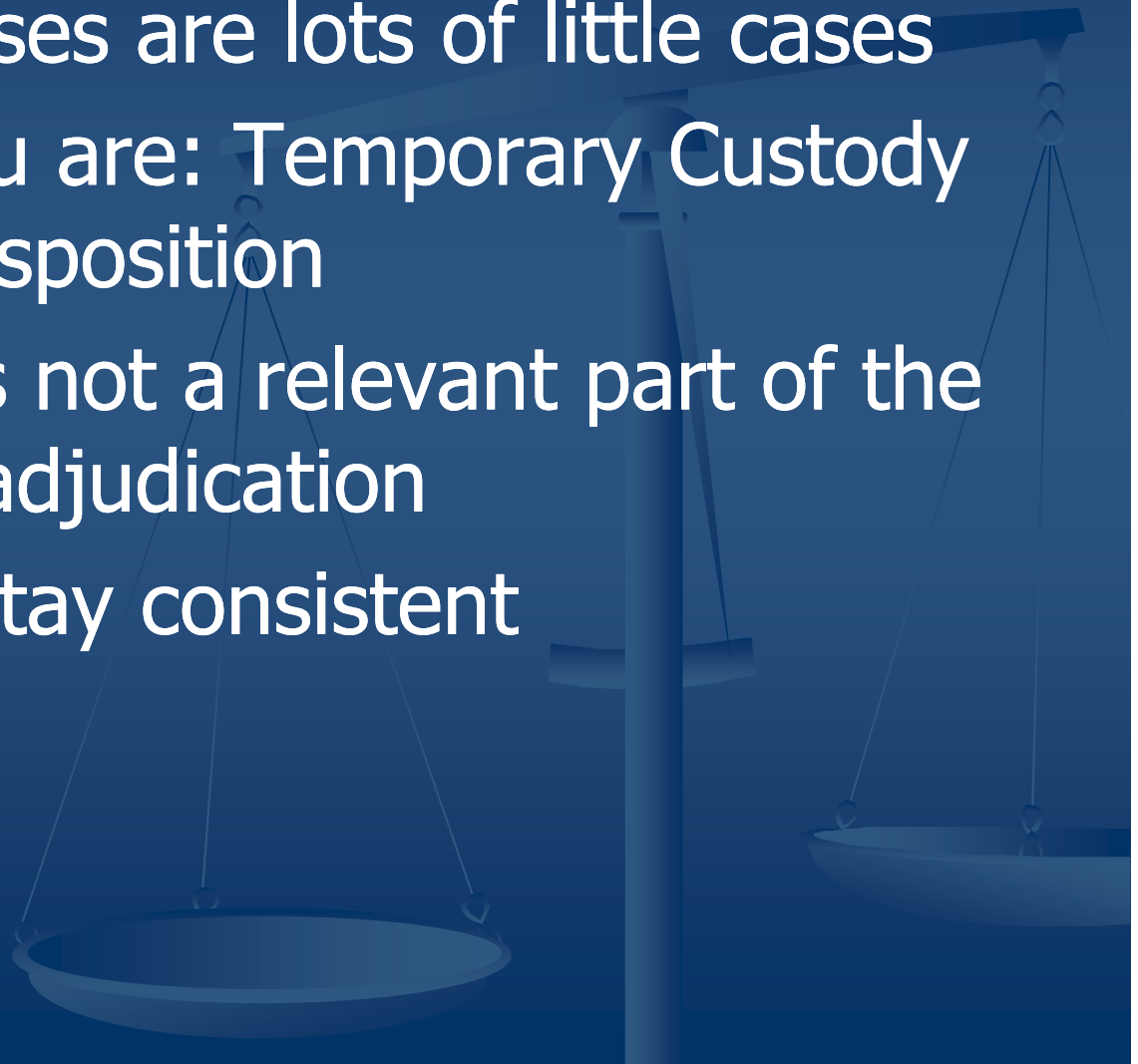
- The Theory is the Legal Theory
 - The elements of the case
 - Primary and necessary, but not enough
- The Theme is the Story
 - Why it makes sense to accept or reject the legal theory / elements of the case
 - “Why should I believe your recitation of the facts?”
 - “Oh, I see what happened”)
 - The Joanna Jones Glove Burn Case

Theme / Story

- There is only one
- Pick a horse and ride it to the finish
- Be guided in ALL your case decisions by your theme
 - Open, Close, Direct, Cross, Introduction of Evidence, Objections
 - If it fits your theme – use it or let it in
 - If it does not fit, you must acquit (don't use it no matter how compelling for another story)
 - Accident or bad guy are different Themes

Phases of Dependency Matter

- Dependency Cases are lots of little cases
- Know where you are: Temporary Custody Adjudication, Disposition
- Best Interests is not a relevant part of the legal theory at adjudication
- Theme *should* stay consistent



Part 2: Direct Exam

- Direct Exam is the primary tool for telling the story of your case (your case in chief)
 - Less so sometimes when “defending”
- Which witnesses will I use to tell which parts of the story of my case
- Witnesses preparation is key because the lawyers questions are really prompts for the witness the tell their part of the story
- The witness, not the lawyer, is the focus

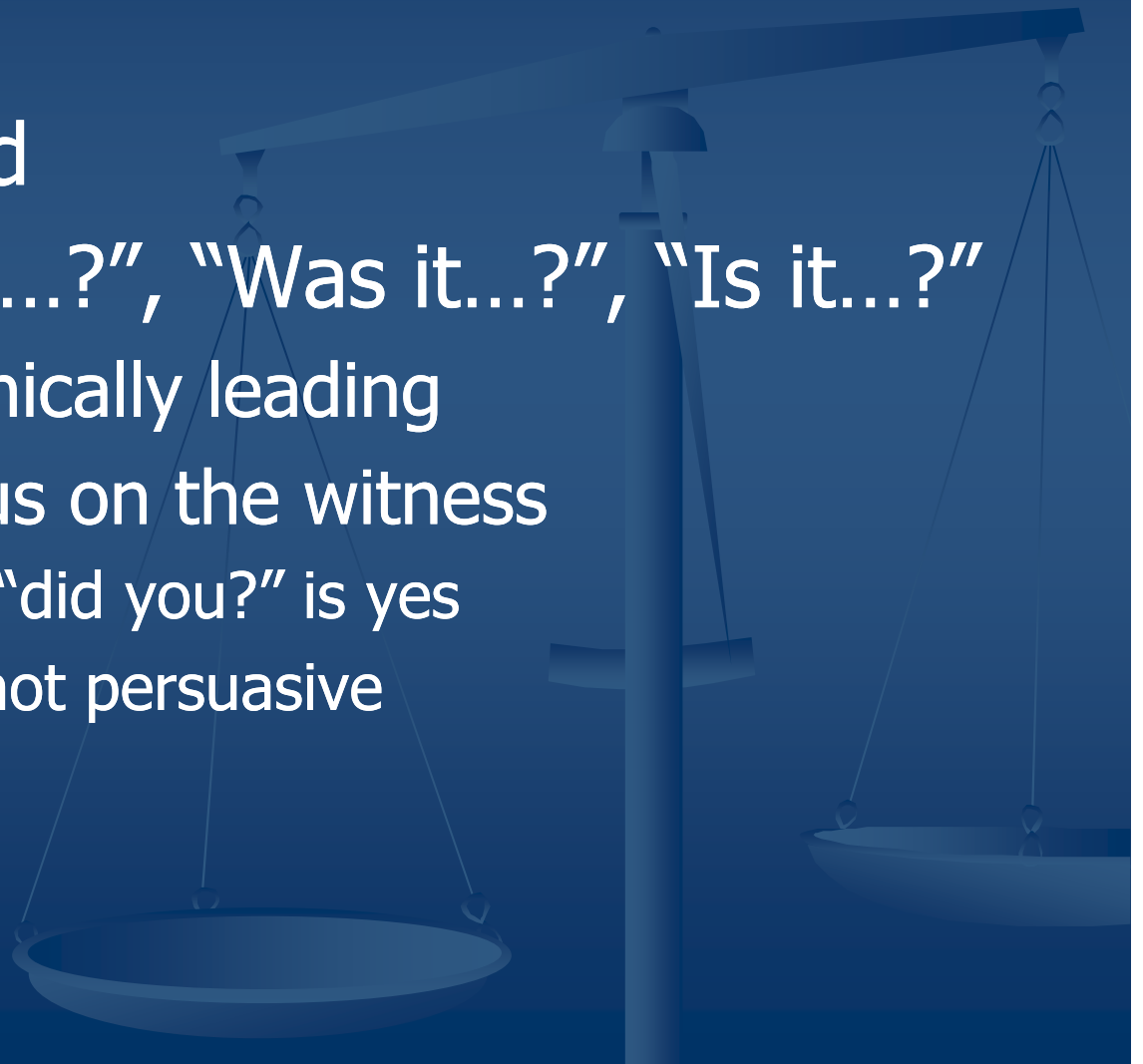
Direct Exam Technique



- Short questions
- Open Ended
- Non-Leading
- 1 fact per question
- Resist opinions and conclusions
- The 7 magic first words
 - Who, What, Where, When, Why, How, Describe or Explain
- Connected by transitions called *Headnotes*
 - Tell everybody where you are going

The 7 Magic Words

- Non Leading
- Witness Focused
- Avoids “Did you...?”, “Was it...?”, “Is it...?”
 - Which are technically leading
 - And do not focus on the witness
 - The answer to “did you?” is yes
 - But mostly its not persuasive



Headnoting

- It's difficult to structure a direct exam using only the 7 magic words
- Use Headnotes to help
 - "Now let's talk about your report"
 - "I'd like to turn your attention to what happened at the hospital"
 - "You mentioned the child seemed scared; Let's discuss that for a few minutes"

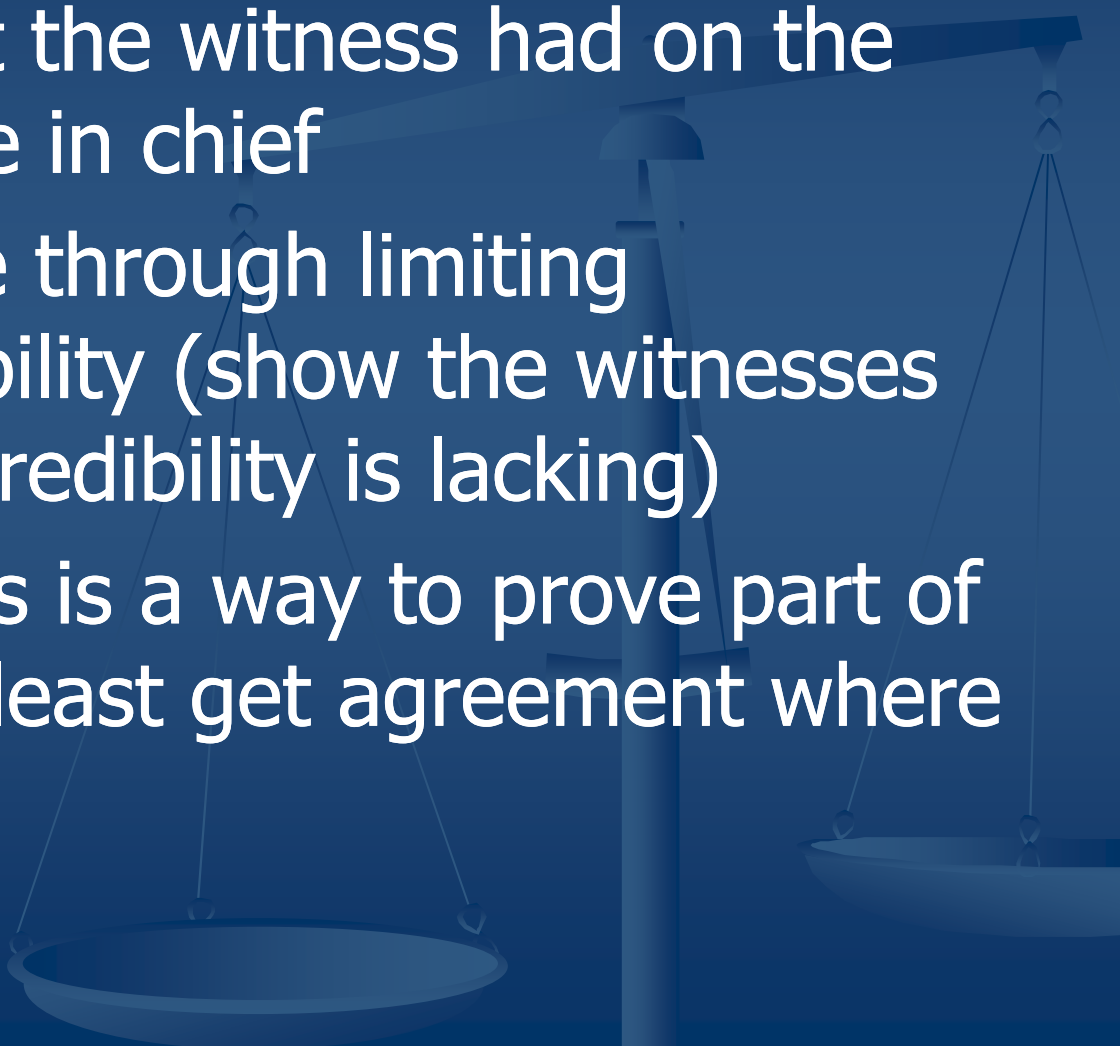
Practice

- Who
- What
- Where
- When
- How
- Why
- Describe or Explain

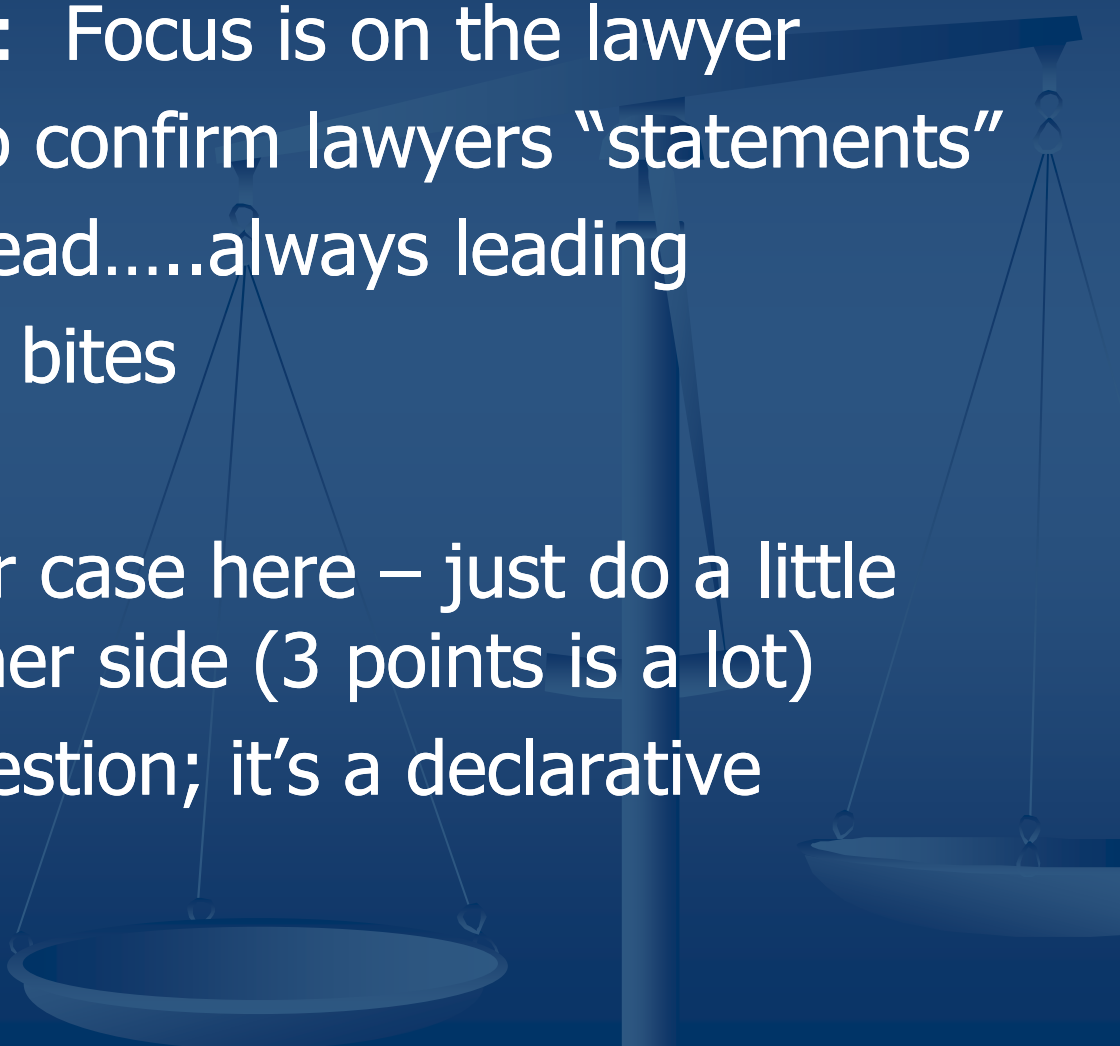
- Remember to Transition with Headnotes



Part 3: Cross Exam

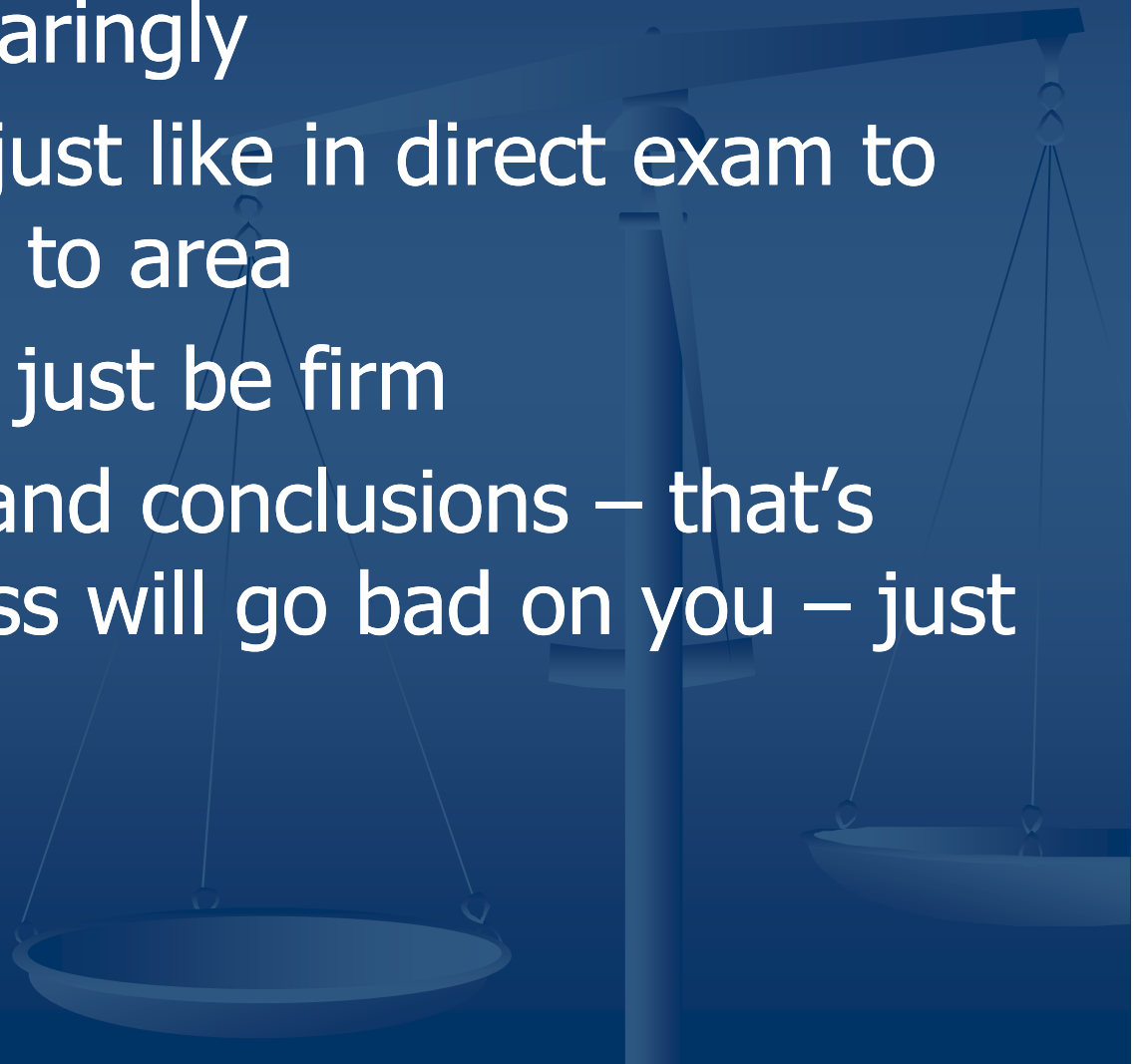
- Limit the impact the witness had on the other side's case in chief
 - Frequently done through limiting witnesses credibility (show the witnesses foundation for credibility is lacking)
 - Sometimes cross is a way to prove part of your case or at least get agreement where you can
- 

Cross Exam Techniques

- Opposite of Direct: Focus is on the lawyer
 - Witness is there to confirm lawyers “statements”
 - Lead, lead, lead, lead....always leading
 - Short / 1 fact little bites
 - Pacing is key
 - You don't win your case here – just do a little damage to the other side (3 points is a lot)
 - Its not really a question; it's a declarative statement
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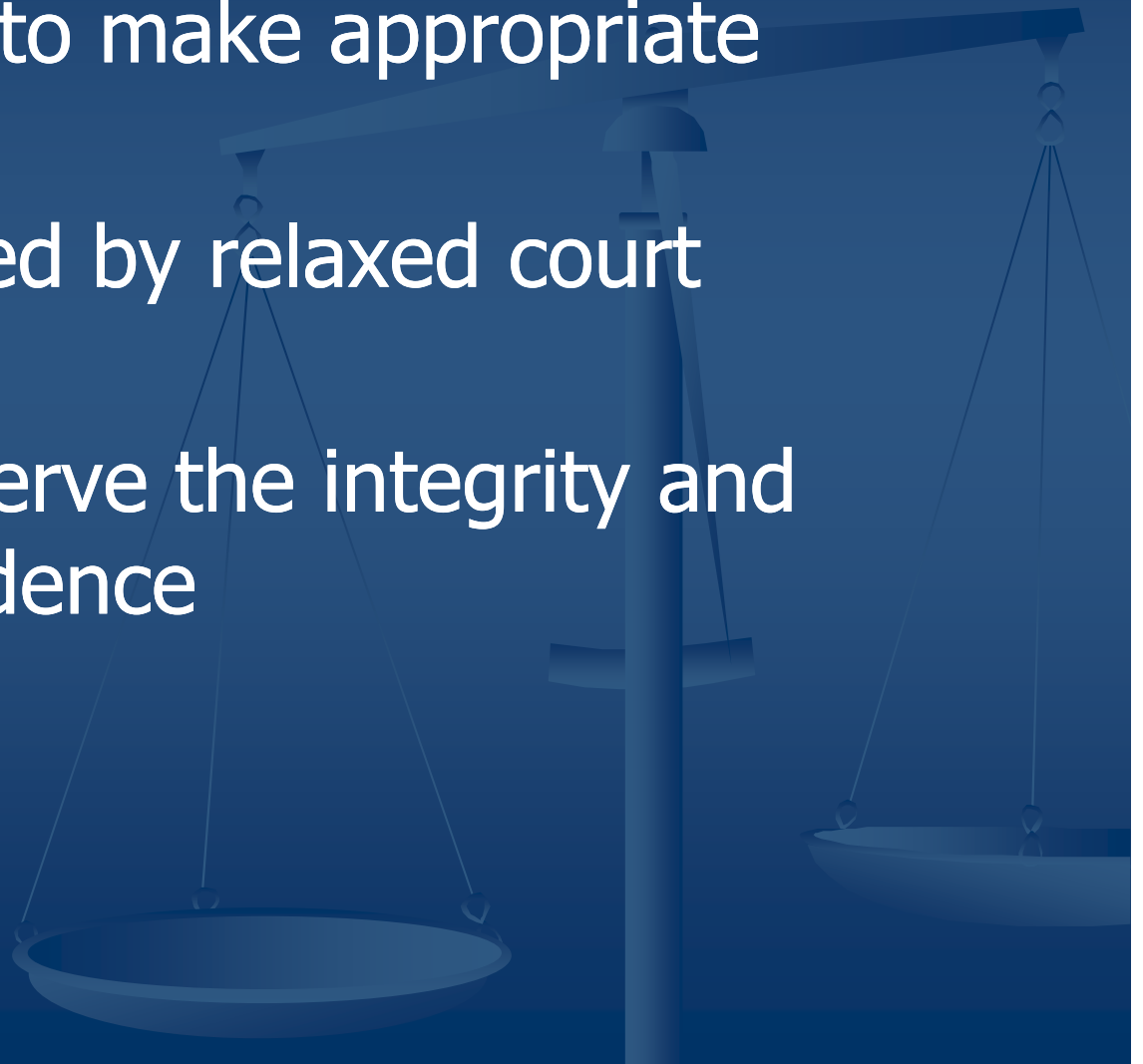
Cross Techniques....

- Use tag lines sparingly
- Use headnotes just like in direct exam to move from area to area
- Don't be a jerk; just be firm
- Avoid opinions and conclusions – that's when the witness will go bad on you – just the facts



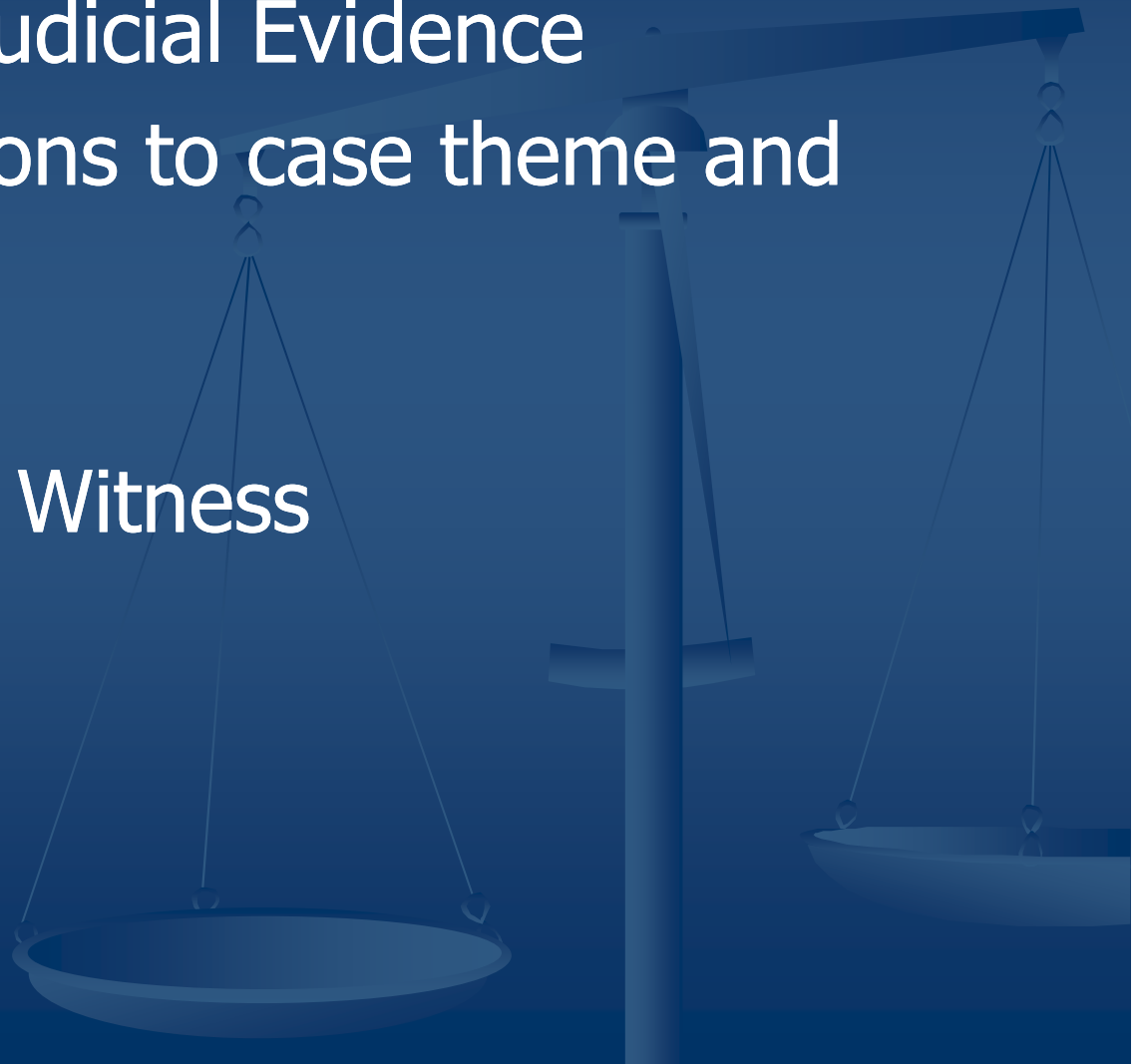
Par 4: Making and Meeting Objections

- You have duty to make appropriate objections
- Don't be deterred by relaxed court processes
- Objections preserve the integrity and reliability of evidence



Reasons to Object

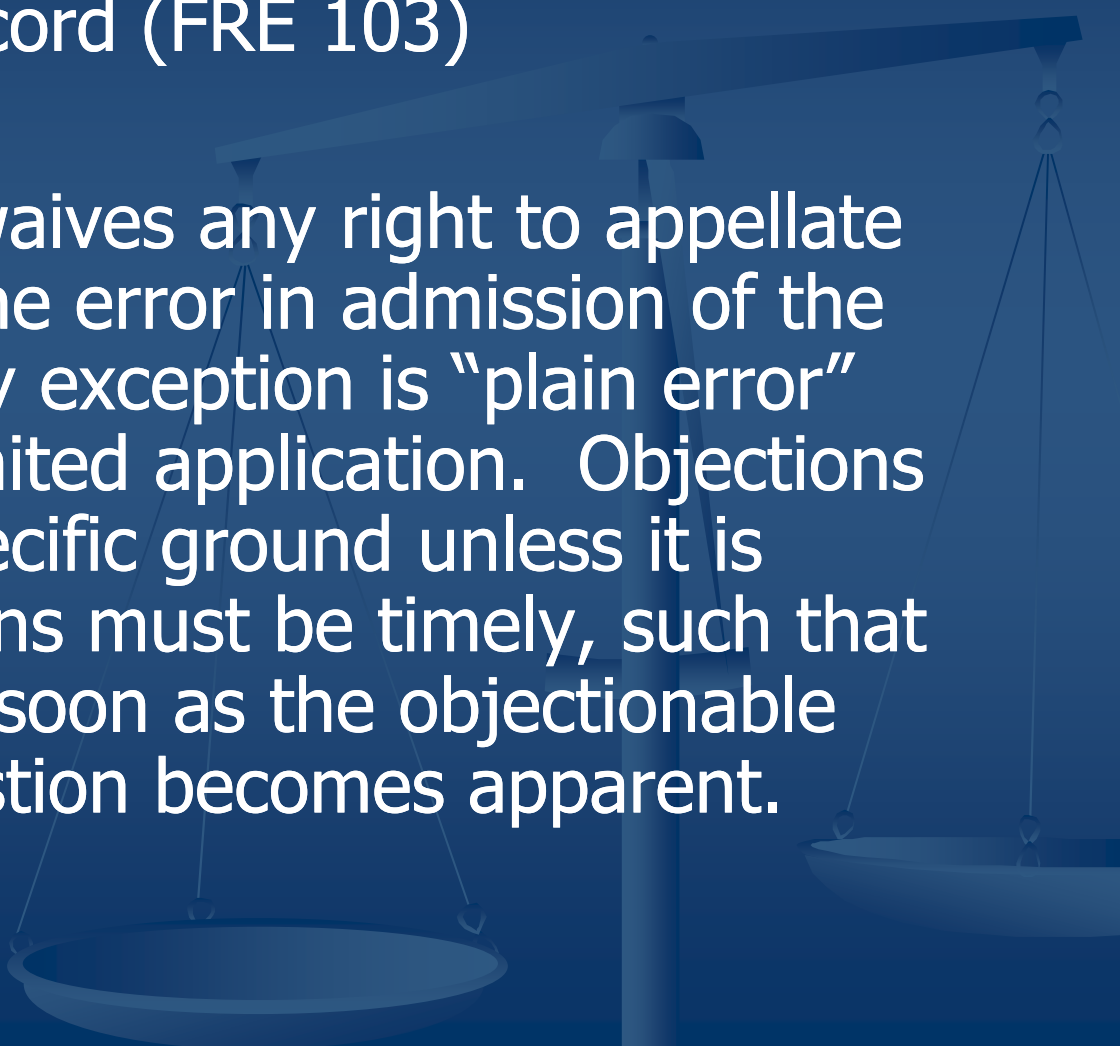
- To Exclude Prejudicial Evidence
Tie your objections to case theme and theory
- To Protect Your Witness



Reasons to Object

- To Protect the Record (FRE 103)

Failure to object waives any right to appellate consideration of the error in admission of the evidence. The only exception is “plain error” which has very limited application. Objections must state the specific ground unless it is obvious. Objections must be timely, such that they are made as soon as the objectionable nature of the question becomes apparent.



Protocol for Objecting

Making the Objection

- Stand up completely
- State the objection forcefully and concisely (no rambling objections): "Objection! - Hearsay"
- Listen to the opposing attorney's response
- Be prepared to argue the objection once recognized by the court. If opposing counsel has given a response to which you would like to respond, ask the judge for permission to respond: "may I respond" or "may I be heard"
- Argue to the court, not to opposing counsel
- Receive the court's ruling with professionalism

Protocol for Objecting

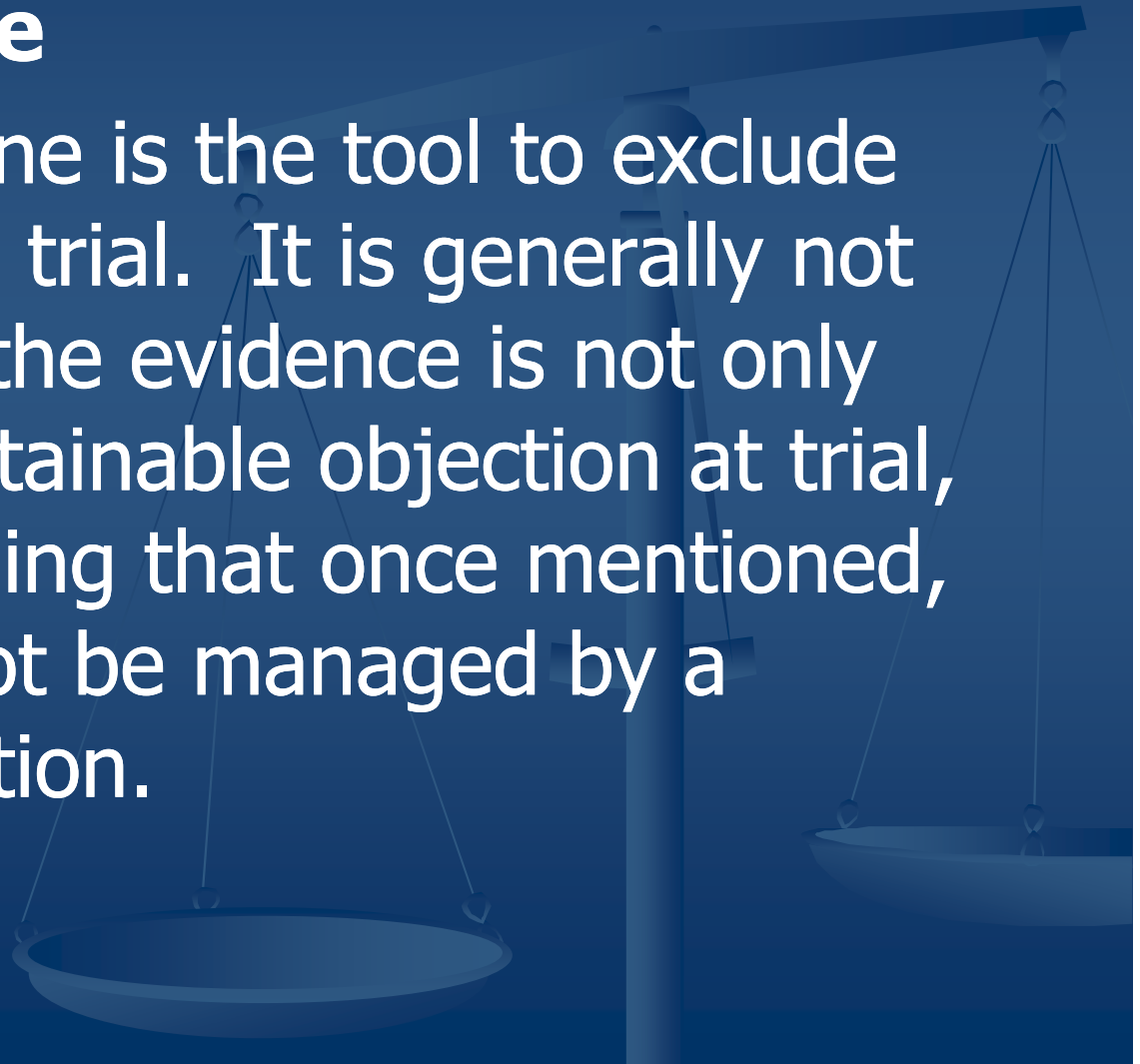
Meeting the Objection

- Ask the judge for the opportunity to respond, tactfully, but quickly before a ruling. Do not assume the court wants argument and just begin speaking
- Argue to the court, not counsel, by explaining why the objection is not valid
- With the exceptions of rephrasing leading, compound or vague questions, do not abandon your question just because there is an objection
- If the objection is sustained, consider making a conditional offer or offer of proof

Objecting Before Trial

Motion in Limine

- A motion in limine is the tool to exclude evidence before trial. It is generally not granted unless the evidence is not only subject to a sustainable objection at trial, but is so damaging that once mentioned, its impact cannot be managed by a sustained objection.



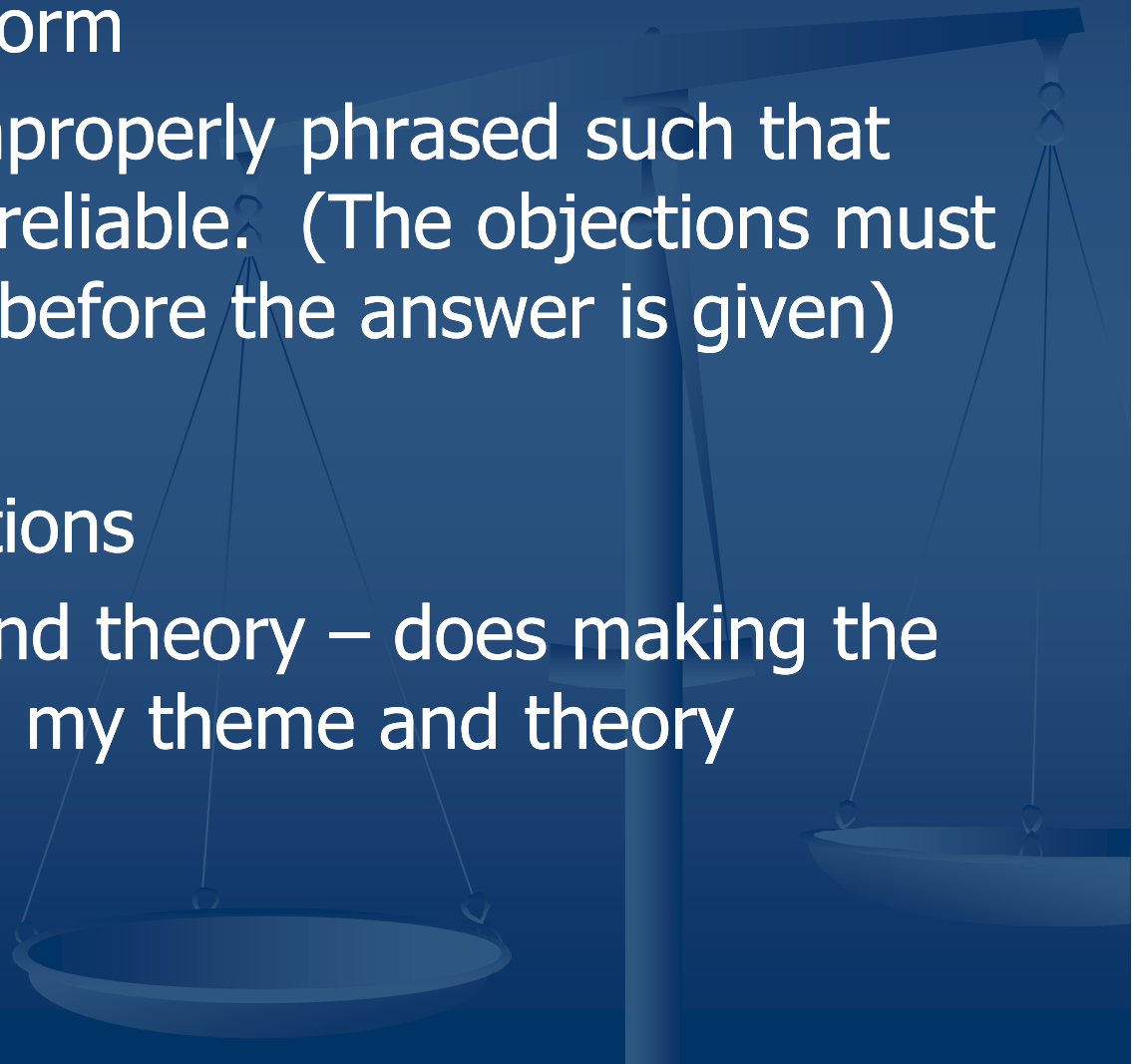
The 2 Categories of Objections

- Objections as to Form

The question is improperly phrased such that the answer is not reliable. (The objections must be timely – made before the answer is given)

- Evidentiary Objections

Focus on theme and theory – does making the objection promote my theme and theory



Objections as to Form

- **Leading** (FRE 611)

The question suggests the answer and is objectionable on direct.

Response: Foundational / Special witness (young, old, infirm, hostile) / Rephrase.

- **Compound**

The question is two separate questions.

Response: OK if the 2 questions have a relationship or rephrase.

Objections as to Form

- **Vague**

The question is likely to get an ambiguous answer

Response: Rephrase.

- **Argumentative**

Asks the witness to accept questioner's conclusion rather than provide a fact.

Response: If it's not argumentative, explain how it calls for a fact.

Objections as to Form

- **Narrative**

Applies to questions and answers. Witnesses are required to answer questions, not give speeches.

Response: Break it up. But some complex issues require longer answers.

- **Asked and Answered**

You may not repeat a question to a witness.

Response: Explain how the question is a variation of the previous question or rephrase to get to the new information.

Objections as to Form

- **Facts Not in Evidence**

You may not include, as a predicate to a question, a fact that is not proven. To do so is unfair because it requires the witness to admit an unproven assumption in order to answer the question.

Response: Establish the fact not in evidence by a question.

- **Non-responsive**

You may move to strike an answer that does not respond to the question.

Response: Explain how the answer was in fact responsive.

Evidentiary Objections

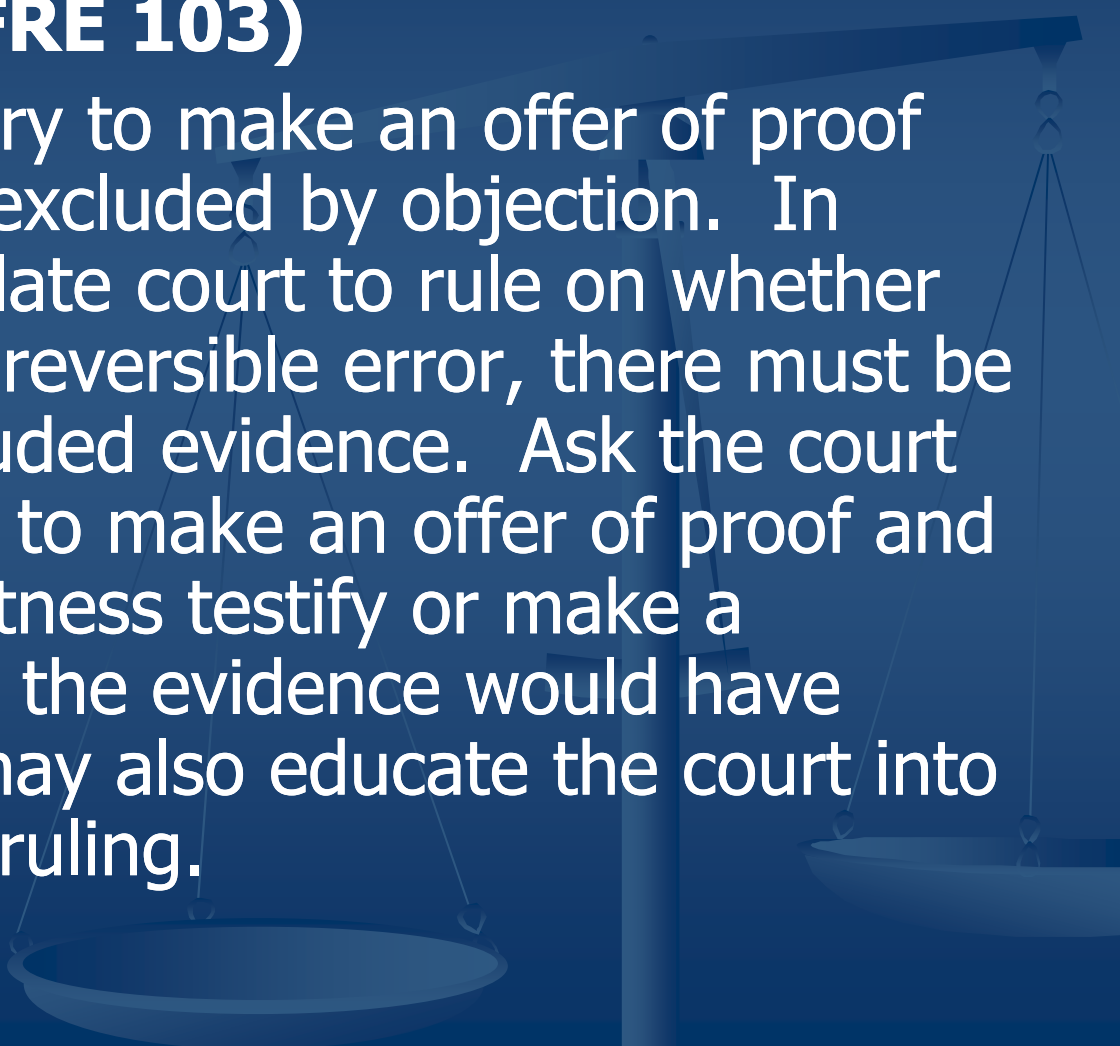
The Big 3

- Relevance (FRE 401, 402)
Does the testimony make a fact at issue more or less likely?
- Foundation
Does this witness have the basis to talk about this?
(Foundation, Speculation, Improper Lay Opinion (FRE 701) & Lack of Personal Knowledge (FRE 602))
- Hearsay (FRE 801 c)
Is this an out of court statement offered to prove the truth of the matter asserted?

Special “Offers”

- **Offer of Proof (FRE 103)**

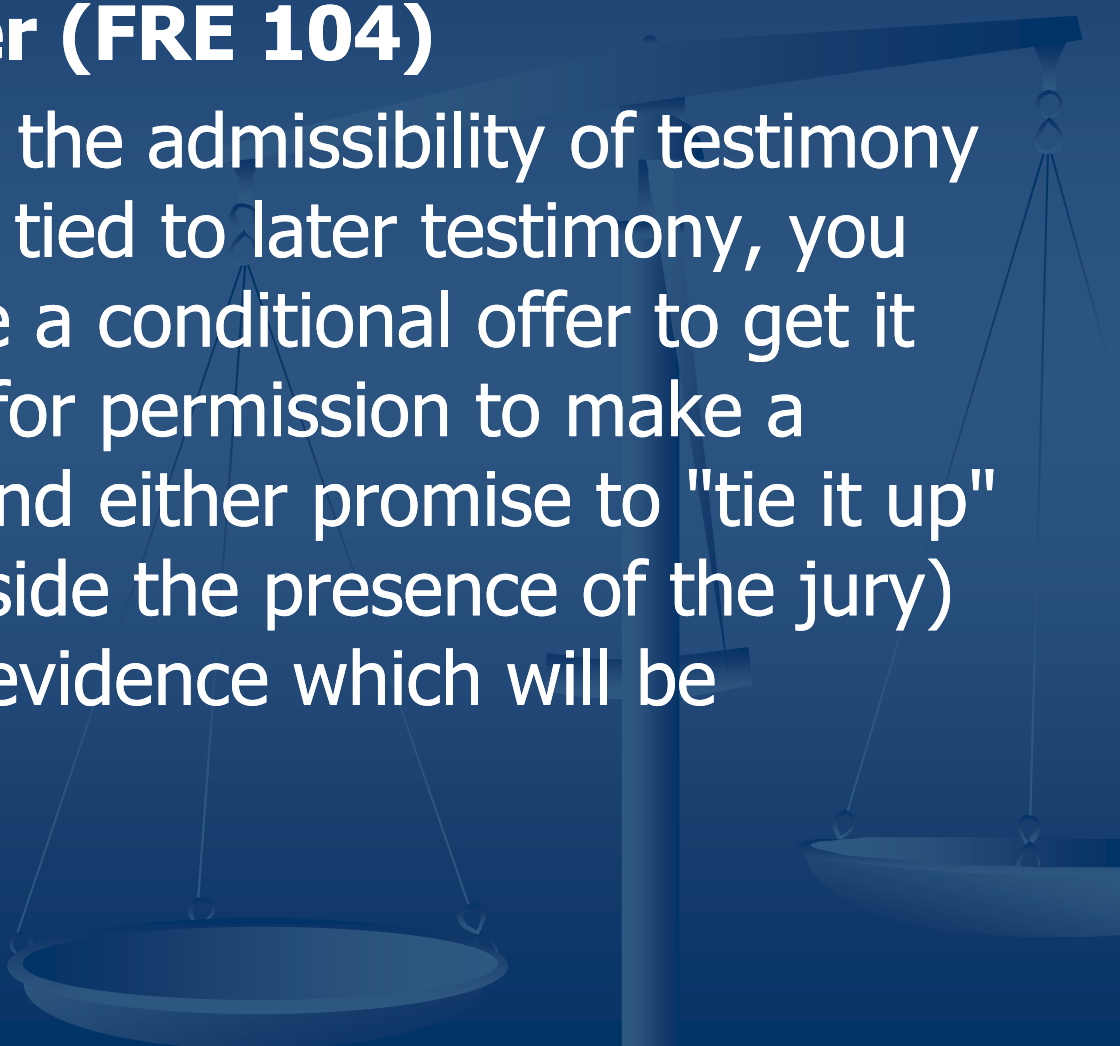
It may be necessary to make an offer of proof when evidence is excluded by objection. In order for an appellate court to rule on whether the exclusion was reversible error, there must be record of the excluded evidence. Ask the court for an opportunity to make an offer of proof and either have the witness testify or make a statement of what the evidence would have been. The offer may also educate the court into reversing its prior ruling.



Special “Offers”

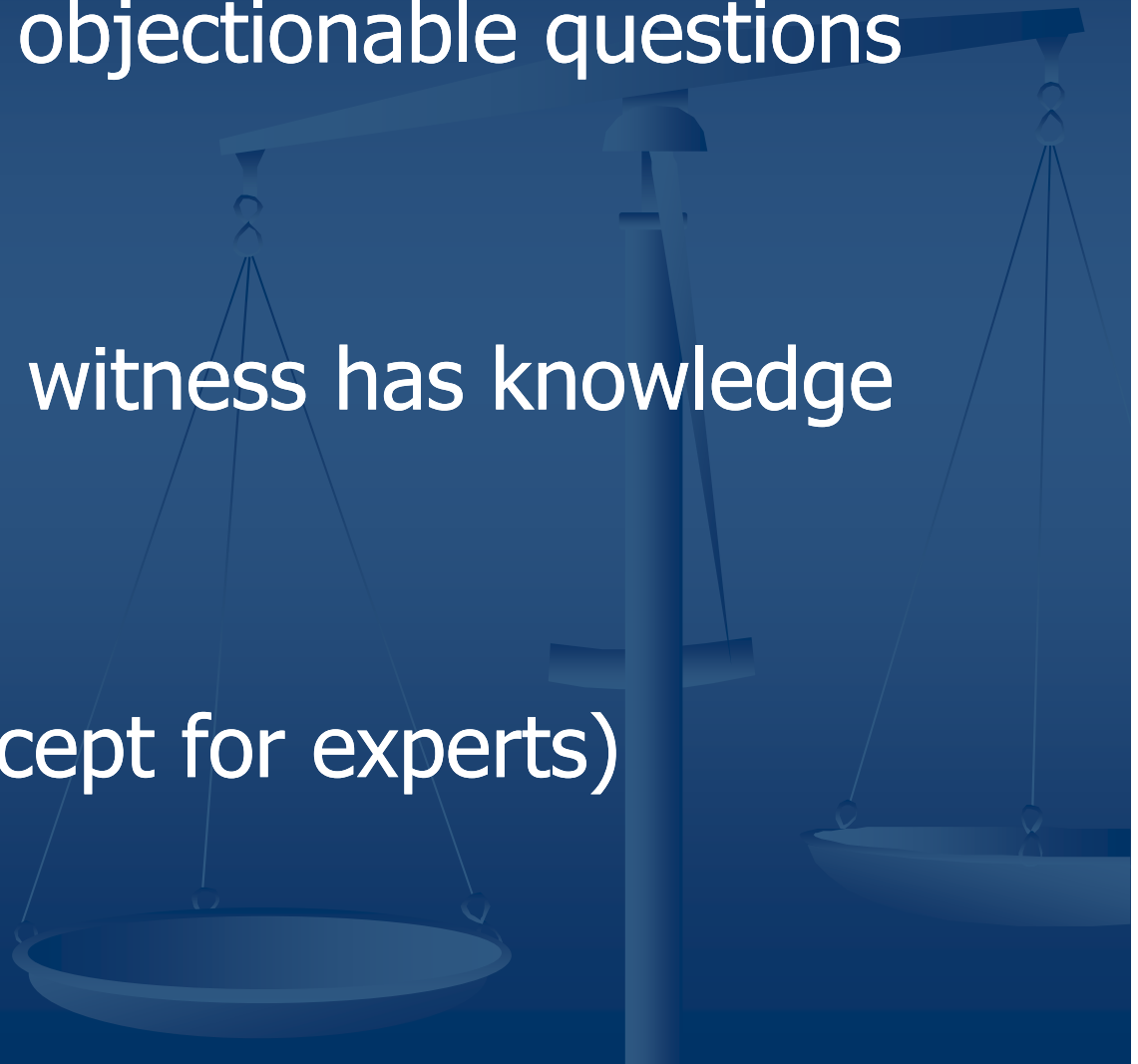
- **Conditional Offer (FRE 104)**

To the extent that the admissibility of testimony you are eliciting is tied to later testimony, you may need to make a conditional offer to get it in. Ask the court for permission to make a conditional offer and either promise to "tie it up" later or state (outside the presence of the jury) the nature of the evidence which will be introduced later.



Avoid Objections

- To avoid asking objectionable questions ask, is this
 1. A fact
 2. Of which the witness has knowledge
- Stay away from
 1. Conclusions
 2. Opinions (except for experts)



Part 5: Exhibits

- Introduce an exhibit to promote your theme and theory or to detract from the other side's
- Use the exhibit once introduced
- All exhibits have a
 - Preliminary Foundation
 - Specific Substantive Foundation
 - Ex: photo, object, document, diagram

Preliminary Foundation



- 1. Introduce the topic
 - 2. May I approach the witness
 - 3. Show to opposing counsel
 - 4. Hand and ID “marking” to the witness
 - 5. Ask the witness if she/he recognizes it
 - 6. Ask the witness what it is
-
- Then move on to specific substantive foundation for that particular type of exhibit

The Full Foundation

- 1. Introduce the topic
- 2. May I approach the witness (assume its pre-marked or mark it)
- 3. Show to opposing counsel
- 4. Hand and ID “marking” to the witness
- 5. Ask the witness is she/he recognizes it
- 6. Ask the witness what it is

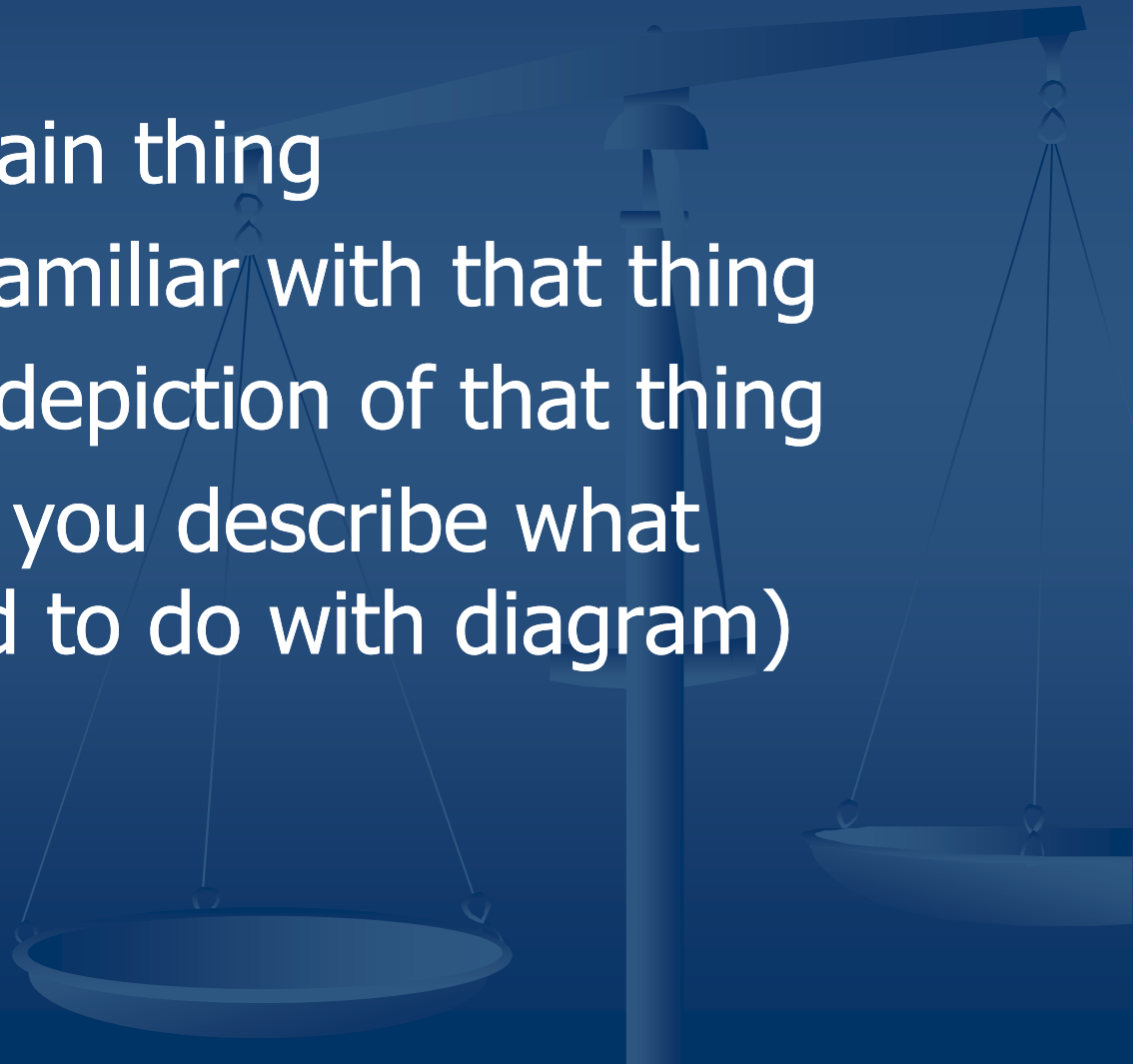
- 7. **Complete the substantive foundation**
 - (Red Book Ch. 22-F; real, demonstrative, and documentary)

- 8. Move to Admit (be prepared to argue foundation)
- 9. Publish it
- 10. Use it / Talk about it

Substantive Step 7

Example: Diagram or Photo

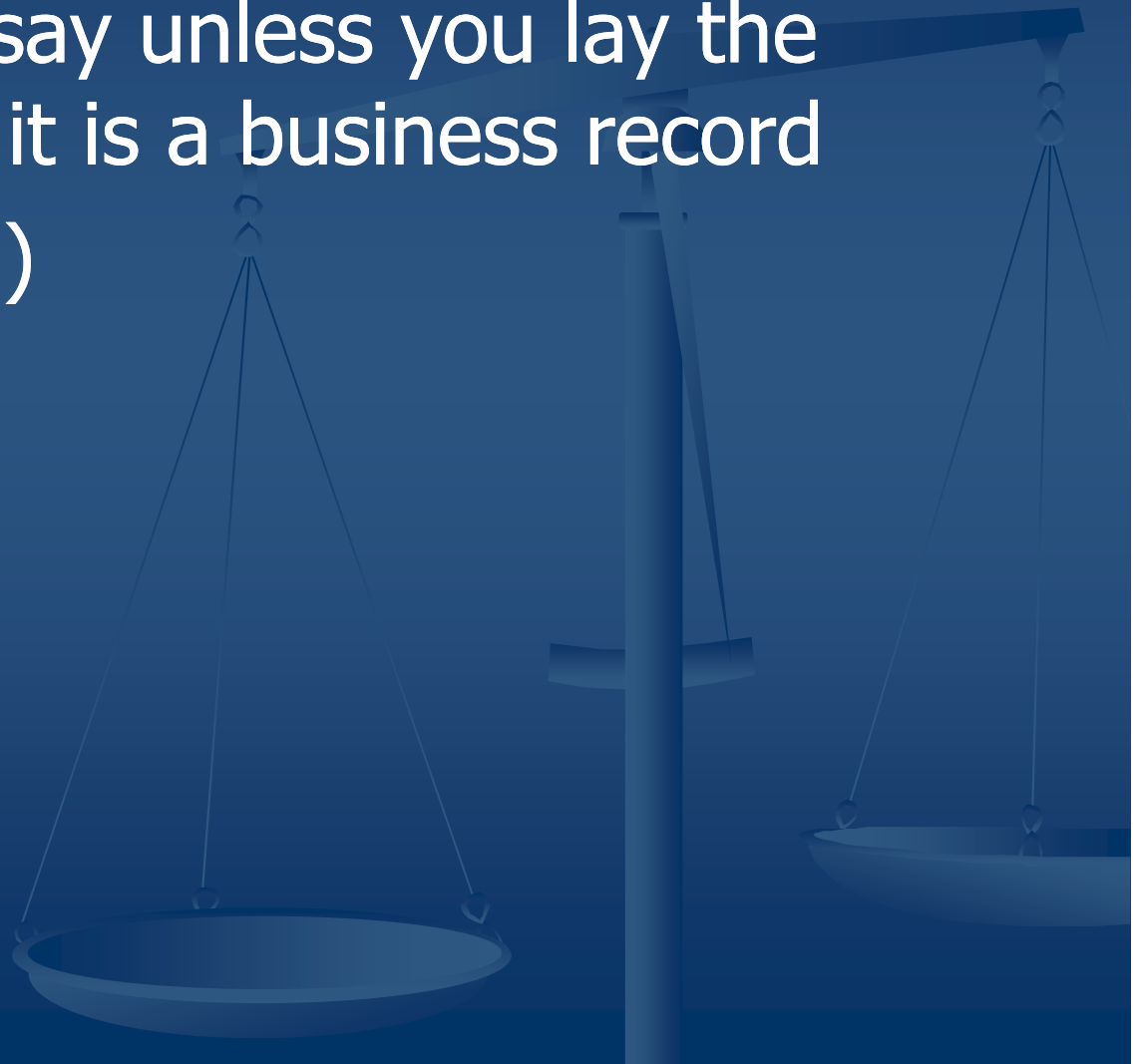
- It depicts a certain thing
- The witness is familiar with that thing
- Its an accurate depiction of that thing
- Would this help you describe what happened (good to do with diagram)



Substantive Step 7

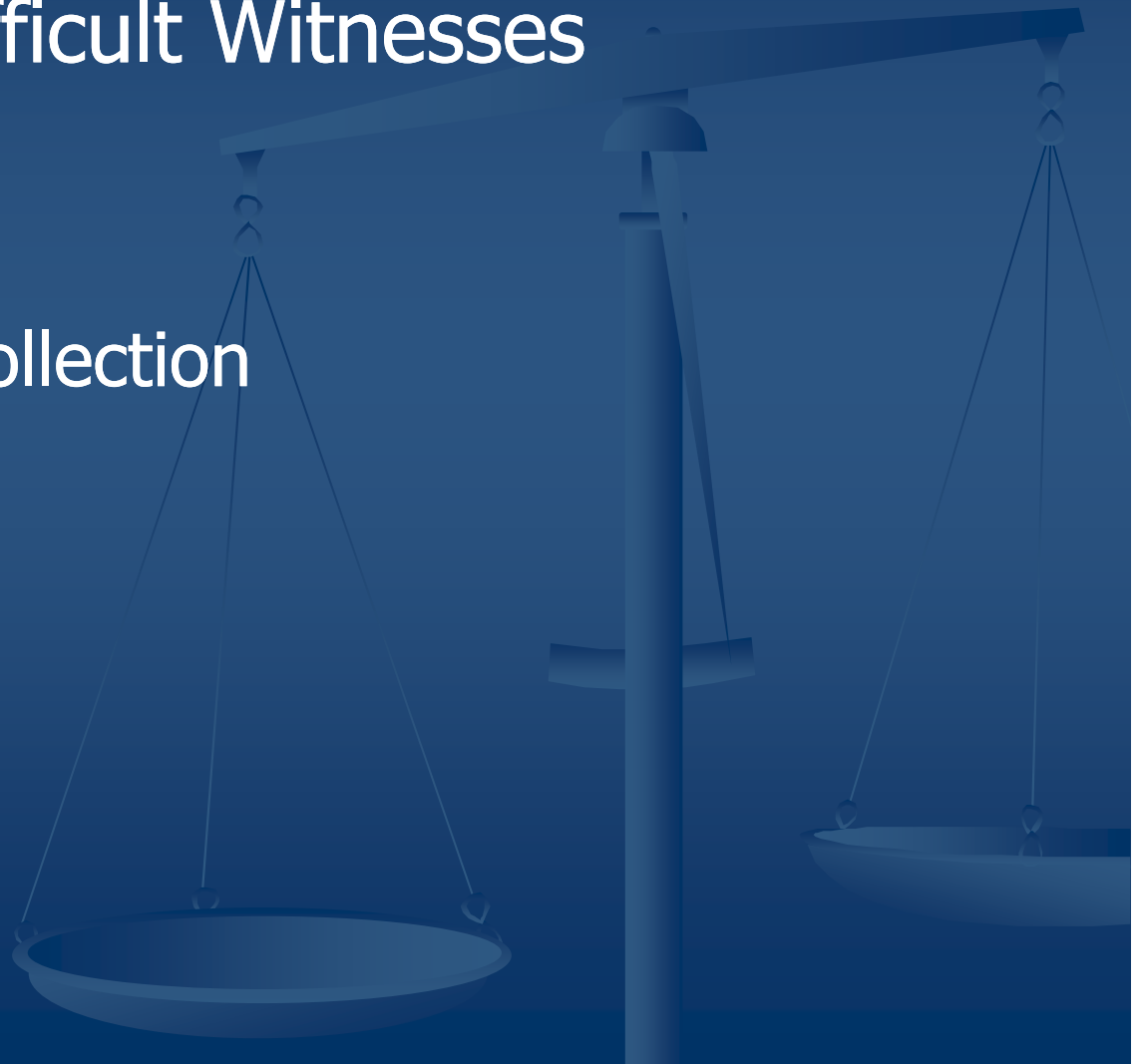
Example: A Report

- A report is hearsay unless you lay the foundation that it is a business record
- Fed Rule 803 (6)

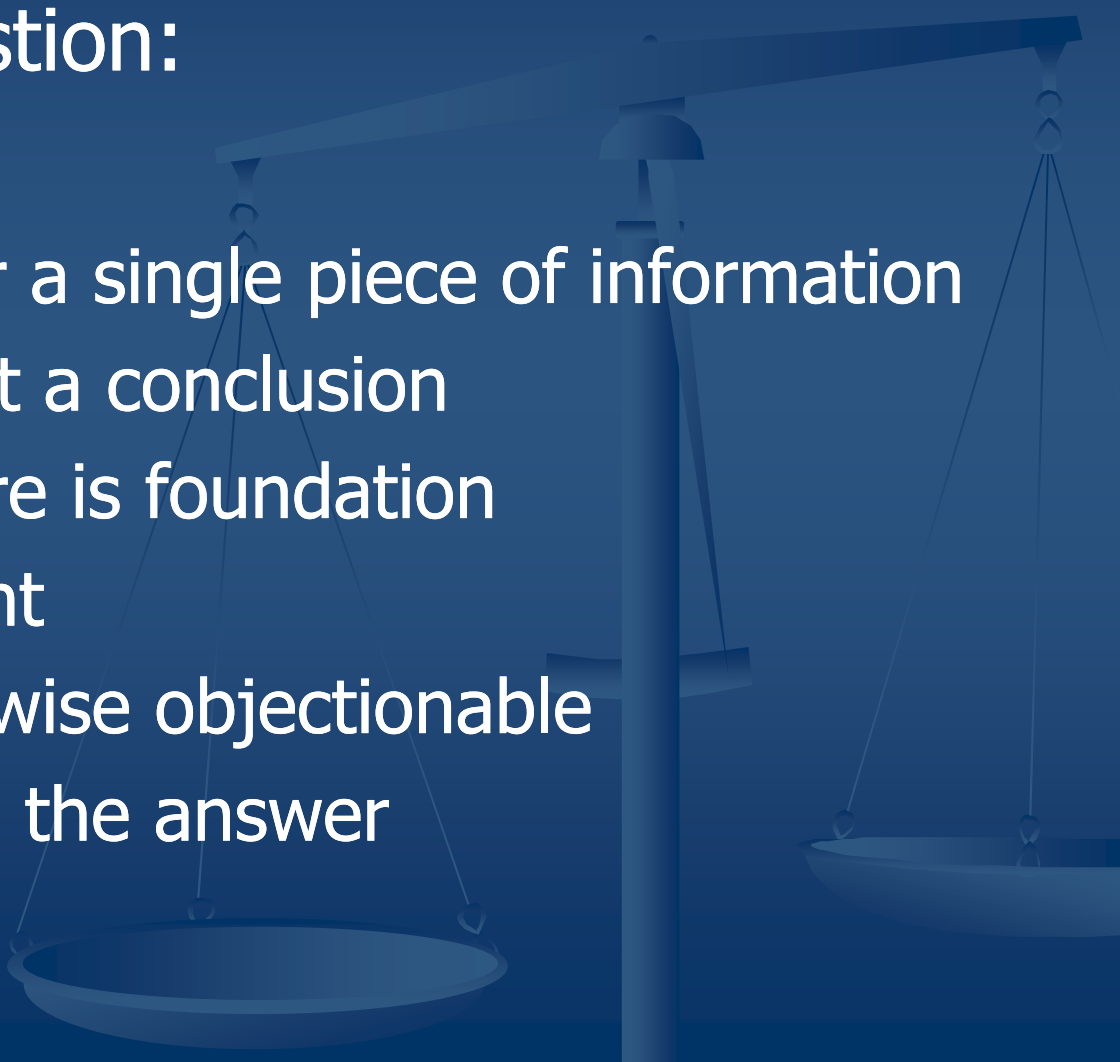


Part 6

- Dealing with Difficult Witnesses
 - Generally
 - Impeachment
 - Refreshing Recollection

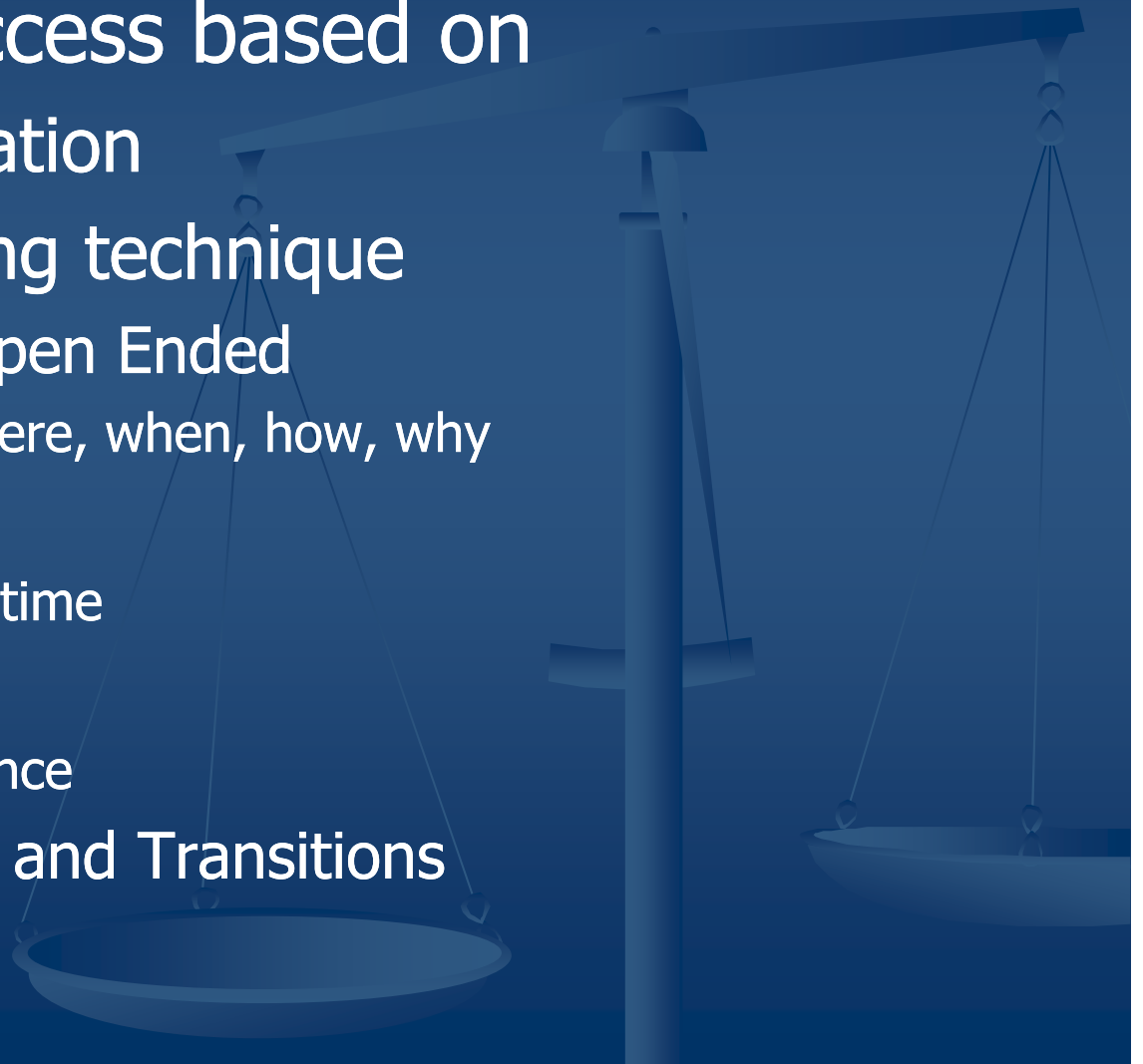


Good Questions Get Good Answers

- Test your question:
 1. Does it call for a single piece of information
 2. It is a fact, not a conclusion
 3. For which there is foundation
 4. That is relevant
 5. It is not otherwise objectionable
 6. And you know the answer
- 

Question Form and Organization

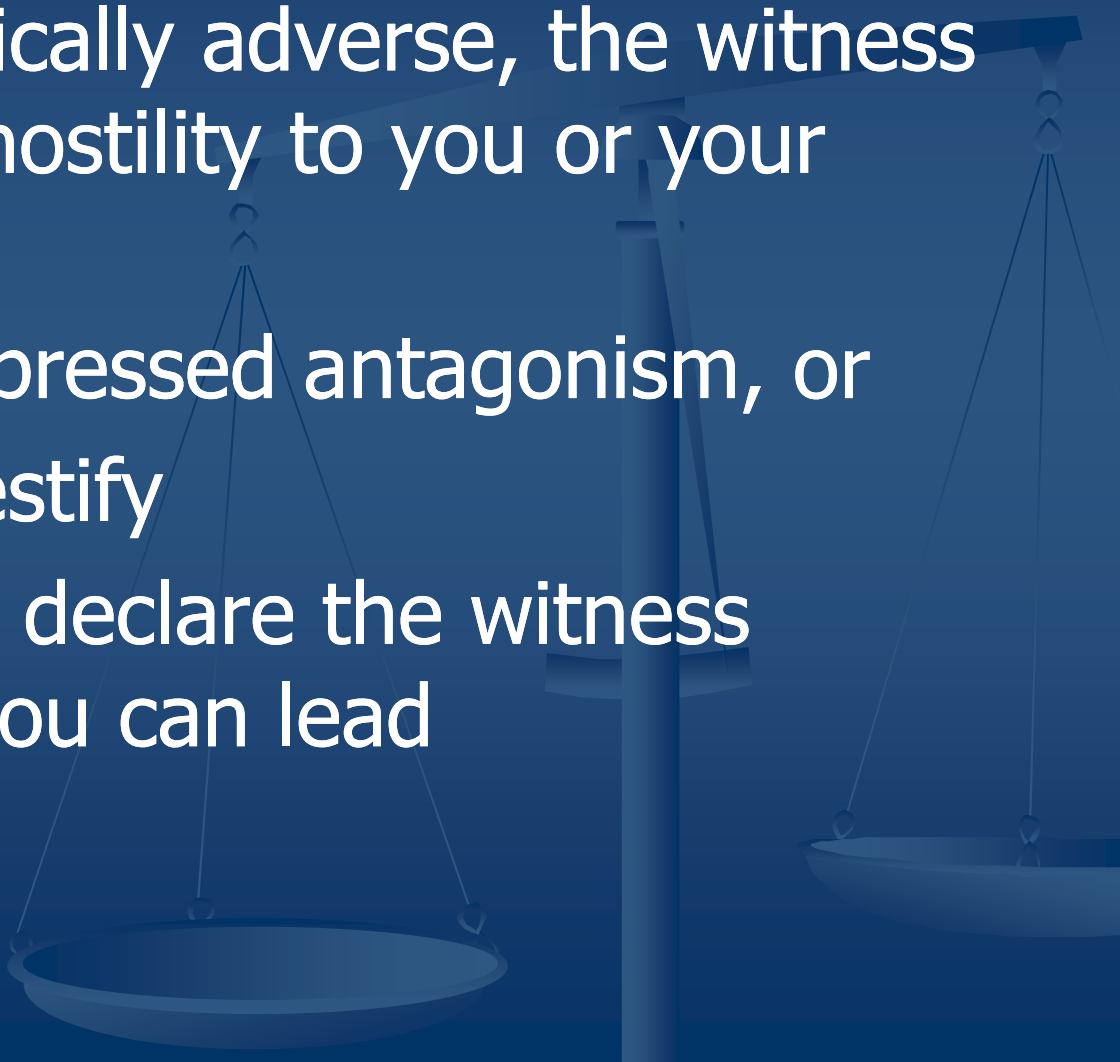
- Direct exam success based on
 - Witness preparation
 - Good questioning technique
 - Simple Short Open Ended
 - who, what where, when, how, why
 - Incremental
 - One step at a time
 - Linear
 - In time sequence
 - Use Headnotes and Transitions



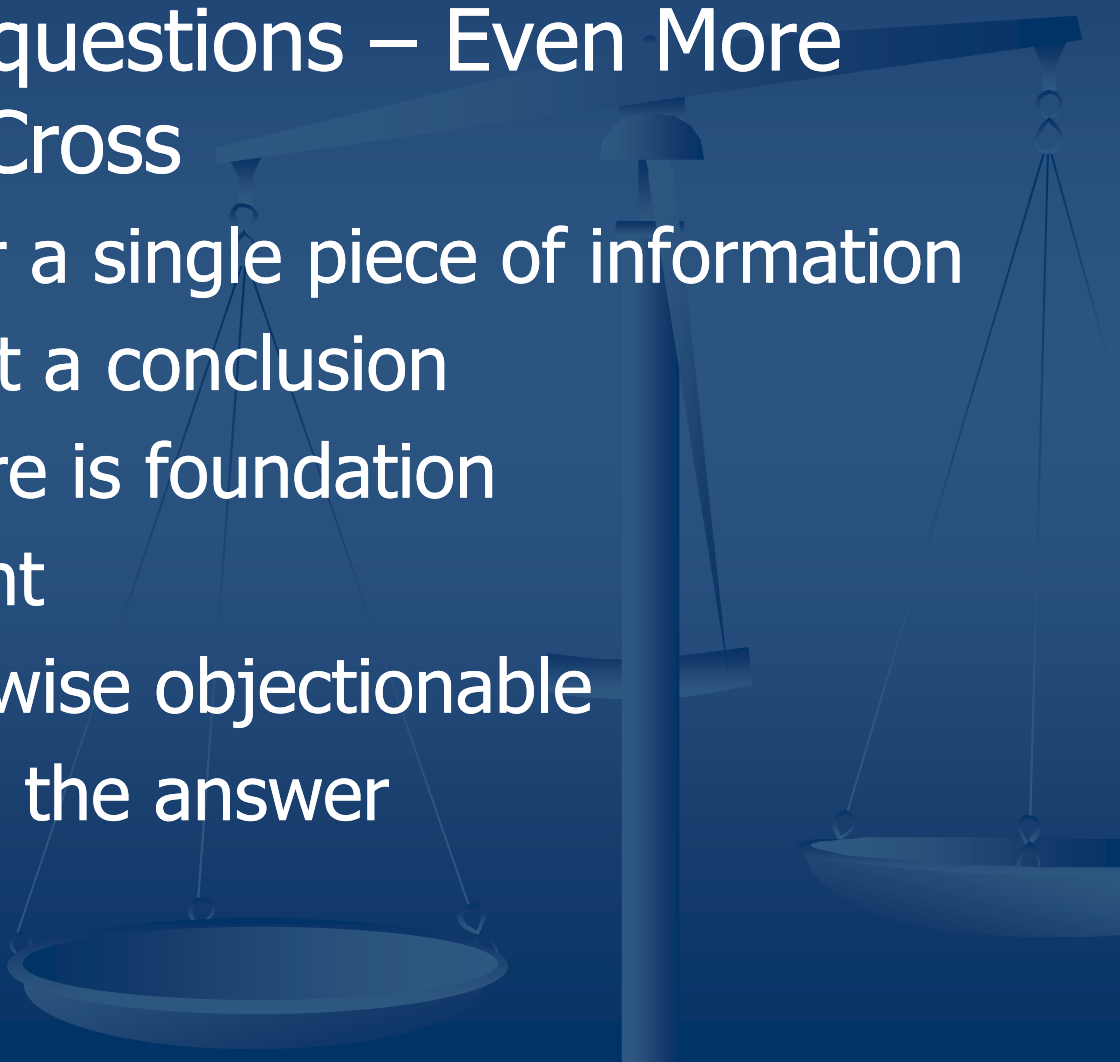
Adverse Witness Direct Exam

- Adverse Witness
 - Opposing party and those “identified” with opposing party
 - “Identified” include employees, relatives, business partners where there is a community of interest
 - Up to the court whether sufficiently identified
- Rule 611 (c) allows leading
- Alert the court you are calling an adverse witness
- Use sparingly

Hostile Witness

- While not technically adverse, the witness displays actual hostility to you or your client
 - As shown by expressed antagonism, or
 - Reluctance to testify
 - Ask the court to declare the witness hostile so that you can lead
- 
- A faint, stylized image of a scale of justice is visible in the background of the slide. The scale is positioned on the right side, with its central pillar and two pans hanging from a horizontal beam. The image is rendered in a light blue color, matching the overall theme of the slide.

Cross Exam

- Same test for questions – Even More Important on Cross
 1. Does it call for a single piece of information
 2. It is a fact, not a conclusion
 3. For which there is foundation
 4. That is relevant
 5. It is not otherwise objectionable
 6. And you know the answer
- 

Cross Technique



- Short
- ALWAYS LEADING!!
- Incremental – one small easy to agree to fact at a time
- Use Headnotes on Cross too
 - Its OK that the witness knows where you are going with this
 - They are agreeing to talk about this point

Witness Control



- Comes from

- Pace you have established with good questioning technique

and

- Authority you demonstrate by your behavior

Establishing Authority

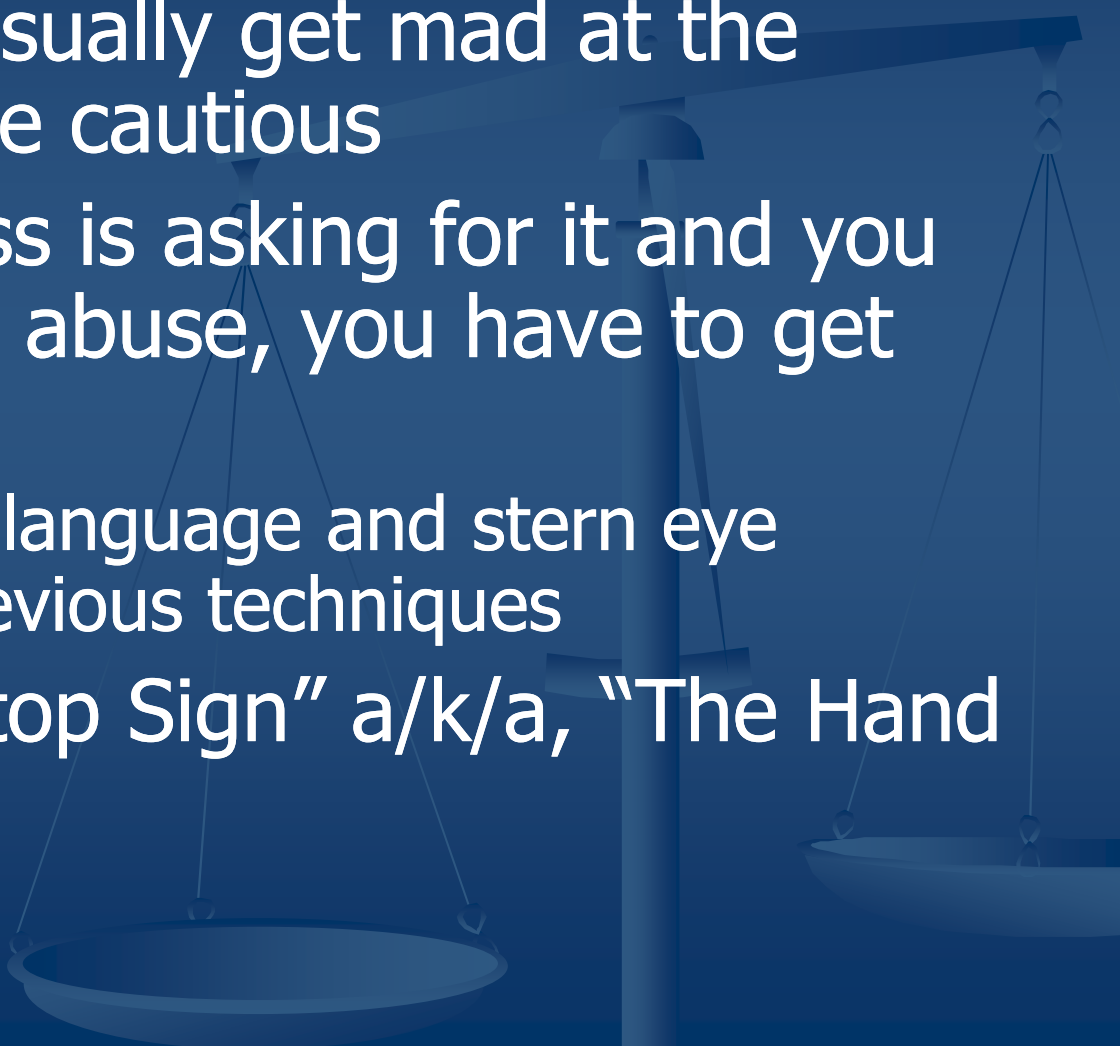
- Its not about you – its about the process and the information. Don't personalize it
- Do not lower yourself and fight with the witness – juries are not impressed and judges can't stand you
- Exhaust reasonable dispassionate responses / techniques before you
 - Get tough, or
 - Last resort, go to the Judge

Techniques

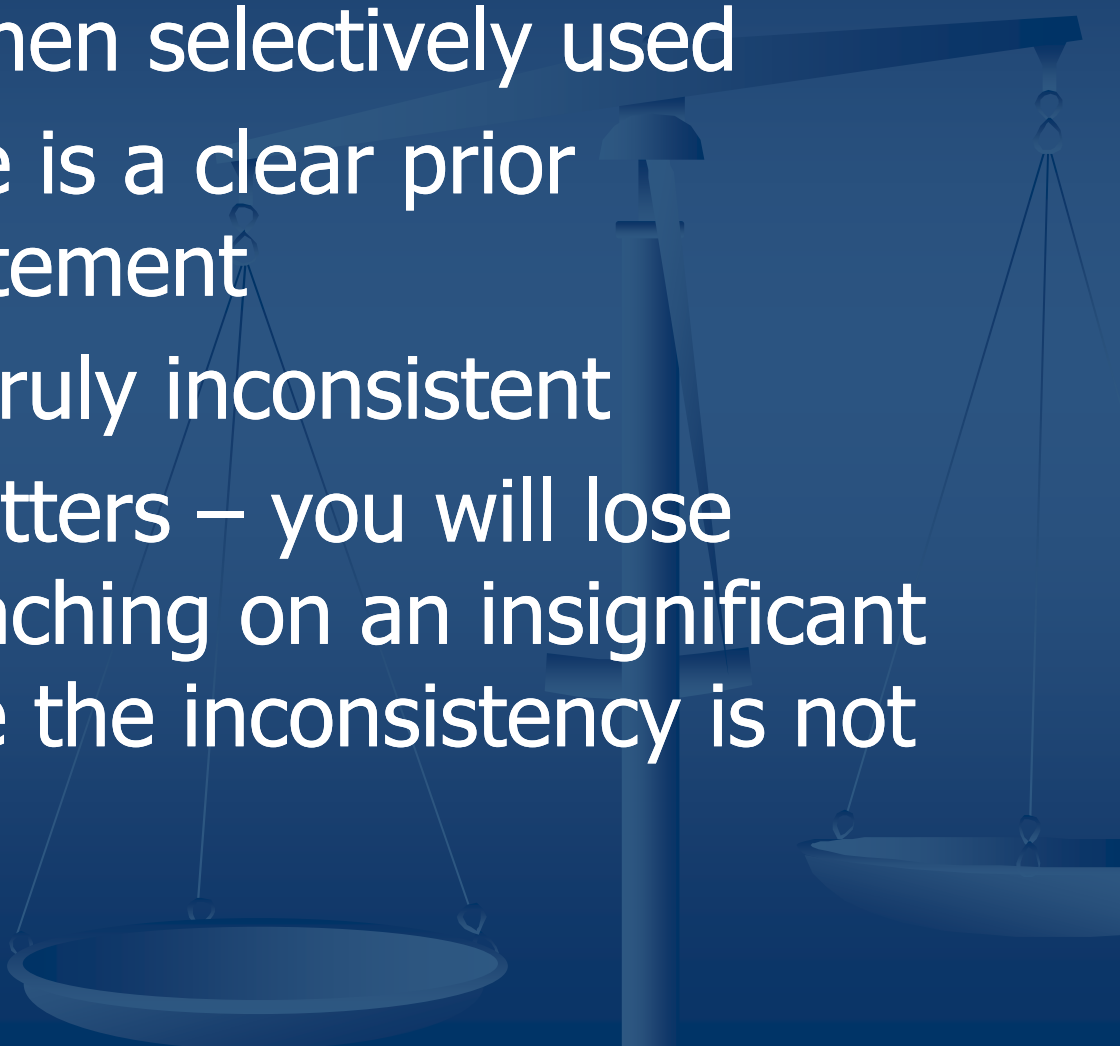


- Non Responsive answers
 - Patiently repeat and say, my questions was....
- Qualified, “yes, but...” answers
 - So the answer to my question was yes
 - Consider moving to strike non-responsive portion
- Consider taking a walk until he/she is done babbling
 - As if to say, “are you done now so we can get to work?”
- Explain you can talk about that later with your lawyer

Interruption

- The judge will usually get mad at the lawyer first so be cautious
 - But if the witness is asking for it and you just keep taking abuse, you have to get tough
 - Use tone, body language and stern eye contact with previous techniques
 - Consider the “Stop Sign” a/k/a, “The Hand of God”
- 

Impeachment

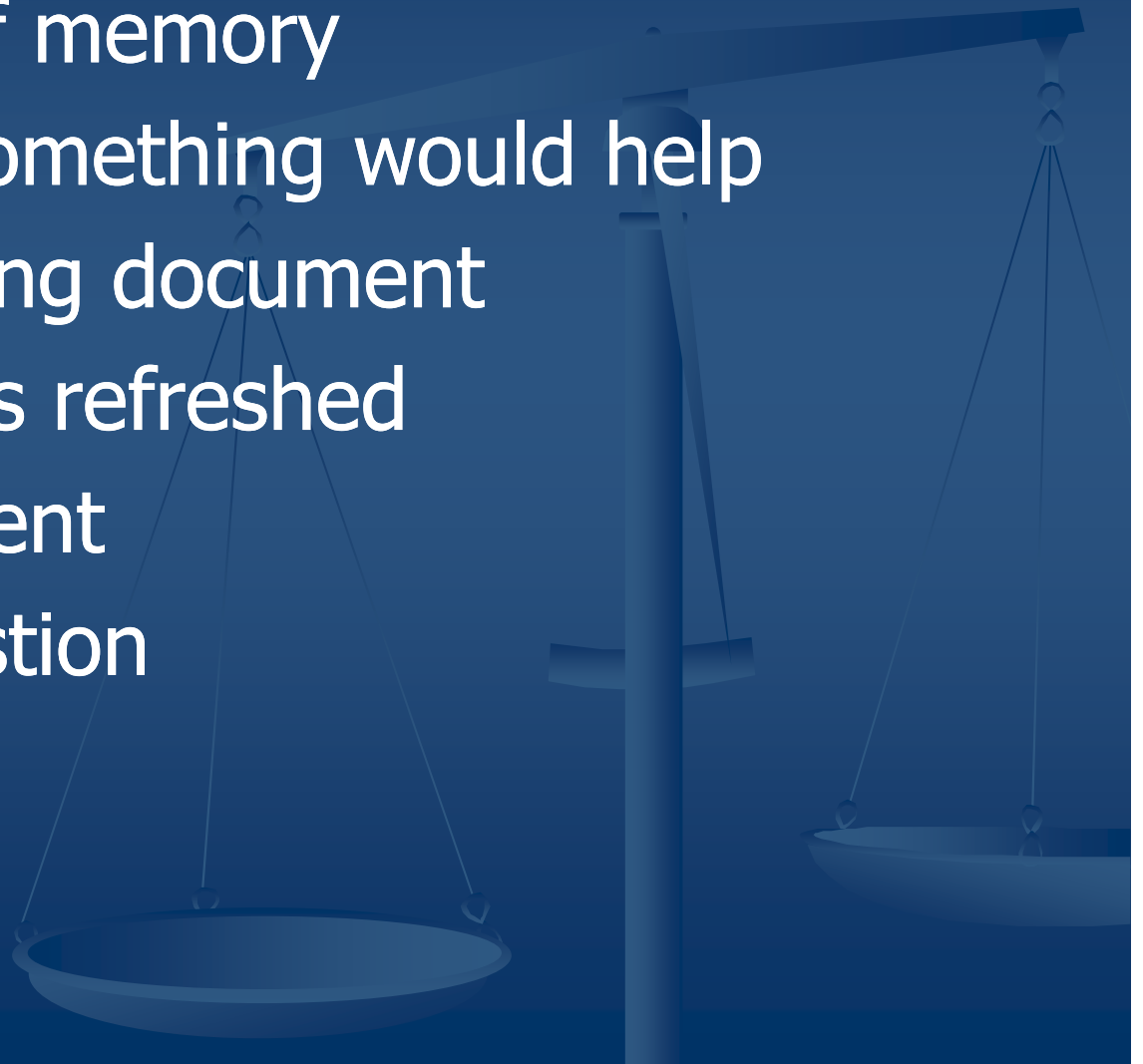
- Powerful tool when selectively used
 - Best when there is a clear prior inconsistent statement
 - Make sure it is truly inconsistent
 - Make sure it matters – you will lose credibility impeaching on an insignificant matter or where the inconsistency is not clear
- 

Impeachment Technique

- Clear and Quick (but don't race)
- Make sure everyone sees the 3 parts of impeachment – the 3 Cs
- Distinguish them with your tone of voice and inflection
 - Confirm (Its your testimony that...)
 - Tone: Incredulous
 - Close off (You remember...)
 - Tone: Technical
 - Confront (It says...)
 - Tone: Stern, Authoritarian, Confining

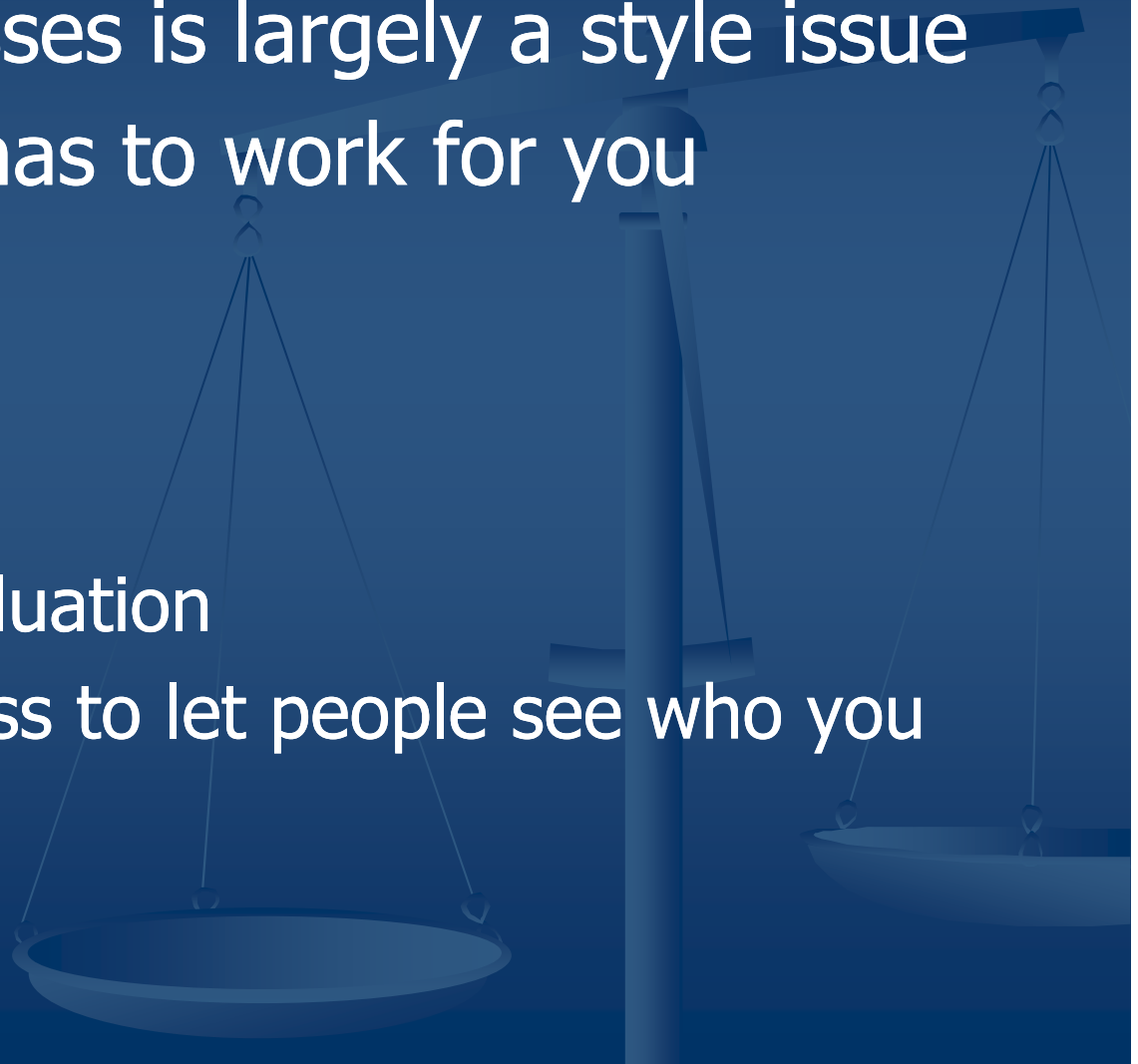
Refreshing Recollection

- Establish lack of memory
- Establish that something would help
- Provide refreshing document
- Ask if memory is refreshed
- Remove document
- Re-ask the question



Style

- Handling witnesses is largely a style issue
- The technique has to work for you
- Find your voice
 - It takes time
 - Practice
 - Honest self evaluation
 - And a willingness to let people see who you are



Are You Ready to
Go to Court Now?

