CROSS-EXAMINATION: PREPARATION[1]

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INTRODUCTION

1. I have been asked to present on the following topics:

    a. The most basic (and most important) rules of cross-examination,
    b. Identifying topics,
    c. Establishing control over a witness, and
    d. Prior inconsistent statements.

2. Whilst there are many papers and books on advocacy, I have been heavily guided in my career by two books in particular. The first is Advocacy in Practice, (the now) 6th edition by James Glissan QC, LexisNexis Butterworth. The second is the Advocacy manual, the complete guide to persuasive advocacy by Professor the Honourable George Hampel AM QC, Elizabeth Brimer and Randall Kune. I recommend you read both.

3. If you are new to advocacy, know that there is no singular correct approach to cross-examination. Each advocate will develop a style that will suit their personality. That style will then mould to their environment, their opponent, the witness or even their client. In my experience, the days of barristers only having the one 'gear' whereby they shout and intimidate the witness has come or is coming to an end. Our Judges appear to be less tolerant of this approach, and more importantly, our jurors appear, except for the infrequent 'deserving' witness, to be unimpressed when such a course is taken.

4. There continues to be a general misconception that your case will succeed or fail on your cross-examination. Whilst evidence-in-chief affords the best opportunity to win the case, you should remember that cross-examination provides an unequalled opportunity to lose the case.[3] Therefore, assess the risks, plan your cross-examination and if in doubt, be as brief as possible.

[1] Presented at Legalwise seminar on 6 September 2022.
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[3] Advocacy in Practice, 6th edition, J L Glissan, LexisNexis Butterworth, at 5.1.

THE MOST BASIC (AND MOST IMPORTANT) RULES OF CROSS-EXAMINATION

5. The are many rules of cross-examination. The most well-known are the 'Ten Commandments' set out by Professor Younger on the 'art of cross-examination.' If you have not watched Professor Younger's seminar, do so.[4] The following rules are some of the more basic that I use:

   a. Rule 1: settle your case theory first. This is, in my opinion, the most important rule. After reading your brief, this should be your first tangible output. I've expanded on this rule under the separate heading below. Some authors describe this rule as the requirement to cross-examine only if there is a good reason to do so. You will only know if there is a good reason to do so once you have settled your case theory.

   b. Rule 2: ask leading or leading propositional questions.

   c. Rule 3: don't ask the question if you don't know the answer. It was recently expressed in a broader sense to me,[5] which I agree with. That is, if you do not know the answer, at least be in a position to deal with any adverse answer. In Queensland, matters proceed to trial by jury, more often than not, without witnesses having to testify at a committal hearing. Therefore, it is difficult to know the answer to every question. The ability to deal with an answer will come down to an assessment of the risk analysis of the question. You may draw comfort if you can infer what the answer will be from other evidence or if another witness is expected to provide a positive answer.

   d. Rule 4: be brief.

   e. Rule 5: have the courage to not ask any questions at all. This is one of the signs of mastery.

   f. Rule 6: short questions, plain words. Described another way "one question, one concept, one sentence."[6]

[4] The Ten Commandments are listed in the Advocacy manual, the complete guide to persuasive advocacy, Professor the Honourable George Hampel AM QC, Elizabeth Brimer, Randall Kune at 111-114 and adapted for use by the Australian Advocacy Institute.
[5] Lynch QC DCJ, 'A country special 2021', cross-examination.
[6] Advocacy in Practice, 6th edition, J L Glissan, LexisNexis Butterworth, at 5.33.

g. Rule 7: listen to the witness' answers to your opponent's questions. If the witness did not come up to proof on material points, then ask yourself if you should even ask any questions at all. If you do ask questions, at least quarantine the questions that you intended to ask that touch upon the omissions. Do not open the door to re-examination on the omitted topics. Listen to the answers to your questions. Resist the temptation to focus on the next question and be in the present.

h. Rule 8: your cross-examination, even though conducted in accordance with a plan, should not be conducted according to a script. By all means, have notes. But you should, more often than not, be watching the witness and constantly assessing the environment in the court room. A script is inflexible, and cross-examination must, at times, be flexible. On occasions, opportunities arise that are worthy of your pursuit.

i. Rule 9: do not allow the witness to repeat their evidence in chief unless you are generating some momentum.

j. Rule 10: Plan the order or sequence of your cross-examination. There is a general rule, to which, of course, there are exceptions. The general rule is that you should begin by repeating or expanding upon the favourable evidence that was elicited in evidence in chief. Then utilise the constructive cross examination technique where you get the witness to complete the picture to the extent that it favours your case. Once all of the favourable aspects of the witness' testimony have been acquired, then embark upon destructive cross-examination. Another approach is to start with your second-best point and finish with your best.

k. Rule 11: Know the rule in *Browne v Dunn*, which Dominic Brunello will present on a little later today.

l. Rule 12: be fair. Not only will the judge or jury prefer this, but you will remove any opportunity for your opponent to either shift the focus from the witness' poor answers onto you or to mitigate the bad answers on the basis that the witness was intimidated or confused. My most feared opponent is the fair Crown Prosecutor. If I have a bad case, I long for the unfair opponent.

IDENTIFYING TOPICS

6. The purpose of your cross-examination is to lay the foundation for your closing address which must be consistent with your case theory. That is why you must settle your case theory first and have your closing address in advanced draft form before you prepare your cross-examination. Once you have done so, then you will be able to identify what needs to be asked of which witness or if you even need to ask any questions at all. Think of it this way. Your case is a puzzle. The completed puzzle, the one that displays a picture, is your case theory. Your closing address are the instructions of putting the pieces of the puzzle together. It is much easier to put a puzzle together when you know what the picture is meant to look like. By starting with a completed puzzle, you can then remove the pieces and lay them in an organised form. The pieces of the puzzle are the pieces of evidence. If you start with the case theory, then you will know what pieces of evidence you need to complete that theory. Once you list these pieces, you can then assign them to a particular witness. Once that is done, you will have your topics.

7. You should not cross-examine a witness simply for the sake of cross-examining the witness or because your client wants to see someone get embarrassed. It matters little if you destroy a witness and win that encounter to merely lose the trial.

ESTABLISHING CONTROL OVER A WITNESS

8. Remaining in control is essential. It starts from turning up early, being well presented, and having your side of the bar table well organised. Most importantly, preparation of your case and court discipline promotes control. You will have witnesses who will ask questions of you, not answer your questions, argue with you, or even become aggressive.

9. Your questions should be short, direct, and clear. Such questions will permit your cross-examination to evolve in small incremental steps which, in turn, will promote control. The broader or more confusing your questions are, the greater the scope the witness will have to be non-responsive, argue or give you an unfavourable answer.

10. Unless the witness is attempting to clarify your question, do not answer a question from a witness. A response to a witness' question will reveal inexperience and may lead to argument. The judge, whose job it is to control the proceedings, will not look kindly if their Court descends into chaos. Whilst some counsel immediately respond with "answer the question" or "I advise you to answer the question", the better course is usually to ignore

the question from the witness and move on to your next question. If the witness asked a question of you instead of answering your question, then ask the question again. If you are met with another question, ignore it, pause, and ask your question again. Remain calm. A number of things could then happen. The judge will direct the witness to answer the question, or you could ask the judge to direct the witness to answer the question. In my experience, the judge will intervene before any request from counsel in circumstances where the counsel has been politely and fairly pushing a point. You could ask "please answer my question" or "do you understand my question." If needs be, break your questions down into small components and invite an answer to each component. There have been occasions when I have been content to proceed to my next question without the witness answering the previous question. You can either move on to your next question or ask, "you don't want to answer the question?" You will know from settling your case theory if the answer is critical and must be answered.

11. If a witness does not answer the question and embarks on a speech or some rambling answer, then you have a number of options. The first is to stop the witness mid response and ask the question again. The second approach is to allow the answer to be given, then pause and ask your question again. In some instances, ask it a third time if you need to. Do not ask the exact question a fourth time. Rephrase your question in simple terms to avoid any suggestion of confusion. You might ask "Mr Smith, I've asked this question a number of times. Please listen carefully to my question. My question is, the person who was armed with the knife was wearing a short sleeve t-shirt? Now, you do understand my question don't you? – yes." Then ask "then please answer it. The person armed with the knife was wearing a short sleeve t-shirt, wasn't he?" If the witness continues to be non-responsive, one option would be to take note of the unresponsive topics raised and insert them into your question. For example, "you said that you understood my question. My question is the person who was armed with the knife was wearing a short sleeve t-shirt? Before you answer, please do not volunteer how many people were around, what you thought of my client or how intoxicated other people were. My question is, the person who was armed with the knife was wearing a short sleeve t-shirt, was he?"

12. There is always a need to control a witness. For example, if the witness starts leading down a path that could derail the trial, it is your duty to stop them. If the witness is simply taking the opportunity to introduce negative evidence, then stop them. Don't be theatrical, simply say 'stop.' You can even raise your hand at the same time. However, sometimes a witness can self-implode to your advantage. If a witness begins to ramble, and the long unresponsive answer is doing you good, then let them go.

13. An aggressive witness might be part of your strategy. If it is not, then just remember this. If you are prepared, disciplined and polite, then any aggression from the witness will be unwarranted. The judge and jury will look unfavourably upon a witness who becomes aggressive with a polite, well-mannered and fair barrister. I recommend that when a witness becomes aggressive, you should become calmer. The more irrational they become, the more rational you become.

PRIOR INCONSISTENT STATEMENTS

14. I understand this paper is being broadcast to legal practitioners from different states and territories. As such, this portion of the paper will be broad, but you should know that each jurisdiction has legislation that governs this area, and you should be familiar with those requirements.

15. A prior inconsistent statement is an effective tool to target the witness' credibility or reliability and is more often used when employing destructive cross-examination. This is, however, one area that I suggest you rehearse. The reason for this is that to cross-examine correctly on prior inconsistent statements can be devastating to the witness. However, if you approach this task incorrectly, the judge will invariably intervene. If that happens, then, at best, you will lose some of the momentum of your cross-examination. At worst, the jury's focus will be on your exchange with the judge rather than on the actual prior inconsistent statement.

16. There is a preliminary step. First, there has to be an inconsistency. Whilst this step might seem obvious, it is still breached more often than you would appreciate. Not every inconsistency will warrant attention. Counsel are often taught not to cross-examine on minor, trivial or irrelevant inconsistencies for it might be viewed as cheap point scoring or as an attempt to unsettle the witness. This is not a hard and fast rule. It can sometimes be the case that the cumulative effect of a number of inconsistencies can negatively impact the jury's assessment of the witness' credibility or reliability. If the inconsistencies are minor and few, I would suggest against walking down this path or you may invite your opposing counsel to comment in their closing address along these lines:

> "You heard my learned friend cross-examine this witness on two, seemingly small points. That is, out all of the statements previously provided by this witness, my learned friend could only find two small inconsistencies in the witness' evidence. Well, over the passage of time, you would expect some minor inconsistencies to arise. That

is consistent with human memory. But what it does demonstrate is that this witness, because they weren't cross-examined on any other inconsistent statements, has been consistent on the salient features every step of the way."

17. Step one, if there is an inconsistency, then use short simple questions and "close the gates." If you skip this step, you invite the witness to respond with "I was too upset when I provided my statement", "I was never asked that question by the police officer" or "I didn't think it was relevant at the time." Whilst none of these answers would prove fatal, once the witness has either given an inconsistent answer in evidence in chief or in your cross-examination, I suggest you close the gates. Below is an example of closing the gates:

"Around 24 months have passed since this incident occurred? – yes.
After you say this incident happened, you went down to the police station? – yes.
In fact, you went to the police station that afternoon? – yes.
And you provided your statement to the police? – yes.
Considering that only a couple of hours had passed, your memory would have been better on the day you provided your statement to the police compared to what it is now? – yes.
The police officer spoke to you before you gave your statement? – yes.
You were made to feel at ease? – yes.
You were taken to a private room? – yes.
So that you could talk openly about what you say happened? – yes.
The police officer then asked you some questions about the incident? – yes.
And when you gave your answer, you saw the officer type your answers into a statement on the computer? – yes.
That process, of the officer asking you a question and you answering, continued until you provided a detailed version of what you say happened? – yes.
The officer then printed a copy of your statement? – yes.
And asked you to read it? – yes.
And told you to check that it was accurate, in other words, that what the officer typed was correct? – yes.
You then read your statement? – yes.
You weren't rushed to read you statement? – no.
The officer told you that it was important to get the statement right? – yes.
That it was important to put as much information as you could into the statement? – yes.
You then told the officer if there were any changes that you wanted to make? – yes.

You, eventually, settled on your statement? – yes.

A fresh copy was printed for you to sign? – yes.

You were told to sign the endorsement on the last page of the statement that stated that the statement of true and accurate? – yes.

Considering that the incident was still fresh in your mind, and since you were happy that the statement was true and accurate, you signed the statement? – yes.

After signing the statement, and before coming to court today, you've spoken to the same officer a number of times? – yes.

You gave evidence in the Magistrates Court on 3 May 2021? – yes.

The police prosecutor, who is different to my learned friend, the Crown Prosecutor, asked you a few questions on that day? – yes.

One of the questions was, after showing you a copy of your statement, whether there was anything that you "wished to add, change or delete" from your statement? – no, I mean, yes, he did.

You told him that there wasn't anything that you wanted to change? – correct.

Before giving evidence in the District Court today, you spoke with my learned friend last week, in her office? – yes.

You were shown a copy of your statement? – yes.

You were then asked some questions about the incident? – yes.

This morning before lunch, in your evidence-in-chief, you told my learned friend that the person who had the knife was wearing 1) a black shirt? – yes.

2) blue jeans? – yes.

3) a cap? – yes.

4) and was Caucasian? – yes.

Correct? – yes.

That's not what you told the police though? – I don't know.

You told the officer that you couldn't remember what the person was wearing? – yes.

That is, what you said in your statement to the police on [date]? – yes.

In fact, the only feature, on the topic of identification, that you described was that the person with the knife was a male? – yes."

18. In this particular example, identification was the issue at trial and this witness accepted that he did not tell the officer anything more than that the person who had the knife was a man. Whilst prior inconsistent statements are often used during destructive cross-examination, this is not always the case. The cross-examination of this witness was largely constructive. That is because the witness was an honest witness. He was simply mistaken. The point made during my closing address was that the person this witness described in his evidence in chief was the defendant. This is what the defendant was

wearing on this night and what he was wearing in the photographs splashed on social media and on the news. The submission I made was that this witness, over the space of 18 months or so, had simply superimposed the images of the defendant that he had seen in photographs into his narrative. This was a subconscious act (i.e., the displacement effect)[7] rather than a conscious act of dishonestly. In addition to this, I made an assessment of this witness. He presented well. He was clearly not enjoying the experience of giving evidence. Most importantly, he did not know the complainant or the defendant. Therefore, he did not have any skin in the game. Unnecessarily employing destructive cross-examination would have risked the jury sympathising with the witness and taking an instant dislike to me.

19. Say this witness answered the last three questions differently and said that they either did tell the officer what the person was wearing or that they couldn't remember what they told the police, then I suggest the following. First, if you haven't already, lay the foundation by informing the witness of enough of the circumstances of the prior inconsistent statement. This could be "on [date] you provided your statement to the police? – yes." I would then quote from the statement and ask, "Did you tell the officer 'All I remember about the person with the knife was that he was a man?" From that point the witness will either answer 'yes', 'no' or 'I can't remember.' If the answer is 'yes', then you have proved the inconsistency. If the answer is not 'yes', then hand the witness their statement. I suggest doing it this way. Call for the original statement. If it is a long trial, give your opponent's instructor a little bit of notice. Judges usually do not mind if it is not the original statement, as long as it is a clean copy without notations. Then say 'I am going to hand you (through the bailiff) a document. Please do not identify the document." Once the witness has the document ask, "please look at the top of the first page" to where their name and date is. "Now look down the bottom of the first page" to where their signature is. "Please turn to the second page and look down the bottom" to where their name and signature are. Repeat this step for each page or until you are satisfied that the witness appreciates that it is their document. Do not do this for every page if the statement is greater than five to 10 pages. If the witness starts to read portions of the statement out at any point, be polite and say, "please do not read the document out loud or identify the document." This is, after all, an artificial process to a lay person. "Please turn to the last page and read what's in the box" to where the *Justice Act 1886* acknowledgment, or its equivalent is. "Now turn to page X, paragraph [X] and read that paragraph to yourself." "Have you finished, now hand the statement back to the bailiff.

[7] See *Davies & Cody v The King* (1937) 57 CLR 170 at 180-181 and *Alexander v The Queen* (1981) 145 CLR 395 at 409.

Do you agree that you told the officer “All I remember about the person with the knife was that he was a man?” If the answer is ‘yes’, then the prior inconsistency is proved.

20. If the witness answers “no” then prove the inconsistency through local practice. If you are professional and pleasant to your opponent, then they will usually admit the inconsistency. If not, ask your opponent to call the officer who took the statement, or, if it is not objected to, ask the investigating officer. That would entail “Officer X, on [date] you took at statement from [witness]?” I would then close the gates. For example, get the officer to agree that they took their time in drafting the statement, that they didn’t lead the witness to give particular answers, that the witness was told the importance of telling a truthful and complete account to them, that the witness was told to carefully read the statement and invited to make changes if something was wrong or incomplete, and that the officer stressed the importance of being accurate and truthful before the witness signed the *Justice Act* acknowledgment.

21. It is important to note that prior inconsistent statements can arise in many other forms. For example, the witness might have said something different to another witness, posted something on social media or had their version captured in a third-party document. If the inconsistency is from another witness, ask “you told [name of witness] on [insert date and location] that the person with the knife was a female.” If the witness denies that they said that, whatever you do, do not say “are you suggesting that [name of witness] is lying?” You will then prove the inconsistency when that other witness is called to testify and by asking the jury to prefer the evidence of the other witness.

22. If the prior inconsistent statement is captured in a third-party document, then you should follow the approach in *R v Bedington* (1970) Qd R 353. At 359, the Court stated how third-party documents can be used. It stated “even if inadmissible in evidence, (it) can be put into the witness’ hands and that witness may be asked whether, having looked at the document, he adheres to his previous testimony…. The crown prosecutor may not suggest anything which might indicate the nature of the contents of the document.” At 60, the court gave an example of how this should be done. First, ask the witness the question. Second, suggest that they should have known the proposition that you want to advance. Third, if the witness gives an unfavorable answer, then place the document in the witness’ hands. However, do not refer to the contents of the document, and ensure that the witness does not read it out aloud. Fourth, ask the witness if he or she adheres to the answer which they had just given.

23. This paper focussed on some basic points of cross-examination. I hope that it was of assistance. The next presentation will be by Kennedy of counsel at 2:40pm.

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