

Cross Examination as Advocacy

The Pozner and Dodd practical framework to prepare your next cross examination

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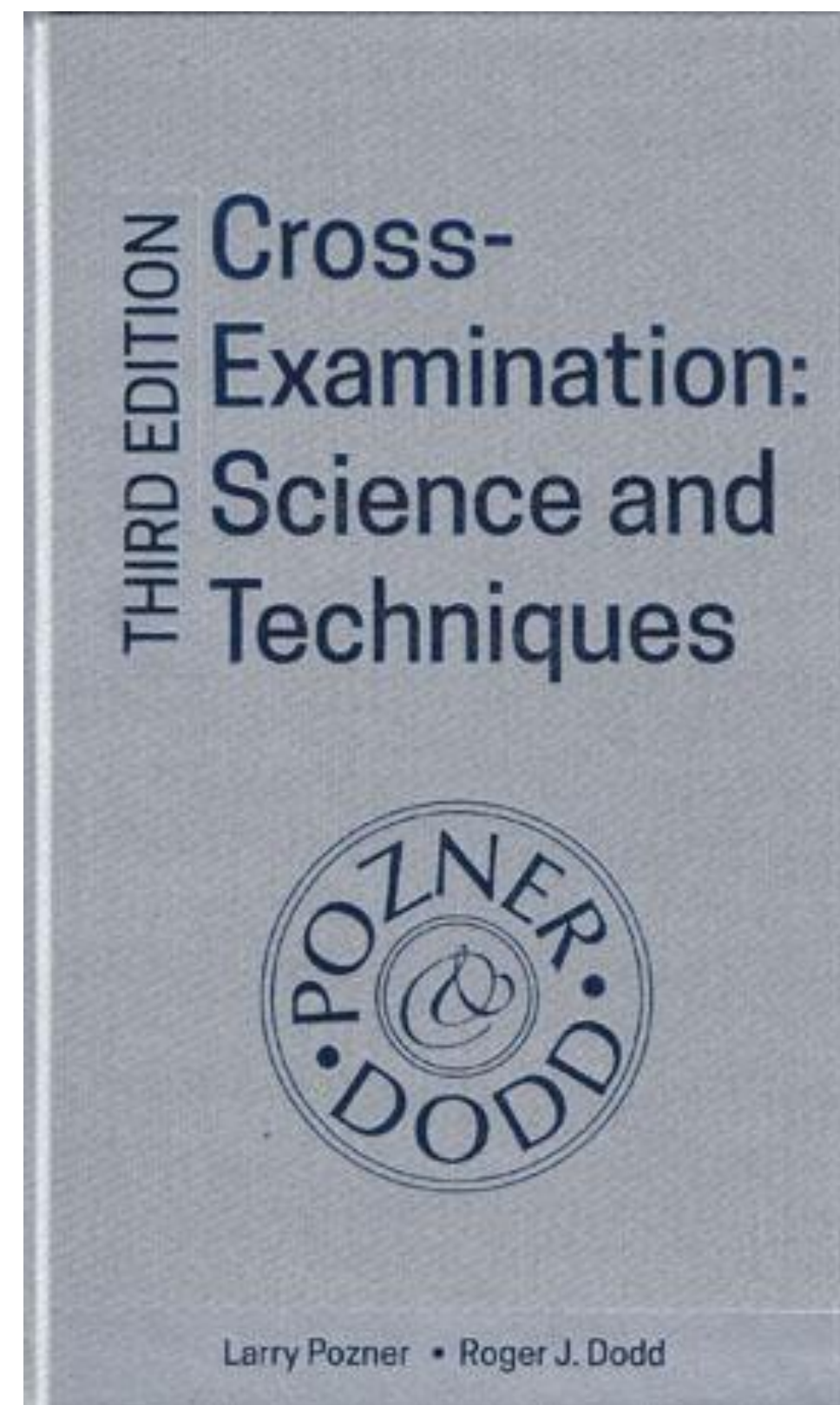
Cross Examination “Truisms”

Some of the rules of cross examination you’ve heard before

- “Never ask a question you don’t know an answer to”
- “Only ask leading questions”
- “Cross examination is dangerous and should be limited to only essential matters”
- “Don’t write down the questions”

Who are Pozner and Dodd?

- Larry Pozner and Roger Dodd are two practising lawyers from the United States who together wrote Cross-Examination: Science and Techniques



Cross-Examination: Science and Techniques

Larry Pozner and Roger J Dodd

The book is the most thorough and comprehensive guide on cross examination techniques

- Word selection, tone of voice and word emphasis
- When attacking credibility, attack very early in the cross
- Silence as a technique
- Determining what “I Don’t Know” or “I Don’t Remember” Really Means

Modern cross examination is much more of a science, much less of an art

Before you write your first question

I've got my brief of evidence, now what?

Step One: What's our Theory

- Make sure you have a clear case theory
 - This does not necessarily mean you are calling your client.
 - This does not mean you are presenting a motive to lie/to be bias
 - This does not mean you are running a positive case.
- “Team line”/“Theme Line”
 - Implausible. Doesn't align with common sense. Doesn't accord with life experience
 - No complaint. No corroboration. Inconsistent behaviour.
 - This was a lie. A lie that was built to get him fired.

“Us vs Them” Case Theories

Pozner and Dodd on Case Theories

- Instructions guide but don't bind
- Ensure the case theory aligns with “immovable facts”.
- Prefer “Them” Theories over “Us” Theories

“Questions aren’t evidence”

- Each aspect of the trial/hearing should advance your theory
- That includes your questions
- Particularly before a jury
 - Juries are desperate for guidance
 - Want it before closing
 - Have them thinking about your case/case theory in each break and looking at each subsequent witness through the prism of your case
- Consistent language gets the benefit of repetition

Step Two: Who am I cross examining and where?

- Where are you cross examining:
 - Local Court Hearing
 - Pre-Record
 - Jury Trial
 - Judge alone trial
 - Witness examination
- Who am I cross examining:
 - Child
 - Unrelated witness
 - Complainant
 - Expert

Take as long as you need Mr Bhutani, I'm not here to limit your cross examination...

Step Three: Internal Inconsistencies within the Crown Case

Prepare a version table for key events

- Inconsistencies can be within a single witness's version or amongst witnesses
- Every case can be distilled into key events
- E.g:
 - Morning before the robbery
 - Arrival at the scene
 - Entry into the service station
 - Into the back room
 - Exit out of the fire exit

Versions Provided By Complainant

Topic	Body Worn – 2/3/23	COPS	SAIK Version	2 March 2023	10 May 2023	15 May 2023	VERSION IN COURTa
Time and Date							
Date	"2 days ago" Meaning 28/2		26/2/23	25/2/23			
Time	Unmentioned	Unmentioned	3:00am – 3:20am SAIK report says * [REDACTED] notes a different time in her report and her notes	A short time later after 2:40am	5 minutes after 2:02am	N/A	
Lead Up							
How got in	Unmentioned	Some time in the early hours, argument, snatched keys and walked out Later returned unlocking the door	Front door opened and [REDACTED] was running towards her	Heard someone running Yelling at me angry	Came barging in with keys	N/A	
Activity Done	He put me in a fucking headlock	Shortly after the POI returned to the apartment, the victim heard as he placed the house key into the lock and	Choke from behind using forearms Passed out Headlock	Took my phone from me started deleting things Grabbed me from behind and wrapped both	Unmentioned	N/A	

VERSIONS

Date of allegations

Allegation	12/2/19 - Notes	21/2/19 Incident Report	25/2/19 Incident Report	25/3/19 – EPAC Transcript	3/4/19 Handwritten Report –	4/7/19 Handwritten Report – Really weak complaint	19/10/20 List of	1/12/20 Transcript	16/3/21 – 3 rd Reports	9/4/21 – Police Statement	14/5/21 – Police Statement
Holding hand for a few second	Using too much physical contact	N/A	N/A	(840) Couple of times had my hand up, grab it for two or three second Pushed me head into the desk Messes hair a little bit I reported that to my mum (980) Did he ever do it (touching) again – No (1030)	N/A	N/A	Frequently grab face Regularly stand so close I would have to lean up against a wall or desk Began term 2 2018 became daily	Standing in front of you with hand up against the wall (410) Did anyone see – only casual passer-bys (465) I mean again it would sometimes happen	He would wrap his arm around my waist or put his hand on my hips while passing by me.	[11] If I raised my hand to ask a question, he would walk up to me, grab my hand, stroke it and then let go and continue walking without acknowledging my question.	

Step Four: Are there any directions I'm after/or will be given?

- Self defence
- Character
- Duress
- Motive to lie
- Joint criminal enterprise or conspiracy

The Chapter Method

The Pozner and Dodd method of cross examination preparation

“We advocate a significantly structured approach to cross. This structure is the Chapter Method of cross. The chapter method is a method to organise our cross of any witness into a series of small examinations (chapters) on individual topics”

Pozner and Dodd

Breaking down the topic

- Morning of the robbery
- At 5:15am a next-door neighbour looked outside their window to see your client arrive at the home of a co-accused. The neighbour doesn't know him, but described part of his clothing that is consistent with the clothing seen during the CCTV footage of the incident.
- Your “chapter” is **not**:
 - The morning of the robbery
 - The circumstances of the identification

What and Why of Chapter Method?

- A chapter is a group of leading propositions designed to accomplish a goal.
- The goal does not need to be to undermine our opponent's case.
- A goal can be to highlight a fact, dispute a fact, introduce a new fact or to impact credit
- Knowing this goal very clearly allows you to draft your questions in a more precise manner
- Also allows you to respond to objections

How I set out my document?

[BROAD TOPIC AREA]		[DOCUMENTS NEEDED]	
Proposition		Objective Evidence	Notes
WHAT GOAL AM I TRYING TO ACHIEVE IN THIS CHAPTER OF MY CROSS EXAMINATION			
PROPOSITION 1			
PROPOSITION 2			
PROPOSITION 3			

REX

-v-


CROSS EXAMINATION OF COMPLAINANT

Establish phone numbers

Proposition	Objective Evidence	Notes
IN LATE 2022 – MARCH 2023 PHONE NUMBER WAS 0405 [REDACTED]		
Focus on the years 2022 – 2023, you used a mobile phone number ending in the digits 705		[REDACTED]
Document – [REDACTED] New (ENVELOPE A)		
You see that's a screenshot of an iPhone contacts page		[REDACTED]
Your phone number is there – 0405 [REDACTED]		
This particular phone it is saved under "Jana New"		[REDACTED]
MFI		[REDACTED]

Seniorita

Proposition	Objective Evidence	Notes
NUMBER WAS SAVED IN CLIENT'S PHONE AS SENIORITA		
It is the case that [REDACTED] had that phone number ending in 705?		
[REDACTED] would contact you on this phone number?		
You would contact Mr [REDACTED] from this phone number?		
It's the case that your number was saved in [REDACTED] phone as "Seniorita"?		

IF NOT ACCEPTED– Show document – Seniorita (Envelope B)		
Again this is a screen shot from the contacts page on an iPhone		
You see your number there?		
Seniorita (love heart)		
Now refresh your memory that your number was saved in [REDACTED] phone as Seniorita		
It was you that picked out the name.		

IF STILL NOT AGREED – COME BACK TO THAT

Messaging Services

Proposition	Objective Evidence	Notes
IN LATE 2022 – MARCH 2023 MESSAGING SERVICE		
Focus on the years 2022 – 2023, during that time period did you use WhatsApp		
During that time period, you also used iMessage		
You used both of these to communicate with [REDACTED]		
Also used them to communicate with other people		

Police Statements

Proposition	Objective Evidence	Notes
LOCK HER INTO TELLING THE TRUTH IN POLICE STATEMENTS		
Also as part of the investigation you also gave written statements to the NSW Police?		
It's the case you gave multiple statements?		
First statement was on 2 March 2023		
Second statement on 10 May 2023		

Step Five: Chapters

- Short declarative questions
- One fact per question
- More detail, the better
- Use objective facts
- Produce the “yes”
- Word selection
- Looping

Expanding the role of cross examination

- Using it to expand on the best parts of your case
 - Instead of:
 - You did not find any of my client's DNA on the knife
 - Expand it out
 - You have worked in forensics for 11 years
 - You have performed hundreds of forensic examinations
 - You were given a knife by the investigators in this matter....

Step Six: Sequencing your Chapters

- Rarely should you chronologically cross
- Do not merely follow the order of the chief
- Start with the safe
- Get agreement before attack on credit
- Work in your theory early

Step Seven: Eliminating Distractions

- Advocacy is about trust-building
 - Documents
 - Videos that play
 - Method of organisation

Takeaways

1. Start with the goal and then the short, direct propositions needed to achieve that goal.
2. Think carefully about your word selection.
3. The performance matters.

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