

# Advocacy 608 Examination of Witnesses

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# Examination of Witnesses

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- ❖ Direct examination in Chief / Direct Examination
- ❖ Cross-examination
- ❖ Re-examination
- ❖ Examination of Experts

# Direct Examination

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- ❖ Putting in your case – presenting to the Court your theory of the case.
- ❖ Done through adducing evidence to support the cause of action (all of the essential elements).
- ❖ Strive to do so in a persuasive manner such that it is more believable and credible than the opposing side.

# Persuasive / Efficient

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## Use of the “Factor List”

- ❖ This will assist in identifying the evidence (oral, expert documents) you will need to prove the essential elements of your case.
- ❖ Also may be agreed facts and documents.
- ❖ One of the most basic skills.
- ❖ “Your witness never looks as good as when you finish your examination in Chief!”  
(anonymous)

# Briefing the Witness

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Prepare the witness so that they are at ease (which can be difficult some times) and they do not appear scripted.

Review:

- Prior statements
- Questioning transcripts
- Provide an overview of where their evidence fits in
- Highlight key parts of their evidence
- Go through their direct evidence so they are familiar

# Briefing the Witness - Continued

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Explain the rules of evidence.

- Cannot lead.
- Not to provide opinion evidence or conclusion evidence. Just factual evidence.
- Also hearsay (second hand evidence) is not allowed.

# Tip / War Story

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You may need to have a stern discussion with your client... in context of briefing.

- Remember, this should not extend to “coaching” the witness.
- The Witness’s evidence must be his/her evidence, and his/her honest recollection of matters.

# Preparation of the Witness

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- ❖ Presence – witness should speak loud and clear enough that the court can hear their evidence.
- ❖ Keep their head up, look at the questioner and look at the Court when answering.
- ❖ Keep composure, be relaxed.
- ❖ They will be nervous.
- ❖ Use aids (pictures) if haven't been to court before.
- ❖ You will also have to let them know how to address the court.



# Preparation of the Witness - Continued

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- ❖ Go through potential exhibits.
- ❖ Go through foundation of entering exhibits.
- ❖ Go over attire (very important)!!!
- ❖ Sit or stand in the court?
- ❖ Water...
- ❖ The best witness is a properly prepared and briefed witness!

# The Examination in Chief

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The witness will be outside of the courtroom... you will need to get her/him.

There will be an exclusion of witnesses (usually ordered at the beginning of the trial and does not include experts – *Rule 8.18*).

-*Rule 8.13* deals with communication with excluded witnesses.

Bring them in and introduce them to the Court...

*“..our next witness will be Mrs. Smith, who was sitting in her car across the intersection from the Plaintiff’s car.”*

# The Examination in Chief - Continued

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- ❖ The witness will take the stand. (they must stand unless the Court gives them leave to sit)
- ❖ Microphone is for recording not amplification.
- ❖ Start with introductory matters.
- ❖ Here you can use leading questions:
  - Your name is Michael Kirk, and you are a partner with the law firm Miller Thomson LLP?
  - Non-controversial and preliminary areas, proper to lead and probably helpful to the Court.

# Leading Questions

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As a general proposition, you may not lead your own witness.

A leading question is any question that suggests the answer.

- Leading question - The car was blue, wasn't it? (answer is yes or no)
- Proper question – What colour was the car? (the witness will say blue because he/she is properly briefed!!)

# Leading Questions - Continued

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Do not lead because:

- It may attract an objection and interrupt your flow of the exam in Chief.
- It may diminish the impact of the evidence, the court may give that evidence less weight.

# Focus... Focus... Focus...

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- ❖ The focus during the Examination in Chief is the witness.
- ❖ Avoid distractions. Fade into the background.
- ❖ Don't have lots of hand gestures, don't play with a pen or change in your pocket!
- ❖ You "direct" the witness...
- ❖ Use of laptop or tablet by Counsel, is it distracting?

# Sequence

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Start with introductory matters:

- Who the witness is, what does he/she do, what is the relationship to the parties, what possible interest or lack of interest in the outcome?

Why do this?

- Some degree of comfort/relaxation for the witness
- Personalizes the witness to the judge/jury
- Identifies his/her ability to perceive/relate to evidence
- Establishes the Court's expectations

# Sequence - Continued

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Structure the evidence, try to introduce topics.

*“Now, Mrs. Smith, was anyone else there?”*

Or

*“Mrs. Smith, I would like to turn your attention to the accident scene. Who do you recall being at the accident scene?”*

This focuses the Court’s attention on this issue.



# Primacy and Recency

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## *Primacy*

- ❖ Credibility issue first – “People believe most what they hear first”.

## *Recency*

- ❖ Details to remember last – “People remember best what they hear last!”

# Primacy and Recency

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Because of these reasons, chronological order is not the best.

- Elicit weak evidence in the middle, least important time in terms of ultimate impact the evidence will have.
- Structure the testimony on the case theory or theme, and highlight important parts.

# The 5 W's for Questions, and one H

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Your questions for the examination in chief should be open-ended.

❖ Who?

❖ What?

❖ Where?

❖ When?

❖ Why?

❖ And How?

# The 5 W's - Continued

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i.e. “Now Ms. Witness, you just testified that you saw the defendant go through the red light and crash into my client’s car. Please tell the court what you saw, step by step?”

- ❖ When it’s time to move on, use these catch phrases.
  - What happened next?
  - Then what?
  - Now, moving to the arrival of the Police, when did that occur?
  - What happened when they arrived?
  - Anything else?

# Objection, Justice!

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Objections to the form of a question must be made before an answer is given.

- ❖ If the question is leading, the answer is inadmissible.
- ❖ The objection should be made before the answer is given, it should be succinctly and specifically stated.
- ❖ “Objection Justice Smith, Counsel was leading the witness with that question.”
- ❖ If the objection is made and sustained, you will have to rephrase the question.
- ❖ If the answer is unimportant or irrelevant, why are you asking the question in any event?

# Cross-Examination

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This is the most difficult task facing trial counsel.

It takes experience to get better at it.

Unlike other aspects of advocacy, cross-examination is often reduced to the inherent abilities of the lawyer vs. witness in a battle of wits!

The lawyer has the tools and **MUST** use them to his/her advantage.

# Is it Necessary?

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If nothing controversial is said by the witness, then it may not need to cross.

If the evidence is mildly troublesome, and the witness is credible, consider that by cross-examining, you may well:

- Annoy the judge who sees the witness as credible.
- Build up the relevance and import of the evidence way out of proportion to its real worth.

# Is it Necessary? - Continued

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In this situation, consider that by asking no questions, you are:

- Minimizing the impact of a credible witness.
- Getting that witness out of the court room ASAP!
- Creating an impression for the Court that “this evidence couldn’t be too damaging (or else you would have cross examined!)”



# Is it Necessary? - Continued

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- ❖ Don't conduct a purposeless cross-exam which may do nothing but allow the witness to repeat his/her testimony-in-chief.
- ❖ If there is nothing to be gained from the cross-exam, waive it.
- ❖ If something can be gained, get to the point.
- ❖ Be careful on cross-examining on testimony elicited in chief that was favorable, as you may lose it if they "correct themselves" during the cross-exam.

# Establish Goals for the Cross

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Once you decide it's necessary, there are four possible goals:

1. To elicit helpful evidence from the witness.
2. To qualify the evidence the witness has given.
3. To impeach the evidence the witness has given.
4. To impeach the witness him/herself

# Eliciting Helpful Evidence

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- ❖ Most witnesses are honest, or trying to be honest.
- ❖ They may be mistaken, but are not liars.
- ❖ The full glare and nervous emotions in the courtroom setting (which can be very intimidating), helps bring out the truth.
- ❖ Because of this, most witnesses will have something that is helpful, so bring it out first.

# Qualifying Damaging Evidence

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- Does the witness have any memory difficulties? (how long ago was the incident?)
- Does the witness have any observational difficulties? (how far away were you standing? Was it dark? Were there any streetlights? How long did you observe the “accident scene”? Do you wear glasses? Were you wearing them at the time?)

Questions will qualify the answer, or raise doubt. (Brain injury reference – since the incident – lobbed a beach ball at me!!)

# Impeaching Evidence

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This can be accomplished by:

- Prior contradictory evidence (i.e. Questioning transcript admissions, or answers to undertakings).
- Prior inconsistent statements (i.e. To the police or an insurer).
- Inconsistent documents (i.e. Letters contractual terms).
- The formula is simple but must be strictly adhered to during the cross-examination.
- The witness must be confronted with the prior inconsistent statements during the cross-examination.

# Impeaching Evidence – Continued

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Confronting the witness with his/her own inconsistency will often have a dramatic impact that cannot be duplicated by introducing evidence of the earlier statement in another way, in any event.

# Impeaching the Witness

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Total impeachment of a witness is very difficult and not normally done. It may not be desirable because they may have some helpful evidence.

Can be accomplished in two ways:

- Showing incompetence
- Showing the witness has no credibility

# Incompetence

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This is about the ability of the witness to testify about the matter, whether ordinary or expert.

- ❖ “A near blind person testifies about what he/she saw and you establish that they weren’t wearing their glasses at the time of the incident.
- ❖ This doesn’t happen very often.



# Credibility

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Usually, if you can elicit enough examples of incredibility evidence to wholly discredit the witness, you have done your job. The cumulative effect of a number of “small” victories will, when combined, often have the effect of discrediting the entirety of the witnesses testimony.

# Credibility - Continued

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*For example...*

[23] I reject Sikora's evidence. First, it directly contradicts the evidence of his own witness, Joseph Sikora, who testified that Sikora had told him a couple of years ago that there was to be a 70/30 split to Paley of the sale proceeds on this "side deal". Second, Sikora was one of the least credible witnesses whom I have ever heard give evidence, a conclusion I have arrived at for the following reasons:

...

d. He attempted to explain the major discrepancies between his evidence on examination for discovery and at trial by testifying that he did not give careful attention to his evidence at discovery, which reveals that he does not value honesty and accuracy in evidence given under oath;

# Manner with the Witnesses

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No need to be cross with the witnesses.

No need to be super aggressive.

Always listen to the witnesses' answers. Do not assume what they will be.

Maintain control of the witness.

# Maintaining Control of the Witness

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Q. Were you in need of money at the time you signed the loan agreement?

A. Why would you think that?

Q. Could you answer the question...

A. I would never have signed the agreement just for the money...

Q. Let's try again. My question was...Were you in need...Please answer that question.

(witness continues to be evasive)

Use this to your advantage, become more sarcastic...“Perhaps you didn't hear the question? Did you hear the question? Did you understand the question?”

This is better than...Justice Smith, would you please direct the witness to answer the question?

# More Tips

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- ❖ Never ask an open ended question.
- ❖ Always lead the witness.
- ❖ When the witness is difficult, end your question with controlling words such as... Right? Correct? Isn't that true?
- ❖ Use your tone of voice.
- ❖ Never give up on the question.
- ❖ Frame your question as a statement of fact... It is true that X happened, isn't it?
- ❖ Use simple language ("before" as opposed to "prior")
- ❖ Rule in *Browne v. Dunn* – if you are going to call evidence that contradicts the testimony of the witness, you must give them an opportunity to qualify their evidence in cross.
- ❖ You must PUT that evidence to the witness, (make a list) and it's usually a formality, as they will deny.

# More Tips - Continued

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- ❖ Should you make notes?
- ❖ Be flexible, one issue per page.
- ❖ Have your questioning transcripts indexed/summarized for impeachment.

## NEVER:

- Review the witness' evidence in chief.
- Argue with the witness.
- Ask them to adopt your point of view (i.e. so then given the info you've just testified to, wouldn't you agree that you were driving recklessly?).
- The witness will never agree and you may lose the impact of prior admissions which you may be able to use to make this point in the final argument to the court.
- Ask convoluted questions, keep them short and simple.

# Re-Examination

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- ❖ There isn't much literature on this particular area.
- ❖ Not utilized much.
- ❖ Can be very effective, but the literature on this area is very scant.
- ❖ It is an area that is fraught with potential "minefields".

# White's First Rule on Re-examination

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What is White's First Rule on Re-examination of a Witness?...



# White's First Rule on Re-examination

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# Re-examination - Continued

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A quote comparing cross-examination to re-examination:

*“Only one art is more difficult; that is the art of re-examination. Herein the object of the advocate is to overcome the effect of a destructive cross-examination. The object is attained by a miracle; if you can’t perform them, you had much better allow your witness to go out of the box without further question.”*

# Re-examination - Continued

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There are a few restrictions:

- Except the leave of the Court (which is rare), you cannot confer with the witness before the re-examination.
- You are to elicit all of the witness's evidence in direct examination/examination-in-chief.
- The re-examination is limited to new matters raised in cross-examination.
- The witness cannot be re-examined to repeat prior testimony given during examination in chief or to raise new matters not opened up in cross-examination.

# Re-examination continued

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- Specialized hearings may provide a unique way in which re-examination can be useful.
- Example – Arbitration
- Evidence was limited to a brief introduction of a witness statement, then cross-examination.
- Real-time transcripts.
- Were of benefit for re-examination.
- Both in conducting and defending.

# Example Re-Direct at an Arbitration

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**MS. HOLLMAN FURTHER QUESTIONED BY MR. KIRK:**

**THE ARBITRATOR:** Go ahead, please.

**Q MR. KIRK:** Ms. Hollman, Ms. Wong asked you a series of questions beginning at the marker on the transcript is 14:33:02. And the first question was in relation to paragraph 9 of your witness statement where you reference the multiplate. And the second question at 14:33:33, which was a follow-up, and the question was (quoted as read):

"Now, Ms. Hollman, you don't know of anything that would make this pipeline inaccessible even after the multiplate was installed, do you." And you answered, there's a road on top of it. Inaccessible, I guess. Bad terminology, but it would be extremely difficult to get back at that pipeline again. The road is on top of it.

And Ms. Wong then questioned you (quoted as read):

"So just to clarify, it's not inaccessible. It would be expensive to do."

Answer (quoted as read): "Yeah, yes."

# Arbitration Re-Direct Cont.

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**Q MR. KIRK: Ma'am, when you said it would be extremely difficult to get back at the pipeline, there was reference to cost. What other factors other than cost would be taken into account?**

A MS. HOLLMAN: You'd have to remove all the infrastructure above the pipeline with -- giving us enough room to access. We would have to break open the protective coating. And technically -- although normally if a third party puts a facility on top of us, it's at their cost, they have to remove it if we have to get to our line.

**Q What about any approvals?**

A MS. HOLLMAN: We would have to go to whoever owns the road because we'd have to shut it down. As well, there's rail tracks on the facility, so we'd have to talk to CP, the rail owners.

**MR. KIRK: Thank you, Ms. Hollman. No further questions.**



# Kirk / Kelly – Advocacy 2023

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