Don't Go To Court Dressed Like A Car Accident

- And Other Really Useful Tips On Cross-Examination

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This paper is written from a criminal defence perspective.

The most recent edition of this paper can be found on the internet at www.CriminalCLE.net.au on the Advocacy Page of that website. If you have a free email subscription to that site you will automatically be notified of the publication of a more recent edition of this paper whenever it is updated.

Much has been written on this topic by people far more eminent than the author of this paper. There are countless books, digital recordings, workshops, seminars, training courses etc. that are available to a defence practitioner. It is acknowledged at the outset that professional minds may reasonably differ as to the opinions expressed in this paper.

Mastering the imprecise art of cross-examination is a task that will consume the professional advocate from the first to last day of their career. What follows is a brief outline of a few "tips" based on some of the things I have learnt over the years. It by no means "covers the field" of this complex and difficult topic, but rather is offered in the hope that it may be of some assistance as part of a much broader and ongoing learning experience.

Tips For Beginners

You will spend your entire career trying to perfect this art. DO NOT be too hard on yourself if you feel that you are not highly expert in the early stages of your career. This is the hardest part of advocacy. You will make mistakes, ask dud questions you wish you hadn't, and think of questions later that you wished you had, etc. for as long as you practice as an advocate. This monkey will stay on your back forever, no matter how good you get. Get used to the presence of that monkey, and don't let it bother you to the point of losing confidence and faith in your ability to develop your skills in the longer term. The ability to cross-examine effectively is a work in progress that will not finish until the day you retire from professional advocacy.

Many people starting out in their first few hearings write out each and every question they intend to ask. This is a perfectly legitimate approach for somebody who is new and feeling a little challenged in terms of self-confidence (I certainly did it). However, you should not rely on this technique beyond your first few defended hearings, as it will not generate higher quality cross-examination in the longer term. When you are on your feet in those first few hearings, experiment with "departing from the script" occasionally for the purpose of clarifying answers, or pursuing a particular theme further.

Try to progressively build your skills in "departing from the script / notes" where necessary in order to pursue or challenge unfavourable evidence as it emerges.

After you have had a few goes, abandon the "write out every question" approach.

Those starting out in criminal practice might be further assisted by my paper "Preparing For A Hearing in the Local Court" which can be found on the Local Court page of http://www.CriminalCLE.net.au.

More General Tips

PREPARING TO CROSS-EXAMINE

Identify The "Underlying Emotion" of the Case

Criminal trials are like pop music – every song has an underlying emotion (albeit sometimes a very simple emotion). Every criminal case also has an underlying emotion, and in a criminal trial the tribunal of fact is duty bound to listen.

An allegation of child sexual assault brings forth the emotion that child sexual assault is a putrid crime committed by deeply evil people.

An allegation of murder will likely bring forth the emotion that a life has been tragically cut short in violent circumstances.

An allegation of break enter and steal from a residential dwelling brings forth the emotion that someone has had their home violated and their hard earned possessions taken from them by some unworthy soul.

Defence practitioners should not lose touch with what ordinary citizens think about such matters (in the case of jury trials), nor forget that judicial officers are people too (in the case of Magistrates or Judge alone trials). A burnt out cynicism borne of too many years in criminal practice is a poor substitute for forensic judgment.

So what is the relevance of this "underlying emotion", and why bother identifying it? A trial advocate may seek to nullify the negative underlying emotion in an opening address – e.g. "there is no issue in this trial that child sexual assault is an appalling crime….". It may also influence the manner or style in which you cross-examine. By being aware of any such issue, you can retain the appearance of reasonableness before the tribunal of fact, and clear the way for a more unimpeded cross-examination that more effectively pursues your forensic goals.

Have A “Case Theory”

A "case theory" is an idea or set of ideas that completes the following sentence: "My client should be found not guilty because.....". Prior to commencing a defended matter you should have a clear notion of why it is that your client should be found not guilty.

Not having an argument or “case theory” as to why your client should be found not guilty is not a professionally competent thing to do. Whilst hope may spring eternal, the idea that a viable defence may suddenly emerge in the course of the evidence will, in the overwhelming majority of cases, amount to nothing more than wishful thinking. Such wishful thinking will result in the loss of the utilitarian value of a plea of guilty.

A simple example of a "case theory" involving an allegation of sexual assault might be that sexual contact occurred, however it was consensual - hence "my client should be found not guilty because whilst sexual contact occurred it was consensual."

Have A "Case Plan" As Well As a Case Theory

A case plan is a tactical road map of how it is you intend to conduct the case in order to demonstrate the validity of your case theory (that is - demonstrating why it is that your client should be found not guilty).

To continue with the sexual assault example for immediately above, your client may have participated in an interview with police wherein it is acknowledged that sexual contact occurred but it was consensual. Assuming the client is of prior good character two simple points in the case plan might be as follows:

1. We will not call the client, but rely on the ERISP interview, so as not to expose the accused to the risks inherent in being cross-examined.
2. We will call evidence of prior good character, including leading the fact of nil prior record from the officer in charge under cross-examination.

Know the Relevant Law

Knowing the relevant law will help you to shape your cross-examination and select your “themes”. Cross-examine with a view to “steering” the evidence away from elements that are essential proofs for the prosecution and /or try to “steer” the evidence towards an available defence, or into a dark shadow of (reasonable) doubt as to an essential proof.

A discussion of using the legal definition of “offensive” to assist in formulation of cross-examination in a matter of offensive language or offensive manner can be found on pages 4 to 8 inclusive of my paper “Dog Arse Cunts – A Discussion Paper on Law of Offensive Language and Offensive Manner”. A further example of using the law pertaining to possession of drugs to assist in formulating the cross-examination of police can be found at pages 2 and 3 of my paper “Cross-Examination of Police”.

Type Your Notes

Typing your notes, complete with headings and sub-headings will aid in ensuring structure. During your preparation you can cut and paste, re-visit issues, re-consider your tactical approach, add in new themes not previously considered, etc.

This method will increase your preparation time, but will also increase the quality of your cross-examination. The trouble with handwritten notes is you may well lose some of the flexibility to revise and refine. A scribbled page with lots of swirls and arrows is much harder to follow when you are on your feet. The risk of error or omission is greatly increased.

Ensure That There is “Structure” To Your Cross-Examination

“Structure” is important. Do your utmost to avoid “criss-crossing” between themes or issues that you are cross-examining about. If you cannot logically pursue the themes or issues you wish to pursue, you cannot reasonably expect the tribunal of fact to follow your argument or case theory.

An argument or issue that is not understood by the tribunal of fact due to a poorly structured presentation is an argument more likely to be rejected.

I have heard it said by another practitioner that “cross-examination is about asking the right questions in the right order.” This is sound advice indeed.

Have Effective "Information Management" Systems

You will inevitably need to access information in a timely manner during the course of litigation. In some circumstances you may need to access the information very quickly indeed. In complex matters you will need to have in place a system that ensures you "know here to find things". You should always have your brief "tagged" or "indexed" in some sort of logical order such that you can find what you need - and very quickly if necessary.

Exhibits and mfi - It is important to keep track of exhibits and items marked for identification (mfi). This includes not only knowing what the exhibits are, but knowing where to place your hands on your copy of them (if you have one) or knowing for a fact that you do not have a copy and thus need to seek access to the actual exhibit or mfi itself. In a short Local Court hearing this might mean an approach as simple as writing these things down on a separate piece of paper, and leaving a separate pile of paper on the Bar table with exhibit and mfi numbers of letters written on them. In anything above this most basic level it is the author's view that it is worthwhile to keep a record on a pro forma document. A pro forma word document stored in the cloud can be accessed at the Bar table, your office, or if necessary from home. A template is attached to this paper as Annexure 1 (with thanks to Sophie Toomey). At trial level, you might want to consider a "trial index" (see below).

Transcripts **-** Often there will a transcript associated with a more complex matter. Should you obtain an electronic copy, store it electronically as well as in hard copy. An electronically stored transcript is more easily searched.

Cloud Computing - Want to keep track of exhibits, mfi, transcripts, the brief or other important documents? A document in the cloud can be accessed at the Bar table, your office, home or anywhere in the world that has an internet connection. It is also a handy place to look when you absolutely cannot find your hard copy of the document but know exactly where to look (or search) in the cloud for it. Dropbox.com offers a simple and easy to use free account with storage of up to 2 GB for free, as do others. A terrabyte in the cloud can cost about $US100 per year or less. Quite apart from the search capabilities and ease of storage, it can save you carrying many documents to and from court in a matter that runs for days or weeks.

Timelines - How do events in your brief relate to each other? Making a timeline by way of a simple chronological table can be of assistance in putting events in context relative to each other. It can provide a quick reference point for refreshing your memory as to the occurrence of key events.

Summary Tables - some briefs have numerous telephone numbers, addresses, motor vehicles or other items featuring in them. Making a summary table of these things in a word document and storing that document in the cloud makes for easily collation, access, and / or recollection of this information.

Trial Indexes - in matters where there is a daily transcript the author uses a "trial index" template (a self-developed word doc table) to track exhibits, mfi, the evidence of witnesses including page references to examination in chief, cross-

examination etc. The document becomes a de facto index of the transcript of the matter. Such a document can be of huge assistance in recalling evidence or other issues in the trial, as well as for preparing far more effectively for the closing address. For more complex matters, develop such a document in the cloud. It is then available to you at the Bar table, in your office, at home, or wherever else you might need or want to access it. A blank template is annexed to this paper.

Maintain a Professional Appearance At All Times - Don't Go To Court Dressed Like a Car Accident

Don't go to court dressed like a car accident. Your client will not be impressed. Nor will the bench, nor will your professional colleagues. Your professional reputation ***will*** suffer. If you want to act the part of the capable professional advocate the first step is to look the part. There is nothing wrong with a nod to fashion, however the courtroom is not the place to push the boundaries with the risqué or revealing.

Male practitioners should not go to court dressed in a fashion that says "I am busting to go to my favourite nightclub just as soon as I can get this court commitment out of the way." There is nothing inherently wrong with wanting to go to a nightclub straight after court, if that is your lifestyle choice. However, whilst your fashion sense may be something that impresses you, it may be at odds with projecting the image of a capable and highly focused professional advocate who is worth listening to. Even if your client happens to like nightclubs, they may be unimpressed with your apparent lack of professional focus. Similarly male practitioners should not wear a suit that says "I only bought this suit because I got invited to my third cousin's wedding." A ridiculously cheap suit too often looks exactly like what it is. It might be okay for your third cousin's wedding, (especially if you don't really like them that much and the lights are really low), but it really wont "pass muster" when attempting to adapt it to the role of a professional advocate in a courtroom. Engage in a bit of tactical shopping during the half-year and end of year sales if you need to - a mid priced suit bought at a "sales" price together with some reasonable ties can do the trick. Be careful of what image you project. Guys - shine your shoes, wear a clean and ironed shirt, tuck the shirt in, and make sure your tie is straight. Even if you are borderline destitute spend a few dollars on some decent ties. To those of you who have hair - wash it and run a comb through it before you get to court.

Female practitioners should not go to court dressed in a way that says "I would rather be at the beach" or "I would rather be at a nightclub". There is nothing inherently wrong with wanting to be at the beach or at a nightclub. However, you are not being paid to be at those places, nor dress in a way that anticipates being at such places at the earliest possible opportunity. Your client's interests are at

stake; and clients are typically more interested in outcomes than they are your apparent desire to be elsewhere. Be careful what image you project.

People will form at least an initial impression (and possibly a lasting impression) about you based on the way you are dressed. An overly casual, slovenly or "couldn't care less" appearance projects an impression of an overly casual, slovenly or "couldn't care less" attitude towards the matter before the court. If you project a message that says "I don't care", you are issuing an invitation to the tribunal of fact that they need not care either.

"ON YOUR FEET" - THE ACT OF CROSS-EXAMINING

You Should Not Have A Solitary Advocacy “Style”

A good advocate should have a range of styles to suit the range of different circumstances that you will inevitably confront during the course of practice as a criminal defence lawyer.

An advocate’s range of styles will often be shaped by a combination of their personality, professional experiences, and the influences they have been exposed to during the course of their professional development. A range of different styles may be required within a single case, or even within a single witness.

The “underlying emotion” of the case may influence the “style” of cross-examination for a given witness or aspect of the case. There is no single “correct answer” as to what style suits a particular set of circumstances, however some generalised suggestions follow:

Police Who Are Allegedly Fabricating Evidence

This issue may well require some fairly aggressive advocacy, at least when you get to the “nub” of the issue. “Aggressive” may mean a raised and sharp tone for one advocate, or a series of calm but highly pointed questions for another. Whatever the preference, there will be unmistakable forensic conflict conveyed through cross-examination at the appropriate moment.

A Complainant in a Child Sex Matter

This circumstance will require simple language such that the child is capable of understanding the questions. A friendly tone (think “The Wiggles”, “Romper Room” or “Play School”) may well be appropriate so as not to signal to the child that your purpose may be to tear down their credibility in its entirety. It might be appropriate to leave the *Browne v Dunn* questions to the end and put them in short form so as to avoid signaling your purpose to the child, and / or upsetting them in a way that the tribunal of fact develops considerable sympathy for the child, and considerably less sympathy for your case as a result.

An Adult Complainant in A Sex Matter

Your case might be that sexual contact occurred, but it was consensual. Consent in the circumstances might imply promiscuity on the part of both the complainant and accused. Openly disrespectful questioning of a complainant in a tone that implies moral condemnation for having engaged in promiscuous behaviour is unwise in that it creates a substantial risk of garnering sympathy for the complainant and losing the sympathy of the tribunal of fact for your case. Consider an unfailingly polite tone, always referring to the complainant as "Miss / Ms (Surname)" rather than their first name. If it be the case that the complainant has allegedly been promiscuous in the circumstances, allow the evidence to demonstrate that, rather than seeking to imply it through open disrespect or rudeness. Never get on the wrong side of the "political correctness" of this issue as a product of your advocacy style.

Try to avoid making the complainant distressed to the point of tears. A complainant who cries in front of the tribunal of fact may well garner sympathy. If you feel the witness is teetering near the edge of tears, it may be wise to invite the Judge / Magistrate to offer the complainant a break. By doing so, you appear reasonable to the tribunal of fact, and minimise the risk of the complainant garnering sympathy.

The Victim of A Serious Example of Grievous Bodily Harm

The victim of such a matter may well be grossly disfigured and / or permanently physically impaired as a result of the alleged offence. The central issue may require robust cross-examination – e.g. self-defence, or motive to lie in the case of outright denial.

Cross-examination to the effect that the victim has suffered permanent changes to their lifestyle, employment or career prospects, physical appearance, etc. will likely require considerable sensitivity if you do not want to lose the sympathy of the tribunal of fact for your case, and / or have the alleged victim gain sympathy. But you may need to put these matters in evidence for the purposes of a *Brown v Dunne* proposition that the alleged victim is embittered and this embittered state is colouring the evidence adverse to your client.

Thus you might require at least two different styles of advocacy within the cross-examination of the witness referred to above.

Consider The Impact of Your Advocacy Style on The Tribunal Of Fact - If They Don't Like The Advocate They Might Not Like The Argument

The purpose of cross-examination is to persuade the tribunal of fact. Never lose sight of this purpose. What will the tribunal of fact think of your argument given your style of advocacy?

We have all had the unpleasant experience of an overbearing or unlikeable sales person to deal with - whether it be regarding a car, real estate, life insurance, or

other matter. It is not an uncommon experience for people to "switch off" from whatever message is being conveyed when they find the source of that message unappealing. If the tribunal of fact "switches off" or "tunes out" from you as an advocate, then what chance is there for your argument? Always consider the impact that your style of advocacy will have on the tribunal of fact.

Use Plain Language

If you do not use plain language there is a real risk that the witness will not understand the question. Further the tribunal of fact may not understand the question. If you are not readily understood, then your efforts are fruitless.

Avoid Long-Winded Questions

Again, if you ask long-winded questions, you may not be understood; either by the witness, or by the tribunal of fact, or both. If you are not readily understood, again, your efforts are fruitless.

Ask Leading Questions

Cross-examination is not Speech Day for prosecution witnesses. If you allow it to be so, prosecution witnesses will say all manner of things, and give all manner of reasons in justification of what they wish to say. This will leave you in a forensic position that is akin to that of a person who has been given the task of herding cats. You will face the highly challenging task of trying to put things back into some semblance of order consistent with your case theory.

Leading questions have the effect of controlling the witness, limiting what they are able to say, and often suggesting to them the appropriate answer. Ask leading questions.

"Close All The Gates In the Paddock" Before Aiming At the Bullseye

If you want to force a witness to concede a point (or have the point as an inevitable conclusion, even if they do not concede it), then you will need to ask questions that close off all possible "escape routes" before seeking to press that ultimate point.

A common example of "closing the gates" is one often used by interviewing police as follows:

> *Q. Is that your phone?*
> *A. Yes.*
> *Q. Does anybody else use that phone?*
> *A. No*

The suspect has now locked themselves into being at locations that correspond with the call charge records of a phone that may or may not be registered in their name. Such an assertion by the prosecution will highly likely be accepted by the tribunal of fact. Any assertions to the contrary will be readily characterised as obvious lies. The gates have been closed. The bullseye awaits the prosecutor.

When You "Hit the Bullseye" – Move On

When you have got the evidence where you want it to be – leave it there and move on.

You should have sufficient discipline as an advocate not to tinker with good evidence. Asking further questions only presents a witness with an opportunity to change their evidence and undo all your previous efforts on the relevant point.

I have heard many an experienced advocate express the above ideas succinctly with words to the effect: "When Daniel escaped from the lion's den, he never went back for his hat." I confess to lacking sufficient familiarity with the Old Testament to have ever ascertained whether Daniel was wearing a hat in the first place, however the imagery is both relevant and succinct.

Watch The Witness – "Sense" The Lie

Body language is an incredibly important form of communication. Often the credibility of a witness will come down to not what they say, but how they say it. Observing the body language of a witness is very important in assisting your forensic judgment in "sensing" when the witness is lying.

In our lives we deal with real estate agents, car salesmen, friends, colleagues, acquaintances and all manner of others who are seeking to tell us a story. We assess and consider what we are being told and form a view whether we believe it. Part of what we do (whether consciously or otherwise) is take in the body language of the person we are listening to. You should utilise these everyday life skills in the courtroom to assist your forensic judgment.

A witness who looks down or away when asked a critical clarification question by a Magistrate or Judge alone is unlikely to be believed. There are countless other examples.

Listen to The Witness – Follow The Evidence / Hear The Lie

If you do not listen carefully to the witness, you may completely miss an important piece of evidence. If you listen carefully you can readily respond to unexpected issues as they arise.

As with body language, the sound of the words spoken by the witness may tell you something about the truthfulness or otherwise of the witness. A hesitant tone, distress, an awkward pause, a gruff response may betray the emotion behind the answer. In our everyday lives we make assessments as to the

credibility and reliability of those we meet and speak with. These everyday life skills should come into sharp focus during your time in a courtroom. Use them to your forensic advantage.

Be Intuitive About Human Behaviour

Just as watching and listening to the witness carefully allows you to gain a much improved assessment of the witness' credibility, so too your sense of "human nature" and "common sense" will allow you to sense an inherently implausible lie. Again, your everyday life skills and everyday instincts will play a significant role in your advocacy. Being intuitive about people is an important advocacy skill.

Consider the motive of the witness. What is it that makes this witness "tick"? What is in it for them (that is, the position they take as to disputed facts)?

Examples of such matters abound in courtrooms each and every day. Might a mother want to give evidence favourable to a son? Might a police officer want to give evidence covering for a colleague who has done wrong? Might a witness be reluctant to admit their own poor or embarrassing conduct? Might an alleged co-offender minimise their own role whilst over-stating the role of others? All such issues are identified and then pursued after reflecting and being intuitive about human behaviour.

Recruit Independent Witnesses To Your Cause.

A witness who is characterised as an "independent" witness is more likely to be believed than one who is perceived as having a motive to lie.

If an "independent" witness is against you on a matter of substance, and their reliability has not been undermined, then your case is in trouble. Conversely, if the "independent witnesses" are consistent with your case, and inconsistent with the prosecution case, you should "twist the knife" without mercy in the part of your closing address that deals with this issue.

Police officers can become your friends (for a limited time) as highly useful "independent" witnesses if the evidence suits that characterisation. A submissions to the effect that the tribunal of fact would "prefer the independent evidence of the police officer – they have no reason lie", or similarly "you should believe the police" - can have a devastating effect on the prosecution case. Law abiding citizens sitting as jurors are thought to be particularly receptive to such a submission.

If You Give a Witness a Choice of Blaming Themselves or Blaming Someone Else, They Will Almost Always Blame Someone Else.

People are often reluctant to admit to wrongdoing or mistakes. People on public display in a witness box are often especially reluctant to admit such things.

A carefully framed question offering a witness the choice of blaming themselves or blaming someone else will very often yield a response to the effect that it is someone else's fault. Play the independent witnesses off against the contentious witnesses. Make the independent witnesses blame free and the contentious witnesses blameworthy if that is what suits your case. Police are often especially good at letting themselves off the hook at the expense of their civilian witnesses.

Angry Witnesses Often Say Dumb Things.

Have you ever heard someone say something in anger that they later regret? Have you noticed that angry people often fail to give proper consideration to what they are saying? Have you ever noticed that an angry person is highly susceptible to uttering distortions, gross exaggerations, or just plain lies? All of these human failings are often seen in the witness box. Within ethical limits, it is a legitimate forensic tool to seek to elicit a degree of anger from the witness for the purposes of eliciting answers the product of the abovementioned human failings, and using those answers to impeach their credibility.

An angry witness will often amount to a "gift that keeps on giving" to the cross-examiner.

Anger can be elicited without having to ask improper or unethical questions. Perfectly legitimate questions can convey a hint of aggression through tone, manner, timing, accelerated pace of questioning etc. A common example is the typical prosecution cross-examination of an accused person who has raised a self-defence issue in answer to an allegation of personal violence. Prosecutors will often launch cross-examination in a "fast and furious" fashion with a view to angering the accused, thus showing that he / she is a person of generally aggressive disposition, would be inherently likely to be motivated by aggression or revenge rather than self-defence. On a good day, a prosecutor can have an angry accused readily admit such things, thus destroying all prospects of forensic success for the defence.

Young Working Class / Welfare Class Men Are More Often Quick to Anger (And Thus More Often Say Dumb Things)

Young men are full of testosterone. Young men are more inclined to resolve conflict through acts of aggression than other groups in the general population. Less well-educated young men are often less articulate. Such young men are often less able to engage in the forensic battle of words that often takes place during the course of cross-examination. A sense of frustration can quickly manifest itself as anger. Such anger often results is "gifts" for the cross-examiner.

You may think that the above is somewhat politically incorrect. Whether that be so or not, it is something I have noticed countless times in my career. Young working class / welfare class men often represent the easiest of all targets during cross-examination in criminal matters.

People Will Believe Documents Before They Believe People

Independent documents are a valuable source of evidence. Recurring themes in criminal litigation include accounts given to medical practitioners, counsellors, police at the scene by way of notebook entries, telephone records, banking records etc. Almost invariably the tribunal of fact will believe a contemporaneous record and / or business record in preference to a later account in oral evidence. Documents can be crucial in the assessment of the credibility of the oral evidence of a witness.

Always remember "people will believe documents before they believe people". Use this guiding thought in the course of your advocacy.

Use Other Visual Aids Or "Sight Gags".

A picture paints a thousand words. Take a picture, print it, give it a caption, and tender it through a witness. This will engage the tribunal of fact far more readily than a thousand words of oral evidence. The tribunal of fact may be perfectly bored listening to many hours or days of oral evidence. Tendering a physical exhibit or a visual aid will engage the tribunal of fact and give some "real world" context to the evidence to which it relates. In the case of jury trials, it will give jurors a visual reminder of the relevant part of the evidence during the course of their deliberations.

Do Not Allow the Witness to Repeat Their Evidence In Chief

"A lie repeated often enough becomes the truth". So spoke Vladimir Ulyanov (Lenin). Never let the witness repeat their evidence in chief under cross-examination, lest it be more likely received as the truth as a direct result of having been repeated.

Never Let Your Idle Curiosity Get The Better of You

"Young players" are sometimes prone to falling into this trap. The purpose of contested criminal litigation from the defence perspective is not to satisfy the advocate's personal curiosity about what "really happened", nor to engage in a thorough "fact finding inquiry" where "all is revealed". Sometimes "less is more".

Your purpose is to ethically present a case consistent with your instructions to persuade the tribunal of fact that your client should be acquitted. Pursuing your idle curiosity during the course of cross-examination is a dangerous thing to do and may result in a forensic disaster.

Always Have a Forensic Purpose to Your Question

If your question has no forensic purpose, then why ask it? Relevance is the touchstone of admissibility. The bench will typically allow some leeway, however you should retain a notional capacity to argue the point of any objection based on relevance.

A trap for "young players" is the mistaken belief that quantity equals quality. A misguided effort to emulate a detailed, lengthy forensic cross-examination that they have seen from a more senior colleague does not assist.

Don't Cross-Examine About Matters Not in Dispute, Or Irrelevant To The Issues At Hand.

This is a waste of your time, the court's time and your client's time. Worse still, you run the grave risk that the tribunal of fact will lose interest in you broader argument.

Save The Ultimate Point Or Inference For The Tribunal Of Fact

There is some tension between this concept and the rule in *Brown v Dunne*. Sometimes you will be required to put the point to the witness in order to be able to address on it.

Where possible, save the ultimate inference for the closing address. Putting the relevant assertion before the witness unnecessarily only allows the witness the opportunity to explain it away.

Cross-Examine With an Close Eye Towards What You Would Like to Say in Closing Address

This issue is very closely connected to the notion of having a "case theory". A closing address should seek to draw together various strands of evidence for the purposes of mounting a highly persuasive argument. Such evidence will come from a range of sources, and may or may not have been the subject of cross-examination by the defence advocate. However, if there is a theme you wish to pursue, you may be prohibited from doing so as you have not cross-examined on it pursuant to the rule in *Brown v Dunne*. It is important, therefore, to envisage closing address in advance to a substantial degree when preparing and conducting contested criminal litigation, including the preparation and conduct of cross-examination.

BUILDING YOUR SKILLS FOR THE LONGER TERM

Ultimately, experience will be your greatest teacher. However, there are number of proactive steps you can take to accelerate your learning. Some of them are discussed below:

Learn From Your Mistakes

There is no such creature as the perfect advocate, nor any such thing as the perfect cross-examination. All advocates make mistakes. The better advocates learn from their mistakes and resolve not to repeat them. Reflect upon your mistakes and endeavour never to make the same mistake twice. Endeavour to keep your mistake rate as low as possible as a direct result of learning from your mistakes.

Keep a memory bank of what worked and what didn't work. In the future you will be able to pull things out of your memory bank as required when you are on your feet.

Watch Other Advocates (Both Good And Bad).

This is useful for practitioners at all levels of experience, and is particularly useful for less experienced practitioners.

Incorporate techniques and styles of other advocates that you believe were effective. Junior practitioners in the Local and Children's Court should not be shy about learning from experienced police prosecutors in this regard.

Make a mental note of poor advocacy that you have seen, and resolve not to copy it.

Never try to precisely replicate the style of any single advocate. You do not share the exact same personality, nor the exact same set of personal or professional influences or life's experiences.

Watch as many different advocates as you can, especially in the early years of your career. You can learn many things from different advocates, and should endeavour to become a "blend" of different effective methods and techniques that you have seen and heard and are suited to you.

Books, Digital Recordings etc. on Cross-Examination

There are countless books, digital recordings etc. available on this topic published throughout the English speaking common law world. The great

majority of them will offer at least something in terms of further learning or insight into the task of cross-examination regardless of your level of experience. Take the time to read some of these books as you move through your career.

A word of caution concerning publications by authors for the UK and USA (where many of the publications arise) - there are important cultural and social differences throughout the English-speaking world. What might be regarded as an acceptable advocacy style in an American courtroom may not sit well in the Australian context. Whilst you can still learn from these sources, you may need to apply your own "cultural filter" before proceeding.

A recent Australian publication that is worthy of note is *"R v Milat: A Case Study In Cross-Examination"* by Dan Howard (published by Lexisnexis). This book reproduces in its entirety the three days of cross-examination of the accused Ivan Milat in the infamous "backpacker murders" trial of 1996. Mark Tedeschi QC, Senior Crown Prosecutor, conducted the cross-examination. His then junior counsel, Dan Howard, offers detailed commentary and analysis of the techniques used in the course of the cross-examination. It is a worthy read in this author's humble opinion.

Advocacy Courses

There are a number of courses available. The Australian Advocacy Institute and Australian Bar Association conduct courses that enjoy positive reputations within the profession.

I hope the above has been of some help. Continue on the learning curve until the day you retire.

Mark Dennis
FORBES CHAMBERS

July 2015

ANNEXURE 1

EXHIBITS / MFI LIST TEMPLATE
(kindly provided by Sophie Toomey)

Exhibit/MFI	Trial/Voir Dire	Date	Tendered by/Marked by	Witness

ANNEXURE 2

TRIAL INDEX TEMPLATE
(as used by the author)

VOIR DIRE

DATE	EXHIBIT	DESCRIPTION	T REF

MARKED FOR IDENTIFICATION

DATE	MFI	DESCRIPTION	WITNESS	T REF

CROWN EXHIBITS

DATE	EXH	DESCRIPTION	WITNESS	T REF

DEFENCE EXHIBITS

DATE	EXH	WITNESS	T REF

TRANSCRIPT INDEX

DATE	WITNESS / EVENT	STAGE	T REF
		X	
		XX	
		RX	

ERRATA

WITNESS	ERRORS	T REF