CHAPTER 10

Cross-Examination

The Purpose of Cross-Examination

The purpose of cross-examination is to elicit favourable testimony and undermine unfavourable testimony. This can be done by attacking the evidence directly or by discrediting the witness.

The scope of cross-examination is very broad. You can ask leading questions, suggest the answers, if you want, and repeat questions in several ways. You are not confined in your questioning to areas covered by the witness in chief, and you may ask questions regarding collateral or unrelated issues, if they are designed to test the witness' credibility. Although you may not be unduly abusive or insulting, tedious or repetitive, you are entitled to a full opportunity to test the witness' evidence and the witness' veracity. However, you must conduct your cross-examination fairly and in accordance with the rules of evidence.[23]

The arbitrator cannot join the fray by taking over cross-examination, nor should he or she interrupt the flow of questioning or limit the length of time an advocate takes in cross-examination. Rather, the arbitrator should rule on the propriety of the evidence, question by question, and curtail further questioning only if full opportunity has been given for cross-examination, and the questioning has become tedious or vexatious.

Should You Cross-Examine?

You have a right to cross-examine, but you have no obligation to do so. If the witness has said nothing that damages your case, there may be no point in conducting a cross-examination, unless you believe

23 The *Rules of Civil Procedure (Ontario Court of Justice)* provide: The trial judge shall exercise reasonable control over the mode of interrogation of a witness so as to protect the witness from undue harassment or embarrassment and may disallow a question put to a witness that is vexatious or irrelevant to any matter that may properly be inquired into at the trial. R.R.O. 1990, Reg. 194, s.53.01(2).

that you can elicit helpful testimony. However, while most cases are decided on the basis of the clash of opposing witnesses, cross-examination can be crucial, especially where credibility is involved. Indeed, if there is a failure to cross-examine, in circumstances where it is reasonable to expect it, the failure to do so will enhance the credibility of the witness. If you decide to cross-examine, do not feel that you have to question a witness regarding each and every matter upon which the witness has given evidence. Much of the witness' testimony may not have been damaging to your case, and may not require to be pursued on cross-examination. On the other hand, you can cross-examine regarding matters that have not been addressed by the witness in chief.

Preparing Cross-Examination

Cross-examination should be carefully thought out in advance. You will have given some thought to the witnesses you expect the opposing advocate will call before the hearing begins, and you will have prepared some questions for cross-examination, based on your knowledge of the case. Do not write down your questions verbatim, but rather note the points you wish to cover. In this way, you can concentrate on the witness rather than on your notes. But your first opportunity to actually observe the opposite party's witnesses usually occurs only when they take the stand. You must pay careful attention as they give evidence, and listen attentively to their testimony, not solely for the purpose of raising objections to improper questions, but also for the purpose of considering the implications of their evidence for the entire case, and of ascertaining possible avenues for fruitful cross-examination. Pick out the weak spots in the witness' evidence and zero in on them.

Watch the witness closely during examination-in-chief for any signs of uncertainty. Pauses or hesitations may signify that the witness knows more than he or she cares to reveal. This is your chance to take a measure of the witness' personality, and to decide on the approach you wish to employ in cross-examination. You should be in a position to take careful notes as the opposite party's witnesses give their evidence in chief. Indicate in the margin the answers you wish to explore further in cross-examination.

In preparing cross-examination, divide your notebook into three columns: the first for questions, arranged by topic or other logical method, the second for documents, exhibits and references to other

evidence, and the third for the witness' answers. You should record the essence of the witness' answers as the witness testifies, if a colleague is not able to take verbatim notes. Underline the crucial admissions you will want to quote in final argument. Usually, only four or five phrases or documents are important. If it is your witness who is under cross-examination, take verbatim notes.

Dealing With Documents

You should have relevant documents at hand, with copies for the arbitrator and your adversary, and they should be arranged in the order in which you intend to use them, so that your cross-examination is not interrupted by a search for relevant material. Remember that you may be able to introduce additional documents, which you have not been able to authenticate through your own witnesses, by putting them to the opposite party's witnesses on cross-examination. Mark exhibits clearly with an identifying number.

Engage the Witness

When you question a witness, make sure the witness faces you, and not his or her own advocate. Otherwise, the witness may look to the opposite advocate for encouragement or even signals as to how to respond. Remember that the arbitrator is usually in a position to see everyone in the hearing room. You should therefore advise members of your party not to react, verbally or visibly, to testimony that is given.

Pay Attention to the Arbitrator

Be sure that the arbitrator has an opportunity to write down your questions and the witness' answer before proceeding to the next question. Do not lose the attention of the arbitrator.

Taking Notes

It is difficult for you to make your own notes of what the witness says while you are cross-examining. Ask one of your colleagues to take notes, but note down important admissions yourself. You will be able to take careful notes as the opposite party's witnesses give their evidence in chief. Indicate in the margin the answers you wish to explore further in cross-examination.

Discrediting the Witness

In cross-examination, you are not bound to accept the witness'

answers. You are entitled to test them by further questioning, and to bring out inconsistencies. You can discredit a witness by putting to the witness: contradictions in his or her own testimony; conflicts with the testimony of others; prior inconsistent statements; questions testing the witness' memory, perception, judgment, and opportunities of observation; questions bearing on the witness' motivation, objectivity, character and credibility; and previous criminal convictions, if any.

Attempt to bring out a motive that would explain the self-interest of the witness in giving the answer that he or she has given so that you can later contend that he or she is biased, partial, or lacking in objectivity. However, be careful in attacking character, since if you fail, you may shore up the witness' credibility. Moreover, be cautious in suggesting directly to a witness that he or she is lying. The witness will probably only deny it.

If you are testing the reliability of a witness' recollection of an event, you may explore the mental state and opportunities for observation of the witness, as well as his or her powers of recall. For example, you may ask him or her whether he or she has a clear recollection, how it is that his or her recollection is so clear on one point, but not on another, whether he or she was in a position to see and hear what occurred, why it is that he or she was paying so much attention, whether he or she made notes of the event in question, whether his or her ability to observe was affected by anything relating to his or her own condition (e.g. eyesight, hearing) or to external circumstances (e.g. bad weather, darkness). In short, if you cannot attack a witness' honesty by suggesting improper motive, you may be able to undermine the reliability of his or her evidence by suggesting poor memory or impaired perception.

Turning Witnesses to Your Advantage

Remember that you are not restricted in cross-examination to asking questions only about areas which the witness has covered in chief. You are free to ask the witness questions about any matter that is relevant to the issues, or about collateral or unrelated matters, if the questioning is for the purpose of testing the witness' credibility. Remember that it may be in your interest to ask a witness questions not only regarding what he or she has said, but what he or she has left out, or not said. Consider asking about other areas of which the witness may have knowledge, and probe these areas to determine whether you can elicit helpful testimony. Test the wit-

ness, for example, by asking him or her about conversations he or she may have had with other witnesses regarding the events in question. Often, the witness will not have been prepared for this approach, and may disclose evidence valuable to your cause. By this means, you can occasionally turn a witness to your advantage.

Collateral Questions As to Credibility

In order to test a witness' credibility, you may question the witness regarding matters which are not relevant to the issues in dispute. If the witness is seen to be untruthful regarding these collateral issues, you can argue that the witness' evidence as a whole cannot be relied upon. However, in order to prevent a series of mini-trials into the truth or untruth of unrelated collateral issues, you will not be permitted to call evidence to contradict the witness' answers on these points. This does not mean that the witness' answers have to be accepted as the truth. Moreover, you are entitled to probe the witness' answers, but you cannot call contradictory evidence if the witness insists on giving the same answer. There are exceptions to the rule against calling evidence on collateral issues. You can, for example, call evidence relating to the witness' bad character, lack of credibility, and any mental defect rendering the witness incapable of belief.

Cross-Examining on Notes Used to Refresh Memory

You can, if you wish, ask a witness to produce any notes or documents, whether or not authored by the witness, which are used to refresh the witness' memory *while* testifying, whether or not the notes or documents are otherwise protected by privilege. Then, you can cross-examine on those parts of it that relate to the issues in the case, in order to show inconsistencies with the witness' testimony. You can mark the notes or documents as exhibits. If it becomes apparent that the witness has used notes or documents to refresh his or her memory, *before* giving evidence, it is for the arbitrator to decide whether such notes or documents must be produced. It can be argued that they should be produced in order to test whether the witness' recollection is accurate. An attempt should be made to extract form the witness any notes in his or her possession, contemporaneous with the incident, that may be relevant to the issues.

Raising Prior Inconsistent Statements

One of the most effective methods of cross-examination is to confront a

witness with a prior inconsistent statement. The purpose of this type of cross-examination is to show that the witness should not be believed as he or she told a different story on other occasions. For this purpose, it is important to obtain prior statements of a witness, preferably before the hearing begins. Such statements can be used to discredit the witness. Indeed, evidence of prior inconsistent statements of a witness other than an accused may now be substantively admissible if the necessity arises and the evidence is reliable: see *R. v. B. (K.G.)*, footnote 21 at pate 91.

However, before you confront a witness with a prior inconsistent statement, you should set the hook by committing the witness to his or her testimony before proceeding to contrast it with the prior statement. First, ask the witness whether or not he or she wishes to affirm or change the evidence he or she has given. Then, ask the witness if he or she made a prior statement, giving particulars of the date and circumstances. If the prior statement is admitted, you may cross-examine upon it. If the witness denies making such a statement, you may show the witness the statement. If the witness continues to deny having made the statement, you may call another witness to prove that it was made, although this would ordinarily be done as part of your own case.[24] Whether the entire statement should be marked as an exhibit is within the discretion of the arbitrator. For this reason, before raising a prior inconsistent statement, you should weigh the advantage of contradicting the witness against the effect of the disclosure of other matters in the statement that might be prejudicial to your case.

Cross-Examining About Criminal Record

You can cross-examine about a previous criminal conviction, or other criminal misconduct, on the basis that this is a matter going to credibility, either under common law or pursuant to statute.[25] If the conviction is denied, you can prove it by producing a certificate. However, the impact of this evidence on the witness' credibility may be limited, especially where the witness acknowledges his or her record when giving evidence in chief.

Give the Witness A Chance to Explain

If you intend to discredit a witness by calling evidence to contradict the witness' version of facts, then you must put to the witness the substance of the contradictory evidence you propose to adduce, and

24 *Canada Evidence Act,* R.S.C. 1985, c.C-5, s.10; Ontario *Evidence Act*, R.S.O. 1990, c.E.23, s.20. See Appendix 1.
25 *Canada Evidence Act*, s.12; Ontario *Evidence Act*, s.22. See Appendix 1.

give the witness a fair opportunity to explain his or her position. You might introduce the question by stating: “I will be calling witness X who will say the following—what do you have to say to that?” It would be unfair to fail to challenge a witness’ evidence in cross-examination, and then to ask the arbitrator to disbelieve what the witness has said, although not one question was directed either to the witness’ credibility or to the accuracy of the witness’ testimony. This rule, laid down by the English House of Lords in *Browne v. Dunn*,[26] and followed by courts and tribunals in Canada, is designed to accord fairness to witnesses and to the parties.

The rule does not apply where the evidence is introduced for purposes other than impeaching credibility, e.g. simply to add details of conversations raising no adverse implications regarding credibility. Moreover, the rule is not absolute, and may be relaxed, for example, where the testimony is of such a nature that it is obvious that credibility is in issue. There is also a discretion to allow such evidence, even though the contradictory version of events was not put to the witness when he or she initially gave evidence, if the witness has an opportunity to dispute that version by giving evidence in reply. However, the discretion is exercised sparingly because the witness, if called in reply, would be subject to further cross-examination.

Don’t Suggest Misconduct You Can’t Prove

While you cannot give evidence yourself, you can suggest that the facts are such and so and ask the witness to confirm or deny it. However, it is dangerous to suggest misconduct that you cannot prove, and you should not suggest facts if there is no reasonable basis in the evidence, or if you have no information or material in your possession which would give rise to a reasonable belief that they are true.

Querying the Failure to Call a Witness

If you intend to argue, at the conclusion of the hearing, that an adverse inference should be drawn against the opposite party, because of its failure to call a particular witness, you should lay the groundwork by asking questions of other witnesses that underline the absent witness’ material role in events, and confirm that the witness is either present in the hearing room, or available to be called as a witness.

26 (1893), 6 R. 67 (H.L.).

Can You Cross-Examine a "Friendly" Witness?

Where the opposite party has called a witness who is friendly to your cause, i.e. with a natural bias in favour of your case, you may not be permitted to ask leading questions, or cross-examine. If you are permitted to cross-examine, in such circumstances, the arbitrator may warn that little weight will be given to answers to leading questions. It is better practice to question such a witness as if you were examining him or her in chief.

Hearsay Questions Limited

You cannot ask questions which are likely to result in the introduction of inadmissible evidence, such as questions which call for information based, not on personal knowledge, but on hearsay. If you do, and the opposing advocate does not object, you run the risk that the person who gave the information may not be called as a witness, and you will have lost your opportunity to cross-examine that person.

Opinion Evidence Restricted

You may not ask questions that invite opinions, unless the witness is qualified as an expert. Your questions should be confined to the facts. You should not ask a witness legal questions, or debate points of law.

Privileged Matters Out of Bounds

You may not ask questions about privileged matters, such as discussions during the grievance procedure.

Questioning Must be Directed

In deciding which path to follow in cross-examination, you must have a game plan. All your questions must be consistent with your theory of the case. Every question should be directed to a specific purpose. Random, aimless questioning will only lead you into blind alleys. Try to ask questions that require a "yes" or "no" answer, i.e. closed questions. Open-ended questions, such as "what happened?", allow the witness to advance his or her own case or explain away his or her conduct. If the opposing advocate argues that you are cutting off the witness, respond by noting that the witness will have an opportunity to explain his or her answers on re-examination. At all times, you must be in control. Try to frame questions in such a way that the witness has no option other than to give you the information you seek, and

preferably with a “yes” or “no” answer. Don’t ramble. All questions should be directed to a specific goal, calculated to extract a particular expected response. There is no room for aimless interrogation.

Avoid Open-Ended Questions

Be careful about open-ended questions since they may allow the witness to supply information favourable to his or her position. Avoid questions that give an opportunity to explain, such as questions beginning: “Why?” or “What do you mean?” or “Why do you say that?” or “What happened?” or “How could you have seen that?” You should probe critical areas, where a witness may give a damaging answer, gingerly, on a step-by-step basis, so that you can retreat quickly, if need be, before any damage is done. The questions must be controlled, directed to producing certain answers. Do not disclose the purpose of your questioning. Otherwise, the witness may be evasive.

Step By Step Questioning

Your questions should be focused on a particular point. The witness should not be given an opportunity to give expansive answers. If the witness persists in doing so, ask the witness to inform you if he or she cannot answer “yes” or “no” to a specific question, and then rephrase the question. You cannot insist on a “yes” or “no” answer, but you can insist on an answer that is responsive to your question. Repeat the question if necessary. If the witness is evasive, you may ask the arbitrator to direct the witness to be responsive to your questions.

Closing the Escape Hatches

Before you pose a direct question on a critical matter, try to close the escape hatches by asking a series of preliminary questions so that, when you spring the trap, the witness cannot explain away his or her conduct. Avoid signalling or telegraphing the purpose of your questions since, if you do so, the witness will contrive to prepare an escape.

Don’t “Retravel Direct”!

Do not “retravel direct”. In other words, do not repeat to the witness, one by one, the answers that he or she has given on his or her examination-in-chief, with the suggestion that he or she is lying. By doing so, you will succeed only in giving the witness an opportunity to reiterate his or her earlier answers, but with greater emphasis. On the other hand, once a witness has made an admission, do not repeat the

question in case the witness uses the opportunity to water down the answer. However, if the witness gives an answer that is damaging to your case, you may later want to approach the same subject matter, through a different set of questions, in order to lessen the damage.

Unsettling the Witness

It is not necessary to follow the order in which the witness gave evidence in chief or to pursue questions in a logical or chronological sequence. An orderly approach will allow the witness to consider his or her answers more carefully. You may shuffle the cards, and switch topics, change your pace and vary the tone of your voice, focus intensely upon a particular topic, or zig zag randomly from subject to subject, with a view to unsettling the witness. You may also speed up the pace of questions and answers so that the witness has less time to develop guarded responses. You can also take your time, even leave silences. Think over the witness' previous answers, as you proceed with your questioning, in order to determine whether there are inconsistencies that ought to be probed.

Questioning—Friendly or Aggressive?

Depending upon the witness, you may want to approach cross-examination in a friendly, rather than an aggressive, manner, on the theory that one can catch more flies with honey than with vinegar. Using this approach, you would begin your cross-examination by framing questions with a view toward maximizing agreement by the witness. Your tone should be matter of fact, not accusatory, for gentle questioning will ally fear, and disarm defiance. You may even smile encouragingly, and ask the witness to "help me out here". Often, witnesses are anxious to please, and to be accommodating, and you can promote this attitude by giving the witness the impression that you expect him or her to answer fairly. If the witness is evasive or defensive, you can become sharper in your questioning.

On the other hand, if you cannot gain the witness' confidence, it may be as well to try to unnerve him or her, right at the outset, by shaking the witness on a point that you are confident you can successfully establish. The advantage of this approach, if you succeed, is that you will sow doubt in the mind of the arbitrator regarding the rest of the testimony that the witness has given.

Your approach must be tailored to the witness. With decent, honest witnesses, there is no need to be abrasive. Indeed, harassing

a mild-mannered witness will only win the witness the sympathy of the arbitrator. If the witness is belligerent, the arbitrator will likely conclude that the witness can take care of himself or herself, and you can afford to be firm.

Don't Go Too Far

Avoid asking a question to which you don't know the answer, if the wrong answer could damage your case, unless you have nothing to lose, since your case is otherwise a lost cause anyway. And be careful not to ask one question too many. Stop at the right point. If you obtain an admission that is helpful to your case and damaging to your opponent, avoid the temptation to gild the lily. You may undo all the good you have done.

Driving the Witness to Extremes

If the witness proves to be unyielding, and prepared to go to any extreme to oppose your case, it may occasionally be an effective tactic to allow the witness to make more and more exaggerated statements, so that at the end you can paint the witness' testimony as either unreasonable or incredible.

Suggesting the Opposite

Sometimes, if a witness is contrary or querulous, you may want to suggest the opposite of the answer you really wish, so that the witness will not know where you are going.

Dialogue with the Witness

A very effective method of cross-examination is to retrace with the witness his or her course of reasoning; the witness may become so involved in the dialogue that matters are revealed that would otherwise have been concealed.

Make it Clear and Simple

Do not ask compound or double-barrelled questions which contain several questions within themselves, since it will not be clear which question the witness is answering. Use simple language, and make your questions short and intelligible. Wait until the witness has answered one question before you ask another. But don't rush through a series of prepared questions. Listen to the answers that are given in case you wish to pursue them further with additional questions. Even if the witness' answers are off topic, it may be use-

ful to follow them up at the time, rather than leaving them for later, when the witness may not be so forthcoming.

Don't React

Do not allow yourself to become excited or angry in questioning a witness, unless it is intentional. If the witness should become angry, it is even more important that you remain cool. Do not show surprise, disappointment or defeat. The arbitrator will notice it if you do. Act as if you expected each answer that is given.

Don't be Argumentative

Avoid being argumentative by presenting your own views in the course of questioning. Asking questions beginning: "Isn't it a fact that. . .?" or "I suggest that. . .", or "Isn't it true that. . .?" tend to invite denials, and can end up being argumentative. Do not try to get the witness to admit he or she is a liar. It won't work. Most witnesses don't lie, they just shade the truth. Occasionally, in questioning, you may wish to make a point, so that the arbitrator will know where you are headed, but on the whole you should avoid mixing argument with evidence. It will only alert the witness and the opposing advocate to where you are going, so that one can evade and the other prepare a response. The time to pull the threads of your evidence together is during final argument.

Asking About Witness Preparation

It may be useful to ask a witness whether he or she has discussed the matter in advance of the hearing with other witnesses or with his or her advocate in the presence of other witnesses, so that you can determine whether evidence has been influenced or fabricated. You may also inquire whether the witness has refreshed his or her memory prior to giving evidence by consulting notes or documents; in such a case, you should request that they be produced.

Dealing with Obstructive Tactics

Do not permit the witness to sit in a position where his or her advocate is in the witness' line of sight. The witness should be facing you, and not be able to seek help from his or her advocate or others in the room. Watch the opposing advocate to make sure that he or she does not signal to the witness what answers to give by nods of the head. If he or she does this, protest to the arbitrator that the oppos-

ing advocate is assisting the witness. If your questioning reaches a critical point, and the opposing advocate interjects in an effort to distract attention, or to give the witness time to think, or to suggest an answer, demand that the witness be excluded and point out to the arbitrator the stratagem of the opposing advocate.

Object to the opposing advocate's conduct as an attempt to interfere with legitimate questioning, and ask the arbitrator to direct the opposing advocate not to disrupt your cross-examination. Even if the arbitrator does not respond to your request, this will have a dampening effect on the readiness of the opposing advocate to interrupt you further. Where the opposing advocate makes an objection, and then launches into an argument that may indicate to the witness what answers he or she might give, you should move to block this tactic by requesting that the witness be excluded while the argument proceeds. When a ruling is given on the propriety of the question, the witness can then be asked to return to the hearing room. Examples of common objections to questions asked on cross-examination are set out at the end of this chapter.

Cross-Examining the Expert

If the witness is an expert, you may seek to challenge his or her qualifications. If that approach is not fruitful, you can question the facts on which the opinion is based, or the theory on which the opinion rests. Confront the witness with the views of other experts or authorities who hold contrary opinions.

Caution the Witness

If there is a break in the proceedings during cross-examination, ask the arbitrator to remind the witness that he or she may not discuss the case with anyone during cross-examination, including his or her own advocate. Detail one of your own party to keep an eye on the witness. You are entitled to ask the witness, when the hearing resumes, if he or she has discussed the matter with anyone during the recess, and what was said. If witnesses are excluded, arbitrators generally caution witnesses that they must not discuss their evidence with others, before all the evidence is concluded. Guidelines respecting communications with witnesses giving evidence are set out at the end of this chapter.

A Final Note

Close your cross-examination on a strong note, with a question that drives home the point of your case. End with a bang, not a whimper.

COMMON OBJECTIONS TO QUESTIONS ASKED ON CROSS-EXAMINATION

☐ The question is irrelevant to the issues, and is not designed to test the witness' credibility.

☐ The question invites a hearsay answer, and does not fit within the exceptions to the rule against hearsay, which include admissions, declarations against interest, statements regarding mental or physical state, business documents and medical records, testimony from previous proceedings, and contemporaneous statements (*res gestae*).

☐ The question relates to privileged matters, such as discussions during the grievance procedure.

☐ The question calls for an opinion, although the witness is not qualified as an expert.

☐ The question calls for speculation or a hypothetical answer, rather than facts.

☐ The question lacks a foundation in that it suggests facts which have not yet been proved in evidence.

☐ The question suggests misconduct, although the advocate asking the question has no evidence to support it.

☐ The question includes a misstatement of previous testimony.

☐ The questioning is unduly harsh and oppressive, and is designed to bully or badger, demean or ridicule.

☐ The question is confusing, or it includes several questions which cannot be answered at the same time, i.e. it is a compound or double-barrelled question.

☐ The question relates to past practice or statements made during negotiations, and is asked for the purpose of determining the meaning of the collective agreement, although this is permitted only where the agreement is ambiguous or an argument of estoppel is asserted.

☐ The question calls for a legal opinion, e.g. an interpretation of the contract, which is a matter for the arbitrator to decide.

Note: It is advisable to object only when it serves a purpose to do so. It makes little sense to object, even if the question is arguably improper, if no harm is done to your case by the witness' answer. When you do object, address the arbitrator, not the opposing advocate, and give your reasons for the objection.