

## ADVOCACY TIPS

Q. I'm newly qualified and just starting trial advocacy. I know the groundrules for Cross-Examination - mainly closed, leading questions - but I actually find *avoiding* leading my client in Examination-in-Chief rather more difficult. What's the best way of performing this role?

A. This is a common concern. You've got their proof and you want to keep them within it and accordingly it is very easy to slip in to leading questions. Your opponent will then take great pleasure in telling you not to lead!

Instead you must approach your questions, and your witness, almost as though you were taking their instructions for the first time (although on this occasion you know what they are going to say – hopefully!!) Your questions will then enable the story to be told in the witness's own voice, and will not sound like you can't trust them, and have to tell it for them.

A useful way to structure your Examination-in-Chief is by using the 'Box' Model. Write down a sequence of boxes which consist of 1 or 2 word headings. This will be your overall structure that you are going to follow and which you can explain to your client so that they can understand what you are going to ask them. For example, let us say your client works for a shop where the amount of money in the cash till has been found to be short on two occasions. For your Examination-in-Chief you could structure it with the following boxes: (1) His background (2) His employer (3) His role (4) Other staff (5) Till Processes (6) 1st date (7) 2nd date.

The next step is to 'funnel' each of these topics. Funnelling is a concept utilised in investigative interviewing but it has equal value in Examination-in-Chief. You will start by introducing the topic followed by a Wide Open Question - these are ones that begin, "Tell me about...", "Describe...", "Explain..." and so on. Don't fall into

the trap of making it a closed question by trying to be polite and starting with "Could you" or "Can you". Instead, if you want to be polite, just begin with "Please". Returning to our scenario and funnelling the first box a focused Wide Open Question on the topic of his background would therefore be, "I want to start by asking about your background. Tell me about the jobs you had prior to your current position." This question should prompt your witness to give you lots of information that allows you to probe deeper.

In order to do so you must ask specific open probing questions. This means those questions all of which begin with a 5WH i.e. a Who, What, Where, When, Why or How. Again, returning to our scenario, let us say our client's response was that he worked in a bookmakers prior to his current job. You could then ask a series of probing questions as follows:- "When did you start this job? What was your role? What tasks did you have to perform in that role? How long did you work there? Who supervised you, if anyone? Why did you leave?". Hopefully what you will also have spotted is that to a large extent these questions follow on from each other. Try not to rely upon the most frequently used open question though, "What happened next?" This is not only lazy but more importantly it is too vague, too ill defined to be probing enough. Do not be surprised if accordingly the witness comes out with something unpleasant and unwanted.

At the end of these probing questions you will now be able to ask the occasional closed question to focus or clarify your client's evidence, or to summarise or emphasise certain aspects of it - when doing so you will not be 'leading' new evidence because the facts you are discussing have already been adduced. Returning one final time to our scenario let us assume our client said that in his previous job he handled thousands of pounds on a daily basis and only left to progress his career. Follow up questions to emphasise your case could then be, "You've said that substantial amounts of cash passed through your hands is that right? Not just occasionally but every single day? Were you ever accused or disciplined for any alleged dishonesty during that job?"

A useful by-product of knowing how to conduct appropriate Examination-in-Chief therefore is that your taking of instructions should improve as you will have an enhanced awareness of what is going to be needed at trial.

If you are now starting to worry that in adopting this style for the whole of your Examination-in-Chief your witness will be giving evidence for days - stop! To reduce the amount of material that will need this careful approach, ask your opponent which issues they are happy for you to lead on - they should object only to the genuinely contentious areas where they want you to have less control. If your opponent refuses to let you lead *anything* you could begin this process with a completely undisputed area and see how long it takes for your opponent to reconsider their stance!

Most of all remember this witness should be supportive of the questions you are to ask and shouldn't react badly to what you seek to clarify.

Prepared by Leslie Cuthbert on behalf of SAHCA