



Cross-examination Insights

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What we'll cover

- Purpose
- Preparing as counsel
- Preparing experts
- During
- Re-examination

Slumber Party Court



Purpose of cross-examination

General: One of a lawyer's obligations:

In any proceeding, a party must cross-examine a witness on significant matters that are relevant and in issue and that contradict the evidence of the witness, if the witness could reasonably be expected to be in a position to give admissible evidence on those matters. (Browne v Dunn 1893, now in Evidence Act, s92)

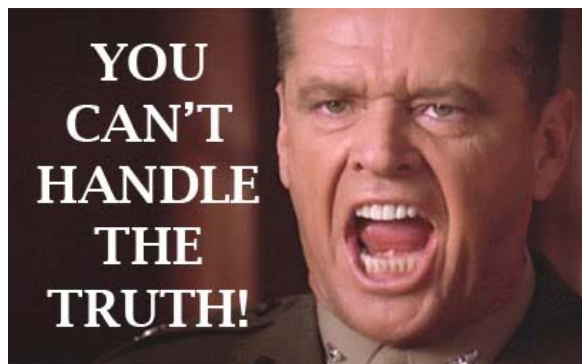
Environment Court: not always required (or desired). Potentially necessary when your case does not have expert evidence

Why:

- Test truth and completeness
- Elicit favourable evidence
- Discredit unfavourable evidence – inconsistencies, gaps, assumptions, "alternative facts", expertise

Purpose

It is generally not a "smoking gun"...



Preparing for cross-examination

- Requires a lot of preparation – more than you think!
- Determine your style:
 - More structured: write up the questions and (expected) answers/desired outcomes
 - Less structured: notes on the evidence, topics.
- Ask your experts for potential subject areas, and how to best formulate questions
- Remember your audience
- ‘Quality over quantity’
- Have every document that you may use in cross examination with you, and easily accessible
- Have extra copies of any documents you wish to produce as an “exhibit”

Cross-examination in action

- Be orderly - ask the witness to gather the documents you will refer them to, keep a check list of topics, issues, prioritise
- Use closed questions, and keep them succinct
- Keep questions within expertise/knowledge of witness
- Monitor cross from other counsel and bench questions. Does that change your approach?
- Know when to stop and move on
- Keep your eye on the panel/bench to assess ‘the vibe’
- Be prepared for surprise answers and twists
- Be prepared to follow a new line of cross-examination eg if the witness makes an inconsistent or unclear statement
- Remember – expert witnesses generally know a lot more than you – be careful on technical issues
- Don’t be afraid to repeat, but be careful

Preparing your experts

You cannot “coach” your expert. Remember obligations under the Code of Conduct for Expert Witnesses.

But you can prepare your experts. Appropriate preparation includes:

- Discussing process, order
- Interviews to discuss the evidence
- Clarifying if evidence/answers are not clear
- Ensuring that evidence is relevant, correctly identifies the issues to be addressed, and the weight to be given to each issue
- Suggesting questions that may be asked during cross-examination
- Discussing opposing counsel style and approach – what can be expected
- Pointing out inconsistencies or gaps in evidence

Re-examination in action

- Re-examination gives your expert an opportunity to fix a mistake, or add clarifying detail
- It is hard
- Usually, less is best
- Leading questions reduce the weight of answers

Questions

