

# Hit prosecutors with a powerful one-two punch

To many criminal defense attorneys, the trial represents the arena in which they fight every accusation and contest every issue — admit nothing and challenge everything.

Like a boxer flailing away blindly at his opponent, this approach scores no points with jurors. By overwhelming them with unfocused and repetitious questioning and drowning them in minutia, a trial lawyer risks antagonizing the jurors.

Making his punches count, author Kevin Mahoney instead uses a compelling, detailed opening statement as a foundation for targeted cross-examinations. He explains and heavily illustrates this courtroom-proven attack in *Relentless Criminal Cross-Examination*.

First, Mr. Mahoney teaches you how to believably outline in your opening the weaknesses you will expose in the government's case. Second, he shows you how to demonstrate to the jury, through your cross-examinations, that the facts are more in accord with your opening than with the prosecutor's.

You will win this battle for credibility with techniques like:

- Using the police report to hog-tie the arresting officer. §1:25
- Spotting the witness who is lying, exaggerating, or omitting important information. §1:47
- Employing the prosecutor's objections to your advantage. §1:62
- Making the prosecutor pay when he signals a witness. §1:63

## OPENING STATEMENTS

- Arranging your stage with a detailed opening. §2:06
- Specifying the inconsistencies you will inquire into. §2:14
- Calling attention to the witness' demeanor. §2:16
- Planting the seed of suspicion toward the prosecutor. §2:17

## SUPPRESSION HEARINGS

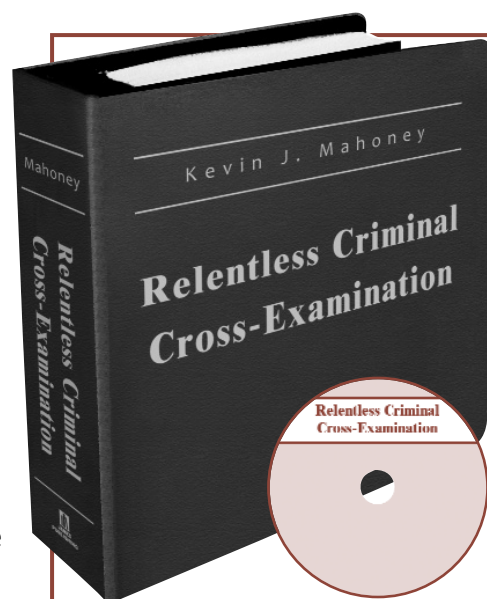
- Why you should subpoena additional police witnesses. §3:04
- Attacking the reasons for stopping your client's vehicle. §3:29
- Focusing on elimination of danger in searches incident to arrest. §3:70

## CONFESSIONS

- Demonstrating how the detectives coerced a "confession" from your client. §4:07
- Showing that the detectives needed the confession because the forensic evidence was unknown. §4:12
- Explaining how the detectives isolated and interrogated your client for hours. §4:17
- Detailing how the detectives kept your client from making the phone call he was entitled to. §4:20
- Demonstrating that your client was in custody with a detailed recitation of the surrounding circumstances. §4:20
- Cross-examining the detectives so thoroughly on the written statement that the jury will lose faith in its validity. §4:31

## INFORMANTS

- Tying the accomplice to the crime. §5:01
  - Exposing the consummate liar. §5:20
  - Shredding the credibility of criminals. §5:30
  - Attacking the wealthy co-defendant. §5:39
  - Highlighting the motives of prison informants. §5:50
- Techniques continued inside...*



## 12 practice tips from the book

1. **Ask questions in the negative to get admission.** "When a witness refuses to admit the obvious after you've repeatedly questioned him in an affirmative manner (e.g., 'The sky was cloudy?'), reverse course and flip the question so that you're asking him to admit the opposite (e.g., 'The sky was clear?' 'Not a cloud in the sky?' 'Never saw a sky so blue?'). Such a question catches the witness off guard and he'll likely reverse course and blurt out the admission you were attempting to secure in the first place." §1:28
2. **Visit the scene.** "When I go to the scene — whether it's a backyard where a client allegedly detonated a bomb, a street where a client performed field sobriety tests, or a police station interrogation room where a client confessed to murder — I take a forensic photographer, a tape-measure, and a notebook within which to draw diagrams and to write notes. Many of my best ideas for cross-examination come to me as I explore the area and test the representations of the police and/or the witnesses against reality. I notice, perhaps, what

*Tips continued inside...*

**Sample pages and contents inside...**

## EYEWITNESSES

- Contending the witness' faculties were overcome with emotion. §6:02
- Exposing the witness' failure to make eye contact with the defendant. §6:04.3
- Locking in an initial faulty description. §6:10
- Attacking photo arrays. §6:30
- Exposing the problems with line-ups. §6:45
- Techniques for making eyewitnesses appear untruthful. §6:55

## EXPERTS

- Emphasizing the expert was hired after your client was charged. §7:06
- Diffusing the prosecution's anticipated attack on your expert. §7:12
- Attacking state chemists. §7:26
- Effectively cross-examining medical examiners. §7:40
- Exposing the errors in the accident reconstructionist's investigation. §7:65
- Explaining the weaknesses in fingerprint matching. §7:90

## SEXUAL ASSAULT

- Techniques for effectively cross-examining the child victim. §8:06
- Highlighting the failure to inform parents or tell a teacher. §§8:10, 8:15
- Easy ways to undermine the rape victim's credibility. §8:25
- Detailing the failure to report the attack to police, §8:45, or friends and family. §8:52
- Emphasizing the changing story. §8:60
- Questioning the ambiguous sexual-assault exam. §8:81
- Bringing out the possible motives for a false accusation. §§8:96,100, 104, 108

## DWI

- Stressing the officer's observations of good driving, §9:01, and the absence of red flags, §9:05
- Countering bloodshot or glassy eyes, §9:10, and the odor of alcohol, §9:15
- Dismantling the horizontal gaze nystagmus test results. §9:20
- Handling heel-to-toe, §9:25, one-leg stand, §9:30, and alphabet tests, §9:35
- Shaking the jury's confidence in breath test results. §9:55

3-19 Cross-Examination of Arresting Officer: Motions to Suppress §3:31

**§3:29 Strategy**  
On direct examination, and in his police report, the officer will cite the reasons for stopping your client's car. List those reasons and attack each reason individually and thoroughly. If the reasons conflict, juxtapose them. If the reasons are consistent with innocent behavior, cross-examine the officer on every innocent explanation the facts will support.

**§3:30 Angles of Attack**

- ✓ Defendant's junky vehicle was out of place in pricey neighborhood [§3:31.1].
- ✓ Residents of pricey neighborhood might have visitors who drive junky cars [§3:31.2].
- ✓ Three factors drew officer's attention to defendant's car: time of night, speed of travel, turning around in driveway [§3:31.3].
- ✓ No law against driving at 3:00 a.m. [§3:31.4].
- ✓ No other vehicle on the road at that hour suspected of casing the neighborhood [§3:31.5].
- ✓ No law against driving below the speed limit [§3:31.6].
- ✓ Driver must drive at speed safe for road conditions [§3:31.7].
- ✓ A driver might drive below the speed limit for a number of reasons that have nothing to do with casing the neighborhood [§3:31.8].
- ✓ Officer watched defendant pull into driveway, turn around, and drive slowly away, and concluded defendant was casing that particular house [§3:31.9].
- ✓ Defendant had to pull into driveway to turn around because a U-turn would have been illegal [§3:31.10].

**§3:31 Cross-Examination**

**§3:31.1 Defendant's junky vehicle was out of place in pricey neighborhood**  
Q: Lexington is a pricey neighborhood?  
A: I don't know about that, Counselor, we have families of every socio-economic background. It is a nice town.  
Q: Lexington is one of the wealthiest towns in the Commonwealth? [The judge knows this is true: he probably lives there.]  
A: I don't know. I can't say. I'm sure there are wealthier towns.  
Q: You stopped my client on Merriam Street?

A: That's correct.  
Q: Merriam Street leads into Lexington center?  
A: Yes.  
Q: It's lined with million-dollar homes?  
A: Ah, yes. Very likely.  
Q: The residents of Merriam Street drive very nice cars?  
A: I can't say. I don't know.  
Q: The residents own million-dollar homes, but don't drive nice cars?  
A: I don't understand the question. Most of the residents on that particular street probably drive decent cars.  
Q: You testified that you noted my client's car?  
A: Yes.  
Q: A white Honda Civic?  
A: Right.  
Q: With a few dents?  
A: Yes.  
Q: Some rust?  
A: I didn't notice the rust.  
Q: A car that hadn't been washed in some time?  
A: Maybe not. I don't know.  
Q: It was the type of car that did not fit with the neighborhood?  
A: No. I did not say that.

**§3:31.2 Residents of pricey neighborhood might have visitors who drive junky cars**  
Q: Merriam Street is not restricted to Lexington residents?  
A: No.  
Q: Drivers from all over the Commonwealth use that street?  
A: Yes.  
Q: Drivers from less well-to-do neighborhoods?  
A: Yes.  
Q: From Burlington?  
A: Very likely, yes.  
Q: Waltham?  
A: Yes.  
Q: Boston?  
A: Yes.  
Q: Residents of Merriam Street don't just associate with well-to-do people, do they?  
A: I'm not... I can't say.  
Q: You allow for the possibility that Merriam Street residents might have visitors who drive junky cars?

**QUESTIONS FOR COMMON FACT PATTERNS.**  
The book illustrates techniques for winning or obtaining helpful statements in a variety of suppression hearings.

*“Mr. Mahoney immediately establishes his credibility as a trialsmith by offering advice that is not academic or otherwise shouted from atop the ivory tower. This is good stuff for the practicing trial lawyer.”*

# ABBREVIATED CONTENTS

## 1. Governing Principles & Strategies

Overcoming Defense Attorney Credibility Deficit, Controlling Your Client, Do No Harm, Prepare Tactical and Goal-Oriented Cross, What Does Not Work

Use Police Report to Hog-Tie Officer, The Answer Is in the Documents, Visit the Scene, Difficult Witnesses, Practical Tips for Watching the Witness

Annotate Your Outline With References to Documents, Copy Witness' Precise Language on Cross, Note Every Enhancement of Witness' Story, Dealing With the Prosecutor, Dealing With the Judge

Pattern Crosses: Pressure to Draft Comprehensive Report, Officer Backpedals From Report, Crime Scene Details, Make Defense Witness Your Own

## 2. Case Theory, Opening Statement, Closing Argument

Theory: Developing, Purpose, Begin With Basic Chronology

Opening: Tell Defendant's Story, Persuade With Detailed Factual Account, Resist Temptation to Play It Safe, Call Attention to Witness' Demeanor, Plant Seed of Suspicion Toward Prosecutor, Strategy, Samples

Closing: Matters in Close Cases, Deliberations Not a Search for "Truth," Demonstrate Emotional Commitment to Your Client, Arm "Your" Jurors With Tools to Prevail During Deliberations, Help Jurors Overcome Fear of Law Enforcement, Provide Own Definition of "Reasonable Doubt," Derail Prosecutor's Closing, Samples

## 3. Cross-Examination of Arresting Officer: Motions to Suppress

All-Too-Common Fact Patterns, Strategy for Suppression Hearings

Strategy, Angles of Attack, and Pattern Cross Examinations for: In Custody, Suspected Drug Deal in Vehicle, Suspected Stolen Car, Search of Trunk Based on Odor of Marijuana, Furtive Movements, Hand-to-Hand Drug Deal, Failure to Include Evidence in Search Warrant, Confidential Informants, Search Incident to Arrest

## 4. Cross-Examination of Detective Who Obtained Confession

Interrogation Tactics, Exposing Coercive Tactics

Angles of Attack: Detectives Have Only One Chance to Question Suspect, Using the Ticking Clock to Make Suspect Feel Desperate, Detectives Need Confession Because Forensic Evidence Is Unknown, Isolating the Suspect, Right to Make Telephone Call, Failure to Record Defendant's Statement, Written Statement is Invalid

Motion to Suppress Confession

## §6:04 Cross-Examination

Robbery was a terrible ordeal for witness. [§6:04.1]  
Q: In broad daylight, an individual pulled out a sawed-off shotgun?

A: Yes.

Q: And pointed it at Mrs. Webster?

A: Yes.

Q: You saw the gun?

A: Yes.

Q: You stared at the gun?

A: Yes.

Q: Mrs. Webster was a frail, elderly woman?

A: Yes.

Q: She let out a yelp?

A: That's right.

Q: The robber reached out and grabbed her pocketbook?

A: Yes.

Q: That Mrs. Webster wouldn't let go?

A: No.

Q: The robber screamed at her to let go?

A: Yes.

Q: He said, "If you don't let go, I'm gonna beat your f\*\*\*ing head off?"

A: Yes.

Q: You believed he might do it?

A: That's right.

Q: You wanted Mrs. Webster to let go of the bag?

A: Right, I didn't want to see her shot.

Q: You thought she was being pretty stupid?

A: I did.

Q: The robber knocked her to the sidewalk?

A: Yes.

Q: She fell hard?

A: Yes.

§6:04.2 Witness was immobilized with fear.

## PRACTICE POINT:

Expose witness's character.

To successfully cross-examine a witness, particularly an eyewitness, you must crawl into his hide and assess his character, motives and fears to fully understand his emotional reaction to what he claims he saw. This cross-examination exposes not just the bystander's cowardice, but that he was so overcome by fear that he did not even manage to dial 911. In con-

trast, the victim fought back against the robber. In closing, I'll argue that the jury should credit the description provided by the courageous victim, rather than the pathetic bystander.

Q: You wondered if you should come to her aid?

A: Well, L... didn't know what to do.

Q: You didn't want to be shot?

A: No.

Q: You didn't want to do anything that would upset the robber?

A: No.

Q: He was a maniac?

A: Yes.

Q: He might just shoot you?

A: Right.

Q: You did not rush to her aid?

A: No.

Q: You made no move?

A: No.

Q: You did not tell the robber to leave her alone?

A: No.

Q: You did not yell out "Help!"?

A: No, I didn't.

Q: At that moment, you did not call 911?

A: No.

Q: You did not run?

A: No.

Q: Your mind was racing?

A: Yes, it was.

Q: You were immobilized with fear?

A: Well, L... I was scared.

Q: You were terrified?

A: Yes.

Q: You neither intervened nor fled?

A: No.

Q: You were too scared to do either?

A: Yes.

Q: You were immobilized with fear?

A: Yes.

§6:04.3 Witness did not look the robber in the eye.

## PRACTICE POINT:

Eye contact is crucial to identification.

When we look at someone, we are drawn to his eyes. We may note other facial features (such as a large nose or full lips), but unless

## D. Lay Foundation for Cross-Examination

## §2:14 Detail Inconsistent Statements

Many attorneys, maybe even most, believe that closing argument is the more appropriate time to argue that a witness should be disbelieved. Wrong. Closing argument is where you shoot the dead—and the witness is dead because you killed the bastard at your first opportunity, with a blazing opening and an eviscerating cross-examination. If you wait until closing argument to piece together why a witness should be disbelieved, you likely have failed your client. Give the jury concrete examples of the witness's inconsistent statements *before* the jury decides they believe him. For example, consider the following opening statement in a case where an alleged sexual assault victim's story evolved and expanded when his original tale of woe came under fire.

## Sample Opening Statement:

When Mr. Cooper returned to Pennsylvania, he wrote out a statement for the school principal. In that statement, he identified two attackers: Ken Walton and Don Bronstein. In six places in that statement, he identifies Ken Walton and Don Bronstein as the individuals who attacked him. Not once does he include Mr. Filmore. When, a week later, he testifies before the school board, he identifies two attackers—Ken Walton and Don Bronstein. Who slapped him across the face with their penises? Ken Walton and Don Bronstein. Who tackled him onto the bed? Ken Walton. Who held him down on that bed? Don Bronstein. Who pushed his penis into his mouth? Ken Walton. Who chased him across the room with their penises exposed? Ken Walton and Don Bronstein.

When a school board member suggests in a question to Mr. Cooper that he should have fought these two boys off, Mr. Cooper exclaims, "I tried, but they were bigger than me." He does not say, "I tried, but there were three of them." Mr. Cooper is humiliated. He worries people will think he's a homosexual. Now the story grows. Mr. Cooper isn't attacked by just two classmates. He's attacked by three classmates. Who does he name as the third attacker? Mr. Filmore. Mr. Cooper begins to attribute criminal attacks to Mr. Filmore that he had previously attributed to only Don Bronstein and Ken Walton.

I will be asking Mr. Cooper about these inconsistencies in detail. I'll ask him, "Didn't you testify at that school board hearing that only Walton and Bronstein attacked you?" "If Filmore really attacked you, why didn't you include him?" As you consider his past statements and listen to how he tries to explain them, if he can offer any explanation, ask yourselves, "Is this a young man I can believe?"

After such an opening, the jurors will not be just skeptical of Cooper; they will be downright suspicious of him. With such a pointed and detailed attack on his witness, the prosecutor will now have to figure out how, on direct examination, he's going to handle these inconsistent statements. His effort to diffuse the issue will only exacerbate the credibility problem, as the witness stumbles and mumbles through a suspect explanation, an explanation that may be easier to explain than the underlying inconsistency.

## §2:15 Show Witness's Allegations to Be Inconsistent With Facts

Other times, your cross-examination will focus less on inconsistencies and more on the incompatibility of the allegations with indisputable facts, e.g., the layout of the location of the alleged crime. To get the most out of this type of cross-examination, detail in your opening exactly how the location or layout of a building is inconsistent with the witness's anticipated testimony.

For example, in a rape case, a young woman claimed that following a work party, my client held her against her will in the basement of their office building, attempted to pour beer down her throat, threw her against a wall, subdued her, and raped her. After viewing the basement myself, the alleged victim's story was not just incredible, it was specious—a story only a prosecutor could embrace. As was expected, in her opening the prosecutor amped up the allegations, claiming my client held the woman hostage in the basement where he violently, repeatedly assaulted and raped her. She described the woman trying frantically to claw her way up the inside stairs as my client tackled and groped her from behind. When the prosecutor was finished, the jurors were clearly stunned by my client's depravity. Most jurors were so horrified that they wouldn't even look in our direction. Others glanced over at us, as if to assure themselves that my client was not about to go on a violent rampage. By choosing to sensationalize the

## TECHNIQUE TIPS.

The pattern questions are annotated with helpful explanations of the strategy being employed.

## PERSUADING WITH DETAIL.

Mr. Mahoney believes in using the opening statement to reveal the inconsistencies in the prosecution's case.

## 5. Cross-Examination of Informants and Accomplices

Strategy, Key Facts, Angles of Attack, and Cross-Examination for...

*The Innocent Bystander:* Tie Bystander to Crime, Distance Bystander From Client, Bystander Desperate to Avoid Being Caught

The Consummate Liar

*The Desperate Witness:* The Miscreant Defendant, The Innocent Bystander/Accomplice, The Wealthy Defendant

The Prison Informant

## 6. Cross-Examination of Eyewitnesses

Attack Conditions Under Which Victim Made Initial Observation, Initial Description Does Not Match Defendant, Failure to Select Client's Photograph

Photo Array: Failure to Conduct Line-Up, Using Photograph Unlike Others

Line-Up Identification, Threaten to Test Witness's Recollection, Juxtaposing Witnesses, Form: Motion to Suppress Identification

## 7. Cross-Examining Expert Witnesses

*Government's Hired Expert:* After-the-Fact Expert, Expert's Fees, Expert Testimony Is Competitive Business, Diffuse Prosecution's Attack on your Expert, Bias, Testifying for Defense Once or Twice Does Not Make Expert "Independent"

*State Chemists/Toxicologists:* Governing Principles, Possible Contamination of Sample, Failed Confirmation of Screening Test, Building Up Reliability of Negative Tests

*Medical Examiner:* Governing Principles, Bullet Wounds, Poisoning, Death by Natural Causes

*Accident Reconstructionist:* Governing Principles, Little Formal Education or Training, Subjective Component to Accident Reconstruction, Conclusions Conflict With

Witnesses, Shenanigans With Measurements, Motive for Revising Analysis, Misleading Clues, Auto/Pedestrian Cases

*Fingerprint Evidence Expert:* Governing Principles, Latent Prints and AFIS, Error Rate, Expert Compared Latent Print With Client's Print Only, Downplaying Accuracy of AFIS, Poor Quality of Latent Print, Galton Points Standards

## 8. Cross-Examination in Sexual Assault Cases

Not for the Faint of Heart, Length of Examination, Tone, The Crying Witness

*Child Witness:* Governing Principles, Failure to Inform Parents, Failure to Tell Teacher

*Officer Who Conducted Initial Interview:* No Special Training, Children Seek to Please Authority Figures, Improper Questions Result in Allegations of Abuse

## 2. Failure to Contact Police After Hospital Examination

### §8:49 Strategy

Should the alleged victim present herself to a hospital emergency room and report that she has been raped, the hospital will notify the police that they are performing a rape kit so that an officer can retrieve the evidence and deliver it to the crime lab. Hospital staff will usually attempt to persuade the alleged victim to contact the police or to allow them to interview her if they should contact her. They will likely have explained to her that, if she wishes to press charges, she will need to cooperate with the police. Despite this admonition, the alleged victim, having given her statement to the hospital staff and suffered an examination, may decide against, or at least decide to postpone, submitting to another round of questioning. If the alleged victim found that she did not have credible answers to the questions posed by the nurse or physician completing the "Rape Kit," she may decide to leave well enough alone. Most jurors will, however, expect a rape victim to give a statement to police, particularly after giving a statement to the nurse or physician.

### §8:50 Angles of Attack

- ✓ Alleged Victim submitted to hospital examination several hours after alleged rape. [§8:51.1]
- ✓ Alleged Victim answered questions and gave statement to hospital personnel. [§8:51.2]
- ✓ Hospital notified police and told Alleged Victim to contact police to press charges. [§8:51.3]
- ✓ Alleged Victim did not contact police for three months. [§8:51.4]

### §8:51 Cross-Examination

- §8:51.1 Alleged Victim submitted to hospital examination several hours after alleged rape.
- Q: Several hours after the alleged rape, you went to Massachusetts General Hospital?
- A: Yes.
- Q: You told the hospital staff that you had been raped?
- A: Yes.
- Q: Violently raped?
- A: Yes. I was.
- Q: A nurse met with you?

- A: Yes.
- Q: Nurse Vicky Grogan?
- A: I think so.
- Q: She was nice to you?
- A: Yes.
- Q: She took you to a separate area of the emergency room?
- A: Yes.
- Q: There, you met in private with her?
- A: That's right.
- Q: She examined you?
- A: Yes.
- Q: She was professional?
- A: Yes.
- Q: She was empathetic?
- A: Yes.
- Q: She was gentle?
- A: Yes.

- §8:51.2 Alleged Victim answered questions and gave statement to hospital personnel.
- Q: Nurse Grogan asked you a number of questions?
- A: Yes.
- Q: From forms she was completing?
- A: Yes.
- Q: She also asked you what had happened?
- A: Yes.
- Q: You gave her your statement?
- A: Yes.
- Q: She remained professional?
- A: Yes.

- Hospital notified police and told Alleged Victim to contact police to press charges. [§8:51.3]
- Q: At the conclusion of the examination, she told you that the police had been notified of your accusations?
- A: Yes.
- Q: She gave you Officer Stephanie Moore's card?
- A: Yes.
- Q: She explained that you needed to contact Officer Moore if you wanted to press charges?
- A: Yes.
- Q: Nurse Grogan told you that Officer Moore was easy to talk to?
- A: I don't remember.
- Q: You understood when you left the hospital that if you did not contact the police, no charges would not be brought against Mr. Jones?
- A: Well, I am not sure. I was very upset.

## QUESTIONING RAPE VICTIMS.

Contrary to the usual advice, author Kevin Mahoney recommends lengthy and thorough cross-examinations of sex victims. Strategy, angles of attack, and pattern questions are provided for dozens of scenarios.

**Alleged Rape Victim:** Consent Defense, Failure to Report Attack, Story Seems to Change

**Emergency Room Nurse/Physician:** Decision to Conduct Sexual Assault Examination, Completing Sexual Assault Forms, If No Evidence Connects Accused to Crime, If No Injuries Found, Attempts to Document Injury to Vagina – None Found

**Motive for Making False Accusation:** Save Face, Deflect Allegations of an Affair, Revenge and Ignorance of Law, Break Up a Marriage

## 9. Cross-Examination in DWI Cases

**Cross-Examination of Arresting Officer:** Governing Principles, Good Driving, Absence of Drunk Driving Red Flags, Bloodshot or Glassy Eyes, Odor of Alcohol

**Field Sobriety Tests:** Horizontal Gaze Nystagmus, Heel-to-Toe, One-Leg-Stand Test, Alphabet Test, No "Red Flags" in Defendant's Behavior, Hospital Testing

**Breathalyzer Expert:** Police Not Entrusted With Real Toxicology Equipment, Breathalyzer Tests Air and Not Blood, Hospital Testing

## ABOUT THE AUTHOR

Kevin J. Mahoney has won 37 of his last 39 trials.

He recently persuaded juries to acquit a young woman of motor vehicle homicide, a father accused of rape, a woman indicted for bank robbery, a young man of assault with intent to rape, and a man falsely accused of motor vehicle homicide.

Mr. Mahoney served as an Assistant District Attorney for the Middlesex County District Attorney's Office, Cambridge, Massachusetts, from 1991 to 1993. As a prosecutor, he tried approximately 30 cases, and prepared and argued 14 appeals, winning all but 2. Since 1993, he has focused almost exclusively on criminal defense, compiling a record of 40 wins, 1 hung jury, and 5 losses.

Kevin J. Mahoney was an Editor for the *New England Law Review* at New England School of Law and won the American Jurisprudence Award for an advanced trial practice course. He regularly provides on-air legal analysis for Fox News Live, Fox & Friends, CNN, Nancy Grace, and Court TV. His successful defense of Christina Martin, dubbed the "Jell-O Murderer" by the national press, was chronicled on Court TV's Forensic Files. Disgruntled prosecutors consider him a son-of-a-bitch.

In his spare time, you can find Mahoney hiking the rain forests of Costa Rica, backpacking through Glacier National Park, running along the Charles River, living it up in Reykjavik, and competing in No-Limit Texas Hold'em poker tournaments.

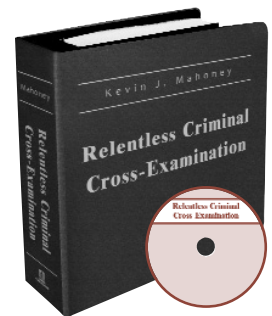


## ABOUT THE BOOK AND CD

Kevin Mahoney's *Relentless Criminal Cross-Examination* contains 475 letter-sized pages in a sturdy and tabbed 3-ring binder. The first two chapters detail cross-examination principles and techniques common to all prosecution witnesses. The remaining seven chapters are specific to type of witness:

1. Arresting officer
2. Detective who obtained confession
3. Informants and accomplices
4. Eyewitnesses
5. Government experts
6. Sexual assault complainants
7. DWI arresting officer

Included at no extra charge is an intuitive, full-text CD which requires no installation before use. It may be searched by key word, case name, topic, or form. The CD's forms and chapters are also provided in Word in case you do not want to work with the CD's database.



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## 12 practice tips from the book *(continued from front page)*

the police did not. I note what the police refrained from including in a report. I consider whether the alleged victim's version makes any sense given the configuration of a room. When I turn over my photos of the area to the prosecutor, I know the prosecutor will pass them along to the witnesses; these witnesses will know that I have been to the scene and if they have lied, they know I know it, and they know I've got photographs and a forensic photographer on my witness list. These witnesses will likely try to recast some of their less credible assertions. Armed with knowledge and evidence, I can cross-examine these witnesses with complete confidence." §1:30

3. **Attacking the confession.** "Few criminal defense attorneys seem willing to challenge written statements, particularly those signed by the client. No doubt, few clients are up to the task of credibly testifying to having signed a confession they knew to be untrue. The detectives, though, can be cross-examined so thoroughly that the jury will lose faith in the validity of the written statement. The client, after all, did not type that statement, did not choose the words used, did not decide what was included and what was excluded, and either did not appreciate the significance of the word choices and omissions, or was too resigned and overcome with mental fatigue to believe challenging the detectives a worthwhile effort." §4:30

### ARRESTING OFFICER

4. **Don't accept, "I can't speculate."** "Never let the officer get away with saying he can't speculate on what he would do under the circumstances. You are asking him to speculate only if you ask him what someone else would do under the circumstances. If the officer says he 'can't speculate' as to what he would do 'if' such-and-such occurred, ask him what he has done on other occasions under similar circumstances." §3:31
5. **Restricting the officer's testimony.** "It is not uncommon for an officer or detective to testify to an important 'fact' not included in his report. If questioned on his failure to note the 'fact' in his report, an experienced officer will typically shrug it off with, 'This is only a summary, Counselor. It doesn't include every detail or every observation.' If left unchecked, on re-direct, this officer might decide to sneak additional 'facts' into his account. Worse, officers who have not yet taken the stand will hear how easy it is to slip some additional 'facts' into their testimony. Corner the officer by highlighting

the pressures on the officer to make his report as comprehensive as possible." Use the following questions.... §1:27

6. **Changing story.** "I am always taken aback when a police officer tries to distance himself from his own report. It's obvious that either the officer realized too late that this bit of truth would undermine the District Attorney's effort to secure a conviction and wishes ardently that he hadn't included this troublesome section, or the prosecutor has 'persuaded' him to recast his observations in a more government-friendly manner. Thoroughly punish the officer or detective for backpedaling from the truth. Further, if you believe the prosecutor is ethically challenged, use the following cross-examination to highlight his unsavory participation in this evidence-bending scheme...." §1:28

### EYEWITNESS

7. **When description matches your client.** "For many defense attorneys, there is a pathological, often counterproductive, need to make a robbery or attack seem less terrible or frightening than the impression created by the prosecutor or the victim. By downplaying the circumstances in a case involving an eyewitness, you make the ordeal seem less threatening and, thereby, undermine your contention that the witness's faculties were overridden with emotion. Moreover, downplaying the terror of the incident may lead the jury to believe that you believe your client is guilty and are hoping the jury won't be too hard on him because the crime wasn't as bad as claimed. By confronting the facts, you demonstrate that you have no fear of them. I begin the cross-examination of the bystander by establishing the basic facts to illustrate just how terrible this ordeal was for him...." §6:02
8. **Compare and contrast witnesses' testimony during cross so the jury can see the witness' reaction.** "The cross-examiner normally will not be permitted to ask one witness if another witness is lying. Yet, it is entirely permissible to use cross-examination to draw comparisons between the competing versions of what took place. In fact, drawing such contrasts during cross-examination of either witness is far more effective than arguing the inconsistencies in closing argument. If you raise them during cross, you get something you cannot conjure up during your closing – the emotional reaction of the witness." §6:70.3

### SEXUAL ASSAULT

9. **Motive for making false accusations.** "In every sexual assault trial, the jurors are

going to confront the question: Why would the victim make such an accusation if it wasn't true? The prosecutor may argue that the alleged victim has nothing to gain by her accusations and that, on the contrary, no one would willingly subject herself to the scrutiny that is sure to follow an admission that she has been sexually assaulted — undergoing a sexual assault examination, allowing hospital staff to seize her clothing, reporting the incident to the police, testifying before a grand jury, testifying before a trial jury and risking the humiliation of a defense verdict — unless the accusation was true. That argument is mostly nonsense...." §8:95

### DWI

10. **Use open-ended questions to challenge vehicle stop.** "Open-ended questions force the officer to give you his reasons for the stop, rather than having him just shoot down each reason you suggest in leading questions. Make the officer commit to a specific number of reasons and then attack each reason separately." §3:31.3
11. **Odor of alcohol.** "Except in rare cases, tripping up the officer or attacking his ability to recognize an odor of an alcoholic beverage is a wasted effort. Tactically, it is preferable to attack the conclusion that the officer or the prosecutor would have the jury draw from that odor. Having no means available to forensically measure this odor, the officer must give an imprecise, unscientific opinion: slight, moderate or strong. Whatever its strength, the odor actually reveals little about a motorist's sobriety. From the odor (or, better, the motorist's breath), the officer could not determine when the motorist consumed the alcohol, the type of alcohol he consumed, how much alcohol he consumed, or over how long a period of time he consumed that alcohol. It is here that you should direct your attack." §9:15

### FINGERPRINTS

12. **Downplaying accuracy of AFIS.** "If the expert submitted the latent print to AFIS, and AFIS characterized the latent fingerprint as a 'match' with your client's, it may be necessary to downplay the accuracy of AFIS. By demonstrating that the computer assigns accuracy scores to the fingerprints it returns, and that human beings must be the final arbiters of whether the computer has found a match, you can undermine the trust the jurors place in this machine." Use these questions.... §9:98

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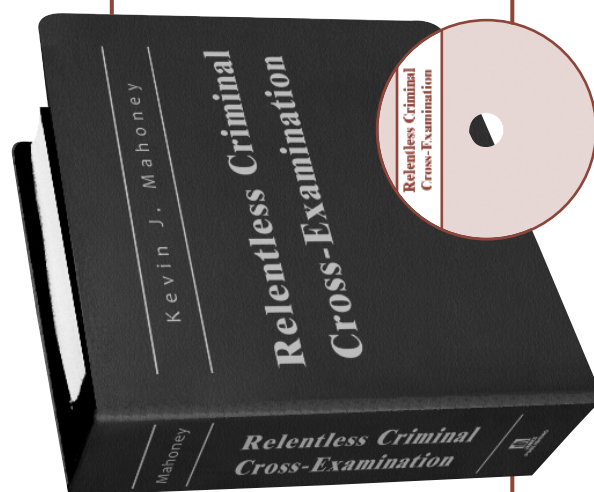
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