# Cross-examination and the Evidence Act
# - more than just asking questions



A Paper presented to Young Lawyers

30 October 2010

***Sun Tzu* in the "Art of War" (in 6th century BC) wrote inter alia:**

When able to attack, we must seem unable;
When using our forces, we must seem inactive;

When we are near, we make the enemy believe we are far away;
When far away, we must make him believe we are near.

Hold out baits to entice the enemy.
Feign disorder, and crush him.

If he is secure at all points, be prepared for him.
If he is in superior strength, evade him.

If your opponent is of choleric temper, seek to irritate him.
Pretend to be weak, that he may grow arrogant.

If he is taking his ease, give him no rest.
If his forces are united, separate them.

Attack him where he is unprepared.
Appear where you are not expected.

---

**I have deliberately minimised reference to cases and authorities because it is your function to research your cross-examination and develop good habits. That includes going to 'the source' when preparing every time.**

## Introduction

1. The legislative framework within which you will be required to present any cross-examination is the Evidence Act 1995. There is in fact no statutory right to cross-examine a witness. It is an evolutionary discretion exercised to allow the opponent to test evidence, issues and credit of witnesses.

2. As far as the practice of law is concerned, there are few things more satisfying than an effective cross-examination. It is the tool by which you can make a great impact on the case you are fighting.

## Assessment and Preparation

3. Before contemplating cross-examination a thorough assessment of the client's case, in light of the issues joined, must be made upon the facts then available and applying the relevant law to your objectives.

4. The next step is planning a strategy. Along that road the advocate will plan to shoehorn and beat the unpalatable facts to a preferred position and enhance that which will assist. The Evidence Act 1995 (the Act) is but one resource or hurdle depending on the situation.

5. Every time you go to a section of the Evidence Act to assess if you can, should or need to do something, or not – also go to the Dictionary to ensure that you get the full and correct meaning of the section. That's your starting point. The Dictionary is indispensable. It is extraordinary how much time is wasted on misconceptions regarding the Act simply through this fundamental oversight, or laxity.

6. The practical cornerstone of the Act is not at the beginning but in S. 55; i.e. Q. Is the evidence relevant? A. If it is, the chances are it is going to be admitted - somehow.

**Relevance**

7. Section 55 Relevant evidence

*(1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.*

*(2) In particular, evidence is not taken to be irrelevant only because it relates only to:*

*(a) the credibility of a witness, or*

*(b) the admissibility of other evidence, or*

*(c) a failure to adduce evidence.*

8. Section 56 Relevant evidence to be admissible

*(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.*

*(2) Evidence that is not relevant in the proceeding is not admissible.*

**Separating the truth from the rest**

- Where is the truth? What is reliable? Who is accurate? Can that opinion stand?

9. The cross-examiner needs to apply hard work and harness any natural talents they posses and, more so, those talents that are not natural or abundant. Being perceptive, clever and inventive helps your quest. If you know what the witness is expected to say from a statement, affidavit or your opponent's opening; preparation is so much easier.

10. Remember that you are about to cross-examine a witness because they are not favourable to your case. Try to, think like the witness, to know where the witness is coming from, to be intuitive about the weakness of the witness and/or the evidence they are giving. The able cross-examiner should have:

- presence to control the court when on their feet
- personality to mould the witness's anxious cooperation or extract the necessary information and
- persuasive technique to attract the court or jury toward the cross-examiner's case.

**Exercise Judgment**

11. Often it is difficult to recognise when cross-examination will not help your case. Generally if the witness has done no damage to your case there is no need to cross-examine. On the other hand, sometimes you may you might want to establish some fact to assist your case e.g. from an expert witness. That is sometimes called constructive cross-examination.

12. Having identified your objectives – keep them in focus. Your first and foremost objective requires persuading the Court or jury that your case is the worthy one. Signpost, for yourself the logical path you need to tread and the permutations. If your objectives are physically mapped out you can work toward them and cross them off as you achieve them or if unsuccessful on first try; remind yourself to return to them when you might be able to use material collected during cross-examination.

13. During preparation you may recognise that there may be some questions with which must be very precise to the extent that you might write the question out and cross-examine verbatim***.*** A clearly defined structure will also help you from being deviated or distracted from your objectives. There is great utility in lists, charts and chronologies.

14. If it is necessarily a longer cross-examination, make sure you intersperse your primary path with a few ancillary avenues. You may need to bring the witness back under control or perhaps to allow the witness to relax briefly before you strike. Once you have achieved what you set out to, move on, do not ask the ultimate and most dangerous

question unless there is only one answer as a realistic possibility by then.

**Evidence Act 1995 – Some Specific Sections**

15. **Sections 26 and 29** only apply only once a witness has been called. They exist to validate statutory control over the questioning process, to ensure that the witness receives just treatment in the Court environment.

16. **Section 26** *Court's control over questioning of witnesses*

*(1) The court may make such orders as it considers just in relation to:*

*(a) the way in which witnesses are to be questioned, and*

*(b) the production and use of documents and things in connection with the questioning of witnesses, and*

*(c) the order in which parties may question a witness, and*

*(d) the presence and behaviour of any person in connection with the questioning of witnesses.*

**Notes - Section 26**

17. S 26 primarily concerns itself with fairness i.e. the manner of questioning; as well as who, (in multiple party cases) might cross-examine on a topic and where the circumstances might be disruptive or intimidating; even, who may be present. It may be utilised by the court to control repetitive, prolix or intimidating cross-examination.

18. **Section 29** *Manner and form of questioning witnesses and their responses*

*(1) A party may question a witness in any way the party thinks fit, except as provided by this Chapter or as directed by the court.*

*(2) A court may, on its own motion or on the application of the party that called the witness, direct that the witness give evidence wholly or partly in narrative form.*

*(3) Such a direction may include directions about the way in which evidence is to be given in that form.*

(4) *Evidence may be given in the form of charts, summaries or other explanatory material if it appears to the court that the material would be likely to aid its comprehension of other evidence that has been given or is to be given.*

**Notes - Section 29**

19. Relevantly, section 29(2) may be invoked particularly where a witness appears to be sympathetic to the cross-examiner's cause and is not apparently giving unbiased or truthful evidence. [see S. 42(c)]. Try to avoid motivating the court from insisting that a witness, under your cross-examination, be allowed to give their evidence in narrative form. If that is allowed, you will lose control of the witness who will tell their story their way and not the way you want.

20. Do not, in cross-examination, follow the same or even similar order that your opponent has conducted the examination in chief. The obvious good reason is that the astute witness will be able to see where you are going and pre-empt your path. You will be assisting the witness and that is rarely the cross-examiner's purpose. It will also indirectly remind the court or jury of the witness's evidence in chief because of your repetition of the sequence of issues. However whatever the issue, be methodical lest you and the court get lost in a maze of issues, ideas, words and relevance.

21. **Section 38** *Unfavourable witnesses*

*(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.*

*(2) Questioning a witness under this section is taken to be cross-examination for the purposes of this Act (other than section 39).*

*(3) The party questioning the witness under this section may, with the leave of the court, question the witness about matters relevant only to the witness's credibility.*

*Note: The rules about admissibility of evidence relevant only to credibility are set out in Part 3.7.*

*(4) Questioning under this section is to take place before the other parties cross-examine the witness, unless the court otherwise directs.*

*(5) If the court so directs, the order in which the parties question the witness is to be as the court directs.*

*(6) Without limiting the matters that the court may take into account in determining whether to give leave or a direction under this section, it is to take into account:*

*(a) whether the party gave notice at the earliest opportunity of his or her intention to seek leave, and*

*(b) the matters on which, and the extent to which, the witness has been, or is likely to be, questioned by another party.*

*(7) A party is subject to the same liability to be cross-examined under this section as any other witness if:*

*(a) a proceeding is being conducted in the name of the party by or on behalf of an insurer or other person, and*

*(b) the party is a witness in the proceeding.*

**Notes - Section 38**

22. A witness who gives unfavourable evidence is not necessarily a hostile witness. A witness who does not appear (for one of a multitude of reasons) to be making a genuine attempt to give the evidence reasonably expected or a witness who has made a prior inconsistent statement, may be cross-examined subject to leave being granted (S.

38(3)). That may include a witness who appears to be struggling with memory of the matters they are expected to be able to give evidence about. Ss 38(6) includes two matters the Court must take into account before granting leave.

23. It does not have to be established that the witness is being untruthful, recalcitrant or truculent but if it is apparent that they are, leave to cross-examine may be much wider than simply seeking their expected evidence and cross-examination may be permitted on credibility issues. In criminal prosecutions the Crown can and does call witnesses expected to give unfavourable evidence. The Crown also invokes S. 38 in some circumstances where unfavourable evidence has been elicited in cross-examination by the opponent to cross-examine their own witness and attempt to repair the damage that cross-examination has created.

24. Section 192 of the Act- empowers the Court to grant leave to cross-examine pursuant to Section 38. Before that leave is granted the Court must take into account the matters in 192(2). Leave may then be granted, on terms and the discretionary sections S 135 and S137 also might come into play.

25. The use of section 38 is commonly used by the Crown in criminal prosecutions but under-utilised generally by defence practitioners. Advocates should not shy away from seeking to utilise section 38 as it can effectively take you much further with some witnesses who don't come up to proof (and there is a prior inconsistent statement) or prove to be deficient in the witness box. Useful cases regarding section 38 include *R v Pantoja* [1998] NSWSC 565; *R v Fowler* [2000] NSWCCA142; R v Le [2001] NSWSC 174; *R v Adam* 47 NSWLR 267 .

**Chapter 2 Part 2 Division 5**

**Improper questions – (during cross-examination)**

26. **Section 41(1)** *The court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a "disallowable question"):*

*(a) is misleading or confusing, or*

*(b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or*

*(c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or*

*(d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).*

**41(2)** *Without limiting the matters the court may take into account for the purposes of subsection (1), it is to take into account:*

*(a) any relevant condition or characteristic of the witness of which the court is, or is made, aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality, and*

*(b) any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject, and*

*(c) the context in which the question is put, including:*

*(i) the nature of the proceeding, and*

*(ii) in a criminal proceeding-the nature of the offence to which the proceeding relates, and*

*(iii) the relationship (if any) between the witness and any other party to the proceeding.*

**41(3)** *A question is not a disallowable question merely because:*

*(a) the question challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness, or*

*(b) the question requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness.*

**41(4)** *A party may object to a question put to a witness on the ground that it is a disallowable question.*

**41(5)** *However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question.*

**41(6)** *A failure by the court to disallow a question under this section, or to inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question.*

*Note: A person must not, without the express permission of a court, print or publish any question that the court has disallowed under this section-see section 195.*

**Notes – Section 41**

27. Section 41 applies to both civil and criminal proceedings. “As well as imposing a duty to disallow improper questions for all witnesses, it sets out a … comprehensive and detailed list of questions that are inappropriate. … [ALRC recommendation 102.]

28. All cross-examination has the potential to intrude on the sensitivities or sensibilities of any witness and there is often a tension between the witness’s comfort or dignity and the courts determination to allow the evidence to be tested; within bounds dictated by the needs of justice. Embarrassment or distress for the witness is often a by-product of

effective cross-examination and not in itself a reason to invoke the section. Court is an exacting arena for most witnesses.

29. The greater significance the issue that the cross-examination is dealing with, it seems the greater the latitude in the discretion. That much is implicit in the expression ‘unduly’. The manner of delivery however can always be controlled – don’t confuse the two.

30. Some witnesses are up to the task of taking on the cross-examiner head to head either because:
    - the cross examiner is hopelessly trying to establish a position which is simply unattainable (e.g. the witness is telling the truth, sticking to it whilst your client has misled you)
    - the witness knows more about the subject matter (e.g. expert witness)
    - is better able to deal with the cross-examiner than the cross-examiner is with the witness (e.g. professional witness, the cunning, the stupid, the consummate witness)

31. The witness with an interest in the outcome of the hearing is generally the hardest to shift; the litigant themselves, the ‘give up’ trying to preserve his sentence discount, the co-offender shifting blame, the expert hanging on to a reputation etc. That is why you must expose the witness who has an interest in supporting the evidence you are attacking. The timing of exposing or alleging any bias or deception will bear greatly on the successful impact of that exposition.

32. It is usually the moderate rational witness without anything to lose who is easiest to shift. Do not underestimate the use you can make of a non- controversial witness. They will more readily recognise and acknowledge when their position is wrong or untenable. They may move away from your opponent and shore up an important part of your case or simply make your client look better in some respect.

33. A considered cross-examiner will not only use the opponent's witnesses to help destroy the opponents case or part of it but also, where appropriate and possible to further his own. Once you are cross-examining, almost any shift toward you or your case is impressive to the court or jury. Even if the shift is not determinative, it at least fortifies the cross-examiner in the eyes of the tribunal; which must be a positive.

34. Section 41(2)(a) and (b) allows for the court to note for itself or be informed by other means (e.g. submission by counsel) of any relevant condition or characteristic of the witness.

35. A useful guide to the operation of S.41 in criminal trials is also contained in the Judicial Commission of NSW Bench Book at: bookhttp://www.judcom.nsw.gov.au/publications/benchbks/criminal/cross-examination.html

36. Section 41 (4**) -** Disallowable questions can be identified as either those precluded by the Act, other statute or the common law. Some common law examples of disallowable questions are those that are:
    - irrelevant
    - hearsay
    - argumentative
    - ambiguous or vague
    - compound or double questions
    - comments
    - misquoting evidence
    - assumptions not in evidence or not coming into evidence
    - repetition
    - privilege
    - cutting off answers

37. **Section 42 Leading questions**

*(1) A party may put a leading question to a witness in cross-examination unless the court disallows the question or directs the witness not to answer it.*

*(2) 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:*

*(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.*

*(3) The court is to disallow the question, or direct the witness not to answer it, if the court is satisfied that the facts concerned would be better ascertained if leading questions were not used.*

*(4) This section does not limit the court's power to control leading questions.*

*Note: "Leading question" is defined in the Dictionary.*

**Notes - Section 42**

38. Opposition witnesses are invariably called to promote the opponent's case or damage yours and so will not willingly reveal facts

- inconsistent with the opponent's case,
- inconsistent with the witnesses credibility or
- which will help your cause.

39. Courts are alive to the ‘sympathetic witness’ under cross-examination particularly when the cross-examiner seems to be getting further with the witness than common sense dictates. The court can invoke Section 42(3) and require that the cross examiner not use leading questions. S. 42 further states circumstances that may restrict leading. Leading questions play a large part in controlling a witness. Hang on to that opportunity doggedly even if you have to back-pedal for a bit.

40. **Section 46 Leave to recall witnesses**

*(1) 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.*

*(2) A reference in this section to a matter raised by evidence adduced by another party includes a reference to an inference drawn from, or that the party intends to draw from, that evidence.*

**Rule in Brown v Dunn**

41. Odgers opines that section 46 “*overlaps but does not affect the continued operation of the common law rule of fairness usually referred to as the rule in Browne v Dunn …*”

42. The principle in summary is that fairness requires that the cross-examiner put the substance of any challenge to the witness on the issue i.e. a witness must have had a chance to comment on, or counter the evidence sought to discredit them. It also puts the opponent (to the cross-examiner) on notice, that the witness’ evidence is challenged and further corroboration may be required. The consequences of a breach

of the rule in 'Browne v Dunn' may differ, based on, whether it occurs in a criminal or civil case.

43. Possible consequences of a breach include that evidence adduced by the party in breach of the rule is excluded or limited, the unchallenged witness is recalled (even if that means re-opening a case), the party in breach is precluded from contradicting the unchallenged evidence in submission or address..

44. Failure to comply with the rule may invoke S. 46 of the Evidence Act which allows for a witness to be recalled if you fail to cross-examine that witness on a matter the Court considers in fairness that you should have. It is in reality a requirement that issue is joined fair and square and not by trickery or circumnavigation of the opponent's case.

45. I include specific reference to *Khamis v Regina* [2010] NSWCCA 179 because it appears to be the latest word in respect of criminal trials. The extract bellow appears in the excellent criminal law resource created and maintained by John Stratton SC Deputy Senior Public Defender known as the "Criminal Law Survival Kit" which is at http://www.criminallawsurvivalkit.com.au/Evidence.html#Part%20B:%20Evidence**.** I commend this resource to all practitioners; young lawyers and experienced alike.

Whealy J (with whom Campbell JA and Simpson J agreed) said at paragraph 32

*(a) The issue of the proper approach to the rule in Browne v Dunn in criminal trials has been examined recently by the High Court of Australia in MWJ v The Queen [2006] 80 ALJR 329; [2005] HCA 74. At [18] Gleeson CJ and Heydon J stated: -*

*(b) "The principle of fair conduct on the part of an advocate stated in Browne v Dunn is an important aspect of the adversarial system of justice. It has been held in England, New South Wales, South*

*Australia, Queensland and New Zealand, to apply in the administration of criminal justice, which, as well as being accusatorial is adversarial. Murphy J, in this Court even applied it to the conduct of an unrepresented accused. However, for reasons explained, for example, in R v Birks and R v Manunta, it is a principle that may need to be applied with some care when considering the conduct of the defence at criminal trials. Fairness ordinarily requires that if a challenge is to be made to the evidence of a witness, the ground of the challenge be put to the witness in cross-examination. This requirement is accepted, and applied day by day, in criminal trials. However, the consequences of a failure to cross-examine on a certain issue may need to be considered in the light of the nature and course of the proceedings." (Case reference omitted).*

**Possible Consequences of Breach of the Rule in Brown v Dunn.**

(at paras [42] to [46]):

*[42] It may be said, however, there are a number of sanctions generally available for a court's consideration where, in a criminal trial, there has been a breach of the rule in Browne v Dunn. The more recent authority, to which I have referred, makes it clear, however, that a trial court must always endeavour to demonstrate flexibility in its response to the particular problem before it. This will be largely determined by the particular circumstances involved in the case and the course of the proceedings. I will mention, without attempting to be exhaustive, a number of the available responses.*

*[43] First, if a witness is not cross-examined on a point, cross-examining counsel may be taken to accept it and may not be permitted to address in a fashion which asks the court not to accept it. That was one of the options suggested by Mahoney JA in Seymour [Seymour v Australia Broadcasting Commission (1977) 19 NSWLR 219], although that was a civil case.*

*[44] Secondly, if the witness has not been cross-examined on a particular matter, that may be, depending on the circumstances, a good reason for accepting that witness's evidence, particularly if it is uncontradicted by other evidence. Where however, a witness's evidence upon a particular matter appeared to be incredible or unconvincing, or if it were contradicted by other evidence which appeared worthy of belief, the fact that the witness had not been cross-examined might be of little importance in deciding whether to accept his evidence (Bulstrode v Trimble [1970] VR 840 at 848-9); Precision Plastics v Demir (1975) 132 CLR at 371).*

*Thirdly, the trial judge may, on application by counsel for the party who called the witness in respect of whom the rule was broken, accede to the application so that matters not put to the witness earlier may be put (s 46 Evidence Act 1995). Quite apart from the ability to grant leave under this section, a trial judge may require the relevant witness to be called for further cross-examination or grant an application for the recall of the witness (Payless Superbarn (NSW) Pty Limited v O'Gara at 556; R v Burns (1999) 107 A Crim R 330; MWJ v R [MWJ v The Queen (2006) 80 ALJR 329] at [40].*

*[45] Fourthly, as indicated by cases such as Schneidas [Schneidas (no. 2) (1981) 4 A Crim R 101] there is, at least in this State, a power in criminal trials to exclude evidence sought to be relied upon by an accused to support a point not put in cross-examination of a witness called by the Crown. This option, in my opinion, should, (in this situation) generally speaking, be a last option and not one of first resort.*

*[46] Finally, if an accused's evidence is allowed, and there has been a breach of the rule, there may be a need for appropriately fashioned directions to be given to the jury. This option, and the care and caution needed to be taken in respect of it, was the subject of this court's decision in RWB v R [2010] NSWCCA 147 to which I made reference at the commencement of these*

*reasons. There is no need for me to say anything further on that subject*

**Part 3.3 Opinion Evidence**

**Expert Witnesses**

46. **Section 79** is an exception to *'the opinion rule'* that and provides in essence that if a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

47. Because experts can have such a profound effect on the outcome of proceedings or the resolution of important issues and because they are being used more frequently it is critical that the cross-examiner pay particular attention to their role in proceedings. The expert will outclass almost every advocate in the area of specific knowledge. Do not engage the expert in a debate. It is a presumptive folly that you can match your knowledge with the expert.

48. Learn the language and terminology of the area of expertise at least to the extent that it is relevant to your areas of inquiry. You should have advance notice of the arrival of an expert and, if you have done you're your homework thoroughly, you will be prepared to meet them on a more even field. If you have prepared your cross examination you will understand their parameters and be able to restrict the expert to their actual field of expertise.

49. You will have to prepare much more than your opponent's expert. They, like you will want to stretch the boundaries. Have your own expert available if at all possible. Nothing is worse than a cross-examiner fumbling with concepts and terminology and trying to remain

credible. Identify what positive use can you make of the expert e.g. getting their expert to agree with as much, as possible, of your expert's evidence, or to shore your expert's, qualifications, methodology and opinion.

50. It is relatively uncommon that you need to attack the honesty of an expert. However the courts are replete with experts who are biased toward the party calling them or they are called because they are proponents for a particular view (e.g. PTSD, retrieved memory etc). Find out as much as possible about your opponent's expert. Most forensic experts have a reputation. Chances are you may be able to locate previous cross-examinations of them or previous views expressed by them in literature that assists your cause, contradicts to some degree the evidence they give or dilutes their conclusions in the instant case.

51. Their expert may have flawed background information, made incorrect assumptions, and received an incorrect or incomplete history, be expressing opinion outside their real area of expertise. Many experts will rely on their expertise rather than specific preparation. That can be a bonus for the cross-examiner. Heydon JA (as he then was) in his summary of the applicable principles in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85]) said, (and I paraphrase), for evidence tendered as expert opinion evidence, to be admissible;
    - there must be a field of "specialised knowledge";
    - the witness must be qualified as an expert by reason of specified training, study or experience,;
    - the opinion must be based on the witnesses expert knowledge;
    - the facts "observed" by the expert, must be identified and admissibly proved by the expert;
    - in so far as the opinion is based on "assumed" or "accepted" facts, they must be identified;

- the facts on which the opinion is based form a proper foundation for it;
- and the opinion of an expert requires transparent methodology

52. It is one or more of those areas where a cross-examiner needs to concentrate to undermine the witness's opinion or display inadequacies in methodology**.** The fact that a witness asserts expertise should not be the end of your curiosity but the beginning, in other words don't be too accommodating by accepting that the witness's opinion will be correct just because they have qualifications or a specialty. Maintain a robust and probing assessment of the evidence they support.

53. If the expert has overwhelmed your case in giving evidence in chief; once you have got whatever concessions they can give you in cross-examination, it should be your purpose to try to disable the confidence of the expert with some questions within their field for which they may not be prepared. Many experts will not be familiar with studies or articles that do not accord with their opinion. Like everyone, their time for research is not limitless and chances are they will not have the commitment to your opponent's case that you have for your client's. Show how they have not considered the breadth of the field they are giving evidence about or that they are not up to date with the latest or most informed thinking on the subject matter, like your witness. Courts and juries love to see the best expert just like the best cross-examiner and often respond irrationally to that perception.

54. Often an expert is called on, in the witness box, to assume a hypothetical state of facts (based on evidence or assertions from other witnesses). You must be vigilant to ensure that the hypothetical is an accurate recount of the facts or assertions in evidence and astute to be able to put any alternative or differing hypothetical in cross-examination. The slightest deviation at times can result in a

monumentally different outcome in the opinion. In other words an expert opinion is usually formidable but often, also brittle.

55. Call for the letter of instruction, briefing notes, working notes, draft reports and any other material that the expert may have had resort to (S.35 Evidence Act) and then also look for what and expert has omitted that you reasonably (or indispensably) would expect to be factored into the expert opinion. Often you locate gems for cross-examination that undermine the opinion or credibility of the expert, or the witness that supplied the expert, with the background material.

**Some Discretions**

56. The Act provides numerous avenues for discretionary and/or mandatory exclusion of evidence. Be familiar with those and steer your cross-examination toward that end if you think you can exclude damaging evidence. Of course that will be done on the voire dire. The ancillary benefit of a voire dire is that, in the process, you may find out more than you started with even if the evidence is not ultimately excluded. I will simply list the sections you may wish to focus on for this avenue of cross – examination.

- Section 90 - Discretion to exclude admissions
- Section 135 - General discretion to exclude evidence
- Section 136 - General discretion to limit use of evidence
- Section 137 - is not in fact a discretion but a mandatory basis for exclusion if the probative value of the evidence is outweighed by the danger of unfair prejudice to the defendant section
- Section138 - Exclusion of improperly or illegally obtained evidence

## Some Further Considerations Regarding Cross-Examination

57. Although cross-examination must be creative, pliable and considered broadly the extremities of the two primary and contrasting techniques have been described as:
    1. 'The stockman' – builds a fence around a witness, first posts, then wire to connect, make sure the witness is within it and close the gate.
    2. 'The thug' – beat the witness into submission.

### Topics – the issues in the case

58. Decide what features of the respective cases or what elements of the charge are most vulnerable and which witnesses may most impact on those vulnerabilities. Understand every relevant fact. Go to the Act. Know the subject better than your opponent. Proper planning and deliberate purpose can make success more than a hope.

### Refine your topics - relevance

59. Refine your topics to the ones that count. Will the cross-examination enhance the case or leave the cross-examiner open to the accusation or even perception of distracting irrelevancies? Don't trifle with minutiae. That does not suggest microscopic details never matter, however the best cross-examiners go for the big issues or are able to convince the court through their approach and precision that whatever they pursue can significantly contribute to the ultimate question. If you are vulnerable to an accusation of cross-examining on irrelevancies you will look like you are grasping at straws and avoiding the real issues. Your case will suffer.

### Control

60. When you are in control of the case you are in control of your mood, words, the logic of your path, and most importantly the witness. You want to encourage the witness to open up what you want the court or jury to see and hear, nothing more. Do not delude yourself that if you

pay attention to what you need to establish in your case you are prepared; you need to be in control of ‘the case’.

61. What do you want to achieve? Do you want to attack the evidence or the witness or both? You may be dealing with any, or a combination of:
    - mistake
    - bias
    - innocent or manufactured distortions, exaggeration etc
    - vulnerabilities due to health, eyesight, memory, alcohol, substance abuse, psychiatric or psychological conditions
    - inconsistent statements
    - misconduct or dishonesty reflecting adversely on veracity.
    - criminal convictions

62. The tribunal of fact has to trust you before you finish the cross-examination. They have to trust that you know what you are doing and doing it for good reason. Retain a pleasant personality as much as possible, not fawning and not acting. Remain courteous, respectful and clear. Be efficient, do not fumble or mumble both irritate the court and/or jury intensely.

**Opening Address**

63. The Crown in a prosecution, the Plaintiff in any civil proceeding has a natural advantage. They are heard first. Their witnesses are heard first. Anecdotal evidence suggests it is much easier to make an impact when the story is heard for the first time.

64. Make it easier for yourself. If you are for a Defendant or Accused - open your case. Don’t open to high or too wide because your cross-examination may not produce what you expect and that can leave you, more particularly your client, looking very foolish. The question how much do you say before you cross-examine and/or call evidence is a 6th sense that experience and courage provide.

65. The cross-examiner therefore is usually burdened with attempting to unravel the Gordian knot the witness has tied or contributed to.

**First and Last Impressions**

66. First and final impressions tend to be lasting impressions, however remember that someone in the courtroom is assessing you all the time as well as the witness. The collective IQ a jury of twelve will be formidable. For the Court or jury to listen to you, you must establish trust. When you open, make sure that some material you use will be established by cross-examination and if you can't, try to refer to some matters that won't be in dispute. That way, as the case unfolds, the Court will be reminded of things you have said, heard them confirmed and repose some trust in you which will be a positive for your client.

67. Do not give anyone a reason to dislike you. Judges have their own sense of fairness and want to maintain a disciplined court. Be politely firm but also authoritative. You may on occasion show indignation where the witness is blatantly trifling with the court but keep your professional dignity and remain above the fray. That does however sometimes require restraint. Ultimately you will be seeking to persuade the court or jury; not bludgeon them so never lose sight of that fact. You can't force others to accept your view or your client's case. If you can't persuade your court - that's it.

68. No matter what you think of your court or jury, it is it or they who will decide not you. Remember while trying to establish facts or doubts you are most importantly trying to appeal to the listener. Just think of how easily someone can be turned off any proposition, any time any place and for a multitude of rational and/or irrational reasons.

69. You are doing a most important task for a client, not in a personal contest with the witness. Once you have extracted all that a witness will give; you move in to take what you can get. If you want to display the

witness's bias, show how they use their position and their oath as tools or shields to unfairly prejudice your client. Whether you move in for the final thrust or merely seek to play one witness off against another try to show that witness's negative characteristics.

70. Just like a trust takes a long time to establish and a moment to destroy, a momentary lapse during cross-examination can destroy whatever has been gained. It requires method, logic, and patience. If you have unarguable material in black and white or colour dare the witness – juries love brave, successful cross-examiners but it is a dangerous sport. Bullies don't succeed in court; they may bluster when attorney hugging, in bars or even in the media.

71. More cross-examiners than not introduce harm to their cause as collateral damage to seeking to establish facts. Often only when it comes to addressing the court or jury or verdict that the collateral damage becomes obvious and by then it is too late. Do not ask too many questions. Better one question too few than one too many.

**One proposition per question.**

72. Questions can be leading and many lawyers say questions in cross-examination should only be leading. A question, which is not leading, can be asked but restrict that type of cross-examination to those areas where you know (not think you know) the answer.

73. Short questions, simple questions, invite short simple answers. Any other answer seems evasive or self-justification. If the short simple question is not answered or is evaded; ask it again. Do not rephrase it. Unless instructed by judge to rephrase the question; repeat it until it is answered.

**Keep it simple**

74. Don't use big words, ambiguous language, metaphors or fashionable clichés, in your questions. Often the answer to such a question is

meaningless. If asked to rephrase the question you may well have deviated from the principle short and simple; one question, one issue.

75. Avoid questions starting with “what, when, where, who how, and why”. Questions starting with those words allow the witness to take control of the answer and often the cross-examiner. Rarely should those words be uttered unless you are rationally confident that the witness will help your cause with the explanatory answer.

76. Do not repeat the evidence in chief in your cross-examination. Repetition reinforces and reminds witness. Repetition has a lasting effect.

77. If you have properly prepared you will be able to cope with objections and interruptions. If you find that the bench is interrupting your cross-examination almost invariably you are not keeping the above principles in the forefront and thinking about your questions.

**Listen to the answer**

78. Your questions should mostly contain the answer or elements of the ultimate proposition you want in it. The witness should be restricted to the simplest of possible answers as much as possible e.g. Yes, No, Don’t recall, Don’t know. Listen to the answer and make sure it is an answer to the question asked. Some skilful witnesses are able to seemingly answer a question but leave themselves with an escape should you not close in on them.

79. Avoid the temptation to summarise what you believe you have achieved in rolled up questions. They are rarely good questions.

**IRVING YOUNGER'S**
**10 COMMANDMENTS**
**OF CROSS EXAMINATION**

**Be Brief -**The shorter the time spent, the less chance for error. A simple cross-examination that restates the important part of the story in your terms is more easily absorbed and understood by the jury. Make your points and sit down.

**Use Plain Words -** Everyone can understand short questions and plain words. This is not about your eloquence, it is about your clients case.

**Use Only Leading Questions -** Cross-examination, permits you to take control of the witness. Any questions which permit the witness to restate, explain or clarify the examination in chief is a mistake.

**Be Prepared -** Never ask a question that you do not know the answer to. Cross-examination is not the time for the witness to complicate your case by delivering surprises at the trial.

**Listen -** Listen to the answer. For some, cross-examination of an important witness confuses the mind and panic sets in. You have a hard time just getting the first question out, and you're generally thinking about the next question and not listening to the answer.

**Do Not Quarrel -** When the answer to your question is absurd, false, irrational contradictory or the like; resist the temptation to respond. Don't create an opportunity that explains away the absurdity and rehabilitates the witness.

**Avoid Repetitions -** Never allow a witness to repeat on cross-examination what he said on direct examination. Cross-examination should involve questions that have nothing to do with the direct examination.

**Disallow Witness Explanation -**
Never permit the witness to explain anything in cross-examination.

**Limit Questioning -** Don't ask the one question too many. If you have successfully shut the gate sit down. Stop when you have made your point. Leave the argument for the jury.

**Save for Submissions -** A prepared, clear and simple leading cross-examination that does not argue the case can best be brought together in final submissions.

Summarized from The Art of Cross-Examination by Irving Younger published by the American Bar Association Section on Litigation, from a speech given by Irving Younger at the ABA Annual Meeting in Montreal Canada in August of 1975.