ADVOCACY
Your Approach to Cross-examination

Hon Justice Riley

"Never, never, never, on cross-examination ask a witness a question you don't already know the answer to was a tenet I absorbed with my baby food."

Harper Lee: To Kill a Mockingbird

We have discussed the need for careful preparation for cross-examination and the fact that part of that preparation will involve a consideration of the nature and characteristics of your witness and how best to approach that witness. You need also bear in mind your own personal characteristics.

We each have different personalities with different strengths and weaknesses. Some of us are naturally forceful whilst others may be less so. Some may be loud and others quiet and so on. In determining your approach to a particular witness, indeed to a case, you should bear in mind your strengths and weaknesses and your limitations. You may need to modify your natural inclinations in your dealings with different witnesses.

There are many general rules of advocacy that you should obey in the presentation of your case and, in particular, in your cross-examination. I discuss some of these below.

You should never become angry. An angry advocate is one not fully in control of the situation and one who is likely to make mistakes. An angry advocate is also likely to alienate the Court and particularly members of a jury. There is no reason why you should not be firm or forceful as the occasion requires but never angry.

You should always be courteous. Descent into discourtesy reflects upon you, and probably upon your client, rather than upon the witness. The courteous but firm and persistent pursuit of an issue is likely to obtain better results than any other approach. If the witness is being evasive or sarcastic or in some other way obstructive, a courteous, but persistent and firm, pursuit of the issue will highlight that. Discourtesy on the part of the advocate serves to focus attention upon the advocate rather than upon the witness.

An aspect of being courteous to the witness is that you should be fair to the witness. If you are unfair to the witness, for example by misrepresenting the evidence or browbeating the witness or becoming angry with the witness, you will find that this will not assist your cause. The Court will be likely to interfere and will, at least, feel sympathy for the witness.

You should never argue with a witness. The witness is there to answer questions. You are not. If the witness seeks to engage you in argument you should clearly and firmly avoid the invitation. You should be in control of the situation and you will lose that control just so soon as you enter into debate with the witness. You should always bear in mind that you will have the last word. When all of the evidence is complete and the witness has left the Court you will have the opportunity to address the Court on the evidence of that witness.

Your questions should invariably be clear and concise. If your question is not clear and not concise you risk not obtaining an answer to your question or, alternatively, losing the impact of a clear answer to the question. If the meaning of the question is not clear then what was meant by the answer becomes a matter of interpretation. Such questions also permit a witness to avoid answering directly and frankly. The witness can seize the opportunity to "misunderstand" the question and answer another question. However if your question is clear and concise it will quickly become obvious if the witness chooses to misunderstand the question or not respond to the question.

When asking questions you should formulate the question in a manner which will allow the witness to comprehend it. Generally speaking you should use plain language readily understood by all. There is no point in using language which is beyond the comprehension of the witness. All that will follow will be confusion. Similarly if you have a witness who has some expertise in an area there is little point asking questions which demonstrate your thorough preparation in the area by the use of unfamiliar words if the Judge or jury will not understand those words. You may feel clever in discussing with a medical expert a subarachnoid haemorrhage but there will be little advantage to your case if that expression is not fully understood by the tribunal.

When you ask any question ensure that you listen to the answer. Your question is not the evidence, the answer is the evidence. If you do not listen carefully to what the witness says you may miss the fact that the witness has provided you with a non-responsive answer or has provided you with information worthy of further pursuit.

In the event that you receive an answer to a question that is unexpected or, worse still, devastating to your case, you should endeavour not to show surprise. An unexpected answer will

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be unduly emphasised by your reactions. Rather you should proceed as if nothing untoward had happened whilst you plan the best way to counter the unfortunate turn of events.

At the commencement of this article there is a quote from "To Kill a Mockingbird". The quote reflects a rule which is often repeated to young advocates and that is you should never ask a question to which you do not know the answer. That is probably to express the rule in terms that are too broad and rigid. There will be questions you will ask which will have either answer (a) or answer (b), with either of which you will be happy. In those circumstances you may wish to ask the question without knowing the answer. There will also be those questions where you are not concerned by the answer because the questions and answers form part of a building process undertaken with a view to asking a later and more important question. However in relation to those questions which are crucial to the outcome of the case the rule holds true: you should not ask a question to which you do not know the answer.

In a similar vein you should not ask questions which permit the witness to explain. Again this rule is subject to exceptions and a question seeking explanation may be particularly effective if there cannot be an explanation and the witness is left to flounder. However as a general proposition you should not permit the witness to explain any matter in his or her evidence. If you wish to have an answer explained then you should do so by suggesting the explanation rather than simply calling for an explanation. To call for an explanation gives the witness the opportunity to be expansive regarding matters which may be detrimental to your case.

There are many rules of advocacy and I have discussed some of these above. In relation to each such rule there will be exceptions. I suggest that departure from the rules should be left to the exceptional circumstance and to the very experienced advocate.

CASE NOTES

Northern Territory of Australia v Mueller & ors

Supreme Court No. 19/2000

Judgment of Riley J delivered 6 April 2000

CIVIL LAW - COSTS - CRIMES (VICTIMS ASSISTANCE) ACT

The respondents were each issued with an assistance certificate in the Local Court at Alice Springs pursuant to the *Crimes (Victims Assistance) Act ("CVA Act")*.

The magistrate awarded each respondent costs to be paid on the basis of 80 percent of the relevant scale of costs as set out in the appendix to the Local Court Rules ("the Rules").

Her Worship considered there to be "no reason" to differentiate between work done prior to the commencement of the amended Rules and work done after May 1998.

HELD

1. Appeals allowed
2. Work carried out prior to June 1998 to be taxed.

Mark Hunter

His Honour observed that the *CVA Act* in combination with the *Local Court Act* contemplates a scale of costs for proceedings under the *CVA Act* to be fixed by the Chief Magistrate. Any discretionary variation by a magistrate in awarding costs for work done prior to June 1998 must be referable to the scale *then applicable* under the Rules.

Appearances

Appellant - Anderson / Povey Stirk

Respondents - Goldflam / NTLAC

Case Notes is supplied by Mark Hunter, a barrister in Darwin.

Legal Admin Traineeship

Up to one thousand jobs for first time job-seekers may be created across Australia over the coming year following the recent launch of a traineeship scheme for legal administration support staff.

The traineeship is the product of three years' collaboration between the federal Government, the Law Council's General Practice Section, the Admin Training Company (which developed the scheme on behalf of the Australian National Training Authority) and various other bodies.

Under the Legal Admin Traineeship, trainees will receive a nationally recognised qualification of Certificate III in Business (Legal Administration) following the successful completion of twelve months' training.

The traineeships involve paid work within a law firm, and structured training which is registered with the relevant authorities. The traineeships can be full-time or part-time, with the training component of the scheme undertaken entirely in the legal workplace, off-the-job or both. Trainees are eligible to be paid a training wage, which is normally 75% or non-trainee wages, although higher remuneration can also be offered.

Further details regarding the Legal Admin Traineeship can be obtained by contacting Carmel Byrne or Kim Trotter at the Admin Training Company on tel. (03) 9820 1300 bh or by email at national@adtc.com.auFurther information can also be obtained on the Law Council of Australia's website at www.lawcouncil.asn.au