

Advocacy - Preparation for cross-examination

"...answers are not obtained by putting the wrong question and thereby begging the real one."

Felix Frankfurter:

Priebe & Sons v United States

Having determined that you will cross-examine a particular witness it becomes necessary for you to plan that cross-examination. You will need to determine in advance the topics or areas in relation to which you will ask questions, the topics or areas that you will avoid, the nature of your approach and the order in which you will deal with the matters you wish to raise.

In most cases it will be possible to determine in advance of the hearing whether it will be necessary to cross-examine a particular witness. Prior to the commencement of the hearing you will be aware of the nature of your case, the nature of your opponent's case and the likely content of the evidence to be led from most witnesses. You will therefore have the opportunity of preparing much of your cross-examination by anticipating what the evidence will be. Having prepared the substance of your cross-examination in advance you will then be able to add to or delete from what you have proposed by reference to the performance of the witness in actually giving the evidence.

In your preparation the first matter to be considered is the identification of the areas that are to be addressed and, conversely, those you propose to avoid. As I observed on an earlier occasion you should only enter into cross-examination where it is necessary to achieve an identified purpose. Before asking your first question you should have a clear idea of the goals of your cross-examination and how those goals are to be achieved.

In considering how you will achieve your goals it will be necessary to determine the nature of your approach to the cross-examination. Broadly speaking there are two approaches to cross-examination. The first is the indirect, probing approach where the witness is not attacked but rather information is led (or extracted) from him or her in an indirect, courteous and non-combative way.

The other approach is a confrontational one in which the witness is directly challenged, possibly vigorously, in relation to the evidence that has been given.

In many instances you will, at different stages of your cross-examination, employ both approaches. There will be matters that you will wish to lead from the witness as being favourable to your client's case or reflecting adversely upon the case to be presented by your opponent. In relation to other matters it will be necessary for you to directly challenge what the witness has said. You will be required to put matters to the witness to provide a basis for a submission that the Court should not accept the evidence of the witness because the witness is untruthful or is, for some other reason, unreliable.

If your cross-examination is to involve a combination of approaches then, generally speaking, it is prudent to endeavour to extract the favourable information from the witness before launching into any challenge to the witness. You should bear in mind that the great majority of witnesses endeavour to tell the truth as they recall events. They may be mistaken but they are not setting out to deliberately deceive. You may be able to undermine the impact of the evidence of such a witness by drawing further information from them or qualifying that information which has already been given in evidence.



Hon Justice Riley

It would be imprudent to deal with issues in relation to which you propose to directly challenge the witness prior to dealing with those other matters because, as we all know, once you attack a witness such an approach is likely to result in the witness becoming decidedly unco-operative.

It is therefore necessary to predetermine the nature of the approach you will adopt regarding each topic to be addressed and then to deal with those topics in an order which is likely to achieve the best results.

Further, in determining the approach you will adopt, it will be necessary to take into account the personality of the witness. This may involve some preliminary and testing questions in the early part of your cross-examination. For example a witness who is tentative in evidence and hesitant about his or her answers may be most productively dealt with by short firm positive propositions being confidently placed before them. On the other hand a witness who is quick to adopt a position and is immediately firm in that position may be better dealt with by a series of less direct questions leading ultimately to a necessary acceptance of the proposition which you wish to be adopted. The approach will depend upon many factors including the matter to be addressed and the nature of the witness. In most cases the most productive approach is likely to be to adopt the non-combative, probing approach initially and only resort to a directly challenging approach at a later time. It will be a matter for your judgment on each occasion.