

SAHCA Advocacy Tips

Advocacy Tips - Cross Examination, Part 1

Q: How do you start to prepare for cross-examination?

A: Practitioners prepare for cross-examination differently. Some start with the witness statement (which stands as, in most civil cases, the evidence in chief); work through the points the witness supports in the other side's case; take out a list of other issues that need to be challenged; mark any internal inconsistencies in the witness statement; explore the trial bundle for documents to put to the witness; and work out a series of questions from there.

A better approach is to start from the propositions you would like to make in the closing submissions - and work backwards. Sometimes arguments are raised in closing submissions that have not been put to the witnesses during cross-examination. Sometimes this is unavoidable: cases change considerably during trial. More often, however, it is because the themes of the witnesses' evidence had not been tied in to the closing arguments beforehand. Alert Judges are alive to this. How often have you heard in judgments "XYZ was not put to the witness, so I am unable to make a finding on that..." or "Counsel chose not to challenge that in evidence...". Sometimes the failure to challenge is deliberate; often it is not. You can reduce the risk of this happening by tying in, from the start, the themes of your cross-examination with the bare threads of your closing argument.

An effective way to start your preparation is to consider from the outset the "theme" your series of questions is going to follow. The theme will be case-specific, designed to deal with your client's slant on a particular issue that the Judge must consider when reaching his decision. Equally, your theme may be based solely on discrediting the testimony of the witness. Either way, this theme should be prevalent throughout your questioning.

Set out your theme on a cross-examination "route-plan" - an overall guide to your cross-examination from where all your notes and questions will be

devised. Only once this is prepared are you ready to start effectively preparing your cross-examination.

Q: How should I approach my cross-examination route-plan?

A: Your "route plan" is the guide to where you want to take this witness in front of the Judge (or jury in criminal cases). The purpose of any cross-examination is two-fold: to elicit favourable evidence and discredit evidence that is unhelpful. Anything else is a fishing exercise, which should be avoided. Set out the following on a plain sheet of paper: (1) which part of this witness's evidence in chief assists or supports your case? Usually there are a few agreed facts; take a list of these; (2) how can this witness corroborate your theory of the case? Tie these agreed facts in with your theory of the case and consider the propositions required in order to turn this witness into corroborating your client's slant on the issues; (3) what must this witness admit? Make a list of the propositions you would like this witness to admit - these propositions should all tie in with your theme for this witness and the overall theory of the case in closing; (4) what should the witness admit? Consider what the witness cannot deny from the agreed facts; the propositions from which he cannot possibly escape. Use these to develop your position in other areas. These are all useful tools for effective cross-examination.

Q: What tips can you give a practitioner in advance of their first cross-examination?

Cross-examination depends on your audience. You are expected to act in a different way before juries or lay magistrates than you are in front of a County or High Court judge or a lawyer-led Tribunal. Remember who your audience is and be flexible. On presentation, it is usually a good idea to bear in mind the following advice: (1) make your questions leading - answers should be "yes" or "no" - if you ask an open question, the witness can respond in any number of ways; (2) make a statement of fact and ask the witness to agree with it - the best practitioners keep control of their witnesses by putting facts to the witness in the question and asking them "do you agree?". This leaves the

witness with no room to manoeuvre into unhelpful matters. Lead up gently to the main question with a series of agreed facts from your "route plan"; (3) be confident: more so in jury trials, advocacy is like acting. If you do not project gravitas and authority the effect of your cross-examination will be lost, a jury will not be impressed and the witness will start to take advantage; (4) be polite to the independent and expert witness, unless circumstances dictate otherwise; (5) listen to the witness - very often cross-examiners are not listening to the witness; this is acceptable if the witness provides you with an expected answer, but witnesses are more often than not sophisticated and unpredictable. Listen to what they are saying and be prepared to challenge an issue they raise for the first time; (6) do not, under any circumstances, argue with the witness. All too often cross-examiners respond to throwaway remarks by witnesses designed to challenge propositions put to them. If they answer a question with a question, tell them it is your role to ask the questions and their role to answer them.

On content, remember: (1) make your strongest points at the start and end of your cross-examination; (2) keep your eye on your audience; judge their reactions. You may not need their constant attention - you may, after all, be eliciting evidence for a closing submission - but you do need to keep their interest or provide for them a point of reference if you want them to follow your theme on closing; (3) try and vary the order of subject matter - this may be better done by taking it issue-by-issue or chronologically; (4) try your best not to allow the witness to repeat his direct examination; (5) know the probable answer to each question - and devise a route plan for any unexpected answers; (6) do not start to prepare a script of all the questions you propose to ask: it may make you may feel safer having all the questions on one sheet of paper, but it will not help you on the day.

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