

ASA below 40 and DIS 40 Seminar

Cross-Examining Witnesses: A Practical Toolbo

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Stage One

Strategic and preparatory work

Stage one: case theory

- Formulate a “case theory”. What are the key points you need to demonstrate to win the case?
- For each witness, consider which of the key points is relevant and can be drawn out in his/her examination
- Only once you have established the key points relevant to your witness should you start exploring documents, looking for inconsistencies etc.
- This strategy will prevent cross-examination becoming a “black hole” for time, chasing issues which in the context of your case theory, simply do not matter



Stage one: objectives

- Witnesses should be used to advance your own case ("testify through the witness"). Very important: build up your own case rather than just knocking down the other side's
- Sow doubt about the witness's credibility or recollection. Can the tribunal rely on any of the witness's previous evidence once he/she has proved unreliable on one issue on the stand?
- Explore ambiguities or inaccuracies surrounding the witness's testimony. Can confused evidence be turned to your advantage?
- Sow doubt about whether the witness's evidence is relevant at all. Is the expert even an expert?



Stage one: strategic considerations

- Why has the other side put this witness forward? How does the witness fit into their case theory?
- Is the witness a fact witness, an expert witness or a mixture of the two? This will impact on the nature of the questions asked
- Are there parts of the testimony which, although important in the eyes of the other side, are irrelevant and which you should ignore?
- What do you need to show to rebut the witness's evidence in line with your case theory?
- How can this best be achieved (e.g. should the cross-examination be brief or drawn-out)?



Stage one: simple preparatory steps

- What must the witness admit? What can s/he not deny?
- Are there inconsistencies within the witness's own statement, with the witness's prior statement or with prior publications of the witness?
- Are there inconsistencies with the other witness's statements?
- Are there inconsistencies with the other side's pleadings?
- Are there inconsistencies with the documents on the record?



Stage Two

Technical Approach

Ten Golden Rules

- Ask only closed (leading) questions, only ask open questions in dire need
- Keep questions short: no long complicated questions
- Refer to documents only after concessions have been obtained
- Know when to stop: don't ask one question too many
- But, don't abandon questions unnecessarily, nor be afraid to leave your list of prepared questions
- Style: employ appropriately the “friend”, “enemy” or “fireside chat”
- Experts - use hypothetical questions. Fact witnesses – don't
- Keep calm and do not argue with or interrupt the witness
- Read transcript as you go (where using LiveNote)
- Don't ask questions to which you don't know the answer



Tips on technical style

- The answer to a leading question should be yes or no. If you ask an “open” question, your witness can answer in any number of ways, e.g:
 - *“The car was red, correct?”* Answer: “Yes”. **GOOD STYLE**
 - *“What colour was the car?”* Answer: *“Er, hard to say. It reminded me of the colour of the brick of my youth, with a hint of peachy yoghurt”*. **BAD STYLE, BAD RESULT**
- Lead up to the main question gradually with a number of sub-questions (*“the knockout punch only works after a lot of feinting and jabbing”*)
- Ask short questions; use simple words
- Keep it simple: avoid complex similes, comparisons, metaphors
- Stay calm and keep control of the witness – don’t let him/her dominate you
- Be respectful: don’t employ sarcasm, don’t try to be funny or “overact”. Take the blame “I’m sorry, but the question I meant to ask you was...”
- The best cross-examiners examine from memory: know your case inside out



Further dos and don'ts

- **Dos (Background)**
- Do: establish foundations for your questions by getting admissions before the witness knows where you are going
- Do: challenge a witness's area of expertise (e.g. economist/engineer making legal remarks or vice versa)
- Do: establish a witness's knowledge of facts or documents you are referring him/her to
- Do: establish a witness's knowledge of what other witnesses have said if there are contradictions (e.g. have you read the statement of X?)



Further dos and don'ts

■ Dos (Substance)

- Do: break each key point of your case theory down into one line of questioning with an ultimate goal
- Do: have documentary evidence to back up your line of questioning if the witness denies it
- Do: have exhibit numbers and exhibits at hand to show to the witness / include in witness bundle
- Do: use visual aids where helpful
- Do: direct the witness (and the Tribunal) to the specific paragraph of the witness's statement you are referring to in your questions
- Do: break questions down into small bites, especially where you are taking the witness through an issue which is long and complicated, or if there are translation issues



Further dos and don'ts

■ Don'ts

- Don't: ask too many questions seeking to challenge credibility of witness (e.g. whether they were prepped, had help in writing their statement, etc)
- Don't: try to cover all aspects of the witness's statement / expert's report (e.g. issues that are not fundamental to the case)
- Don't: refer to long documents that the witness will not have seen before
- Don't: interrupt the witness when he/she is answering unless strictly necessary (e.g. witness is clearly answering the wrong question)
- Don't: argue with the witness, lose your temper or lose control; you should appear earnest and sincere, not pompous or a bully
- Don't: ask too many questions



Cross-examining an expert witness

- Counsel: Before you signed the death certificate had you taken the man's pulse?
- Coroner: No
- Counsel: Well, then, did you listen for a heart beat?
- Coroner: No
- Counsel: Did you check for respiration?
- Coroner: No
- Counsel: So when you signed the death certificate you had not taken any steps to make sure the man was dead, had you?
- Coroner: Sir, at the time I signed the death certificate the man's brain was sitting in a jar on my desk. But I can see your point. For all I know he could be out there practicing law somewhere.



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