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- Cross-examination

PAPER

Examination-in-Chief
Cross-examination and Objections

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Contents

Examination-in-chief

One sometimes hears discussions on the relative importance of examination-in-chief, cross-examination and the speeches. These discussions are really unprofitable, because the relative importance varies from case to case. However, it is at least clear that examination-in-chief plays a central role. No civil claim, and no prosecution, can succeed unless it is sustained by the evidence. It is the role of examination-in-chief to present this evidence is a complete and convincing form, and the evidence-in-chief is therefore the pivot of the whole case.

The Proofs

If, ordinarily speaking, the case centres on the evidence-in-chief, this in turn is founded on the statements of witnesses or 'proofs'. Statements ought to be taken from the witnesses at the earliest opportunity. The details fade with the lapse of time, and the evidence becomes modified under the influence of imagination.

In taking a statement it is best in the first place to ask the witness to tell his/her story, just noting the salient facts and dates. When the outline is clear the statement should be taken down in chronological order, amplifying the details at the same time – doubtful points should be tested at once by a few searching questions.

The ideal proof/statement contains all the facts in the right order. It also contains complete details, some of which counsel may not wish to bring out, but they should be there so that counsel can use their discretion. The ideal proof or statement contains, besides, explanations in simple language of anything which might be obscure to the average person, such as the layout of a street or a house, or the workings of a machine.

Such explanations ought not to be left to the end, as footnotes so to speak, but ought to be introduced side by side with the part of evidence which they are intended to clarify. Each 'stage' of the evidence should be rounded off and completed before going onto the next.

Rules of law

The rules governing examination-in-chief are part of the laws of evidence, and here attention is simply drawn to the outstanding points of practical importance. Evidence-in-chief is confined to relevant facts ie those lawfully admissible in evidence, and hearsay is in general excluded, subject of course to the relevant provisions allowing hearsay evidence to be admissible pursuant to the Evidence Act 2006.

Leading questions must not be asked. A leading question is one which tells the witness what answer they are expected to give, and it is disallowed as a general rule because it would give the examiner an undue advantage in questioning their own witness. Leading questions are allowed however, in two cases:

1. Where the facts are not disputed, especially in introducing information such as the name and address of the witness and their connection with the subject matter of the case.
2. Where it is necessary to obtain an express denial of some allegation.

The Aim

The aim of examination-in-chief is to elicit from the witness a complete, orderly story, told by the witness in their own natural way, with the minimum of prompting. This is a skill which must be learnt by practice and honing over time. Some lawyers are better than others. You can spot a good examiner – the evidence has the appearance of flowing in an almost seamless manner with a minimum of prompting and in a sequential order with the examiner only pausing to prompt the witness to elaborate on or explain certain points which the examiner wishes to concentrate on.

The story should be in the right order, usually the order of time: if there are several distinct topics, they should be introduced or prefaced one-by-one, according to their importance, each topic being exhausted before turning to the next. The story should be complete in detail, so far as necessary for the proof of the case or to carry conviction, but this does not mean that it is necessary to go into minute details which have no substantial relevance – selection may be necessary.

The Technique

The foundations

The foundations of technique in examination-in-chief are twofold:

1. The first requisite is a firm grasp of the main lines of the evidence, and their place in the unfolding of the case. The ideal advocate does not examine from their statement – although they use it to assist their memory on dates and other details – but has absorbed the essentials of the story so that the evidence is 'alive' for them and comes out effortlessly.
2. The second requisite is skill in the use of words, so as to be able to guide the witness in the right direction without leading them. The choice of simple words is helpful. One reason is that a thing is always clearer if it is expressed simply, and another is that a relatively uneducated witness will have less difficulty in understanding what is said.
   Apart from using simple words, the questions themselves should be short and simple, as an intricate and complicated question is liable to confuse a witness, and thereupon there is a great waste of time in clearing up the confusion and splitting up the question into its component parts. Verbosity and ponderousness are cardinal faults in all forms of examination.

Guiding without leading

It has been said that the essence of successful examination is "to lead without appearing to lead". Such axiom is badly expressed, as it suggests a deliberate and cunning evasion of the rules of evidence. The true technique is to guide the witness without leading them. The witness must not be shown what answer is expected from them, but ought to be given the clearest possible indication of the point on which their evidence is required, one way or another.

So for example it is wrong to ask:

"Was X wearing a blue baseball cap?"

Instead the correct sequence is:

1. "Did X have anything on their head?"
2. "What was it?"
3. "What sort of hat/cap?"
4. "What colour was it?"

Again, it is wrong to ask:

"Did you see another car coming very fast from the opposite direction?"

The right approach would be:

1. "Did you notice any other traffic?"
2. "Which direction was it coming from?"
3. "What speed was it travelling at?"

The last question might be framed in an alternative way: "Was it going fast or slow?'

These are obvious alternatives – one or other of them must be true – and there is nothing in the wording of the question to show which answer is desired.

This method of framing questions in an alternative form can be extremely useful, as would be the case if it introduced new and suggestive details which the witness might not have remembered on their own.

For instance, the question about the cap might be framed in this way:

"Was X wearing a blue baseball cap or not?"

That would still be a leading question; if the evidence desired is simply whether a thing was so or not, the 'alternative' form of question is correct. But, if the witness is being asked to give a description or reveal something new, the alternative form is wrong.

Retaining Control

Throughout the evidence-in-chief the examiner must be in control, able to deflect the story in the right direction and away from irrelevancies; they must also be ready to contain a talkative or rambling witness, and to **encourage** one who is timid or hesitant.

Occasionally it is convenient to say:

"Tell us about it in your own words."

Such a question should however be limited to a particular phase of the evidence.

Eg "Tell us in your own words what you saw at the moment of collision."

If the witness is allowed to give the **whole** of their evidence in their own way they may miss important points and stray into irrelevant details. In such a case the examiner is abdicating their function, and the Judge may intervene and take the witness out of the examiner's hands. If, of course, a witness is telling their story correctly and completely in their own way, as experts often

do, then they ought not to be interrupted, but the examiner must be ready to intervene if necessary.

The right order

If the Court is to follow the evidence and understand it, the story must be told in the right order, which, in general, is the order of time. Each incident should be finished with before going on to the next. In a motor accident case the order might be:

1. How the witness came to be on the scene;
2. What they saw of the movements of traffic before the accident;
3. What they saw at the moment of the accident; and
4. What they saw and heard afterwards.

If phases 2 and 3 are mixed up, the result will be confusion.

Some subjects do not lend themselves to this approach, and should therefore be dealt with in the order which is most natural.

Thus, when examining an expert engineer, describing a machine which has caused an accident, the expert should be asked:

1. first, to explain the general nature and layout of this machine;
2. then, to explain the interconnection of the main parts; and
3. lastly, to explain the detailed mechanism at the critical point where the accident occurred.

Thoroughness

Orderliness and thoroughness rank together as the leading principles of evidence-in-chief; every material detail must be brought out before moving onto the next stage. This does not mean that it is necessary to cover every detail set out in the proof or statement; some of these may be irrelevant, as a brief of evidence should usually contain too much information rather than too little. It is important however to avoid jumping from one subject to another in a disconnected manner, or going back in the story to bring out something which was carelessly overlooked. A consequence of these remarks is that evidence-in-chief ought not to be hurried.

Among the material details which must be brought out at the time are explanations of points which are not readily understood, or which, though second nature to the witness, are obscure to the outsider. Such matters include the layout of rooms or buildings, the explanation of technical phrases, colloquial slang/street language or trade terminology.

Refreshing memory — 'aide memoire'

If a witness has difficulty in recalling a material factor, they should be guided to it as closely as possible without leading them. If the witness still cannot remember, they should not be pressed, because this may set up a mental strain which will make the witness's memory hazier than before.

Instead, it is better, as if it did not greatly matter, to allow the witness to relax. Afterwards, go back to the events leading up to the forgotten incident, and it is quite possible that the recollection will come back easily, stimulated, without strain, by the association of ideas.

As is well known, this is usually the case for police officers with their notebooks who are allowed to refresh their memory from a note made at, or about the time of the occurrence, or shortly after it. This can be a great help especially with reference to reporting conversations.

Toning down weak points

This subject is self-explanatory. Where there is a weak point in the evidence, the manner of dealing with it may raise a difficult problem of practical judgement. It is the duty of counsel to treat the Court with frankness and certainly not to conceal facts if they are relevant. Furthermore, if the point is brought out in cross-examination its effect will be more damaging. As a rule, therefore, the better course is to bring out the point in examination-in-chief, without undue emphasis and toning it down as far as the facts allow.

The case of Mr 'A'

Counsel for the defence was in the awkward position of having to call a convicted man as the main witness for the defence.

This is how counsel endeavoured to discount the fact.

"I am sorry to have to ask you Mr X, but I have to ask you Mr X, but I had better ask it here. Have you been convicted of forgery?"

"Yes I have."

"In the year 1907?"

"I suppose that would be the year."

"And you served a sentence in respect of it?"

"I did yes."

NB: this is meant to be an example of a sympathetic atmosphere created by the examiner, and the inference that, with the sentence having been served, it was all over and done with! But I am not sure about mitigating the harm here!

Treating a witness as hostile

If a witness proves to be hostile to the party who called them – as distinct from merely being awkward – the Court may give leave to that party to treat them as hostile. Section 94 of the Evidence Act 2006 provides:

"In any proceeding, the party who calls a witness may, if the Judge determines that the witness is hostile and gives permission, cross-examine the witness to the extent authorised by the Judge."

'Hostile' is defined in s 4 of the Act as meaning the witness:

"(a) exhibits, or appears to exhibit, a lack of veracity when giving evidence unfavourable to the party who called the witness on a matter about which the witness may reasonably be supposed to have knowledge; or

(b) gives evidence that is inconsistent with a statement made by that witness in a manner that exhibits, or appears to exhibit, an intention to be unhelpful to the party who called the witness; or

(c) refuses to answer questions or deliberately withholds evidence"

Examples:

1. A complainant who refuses to acknowledge a statement alleging a domestic assault that was earlier given to Police and then seeking to resile from that earlier account when called to give evidence at a Judge-alone trial.
2. A co-accused who has admitted his guilt at an earlier hearing for say breaking and entering, and later is called to give evidence against a co-accused.

Producing Exhibits

The category of exhibit – real; demonstrative; records; written statements – affects the process required for production.

1. Real evidence:

Tangible objects such as clothes, weapons, tools.

3. Demonstrative evidence:

Evidence that represents or illustrates the real thing such as photos, videos, diagrams, maps, and charts.

4. Records:

Government or business writings, hospital records, police reports, and payment records.

5. Writings:

Evidence other than records that are in writing such as letters, receipts, and contracts.

Before an exhibit can be offered into evidence in Court, a foundation must be laid for its admission. When evidence rules require a fact or event to occur before an article can be considered evidence, that fact or event becomes part of the foundation necessary for the article's admission into evidence. The facts and events that must be shown represent a judgement as to what information demonstrates the evidence is reliable and trustworthy.

For all exhibits the **first** foundation that must be laid is that the article is **authentic** and to actually **be** what it purports to be. This is usually no issue with real and demonstrative evidence. Writings and records when offered to prove that the statements contained in them are true can constitute hearsay issues potentially and so the rules of evidence need to be considered.

Most foundations for exhibits introduced in a Court are laid by live witness testimony. Choose the witness who has the most knowledge of the exhibit for its production.

The mechanics — the steps

When tactically appropriate see if your proposed exhibit can be admitted by consent with your opponent.

If applicable lay the foundation/the history of the exhibit, including the **chain of custody –**in other words, from where it was discovered or 'in situ' to its storage, subsequent testing scientifically (eg a weapon with blood on it has DNA) and its subsequent uplift from a lab to a safe prior to being uplifted again to bring to Court.

- Give opposing counsel the opportunity to examine the item prior to seeking to have it produced formally.
- Seek permission to approach the witness in order to ask the witness to describe and identify the exhibit.
- Put the exhibit in front of the witness.
- Ask the witness to produce the exhibit.

Some exhibits should be used in Court, a demonstration done with or on the exhibit eg a folding knife demonstrated by a Police Officer.

An exhibit can be referred to/looked at/used by another witness before it is formally produced. For example, a weapon found at a 'fight' scene where there are multiple witnesses at the scene who may be shown it to ascertain whether a particular witness may have recalled it being present at that scene.

Presentation

- Maintain eye contact.
- Always listen to a witness's answers/how they answer –are they confident, vague etc?
- Monitor pace of their answers – not too fast.
- Monitor pitch, volume and pace of your questions.

Cross-examination

The Aims of Cross-examination

Testing the evidence-in-chief

A distinguished Judge has said:

> "Cross-examination is a powerful and valuable weapon for the purposes of testing the veracity of a witness and the accuracy and completeness of his story."

If we compare the evidence-in-chief to a rope – quite strong to all appearances – cross-examination may be compared to the testing of the rope, inch by inch and strand by strand. If the rope is really strong, it will stand the test. If it is weak it will give way at one point or another. It follows that cross-examination ought not to be expected to shake a story which is substantially true.

That is only a picture, but it can with advantage be elaborated a little. For instance, the rope may be stretched out in a new direction; or it may weaken and become slack under the strain applied to it, without actually breaking; or finally, the supports which hold it up may give way, with the result that the rope falls to the ground.

Four specific aims

In greater detail, the aims of cross-examination are these:

1. To destroy the material parts of the evidence-in-chief;
2. To weaken the evidence, where it cannot be destroyed;
3. To elicit new evidence helpful to the party cross-examining; and
4. To undermine the witness or 'shake their credibility' as it is commonly expressed, by showing that the witness cannot be trusted to speak the truth, or that the witness account, however honest, relates to matters of which they have no real knowledge.

To destroy adverse evidence outright is usually going to be too much to hope for, except in some cases eg cross-examination of an accused who has put forward an improbable story.

The **ideal** to be aimed at is to **lead** the witness to admit that their evidence was untruthful or mistaken. The evidence of a witness may also be driven into a 'pregnant silence' – as where a witness, offering a fantastic story, is pressed to explain detail after detail until finally the witness invention runs out – many police interviews of defendants exemplify this technique. Eg a defendant is found in possession of a weapon with which an assault was committed, or of house-breaking or car-theft implements, or where a witness is cross-examined with the help of incriminating letters.

Yet a third method of destruction is to draw from the witness admissions of facts which are inconsistent with their story, or to draw from them positive assertions of facts which can be disproved.

In most cases the objective is **not** so much to **destroy** the evidence outright as to **weaken** it that is to say to **reduce** the **weight** of the evidence and qualify the inferences which might be drawn from it. It is nearly always possible to weaken evidence, and this objective is particularly important where the evidence is circumstantial, so that its damaging effect depends not so much on what is actually said as on what may be deduced from it. The witness may be induced to admit that other explanations are possible; or relentless probing into the details – as in cases where identification is in issue – may show that there is a possibility of a mistake.

The eliciting of fresh evidence

This may lead to a new topic altogether, eg counsel for the defendant in a criminal case may be able to use one of the prosecution witnesses to help him to build up an alibi. More often however, the new evidence simply consists of facts which put a new colour on the evidence-in-chief. If this is

done successfully, the result is not only to help in the building up of one's own case, but also, at the same time, to weaken the other side.

Undermining

Undermining – if successful – destroys the assumptions on which the reliability of the evidence depends. Thus it may be shown that the witness is a confirmed liar, or that they were quite deaf, and could not possibly have heard, except in the witness's imagination, the conversation which they have relayed with so much assurance.

Important Rules of Practice

1. The witness must be cross-examined on all material facts which are disputed otherwise the Court will take it that the evidence is not disputed.
2. The cross-examiner must put to the witness the case they are trying to set-up so far as it lies within the witness's knowledge – such cross-examination is a necessary preliminary to the calling of contradictory evidence.

The rule in *Browne v Dunn* (a 19th Century English case, (1893) 6 R. 67, H.L.) forms the basis of our statutory duty in s 92 of the Evidence Act.

> "**92 Cross-examination duties**
>
> (1) In any proceeding, a party must cross-examine a witness on significant matters that are relevant and in issue and that contradict the evidence of the witness, if the witness could reasonably be expected to be in a position to give admissible evidence on those matters.
>
> (2) If a party fails to comply with this section, the Judge may—
>
> (a) grant permission for the witness to be recalled and questioned about the contradictory evidence; or
>
> (b) admit the contradictory evidence on the basis that the weight to be given to it may be affected by the fact that the witness, who may have been able to explain the contradiction, was not questioned about the evidence; or
>
> (c) exclude the contradictory evidence; or
>
> (d) make any other order that the Judge considers just."

Some lawyers seem to look upon cross-examination as little more than a formal compliance with these rules, 'suggesting' to the witness that they are mistaken about this, that and the other, and 'putting it to them' that the facts set up on the other side are true. This procedure has at any rate the merit of 'obtaining denials' and so showing precisely what is in issue. A real artist, however, will comply with the rule that they must challenge the adverse evidence, not in any perfunctory and formal manner, but by using all the resources of their technique to weaken, undermine or destroy it. Likewise, instead of formally putting their case to obtain denials, they will try to insinuate it and

build it up out of the witness's own mouth. Sometimes, of course, there is no scope for anything but a formal challenge.

The Limits of Cross-examination

Cross-examination is not allowed to roam at large over every subject under the sun. Questions are not allowed unless:

1. They are relevant to the issues in the case; or
2. Though relating to collateral questions, they tend to impeach the credit of the witness (ie to undermine him/her).

So far as questions are relevant to the issues, they are governed by the ordinary rules on the admissibility of evidence. Hearsay, for example, is not in strict theory admissible. In practice, it is true, great latitude is allowed in cross-examination as to conversation and matters of that kind. If, however, a particular question is objected to as introducing hearsay evidence, the cross-examiner must be prepared to justify the evidence on one or other of the recognised grounds: for example that it is an admission made by the opposite party, or a statement which accompanied and explained the res gestae. When cross-examination counsel introduces part of a conversation or statement in this way, the **whole** of the conversation or statement becomes admissible in re-examination.

Questions directed to credit are designed to show that the evidence of the witness can't be trusted – for instance they may be directed to such matters as:

1. Bias
2. Previous inconsistent statements
3. Previous character, conduct, and convictions (think propensity) tending to show that he is a liar or generally dishonest.

In general, evidence can't be given afterwards (by the party cross-examining) to prove matters which the witness denies, but, exceptionally, contradictory evidence is allowed to prove bias or hostility, previous inconsistent statements, previous convictions, or a general reputation for untruthfulness.

For each witness, consider your aims in cross-examination:

1. To gain an advantage.
2. To discharge an obligation (s 92).
3. To create a particular effect.

For each witness, identify the **areas** of a witness's evidence-in-chief you wish to challenge and how you will embark on achieving that. Prepare your cross-examination.

Cross-examination on a Previous Inconsistent Statement

The witness should be **reminded** of the **circumstance**s in which s/he made a statement and then asked whether the witness in fact made such a statement. If, after these preliminaries, the witness

does not distinctly admit they made the statement, evidence may be called in due course to contradict him/her.

The most frequent case arises when the defence seeks to challenge a prosecution witness with an earlier inconsistent account of evidence-in-chief given in Court.

The preliminary questions and process

- You have stated X in your evidence-in-chief today.
- Have you on a previous occasion ever said anything different from X?
- Did you provide a statement to Police on xx date which you signed?
- Was the evidence taken down?
- Read over to you?
- And you signed it/initialled every page?
- [Refer document/statement to witness.]
- [Get them to acknowledge their initials/signature.]
- [If a formal statement, get witness to acknowledge the usual words accompanying the statement.]
- And did you say in your evidence (XYZ)…? (Assuming the witness acknowledges or admits the statement, there will be no need to prove it independently.)

Question Format: Golden Rules

- Short, succinct questions.
- No double-barrelled questions, no double negatives, as they are confusing.
- Always try to adopt leading questions, to control the witness.
- Don't ask if you don't know the answer – it can often serve to undermine your cross-examination up to that point and allow the witness to give an answer which explains everything.
- Don't quarrel with the witness.

Technique

Successful cross-examination is founded on three main techniques:

1. Confrontation
2. Probing
3. Insinuation

Confrontation

As the name suggests, confronting a witness consists of confronting him/her with facts he/she cannot deny and which are inconsistent with the witness's evidence. It is a destructive technique,

but when it fails to destroy it still may succeed in weakening. It cannot be employed in a massive way unless there is strong material at the service of the cross-examiner.

Probing

Probing consists of inquiring thoroughly into the details of the story to discover flaws. It may be used to either weaken or destroy, or open up a lead to something new.

Insinuation

Insinuation is a many-sided technique and perhaps the most important of the three in everyday practice. In essence, it is the building up of a different version of the evidence-in-chief, by bringing out new facts and possibilities, so that while helping to establish a positive case in one's own favour, at the same time it weakens the evidence-in-chief by drawing out its sting.

Insinuation may take the form of quietly leading the witness on, little by little; alternatively it may be necessary to drive them and in that case the cross-examiner must have material at their disposal.

These techniques are not wholly distinct. They may be associated together.

Probing for example may disclose a weak point which suggests a line for insinuation; or it may lead the witness to make statements which can be destroyed by confrontation.

Probing by confrontation is a technique that can be used without having any material for cross-examination; for it consists of simply delving into the story as told, so as to detect and expose its inherent weaknesses. The characteristic of probing is to ask such questions as Who? What? Where? When? Why?

But though all probing consists of delving into the detailed facts, this may be done for several different reasons.

If as in ID it is believed the witness has interpreted the facts wrongly, the object will be to investigate the grounds of the statement. If the story is believed to be false, the object may be to draw the witness on until s/he asserts a fact which can be contradicted.

Alternatively they may be asked searching questions about things they claim to have seen until the witness's invention runs out or the witness makes improbable statements. Practical judgement here is **valuable**!

Insinuation consists of leading the witness by adding facts at one point and modifying details at another, to give a version of the evidence which is more favourable to defence. Its effect is to elicit favourable evidence and at the same time weaken evidence-in-chief. If skilfully used its effect is to give the story a totally new orientation, without altering the fundamental facts.

Undermining

Cross-examination as to credit. Used, in broad terms, to show:

1. The witness does not know what they are talking about; or

2. Though the witness may know the truth, they are not telling it.

- No opportunity to observe.
- Bias.
- Previous inconsistent statements.
- Distortion by memory and imagination.
- Previous convictions.

Examination-in-chief Checklist

General

Your examination-in-chief should be consistent with your theory of the case.

Structure

- Introduction ie name, address (eg suburb) and occupation.
- Qualify the witness where appropriate.
- Set the scene.
- Narrative of events – including possibly covering, and hopefully explaining, weaknesses in a witness's evidence. The Defendant should answer the Prosecution/Police allegations because the obligation of 'putting the case' means that the allegations will be put in cross-examination.
- Introduce and produce exhibits where applicable.
- Ask the witness to remain seated to answer questions from 'my learned friend' and His/Her Honour. After your last witness has been cross-examined (and possibly re-examined), you would announce the close of your case to the Judge.

Question Format

Non-leading; open.

Short, simple in form and language, and containing only one question.

Precision – 'signposting' and 'grafting' will help.

Exhibits

The category of exhibit (real; demonstrative; records; written statements) affects the process required for production.

Some exhibits may be able to be produced by consent.

If applicable:

- lay the foundation: the 'history' of the exhibit, including the 'chain of custody' if applicable including:
  - give opposing counsel the opportunity to look at the exhibit before it is produced;
  - ask the witness to describe and identify the exhibit;
  - put the exhibit in front of the witness;
  - ask the witness to produce the exhibit.

Some exhibits should be used in Court, ie a demonstration done with or marking the exhibit (as applicable). The witness should 'talk through' the demonstration.

An exhibit can be referred to/looked at/used by another witness before it is formally produced.

Specific Techniques

- Refreshing memory (aide memoire). This is common for Police officers. The notes sought to be referred to need to have been made sufficiently contemporaneously with the events to be described, and leave from the Judge is required.
- Dock identification. Formal identification procedure (ie description of the person and evidence any formal identification procedure eg identification parade), then evidence of recognition (if applicable). Refer to s 45 of the Evidence Act 2006.

Presentation

The witness's answers should be addressed to the Judge.

Maintain eye contact with the witness as much as possible.

Listen to the witness's answer. You may need to reformulate or rephrase your next question.

Monitor the pace of your questions and the witness answers ie not too fast.

Monitor the volume, pitch and pace of your questions.

Re-examination Checklist

Ask yourself: Is re-examining necessary?

Question format: Non-leading, open questions (as for examination-in-chief).

Only matters raised under cross-examination can be covered – it's not a chance to 'plug the gaps' in your examination-in-chief!

Avoid repeating evidence unnecessarily.

Cross-examination Checklist

General

For each witness, consider your aims in cross-examination ie:

- To gain an advantage.
- To discharge an obligation.
- To create a particular effect.

For each witness:

- Know what you wish to challenge and what you would wish to say about the witness/their evidence if you were making a closing address, ie that they are:
    - Unreliable, due to bias, previous convictions and/or previous inconsistent statements; and/or

- Mistaken about the facts because of faulty memory, faulty perception and/or inconsistency of conduct; and

- Determine on what you are obliged to cross-examine (ie to discharge a duty).

You are not limited to cross-examining on matters raised in evidence-in-chief – of course, the requirements of relevance and admissibility apply.

General don'ts:

- Don't ask a question to which you don't know the answer.
- Don't ask one question too many.

Structure

Avoid repetition of the evidence-in-chief content unless it helps your case or is required to help establish a point that you wish to make.

Try to start and finish on a strong point.

Work topic-by-topic.

Include any particular requirements such as 'putting the case'.

Question Format

Leading, closed.

Short, simple in form and language, and containing only one question.

Precision ie sufficiently narrow.

Use (where necessary) and vary the placement of 'questioning words' such as '…isn't it?', 'It isn't…?, 'wasn't it?', 'It wasn't…?' etc.

Specific Techniques

Discrediting the witness:

- Previous convictions (other than the Defendant, unless he/she through counsel or a witness puts in issue the Defendant's good character, or the character of a Prosecution/Police witness).
- Bias ie in favour of the other side.
- Putting a previous inconsistent statement. (This technique shouldn't be used for every inconsistency: materiality is the key.) The process differs depending on whether the statement was in writing or oral. In either case, repeat, build up and contrast. The inconsistency needs to be established by putting it the witness. If the witness continues to deny making the previous inconsistent statement, put the substance of it again and, if applicable, show or disclose the contents of the statement. The witness must have the opportunity to deny making the statement or to explain the inconsistency.

Discrediting the evidence:

- Faulty memory: look at statements and other evidence for whether memory can be challenged.
- Faulty perception: it may be possible to undermine evidence of a 'direct' witness by emphasising the difficulties the witness may have had in seeing or hearing events etc. This may be particularly helpful where there is disputed identification evidence.
- Inconsistency of conduct: ie with what the witness saw, heard or believed.

Putting the case:

- For the Prosecution/Police: The main allegations must be put.
- For the Defence:
  - This should be done for every Prosecution/Police witness where their evidence differs with the version of events to be given by any Defence witness.
  - If the defence being run is mistaken identity, the Defence must put to any identifying witness (whom the Defence believes is mistaken) that they are mistaken.
- Refer to s 92 of the Evidence Act 2006.

Parading your case: This is a series of questions which seek to have the witness agree to facts that support your cases. It is very useful in relation to circumstantial evidence against the Defendant.

Presentation

Maintain eye contact with the witness as much as possible.

Listen to the witness's answer, and formulate the following question accordingly.

If referring to evidence already given, repeat it accurately.

Monitor the pace of your questions and the witness answers, ie not too fast.

Monitor the volume, pitch and pace of your questions.

Don't argue with the witness.

Don't interrupt the witness, unless a reminder is pertinent eg that a 'yes' or 'no' answer is sought.

Don't comment on the answers.

Objections

General

General rule: You should only object to serious breaches of important rules which have the potential to be of consequence in the case.

Don't object during an opening or closing address. If a point needs to be raised, do so by addressing the Judge at the conclusion of opposing counsel's address.

Procedure for Objecting

1. Stand before you say anything (opposing counsel sits).
2. State your objection (ie make your objection and state the nature of it).
3. The Judge may invite opposing counsel to respond to the objection.
4. The Judge rules on the objection.

Common Objections

Objections to questions

Examination-in-chief and Re-examination:

- Leading question – as it suggests the desired answer
- Leading question – as it assumes a fact not yet brought into evidence

Examination-in-chief only

- Exhibit being introduced without foundation or authentication

Re-examination only:

- Question is outside the matters covered in cross-examination

Cross-examination (usually):

- Compound or multiple question as it brings up more than one fact

Overall:

- Question invites a hearsay answer
- Question calls for an opinion or for speculation
- Question misquotes evidence already given
- Question is repetitive
- Question is irrelevant
- Question is confusing/misleading/ambiguous/vague/unclear
- Question is argumentative
- Question is improper in that it wrongly puts the character of the witness in issue
- Question is outside the scope of matters raised by cross-examination (ie in relation to re-examination only)

Objections to answers

Answer is:

- Hearsay – as it is an out-of-court statement made by another person *and* the witness is introducing that statement to prove the truth of that statement
- Irrelevant – as the answer does not go towards proving or disproving a material fact
- Opinion – the answer is not a fact, it is an opinion of fact
- Inference/speculation – the witness is guessing rather than stating a fact
- Disclosing privileged information

Responding to Objections

1. Sit down when opposing counsel makes an objection.
2. If the Judge asks you to respond to the objection, stand up and do so.
3. The Judge rules on the objection.

Getting Past Objections

- Objections can be distracting and time-consuming, and constant objections can be annoying for the Judge.
- Before you object, consider whether you should object (eg is the evidence admissible?; does the question or answer help your opponent's case/harm your case?). Likewise, if you are asked for a response, consider the implications of your response.

In some cases, objections can be avoided (by your actions in Court or appropriate briefing of your witnesses, as applicable). In other cases, there may be ways around an objection eg rephrasing a leading