



The Guardian and the Trial

Preparing Yourself to Testify and Be Cross Examined

Megan Hunt Dell

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Trial is Set!

(Err, Now What?)

- Stand-by Date vs. Date Certain
 - A, B, Cs?
- Do I need a lawyer?
- Phone a friend
 - When in doubt, ask!





DEADLINES



I. Statutory

- a. 20 Days
- b. 10 Days
 - i. How to?
- c. What happens if not submitted timely?

II. Mandatory

- a. Motions
 - i. Fee Cap
 - ii. Pre-payment of experts or costs
 - iii. Trial retainer
 - iv. Notice to parties/attorneys
 - v. Is there something you need the Court to do
 - vi. 365-day Rule!!! (it often sucks)

III. Practical

- a. Be your own timekeeper – Find the holes!
 - i. More info needed?
 - ii. Records deadlines
 - iii. Subpoena timeline

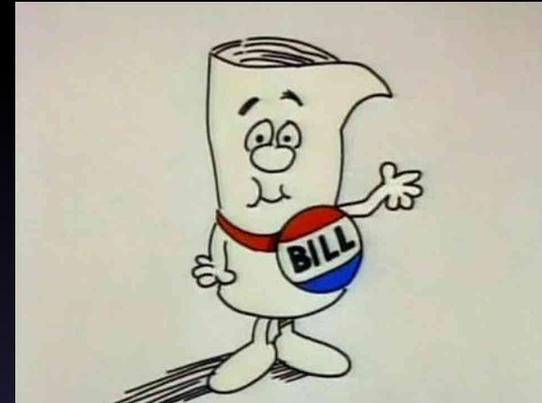


WRITE YOUR REPORT



Statutory Basics

- Read and Re-Read the Statute
- Listing The Witnesses
 - Sample format in materials
- “accurate current information”
- “relevant to matters pending before the Court”



Substantive Investigation

INDEPENDENT
BALANCED
IMPARTIAL



INDEPENDENT

DEFINITION

Independent: Free from outside control; not depending on another.

Hypotheticals:

Parent alleges that He/She has been primary parent and cites having taken Child to all medical appointments and provides some records but not all. What do you do?

Parent alleges that Child's grades have increased/decreased as the result of the current custody arrangement and provides current school records. What do you do?



Hermey: Hey, what do you say we both be independent together, huh?

BALANCE

DEFINITION

Balance: taking everything into account; fairly judged or presented.

- Know the difference between “equal” and “equitable”
- More complex than keeping mathematical score

Hypothetical:

Teenage Child and Parent have fight. Parent asks that GAL talk to Third Party who was present for fight.

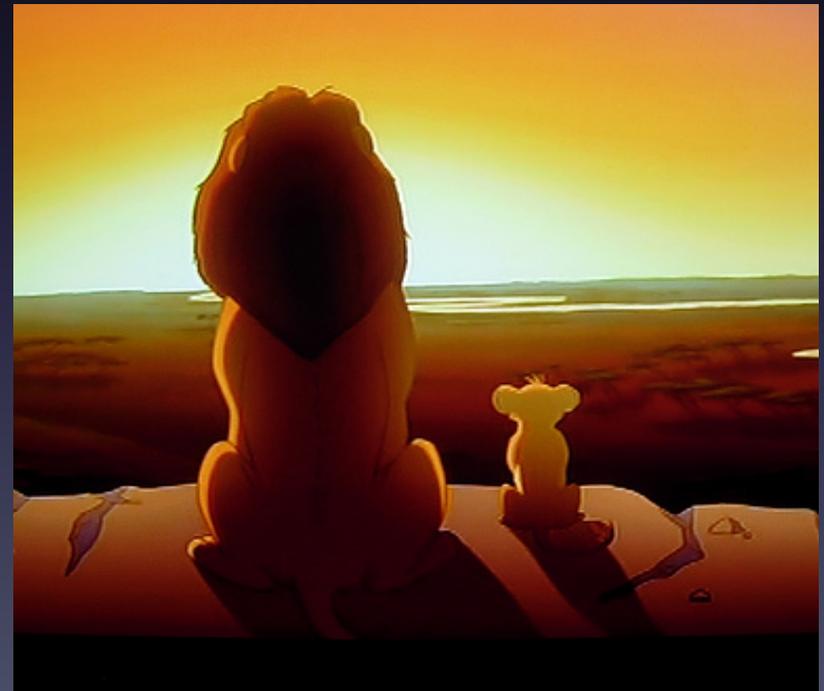
Would you talk to the Third Party? Why or why not?

What if there is no dispute that the fight occurred?

What if Third Party is Parent’s best friend?

Mufasa: Everything you see exists together in a delicate balance. As king, you need to understand that balance and respect all the creatures, from the crawling ant to the leaping antelope.

Young Simba: But, Dad, don't we eat the antelope?



IMPARTIAL

DEFINITION

Impartial: Treating all disputants fairly/equally;
treating all disputes (equitably, equal, equatable)



1. Taking reasonable steps to investigate each claim the parties made against the other as relates to the children.
2. **Beware of the Tiger Trap: BIAS**
 - Throughout your investigation, you should be questioning yourself on whether you are being biased – not just whether you are showing bias, but whether it is happening in your head

BIAS?!

Who me?!

Biased?!!!

PFFFFFFT!

IMPOSSIBLE!

INCONCEIVABLE!

.....Except
not really.

Because we are
human!

20 COGNITIVE BIASES THAT SCREW UP YOUR DECISIONS

1. Anchoring bias.

People are **over-reliant** on the first piece of information they hear. In a salary negotiation, whoever makes the first offer establishes a range of reasonable possibilities in each person's mind.



2. Availability heuristic.

People **overestimate** the **importance** of information that is available to them. A person might argue that smoking is not unhealthy because they know someone who lived to 100 and smoked three packs a day.



3. Bandwagon effect.

The probability of one person adopting a belief increases based on the number of people who hold that belief. This is a powerful form of **groupthink** and is reason why meetings are often unproductive.



4. Blind-spot bias.

Failing to recognize your own cognitive biases is a bias in itself. People notice cognitive and motivational biases much more in others than in themselves.



5. Choice-supportive bias.

When you choose something, you tend to feel positive about it, even if that **choice has flaws**. Like how you think your dog is awesome — even if it bites people every once in a while.



6. Clustering illusion.

This is the tendency to **see patterns in random events**. It is key to various gambling fallacies, like the idea that red is more or less likely to turn up on a roulette table after a string of reds.



7. Confirmation bias.

We tend to listen only to information that confirms our **preconceptions** — one of the many reasons it's so hard to have an intelligent conversation about climate change.



8. Conservatism bias.

Where people favor prior evidence over new evidence or information that has emerged. People were **slow to accept** that the Earth was round because they maintained their earlier understanding that the planet was flat.



9. Information bias.

The tendency to **seek information when it does not affect action**. More information is not always better. With less information, people can often make more accurate predictions.



10. Ostrich effect.

The decision to **ignore dangerous or negative information** by "burying" one's head in the sand, like an ostrich. Research suggests that investors check the value of their holdings significantly less often during bad markets.



11. Outcome bias.

Judging a decision based on the **outcome** — rather than how exactly the decision was made in the moment. Just because you won a lot in Vegas doesn't mean gambling your money was a smart decision.



12. Overconfidence.

Some of us are **too confident about our abilities**, and this causes us to take greater risks in our daily lives. Experts are more prone to this bias than laypeople, since they are more convinced that they are right.



13. Placebo effect.

When **simply believing** that something will have a certain effect on you causes it to have that effect. In medicine, people given fake pills often experience the same physiological effects as people given the real thing.



14. Pro-innovation bias.

When a proponent of an innovation tends to **overvalue its usefulness** and undervalue its limitations. Sound familiar, Silicon Valley?



15. Recency.

The tendency to weigh the **latest information** more heavily than older data. Investors often think the market will always look the way it looks today and make unwise decisions.



16. Saliency.

Our tendency to focus on the **most easily recognizable features** of a person or concept. When you think about dying, you might worry about being mauled by a lion, as opposed to what is statistically more likely, like dying in a car accident.



17. Selective perception.

Allowing our expectations to **influence how we perceive** the world. An experiment involving a football game between students from two universities showed that one team saw the opposing team commit more infractions.



18. Stereotyping.

Expecting a group or person to have certain qualities without having real information about the person. It allows us to quickly identify strangers as friends or enemies, but people tend to **overuse and abuse** it.



19. Survivorship bias.

An error that comes from focusing only on surviving examples, causing us to **misjudge a situation**. For instance, we might think that being an entrepreneur is easy because we haven't heard of all those who failed.



20. Zero-risk bias.

Sociologists have found that **we love certainty** — even if it's counterproductive. Eliminating risk entirely means there is no chance of harm being caused.



SOURCES: Brain Biases; Ethics Unwrapped; Explorable; Harvard Magazine; HowStuffWorks; LearnVest; Outcome bias in decision evaluation, Journal of Personality and Social Psychology; Psychology Today; The Bias Blind Spot: Perceptions of Bias in Self versus Others, Personality and Social Psychology Bulletin; The Cognitive Effects of Mass Communication, Theory and Research in Mass Communications; The less-is-more effect: Predictions and tests, Judgment and Decision Making; The New York Times; The Wall Street Journal; Wikipedia; You Are Not So Smart; ZhurnalWiki

The Home Study



DO I STAY OR DO I GO NOW?

- What are the allegations?
- Are Photos helpful?
- If custody is contested, better to err on the side of the study

Recommendations/Conclusions

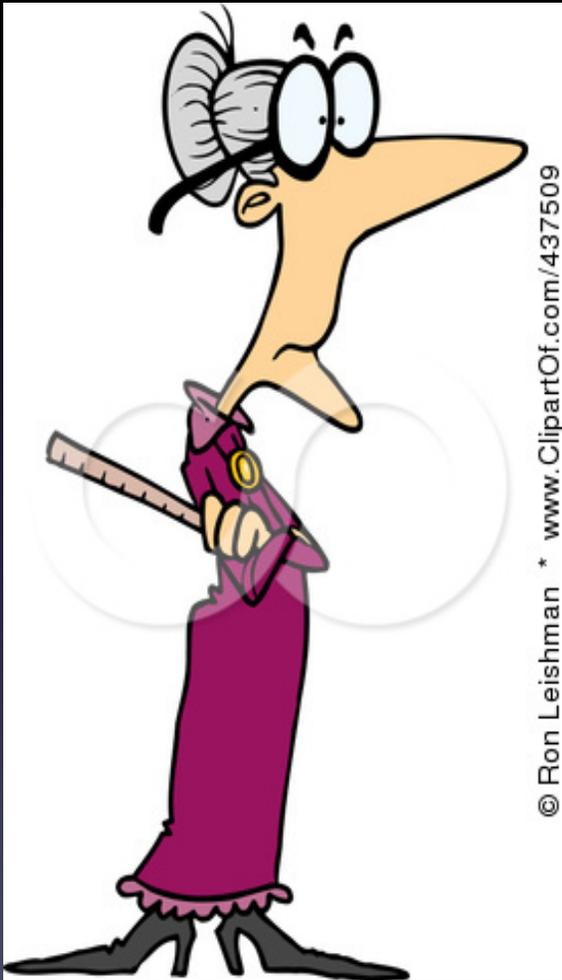
ADVOCACY AND §63-3-830(B)

- ✓ DO include “clear suggestions...for evaluation, services, and treatment for the child and the child’s family”
- ✓ DO include “conclusions based upon the facts contained in the report”
- ✗ DO NOT include “a recommendation concerning which party should be awarded custody” in your Final Report
 - but what about the Interim Report?



SCRE Compliance

63-3-830(B)



Hearsay

- This is complicated! Know the Rule and the exceptions
- Child's statements - Melissa's materials from her presentation are fab
- Value of Redacting - is this a way to get the information to counsel without submitting to Court - can it help settle the case?

Criminal Convictions - See Rule 609(b)/608(c)

Settlement Negotiations - See Rule 408(3)



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Part 2

Prepare to Present Witnesses

If a witness has information that you thought was crucial to your report (i.e. if you struggled to avoid hearsay), you should make sure the Court hears from them - this is your job!

- Talk to counsel and ask who they consider to be crucial
- Issue Subpoenas - SCRPC 45
- Taking Testimony?



So They Want My File, Eh?

Responding to a Subpoena for your File

- This is annoying, but necessary – making it easy happens LONG before you receive the subpoena
- “Notes”/“Work Product” – you cannot change the character of the material from not privileged to privileged
- Turn it all over!

Hypothetical:

You have had written communications with an expert in the case that you did not copy counsel or the litigants – is this work product?

Look to Rule 26(b)(6) SCRPC

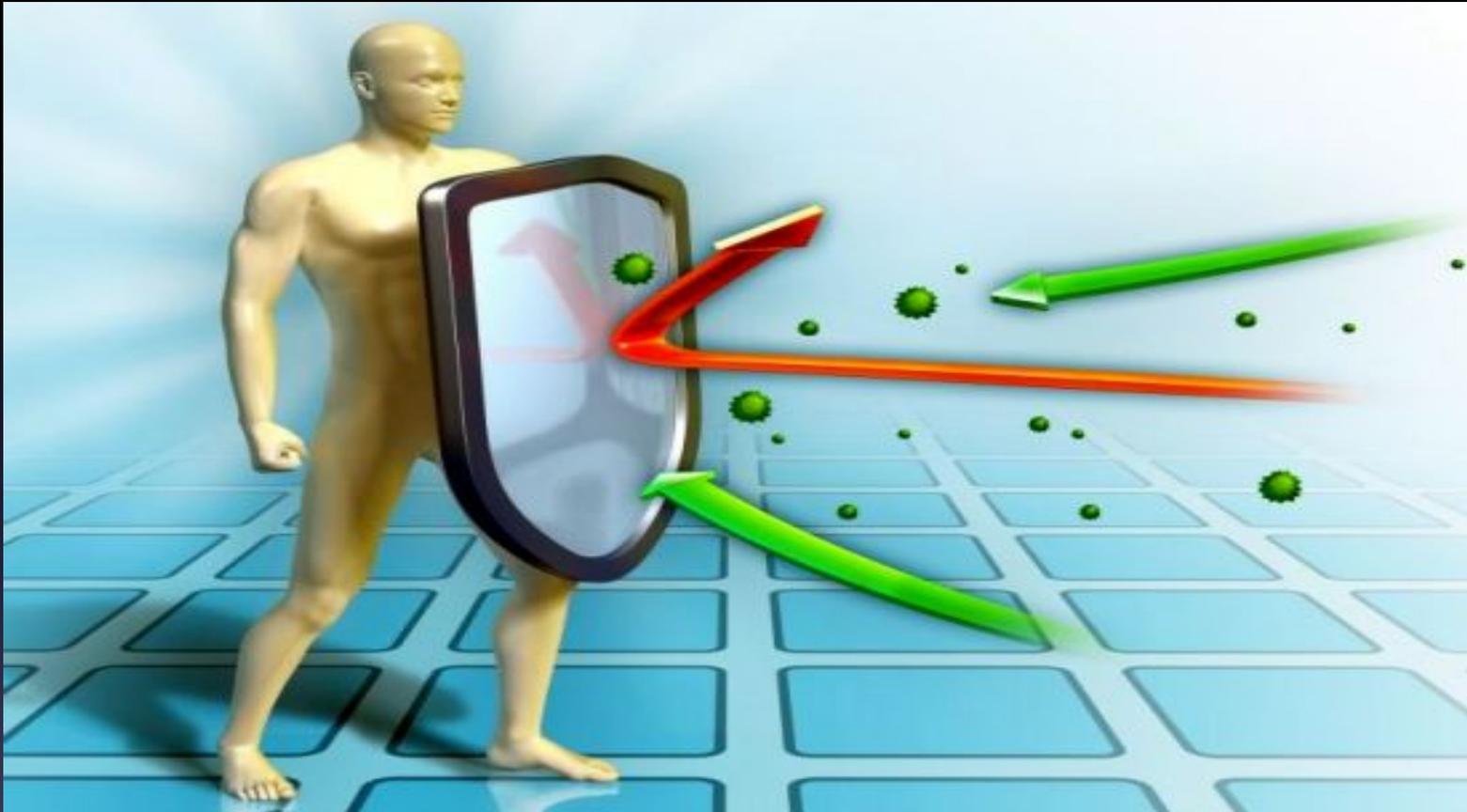


What to Bring to Trial?



- File
- Copies of Exhibits
- Copies of Subpoenas/Affidavits of Service
- Paper, Pen
- Other office supplies: stapler, paperclips, tabs, etc. (whatever you normally use to keep yourself organized, you should take with you!)
- Rule/Statute books
- Water
- Snacks
- “Oh shit!” bag

IMMUNITY?



Qualified Immunity

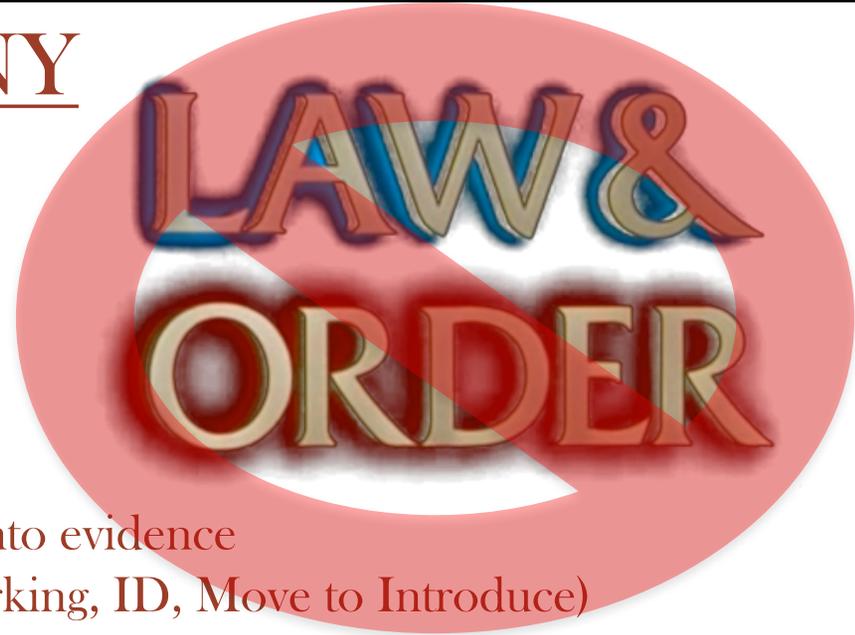
Fleming v. Asbill, 42 F.3d 886 (4th Cir. 1994)

DIRECT TESTIMONY



DIRECT TESTIMONY

- You on the stand
- Tell the Truth!
- “Narrative”
- Your report
 - Not Evidence unless entered into evidence
 - Know the procedure (marking, ID, Move to Introduce)
 - Relevant case law – copies
 - Information about your recommendations (programs, services, etc.)
- Other evidence
 - Authentication of records
 - Copies
 - Procedure
 - Come prepared with the equipment you will need to display or play any evidence (computer, recorder/speakers, call Court in advance)



Direct Testimony Continued....

GETTING PAID

- “Reasonable Compensation” – judges do not have to pay you if you’re gouging people!
- Staff/Paralegal billing
 - The great debate: permissibility vs. financial benefits
 - Ethics an issue when you testify
 - Mercedes allegations on a Pinto budget?
 - What the case needs vs. Wants of the Lawyers vs. Desires of Litigants
 - Creativity: can the judge allocate fees in a way that will better ensure you’re fully paid?
 - Lawyer GALs – subject to not only GAL statute, but also ethics rules

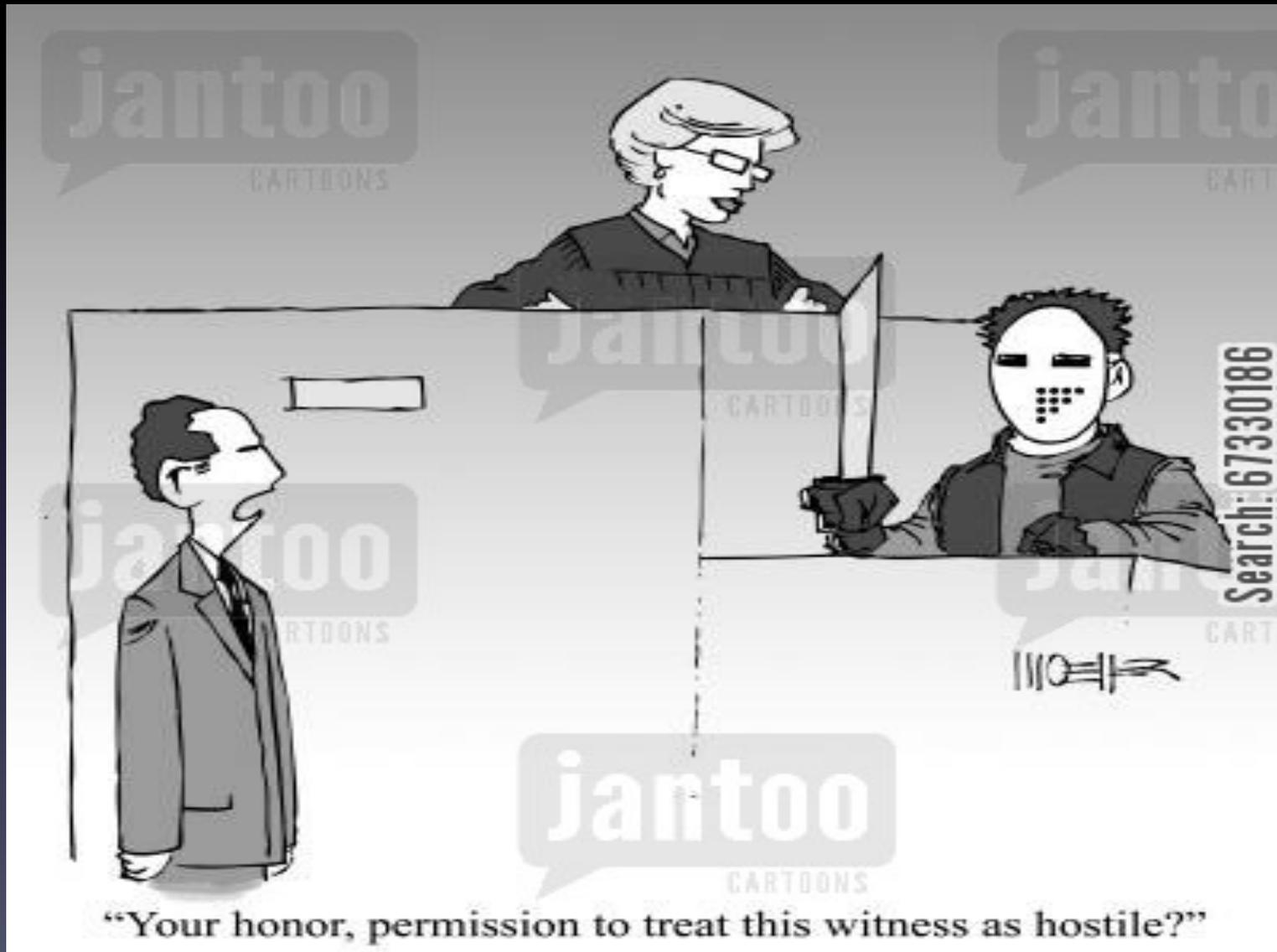
Mechanics

- Bring your whole bill
- Put it into evidence
- The Record
 - Make sure to ask to get paid

If this is your business, then it is your responsibility to treat getting paid seriously.



CROSS EXAMINATION



CROSS EXAMINATION

- What makes for a good cross-examination?
 - Listen
 - ANSWER THE QUESTION ASKED
 - Yes/No *then* Explain
 - Good substantive investigation
 - Ability to acknowledge good and bad facts for each party
 - Your job is “Advocacy for the Child” (not advocacy for the result you want)
 - You are the fact investigator (NOT THE FACT *FINDER*)
 - Advocacy for the Child \neq sticking your head in the sand about facts that don’t favor the result you think is best



CROSS EXAMINATION

Child's Interests vs. Your Ego

WE ARE HUMAN

- Advocacy for the Child \neq pushing the Court to the result that you think is best
- Ways to identify if you are advocating for Your Ego:
 - You want to try to keep facts you don't like out of the record
 - You feel anxious about the possibility that the judge may not agree with the result you think is best
 - In other words: you want to be 'right'
 - You have difficulty being friendly with all parties, not because of their actions but because of your feelings



CROSS EXAMINATION

Awareness of bias & ability to address concerns

You should have already considered your own biases

What if you are “attacked”?

Difference between

Constructive Criticism and *Destructive Criticism*

- Constructive Criticism = questioning how you reached your viewpoint/perspective, your actions/inactions (related to your work); polite tone, demeanor, and volume
- Destructive Criticism = questioning your character, your private life, your values; intended to embarrass/shame

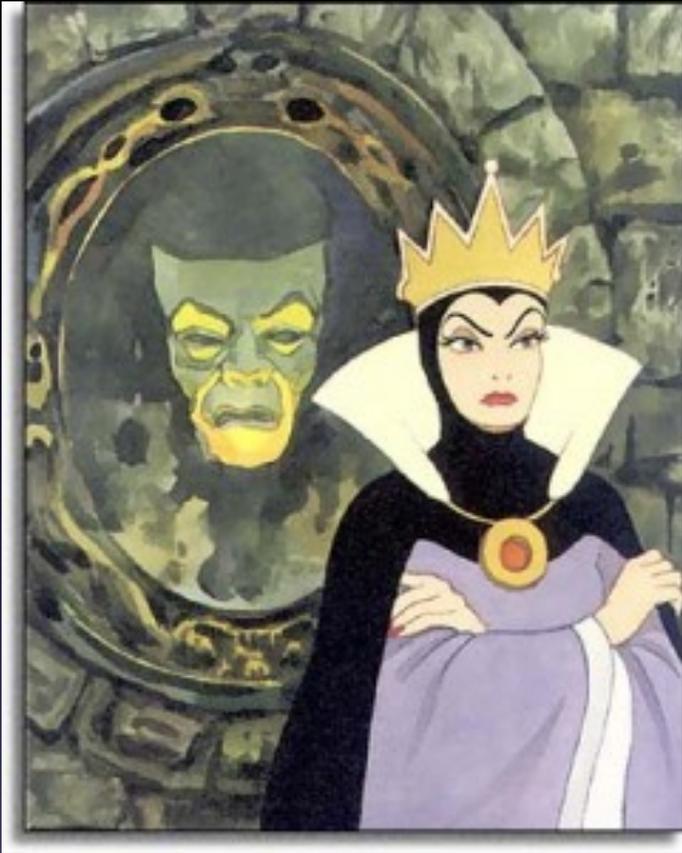
What to do if you are [actually] attacked?

- Stay calm
- Revert to: Answer the question asked
- Object - form of the question; relevance; speculative; hostile
- Ask to take a break



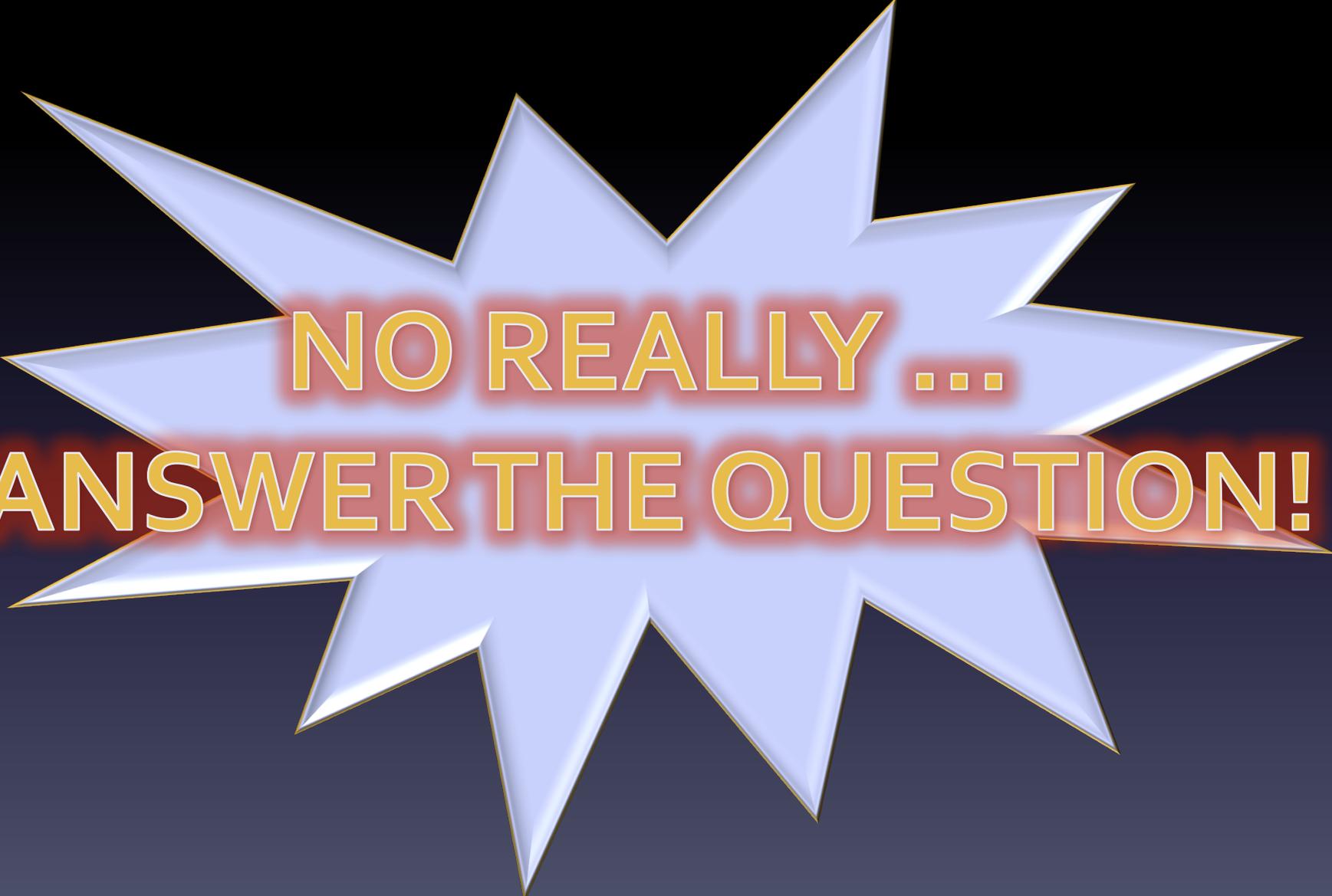
CROSS EXAMINATION

Awareness of flaws in investigation



- If your mistake is called out, own it
 - ✓ We are all imperfect!
 - ✓ This is just good PR!
- Avoid blaming someone else for your mistake/oversight
- If you perceive any criticism – even when constructive – as an attack, Your Ego is probably getting in the way of doing your job
 - Every person in the courtroom has a job to do – sometimes that job is poking holes in your investigation.
 - It is not actually about you, but your work. We are all imperfect!

CROSS EXAMINATION



**NO REALLY ...
ANSWER THE QUESTION!**

THE END

THANK YOU



**FOR LISTENING TO THIS
ROCK ON PRESENTATION**

quickmeme.com

ANY

QUESTIONS?