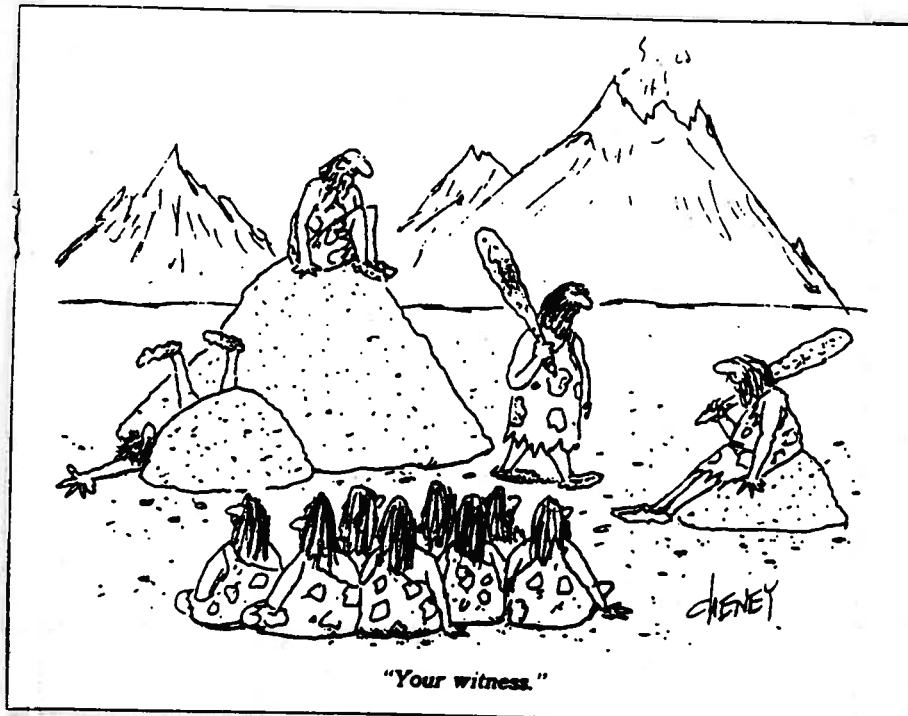


"LOOK GOOD CROSS"

By: Terence F. MacCarthy

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I. Cross is Critical

"The age-old tool for ferreting out truth in the trial process is the right to cross-examination. For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law." United States v. DiLapi, 651 F.2d 140, 149-151 (2d Cir. 1981).

"[Cross-examination is] the greatest legal engine ever invented for the discovery of truth." 5 J. Wigmore, Evidence §1367 (J. Chadbourn rev. 1974).

"Cross-examination is the principle means by which the believability of a witness and the truth of his or her testimony are tested." Davis v. Alaska, 415 U.S. 308, 316 (1974).

II. Scope of Cross-Examination

Rule 611. Mode and Order of Interrogation and Presentation

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

"[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 1435 (1986).

"Cross-examination should be limited to the subject matter of the direct examination and matters affecting credibility of the witnesses [limiting the original draft which allowed cross-examination"... "on any matter relevant to any issue in the case." H.R.Rep. No. 63-650, 93rd Cong. First Sess. 12-1973. But see United States v. Wolfson, 573 F.2d 216, 222 (5th Cir. 1978) (emphasizing that the scope of direct is measured by the "subject matter" of the direct examination rather than by specific exhibits that may have been introduced at that time); United States v. Vasquez 858 F.2d 1387, 1392 (9th Cir. 1988) (permitting cross of defendant regarding the contents of his apartment when the defendant simply testified on direct that he had left his apartment at a certain hour prior to his arrest, and noting that the trial court may permit cross as to "all matters reasonably related" to the issue the defendant put in dispute during his testimony on direct).

Federal Rule of Evidence 611(b) governs the scope of cross-examination. While the rule specifically limits cross-examination to the subject matter of direct examination and to matters affecting witness credibility, it also provides: "[t]he court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." United States v. Harbour, 809 F.2d 384 (7th Cir. 1987); United States v. Alvarez, 833 F.2d 724 (7th Cir. 1987); United States v. Carter, 910 F.2d 1524 (7th Cir. 1990); United States v. Moore, 936 F.2d 1508 (7th Cir. 1991).

III. The First Cross-Examination: Susanna and the Elders

IV. Ethical Considerations

"In appearing in his professional capacity before a tribunal, a lawyer shall not...[a]sk any question that he or she has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person." ABA Disciplinary Rule 7-106(C)(2).

"In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person. . ." ABA Model Rule 4.4.

"The prosecutor should not use the power of cross-examination to discredit or undermine a witness if the prosecutor knows the witness is testifying truthfully." ABA Prosecution Function Standard 3-5.7(b).

"It is unprofessional conduct for a prosecutor to ask a question which implies the existence of a factual predicate for which a good faith belief is lacking." ABA Prosecution Function Standard 3-5.7(d).

"A lawyer's belief or knowledge that the witness is telling the truth does not preclude cross-examination but should, if possible, be taken into consideration by counsel in conducting the cross-examination. Defense Function Standard 4-7.6(b).

It is unprofessional conduct for a lawyer to ask a question which implies the existence of a factual predicate for which a good faith belief is lacking. Defense Function Standard 4-7.6(d).

United States v. Wade, 388 U.S. 218, 257-58, 87 S. Ct. 1962, 1948 (1967) (White, J., dissenting in part and concurring in part.)

[the defendant] "Phillips, complains that the government was not cross-examining Bradach to establish the truth and was therefore acting improperly. The point of impeachment, however, is not to vouch for the validity of the impeachment material, rather, it is to suggest that the witness may be mistaken or inconsistent in his testimony and therefore is not a credible witness." See also: United States v. Phillips, 914 F.2d 835, 839 (7th Cir. 1990)

V. The Bad, The Ugly and The Good

A. **The Bad**: cross-examination is the most difficult trial skill.

1. The Witness -- There to hurt, not help.
2. Anticipation Level, or The Perry Mason Syndrome.
3. State of the Art of Cross-Examination
 - a. The Bible: The Art of Cross-Examination by Francis L. Wellman, Collier Books
 - b. The New Testament: The Ten Commandments of Cross-Examination by Professor Irving Younger
 - c. Taught as an art

B. **The Ugly**: Most cross-examinations today involve three stages.

1. Traditional Introductory Incantations
2. Begging
3. Demolish, Destroy & Devastate

C. The Good: Cross is a science, not an art, and therefore it can be taught and learned as a system.

VI. Cross-Examination should be about: Looking Good – Telling a Story – Using Short Statements

VII. The Purpose of Lecture on Cross:

- 1) Share with and teach the "Look Good" system and style of cross-examination.
- 2) Change overview, perception of cross from dialogue to monologue concept.
- 3) Use cross to tell story to the jury: to paint pictures, create images and persuade.

VIII. The "Look Good" Cross System of Cross-Examination

A. Objectives

1. "Look Good"

Presumed Innocent by Scott Turow: cross-examination of Dr. Kumagi (Painless) (Attachment "A") with permission of author.

2. Helpful Information

3. Confrontation

"[T]he principal purpose of cross-examination [is] to challenge whether the declarant was sincerely telling what he believed to be the truth, whether the declarant accurately perceived and remembered the matter he related, and whether the declarant's intended meaning is adequately conveyed by the language he employed." Ohio v. Roberts, 448 U.S. 56, 71, 100 S. Ct. 2531, 2541 (1980).

"Cross-examination often depends for its effectiveness on the ability of counsel to punch holes in a witness, testimony at just the right time, in just the right way." Perry v. Leake, 109 S. Ct. 594, 601, 488 U.S. 272 (1989).

4. Impeachment

[1] Inconsistent Statements (FRE 613)

[2] Motivation

[3] Truthfulness (FRE 608)

- [4] Convictions (FRE 609)
- [5] What the Witness Could Have Done But Did Not Do

- [6] Capacity
- [7] Contradictions
- [8] Writing Used to Refresh Memory (FRE 612)
- [9] Admissions (FRE 801(d)(2))
- [10] Bad Acts (FRE 404(b))
- [11] Habit (FRE 406)

EXPERTS ONLY

- [12] Learned Treatises (FRE 803(18))
- [13] Expert's Qualifications (FRE 702)

* Using methods 1 through 11 above, you may impeach the credibility of a hearsay declarant under FRE 806.

B. Style/Manner/Housekeeping Rules

1. Lectern

"If your presentation will be delivered from a lectern, you should experiment. If appropriate, move to the side or front of the lectern to get nearer the audience. Many professional speakers do this. It is engaging, and audiences feel closer to the speaker without barriers." Mandel, Technical Presentation Skills -- A Practical Guide for Better Speaking, p.55.

2. Notes

3. Do not hold a writing instrument – use a Blackboard

Holding a pen or pencil in your hand is a communication distraction.

"[C]ross-examination in a technical area frequently requires the availability of material or at least effective demonstrative aids." Thermo King Corporation v. White's Trucking Service, Inc., 292 F.2d 668, 676 (5th cir. 1961).

"No permission or foundation is needed for a lawyer to write on a blackboard as the examination proceeds, so long as what is written is drawn from either a proper question or a proper answer." Siemer, Tangible Evidence: How to Use Exhibits at Trial (2d ed. 1989).

C. Primacy/Recency

1. "It would be fair to say. . ." or "We can agree. . ." or "It is a fact. . .".
2. Thematic or Impeachment
3. Use your head

TFM Trial Advocacy Rule #37: "Learn to use your head. No, not by thinking but by simply moving it up and down."

4. One question too many commandment

IX. Report Card

- A. Gold Star = Yes
- B. Silver Star = "No" (intended)
- C. Bronze Star = "I don't know - don't remember"
- D. Special Awards
 - 1. A "Howard" (see Listen)
 - 2. Non-Plausible Response
- E. **ANYTHING ELSE = A BLACK MARK!**
(See how to handle the intractable witness.)

X. System/Formula:

- 1) See "See Cross-Examination: Why Johnny Can't Lead and Some Other Observations," Dean Deryl D. Dantzler, National Criminal Defense College.

- 2) See: William M. O'Barr, *Linguistic Evidence, Language, Power and Strategy in the Courtroom*, (1982), (reporting the work of the Law and Language Project at Duke University, which studied various aspects of communication and linguistic courtroom behaviors and their effects on jurors).

SHORT + STATEMENT = CONTROL

A. Short

1. Eliminate prefixes
2. Eliminate suffixes
3. Transitions

"Good transitions are useful to the audience because they make clear the thought patterns of the speaker and the relation of evidence to the conclusion it supports. In the form of internal summaries, good transitions aid memory, recall, and understanding of the speaker's material." Minnick, Public Speaking, p.84.

The traditional state of the art transition: "Calling your attention to March 5, 1992, at or about 2:30 in the afternoon, what, if anything, unusual occurred?"

TFM Trial Advocacy Rule #11: "Speak in a courtroom the way you would speak in a bar."

Try a "look good" transition: "I want to ask you a few questions about what you saw when you left Murphy's Bar at 3 in the afternoon. You understand?"

Exceptions (when you can use longer statements)

- a. Looping: Incorporate the good and important into the next statement.
- b. Themes, trilogies, enneads, repetition
- c. Misdirection
"If [a lawyer] can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. . . Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying." United States v. Wade, 388 U.S. 218, 257-58, 87 S. Ct. 1962, 1948 (1967)(White, J., dissenting in part and concurring in part).
United States v. Phillips, 914 F.2d 835, 839 (7th Cir. 1990)

See IV Ethical Considerations

B. Statements

1. **You May Cross-Examine in Three Ways:**

- a. Questions – simple or open-ended.
 - Problems:
 - 1) no control
 - 2) Invite witness to participate – be storyteller
 - 3) Narrative enhances credibility
- b. Traditional leading questions:
 - Problems:

- 1) precludes "one word cross"
- 2) "legal speak"
- 3) No way to tell a story

c. Statements

- Advantages

1. control
2. no "legal speak"
3. helps storytelling

2. Objections as to Form – Few & Seldom Successful

a. Opponent needs a proper legal reason

b. Judges like system

c. The law, no less commonsense, supports the system

- Ohio v. Roberts, 448 U.S. 56, 70-71, 100 S. Ct. 2531, 2541-42 (1980) ("counsel's questioning clearly partook of cross-examination as a matter of form")¹ Yes, we are aware of Crawford v. Washington, 541 U.S. 36 (2004), but Crawford does not speak to the issue of what is proper cross-examination.
- H.L. v. Matheson, 450 U.S. 398, 401-02, 101 S. Ct. 1164, 1167, (1981). The witness gave ". . . monosyllabic

¹ " 'you never gave them. . .'; 'this wasn't then in the pack'; 'you have never [not] seen [discussed; talked]. . .you never gave. . .'"

b. Responding to the Objection:

- "As your honor well knows. . ."
- TFM Trial Advocacy Rule #37 - use your head
- "Right"

3. Details

4. Organization

5. Terms

- a. No legalese. United States v. Marshall, 488 F.2d 1169, 1171 n. 1 (9th Cir. 1973)
- b. Power language: Not hedges, fillers, deferential expressions or intensifiers. Duke Univ. Law and Language Project
- c. Your terms
"The difference between the almost right word and the right word is really a large matter - 'tis the difference between the lightning bug and the lightning." Mark Twain in The Art of Authorship, pp. 87-88, by George Bainton (1890).

6. Tell your story, and paint your pictures by using:

A Yeah.
Q You had determined after talking to the counselor that you felt you should get an abortion?
A Yes.
Q You felt that you did not want to notify your parent--
A Right.

* * *

- a. Statements of the witness
- b. Verisimilitude = Truth
- c. Plausibility = Reasonable - Credible

C. Control

1. Fragmented/Narrative

- a. Pavlov's Dog
- b. Pre-Closing
- c. Dominate the Witness without Appearing Domineering

2. Pace

3. Listen ("Howard's")

4. Impeach

5. Intractable Witness

- a. What is done (conventional wisdom!) but should not be done.
 - i. "All my questions can be answered yes or no"

- ii. "Just answer yes or no"
- iii. Interrupt the witness
- iv. "Your honor, would you instruct the witness to answer yes or no?"
- v. "I move to strike as non-responsive"

"Although it is true that the opponent may not object to a non-responsive answer on that ground alone, he may move to strike such an answer if it is objectionable for any other reason." Elyria-Lorain Broadcasting Co. v. Lorain Journal Co., 298 F.2d 356, 359 (6th Cir. 1961).

- vi. "May I have a cautionary instruction?"

"The naive assumption that prejudicial effects can be overcome by instructions to the jury..., all practicing lawyers know to be unmitigated fiction." Krulewitch v. United States, 336 U.S. 440, 453, 69 S. Ct. 716, 723 (1949) (J. Jackson, concurring).

b. What you may do:

- i. "I'm sorry; I confused you. Let me try again." -- Juanita Brooks
- ii. "Can you try to answer my question?", with questions asked and answered on blackboard -- Jerry Spence
- iii. "You came to tell the truth. If the simple truth is yes, can't you just tell us yes?" -- Garvin Isaacs
- iv. "What did I ask you?" -- Eugene Pincham

c. What you should do: "Tweak the Puppy":

Repeat, word for word, the same statement.

- 1) slowly
- 2) rising inflection
- 3) use of name

Exceptions:

- i. you were wrong (Details)
- ii. perfect one word cross
- iii. add name the third time

WIN ALL SKIRMISHES

- i. Turn your back

7. Safe Havens

USING THIS SYSTEM YOU SHOULD BE ABLE TO SIMPLY TELL YOUR STORY TO THE JURY.

THANKS AND ACKNOWLEDGEMENT TO
SCOTT TUROW

Scott Turow, besides being an outstanding author, was and is an experienced trial lawyer. He was kind in allowing me to reproduce this material from his best selling book, "Presumed Innocent."

ATTACHMENT "A"

Presumed Innocent

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"Doc-tor Kumagai," Stern begins, "you have testified here as an expert, is that right?"

"Yes, sir."

"You have told us about your papers and your degrees, have you not?"

"I answer questions about that, yes."

"You said you have testified on many prior occasions."

"Hundreds," says Painless. Each answer has a kind of screw-you brittleness. He means to be a smart guy and tough, the better of any cross-examiner.

"Doctor, has your competence ever been called into question, to your knowledge?"

Painless adjusts himself on the stand. The assault has begun. "No, sir," he says.

"Doctor, is it not true that many deputy prosecuting attorneys over the years have complained about your competence as a forensic pathologist?"

"Not to me."

"No, not to you. But to the chief of police, resulting in at least one memorandum being placed in your personnel file?"

"I don't know about that."

Sandy shows the document first to Nico, then to Kumagai on the stand.

"No, I never seen that," he says at once.

"Do you not have to be notified under police regulations of any addition to your personnel file?"

"Could be, but you ask what I remember. I don't remember that."

"Thank you, Doctor." Sandy removes the document from Kumagai's hands. As Stern is strolling back to our table, he asks, "Do you have any nicknames?"

Kumagai stills. Perhaps he is wishing that he had acknowledged the letter.

"Friend call me Ted."

"Aside from that?"

"Don't use nicknames."

"No, sir, not that you use. But by which you are known?"

"I don't understand question."

"Has anybody ever referred to you as Painless?"

"To me?"

"To anyone, to your knowledge?"

Again Painless takes a moment to shift around in his seat.

"Could be," he says finally.

"You do not enjoy that nickname, do you?"

"Don't think about it."

"You acquired that nickname some years ago from the former chief deputy prosecuting attorney Mr. Sennett, in an unflattering context, did you not?"

"If you say."

"Mr. Sennett told you to your face, did he not, that you had bungled an autopsy and that the only person who found working with you painless was the corpse, because it was dead?"

The laughter thunders in the courtroom. Even Larren is chuckling up on the bench. I shift in my seat. Whatever Stern has better be good, because for the first time he has abandoned his innate decorousness. His cross so far verges on the cruel.

"I don't remember that," says Painless coldly when the room has come back to order again. Over the years he has grown adroit in his knowledge of the rules of evidence. Every cop and P.A. in Kindle County knows that story. Stan Sennett would be happy to tell it from the stand. But the judge is not likely to allow such a diversion, called collateral impeachment. Painless has drawn his shoulders around him. He looks out at Stern, waiting for more. He has apparently taken some pleasure in what he regards as his own small triumph.

"Now, Mr. Della Guardia and Mr. Molto are two persons from the P.A.'s office with whom you have worked with less—let us say disagreement, is that right?"

"Sure. They my good friends." On this point, Painless has apparently been well schooled. He will acknowledge his contacts with Tommy and Delay, in order to minimize their importance.

"Did you discuss this investigation with either one of them while it was in progress?"

"I talk to Mr. Molto sometime."

"How often did you speak to him?"

"We stay in touch. We talk now and then."

"Did you talk to him more than five times in the first few weeks of April?"

"Sure," he says, "if you say." Painless is taking no chances.

He knows that subpoenas are out. He can't be sure whose MUDS we have obtained.

"And you talked in detail about this investigation?"

"Mr. Molto's a friend. He ask what I'm doin, I tell him. We talk about public information. Nothin from the gran jury." Painless resumes his satisfied smile. These answers, of course, have been the subject of prior discussion with the prosecutors.

"Did you tell Mr. Molto the results of the forensic chemist's analysis prior to conveying them to Mr. Sabich? I am talking specifically about the specimen which showed the spermicidal jelly."

"I understand," says Painless curtly. He looks directly over at Tommy. Molto has his hand over part of his face, and with Kumagai's glance, he straightens up and takes it away.

"I think so," says Kumagai.

He has not quite finished his response when Larren interrupts.

"Just a second," says the judge. "Just one second. The record will reflect that Prosecuting Attorney Molto has just made a gesture which I recognize to be a signal to the witness in connection with his last answer. There will be further proceedings with regard to Mr. Molto at a later time. Proceed, Mr. Stern."

Tommy is crimson as he struggles to his feet.

"Your Honor, I am terribly sorry. I don't know what you are talking about."

Neither do I, and I was watching Molto. But Larren is inflamed.

"This jury is not blind, Mr. Molto. And neither am I. Proceed," he says to Stern, but his anger is too great to store away and he immediately wheels his chair around in Molto's direction and gestures with the gavel. "I warned you. I told you before. I am very upset with your conduct during this trial, Mr. Molto. There will be proceedings."

"Judge," says Tommy despairingly.

"Resume your seat, sir. Mr. Stern, proceed."

Stern comes over to the table. I explain what I saw. He, too, observed nothing. But Stern does not let the incident pass. In a mincing tone he asks, "It is fair to say, Dr. Kumagai, that you and Mr. Molto have always had good communication, is it not?"

The question evokes a few snickers, especially from the reporters' section. Kumagai blinks with disdain and fails to answer.

"Dr. Kumagai," asks Stern, "it is your ambition, is it not, sir, to become coroner of Kindle County?"

"I like to be coroner," says Painless with disarmingly little hesitation. "Dr. Russell doin a good job now. Couple years he retire, maybe I put in for the job."

"And the P.A.'s recommendation would help you obtain that position, would it not?"

"Who knows?" Painless smiles. "Can't hurt."

Grudgingly, I must admire Delay. Kumagai is his witness and he has obviously counseled him to play it straight about whatever was going on during the election campaign. Nico quite clearly wants to have some prosecutorial candor to troop before the jury to make up for some of Molto's gaffes. And his judgment strikes me as correct. If it were not for the incident with the judge a moment ago, it would all sit pretty well.

"By April, had you and Mr. Molto ever discussed the possibility of you becoming coroner, Dr. Kumagai?"

"I say. Mr. Molto and me friends. I talk about what I wanna do, he talk about what he wanna do. Talk all the time. April. May. June."

"And in April you also spoke about this investigation a number of times before you received the forensic chemist's report?"

"I'd say so."

"Now, that report, sir, concerned the semen specimen which you had taken from Ms. Polhemus during the autopsy, is that right?"

"Right."

"And it is that specimen which has been identified as being of Mr. Sabich's blood type and as containing chemicals consistent with the use by Ms. Polhemus of a birth-control device—a diaphragm. Am I correct?"

"You are correct."

"And the presence in that specimen of this birth-control chemical, the spermicide, is critical to your opinion, is it not?"

"All facts important, Mr. Stern."

"But that fact is particularly important, because you, sir, want

us to believe that this tragic incident merely had the appearance of a rape, do you not?"

"Don't want you to believe nothin. I give you my opinion."

"But it is your opinion—to get down to brass tacks, as they say—that Mr. Sabich tried to make this look like a rape, correct?"

"If you say so."

"Well, is that not what you are trying to suggest? You and Mr. Molto, and Mr. Della Guardia? Let us be plain with these people." Sandy points to the jury. "Your opinion is that this was a staged rape. And that the way it was done suggests some knowledge of investigative techniques and of Ms. Polhemus's regular duties in the P.A.'s office, correct?"

"That's what I say on direct."

"And all of that points at Mr. Sabich, does it not?"

"If you say so," Painless says eventually, with a smile. You can see his reluctance to believe that Stern is inept enough to implicate his own client. But Sandy keeps forcing the issue, saying more than Kumagai would risk on his own, and Painless takes his characteristic pleasure in someone else's misfortune.

"And all of those deductions depend in the end on the presence of spermicidal jelly in the specimen you sent to the forensic chemist, do they not?"

"More or less."

"Much more than less, is it not?"

"I would say."

"So this specimen, and the presence of the spermicide, is critical to your expert opinion?" says Stern, arriving at the point where he was a moment ago. This time Painless concedes. He shrugs his shoulders and says a'll right.

"Now, does your expert opinion, Dr. Kumagai, take any account of the fact that no spermicidal jelly was found in Ms. Polhemus's apartment? Are you familiar with that testimony that was given here by Detective Greer?"

"My opinion on scientific evidence. I don't read the transcript."

"But are you familiar with that testimony?"

"I heard about it."

"And are you not concerned, as an expert, that your opinion

depends on the presence of a substance not found in the victim's belongings?"

"Am I concerned?"

"That is my question."

"Not concerned. I got an opinion on scientific evidence." Stern gives Painless the long look.

"Spermicide came from somewhere, Mr. Stern. I don't know where lady hides this stuff. It's in the specimen. Test says what it says."

"Just so," says Sandy Stern.

"You stipulated," says Kumagai.

"That the spermicide was in the specimen you sent. Yes, sir, we did agree to that." Sandy walks around the courtroom. I still cannot guess what it is that Kumagai missed. Until Painless mentioned the stipulation I was ready to bet that the spermicide was misidentified.

"Now, sir," says Stern, "your initial impressions at the time of the autopsy took no account of the presence of a spermicide, did they?"

"Can't remember now."

"Well, think back, please. Was it not your original theory that the person who had last had intercourse with Ms. Polhemus was sterile?"

"Don't recall."

"Really? You told Detective Lipranzer that Ms. Polhemus's attacker seemed to have a condition in which he produced dead spermatozoa, did you not? Detective Lipranzer has already testified once before the jury, I am sure it would be no problem for him to return. Please reflect, Dr. Kumagai, is that not what you said?"

"Maybe. Very preliminary."

"All right, it was your very preliminary opinion. But it was your opinion then?"

"I guess."

"Now, do you recall the physical findings that led you to that opinion?"

"No, sir."

"As a matter of fact, Doctor, I am sure it is difficult for you

to recall, unaided, any autopsy within days of when it took place, is that right?"

"Sometime."

"How many autopsies do you do in a week, Dr. Kumagai?"

"One, two. Sometime ten. Depends."

"Do you remember how many you performed in the thirty days surrounding Carolyn Polhemus's death?"

"No, sir."

"Would you be surprised to know that it was eighteen?"

"Sound right."

"And with that number, it is obvious, is it not, that the specifics of any one examination may slip your mind?"

"True."

"But when you spoke to Lipranzer the details were fresher. Were they not?"

"Probably."

"And you told him then that you believed the attacker was sterile?"

"I say, I somewhat remember that."

"Well, let us review for a moment those findings you presently recall that might have led to that preliminary opinion."

Sandy runs through it quickly. The rigor mortis, blood coagulation, and digestive enzymes established the time of death. The primary deposit of male fluids in the rear of the vagina, away from the vulva, indicated that Carolyn had spent little time on her feet after sex, meaning that intercourse had occurred near the time of her attack. And there was an absence in the fallopian tubes of any live spermatozoa, which one would expect to find ten to twelve hours after intercourse, assuming no contraception had been used.

"And to explain these phenomena, particularly the dead spermatozoa, you theorized that the attacker was sterile. It did not occur to you at first, Doctor, that a spermicide had been used, did it?"

"Apparently not."

"As you look back, you must think you were a fool to have missed something so obvious as the use of a contraceptive spermicide?"

"Make mistakes," allows Painless with a flip of his hand.

"You do?" asks Stern. He eyes the state's expert. "How often?" Kumagai does not answer that. He recognizes his miscue.

"Mr. Stern, I find no birth-control device. No diaphragm. Apparently, I assume no birth control used."

"But certainly, Dr. Kumagai, an expert of your stature could not have been so easily misled?"

Kumagai smiles. He knows he is being taunted.

"Any single fact important," he says. "Kind of thing that murderer knows."

"But you yourself were not trying to mislead Detective Lipranzer when you gave him your initial impression, were you?"

"Oh no." Painless shakes his head vigorously. He has been prepared for that suggestion.

"You must have been convinced, Doctor, at that time, that birth control had not been used—so convinced that you considered the use of a spermicide to be out of the question?"

"Look, Mr. Stern. I got an opinion. Chemist has results. Opinion changes. Lipranzer know opinion's preliminary."

"Let us consider some alternatives. For example, Dr. Kumagai, you would be convinced that birth control would not be used by a woman who knew she could not bear children, correct?"

"Sure," he says. "But Ms. Polhemus got a child."

"So the evidence has shown," remarks Stern. "But let us not consider the particulars of Ms. Polhemus. Just bear my example in mind. If a woman knew she could not conceive, it would be unreasonable for her to use a spermicide, would it not?"

"Sure. Unreasonable." Painless agrees, but his answers are growing slower. His eyes seem thick. He has no idea where Stern is headed.

"Absurd?"

"I'd say."

"Can you, as a forensic expert, conceive of any reason that such a woman might use a diaphragm or a spermicide?"

"We not talkin about a lady in menopause?"

"We are speaking of a woman who knows without question that she cannot conceive."

"No reason. No medical reason. I think of nothin."

Sandy looks up at Larran. "Your Honor, may the court reporter mark the last five questions and answers so that she can read them back later, if need be?"

Kumagai conducts a slow survey of the courtroom. He looks at the judge, the reporter, finally the prosecutors' table. He is actually frowning now. The trap, whatever it is, has been set. Everyone knows it. The reporter attaches a clip to the narrow sheaf of stenographic notes.

"Is it not your expert opinion, Dr. Kumagai," asks my lawyer, Alejandro Stern, "that Carolyn Polhemus was a woman who knew she could not conceive?"

Kumagai looks out at Stern. He bends over the microphone before the witness chair.

"No," Painless says.

"Please do not rush yourself, Doctor. You did eighteen autopsies in those weeks. Would you not rather consider your original notes?"

"I know the lady use birth control. You stipulate," he says again.

"And I, sir, say once more that we stipulated to the chemist's identification of the specimen that you sent."

Stern returns to our table. Kemp is already holding aloft the document Sandy wants. Stern drops a copy with the prosecution and delivers the original to Kumagai.

"Do you recognize the notes of your autopsy of Ms. Polhemus, Dr. Kumagai?"

Painless flips a few pages.

"My signature," he says.

"Would you please read aloud the short passage marked by the paper clip?" Sandy turns to Nico. "Page 2, Counsel."

Kumagai has to change glasses.

"The fallopian tubes are ligated and separated. The fimbriated ends appear normal." Kumagai looks down at the sheet he has read from. He pages again to the end. He is frowning, deeply now. Finally he shakes his head.

"Not right," he says.

"Your own autopsy notes? You dictate them as you are con-

ducting the procedure, do you not? Surely, Doctor, you are not suggesting you made a contemporaneous error?"

"Not right," he says again.

Stern comes back to the defense table for another piece of paper. I have gotten it by now. I look up to him as he takes the next document from Kemp. I whisper:

"Are you telling me that Carolyn Polhemus had her tubes tied? It is Kemp who nods.

The next few seconds are blank. Weirdly, unaccountably, I feel alone, locked in my own teetering sensations. An essential connection has been interrupted. For a moment it is like déjà vu. I cannot make out reasons. What takes place in the courtroom seems remote. I am aware, in a dislocated way, that Painless Kumagai is being devastated. He denies two or three more times that it is possible that Ms. Polhemus had had her fallopian tubes surgically separated to prevent conception. Stern asks if other facts might affect his opinion and pushes into Kumagai's hands the records of the West End gynecologist who performed the tubal ligation six and a half years ago, after Carolyn aborted a pregnancy. It was this doctor, no doubt, whom Kemp went to meet yesterday afternoon.

"I ask you again, sir, would these records alter your expert opinion?"

Kumagai does not answer.

"Sir, is it now your expert opinion that Carolyn Polhemus knew she could not conceive?"

"Apparently." Kumagai looks up from the papers. In my confusion, I find that I actually feel sorry for him. He is slow now, hollow. It is to Molto and Nico he speaks, not Stern or the jury. "I forgot," he tells them.

"Sir, is it not absurd to believe that Carolyn Polhemus used a spermicide on the night of April first?"

Kumagai does not answer.

"Is it not unreasonable to believe that?"

Kumagai does not respond.

"There is no reason known to you that would explain why she might do that, is there, sir?"

Kumagai looks up. There is no way to tell if he is thinking or simply being ravaged by shame. He has taken hold of the beveled rail of the witness stand. He still does not answer.

"Shall I have the court reporter read back your answers to the questions I asked a few moments ago?"

Kumagai shakes his head.

"Is it not clear, Dr. Kumagai, that Carolyn Polhemus did not use a spermicide on April first? Would that not be your expert opinion? Does it not seem to you, sir, as an expert and a scientist, the most obvious reason that no trace of a spermicide could be found in her apartment?"

Kumagai seems to sigh. "I cannot answer your questions, sir," he says with some dignity.

"Well, answer this question, Dr. Kumagai: Is it not clear, given these facts, that the specimen you sent to the chemist was not taken from the body of Carolyn Polhemus?"

Kumagai now sits back. He pushes his glasses back up on his nose.

"I have a regular procedure."

"Are you telling this jury, sir, that you have a clear recollection of taking that specimen, marking it, sending it on?"

"No."

"I repeat: Is it not likely that the specimen containing the spermicide, the specimen identified as containing fluids of Mr. Sabich's blood type, was not taken from the body of Carolyn Polhemus?"

Painless shakes his head again. But this is not denial. He does not know what occurred.

"Sir, is it not likely?"

"It is possible," he finally says.

From the jury box, clear across the courtroom, I can hear one of the men say, "For Chrissake."

"And that specimen, Dr. Kumagai, was sent, was it not, while you were having these regular conversations with Mr. Molto, am I right?"

With this, Kumagai finally rediscovers his spark. He draws himself up in the chair.

"Do you accuse me, Mr. Stern?"

It is some time before Stern speaks.

"We have had enough unsupported accusations for one case," he says. Then, before resuming his chair, Stern nods in the direction of the witness, as if to dismiss him. "Doc-tor Kumagai," he adds.

After court, Jamie Kemp and I sit in Stern's conference room describing Kumagai's cross-examination for a small audience composed of Sandy's secretary, the private investigator Berman, and two law students who work in the office as clerks. Kemp has brought out a bottle of champagne, and one of the young people has turned on a radio. A fine actor, Kemp does a burlesque in which he plays the parts of both Stern and Kumagai. He repeats Stern's most damaging questions in an insistent tone, and then falls in a chair, where he beats his feet and makes the sounds of a person being choked. We are roaring when Stern comes through the door. He has on a tuxedo, or, more properly, part of it: only the striped trousers and the boiled shirt; a red bow tie, not yet knotted, is through his collar. Inspecting the scene he is livid; a fierce anger grips all his features. You can tell that he is struggling to keep himself in check.

"This is inappropriate," he says. He is speaking to Kemp. "Entirely inappropriate. We are on trial. This is not the time to congratulate ourselves. We may not bring a trace of smugness to that courtroom. Juries sense such things intuitively. And they resent it. Now, if you would please clean this up, I wish to speak with my client. Rusty," he says, "when you have a moment."

He wheels and I follow Stern to his office with its soft, almost feminine interior. I suspect that Clara had a hand in the decoration. Everything is done in the same creamy tone. Full-length drapes cover the windows, and furnishings upholstered in Haitian cotton crowd the office, so that it feels as if you are being pushed into a seat. Stern has a heavy crystal ashtray at each corner of his desk.

"It's my fault more than Jamie's," I say when I enter.

"Thank you, but you are not charged with making judgments at this time. He is. That was entirely inappropriate."