

# Approach Point<sup>SM</sup> Cross-Examination

Developed by the National College of District Attorneys

Presented by  
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For  
The Kansas County and District Attorneys Association

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# The Basics

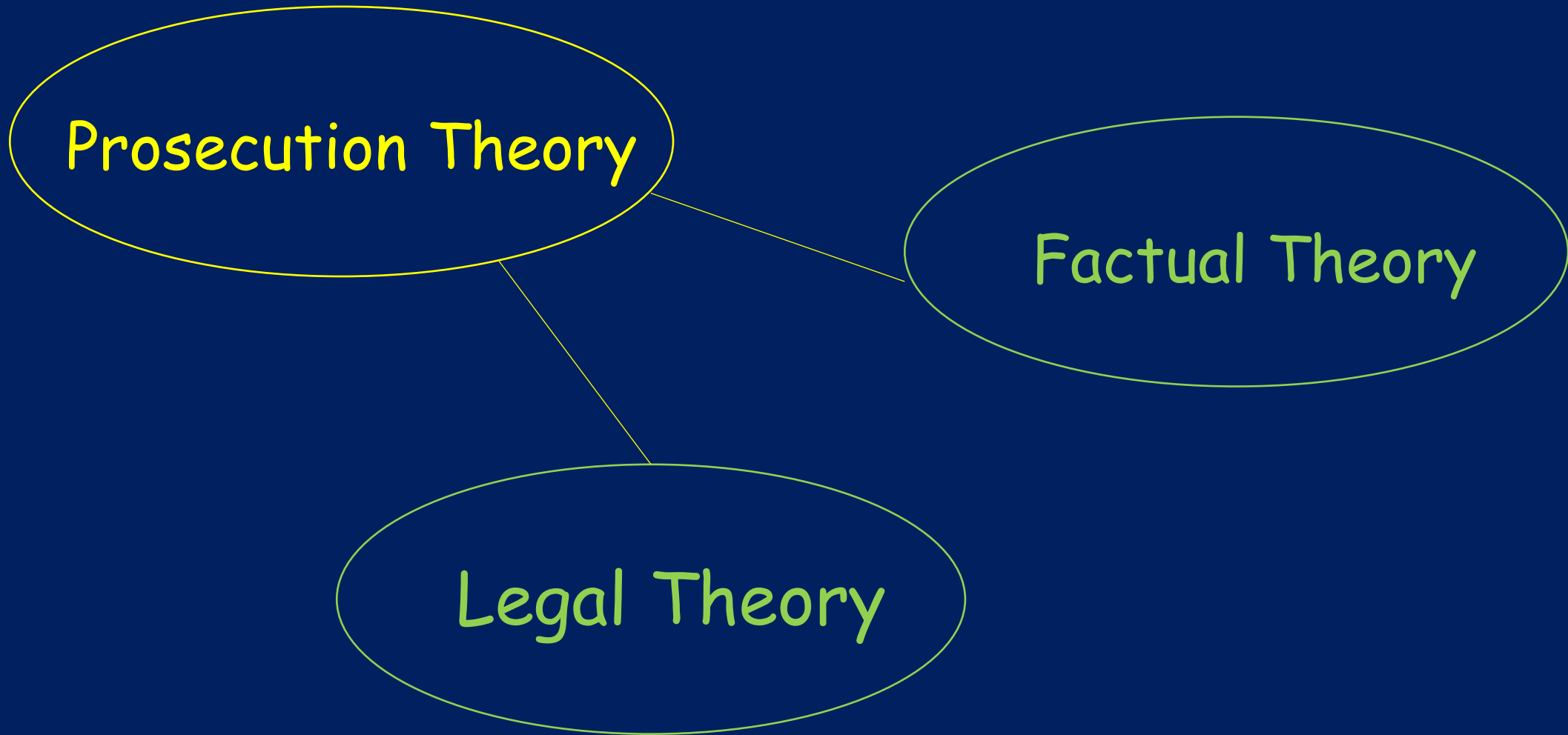
Case Analysis

Rules

Preparation

Performance

# Case Analysis



# Case Analysis

Defendant's Theory

Alibi

Accident

Self Defense

Consent

Misidentification

Intoxication

No Criminal responsibility

# Rules

60-401 Relevance

60-419 Knowledge & experience

60-420, 421, 422 Credibility

60-446, 447 & 448 Character

# Preparation

Discovery

Research /  
Investigation

Brainstorming

Organizing

Discovery

```
graph TD; Discovery --- Subpoenas; Discovery --- InCourtArguments[In Court Arguments]; Discovery --- PretrialConferences[Pre-trial Conferences]; Discovery --- FormalMotions[Formal Motions]; Discovery --- Statements; Discovery --- InformalDiscussions[Informal Discussions];
```

Subpoenas

In Court Arguments

Pre-trial Conferences

Formal Motions

Statements

Informal Discussions



# Research/ Investigation

```
graph TD; A([Research/  
Investigation]) --- B([Internet]); A --- C([Cell Phone Records]); A --- D([Interview Witnesses]); A --- E([Physical Evidence]); A --- F([Criminal Records]); A --- G([Photographs]); A --- H([Visit Scene]);
```

A mind map diagram with a central node 'Research/ Investigation' and seven peripheral nodes: 'Internet', 'Cell Phone Records', 'Interview Witnesses', 'Physical Evidence', 'Criminal Records', 'Photographs', and 'Visit Scene'. All nodes are enclosed in ovals and connected to the central node by thin lines.

Internet

Cell Phone Records

Interview Witnesses

Physical Evidence

Visit Scene

Photographs

Criminal Records

# Concept of Cross-Examination

**I don't  
know who  
that is.**

**I believe  
that's  
Joe.**

**What is  
your name?**

**You're  
Joe,  
aren't you?**

# The person concedes his name

Good faith belief  
that his name is Joe



I believe  
that's  
Joe.

Person concedes  
his name.

Yes, I concede  
I'm Joe.

You're  
Joe,  
aren't you?

The objective is to secure concessions favorable to the prosecution case theory.

I must  
concede that  
fact (to your  
benefit)

**Witness**

[Fact beneficial  
to my case  
theory], isn't it?

**Prosecutor**

OR secure concessions unfavorable to the defense case theory or the defense witness.

I must concede  
that fact (to  
my/our  
detriment)

**Witness**

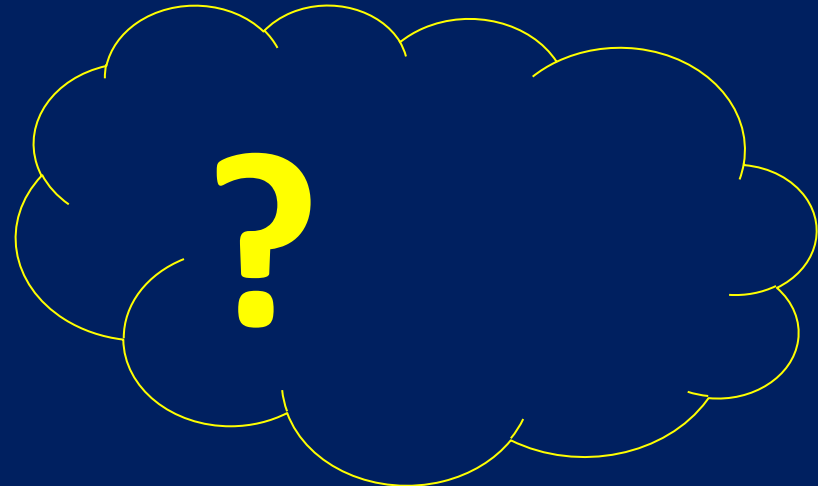
[Impeachment  
fact], isn't it?

**Prosecutor**

"I don't know what the witness is going to say."



**Witness**



**Prosecutor**

Based on the facts and the reasonable inferences, what must the witness concede?

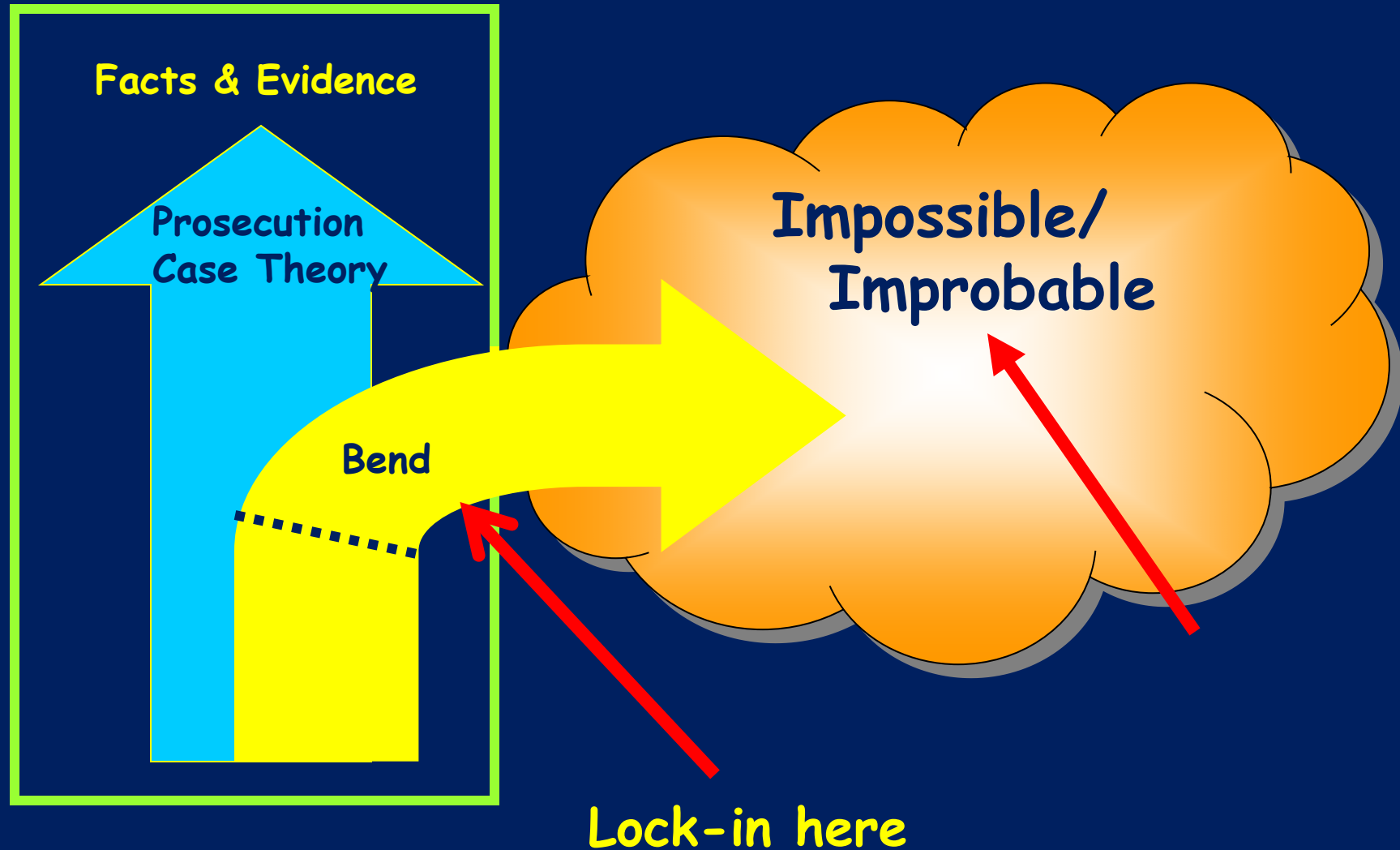
I don't think I'm going to like this.

**Witness**

Hmmm...  
brainstorm

**Prosecutor**

# Both Case Theories Can't Be True





# Got away from the scene

Lock in his concessions;  
show similarities

**Somebody  
was using  
my face**

**Defendant**

**But he matches  
a lot of the  
facts**

**Prosecutor**

She knew him; knew who he was

Lock in his concessions;  
show inconsistencies

**Consent**

**Defendant**

**But the facts  
aren't consistent  
with consent**

**Prosecutor**

# Killer ID known

Lock in his concessions;  
show inconsistencies

**Self-defense**

**Defendant**

**But the facts  
suggest  
otherwise**

**Prosecutor**

# Very, very strong case

Lock in his concessions;  
show inconsistencies

I was out of  
touch with  
reality

**Defendant**

A lot of  
normal  
behavior

**Prosecutor**

# Think about concessions about similarities

I'm going to avoid admitting anything if I can.

**Defendant**

I can get the Defendant to admit everything he has in common with the "criminal"

**Prosecutor**

# Criminal

# Defendant

Descriptions

Locations

Times

Relationships

Property

# Think about concessions about those similarities

I have to concede that or look foolish.

**Defendant**

You heard the witness say the robber's height was between 5'8" and 5'10". You're between 5'8" and 5'10" aren't you?

**Prosecutor**

# Think about concessions about dissimilarities

I wonder if  
I can smash  
this  
prosecutor?

**Expert**

I want to  
contrast this  
“expert” with  
our experts  
who did it  
right.

**Prosecutor**



# Expert

# "Expert"

Reliable

Improbable

Accepted

Unlikely

Credible

Unlikely

Correct

Improbable

Logical

Improbable

# Concessions Contrast

Scientific  
method?

The  
best.

But if I have to  
tell you what  
I didn't follow  
about it,  
I'm doomed.

**Prosecutor**

**"Expert"**

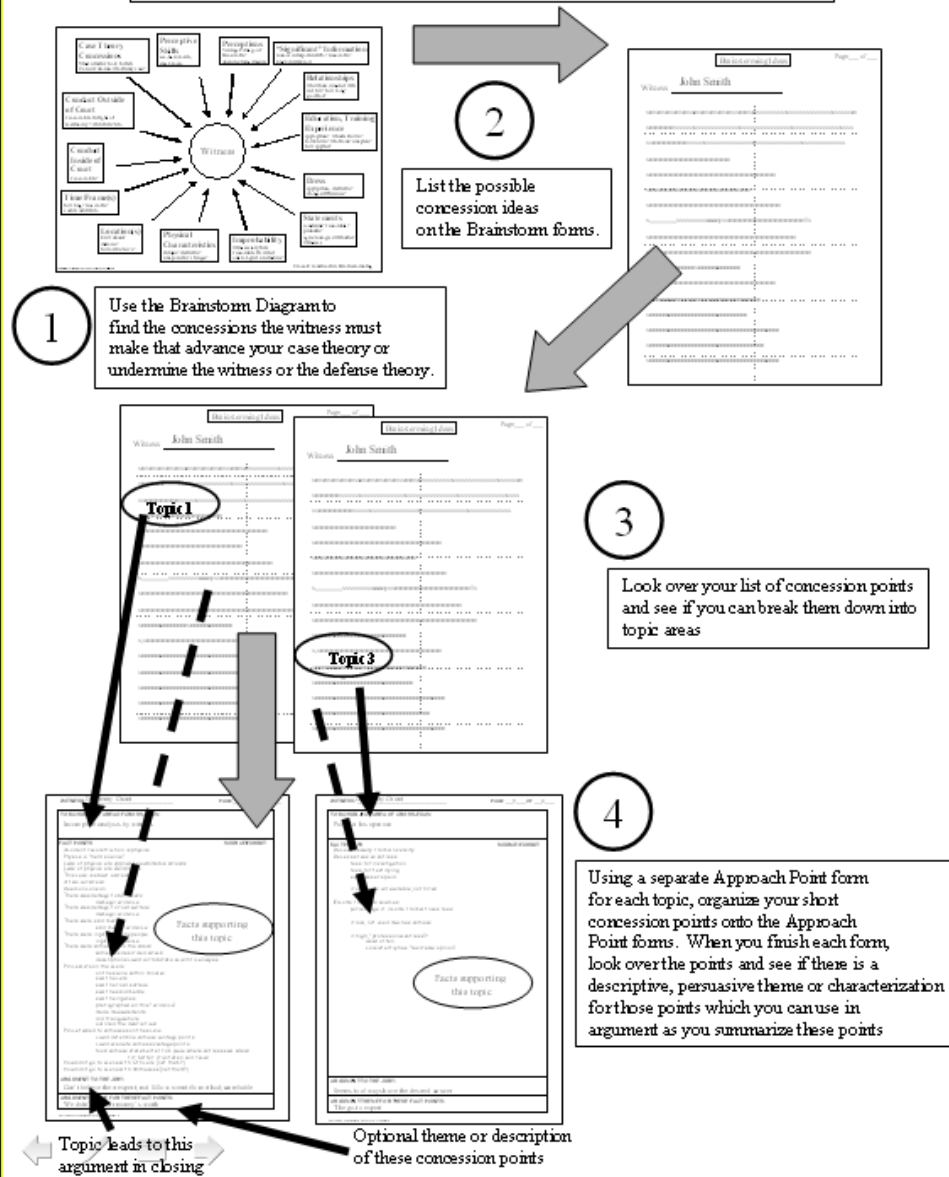
# Concessions Contrast

First I'm going to walk him through the Scientific Method, then walk him through what he did different

Uh, oh! It's the old comparison – contrast cross-examination.

Prosecutor "Expert"

## The National College of District Attorneys Approach Point Cross-Examination Process



# Approach Point<sup>SM</sup> Cross-Examination

## The Process

# Brainstorming

```
graph TD; A(Brainstorming) --- B(Facts in support); A --- C(Topics for organization); A --- D(Argument to jury); A --- E(Why they can't say it); A --- F(What they must say to win)
```

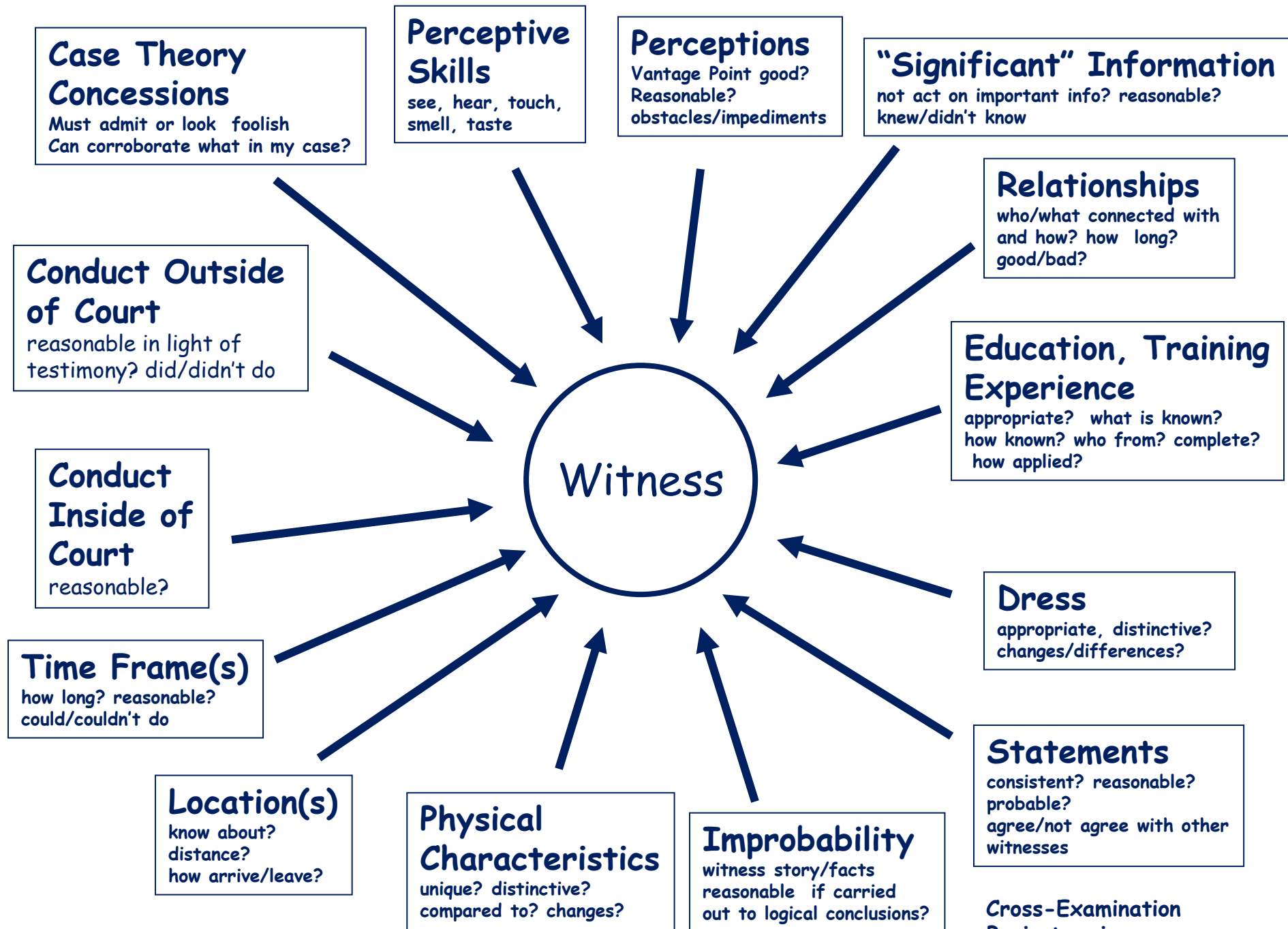
Facts in support

Topics for organization

Argument to jury

What they must  
say to win

Why they can't say it



**Cross-Examination  
Brainstorming**

Situation:

What would have been reasonable or logical in this situation?	What actually happened or occurred?

## Approach Point<sup>SM</sup> Cross-Examination

Collecting  
Brainstorming Ideas

Situation:

What would have been reasonable or logical in this situation?	What actually happened or occurred?
---	-------------------------------------

### The Ideal

Expert Witness

Use Scientific Method

Follows accepted formats

Wants complete investigation

complete facts

recheck facts?

want first hand accounts

want all documentation

Consider source of facts

Not reject any hypothesis

Conduct exams fairly

follow procedures

keep log, journal (precise)

confident in work

not be afraid of findings

write report showing significance

ficance

Reasonably compensated

### Less Than Ideal

Defense Witness

Not follow exact method

Deviated from formats

Incomplete investigation

didn't have all facts

rechecked facts?

did not have first hand

did not have all reports

Did not consider all hypotheses

Does not have notes

Did not write report

Did not provide prosecution

with results till testimony

Full price for incomplete work

Typical Compare/Contrast Cross

## Approach Point<sup>SM</sup> Cross-Examination

## Organizing a Comparative/Contrast Cross-Examination





Organizing

```
graph TD; A([Organizing]) --- B([Chunking Information]); A --- C([Approach Point Sheets]);
```

Chunking Information

Approach Point Sheets

# Argument/Cross Structure

- **Argument Point**

- **Topic/Subject** (“close neighbors”)

- Fact Point 1
- Fact Point 2
- Fact Point 3
- Fact Point 4

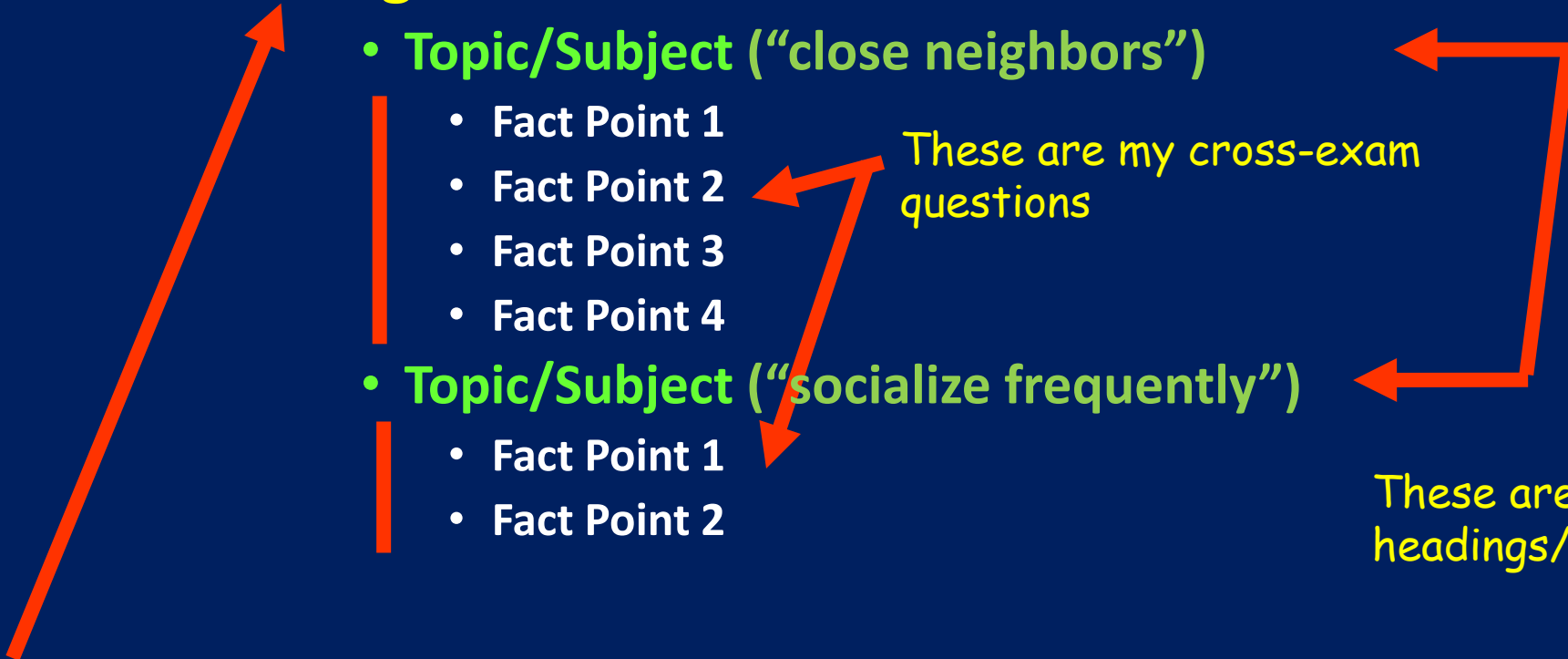
These are my cross-exam questions

- **Topic/Subject** (“socialize frequently”)

- Fact Point 1
- Fact Point 2

These are organizational headings/topics

This is what I argue to the jury





**TOPIC/SUBJECT AREA OF CROSS-EXAM:**

Incomplete analysis by witness

**FACT POINTS****SOURCE/EXHIBIT**

Accident reconstruction is physics

Physics is "hard science"

Laws of physics are applied to automobile wrecks

Laws of physics are well known

This case is about a wreck

A two car wreck

Head-on collision

There was damage to both cars

damage=evidence

There was damage to road surface

damage=evidence

There were skid marks

skid marks=evidence

There were injuries to the people

injuries=evidence

There were witnesses to the wreck

witnesses described wreck

descriptions could corroborate scientific analysis

Police were on the scene

on the scene within minutes

saw the cars

saw the road surface

saw the skid marks

saw the injuries

photographed all this "evidence"

made measurements

did triangulations

outlined the debris field

Police talked to witnesses on the scene

could determine witness vantage points

could evaluate witness vantage points

took witness statements from place where witness saw wreck

for better orientation and recall

You didn't go to scene with Officers (list them?)

You didn't go to scene with Witnesses (list them?)

*Example of making "questions"*

"There was damage to both cars, wasn't there?"

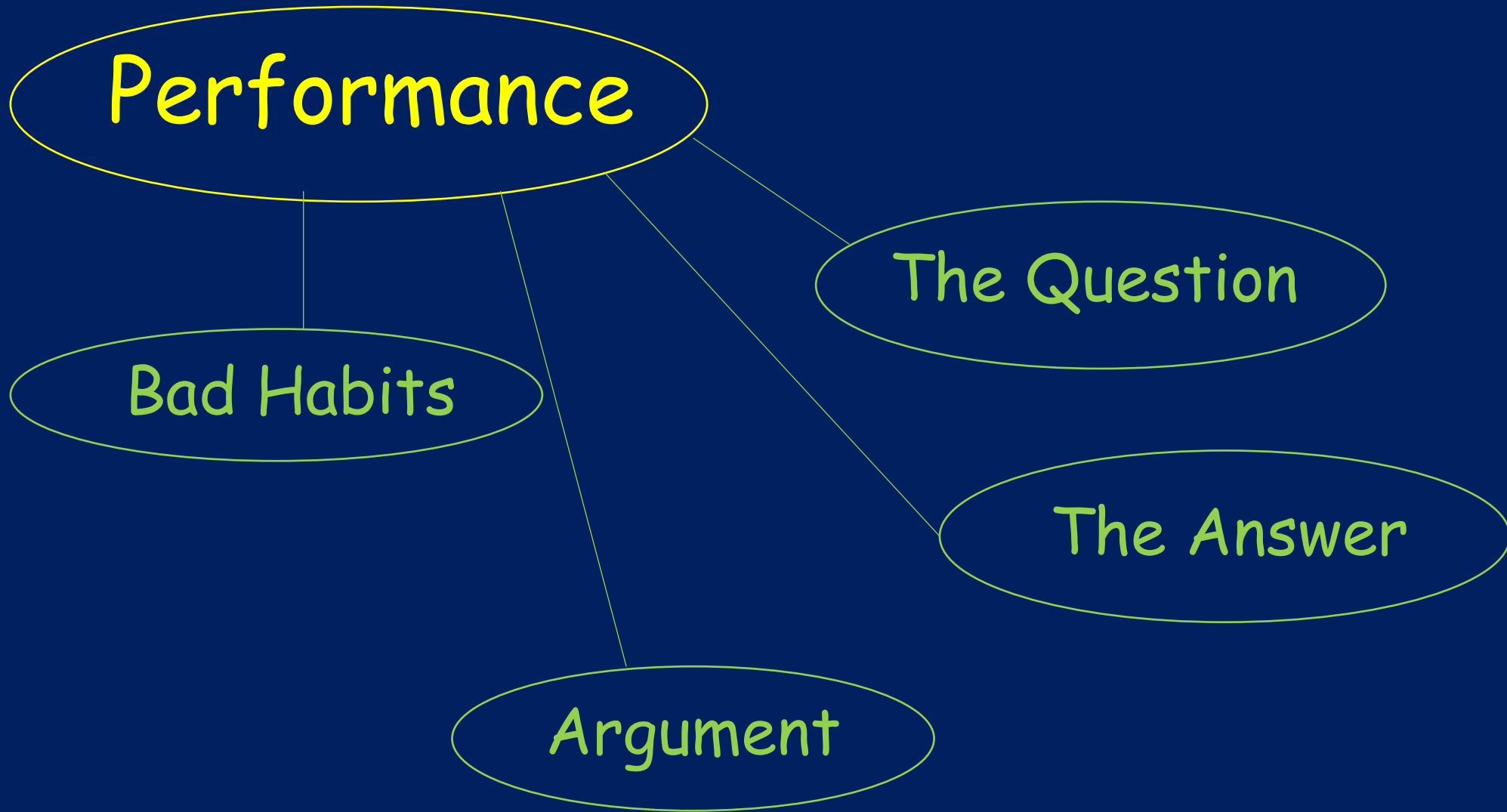
"That damage is evidence, isn't it?"

**ARGUMENT TO THE JURY:**

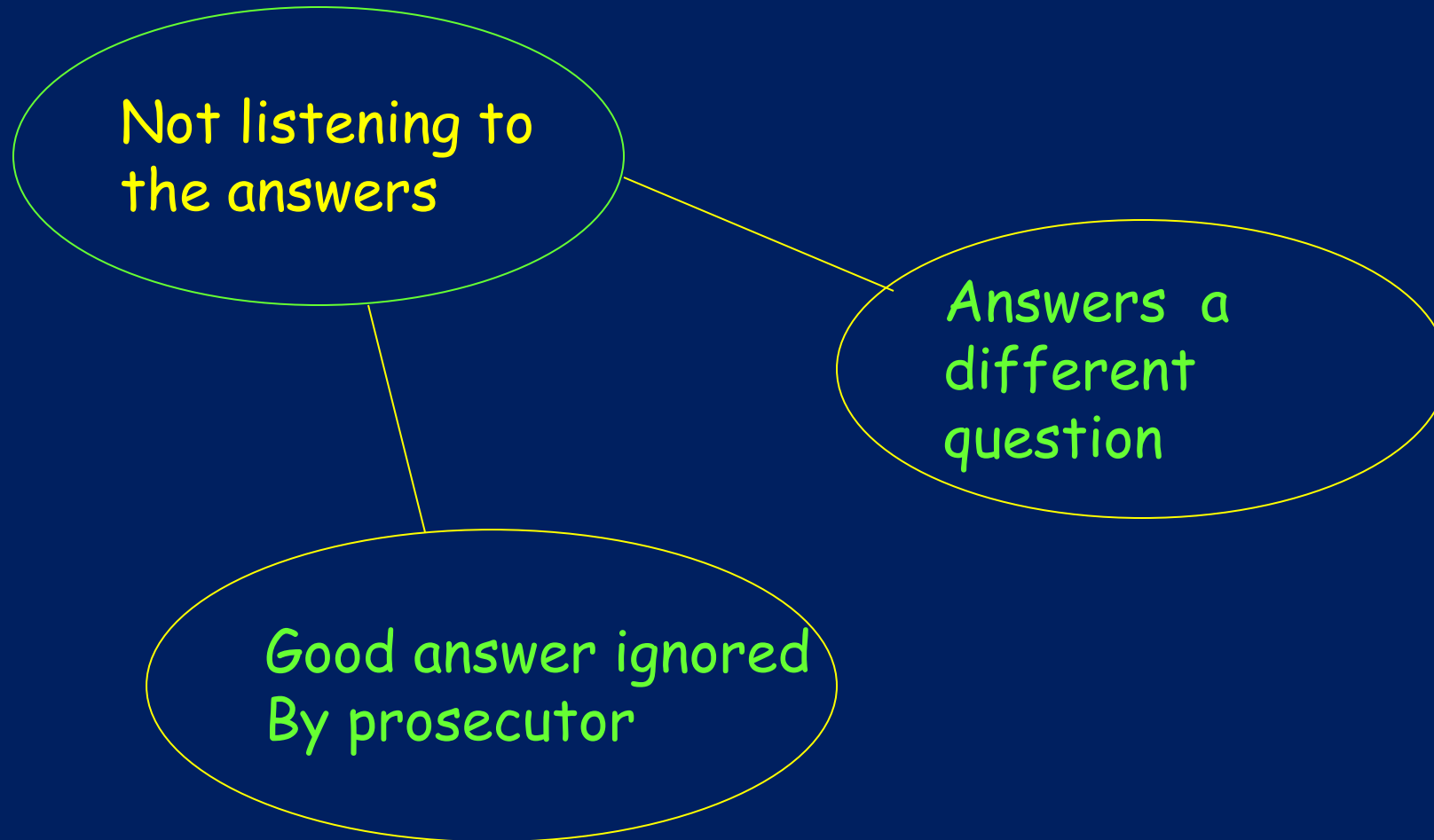
Can't believe their expert; not follow scientific method; unreliable

**ARGUMENT THEME FOR THESE FACT POINTS:**

We didn't get our money's worth



# Bad habits in Cross-examinations



Not listening to the answers  
ignoring good content

While you were watching him there, what did you see him do next?

**Prosecutor**

Well, he kinda **glared** at [the victim], then went down the hill

**Witness**



Not listening to the answers to  
incorporate the good content

# Compare

As you watched him go  
down the hill, . . .

When you saw him  
**glare** at [the victim]

Prosecutor

And, as he was **glaring**  
at [the victim]

# Not listening to the answers (deflected answer)

How many questioned document examinations did you conduct last year?

**Prosecutor**

**We** did over three hundred questioned document exams last year

**Witness**

# Correcting the deflection

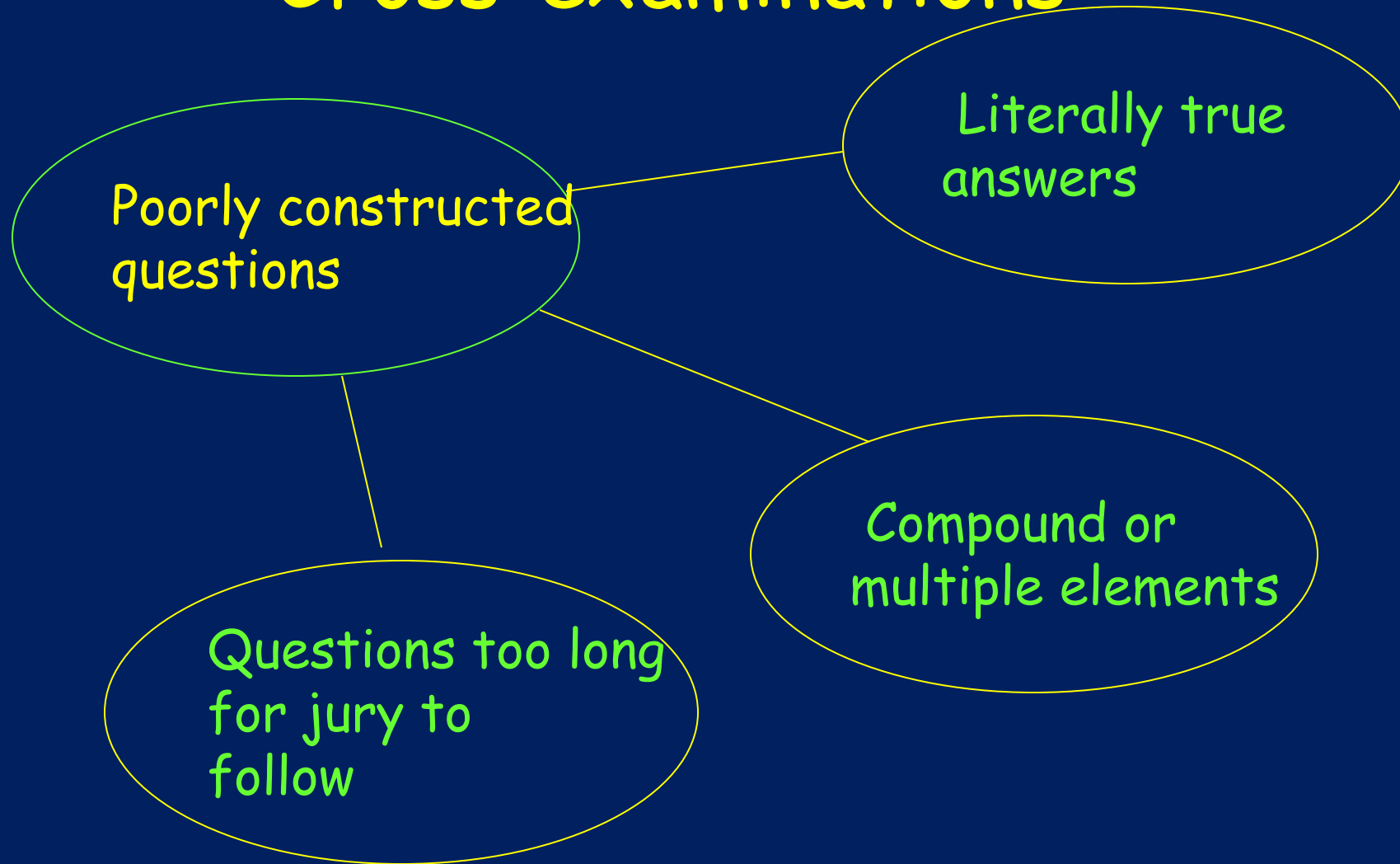
Of those three hundred plus exams last year, how many did **you** do?

**Prosecutor**

Four.

**Witness**

# Bad habits in Cross-examinations



# Literal truth

Is it your  
testimony...

Are you telling  
this jury...

Do you want us  
to believe...

# Literal Truth

Are you  
telling  
this jury  
you did  
not shoot  
the victim?

**Prosecutor**

Yes

Truthfully,  
that **IS** what I'm  
telling them,  
although I  
did shoot him.

**Defendant**

# Compound or multiple elements in the question

Did you take that loaded gun to your Ford truck and then drive to [the victim's] house and shoot her?

**Prosecutor**

No.

**Witness**

# Jurors may not be able to follow long questions

You had the gun, the loaded gun, and you had the truck, and that was when you decided to go over to [the victim's] house because you knew she was going to be over there, wasn't it?

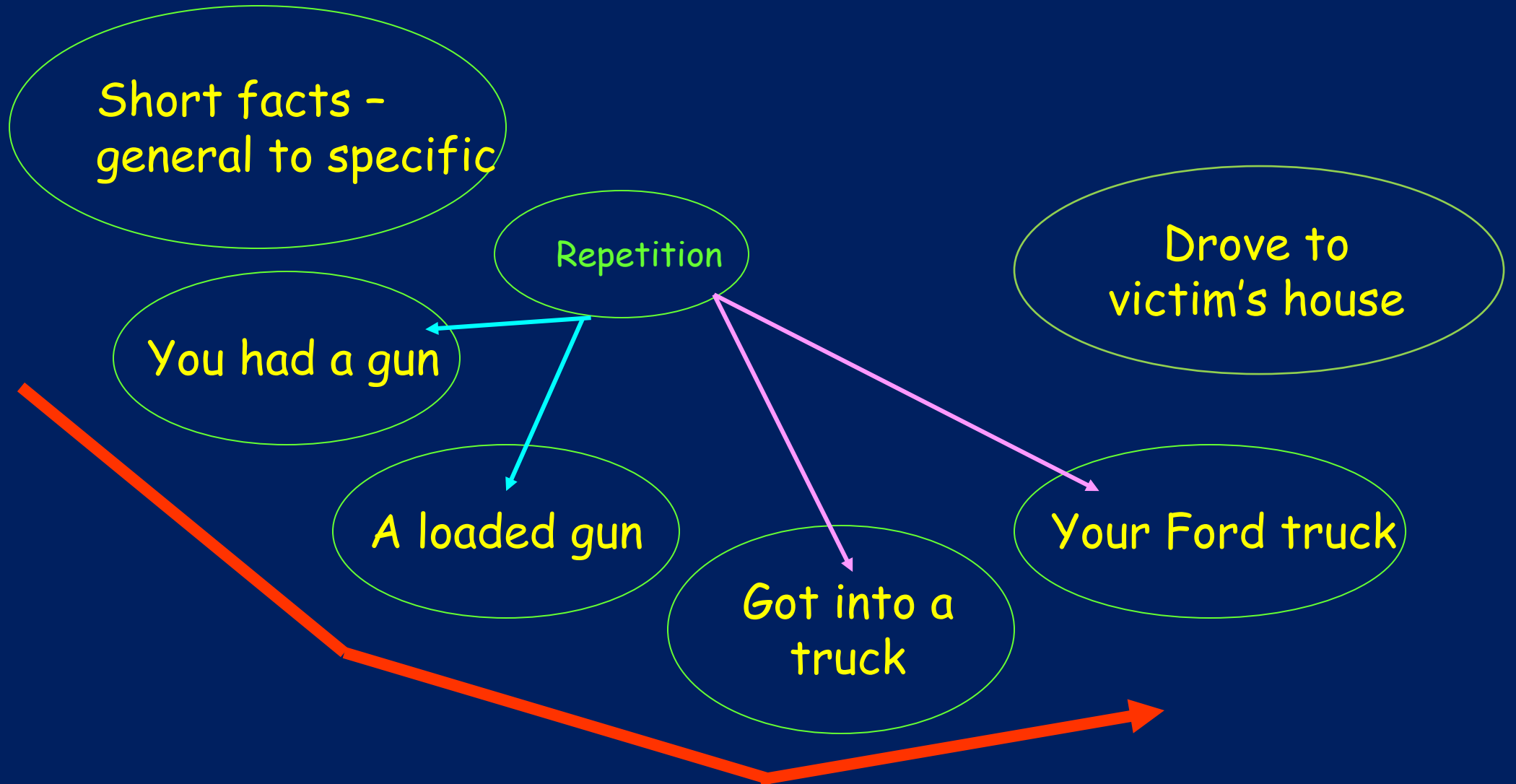
**Prosecutor**

We were only half way through understanding the question when the witness began to answer, so we are confused.

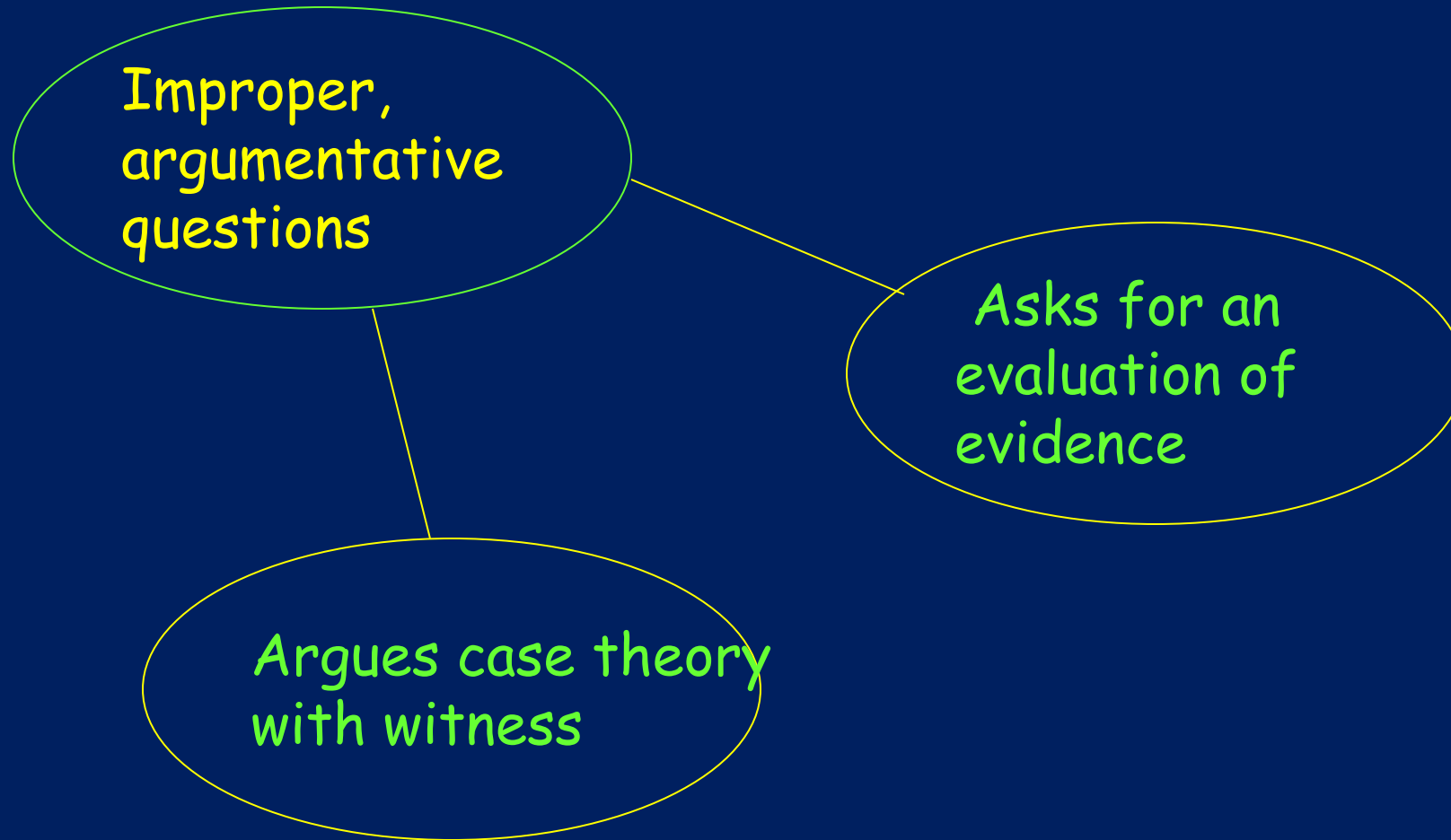
**Jury**



# Compound or too long questions corrected



# Bad habits in Cross-examinations



Calls for opinion without predicate; asks for an evaluation of the evidence

You heard the police officers say they found the drugs in your car. **Were they lying?**

**Prosecutor**

Objection, **argumentative question**. Calls for an **opinion and evaluation of the evidence**

**Def. Atty**

# Argues the case theory with the witness



# Argues the case theory with the witness



# Cross-examination Truths and Myths

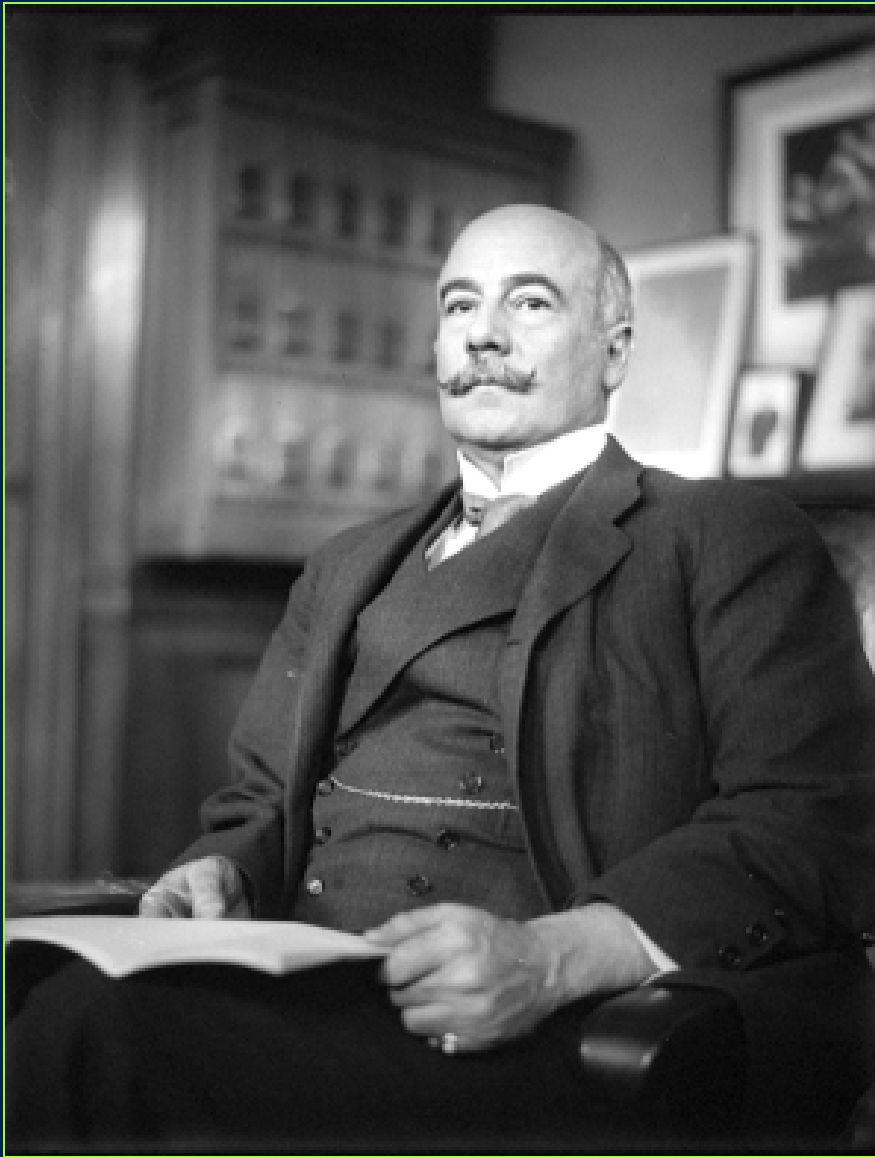
Don't ever  
ask a question  
to  
which  
you don't  
know the  
answer.

Always use  
leading  
questions.

# Conventional Wisdom

Take witness back over  
defense direct





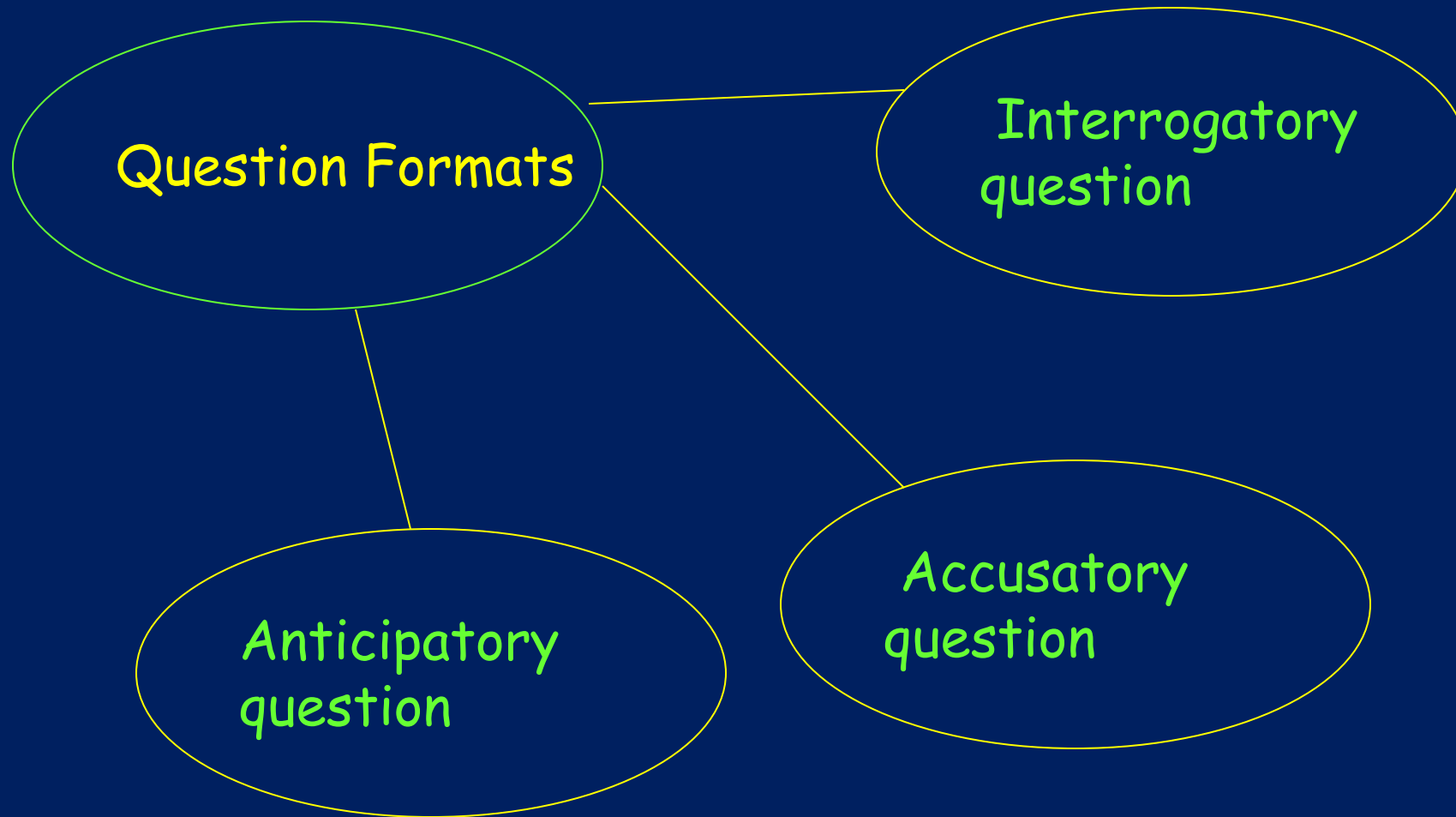
Francis L.  
Wellman

"... earmarks of fabrication, it is often useful, as your first question, to ask him to repeat this story."

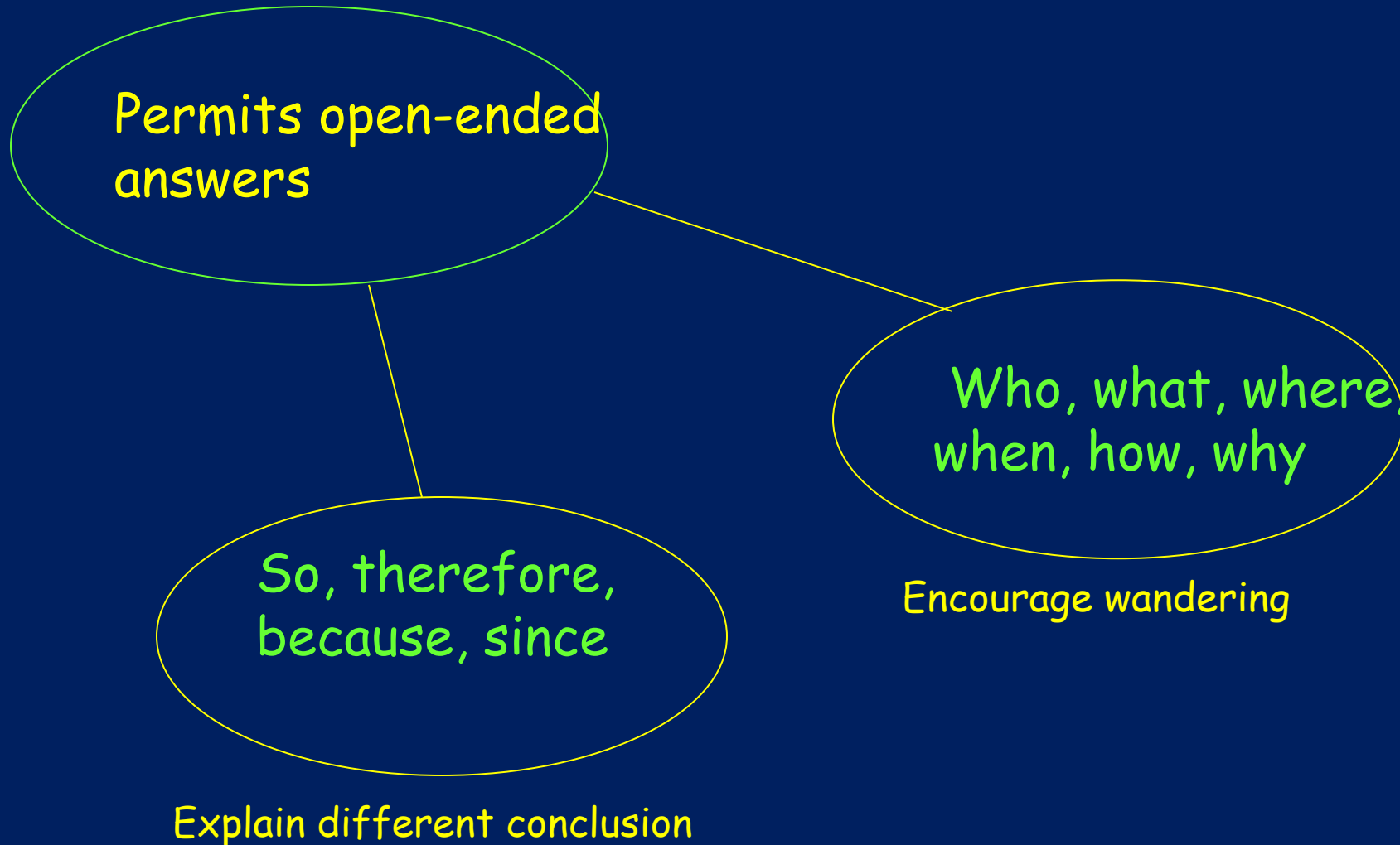
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# Questions



# Interrogatory Question dangerous words



A dangerous word can make a closed- ended format question and open-ended one.

And you did that **BECAUSE** you were upset, weren't you?

**Prosecutor**

No. I'll tell you exactly **WHY** I did it. I did it **BECAUSE** (and the answer goes on forever).

**Witness**

# Anticipatory question can highlight credibility problems

Doctor, you are board certified in this state, aren't you?

No?

**Prosecutor**

No.

**Witness**

# Accusatory Question Offers the most control

[I give you a fact and  
a tag line, and you  
answer YES or NO]

**Prosecutor**

[But that doesn't  
allow me much, if  
any, wiggle room,  
if you do it that  
way. How can I  
fudge?]

**Witness**

# Accusatory Question Offers the most control



**Witness**



**Prosecutor**

Accusatory question  
acts as a leash on  
the witness.

# Deflection & Evasion

```
graph TD; A(Deflection & Evasion) --- B(Repeat); A --- C(Let Ramble); A --- D(Stay calm?); A --- E(Don't go for help too soon!);
```

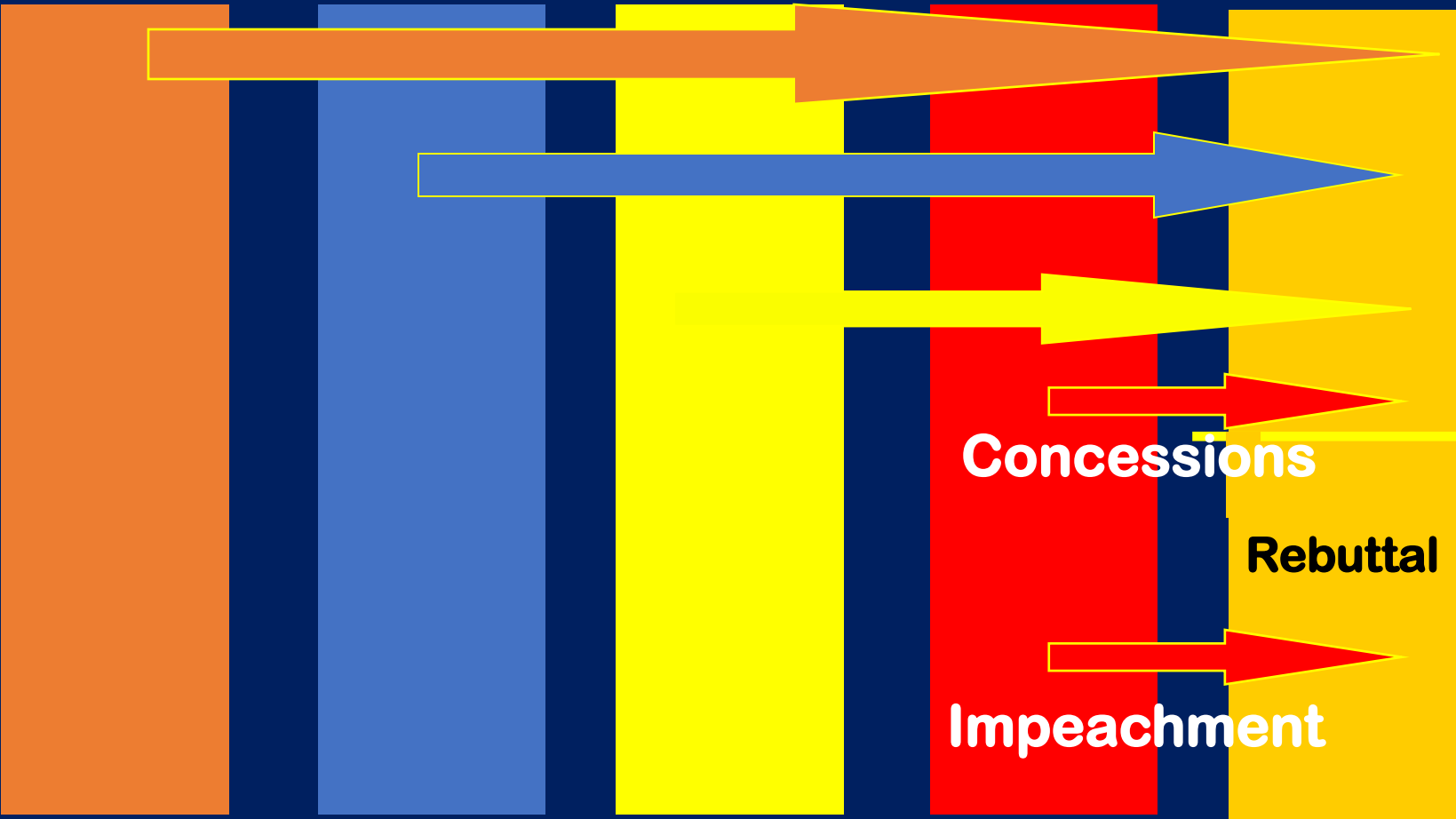
Repeat

Let Ramble

Stay calm ?

Don't go for  
help too soon !

**Jury Selection**   **Opening**   **Direct**   **Cross**   **Closing**



**Concessions**

**Rebuttal**

**Impeachment**