Dealing With Challenging Witnesses and Counsel

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Questioning

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INTRODUCTION

This paper will deal with challenging witnesses and counsel and review ethical considerations. It is recommended that counsel in fact consider these witnesses and counsel as merely "challenging" versus "difficult" or "problems" and maintain perspective versus allowing these potential hurdles to distract, frustrate and annoy counsel thereby reducing their ability to conduct an effective questioning. The goal is to provide practical advice to allow counsel to manage the various "challenging" scenarios that may arise.

CHALLENGING WITNESSES

Hard-to-Manage

It is important for counsel to maintain control of the questioning. In the case of witnesses who are rude, sarcastic or emotional, a good guide is to simply stay the course and not lower one's self to the level of that witness. While tempting, "fighting fire with fire" may more likely simply escalate the scenario, encouraging or rewarding the undesired behaviour or causing the witness to feel justified in their actions.

Maintain a professional and unemotional tone but be firm. For a witness whose personality is normally difficult, one can likely only make the best of it. For a witness who is attempting to intimidate or obfuscate, an even tempered response sticking firmly to the questions may result in the witness following your lead and giving up their ineffective tactic.

For witnesses that are not very forthcoming in giving their evidence and it has to be dragged out by many questions, Robert White, Q.C., recommends additionally considering a speech through the party's lawyer noting that at the rate being taken, the questioning will take much longer and be much more expensive, including counsel's fees, the court reporter fees and court costs should the examining counsel be successful in advancing the client's case. If such a speech does not work, be patient and carry on.

For witnesses that provide too much information or answer every question but the one asked, ensure that no leeway is given and that the question is asked again (or repeated by the court reporter) until an answer is obtained. In this scenario, a similar speech directed at counsel may assist in the progress.

Self-Represented

Particularly in cases of self-represented litigants, it is important to ensure that they confirm the oath or affirmation they have given to tell the truth and that it is binding on their conscience.

The approach to the witness is otherwise similar to the advice above. As there is no legal counsel protecting the interests of a self-represented litigant, it is crucial that counsel do their best to stick to relevant and material proper questions to fulfill their obligations in the administration of justice, and that they not be seen in any way to be providing legal advice or otherwise putting themselves in a potential conflict position. It may be more important to consider keeping discussions on the record and even confirm that they understand that you are not their counsel, and you are not providing them legal advice.

An extra grain of patience is required and advice provided above through counsel would be given directly to the witness.

"Forgetful"

Open-ended questions are often a good place to start in determining the credibility of a witness in terms of the accuracy of their recollection (as opposed to credibility in terms of truthfulness).

Where the witness does not recall, referring to relevant records that have been produced may assist in obtaining the admissions sought. If their memory is not refreshed by this process, you should consider clarifying that they are not disagreeing but just have no recollection. They may even be prepared to agree with the evidence presented in the records.

Where the forgetting just appears to be convenient, or in any event, obtain the recollections possible and the convenience of the "forgetfulness" can be left for the judge (and opposing counsel in deciding to proceed to trial) to determine. Also, going the extra step in confirming that the witness is not stating something did not occur just that they do not recollect it may be helpful to your case.

Language Barriers

A party or counsel may indicate that an interpreter is required. To ensure that there is no argument about a question being misunderstood or an answer being unclear or needing clarification due to a language barrier, in the normal course, a request for an interpreter should be accepted. It is in counsel's best interest to obtain the best interpreter and as costs are usually ultimately borne by the successful party, arguments over who should pay for the interpreter should be avoided. An interpreter should be experienced both with the language (and perhaps dialect) and with