

FUNDAMENTALS OF THE ART OF CROSS-EXAMINATION

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Aims of cross-examination – Why do it?

The objects of cross-examination of a non-expert fact witness include the following:

1. Eliciting positive facts known to the witness that help your case or damage your opponent's case.
2. Challenging the accuracy of the testimony
 - a. Observation
 - i. Who, what where, when and how
 - ii. Surrounding conditions
 - iii. Is there hearsay involved?
 - iv. Witness is not the best person to provide the evidence
 - b. Memory
 - i. Passage of time
 - ii. Confusion with other similar circumstances
 - iii. Reconstruction from other sources
 1. Meetings with counsel
 2. Review of documents
 - iv. Bias
 - c. Expression.
 - i. Language permits many expressions of the same idea; rephrase the witness' language to reduce impact
 - ii. Expose exaggeration or undue emphasis
3. Impeaching the credibility of the witness
4. Making collateral use of the witness
 - a. Support the testimony or credibility of one of your witnesses
 - b. Discredit a witness for the adverse party
 - c. Present your theory to the court

The objects of cross-examination of an expert witness may include all of the above points as well as the following:

1. Challenging or limiting the claimed expertise
2. Identifying the parts of the opinion that are outside this expertise
3. Identifying any assumed facts which must be separately proven
4. Identifying what documents were reviewed and, sometimes more importantly, what documents were not reviewed
5. Challenging the opinion
 - a. Insufficient or incorrect data
 - b. Theory is novel - no peer review
 - c. Procedure is unscientific
 - d. Confidence level
6. Modifying the expression of opinion to reduce its impact
7. Using the expert to recognize your expert

Achieving those aims – How to do it?

Preparation for fact witnesses

Interview every potential fact witness: friend and foe. Start early and continue until trial. At discovery, ask for the names and addresses of the persons having knowledge of each of the factual issues. Interview them. At the pretrial conference, ask for a list of your opponent's witnesses and a general indication of their evidence. If you have not done so already, interview them.

There is no property in a witness. Even hostile witnesses often have some useful information. Besides you need to find out who and what you are up against. It is an advantage in cross-examination to know both what a witness knows and how they react to questions. Are they objective or biased, expansive or concise, reluctant or willing, introvert or extrovert, etc.

If a witness refuses to be interviewed, you may use this to show suggest bias.

After interviewing witnesses, reconsider your theory of the case to accommodate what you have learned. Unless you have good reason to think otherwise, assume that people are saying what they believe to be true—the judge will.

Avoid becoming a witness in your own case. Conduct interviews through or in the presence of someone who could be a witness to the conversation.

If possible, get signed witness statements from both friendly and adverse witnesses. In the alternative, send a letter setting out what was discussed and ask for correction or confirmation. If a witness varies their story at trial you may challenge their memory or credibility. If the witness testifies but leaves out helpful bits, you may confidently draw them out.

Check out the background of the witnesses: criminal charges or other any skeletons in the closet, reasons to bear a grudge, potential to benefit from the outcome, prior testimony in other cases particularly in the corresponding litigation in another jurisdiction.

If you are going to conduct a cross-examination out of court and have reason to believe that the witness has relevant documents that would assist your case or damage your opponents, serve a direction to attend under Rule 91 of the *Federal Court Rules* (or the equivalent document in a provincial court) demanding that the witness attend with the documents.

Preparation for expert witnesses

Preparation for an expert witness begins before you know who they will be. You must learn as much about the relevant portion of the science as possible. In particular, learn the vocabulary. Don't let an expert dazzle you with scientific jargon.

When you learn who is the opposing expert (usually when you get their report) get copies of everything they have written or said including prior testimony. Get copies of the reasons in all previous cases where they have testified. Assemble a team of articling students to scour this material. Look for limitations on their purported expertise, adverse comments from the bench, indications of a particular bias, and statements that are

inconsistent with their present opinion. This is like gold: buried in tons of useless material, but very precious when you find it.

Planning the examination

To plan the examination, do the following:

1. Make a list of the positive statements that you expect the witness to admit during cross-examination. Think about how you can force an admission if necessary.
2. Make a list of the statements of fact or opinion that you intend to challenge on cross-examination. Eliminate the points that do not really matter. Highlight the really important points.
3. For an expert witness, make a note the particular passages of any references you intend to use to challenge the opinion. Learn the procedure for using a reference in this way. You first have to establish that the witness recognizes the author as an authority.
4. If you intend to prove or argue that the witness is not credible, make sure you know the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.). List the points that must be covered during your cross-examination to comply with this rule.
5. Make a list of the inconsistent statements that you intend to put to a witness. Consider carefully whether each is worth the effort. A silent “So what” is not the response you want from the Court. Learn how to put an inconsistent statement to a witness. There is a procedure and if you don’t follow it you will be punished.
6. Here are some ideas for structuring your examination:
 - a. Generally, in my opinion, it is not a good idea to write out all the questions of your examination. You may be tempted to ask your prepared questions without listening to and following up on the useful information in the answers. I prefer the flexibility of a directed and structured conversation. Nevertheless, there are situations where a written question

is useful. For example, when attempting to impeach the witness with an inconsistent prior statement one must carefully phrase the set up question to establish a clear contradiction.

- b. Plan the order in which you will address the topics of interest. Consider starting out with the easy stuff such as helpful facts known to the witness, move to facts that the witness may be reluctant to admit but are undeniable, then move onto the fireworks.
- c. Consider when it is most attractive to the witness to provide favourable answers. For example, while expounding on their expertise, an expert may be more willing to acknowledge peers, theories, publications and other matters that set up later more confrontational questions.
- d. Consider scattering logically connected points throughout the examination to avoid alerting the witness to what you are trying to do. Connect the dots in argument.
- e. Plan how to make your point and avoid getting an unfavourable answer. Do you need probing or set-up questions and, if so, when should you ask them? Plan some exit strategies to use when you are in trouble or when you have made your point.
- f. Plan to finish on a high note. Make sure that your last point is strong, undeniable, and admissible.

Conducting the cross-examination

Perhaps the most important rule in cross-examination is to maintain control of the witness. Generally compose your questions to elicit the answer: “Yes.” Someone once described a cross-examination as a litany: the lawyer sings a series of short prayers each of which is punctuated by “Amen.” from the witness.

Break down complex issues. Keep your questions short and simple. If you have to breathe during a question, it is too long.

Some would say never ask an open-ended question or a question to which you do not know the answer. This is generally good advice, but sometimes such questions can be useful. I once asked a damages expert if he could see any weaknesses in his opinion. To my surprise and delight he launched into a critique of his opinion complaining about the lack of available data. The judge could hardly write fast enough. My advice would be to think carefully before asking an open-ended question or one where you do not know the answer and never ask an open-ended question on an ultimate issue.

Be courteous but firm with the witness. Cross-examination does not require you to be cross. A courteous approach disarms the witness, while a confrontational approach puts the witness on guard. A judge is likely to come to the defence of a witness being badgered without good reason. An overly aggressive approach to a witness is also likely to invoke objections from opposing counsel, which interrupt the flow so that the point becomes lost or obscured. If a witness is evasive, repeat the question. If a witness continues to be evasive, the judge will likely caution the witness. If this seems overdue, ask for a direction from the bench.

Remember that little piggies get fed, but hogs get slaughtered. Do not ask the one question too many. If you get a good answer, move on. Get on to another topic before the witness can qualify the answer.

As a matter of ethics, do not suggest to a witness that a fact is true unless you have good reason to believe it to be true.

It is not a good idea to lose arguments with a witness in court. If things appear to be heading downhill, use one of your prepared exit strategies. A prepared range of different exits allows a quick recovery. For example, if your probing questions raise alarms, you may simply change the subject without losing face. However, if the witness scores a point at your expense, you may want to go immediately to a line of questions that discredit the witness such as a prior inconsistent statement.

Listen carefully to the witness. What they say becomes the evidence. If you are unsure about what you heard, take a break and get the reporter to read back the question and answer. You may decide that you need to revisit the point.

Finally, save a couple of “zingers” for the finish.

Knowing when to sit down

Consider whether to cross-examine at all. “I have no questions of this witness” alerts the judge that you consider the evidence to be immaterial. Just be sure you are right.

Be bold; be brief; be gone. A brief cross-examination is easy to understand and dramatic. Other advantages: you will have less opportunity to make a mess of it, and opposing counsel will have less time to think about how to restore the witness in re-examination.

If you have a great moment with a witness, you may want to sit down with a flourish even if you have not finished all your points. It has a magical effect. However, be sure you have covered all the necessary points such as those required by *Browne v. Dunn*.