Civil Trial Evidence
The Rules of the Road

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I. INTRODUCTION

It could be said that running a trial is like driving a big bus. You have to know the route you need to follow and what stops you need to make along the way to ensure you get to the end having delivered everything. There is nothing worse than preparing your closing argument and realising that you are missing an important piece of evidence. (Of course, that is avoided by preparing your closing argument before the trial even starts, but trial preparation itself is a topic for another day.) Sadly, much of what we see by way of examination-in-chief and cross-examination we see on television or at the movies, and neither is a very good benchmark for reality. This paper will cover the basic rules for putting in evidence through examination-in-chief and cross-examination and the key practical strategies relevant to each. It must be noted that entire books have been written on each of these topics alone and therefore this paper covers only the basics.

II. EXAMINATION-IN-CHIEF

THE THEORY

According to John Sopinka, Sidney N. Lederman and Alan W. Bryant:[1]

> Evidence adduced in examination-in-chief is generally designed to serve one of the following purposes, which are not mutually exclusive:
>
> (1) build or support the calling party's case;
>
> (2) weaken the opponent's case;
>
> (3) strengthen the credibility of the witness;
>
> (4) strengthen or weaken the credibility of other witnesses.[2]

[1] *The Law of Evidence in Canada*, 2d ed. (Markham, Ont: LexisNexis, 1998).
[2] *Ibid.* at 909.

The basic rule on examination-in-chief is that a party is not entitled to ask his or her own witness leading questions. It is therefore improper:

> (1) to suggest the answer in the question itself;
>
> (2) to have the witness agree to the contents of writing produced to him or her; or
>
> (3) to have the witness corroborate the evidence of another witness.[3]

The rationale for the leading question rule was discussed by the Court in *Maves v. Grand Trunk Pacific Railway*,[4] wherein Beck J. set out three reasons for this rule:

> First, and principally, on the supposition that the witness has a bias in favour of the party bringing him forward, and hostile to his opponent. Secondly, that the party calling a witness has an advantage over his adversary, in knowing beforehand what the witness will prove, or at least, is expected to prove; and that, consequently, if he were allowed to lead, he might interrogate in such a manner as to extract only so much of the knowledge of the witness as would be favourable to his side, or even put a false gloss upon the whole…[and] third…that a witness, though intending to be entirely fair and honest, may, owing, for example, to lack of education, of exactness of knowledge of the precise meaning of words…or of alertness to see that what is implied in the question requires modification, honestly assent to a leading question which fails to express his real meaning, which he would probably have completely expressed if allowed to do so in his own words.[5]

According to David M. Paciocco and Lee Stuesser,[6]

> [i]t is what the witness has to say that is of importance, not what the lawyer wants the witness to say…Open-ended questioning enables the witness to tell his own story and reduces the influence of the lawyer. Answers to open-ended questions are often persuasive and credible because the responses will be natural and are likely to be seen to be independent and untainted. Depending on who the witness is, well-organized open-ended

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[3] Gordon D. Cudmore, *Civil Evidence Handbook*, looseleaf (Toronto: Thomson Carswell, 1994) at 9-10 to 9-10.1, relying on *R. v. Situ*, 2005 ABCA 27, and *R. v. Legge* (1936), 11 M.P.R. 144 (N.S.C.A.).
[4] (1913), 6 Alta. L.R. 396 (S.C.).
[5] *Ibid.*, referring in part to William Best, *Principles of the Law of Evidence*, 11th ed. at 624.
[6] *The Law of Evidence*, 4th ed. (Toronto: Irwin Law, 2005).