

# CROSS-EXAMINATION AT TRIAL

Zul Verjee, Q.C.  
Verjee & Associates

# What is cross-examination?

The opportunity to question a witness who has testified on behalf of an opposing party in order to elicit additional evidence or to challenge their evidence or credibility.

# The purpose

- To challenge the accuracy of the witness' testimony;
  - To obtain evidence helpful to your case;
  - To corroborate the evidence of your witnesses;
  - To highlight evidence harmful to the opposing party;
  - To challenge the credibility of the witness; or
  - To discredit the testimony of other witnesses.
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- The most important question to ask: “Do I need to cross-examine this witness?”

# The preparation

Preparation is key to an effective cross-examination.

## Know the theory of your case

What evidence do you need to gather in order to support your theory of the case?

What evidence will undermine the opposing parties' theory of the case?

## Know the evidence

Be familiar with the documents produced during the litigation.

Be familiar with the evidence provided during pre-trial examinations of the witnesses.

## Know the evidentiary rules

Recognize and prepare for any potential evidentiary hurdles.

Recognize the burden that you are required to meet to prove your case.

# The fact witness

- **Use pre-trial examinations to prepare for cross-examination at trial.**
  - Obtain the evidence of the witness on the key aspects of the case.
  - Observe the demeanor of the witness to assess the manner in which they will give evidence at trial.
- **Listen carefully to the evidence provided by the witness in chief.**
  - Has the witness provided new information?
  - Has the witness provided evidence different or contradictory to that during pre-trial examinations?

# The expert witness

- Review other decisions involving the expert for comments by the Court and/or statements inconsistent with the present opinion.
- Learn and become familiar with the vocabulary used by the expert.
- Rely on the expertise of your own expert to identify weaknesses in the opinion.
- Remember that you are not an expert in the area and avoid questioning on minutia.
- Consider questions with respect to:
  - Any limitations on the expertise of the expert.
  - The effect and/or strength of any assumptions underlying the opinion.
  - The strength of any evidence or information on which the opinion is based.

# The questions

- **What evidence do you need from this witness?**
  - Consider your theory of the case and plan accordingly.
- **How did the witness present during their testimony in chief?**
  - Assess the witness to determine the manner they are likely to respond to cross-examination.
  - Consider any reactions from the Judge or Jury to the evidence provided by the witness.
- **How do you control the witness?**
  - Use leading questions requiring a “yes” or “no” answer.
  - Keep your questions short and concise.
  - Structure your questions to build on one another.
  - If the witness attempts to evade a question, do not hesitate to ask it again.
  - Incorporate evidence the witness provided during their testimony in chief.
  - Incorporate documents to build your narrative and keep the witness focused.
  - Be confident and professional and do not argue with the witness.

# The art of impeachment

## What is the aim?

- To have the witness adopt a prior statement or to challenge credibility.
- To comply with the rule in *Browne v. Dunn*.

## What is the process?

- Review the *Canada Evidence Act* (and related provincial legislation).

## Consider the following:

- Is the inconsistency sufficiently material to warrant impeachment?
- If the witness has helpful information, do you want to challenge their credibility?



**REMEMBER: Preparation is the most effective tool you have for skilled cross-examination.**

**THANK YOU.**