2011 SPRING ADVOCACY PROGRAM

ADVOCACY BEFORE THE FEDERAL COURTS
IN INTELLECTUAL PROPERTY MATTERS:
THE ART OF CROSS-EXAMINATION

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PREPARING YOUR FACT WITNESS FOR CROSS

by
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Introduction
Cross-examining a witness may be one of the most exciting aspects of being a litigation lawyer, but for most witnesses, the word “exciting” is not how they usually describe their experience in the witness box before or after cross-examination! The reality is that witnesses feel tremendous pressure and responsibility to perform, not only maintain personal credibility in the eyes of the Court, but also to tell the story they have been put on the stand to tell.

Most witnesses will readily admit that they are nervous about how cross-examination will unfold. The best way to ease these concerns is to ensure the witnesses understand the process and are well prepared to face the questions that will be put to them. Thorough preparation will therefore enable fact witnesses to become at ease with their role, especially in situations where they have never before stepped into a courtroom!

There exist several excellent papers on cross-examination, all of which include helpful insight and tips¹ on successful cross-examination and witness preparation.

The following is a compilation of the essential recommendations, a “check-list” of sorts that I have come to rely on in my own practice.

1. Be in control of the facts of your case, including all of the documentary exhibits.

Prior to putting your witnesses in the “line of fire”, or even meeting with them to prepare, you should anticipate which areas are likely to be covered in cross-examination.

A good starting point in the case of cross-examination on affidavit is to proceed with a thorough review of all affidavits, not just the particular witness’ affidavit, and all documentary exhibits related to these affidavits. This exercise will assist not only in refreshing your knowledge of the facts in issue, but also to identify any weaknesses in your case and the opposing party’s case. These weaknesses will need to be covered with your witnesses during the preparation time.

In the case of an upcoming trial, it is likely that you will have already prepared for the direct examination of your witness, and so a review of the pleadings and documents is a natural part of your preparatory work. However, keep an eye open for potential areas of cross-examination, as this will not only assist in preparing your questions and strategy for direct examination, but also to prepare your fact witnesses for cross-examination. Identify all documents that you will want to put to the witnesses on direct examination.

and those that you suspect opposing counsel will put to the witnesses on cross-examination.

2. **Ensure your witnesses have all relevant documents in their possession well ahead of your preparatory meeting.**

Your witnesses should have in their possession all documents that may be put to them during cross-examination.

In the case of cross-examination on affidavits, they should have a copy of their signed affidavit(s), as well as the documentary exhibits referenced in same. They should also be provided with a copy of any other relevant affidavits, such as rebuttal affidavits, and documentary exhibits of other affiants and which may be put to him during cross-examination.

In the situation of an upcoming trial, the witnesses should have a copy of the pleadings and the exhibits relevant to their testimony, both for direct and cross-examination.

I have found it helpful to provide the witnesses with only the documents they will actually need for their testimony. Burdening the witnesses with a copy of all the exhibits is unnecessary and may ultimately confuse them more than help them. I usually prepare a compendium of documents, where each item is clearly identified and in order so that the witness may review them in a meaningful way prior to the preparatory meeting.

3. **Have your witnesses do their “homework” before the preparatory meeting(s).**

It is most helpful and efficient for your witnesses to come prepared to the meeting.

When preparing for cross-examination on affidavit, I like my witnesses to have read, and re-read, their affidavits and exhibits so that they come to the meeting with a refreshed memory of their written testimony. The witnesses should also have read the relevant parts of the opposing side’s evidence, whether in affidavit form or documents, as this will assist in preparing for potential areas of cross-examination.

In the case of a trial preparation, the witnesses should have read the pleadings, all documents that will be produced on direct examination, and any documents that could be put to them during cross-examination, including their discovery transcripts. Again, this exercise serves to refresh their memory. I have found that many witnesses will even take their “homework” a step further and begin making inquiries or verifications of facts and dates to perfect their knowledge of the facts and the chronology of events.

4. **Have the preparatory meeting with your witnesses in good time before the cross-examination.**
Based on my experience, in IP cases, it is only in rare circumstances that you may find yourself forced to prepare for cross-examination in extremis. There is therefore generally plenty of time to plan and hold one or more preparatory meetings with witnesses prior to them taking the stand.

A “refresher” meeting should be scheduled, if possible, during the days preceding the cross-examination. This “refresher” meeting is especially important in the event the witnesses are testifying in the context of a trial, as there may be new facts or documents brought to light before they are called to testify and that may be relevant to the witness’ testimony.

5. **Explain to the witnesses the purpose of the testimony they will be giving.**

Without delving into too many details or fine strategy, you should provide your witnesses with information on where their testimony fits in the overall presentation of the case. This enables the witnesses to understand the purpose of their testimony, which they will continue to bear in mind during cross-examination by opposing counsel. Well informed witnesses are less likely to be surprised on cross-examination by a potentially unexpected question from opposing counsel.

6. **Thoroughly review the facts and documents with your witnesses.**

You should first begin your preparation by explaining to your witnesses the purpose of the cross-examination, namely that opposing counsel will try to attack the credibility of the witness and the testimony previously given either in affidavit form, or orally during direct testimony at trial and/or that opposing counsel may also try to elicit certain admissions in order to advance his or her client’s case or damage yours.

The witnesses must also understand that their role is to speak to the facts within their personal knowledge and to refrain from making opinion based statements. What a witness thinks, or does not think, about a particular fact or circumstance of the case, is generally not proper testimony for a fact witness.

Once the purpose of the cross-examination is explained, the witnesses should be then asked to relate to you the facts as they recall them. This includes facts that are both favourable and unfavourable to your client’s position. If there are any gaps or holes in the story or the chronology, you can then work on filling them during the rest of the meeting. Test your witnesses’ recollection by asking questions that you think opposing counsel may ask them. The witnesses should speak freely about what they know and recall: if you attempt preparation by suggesting or stating what their testimony should or will be, you may confuse them, or even more dangerously find yourself scripting their testimony which is neither natural, spontaneous nor credible.
The exercise of fact and document review is usually done automatically when preparing a witness for trial. The preparatory meeting will likely cover facts for direct testimony and cross-examination at the same time and you will instruct the witnesses on how to deal with any facts that may negatively affect your client’s position.

Fact and document review is equally important for witnesses who will be cross-examined on affidavit. Although the witnesses will likely be able to address the facts set down in their own affidavits, fact review should include a discussion regarding any rebuttal affidavits, documents or statements from other witnesses and the witness should be instructed on how to deal or respond to such statements. Once again, you should specifically instruct your witness on how to deal with any facts that may negatively affect your client’s position.

Any inconsistencies between the witnesses’ version of the facts as set out in affidavits or documentary exhibits should be addressed with the witness early on. Should the need arise to verify, correct or clarify certain facts, the witness will need likely need some time to do so.

To reassure witnesses, advise them as to which documents they will have access to during their testimony. Witnesses are often nervous about forgetting, even after a thorough review of the case. Make sure that the witnesses are properly advised of the rules concerning personal notes, and the use and production of same, as well as the rules concerning the use of their affidavit, or documentary exhibits, during their cross-examination at trial or cross-examination on affidavit.

Remember that it is difficult, if not impossible, for opposing counsel to discredit a witness who testifies to the facts within personal knowledge and remains truthful and steadfast throughout the examination process.

7. **Provide the witnesses with instructions on how to answer questions.**

   a) **Always answer truthfully.**

   A witness of fact is not an advocate, even on cross-examination. Answering the truth lends and maintains the witness’ credibility.

   b) **Listen to the question.**

   Instruct your witnesses to avoid “guessing” what opposing counsel is asking: if the question is unclear, the witness may ask counsel to repeat or clarify the question.

   c) **Wait for the question.**
The witness should be instructed to maintain silence until a question is formulated by opposing counsel. This will avoid volunteering information. Also, the witness should refrain from interrupting opposing counsel and refrain from speaking when interrupted, as it is your role as counsel to ensure that the witness is provided with the opportunity to give a full answer.

d) **Do not guess.**

“I do not know” or “I do not have personal knowledge of this” are acceptable answers to questions outside the witness’ realm of personal knowledge.

e) **Answer in your own words.**

As a cross-examination tactic, opposing counsel may attempt to make the witness agree with statements that they have not made. The witnesses must be vigilant and ensure that the question put to them, especially in the form of a statement, accurately reflects their knowledge and testimony, as the case may be.

f) **Keep answers short and focused.**

A “yes” or “no” answer are much more effective and avoid the witnesses volunteering information. If the answer cannot be answered this way, answering “yes, but…” or “no, but…” can serve as the introduction to a more lengthy or explanatory answer.

g) **Do not quarrel with opposing counsel.**

It your role, as counsel, to be the guardian of the legality of the questions being put to your witnesses. Explain to your witnesses that if a question has not been objected to, then they must answer the question.

8. **Provide the witnesses with instructions as to demeanour.**

a) **Address the Court as “Madam Justice”, “Mr. Justice”.**

b) **Address opposing counsel as “Counsel”, “Sir” or “Madam”.**

c) **Dress appropriately.**

Conservative business attire is proper in generally all circumstances, especially before the Court, but there are circumstances where somewhat less formal attire may be appropriate. Have this discussion with your witnesses.

d) **Maintain a dignified appearance.**
The witnesses should sit (or stand) straight and avoid fidgeting or playing with items before them, such as shuffling papers, or toying with a pen, as this is a distraction.

e) Use appropriate vocabulary.

It may seem trite, but the witnesses should be reminded not to use slang or expletive words. The use of complicated turns of phrases should also be avoided: simple yet precise vocabulary always conveys the witness’ testimony most effectively.

f) Look at the Court (judge) when answering a question.

Cross-examination is not a discussion or argument with opposing counsel, but rather a part of the witness’ testimony to the Court. I have found that by instructing witnesses to look at opposing counsel while counsel is asking the question, and then turning to the Court to provide a response, allows the witness some time to think before speaking.

g) Speak slowly and clearly.

Nodding affirmatively or negatively is impossible to transcribe for the court reporter, whether at trial or during cross-examination on affidavit. It is also difficult for the Court to follow, as the Court is usually actively listening and taking notes at the same time, so the Court’s eyes are not always on the witness. The use of “MmmHmm” for “yes” and mumbling are also to be discouraged. The witnesses should also practice referencing exhibits or documents by number, page and paragraph, in lieu of referring to exhibits as “this”, “that”, “here”, etc. Frank and clear answers lend additional credibility to the witness’ testimony.

h) Do not lose your “cool”.

Your witnesses must remain polite, calm, composed and in control of their emotions, no matter how tired they may be, or how irritated they may have become with the many questions fired at them during cross-examination.

i) Remain discrete.

During trial, once cross-examination has begun, your witnesses cannot speak to you or to the other witnesses. Do not forget to instruct them as to the particularity of cross-examination. Also, your witness should be instructed to refrain from discussing his testimony with anyone once cross-examination has begun.

9. Hold a mock cross-examination.
A mock cross-examination is helpful in cases where the witnesses are new to the process, or seem uneasy, or do not seem to understand the advice you are giving them. Practice with the witnesses some rapid fire questions, some that can start or end with "do you agree" so that the witnesses becomes accustomed to the rhythm of cross-examination. You may also want to enlist the assistance of a colleague to play the role of the cross-examiner in certain circumstances so that you may evaluate your witness’ performance and then provide the appropriate feedback.

10. Introduce the witnesses to the physical environment they will be placed into on cross-examination.

If possible, have the witnesses visit the trial venue prior to testifying so that they are comfortable with their environment and how the court room is set up.

If the examination is on affidavit and will take place in an office boardroom, explain the set up, for example where the witness will sit, where the court reporter will sit, if the court reporter will type, or talk into a mask, if there is any videoconferencing equipment, etc.

This will help the witnesses imagine themselves in the actual cross-examination situation and should contribute to taking some of the stress away from the “unknown”, especially for first time witnesses.

Conclusion

Cross-examination is generally viewed as a stressful event for most witnesses. Such as every case is different, every witness is also different and you must take the time to assess each of your witnesses’ personalities in order to tailor the preparation to each of their needs. With consistent, thoughtful and thorough preparation, you will undoubtedly get the best from your witnesses!