Advocacy – Cross-examination

"More cross-examinations are suicidal than homicidal."

F.L. Wellman: Art of Cross-Examination

When your opponent resumes his or her seat after leading a witness through the evidence in chief the first question you should ask is not of that witness but of yourself: "Should I cross-examine this witness?".

There is an understandable pressure to cross-examine each and every witness called by your opponent. There is a natural reluctance to allow any evidence called by the other side to go unchallenged. Further, there is often an expectation on the part of your client that you will cleverly undermine or, preferably, destroy the credibility of any witness who has given evidence for another party. Generally the expectation is that you will challenge all or at least some of what has been said.

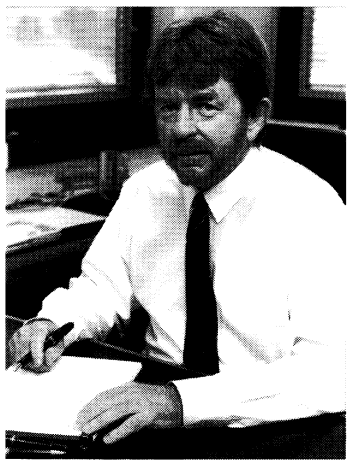
However, you should not feel compelled to cross-examine. It is harder to make the considered decision not to ask questions than it is to launch into an ill-considered cross-examination. If there is no good reason to cross-examine the witness then you should avoid the temptation to do so. In such a case you are unlikely to improve your client's position and you are most likely to damage it.

In the many texts dealing with the topic of advocacy the objects or aims of cross-examination have been identified in a variety of ways. However, a consideration of those writings reveals that the authors are expressing similar views. The aims of cross-examination include the following:

1. To obtain evidence favourable to your client.

2. To destroy and/or weaken evidence unfavourable to your client. This may involve an attack upon the credibility of the witness.

3. To put your case to the witness in order to satisfy the requirements of fairness commonly referred to as the rule in *Browne v Dunn*.



The Hon. Justice Riley

In considering whether to cross-examine a particular witness you will return to your case strategy and by reference to that strategy determine whether anything is to be gained by proceeding to ask questions. Ask yourself whether any of the aims of cross-examination will be achieved in light of your case strategy if you ask this particular witness any questions.

In determining whether to cross-examine that witness you should also bear in mind that in most cases the position of the witness is likely to be adverse to your client's interest. The witness is being called on behalf of your opponent. In the majority of cases you will not be able to be confident of the responses the witness will make to your questions. In those circumstances the asking of questions will always be a dangerous undertaking.

Having considered the matters discussed above and determined that you do need to cross-examine you should apply the same scrutiny to each and every question that you propose to ask. You should limit yourself to what is absolutely necessary to achieve your purpose and you should resist any temptation to undertake a fishing expedition. Whilst an ill thought out or random cross-examination will, on occasion, produce a favourable result, that result will be achieved by accident and incredible good luck. The more likely result is that unfortunate and irreparable damage will be done to your client's case.

If you are to cross-examine it should be in accordance with a clearly thought out plan based upon your case strategy and with definite aims in mind. Your goals should be clear and identified. You should be sure of what you are doing and why you are doing it.

In the event that you decide not to cross-examine it may be prudent for you to keep your client informed as to why you did not do so. In many cases the client will be expecting cross-examination to occur and he or she will be concerned when you announce that you have no questions for the witness.

In their work *Advocacy and Practice* Glissan and Tilmouth describe the first rule of cross-examination as: "do not without very good reason". That sentiment echoes the observations of authors expressed in many works over many years.

Mock Trials

The Interschool Mock Trial Competition 2000 is in the making.

adjudicators & coaches for the teams will be needed.

PLease contact the law society if you are interested in being involved.