Rudimentary Practice Notes for the Inexperienced Trial Lawyer*

This lecture covers rudimentary rules of practice. These rules apply to (1) examination in chief, (also known as direct examination), (2) cross-examination, and (3) re-examination in chief, (frequently called redirect); and will be dealt with under the following headings: the approach on examination in chief, cross-examination, and conduct.

Before outlining these rudimentary rules, it is helpful to give some indication of what is meant by direct examination, cross-examination, and re-examination in chief.

Examination in chief and re-examination are examinations by a lawyer of his own witnesses. Cross-examination, on the other hand, is the examination by a lawyer of his opponent's witnesses.[1] When examination in chief is used, the lawyer is attempting to elicit the evidence from his own witnesses. As will be seen, counsel is not permitted to lead the witnesses, except as permitted by law or by practice in the courts. With respect to the cross-examination of an opponent's witnesses, there is a different thrust.[2] The four aims of cross-examination are: 1) to destroy the evidence in chief, 2) to weaken it, if one cannot destroy it, 3) to elicit new and helpful evidence to the client's case, and 4) to test the credibility of the witness and to show that the witness' testimony is untruthful or unreliable because of a lack of knowledge of the facts. If none of these four specific aims can be achieved, counsel should — no matter how difficult — force these words to be uttered: No questions![3]

A. Examination in Chief

1. There is no substitute for preparation. Collectively or individually, experience, intelligence, talent, technique, personality and humour will not overcome the inevitable results of preparation. Conversely, preparation is stimulated by, and success the natural result of, all of those enumerated components.

2. Witnesses must not be led in direct examination. Evidence given in answer to a leading question is of the weakest character. Leading the witness refers to that manner of questioning in which counsel indicates to the witness by the words used in the question that answer he expects. For example, did

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*Editor's Note: The following is taken from a lecture given to students of the New Brunswick Bar Admission Course, 1983. It represents the observations of an experienced trial lawyer.

[1]Cross examination may be permitted in certain other circumstances such as where the witness has been declared hostile by the presiding judge.

[2]"Cross examination: 'Sir you took an oath to tell the truth?' 'Yes.' 'When was the last time you went to church or synagogue?' Is that the kind of cross examination that you need to know about and will want to use? Will you ever use such a question on cross examination? Not if you *are* in your right mind, because it is greasy kid's stuff." The author is Irving Younger, *The Art of Cross Examination*, (American Bar Association), page 5, No. 1.

[3]The Importance of Cross-Examination:
1. If it is a criminal case, the risk to your client is jail.
2. If it is a civil case, the loss to your client is money or property.
3. The risk and loss to you is your reputation.

Carvin Marven have a brown, six inch hunting knife in his hand?

It is permissible, however, to guide the witness. The proper line of questioning therefore would be: Did Carvin Marven have anything in his hands? What was it? Describe it. Which hand?

Another example of a leading question is as follows: Did you see a car speeding from the opposite direction? The proper sequence of questions in direct examination would be: Did you see any other traffic? What direction was it going in? What impression did you have of the speed of this other vehicle?[4]

3. But, do lead your client in giving full name (including spelling it), age, address, occupation and any other innocuous vital statistics.

4. And do lead your client as to the date, time and place about which you wish to ask questions unless the date, or time, or place, is obviously in issue. For example, "Were you in Fredericton at the corner of King and Queen on May 15th of this year around two o'clock in the afternoon?" "Yes." "Tell the Court what happened then and there in relation to this case".

5. Use simple, uncomplicated, words in short sentences. Plain language is important so that the message intended to be conveyed to the court will not be missed. If colloquialisms or slang are used, make certain that they are explained before the examination is concluded.

6. A client's case should be presented in a complete, a serious and a convincing tone and manner. The accused, his friends and relations very seldom see any value in the levity of counsel no matter how deep and learned is the humour.

7. An ambiguous question is almost as much to be avoided and condemned as an ambiguous answer. Questions should be clear, certain, explicit, intelligible and do not settle for an unresponsive, vague or equivocal answer.

8. Never underestimate your adversary. Often it is too late when counsel finally realize the true thurst of their adversary's question.[5]

9. Do not try to prove the contents of a written document by oral evidence whether on direct or cross examination.[6]

10. When the witness forgets, do not lead him. There are legitimate ways of assisting or refreshing memory such as by looking at a written instrument, memorandum or book made by or in the presence of the witness. Another

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[4]See the S.C.C. case of *Graat* v. *The Queen* (1983) 2 C.C.C. (3d) 365 at 379 et seq; (1983) 31 C.R. (3d) 289 et seq. as to the permissibility of the opinions of lay witnesses.

[5]Following admission, the second biggest disappointment in a lawyer's life is the abrupt dawning on the lawyer of his or her fallibility. When Oscar Wilde arrived in New York in 1882 to commence his U.S. and Canadian lectures he advised the Customs Officers that the only thing he had to declare was his genius. Presumably he was not addressing fellow geniuses. Counsel will find that there are many lawyers, judges and others of superior ability who will be quite pleased to bring you down to a size which fits your hat.

[6]Some exceptions: documents lost or destroyed; documents in exclusive possession of the other side which refuses to produce them after subpoena or notice; or where counsel makes admissions.

method of refreshing memory is from a transcript of evidence given on a previous occasion.[7]

11. You are permitted to lead and to put hypothetical questions to your witnesses called as experts.

B. Cross-Examination

12. Do not ask a question to which you don't know the answer.[8]

13. Lead the witness on cross examination. Never free the witness to wander. A witness called by the other side is consciously, or unconsciously, mentally attuned against your client even if it is only a slight and imperceptible deviation. After all, the witness has been interviewed and briefed by a professional lawyer opposing you. The witness will identify with the side calling him or her.

14. Stop... and sit down... when the answers are favourable to your client. Do not try to improve on them unless absolutely necessary. The greatest temptation is to proceed, not to stop. But do stop. Sit down. Sit on your hands, keep your eyes and ears open and your mouth shut. Curb the desire to improve on the answer.

15. Counsel should stay seated, with eyes and ears open and mouth shut if the other side's witness has done his client's case no harm.[9]

16. Do not ask the witness on cross examination to repeat what the witness said on direct. It only emphasizes the witness' testimony.

17. Make eye contact with the witness at all times.

18. Watch for hand, foot and other body movements which are not the usual and expected signs of general nervousness but are unconscious give-aways of the questionable truthfulness of the answer.

19. Pay close attention to the witness' choice of wording in answer to your question. This will expose evasiveness.

20. Pay attention to the tone of voice used by the witness. What word or phrase is the witness emphasizing?

21. When attacking the credibility of the witness, one should determine

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[7]W.B. Williston & R.J. Rolls, *The Conduct Of An Action*, (London: Butterworths, 1981), Chapt. V, pages 71-77.

[8]Questions in Preliminary Hearings in criminal cases and at Examinations for Discovery and Interrogatories in civil cases are exceptions by the very natures of those three processes. CAVEAT: The evidence may be used at trial if the witness dies or in such other allowable circumstances as set out in the *Criminal Code*, R.S.C. 1970, Chap. C-34 and *Evidence Acts*.

[9]Unless the witness is a convicted perjurer: Q. You have been convicted of perjury, twice? A. Yes. Q. My learned friend is aware of your perjury convictions? ... A. Yes... Q. And yet (s)he called you here to testify? Answer to the final question is immaterial. If the witness says "No", the other lawyer did not know of the previous convictions and it shows poor case preparation.

whether the question is being asked in good faith. If it cannot pass the good-faith test, do not ask it.[10]

22. Confront a witness with the witness' previous inconsistent statements if it is desired to discredit or lessen the witness' credibility.

23. Be brief in cross-examination. The lawyer is aware of what evidence he or she must elicit or discredit; irrelevant forays and repititious recants will cause the judge (and jury) to become annoyed or their minds will wander from the real purpose of the examination.

24. "What happened next?" is a question reserved for direct examination. Don't ask it on cross-examination. The "What happened next" question on cross, gives the witness a chance to repeat the story told on direct examination or to rationalize the previous answer to their client's probable detriment. Avoid repetition. The jury having heard the answer on direct examination may, or may not believe it. If it is brought out on cross examination by letting the witness repeat the answer using the witness' own choice of words, they will probably believe it. A third opportunity to repeat it and they will believe it. On cross-examination, the question "what happened next" shows that you do not know what to do next.[11]

25. Pay attention to the answer. Not only is the question you asked important, so is the answer. Counsel should make sure that it was heard and understood before moving on to the next question. Do not be hesitant to have it repeated by the witness or played back by the court reporter. Aside from the harm the undetected answer might do, it is embarrassing to have the opposing lawyer smugly chuckling while the judge says "pardon me, counsel, but did you not hear that last answer?"[12]

26. Never ask a witness to explain an absurd, irrational or inconsistent answer on cross examination. If one asks, one will receive. An explanation will be forthcoming and the chances of succeeding are small as compared with the chances of failure. Whatever the answer, it cannot have the beneficial impact of the previous one. Inconsistent answers are not to be dealt with by way of a request for explanation on cross-examination, but must be exposed by leading and confining the witness to categorical answers showing that the inconsistent answers are not worthy of belief. For example, "I saw him kill Cock Robin." Q. "Isn't it true that there are no street lights in that area?" A. "Yes." Q. "It was a dark night?" A. "Yes." Q. "There was no moon?" A. "No." Q. "You were approximately 100 meters away?" A. "Yes." Q. "You had never seen

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[10]"Good Faith Basis. 'Mr. Witness, is it not a fact that you commit sodomy every night with a parrot?' Now what? First, they peel the jurors off the back wall. Then, His Honor gestures to the cross-examiner; he would like to speak to you. You trot up to the side bar. His Honor looks at you, and he says: 'What the hell are you doing?' What is your response? Well, if you were younger, you might simply bat your baby blue eyes at the judge and say, 'Well, Your Honor, I'm just testing credibility.' " Irving Younger, *The Art of Cross Examination.*

[11]The legal mind is a magnificent machine in perpetual motion until the lawyer gets up to address the court for the first time.

[12]The Watergate Senator's question: "Did you then enter the oval office?" "Yes." "What did you see?" "Well, I walked into the oval office and there was the President, naked as a baboon, prancing around on all fours with the gem stone file in his mouth." "And when did you next see the President?" Irving Younger, *The Art of Cross Examination*, (American Bar Association) p. 5.

the accused before?" A. "No." STOP. Do not ask the question "Well then, how can you say that the accused killed Cock Robin?" You may get an answer such as "Well, nobody ever asked me this before but I recognize his voice having heard him enter his plea at the opening of court and he limped when he walked into the prisoner's docket just like he did that night." One question too many.

27. Do not cross examine on a conversation or document which was inadmissible on direct examination unless necessary to your case. If counsel does cross examine, he may find that the whole document will be admitted into evidence or the whole of the conversation may be open for damaging re-examination by opposing counsel after he has concluded his cross.

28. Do not object to your adversary's question without logical grounds upon which to base your objection. There is nothing more embarrassing, particularly in front of a jury, than to have your objections continually overruled, nor anything so odious as having the judge conclude, prematurely perhaps, that one is incompetent.

29. If the question is inadmissible at trial, it is still inadmissible on appeal.

30. A lawyer, on re-examination of his witness, that is, after the witness has been cross-examined by opposing counsel, is confined to asking questions only upon matters touched on in cross examination by his opponent. As in direct examination, a lawyer cannot ask leading questions of his witness.

C. **Conduct**

31. Never misquote a case to the judge and, if referring to a dissenting judgment, make sure it is identified as such. Do not exaggerate (1) the law or (2) the facts: (1) "There's hundreds of cases on that point" (2) "This is the worst travesty of justice in the history of the world."[13]

32. Belligerence, rudeness and discourteousness immediately mark the witness. The same conduct in a lawyer indelibly stigmatizes that person to the bench and bar for years if not for a professional lifetime.[14]

33. Do not quarrel with the witness. The lawyer should make his point and move on. You are the professional, not the witness.

34. Press your point, but do not quarrel with the judge. Make your point on the record and move on. It is duly recorded should an appeal be necessary. If your case may be seriously affected by the judge's decision, raise it again a little later after the dust has settled. The judge will see that the lawyer is serious

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[13] "No comment is fair if it is based on a mistake of fact" per Lord Denning in his last book the *Closing Chapter*, (London, Butterworths, 1983).

[14] "Battledore and shuttlecock's a very good game, when you ain't the shuttlecock and two lawyers the battledores, in which case it gets too excitin' to be pleasent." Charles Dickens, *Pickwick Papers*, ch. 20. The sport is now called badminton; the battledore from the old French word batedor (beater) is the racket and shuttlecock, the bird.

about the point and will give it a second consideration.[15]

35. Maintain your professionalism. Avoid putting forth your personal beliefs. Avoid words like "I honestly believe ...". Do however use "The evidence clearly discloses ...", "The tesimony shows ...","The case law is clear that ...".

36. Counsel should argue standing up, never from a seated position. Dignity and respect for the court and its proceedings must not be in doubt even if you are unjustly chastised. Kick the wastepaper basket after you get back to the office or speak to the judge privately after tempers have cooled.[16]

37. Be alert to avoid the same annoying mannerisms in yourself that you see in others. Q. "What is your name?" A. "John doe". Q. "I see. Where do you live?" A. "Fredericton." Q. "I see. What is your occupation?" A. "Pharmacist." Q. "I see."

An attempt to add or expand on these rudimentary rules would not be helpful, but you may wish to add a few of your own.

In conclusion, I leave you with this homespun thought of my own. You can retain a lawyer's time, counsel, physical presence, even loyalty and enthusiasm. There is not enough money in the world to buy the lawyer's devotion of heart, mind and soul; these come free to the client as a result of dedication to our profession.[17]

***PATRICK A.A. RYAN, Q.C.**

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[15] An Irish attorney was making the best of a rather shaky case when the judge interrupted him on a point of law:
"Surely," the judge asked, "your clients are aware of the doctrine de minimis non curat lex?"
"I assure you, my lord," came the attorney's suave reply, "that, in the remote, desolate and inhospitable hamlet where my clients have their humble abode, it forms the sole topic of conversation." Walter Bryan, *The Improbable Irish* (Taplinger).

[16] The New Brunswick Bar has a Liaison Committee with the Judges of Queen's Bench and Appeal to which you may refer problems.

[17] Final advice to the lawyer about to improve on the perfect answer -- Don't.

*Senior partner, Ryan, Graser & Smith, Fredericton, New Brunswick, Bar Admission Course Chairman, course leader.