

# Cross-Examination Tips

Heather C. Devine

# Cross-Examination

- Cross-examination is beyond any doubt the greatest legal engine ever invented for the discovery of truth
  - Wigmore, *Evidence* (1970)

# Three Main Purposes of Cross-Examination

- To weaken, qualify or destroy the opponent's case
- To support the party's own case through the testimony of the opponent's witnesses
- To discredit the witness

# Aspects of Cross-Examination

- Can extend to any matter at issue – including credibility
- Is not limited to matters that have been covered in the examination in chief
- May provide means of obtaining relevant evidence/testing the evidence given during an examination in chief

# Scope of Questioning

- Counsel is given wide latitude – but be sure to control the witness using closed questions – that require a yes or no answer.
- Few restrictions are placed on the questions that can be asked or the manner in which they are asked
- Any question that is relevant to the substantive issues or the witness' credibility is allowed
- Scope is wide enough to permit questions suggesting facts that cannot be proved by other evidence

# Improper Questioning

- Must not be harassing or repetitious
- Must not constitute a misrepresentation
- If the assertion is manifestly tenuous or suspect, the trial judge may inquire of and seek assurance from counsel that a good faith basis does exist

# Improper Questioning

- Although counsel has wide latitude – there are limitations
- Counsel cannot use a cross-examination to circumvent other rules of evidence
  - For example: asking a question, the answer to which would be inadmissible if offered in chief
- Trial judge has discretion to disallow relevant cross-examination

# Witnesses Tendered for Cross-Examination

- A party may call a witness to the stand and without asking any questions in chief, make the witness available for cross-examination
- May be done to avoid the court drawing an adverse inference from failure of the party to call a witness who is presumed to possess relevant information
- Although the witness can then be subjected to cross-examination on substantive issues, they cannot be attacked on their credibility
  - If they haven't given a testimony, their credibility cannot be at issue



# Techniques of Cross-Examination: Be Prepared!

- Preparation is key!
  - Effective cross-examiners are quick on their feet
  - Able to lead their witness down a pre-selected path to obtain information
- These skills are only possible through knowledge of the case as well as case law

# Techniques for Cross-Examination:

## Is the cross-examination necessary?

- Preparedness allows counsel to determine if a cross-examination is even necessary
- Counsel must evaluate if direct testimony has helped or hurt their case
- Determine if the cross-examination will allow the witness to clarify or redeem a poor testimony
- Determine if the cross-examination will allow a witness to resurrect credibility lost during the examination in chief

# Techniques for Cross-Examination: Have a Goal...

- Effective cross-examinations accomplish a goal to the benefit of your case or defence
- Goals are dictated by the knowledge each individual has or is expected to have

# Techniques for Cross-Examination: Common Goals

- Highlight inconsistencies with other witness' testimony
- Demonstrate bias on the part of the witness
- Highlight errors or confusion in the witness' testimony
  - Be careful not to allow the witness to correct or clarify

# Techniques for Cross-Examination: Common Goals

- Attack the witness' credibility through impeachment or other means
- Identify the portions of your own case that the witness can corroborate
- Identify and highlight portions of the witness' testimony that bolsters your own case or defence

# Techniques for Cross-Examination:

## Formulate a plan

- Formulate a plan to elicit relevant knowledge from the witness
- Establish the basic points that need to be established through questioning
- Construct an outline detailing the plan of action for the questioning of each witness
  - Create bullet points for lists of topics to be discussed
  - 2-3 word summaries for questions to be asked
- Identify potential areas for impeachment of the witness
  - Make a reference list for each witness of exhibits and deposition testimony that may be used for impeachment

# Techniques for Cross-Examination: Take Control of the Courtroom

- Focus the attention of the jury on what you have to say
- Control the witness with leading questions
- Direct the jury with leading questions
- Control a witness with short, concise questions
- Control the testimony with introductory topics

# Techniques for Cross-Examination: Take Control of the Courtroom

- Control the courtroom with your presence
  - Engage the jury with your conversation
  - Engage the jury with eye contact
  - Be natural with the jury
  - Learn to be a good actor – if a jury senses you feel your case is weak, your case is ruined.
- Time to shine and step to the forefront!



# Techniques for Cross-Examination: Start Strong-End Strong

- It's a long day: jurors may have short attention spans
  - Start strong because a jury's interest is usually piqued at the start of a new examination
  - Plan so that your last question elicits a significant response because a strong finish leaves a lasting impression

# Techniques for Cross-Examination: Keep it (Mostly) Safe

## Rule of Thumb:

- Never ask a question unless you know the answer
- Surprise can destroy even the best of preparation

## The Exception:

- Gamble on a slim chance! If there is nothing to lose, an unexpected answer might be the answer to get you the win.