The Only Three Rules of Cross-Examination

Adapted from their book

Cross-Examination: Science and Techniques 2nd Edition

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Chapter 8:
The Only Three Rules of Cross-Examination

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SELECTED AND EDITED PORTIONS OF CHAPTER 8 – "THE ONLY THREE RULES OF CROSS-EXAMINATION"

§ 8.1 "Great" Cross-Examination: A Misleading Term (Book page 8-3)

The application of techniques discussed in this chapter will dramatically elevate the ability of the cross-examiner to obtain favorable admissions, provide support for the theory of the case, and minimize the ability of the witness to take the cross-examination into undesirable areas.

The cross-examiner must strive for the consistency of success that comes from preparation advanced by sound technique. Success in cross-examination is an imprecise determination, but can be summarized as the accomplishment of the factual goals set out by the cross-examiner. Few cross-examinations accomplish every goal, but with the sound application of techniques, the advocate can expect to accomplish far more of her goals than would have been accomplished without the application of the science and techniques of cross-examination.

Just as the physicians' creed begins: "First, do no harm," the cross-examiner's creed must be: "First, do no harm to your client's case on cross-examination." There is an element of risk-taking in every cross-examination. Sound application of techniques can reduce the risks of cross-examination, but never extinguish the risks. One of the hallmarks of great cross-examination is the systematic application of techniques employed to establish the greatest amount of helpful information while minimizing the risks inherent in cross-examination.

The conventional wisdom is that if a witness has done no damage to the cross-examiner's case, a lawyer might elect to forgo asking questions. If no questions are asked, certainly the witness can score no additional points. However, even in circumstances where no damage has been done, it may be that the witness could testify to several additional facts that aid the cross-examiner's case (see Chapter 11, *Sequences of Cross-Examination*). Thus, even the witness who has done no damage may need to be cross-examined. In any event, the skillful cross-examiner views every witness as an opportunity to introduce testimony that supports the advocate's theory of the case. Simultaneously the cross-examiner seeks to employ techniques designed to minimize the opportunities for the witness to enhance his previous testimony or to open up new areas that will damage the cross-examiner's positions.

§ 8.2 Great Cross-Examination Teaches (Book page 8-4)

Cross-examination is not an exercise based on emotion, presence, and oratory. It is not the cross-examiner showing the witness and all of those who observe, (but primarily the witness) that the cross-examiner is smarter, quicker, louder, more demonstrative, or more fearsome. It is about teaching the cross-examiner's theory of the case to the fact finder.

Cross-examinations are not about a performance by an advocate, but rather the teaching of facts that are critical to the cross-examiner's theory

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of the case.

Lawyers who believe that cross-examinations are intellectual endeavors rebel against the idea of teaching. They want it to be a contest of egos. However, the jury does not vote on which lawyer "looks good" or which lawyer performed eloquently. Rather the jury is called upon to vote on a theory of the case. When the lawyer realizes that a cross-examination teaches the cross-examiner's theory of the case, pressure is reduced. The focus is shifted from the cross-examiner's ego to the cross-examiner's ability to convey to the listeners the logic behind the cross-examiner's theory of the case. Once the focus is shifted from the cross-examiner as lawyer to cross-examiner as teacher, the focus becomes conveying understandable presentations that guide the fact finder in real time.

Problem:

Open ended questions seek facts, but don't provide facts.

Solution:

Leading Questions = Answers
Answers = Facts
Facts = Learning

§ 8.3 Cross-Examiners Control of Themselves (Book page 8-4)

The system propounded in this text is not based on oratory, flamboyance, demonstrative abilities, or acting skills. Rather, it is based on simple rules designed to teach the fact finder the theory of the case well. It is also designed to teach the witness that disruption of the orderly introduction of facts to the jury will receive a negative reaction. Further, it will teach that the witness complying with the orderly presentation of facts to the jury will receive positive feedback. The sanctions will be that the witness is forced to verify the truthful facts sought to be established by the cross-examiner. This process may require endurance and pain by the witness but it will happen. On the other hand, the witness who honestly admits facts that help the cross-examiner's or hurt the opponent's theory of the case will be rewarded by the cross-examiner moving on to new facts and not punishing the witness for failure to admit desired facts.

§ 8.7 Relationship of Cross-Examination to Anxiety and Confidence (Book page 8-7)

Each cross-examiner performs better when her confidence is higher. When a cross-examiner is confident, the words come easier. When she is confident, the thoughts come quicker. When she is confident, the goal

appears obtainable.

Anxiety impedes the processing of information. Anxiety destroys confidence. Anxiety undermines confidence. Anxiety leads to frustration, anger, embarrassment and fear. This goes for witnesses too.

With the three rules of cross-examination and other techniques in this text, the cross-examiner's confidence can remain at a high point while the confidence of the witness is eroded and replaced with anxiety. The three rules are designed to keep the lawyer's confidence at a high level while keeping the anxiety level of the witness at a high level. Said a different way, the rules are designed to keep the lawyer's confidence high and her anxiety low, while keeping the anxiety of the witness high and his confidence low.

The relationship between the witness and the cross-examiner is an inverse ratio. When the cross-examiner's confidence is high, the witness' confidence is low. When the cross-examiner's anxiety is high, the witness's anxiety is low. When a witness's anxiety is high and his confidence is low, he is less likely to carefully select words to explain his position. He is less likely to offer additional information to explain his position. He is less likely to volunteer new testimony. Ultimately the witness is less likely to tailor his testimony, whether in the obvious form of "lying" or in the less obvious form of carefully orchestrating his testimony to fit into the theory of the opponent's case.

§ 8.8 Real Time Learning in Cross-Examination (Book page 8-8)

The three rules are designed to permit the fact finder to learn the cross-examiner's theory of the case and to understand effective attacks upon the opponent's theory of the case in real time. Real time is defined as being the instant when the questions and answers are spoken in trial. The opposite of real time is to suggest that the jury will only understand the significance of a question and answer in the closing argument, or worse, in the jury room. The jury must understand the significance of the questions and answers at the time of trial. It is only through the building of these facts, one at a time, that the fact finder can appreciate the significance of the testimony and the relationship of that testimony to other testimony that has come before this witness and will come after this witness.

The jurors must be able to say to themselves, "I understand why the lawyer is asking this question and I understand the significance of the admission." Juries vote for what they understand.

§ 8.10 The Historical Context of the Only Three Rules of Cross-Examination (Book page 8-9)

This chapter sets out the foundation methods of obtaining control of the witness question by question. There are only three rules. That is something that can be remembered even in the middle of a cross-

examination. The rules are all positive. Something that leads the cross-examiner to understand the rule before it is violated and the damage is done. Finally, the rules apply to every type of case, whether jury trial, a judge trial, an arbitration panel, or mediation. The rules apply in civil cases, criminal cases, administrative cases, and domestic relations cases. Consequently, because the rules have universal application, the rules afford the cross-examiner a predictability of result in any kind of setting. Because the rules provide predictable responses, results can be replicated. The cross-examiner is no longer required to learn a new system of cross-examination when venturing into a different factual setting. The rules are: (1) leading questions only, (2) one new fact per question, and (3) a logical progression to one specific goal.

§ 8.11 Rule 1: Leading Questions Only (Book page 8-9)

The Federal Rules of Evidence and the rules of evidence of all states, permit leading questions on cross-examination (Fed. Rules Evid. Rule 611 (c); 28 U.S.C.A.). Simultaneously, the right to use leading questions is almost wholly denied the direct examiner. This is the fundamental distinguishing factor of cross-examination. It is the critical advantage given the cross-examiner that must always be pressed.

Despite this incredible opportunity, many lawyers do not take advantage of this rule and insist on asking open-ended questions. This is unnecessary at best and foolhardy at worst. A skillful lawyer must never forfeit the enormous advantage offered by the use of leading questions.

The “leading questions only” technique means that, in trial, the cross-examiner must endeavor to consistently phrase questions that are leading. No matter what the reason or rationale, a non-leading question introduces far greater dimensions of risk and occasions far less control than a question that is strictly leading.

One of the greatest risks occasioned by the use of open-ended questions is not the answer that may be given to that question. The answer may be perfectly acceptable to the cross-examiner. However, by asking the open-ended question the cross-examiner has failed to consistently train the witness to give short answers to leading questions and not to volunteer information. By teaching inconsistently, with every open-ended question the cross-examiner sows the seeds for later problems in the cross-examination. As will be discussed, cross-examiner must teach a consistent lesson to the witness: The cross-examiner will pose the question and the witness may verify or deny the suggested fact. The consistency of teaching through the repetitive form of the leading question is fundamental to the goal of witness control.

§ 8.12 Leading Questions Allow the Cross-Examiner to Become the Teacher (Book page 8-10)

If the lawyer is to teach the case the lawyer must demonstrate that she understands the case. The leading question positions the cross-examiner as the teacher, while the open-ended question positions the cross-examiner as a student. Through the open-ended question it is the witness

who becomes the teacher. The open-ended question focuses courtroom attention on the witness. The leading question focuses attention on the cross-examiner. The cross-examiner seeks that attention not for ego gratification, but for purposes of efficiently teaching the facts of the case. The cross-examiner/teacher using leading questions places the cross-examiner in control of the flow of information. The leading question also allows the cross-examiner to select the topics to be discussed within the cross-examination. These topics will be referred to throughout the book as the chapters of cross-examination.

§ 8.13 Use Short Declarative Questions (Book page 8-10)

Leading questions are often defined as questions that suggest the answer. This is too broad a definition. True leading questions do not merely suggest the answer; they *declare* the answer.

Leading Questions = Answers

- How do you feel about drinking?
- Do you like to drink?
- You like to drink?
- You drink ⊘
  You like it ⊘

§ 8.14 Declarative Questions Give Understanding to the Jury (Book page 8-11)

Juries and judges understand when a leading question is put in a declarative style. The fact proposed is immediately understandable. It is learnable in real time.

Problem:
Open ended questions seek facts, but do not provide facts.

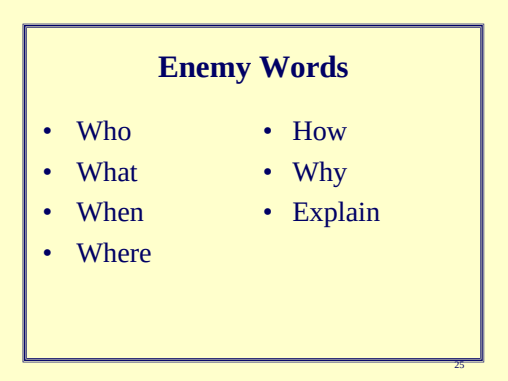
Solution:
Leading Questions = Answers
Answers = Facts
Facts = Learning

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§ 8.17 Avoid Enemy Words that Give Control to the Witness (Book page 8-14)

The adept cross-examiner *never* uses questions that begin with the following:



These words create the polar opposite of closed-ended questions. These words invite uncontrolled, unpredictable, and perhaps unending answers. These words *invite the witness to seize the action*, to become the focal point of the courtroom. They take the jury's mind off the fact the cross-examiner is trying to develop and allow the witness to insert a mishmash of facts, opinions, and stories designed to focus the jury on the issues the witness thinks are most important.

Cross-examiners are not journalists looking to present both sides of a story. Cross-examiners are not interested in having the witness explain everything that the witness wishes to explain. Cross-examiners strive to highlight those portions of the witness's testimony that are helpful to the cross-examiner's theory of the case.

There are those who maintain that they are so skillful that they can pose open-ended questions, the answers to which will always be of assistance. These lawyers are fond of saying, "I didn't care how she answered," or "There were no possible answers that could hurt me." In response, those lawyers have only eliminated the answers they have thought of. None of us are so omniscient that we can confidently state that we have eliminated every possible negative answer. There are truly bad answers and non-responsive answers awaiting the open-ended question. Why take that unnecessary chance? This applies to the most experienced trial lawyer as well as the novice. No one outgrows this advice.

§ 8.22 Word Selection (Book page 8-17)

One of the most important benefits of the leading question permits the cross-examiner to select the words to describe the events to be discussed in the question. Most witnesses do not carefully consider their words nor carefully select words to describe what they are testifying. Normally, just as in everyday life, the witness offers the best word they can think of at the time. This may help the opponent's theory of the case or may be neutral. The one predictable statement that could be made is that the word will not

be selected to consciously help the cross-examiner's theory of the case.

By use of a leading question, the cross-examiner controls the word selection and may more descriptively and vividly describe that which has occurred.

Compare the following two questions:

1) You saw a man lying on the side of the road?
2) You saw a man hurled from the car?

The first question describes with some precision a potential plaintiff in a personal injury suit. But when compared with the more descriptive word "hurled" in the second question, the first question is colorless.

Use Vivid Words to Tell Stories

You saw a man lying on the side of the road?

vs.

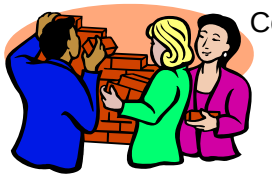
- You saw a man **hurled** from the car?
- From the VW Bug you **smashed** into?
- His body was lying in a **heap**?
- On the **shoulder** of the road?
- In the **dirt**?
- **Unconscious**?

§ 8.24 Rule 2: One New Fact per Question (Book page 8-19)

Cross-examiners need acceptable conclusions supported by facts to work successfully. They need to add only one new fact per question. This is a critical component in the quest for witness control. By placing only a single new fact before a witness, the witness's ability to evade is dramatically diminished. Simultaneously, the ability of the fact finder to comprehend the significance of the fact at issue is greatly enhanced.

§ 8.25 A Time-Honored Method to Teach the Fact Finder (Book page 8-19)

Your Building of Facts Persuades and Convinces



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Dr. Seuss, in his classic work *Hop on Pop*, repeatedly used the smallest component, a single word, and expanded it only so far as necessary to create a simple sentence:

Hop
Pop
We like to hop.
We like to hop on top of Pop.
Stop. You must not hop on Pop.

This teaching method is exactly that necessary to "teach" the witness to answer only "yes." The jury best learns a case this way, too. Three questions are offered as an example:

1) You threw the ball?
2) The ball was red?
3) You threw the red ball to Sue?

The initial question discusses one fact. Each succeeding question contains one additional or new fact to be added to the body of facts established by previous questions.

By this method, the scope of the fact at issue is sharply controlled. As a result of the tight control over the scope of the question, the permissible scope of the witness's answer is tightly controlled.

§ 8.33 Avoiding the Compound Question Avoids Objections (Book page 8-25)

This method of asking only one fact per question also assists in meeting objections. As discussed, when the cross-examiner asks only one fact per question, she avoids having to interpret the meaning of a "no" answer. Similarly, when avoiding compound questions, counsel sidesteps multi-tiered objections that include objections to the form of the question, thus allowing counsel to better meet any forthcoming objection.

One New Fact per Question Solves Problems

- No objection
- Certainty as to answer
- Easier impeachment
- Better juror comprehension

§ 8.37 Facts, Not Conclusions, Persuade (Book page 8-28)

The second rule of one fact per question tightly controls the witness. The

witness has before him but a single new fact. It is hard for the witness to express confusion or be evasive. Moreover the jury is more easily educated by this technique of factual presentation. Because the facts are so detailed and because the facts are presented one at a time, the jury will reach the conclusion to which the facts inevitably point. The jury will embrace the same logical conclusion suggested by the cross-examiner.

One might say, the technique of one fact per question is akin to planting acorns in a jury box, not oak trees. Remember it is the lawyer, not the jury, who is intimately familiar with the facts. The jury must be slowly and carefully be brought to the conclusion sought by the advocate. It is far safer to let the jury reach its own conclusion based on the facts rather than demanding that conclusion from a hostile witness. The structure of one fact per question meticulously builds the picture so that the jury reaches the cross-examiner's desired conclusion, even though the conclusion itself may never be put to the witness. See chapter 9, *The Chapter Method of Cross-Examination* and chapter 10, *Page Preparation of Cross-Examination*.

§ 8.45 Word Selection Made Easier by Envisioning The Event (Book page 8-35)

While presenting one fact per question, the cross-examiner must make certain that the words used are adequate to create the desired case scenario. There is a technique to aid the cross-examiner in selecting the descriptive words that can make the picture clearer and the facts more vivid. If the cross-examiner will form a mental image of what she is seeking to describe, and then present that mental image through leading questions, the result is a series of leading questions of finer texture. The cross-examiner wishes the fact finder to see the picture, so it would only stand to reason that the cross-examiner must first see that picture.

The cross-examiner must strive to use descriptive words to describe accurately the facts questioned upon. The descriptive words will come naturally to mind when the cross-examiner will look into her own head to see the event.

§ 8.46 Labeling (Book page 8-35)

In this age where more and more information is floods our senses daily, jurors and judges find it difficult to remember names and events. Word selection is critical in labeling all major witnesses, all major pieces of evidence, and all major events within the theory of the cross-examiner's case. In the example above, Jim is labeled "the big boy" and Dave is labeled the "little boy". The action is labeled a "beating" (beat on). These are fair, reasonable descriptions of what happened that vividly illustrate the cross-examiner's theory of the case. For more on labeling, see chapter 26, *Loops, Double Loops, and Spontaneous Loops*.

§ 8.47 Rule 3: Break Cross-Examination Into a Series of Logical Progressions to Each Specific Goal (Book page 8-35)

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Cross-examination of a witness is not a monolithic exercise. Instead, the cross-examination of any witness is a series of goal-oriented exercises. The third technique of the only three rules of cross-examination is to break the cross-examination into separate and definable goals.

Each section of cross-examination must have a specific goal. It must be so specific and so clear that the cross-examiner, if asked at any time without notice (as judges are inclined to do), can identify the factual point she is seeking to make. Another way of envisioning this is to view cross-examination as a series of pictures that must be painted.

There are two reasons for developing specific factual goals. First, it is easier for the jury to follow any line of questioning if it clearly and logically progresses to a specific goal. An organized presentation that is broken down into several individual points invites attention. Even a reluctant listener can focus attention when there is clear sense of organization and defined points being made by the speaker.

The second value in breaking cross-examination into individual factual goals, is that it allows the judge to know where the cross-examiner is proceeding so that she will permit the cross-examiner to continue. Long gone is the age when a trial was a civic event. Trials are now statistics. Judges want cross-examiners to “move it along.” There is undoubtedly a general right to cross-examine witnesses. But that is insufficient. There must be a reason to cross-examine the witness. Before rising to cross-examine, the advocate must have firmly in mind the individual goals of that cross-examination.

Each specific goal within a cross-examination should either assist the cross-examiner in building her theory of the case, or assist the cross-examiner in undermining the opponent’s period of the case. It is unnecessary and unwise to pursue factual goals that do not impact the contrasting theories of the case.

Chapters Accomplish Goals

1. Group related facts
2. Use leading questions
3. The grouping establishes the goal
   a. Build your theory or hurt their theory
   b. Leading to a belief about credibility

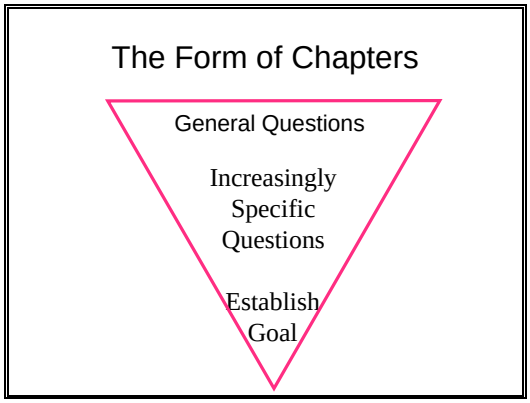
§ 8.48 From The Very General to Very Specific Goals (Book page 8-37)

A logical progression dictates that the issue to be developed must proceed from the very general to the specific goal. Think of it as a funnel. The

general questions funnel the witness to specifics.

Witnesses will find it easier to agree to general issue questioning before they are brought to specifics. This is true particularly when specific facts will be harmful to the witness. The witness will not respond in a monosyllable manner to the question unless that entire issue has been developed from the general to the specific.

A witness is unlikely to admit at the onset of cross-examination that he is a chronic liar. However, a series of facts may well establish that the witness can understand why people would lie, has been in situations where a lie benefited the witness, and has lied in those situations. The cross-examiner should start out generally and proceed slowly and methodically, one fact at a time, to the specific goal of establishing that the witness is a “liar.” The cross-examiner is advised to recall that “liar” is a conclusion, and one that the witness is unlikely to adopt. That is not the goal of the cross-examination chapter. The goal is to provide the fact finder with sufficient facts by which they may infer that the witness is a liar. The technique, as always, is to provide facts to the witness through leading questions making it more likely that the witness will give truthful “yes” answers. The cross-examiner should strive to score the points factually, leaving it up to the fact finder to draw the appropriate inference.



§ 8.52 The More Difficult the Witness, The More General The Chapter Must Start (Book page 8-40)

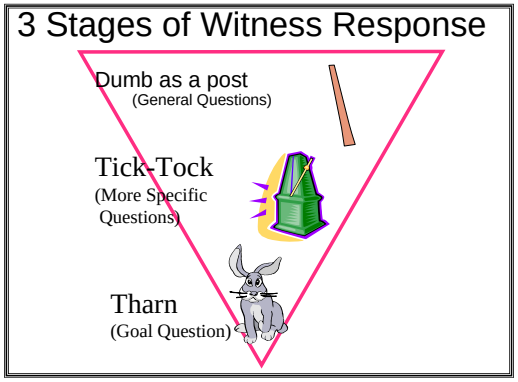
By proceeding from the general to the specific one fact at a time, the cross-examiner is putting the witness in the dilemma of answering general questions before the witness knows where the general questions will lead to specifically. More experienced witnesses, professional witnesses, and expert witnesses are more adept at realizing where the specifics factual goals may lie when a general question is introduced. Consequently, that witness will begin to fight the cross-examiner intentionally at the very beginning of general questions.

There is a technique to disarm this type of witness. It is to start more generally.

§ 8.54 The “Yes” Answer is the Most Understood Response (Book page 8-41)

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The techniques discussed in the only three rules of cross-examination are designed to produce a great many “yes” answers. When the cross-examiner has placed a fact before the witness and the jury through a leading question, the “yes” answer efficiently allows the fact finder to understand what has been proven. The short leading question followed by the short verification is the best teaching method. All answers other than “yes” require more concentration and risk more misunderstanding. That is not to say that in order to be successful the cross-examiner must always get a “yes” response. As will be discussed there are other ways of making important points even when a witness denies the leading question.



§ 8.62 The Three Rules—Building Blocks for Advanced Techniques (Book page 8-48)

It cannot be stressed enough that these three rules are the basic building blocks for all future advanced techniques. If the lawyer can perform the three building block techniques in every question, she can advance to the more artistic techniques. Each new technique builds upon the solid foundational techniques of : (1) leading questions only; (2) one new fact per question; and (3) building toward a specific goal.

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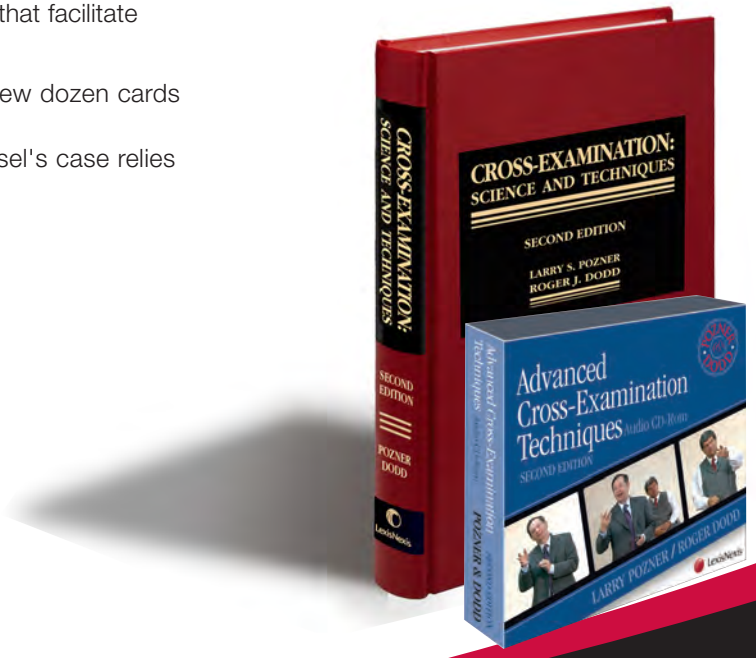
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