

## Cross-examination

### **Q. 1 Just how crucial is cross-examination?**

There is an argument, possibly controversial, that cross-examination is the most important element of trial advocacy. As a simplistic test of that assertion one could point to the fact that in a normal trial the defence gets only one speech, may call only one or two witnesses but is likely to conduct many cross-examinations.

### **Q. 2 How can I use it?**

In general terms cross-examination is aimed at undermining the credibility of a witness who harms your own case, or demonstrating the truthfulness of your own case through the other side's witness. Promoting your own case through an opposition witness is always more convincing to a jury than through your own. Deciding which approach to take informs the structure, content and above all the tone of cross-examination.

### **Q. 3 How then does one make cross-examination effective within the overall trial strategy?**

It is trite but true that cross-examinations of important witnesses should never be extemporised. Preparation is the key to effectiveness. In preparing for cross-examination. Three questions should be posed and answered.

1. What do I want from this witness?
2. Why do I want that?
3. How do I get it?

### **Q. 4 What do I want from this witness and why do I want it?**

In order to apply those questions it is important to know your own case thoroughly. This does not mean simply knowing the facts of your case but being completely familiar with the theory or theme that is the essence of your case. It is your theme, supported and demonstrated by the evidence which you have extracted from the witnesses, that will be the thrust of your closing

speech. What you want from the witness is therefore informed by your knowledge of your case and how a particular cross-examination can move your case forward should then be evident. This analysis could be said to put the relationship between the different trial advocacy skills into perspective, with the vital skill of cross-examination supporting the evidence you extract in chief and the proposals you make in closing.

#### **Q. 5 How do I get it?**

The third question is often the most difficult. Do you go in hard from the beginning or do you win the witness over using persuasion as opposed to challenge? These decisions need to be arrived at long before you stand up. Any vacillation or inconsistency of approach will be picked up by the jury. The one constant, almost subliminal, message you must always convey is belief in your own case. Treating a witness inconsistently, unless you can overtly demonstrate that any changes of pace or direction are deliberate, undermines that message. There is one important caveat. Despite the need to keep an accurate note of the evidence it is important to watch how the witness you are about to cross-examine performs. How they take the oath, how they answer questions, neutral or engaged, can give a clue to vulnerabilities or strengths, antipathies or sympathies to be utilised or avoided. Part of the skill of cross-examination is being able spontaneously to factor changes of tack or emphasis arising from these observations into the careful preparation which should precede all aspects of trial advocacy.

#### **Q. 6 How should I handle cross-examination on documents?**

An important part of the preparation of how a witness is to be treated involves consideration of what, if anything, is to be put to the witness in the form of documents or objects either previously exhibited or introduced for the first time by yourself. This can produce a whole raft of difficult decisions, which have to be taken well before the cross-examination begins. Documents are seldom totally helpful. The first rule is never, ever, use a document which has anything in it which can be used against you, no matter how advantageous to your case some other part of the document is. Once a document has been

put to a witness it goes in its entirety before your opponent, the judge and, of course, the jury. The jury may, in the privacy of their retirement, deal with the document in a way that you cannot control. If this means going without a document which contains helpful material then so be it. The second rule is If you are putting documents to a witness don't over do it. Keep the exercise to the best few. Once the point is made repetition will not improve it and will be counter productive. Use as few documents as possible to get what you need and be willing to discard others. Be strict with yourself and don't give in, however tempting it may be, to the desire to destroy a witness just because you can. That self discipline which can be subtly communicated to the witness, your opponent, the judge and the jury shows more than anything else the degree to which you are in control of your case and your own belief in your client's case.

**Q. 7 Can't I ever go for the jugular?**

Obviously sometimes you will make good progress in cross-examination with an obviously mendacious and malign witness. The jury will enjoy the dismemberment as much as you will. However, most witnesses you cross-examine will either be truthful (perish the thought), mistaken or merely partisan. The observations about self-discipline in relation to choosing material to put to a witness have a more general relevance to the manner in which cross-examinations should be conducted. The proprieties and courtesies that the trial process brings with it are not just part of a tradition but can be very important in making advocates behave in a way that positively assists their client. It is all too easy to forget that whatever happens in a trial the advocate goes home. The same cannot always be said of one's client. A jury's impression of an advocate can impinge upon their views of the client. The advocate's behaviour, not just his or her skills, unquestionably has the capacity to influence the outcome. Jurors have human emotions and responses and are much more likely to accept what they are told by a person for whom they have positive feelings. In simple terms never gratuitously bully, hector, belittle or humiliate the witness, no matter how tempting it may be. That sort of behaviour is unattractive to most right-thinking people, and

hopefully there will be enough of those on the jury to give you the verdict your preparation deserves.

Prepared on behalf of SAHCA