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"How to Cross-Examine a Witness in an Australian Court"

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The Object of cross-examination

1. The objects of cross-examination are to elicit favourable admissions or concessions from the witness; to discredit and/or undermine or weaken the evidence-in-chief of the opponent's witnesses; to obtain evidence which will likely assist in establishing the credibility of a third person and to gather evidential material for use in closing argument. In the course of cross-examination it may be possible to elicit new evidence favourable to the clients' case and/ or to confirm other evidence which has been led on behalf of the client.

Who May be cross-examined

2. Generally any witness who is called to give evidence may be cross-examined by any party against whom he or she has testified, or by any party to the proceeding other than the party calling the witness. There are some limited exceptions to this rule. A person called for the sole purpose of producing a document or documents that are not examined in chief may not be cross-examined. Likewise a person called by mistake, where the mistake is as to the ability of the witness to give evidence relevant to the issues: *Heydon* "Cross on Evidence" 6th Australian Ed 17470. However, if a witness is not called by mistake, but he/she gives no evidence because the proposed evidence to be

led by that witness is wholly inadmissible, the witness may nonetheless be cross-examined: *Phillips v Eamer* (1795) 1 Esp 355: 170 ER 383.

How a witness may be cross-examined

3. Cross-examination of a witness may generally take the form of leading questions, subject to the control of the judge. Confusing or misleading questions may not be asked, nor those which are properly objectionable**.** A witness may be cross-examined on the facts in issue and also as to credit. These are matters which are put with a view to impugning the credit of the witness and discrediting his/her testimony generally. There are numerous ways in which the credit of the witness may be attacked. These include attacking the competency of the witness; testing the ability of the witness to accurately recall the relevant factual circumstances, and establishing bias or lack of impartiality. It is important to confine a witness in giving evidence in cross-examination to matters of fact which are strictly admissible. A witness should not be invited to speculate, engage in argument, give hearsay evidence, or give any answer directly outside his/her actual knowledge. Compound or rolled up questions are objectionable and should not be asked. A witness who is a party to the proceedings may be asked in cross-examination to make an admission about a relevant matter of fact, but he/she may not be asked a question which goes to a question of law, or mixed fact and law.

When to cross-examine

4. In many cases it is necessary to cross-examine on the key issues in dispute. Before any decision is made to cross-examine however, careful consideration must be given to whether cross-examination is in fact necessary, and if so to what extent and in relation to what specific matter or matters falling for consideration at the hearing. Trial lawyers have no obligation to cross-examine a witness called by the opposing party, and in some cases at least, there may be good reasons not to cross-examine.

The Rule in *Browne v Dunne*

5. Before any decision is made not to cross-examine a witness called by the opposing party it is necessary to have particular regard to the rule of practice in *Browne v Dunn* [1894] 6R 67(HL), which is to the effect that the cross-examiner cannot rely on evidence that is contradictory to the testimony of the

witness without putting the evidence to the witness in order to allow him/her to attempt to justify or explain the contradiction. The rule was described in the judgment of Hunt J in *Allied Pastoral holdings Pty Ltd v The Commissioner of Taxation* [1983] 1NSWLR 1 at 16 as follows:

> *It has in my experience always been a rule of professional practice that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matter, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the inference sought to be drawn.*

This rule remains one of the primary rules of consideration during cross-examination. It applies equally in both civil and criminal trials. The rule was restated in *MWJ v The Queen* (2005) 80 ALJR 329 (per Gummow, Kirby and Callinan JJ) as follows:

> *The rule is essentially that a party is obliged to give appropriate notice to the other party, and any of that person's witnesses, of any imputation that the former intends to make against either of the latter about his or her conduct relevant to the case, or a party's or a witnesses credit.*

6. The rule in *Browne v Dunn* is said to be complied with where the substance of the version or submission challenging the witness' evidence is put clearly to the witness. The application of the rule is said to involve matters of fact and degree and it has to be recognized that a cross-examination which covers all possible contingencies may be impractical or indeed oppressive. As a general proposition, it is unnecessary to put the imputation that the cross-examiner intends to rely upon when notice of the imputation arises elsewhere, for example, from evidence of another witness in a document or a record of interview. It is essentially a rule of fairness - that a witness must not be discredited without having had a chance to comment on or counter the discrediting information. It also gives the other party notice that its witness' evidence will be contested and further corroboration may be required.

7. There are a number of consequences arising from a breach of the rule. The court may order that the witness be recalled to address the matters on which he or she should have been cross-examined. The court may also prevent the party who breached the rule from calling evidence which contradicts or challenges that witness' evidence in chief: *Payless Superbarn (NSW) Pty Ltd v O'Gara* (1990) 19 NWSLR 551. The court may allow a party to re-open its case to lead evidence to rebut the contradictory evidence or corroborate the evidence in chief of the witness: Gans & Palmer, *Australian Principles of Evidence* (2nd ed 2004) 64; or comment to the jury that the cross-examiner did not challenge the witness' evidence in cross-examination when that could

have occurred; or comment to the jury that the evidence of a witness should be treated as a 'recent invention' because it raises matters that counsel for the party calling that witness could have, but did not, put in cross-examination to the opponent's witness.

8. Courts have said that while there are established remedies for a breach of the rule, courts will have sufficient flexibility to respond to the particular problem before it. The consequences of a breach of the rule in *Browne v Dunn* may also differ based on whether it is a criminal or civil matter. In *R v Birks*, (1990) NSWLR 677 at 685, Gleeson CJ noted that the failure to cross-examine may be based on counsel's inexperience or a misunderstanding as to instructions. Given the serious consequences, any judicial comment on a failure to cross-examine must take into account these factors, rather than allowing the jury to assume that the contradictory evidence must be a recent invention.

9. As already noted, the rule does not apply in every circumstance where a question is not put to a witness. In civil matters, where the issues in dispute are well known to the parties from the discovery process, the fact that the witness has had notice of the issues will make the rule redundant. In *Porter v Oamps* (2004) 207ALR 635, the court concluded that *Browne v Dunn* did not apply because the parties were aware of the issues by the time of the trial and knew the responses that each witness was likely to give to the propositions put to them.

10. Section 46 of the uniform Evidence Acts (see below) deals with the same ground as part of the rule in *Browne v Dunn,* but does not replace it. The section provides:

> *the court may give leave to a party to recall a witness to give evidence about a matter raised by evidence adduced by another party, being a matter on which the witness was not cross-examined, if the evidence concerned has been admitted and:*
>
> *(a) it contradicts evidence about the matter given by the witness in examination in chief; or*
>
> *(b) the witness could have given evidence about the matter in examination in chief.*

First steps in preparation for cross-examination

11. In preparing for cross-examination is first necessary to identify the facts in issue and the surrounding circumstances which are relevant to proving the case on behalf of the plaintiff/applicant, or establishing the defence of the defendant/respondent. This may sound like a simple matter, but it involves a careful analysis of the issues from a comprehensive analysis and

understanding of the pleadings, along with the surrounding facts and circumstances involved in the matter. In particular, it is important for the cross-examiner to carefully read and understand the documentary material and to identify those documents which may usefully be put to the opponent's witness in cross-examination. Each document which is put to the witness should be relevant to a fact in issue on the pleadings, or otherwise it should go to matters of credit. It is important for counsel to understand the precise relevance of each document before it is put so that the judge may be informed of its relevance if necessary.

12. A useful practice is to prepare a separate file or files of documents which are intended to be put to an opponent's witness in cross-examination. It is helpful to prepare an index of such documents in chronological order. It is important for the court to understand the events as they unfold in the chronology. It may be of assistance to prepare notes on counsel's copies of each document indicating its relevance to a fact in issue (by referring to a relevant paragraph in the pleadings or a relevant portion of a witness statement). Counsel may also include a note on his/her copy of each document briefly identifying the admission which is sought to be obtained from the witness, or any other relevant matter in the course of the cross-examination. It is often a good idea to provide a complete file of such documents to put to the witness as a bundle.

13. The discovered contemporaneous record is of particular importance. Today it is the practice of most judges both at trial and on appeal, to limit their reliance on the appearances of witnesses and to arrive at their conclusions on the basis of contemporary materials and objectively established facts and the apparent logic off events: *Fox v Percy* (2003) 214 CLR 118 at 30-31. This is not to say that issues of credibility are no longer important, but the occasions upon which witness credibility are seen as critical are fewer than in the past.

14. In the course of initial preparation for cross-examination it is necessary to identify those facts critical both to the opponent's case as well as to the cross-examiner's own client's case. Such facts should be reviewed and considered in the light of the discovered documents and the contemporaneous record. The client's witness statements and the opponents' witness statements should also be carefully considered in the same context.

15. It is also necessary when first preparing for cross-examination to have particular and careful regard to the evidential rules and practice applicable in the particular jurisdiction in which the matter is being heard and the relevant applicable laws of evidence in that jurisdiction. The law of evidence in Australia is a mixture of statute and common law together with rules of court. Each court has its own rules dealing with matters of procedure, including some relating to evidence. The introduction of uniform legislation throughout

Australia has not yet occurred, although there has been significant progress made towards a harmonised national set of laws. Federal courts and courts in the Australian Capital Territory apply the law found in the *Evidence Act 1995* (Cth) and some provisions have a wider reach (see sections 185-187). In addition, New South Wales, Victoria, Tasmania, and Norfolk Island have passed mirror legislation (Evidence Act 1995 (NSW); Evidence Act 2008 (Vic), Evidence Act 2001 (Tas); Evidence Act 2004 (NI). These statutes (now usually described as the "uniform Evidence Acts") are substantially the same as the Commonwealth legislation but not identical.

The preparation and conduct of cross- cross-examination

16. Upon completion of the above initial steps, and usually following the completion of a formal or informal advice on evidence, it should be possible to commence the task of preparing a list of questions for each witness who is to be cross-examined. Wherever possible, each question should be cross-referenced to the pleadings, the relevant documents, and/or relevant witness statements. This can be achieved in a simple case by preparing a short note under or referable to each question. In a more complicated case, a spreadsheet can be prepared in which each relevant fact or issue is briefly noted along with the documentary material applicable to each fact or issue and a short note of, or a reference to, the question to be put.

17. When preparing questions for cross-examination is important to bear in mind that what must be put to the witness is a question capable of being answered in the affirmative or negative, and not a statement or an invitation to the witness to speculate about a past, present or future event or occurrence. For the most part is preferable to prepare short and direct questions which will likely result in answers capable of having evidential significance. Complicated questions which are formulated with multiple propositions will not often result in answers which are helpful to the cross-examiner. Wherever possible, questions should be formulated in such a manner as to elicit a simple and direct answer.

18. Care should be taken to avoid cross-examination that is unduly lengthy and repetitive in character. In the exercise of its inherent jurisdiction, a court can give directions limiting cross-examination so as to ensure that it is kept within reasonable limits. It is the duty of counsel to ensure that the discretion to cross-examine is not misused.

19. A trial strategy may be developed and settled at this time so as to determine a coherent and consistent position prior to trial. Once this has been done, counsel should tailor each individual part of the trial, including cross-examination, and the closing argument, to advance this trial strategy. It is

important however to remain flexible in having regard to the trial strategy. It may need to change as the facts emerge during the trial.

20. Early consideration to a likely closing address should also be undertaken. Cross-examination and closing addresses go hand-in-hand. One of the important purposes of cross-examination is to gather material for closing argument. The cross-examiner must therefore know from the start what he/she likely intends to say in closing so the necessary supporting evidential material can be obtained.

21. Preliminary consideration as to how to best "pin down" the witness should also be undertaken. This has to be planned. Written or signed statements, discovered documents and other documentary material forming part of the record are all useful for this purpose.

22. Early consideration should also be given on how best to establish inconsistencies in the witnesses' evidence. The fact that inconsistencies exist can be used with telling effect in closing argument.

The process of cross-examination

23. The approach to be taken with witnesses will depend upon many different factors, not the least being the personality of the witness who is to be made the subject of the cross-examination. It must never be forgotten by counsel that the purpose of the cross-examination is to elicit admissible evidence in the form of answers given by the witness to questions put to him or her. In this regard it is usually beneficial to be polite and respectful when asking questions of witnesses. If possible counsel should seek to develop a rapport with the witness. The witness who feels comfortable in the witness box under cross-examination may be more likely to agree with propositions put to him/her than a witness who feels intimidated and generally uncomfortable. In some cases, however, it may be necessary to ask questions with a view specifically to making a witness feel uncomfortable, if counsel's assessment is that a favourable answer is more likely to be obtained by that means. The approach taken will depend upon many variable factors and the applicable circumstances and ultimately it is a matter of judgment and experience as to which approach is likely to be most productive.

24. As a general rule, questions should be formulated as leading questions so as to best control the witness and to increase the likelihood of a positive response. However, if a question is asked in a non-leading fashion, the weight attributed to the answer by the trial judge may be greater than in the case of an answer to a leading question. There is a particular skill involved in formulating a non-leading question in such a fashion as to obtain the particular answer desired

by the cross-examiner. This can be often be achieved most effectively in the context of questions asked of particular documents which are put before the witness. Great care must be taken however, if a question is to be asked in a non-leading fashion.

25. If a witness wishes to elaborate upon an answer given in cross-examination, in some cases at least it may be preferable to allow the witness to do so without interruption. This is so where the cross-examiner has reason to believe that the answer as elaborated upon will not harm his/her client's case. Otherwise, the witness will likely be invited to give the evidence in re-examination and the impact of the original answer may be substantially reduced. Further, in allowing the witness to give an extended answer, additional facts may come to light which lead to a series of questions which may prove to be beneficial to the examiner. Notwithstanding the often stated mantra that witness should be kept on a "tight leash" and not encouraged to elaborate upon his/her evidence, by permitting a witness to provide relatively full and complete answers to questions and not taking too many technical points, on occasions significant damage can be done by the witness to his/her own case. Arguably the most daunting witness in cross-examination is a witness who refuses to expand upon an answer and confines his/her evidence to a yes or no answer wherever possible. Prudent advice to any client when embarking upon cross-examination from a defensive standpoint is to listen carefully to the question; say as little as possible; not to volunteer information and to endeavour to exit the witness box as soon as possible.

26. Cross-examinations are sometimes conducted without sufficient prior thought having been given to what is involved in cross-examination. It is not uncommon for cross-examinations to consist of a number of unplanned questions without purpose, repetition of direct testimony and argument with the witness, all having the ultimate effect of harming rather than helping the cross-examiner's cause. Cross-examination is always a difficult task. Proficiency requires careful preparation, an understanding of the considerations involved, experience, and an ability to make sound judgments, often on the spot.

How to cross-examine effectively

27. In order to implement and execute on a planned, disciplined and effective cross-examination, regard may be had to the following matters:

    1. Cross-examine by objective and seek to advance the trial strategy.

       Cross-examinations sometimes become unstructured and rambling because the cross-examiner asks questions without any apparent

goal or objective in mind. The objective is always to advance the trial strategy or plan by obtaining favourable answers to be used in the closing address. If a proposed question does not advance the trial plan, it is unlikely to serve any useful purpose. Furthermore, by knowing the objective of a particular cross-examination, the specific questions to be asked should be apparent and the trial judge and opposing counsel should readily understand their relevance.

2. Use a variety of techniques.

   The cross-examiner may develop a tendency to use the same manner and same technique for every cross-examination he/she conducts. This is not good practice. In cross-examination it is useful for counsel to develop a repertoire of devices and techniques, and choose the appropriate instrument for the specific situation. Having the objective firmly in mind, counsel must choose the proper tactic to elicit the testimony which satisfies that objective.

3. Understand how the witness will react.

   Witnesses tend to react differently. One witness if pushed may back down while another witness if pushed may remain firm and thus strengthen his/her testimony. The cross-examiner must choose the techniques to be used, the wording of the questions, the sequence of the questions, and the manner of questioning which will most likely cause the witness to provide the favourable answer he/she is seeking to elicit.

4. Be conservative and realistic.

   Cross-examination is dangerous. The cross-examiner should be cautious in asking questions and generally should not expect to derive too much from the process.

5. Do not ask a question without purpose.

   The natural tendency may be to feel that it doesn't hurt to ask and "something might turn up." Occasionally something does turn up, but the percentages are substantially against the good outweighing the bad. Before resorting to an "all-over-the-place" cross-examination, counsel should consider whether the situation is one of desperation.

6. Do not invite the witness to repeat evidence -in-chief.

This is almost always to the advantage of the witness unless the evidence can unquestionably be demonstrated to be unreliable.

7. Do not think that all testimony must be cross-examined.

   This may result in emphasising the damaging evidence and greatly increases the harmful effects from it. The cross-examiner should carefully consider in advance what admissions are realistically possible from a given witness and seek to elicit just those rather than pushing too far and eliciting unfavourable answers.

8. Do not gamble and ask a question to which the likely or expected answer is unknown.

   Cross-examination is a technical exercise and should not be approached as if it were a game of Russian roulette.

9. Do not argue with the witness.

   A cross-examiner may be tempted to argue with a witness in an attempt to compel the witness to agree with him/her. Usually what happens is that the witness confirms his/her previous evidence.

10. Do not ask one question too many.

    Be happy with a concession once made. If the witness gives a short affirmative answer to a question which amounts to an admission, resist the temptation to ask for elaboration. The answer may result in what was an unqualified admission being very substantially qualified.

11. Control the Witness

    The cross-examiner must maintain control of the witness, particularly when the witness has prejudicial information and has a tendency to volunteer it. A number of methods to control are available including the following:

    (i) Use short, plain, unambiguous questions so as to give the witness no reasonable excuse for prevarication or qualification.

    (ii) Ask about only one new fact or matter per question.

    (iii) Generally use only leading questions which legitimately call for only a “yes” or “no” answer.

(iv) Ask nothing which provides an excuse to "explain."

(v) Require the witness to answer the question asked and not the question the witness would have liked asked.

12. Decide the manner of cross-examination.

The practice of conducting cross-examination in the same manner on each occasion should be avoided. The two basic approaches are the friendly approach and the adversary approach. These can be utilised in combination as the case requires. A friendly approach is often the most productive in obtaining favourable evidence.

13. Put the cross-examination in the most effective sequence

There is a most effective sequence for each cross-examination. The first point should ordinarily be an effective one. One point may be used to "set up" another. If the witness is trying to outguess the cross-examiner so that the witness can provide the wrong answer, the witness may be misled by the sequence.

14. Formulate the questions to achieve the particular purpose

How the questions are formulated will often determine what answers will be elicited. Most witnesses want their testimony to be seen as reasonable. If the question is asked in such a fashion so as to carry the implication that the only reasonable answer is the one which might be expected, counsel will probably receive that answer.

15. Maximize the impact

Be brief. Emphasis is far greater if not too much is attempted. Favourable responses may be forgotten and the impact is lessened. Consider how to make your point or points most dramatically. Use demonstrative evidence. Ask only those questions to which there will likely be favourable answers.

16. Sustain the momentum

A cross-examination must move and "live" if it is to be effective. The cross-examiner must know the facts so well that he/she does not have to study before each question and can "keep it moving." Short leading questions tend to sustain momentum.

17. End on a high note

    The cross-examiner should endeavour to end on a high note. The natural tendency is to cross examine in the same order as the direct examination or to take up the strongest point first, the next strongest second, and so on, ending with the weakest point of all. The natural tendency should be avoided.

Some possible tactics for cross-examination

28. Planning and conducting a cross-examination requires the careful selection of tactics. The choice of tactic depends on the objective to be attained, the evidentiary situation and the personality of the witness. The choice of tactic may determine success or failure. There are a number of factors to consider depending upon the circumstances.

29. When a witness is not confident of his/her evidence it is often productive to press the witness in the areas of weakness and seek concessions touching and concerning those parts of the evidence where lack of confidence is demonstrated.

30. Where a witness has exaggerated portions of his/her evidence, it may be possible to decrease the significance of the evidence by procuring admissions as to the exaggerations and overstatements and inaccuracies.

31. A witness who is firm on the core points may be questioned on less important aspects of the evidence where his/her recollection may be less clear, in an attempt to demonstrate that the witness is perhaps less reliable than might have appeared at first sight.

32. When a witness is confronted with a document which establishes a relevant fact after having not admitted or denied the existence of such fact, he/she may be more willing to admit the next proposition put in questioning without having a document put to him/her to prove it. The more a witness becomes accustomed to the cross-examiner producing a document to establish a relevant proposition, the more likely the witness will be prepared to admit such a proposition in the absence of a document being put to establish it.

33. Where a witness gives a firm opinion or conclusion without a sufficient factual foundation, it is important to ask questions of the witness to ascertain precisely the facts and circumstances upon which the opinion or conclusion is based. This should only be done however in circumstances in which the cross-examiner has it within his/her means to demonstrate the absence of a sufficient factual foundation to support the opinion or conclusion.

Some things a barrister should not do in cross-examination

34. It is impermissible and improper for counsel to engage in questioning amounting to hectoring, intimidation, browbeating or bullying or any related behaviour which could reasonably be expected to offend, intimidate, degrade or humiliate a witness. Such conduct would be unprofessional and almost certainly give rise to intervention by the judge. Questions which are misleading or confusing and/or repetitive and oppressive and have no basis or foundation in the evidence, should never be put. Nor should questions be put which tend to mislead the court as to the law or the facts.
35. Section 41 of the uniform Evidence Acts provides that the court may disallow questions on the basis that they are misleading or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive. Section 42 establishes that leading questions may be asked in cross-examination. However, the court may disallow the question or direct the witness not to answer it, taking into account a number of factors. Subsection 42(2) states:

> *Without limiting the matters that the court may take into account in deciding whether to disallow the question or give such a direction, it is to take into account the extent to which:*
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> > *(a) evidence that has been given by the witness in examination in chief is unfavourable to the party who called the witness; and*
> > *(b) the witness has an interest consistent with an interest of the cross-examiner; and*
> > *(c) the witness is sympathetic to the party conducting the cross-examination, either generally or about a particular matter; and*
> > *(d) the witness's age, or any mental, intellectual or physical disability to which the witness is subject, may affect the witness's answers.*

36. It is not proper or permissible for counsel in the course of cross-examination to inject personal views and editorial comments into the questions. The time for comments is during the course of final address. Nor should a witness be asked a question which invites speculation or argument. Care should be taken to ensure that questions are not put which relate to inadmissible conversations, statements or documents.

37. A barrister must not make serious allegations without taking reasonable steps to verify them. *Strange v Hybinett* [1988] VR 418, nor must he/she be a party by a client to the making of such allegations: *NZ Social Credit Political League Inc v O' Brien* [1984] 1 NZLR 581 at 586. An allegation of fraud or serious misconduct should not be made unless there are reasonable grounds known to counsel to believe that there is available material by which the allegation could be supported and the client wishes the allegation to be made after having been advised of the seriousness of the allegation and the possible consequences for the client and the case if it is not made out: *Rees v Bailey Aluminium Products Pty Ltd* [2008] VSCA 244.

38. As a general rule a barrister should not confer with any witness, including a party or client called by the barrister, on any matter related to the proceedings while that witness remains under cross-examination, unless counsel conducting the cross-examination has consented to the barrister doing so.

39. A barrister must not make a suggestion in cross-examination on credit unless the barrister believes on reasonable grounds that acceptance of the suggestion would diminish the credibility of the witness.

Some things a barrister should do in cross-examination

40. It is important to listen carefully and attentively to the answers given by the witness to the questions asked. This is something which is often overlooked by counsel, but rarely by a judge. Counsel should be both patient and methodical in asking questions. If an answer to a question is unclear, or contains a number of assumptions, or is conclusionary or speculative in nature, experienced counsel will take the time and trouble to flesh out the separate propositions or assumptions which are embedded within the answer and deal with each separately and logically.

41. It is generally good practice to keep a watchful eye on the judge throughout the course of cross-examination. It may be possible to discern the reaction of the judge to both the questions and answers. If it is apparent that the judge is getting little benefit from the line of questioning, counsel should move on to a different topic.

42. Is most important before asking any question for the cross-examiner to have given careful consideration to the likely answer and to consider whether having regard to the likely answer, counsel is in a position to demonstrate the answer which the witness ought to give to the question. This may be done in various ways. The cross-examiner may be in possession of a document or a witness statement which indicates what the correct answer to the question is or should be. It is dangerous to ask a question of the witness when the cross-examiner has no knowledge of the likely answer, or is in no position to exercise the means to contradict it. It must always be remembered that cross-examination is a forensic task requiring careful planning, thought and no little skill. The question for the cross-examiner is how to bring out favourable evidence and how to cast doubt upon the other party's evidence. This question is perhaps best addressed by having regard to the objective factual matrix, particularly in the light of the contemporaneous record. This is most

likely how a court will come to a view of the facts.

43. From a technical point of view is important always to formulate questions which invite an answer which is admissible in evidence. Thus questions which are objectionable on the grounds of hearsay, speculation, argument, conclusion and the other common forms of objection, should be avoided. Even if an objection is not taken to such a question, the evidential impact of the answer will be limited by the inadmissible nature of the question.

44. If a trial judge asks a question of a witness which is inadmissible in chief and would not have been asked by counsel in cross-examination, an objection to the judge's question may properly be taken by counsel on the record. In *Commonwealth Bank of Australia v Mehta* (1991) NSWLR 84, the trial judge permitted the plaintiffs to re-open their case. Dr Mehta gave further evidence and was asked a series of leading questions by the judge which went to the core issue of reliance. Samuel JA said (at 91-92):

> *His Honour in substance believed these answers. But, whilst fully appreciating the respect which an appellate court must accord to a trial judge's findings based on credibility, I cannot believe that we should be impressed with this evidence. The questions were, after all, leading questions inviting the answers they got, and they were put by the judge not counsel. They could not have been put in chief and would not have been put in cross-examination. I do not believe a judge may make impregnable findings of fact by expressing a belief in evidence which he has put in the witnesses' mouth.*

Cross-examination on documents and prior inconsistent statements

45. The position here is not uniform throughout Australia. For example, in Western Australia by section 21 of the Evidence Act 1906 (WA), a witness under cross-examination in any proceeding, civil or criminal, may be asked whether he or she has made any former statement relative to the subject matter of the proceeding and inconsistent with his/her present testimony. If the witness does not admit that he/she made such a statement, proof may be given that it was in fact made by that witness. The procedure for the purposes of section 21 is set out in section 22. It provides, inter alia, that if it is intended to contradict the witness by putting to him/her a prior inconsistent statement in writing or reduced into writing, the attention of the witness must before such contradictory proof can be given, be called to those parts of the writing or deposition which are to be used for the purpose of contradicting the

witness.

46. Cross-examination on documents is also regulated by sections 43 and 44 of the uniform Evidence Acts. Under these provisions, cross-examination may be undertaken on a witness' prior inconsistent statement without the need to provide full particulars of the statement, or to show the document in question. Under subsections 44(2) and (3), limited cross-examination may be undertaken on the previous representations of another person.

47. Cross-examination upon a prior inconsistent statement is often one of the most effective ways in which to undermine the credit of a witness. Where a statement made by a witness in the witness box is shown to be inconsistent with a prior statement, it may go to establishing a fact relevant to the issue, as well as impacting negatively on the credit of the witness. Prior statements may be both oral and in writing and encompass all manner of documents, and may include admissions made from evidence given in the proceedings, including affidavits and depositions. If the statement was oral, it is necessary to first put to the witness if he or she admits having made it.

48. Where a witness is not the author of the document such that the document is inadmissible, and it is proposed to put questions to the witness arising from matters appearing from the document, it is permissible for the cross-examiner to show the document to the witness without identifying it and then to ask the witness if he/she adheres to his/her previous testimony: *Alister v R* (1984) 154 CLR 404 at 442-443 per Brennan and Dawson JJ:

> *Specific complaint was made in pursuing this ground of the applications that, in the course of the cross-examination, questions were asked about parts of documents which were not in evidence and which were not put in evidence. The parts of the documents which were read suggested, it was said, that the Ananda Marga was revolutionary in its aims. In so far as the accused to whom such a document was put was the author of the document in question, there was no requirement that the document be put in evidence: see Evidence Act 1898 (N.S.W.), s. 55. In so far as the accused was not the author of the document, it was impermissible to ask questions about its contents without observing the rule in The Queen's Case: [1820] EngR 563; (1820) 2 Brod & B 284 (129 ER 976) see Darby v. Ousley. [1856] EngR 390; (1856) 1 H & N 1 (156 ER 1093) Most, if not all, of the documents of this type upon which the impugned cross-examination was based would appear to have been inadmissible and, in so far as that was so, the proper course under the rule in The Queen's Case was to ask the accused to look at the document without identifying it and to ask whether he adhered to his previous evidence: R. v. Orton; [1922] VicLawRp 39; (1922) VLR 469, at pp 470-471 Birchall v. Bullough; (1896) 1 QB 325, at p 326 R. v. Seham Yousry. (1914) 11 Cr App R 13 If any of the documents of*

> *which the witness was not the author were admissible they should have been tendered in evidence under the rule. Neither course was adopted. However, no objection was taken at the trial to this aspect of the cross-examination nor was any direction sought in relation to it. The Crown failed to obtain the answers which it sought and there is no real basis upon which it can be said that the accused suffered any prejudice by reason of the adoption of this improper mode of cross-examination. (at p443).*

49. Section 44 of the uniform Evidence Acts concerns circumstances where a cross-examiner may question a witness about a previous representation alleged to have been made by a person other than the witness. Subsection 44(2) allows the witness to be questioned on the representation if evidence of the representation has or will be admitted into evidence. Subsection 44(3) allows limited questioning on a document that would not be admissible if the document is produced or shown to the witness. In that case, neither the witness nor the cross-examiner is to identify the document or disclose its contents. The witness may only be asked whether, having seen the document, he or she stands by the evidence that he or she has given. Section 44 reflects the common law as stated in *The Queen's Case* (1820) 2 Brod & B 284; 129 ER 976.
50. During the course of cross-examination, counsel may decide to call for the production of a document from the other party. At common law the rule was unless it is a document used to refresh the memory of the witness out of court, if the document is produced, the party calling for it is obliged to tender it if required by the other party: *Walker v Walker* (1937) 57 CLR 630. This rule has been abrogated by section 35 of the uniform Evidence Acts. If a witness has refreshed his/her memory from a document in the witness box, it may be called for and inspected by cross-examining counsel without being obliged to tender it into evidence. However, if cross-examination then proceeds on part of the document, counsel may be called upon to tender the whole document.
51. Under section 34 of the uniform Evidence Acts, the court may issue directions as to the manner in which a witness may refresh his/her memory out of court. At common law a witness may be permitted to refer to a document during the course of testimony for the purposes of refreshing his/her evidence, but only with the leave of the court.

Unfavourable witnesses

52. Under the common law, a party cannot cross-examine its own witness unless the witness is declared hostile. To be declared hostile, the court must find that the witness is deliberately withholding or lying about material evidence: *McLennan v Bowyer* (1961) 106 CLR 95. This rule developed because of the general rule at common law that a party cannot impeach his/her own witness. Apart from a limited procedure of putting facts set out in the statement of the witness to the witness in the form of leading questions with the court's leave, at common law there is no remedy for this problem other than calling further witnesses to contradict that witness or convincing the court that the witness is

hostile. Section 38 of the uniform Evidence Acts has however made a very significant change to the law of evidence. It states:

> *(1) A party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about:*
>
> *(a) evidence given by the witness that is unfavourable to the party; or*
>
> *(b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence; or*
>
> *(c) whether the witness has, at any time, made a prior inconsistent statement.*

53. The effect of having a witness declared unfavourable under section 38 of the uniform Evidence Acts is that with the leave of the court, an unfavourable witness may be questioned as if being cross-examined. That is, they can be asked leading questions, given proof of prior inconsistent statements, and asked questions as to credit. However, section 38 is limited to cross-examination on the areas of testimony in which the witness is unfavourable, and does not create a general right to cross-examine. Leave can be granted to cross-examine a witness on only part of his or her evidence, even though the rest of the witness' evidence is favourable to the party that called him or her. Section 38 is a discretionary section and the factors listed in section 192 must be considered in granting leave.

54. The term 'unfavourable' has been interpreted simply as meaning 'not favourable', rather than the more difficult test of hostile or adverse: *R v Souleyman* (1996) 40 NSWLR 712. In *R v Lozano* (unrep NSWCCA 10/06/1997) it was accepted that subsection 38(1)(a) allows a witness to be declared unfavourable and cross-examined even when he or she genuinely cannot remember the events in question. There are numerous examples of the use of section 38 to admit evidence which would not be admissible under the common law (see for example, *Saunders v The Queen* [2004] TASSC 95; *R v Milat* (unrep NSWSC 23/04/1996).

55. Section 38 is not limited to the situation where a witness unexpectedly gives hostile evidence, or unexpectedly appears not to be making a genuine attempt to give evidence. The section allows a party to call a witness they know to be unfavourable for the purpose of having them available for cross-examination and getting an inconsistent out-of-court statement admitted into evidence under subsection 38(1)(c). The prior inconsistent statement is only admissible if it satisfies the requirements of Part 3 of the Acts.

Cross-examination of an expert witness

56. Cross-examination of an expert witness will require the cross-examiner to become familiar with the subject matter of the expert's particular specialist field. It is pointless and dangerous for the cross-examiner to embark upon cross-examination of an expert witness without first having a good understanding of the subject matter of the evidence. This may be acquired by being properly briefed by an expert engaged by the cross-examiner's instructors and/or by reading appropriate material relevant to the particular field of expertise the subject of the expert's evidence. Preparation for cross-examination of an expert witness must always be thorough. There should be a clear strategy in mind and the cross-examiner should avoid arguing with the expert.

57. It is important for the cross-examiner to be satisfied that the expert is in fact qualified to give the evidence. The question of qualification may be tested in cross-examination. Objection may be taken to the admissibility of expert evidence on a number of grounds including that the claimed area of expertise is not a sufficiently recognised field as specialist knowledge; that the area of expertise claimed is within common knowledge and not so appropriate for the reception of expert evidence; or that the witness does not have the training, qualifications or experience necessary to be classified as an expert witness. Each of these matters can be explored in cross-examination after an objection on the ground of qualification is taken on the record.

58. Assuming that the expert witness is suitably qualified, cross-examination going to the weight to be given to expert evidence may be directed to one or more of the following areas: experience in practice [related to the particular facts and circumstances of the case]; correctness of the facts upon which the opinion is based; validity and accuracy of the methodology used and its appropriateness to the circumstances; defects or omissions in tests or investigations conducted; the extent to which any assumptions made were reasonable at the time they were made and the correctness of the assumptions; the validity of the reasoning process leading to the expert's opinion; comparison between the opinion and other expert opinions, and bias or lack of independence or objectivity.

Conclusion

59. Summary of principal points discussed

-Prepare thoroughly.

-Master the brief and identify the essential facts which require proof.

-Always remember that the purpose of cross-examination is to elicit favourable admissions or concessions from the witness, to discredit the witness and /or their testimony or to obtain evidence which will likely

assist in establishing the credibility of a third person and to provide evidential material for use in the closing address.

-Have a clear strategy directed towards assisting in proving the relevant facts in issue.

-Be as brief as possible, using short questions and plain words. Avoid complex propositional or argumentative questions.

-Exercise control over the witness (and if necessary the judge if he/she asks objectionable questions) and only ask questions the answers to which are admissible in evidence.

-Never ask a question to which you do not reasonably expect to know the answer or have the means to demonstrate the correct answer.

-Listen carefully to the witness and watch the witness carefully. The witness may say something which may lead to further questions resulting in an admission of great importance. Do not focus on the next question and miss the import of the answer to the question being asked.

-Do not ask the witness to repeat the testimony he/she gave in chief.

-Avoid one question too many.

-Be cautious and avoid asking risky questions (unless the circumstances are desperate).

-Commence with friendly/complimentary or non-controversial points and only then move to controversial points.

-Save the explanation for closing the address.