Legal Education Society of Alberta

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Criminal Procedure Fundamentals

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Direct Examination in Criminal Cases

Criminal Procedure Fundamentals

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DIRECT EXAMINATION IN CRIMINAL CASES

INTRODUCTION

In every day conversation, active listening helps us to understand stories better. It is natural for a person to interrupt a narrator frequently, or assist with a word when the speaker appears to be struggling. We sometimes fill in the blanks to keep a story moving. These natural tendencies are exactly why direct examination can be counter-intuitive and tricky. Once your witness is under oath, your ability to assist her is very limited. You can, however, structure the examination so that evidence is presented in the clearest and most comprehensible way possible. You can prepare your witness, so that once the oath or affirmation is taken, it is a simple matter of teaching the court what the two of you already know. Provided preparation is adequate (both of the witness and your questions), you should be able to conduct a competent and effective direct examination, even in the most difficult cases.

PREPARATION

Provide the Witness with the Materials they Require

The more serious and complex the case, the more important it is that you allow for adequate time to prepare your witness. Witness preparation does actually vary from prosecution to defence. The Accused, having right to full disclosure[1], has the right to hear the entire case against her before discussing testimony with her lawyer. In the case of preparing the Accused, it is not improper for her to review the anticipated evidence of all other witnesses before you prepare your examination of her. It is advisable to do a mock examination at least once to ensure your client is comfortable with being examined.

All witnesses should receive a copy of their statement to review. Advise your witnesses that the statements are meant to help refresh their memories. Issues may arise, such as contradictions between statements. It is improper, at any stage, to counsel a witness on how to deal with inconsistencies in their statements. It is not, however, improper to advise a witness to turn his mind to any possible explanations for inconsistencies.

You should also make copies of your witnesses' statements for them to have on the stand. While they cannot rely on their statements to give their testimony, they may be able to refer to their statements to refresh their memories (with permission from the court), while testifying.

[1] R. v. Stinchcombe, 1991 3 S.C.R. 326.

Get to Know the Witness

Over the course of your practice, you will encounter witnesses with varying levels of sophistication and range of vocabulary. Before asking your witness to relate a series of events, you need to evaluate how he can best do that. Using words a witness does not understand will not only lead to ineffective, but also potentially misleading, evidence. You will want to assess how the witness feels most comfortable telling a story. Especially in sensitive cases, such as sexual assault, it helps to know whether the witness would prefer to tell the difficult part first, and then discuss the surrounding details afterward. You may wish to ascertain points such as the witness' strongest memory of the events, and work outward from that memory.

These considerations you make regarding strategy are all borne out of your knowledge of the witness. For that reason, the timing of your meeting is also important. As defence counsel, you will obviously want to meet with your client as soon as possible, but for all witnesses, an additional (or occasionally first) meeting should take place closer to the trial. You will want to know what frame of mind the witness will be in at trial, and where their current comfort level is in terms of explaining their version of events.

Advice to the Witness

The most basic and essential piece of advice to every witness is "tell the truth". It is important to remind witnesses that the ultimate result of the trial is not their responsibility, and testimony should not be tailored to any particular result. In addition, witnesses should be given brief tutorials on trial procedure (who the lawyers are and what types of questions they will ask), and rules of evidence (hearsay, opinion vs. fact, *Browne v. Dunn*, character evidence). Particularly in cases of a sensitive nature, advising the witness about the rule in *Browne v. Dunn* is important. It is much easier for the witness to stay calm and simply answer a question that would otherwise be offensive, if she knows opposing counsel *must* put the question to her, as a rule of fairness.

Special Witnesses

Experts

An expert witness has had years to understand her field of study. She has, perhaps, a couple of hours to teach it to you and the trier of fact. It is essential that you understand this evidence before presenting it to the court. Your meeting(s) will be to ensure that she can teach difficult material to *you* in a format you understand, so that she may, in turn, teach it to *the court* in a format that is easy to understand. Before calling an expert witness, make sure that adequate Notice of Intention is provided under s. 657.3 of the *Criminal Code*.