



Evidence & Objections:

Domestic and International Standards

EVIDENCE & OBJECTIONS: DOMESTIC AND INTERNATIONAL STANDARDS

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[PREFACE]

The new Law on Criminal Procedure (hereinafter: LCP) requires defense lawyers to be proactive, especially during the trial proceedings. Being proactive means having an abiding appreciation of certain fundamental evidentiary principles. This is essential in order to make cogent and reasoned arguments as to why certain evidence should be excluded or given limited weight, and why certain evidence should be admitted, especially if all required preconditions are met. During the trial proceedings, these arguments are orally made, and are known as *objections*.

This material on Evidence & Objections is designed to familiarize experienced lawyers trained in the civil law system with the fundamental principles of the law on evidence and evidentiary objections.

Michael G. Karnavas

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INTRODUCTION

Why a material on Evidence & Objections?

The procedure of the LCP is hybrid: part inquisitorial and part adversarial. It is a party-driven procedure, with the parties (prosecution and defense) being involved in gathering their respective evidence and putting on their respective cases.

The prosecution is independent in choosing whom to investigate, whom to indict, the evidence it wishes to gather, the manner in which it collects the evidence, the witnesses it wishes to speak to, the charges it wishes to include in the indictment, and the evidence it wishes to present at trial. Likewise, the defense is independent in conducting its own investigation: which witnesses to speak to, what evidence to gather, and which witnesses and what evidence to present at trial. The judge is neither as active as in the civil law system, nor as passive as in the common law system.

During the trial proceedings, the parties are expected to lead the evidence by asking questions. No longer is the defense lawyer passively sitting and listening to the judge conduct the questioning, waiting to ask a question or two after the prosecution has followed up on the judge's questioning. Now, the defense lawyer is *expected* to engage the witnesses: cross-examining prosecution witnesses (mostly through leading questions), and direct examining defense witnesses (exclusively through open-ended questions unless the witness is declared hostile).

These added tools and modalities place the defense lawyer in a position to meaningfully participate during the trial proceedings. The LCP is much more dynamic than the

old procedure where the judge selected and exhaustively examined the witnesses in fulfilling his or her responsibility of getting as close to the truth as possible. The judge continues to be exclusively responsible in freely evaluating the evidence according to his or her conviction obtained from the entire trial, with the understanding that in case of doubt the evidence should be evaluated in a light most favorable to the accused. This new dynamic procedure, however, requires the defense lawyer to be vigilant during the presentation of the evidence. It requires the defense lawyer to raise objections on the record concerning the quality of the evidence and the manner in which the evidence is being presented; hence the need for an appreciation of the principles of evidence and objections.

But the LCP does not explicitly set out any evidentiary rules. Nor does it provide a list of objections that may be implicitly available in light of the hybrid nature of the proceedings. And in the civil law tradition, that which is permitted by law or procedure must be clearly stated in the text. Notwithstanding these limitations, certain evidentiary principles seem to be applicable to or imbedded in the LCP, thus providing a sufficient underpinning for raising and making evidentiary objections during various stages of the proceedings; hence this training on Evidence & Objections. It must be emphasised that the evidentiary principles does not limit the court in its free assessment evidence and facts finding.

Obligations Worth Stressing: Due Diligence & Preserving Errors for the Appeal with a Record. The concept of *due diligence* deals with the obligations lawyers have toward their clients. This is especially important in criminal matters, where defense lawyers have a continuing obligation to ensure that the client meaningfully enjoys throughout the proceedings all guaranteed fair trial

rights. The defense lawyer's ability to satisfy the duty of due diligence is paramount to ensuring that the client receives effective legal representation.

Preserving errors during the trial proceedings for the purpose of appeal is one of the most important due diligence obligations of a defense lawyer. Errors are preserved by a thorough record. Simply, the record is everything that happens and is recorded / documented during the course of the proceedings, from the investigation all the way until the final judgement. The record consists of: all submissions (motions, responses, replies, etc.), court rulings (orders, decisions, and judgments), hearings, the trial itself (transcripts), all exhibits admitted in evidence, and exhibits found inadmissible.

Thus, in order to make a record, defense counsel must conduct a thorough investigation to search for evidence (and properly collect it), make all necessary written and oral submissions related to the law and facts, and make and address all relevant evidentiary objections in a timely and coherent fashion. With a record that has properly preserved all the errors during the pre-trial and trial proceedings, a defense lawyer just might be able to resurrect a client's case on appeal. The errors are preserved for appeal when they are reflected in the record. A failure to make the record may strip the client of a chance to overturn a conviction or preserve an acquittal. As the saying goes: *God may know, but the record must show.*

The record begins from day one of the investigations and runs until the rendering of the final judgement. Any addition to the record must be made as soon as possible. This means bringing evidence forward as soon as it is discovered, making timely motions, and making timely objections.

The basic rule in making a record is for the defense lawyer to let the judge know what he or she wants, why he or she thinks himself or herself entitled to it, and to do so clearly enough for the judge to understand him or her at a time when the judge is able to do something about it. The judge's function during a trial is to administer justice. One way this is accomplished is by directing the flow of evidence to enable the truth to emerge (to the extent possible). The judges preside over the trial in order to ensure that fair, honest, truthful, reliable and trustworthy evidence and testimony is given so that the case can be decided on that evidence. Consequently, in raising any evidentiary issues before the court, the defense counsel's core argument must always be that it will be just or unjust if the court considers or disregards the introduction of certain evidence.

Some Preliminary Thoughts on Evidence and Objections. The law of evidence is the rules and principles used in proving facts in legal proceedings. In other words, what evidence may be considered by the judges in determining the facts of the case being tried: what evidence should be admitted; what evidence should be excluded.

The presumption of innocence and the prosecution's burden are the prism through which admissibility issues in a system with the free evaluation of the evidence should be viewed. An accused is entitled to a presumption of innocence. This presumption places on the prosecution the burden of establishing the guilt of the accused by proving beyond a reasonable doubt all the facts and circumstances which are material and necessary to constitute the crimes charged and the accused's criminal responsibility.

In determining whether the prosecution established the guilt of the accused beyond a reasonable doubt for each count in the indictment, the judge must consider whether there is any other reasonable explanation of the evidence available other than guilt of the accused. Any ambiguity must be resolved for the benefit of the accused. The Trial Chamber must acquit the accused if another conclusion can reasonably be drawn from the evidence pointing to the lack of guilt of an accused. The significance of this point will be seen in discussing the rather generous use of and conclusions drawn from circumstantial evidence.

The basic test for the admissibility of evidence is that it be relevant and probative, though in assessing the evidence and ascribing what weight if any to give it, authenticity and reliability also play a major role. Also, if the probative value of the evidence is substantially outweighed by the need to ensure a fair trial, then it should not be admissible. In other words, the judge should admit any relevant evidence that is deemed to have probative value, and exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. One example for excluding evidence in furtherance of promoting a fair trial is where evidence is obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings (e.g. torture-tainted evidence).

This material is structured so that the participants will first be introduced to some general principles of evidence found in adversarial systems. With these principles in mind, the most common objections are discussed – even if not applicable under the LCP. The purpose is to introduce the variety of evidentiary objections available in order to better understand the basic evidentiary principle. And with this foundation, the LCP will be analyzed to see what objections may be available and applicable under the LCP and before the domestic courts – even if not expressly stated in the LCP.

EVIDENCE

GENERAL PRINCIPLES OF EVIDENCE

Overview of Types of Evidence and Admissibility

Evidence comes in all sorts of different shapes and forms. The primary types of evidence are:

- Documentary Evidence
 - Pictures
 - Diagrams
 - Statements
 - Records
- Testimonial Evidence
 - *Viva voce* testimony (Lay witnesses, Experts)
 - Witness Statements (Lay witnesses, Experts)
- Demonstrative Evidence
 - Experiments
 - Re-enactments
 - Simulations
 - Computerized Evidence
 - Illustrative Evidence
- Factual Evidence

Direct evidence

Direct evidence is clear evidence of a fact. It requires no additional thought to prove its existence, generally where a witness is testifying on a matter claiming to have personal knowledge as a result of having

experienced or been an eye-witness to an event. Direct evidence may consist of a witness's testimony who heard words or observed acts being done that relate to an issue in dispute. For example, a witness testifies that he saw X hit Y.

Circumstantial evidence.

Circumstantial evidence (also known as indirect evidence) is evidence of circumstances surrounding an event or offense from which a fact may be reasonably inferred. For example, X testifies that when he came out of his house, he saw that the streets were wet. This is circumstantial evidence that it may have rained while X was inside his house. There may, of course, be another explanation, such as that the streets are wet because they were cleaned.

Circumstantial evidence is no less substantial than direct evidence, but then that all depends on the strength of the circumstantial evidence, other relevant evidence and the existence – or non-existence – of other alternative plausible explanations. The court should not draw inferences based on assumptions. Although an accused's guilt may depend on a particular fact that is proved by a combination of circumstantial evidence, such a conclusion must be the *only* reasonable conclusion available.

While evidence of a number of different circumstances which, taken in combination, may point to the existence of a particular fact upon which the guilt of the accused depends because they would usually exist in combination only because a particular fact did exist, such a conclusion must be the only reasonable conclusion available. As a defense lawyer, this is an important factor to consider when searching for evidence; a factor that will become eminently germane at the conclusion of the case when it comes time to argue the facts during closing arguments, also known as *summation*.

In making a record for the purpose of challenging on appeal an inference drawn which establishes a fact on which a conviction may result, the defense lawyer should take into consideration that the question for the Appeal Court will be: whether it was reasonable for the judge to exclude or ignore other inferences that lead to the conclusion that an element of the crime was not proved. Thus, with respect to attacking inferences likely to be drawn and argued by the prosecution from circumstantial evidence, the defense investigation should be focused on searching for evidence that would advance alternative plausible explanations to the ones offered by the prosecution. This should not be confused with the defense having to take on a burden to prove anything.

Background evidence

Background evidence may be of assistance to the court for contextual purposes. Usually this is not contested, but not necessarily. It all depends with the circumstances and purpose/context for in seeking the admission of background evidence.

Foundational Requirements

Before material evidence – in the form of testimony, physical evidence, exhibits, etc., – can be introduced and relied upon in determining a fact or matter relevant to the outcome of the case, foundational evidence must be introduced. This preliminary (predicate) evidence is necessary to show that the material evidence is authentic, reliable (accurate, trustworthy) and relevant. The type of preliminary evidence necessary to lay the proper foundation depends on the form and type of material evidence offered. An objection is likely to be made if the proper foundation is lacking.

Evidence is admissible if it is:

a) RELEVANT – evidence having a tendency to make the existence of a fact or consequence more probable or less probable than without the evidence.

b) AUTHENTIC – the matter or thing in question is exactly what it is claimed to be. For example: the knife, the gun, the video, etc.

c) RELIABLE – the evidence is in the same condition as when it was used or located; i.e. it was not tampered with or altered, or based on (un)corroborated hearsay.

All three criteria must be satisfied before a tangible piece of evidence or an exhibit can be received in evidence for the judge's consideration. Of course, once the judge determines that it is worth considering, he or she will still need to assess how much weight to give the evidence.

For each tangible piece of evidence, referred to as an *exhibit*, the proponent will need to satisfy each of the three criteria *by laying the foundation necessary* for its acceptance as evidence through the testimony of one or more witnesses.

Relevance describes the relationship between an item of evidence and the proposition it is offered to prove. Relevant evidence tends to make the existence of a "material" fact (facts meaningful to the issues in dispute) more or less probable than without the evidence.

- Does the evidence further the inquiry?
- Does it advance the resolution of trial issues?
- Does the evidence throw light on these issues?
- Does it tend to make the existence of a material or consequential fact more or less probable than it would be without the evidence?

Generally speaking, relevant evidence is admissible unless its value is outweighed by the danger of unfair prejudice, is confusing to the issues, or is misleading. In admitting the evidence, the court makes a determination as to whether the evidence is: 1) authentic; 2) relevant; 3) reliable; and 4) prejudicial (leads to prejudice). If the evidence's prejudicial character substantially outweighs its probative value, then exclusion is discretionary.

Once the evidence is heard, it is virtually impossible to get the judges to erase the testimony from their minds. You cannot "unring" the bell. However, it is imperative that the defense counsel clearly and succinctly articulate to the court the reasons why the testimony has little or no value, and to point out how unjust it would be for the court to rely on such evidence. By making this argument, the defense counsel is inviting the prosecution to respond. If the evidence is clearly prejudicial and has no real value, the prosecution will have difficulty in responding. The defense counsel (proponent of the objection) must always ask to have the last word, i.e. to rebut the prosecution's response to his initial objection. During this rebuttal phase of the defense counsel's argument, if the prosecution has failed to adequately establish why the evidence is reliable, trustworthy and essential, the defense counsel should point out to the court that such failure is equal to a concession or admission by the prosecution that the evidence is of no importance (has no weight) to the outcome of the case.

Examples of laying a foundation:

PHOTO (Representation of the scene at the time of the incident, True, Accurate, Fair)

VOICE (Prior knowledge of voice, Ability to hear, Recognized voice)

REAL EVIDENCE (Recognize item, Item is in same condition, unaltered)

A well-known maxim often quoted during trials by prosecutors and defense counsels alike is that "*the evidence never lies*". There is considerable truth to this maxim, given that evidence that is properly collected, stored and tested, when introduced at trial, can make a significant difference in the outcome of the case. Accordingly, being acquainted with the proper, efficient and orderly methods of handling tangible evidence and exhibits is indispensable knowledge for the defense counsel.

Checklist for Introducing Evidence

In trying to introduce real evidence before the court, the defense counsel should go through the procedure of:

- » showing the items to the opposition;
- » requesting permission from the judge for the witness to be shown the items;
- » asking:
 - whether the witness recognizes it;
 - what does the witness recognize it to be (what is it);
 - how is it they recognize it; and
 - whether it is a true, accurate and fair representation of what it is that it purports to be.

Until a proper foundation has been established, a witness should be prohibited from testifying about that particular real evidence. Recognize that:

First, the witness must be deemed competent to testify about the evidence by recognizing it;

Second, the evidence must be unaltered; and

Third, it must be relevant.

Unless this is accomplished, the prosecutor/defense counsel should object and force the opposition to *lay a foundation*. If a proper foundation cannot be established, then the next step is to ask the court to disregard that particular evidence.

Laying a foundation in adversarial proceedings (an illustration):

- » Select the witness(es) necessary to lay the foundation.
 - » Have the exhibit marked by the in-court clerk for identification purposes. The defense counsel may have his or her exhibits marked prior to trial in the sequence he or she expects to introduce the exhibits. If the exhibit will be marked in court, the proponent must request permission from the court by simply stating for example:
 - *Your Honor, may this gun or document, etc. be marked as defense exhibit number 5 for identification.* The marking of the exhibit is most important so as to keep track of the exhibits introduced.
 - » Once the exhibit is marked for identification, the defense counsel should refer to the exhibit as identified, i.e., *defense exhibit number 5 for identification purposes.* The fact that it is marked for identification does not mean that the threshold requirements for its acceptance, as evidence, to be considered by the court have been met. However, it is important to refer to the exhibit as identified, so that the trial record is clear as to what is being referred to during the taking of testimony. It is important that the record is made properly, irrespective of whether the prosecution, witness, or judge is referring to the exhibit.
 - » The next step is to *lay the foundation.* The simplest way is as follows:
 - The defense counsel should elicit from the "authenticating" witness the requisite facts that demonstrate that the witness is qualified to testify to the authenticity of the exhibit.
 - The defense counsel should ask the witness to identify the exhibit.
- Once the exhibit is identified, the witness should be asked to examine it and inform the court whether it is in the same condition as when it was seen, utilized, etc. This is necessary in order to establish that the exhibit is reliable.
 - **Chain of Custody:** In some instances, it may be necessary to establish a *chain of custody*; i.e., that the exhibit has been unaltered even though numerous people handled it. Under such circumstances, it might be necessary to call each witness to testify. This is most relevant when it is the weapon or instrument involved in the crime, and when forensic experts have tested the evidence and they are testifying. It stands to reason that if the evidence was mishandled, irrespective of the reasons, the results of the tests performed may be misleading or unreliable. There may, however, be a legitimate explanation justifying the reasons of the change in condition, as well as, reasons why the changes do not affect the quality of the exhibit.
 - It may be necessary to establish the issue of relevance; i.e., why the exhibit is essential to the case.
 - When the exhibit is not the actual piece of evidence (a replica) or is a photograph, chart etc., and it is being used for demonstrative/illustrative purposes, the defense counsel must elicit from the witness testimony establishing that the evidence *fairly and accurately* represents that which it purports to portray. Depending on the purpose for which it is being offered, the defense counsel must be vigilant to ensure that the exhibit is not misleading. For instance, if the exhibit is a photograph, and the central issue is establishing the reliability of the eye-witness's testimony, the photograph can only be *fair and accurate* if the photograph was taken

under the same lighting conditions, from the same vantage point, etc.

- When more than one witness is required to authenticate the exhibit or establish the reliability of the evidence (chain of custody), the exhibit may be used by the defense counsel, subject to fulfilling all of the requirements (also known as *subject to connection*). This is accomplished by the defense counsel notifying the court of the other witnesses that will be testifying, and providing a brief synopsis of how each witness will fulfil the remaining requirements. Of course, if the defense counsel fails to satisfy these conditions, the judge will have no choice but to disregard the exhibit and any related testimony.
- » Once the defense counsel lays the foundation, he or she should offer the exhibit into evidence. If the court is satisfied, the exhibit is no longer referred to as an exhibit for identification purposes, but as an exhibit. For instance, the defense's exhibit number 1 for identification purposes, becomes the defense's exhibit number 1, and hence forth it should be referred to as such on the record for the remainder of the trial.

Admissibility vs. Weight

The judge first decides whether the evidence is sufficiently relevant to be admitted – generally a low threshold. The judge will then decide – usually at the end of the proceedings having heard and considered all evidence – how much it is worth (the weight and probative value) in making findings of facts from which the conclusions of law and ultimate decision will be made. Evidence as a whole must satisfy a party's burden of production to send the issue to the trier of fact. Each item, however, need only advance the inquiry. It is not necessary to win the case with each witness, but each witness's discrete testimony should advance the case.

Adjudicated Facts

Some facts that may be introduced into evidence may be so notorious and well known, or their authority attested, that they could not be reasonably doubted. In the interest of judicial economy, the judge may take "notice" of these facts relevant to the proceeding deemed "adjudicated", provided that judicial notice of facts does not infringe on the fundamental fair trial rights of the accused.

Agreed Facts

During the course of the proceedings, opposing attorneys may come to an agreement about matters of fact and law. These are agreed facts. They save time and narrow the issues for the judge to consider. The agreement must be voluntary. Any agreement is only binding between the parties who agree to sign it.

Pre-Trial Motions Limiting the Admission of Evidence

Written submissions are often made to limit the admissibility of evidence because it may not meet the criteria of being relevant, reliable, or authentic, or for a number of other reasons. (This type of motion is generally known as a motion in limine). Motions in limine, if granted, can prohibit both the introduction of evidence and the asking of suggestive and prejudicial questions. This may include permissible areas of cross-examination of a prospective witness.

If the motion in limine is denied as "premature" for substantive reasons, it may later transform into a trial objection to the proffer of evidence or the asking of specific questions. With other evidence presented during the trial, facts may have come to light that justify an exclusion of the evidence.

WITNESSES

In order for a witness to testify, he or she must have personal knowledge. For example, he or she must:

- be an eyewitness;
- have heard what he or she is testifying about and what was said by the other witness/accused;
- not rely on what someone else told him or her.

Any witness can be impeached (discredited). The credibility of a witness can be attacked or supported by opinion or reputation testimony. The defense counsel may offer testimony of truthfulness if, for instance, the witness's character for truthfulness has been attacked or challenged. In questioning a witness, the court should exercise its powers to allow the interrogation of a witness and presentation of evidence so that the truth can be ascertained. For this to occur, a witness should not be cross-examined until he or she has had a full and fair opportunity to provide evidence by direct testimony. Leading questions are suggestive in nature and a witness should at least have an opportunity to tell his or her account of the events before the prosecution or court questions the witness. The party that offers the witness is responsible for eliciting testimony by direct examination. Consequently, the defense counsel must always object if the prosecution attempts to examine his or her witness with leading questions, i.e. questions that suggest the answer rather than allow the witness to give a non-suggestive narrative answer to an open-ended question. The objection that the defense counsel must raise is that the prosecution is testifying: "*The prosecution is suggesting the answer and the witness is not being allowed to develop his testimony.*"

Viva Voce Witnesses

The principle of orality places a high premium on live, in-court testimony where the accused is afforded full confrontation rights. In establishing the reliability of evidence by a witness, it is not sufficient that the witness gave evidence honestly. The ultimate basis for accepting the evidence rests on whether the evidence is objectively reliable. In evaluating the credibility of a *viva voce* witness, the Trial Chamber should consider the witness's demeanor, conduct, character, ability to recall evidence, and any inherent bias or interest. Other relevant considerations for the Trial Chamber are the probability, consistency, and other features of a witness's evidence, including corroboration from other evidence and the circumstances of the case. Thus, a judge is expected to take into account the existence of any inconsistencies between the oral evidence of the witnesses at trial and his or her statements given prior to trial and admitted into evidence at trial.

Cooperating Witnesses (Co-Accused)

The defense lawyer should pay particular attention to cooperating witnesses (co-accused). Arguably, when evaluating evidence of cooperating witnesses or co-accused that plead guilty, a judge should consider any benefits accrued to these witnesses, such as evidence of a reduction of charges, a refusal to charge, or a recommendation for leniency at sentencing. Furthermore, when evaluating the testimony of such witnesses, the judge should consider the prosecution's conduct in obtaining evidence from the witness (co-accused). Bargains (*deals*) made by the prosecution are unquestionably relevant. Any failure by the prosecution to record debriefing sessions or to take verbatim notes while negotiating with the cooperating witness (co-accused) denies the defense

the opportunity to challenge what, if anything, was disclosed to the cooperating witness/accused concerning what facts the prosecution wished to have acknowledged: telegraphing the information it wished to hear which might be of assistance in filing in gaps in the prosecution's case, as opposed to taking an unguided narrative. The number of occasions the prosecution questioned the cooperating witness/accused in order to obtain the 'truth', and any other questionable conduct by the prosecution that reveals manner, means, or motives of the prosecution to deviate from fair and ethical procedures of obtaining information from cooperating witnesses/accused who plead guilty as a result of prosecutorial deal-making is equally relevant, and may prove to be fertile ground for impeachment.

Witness Competency

Witness competency concerns the witness's qualifications to testify.

- » *Mental competency:* The witness must possess the standard ability to perceive, observe, recall and narrate events;
- » *Moral competency:* The witness must have the ability to comprehend the witness's duty to testify truthfully under oath;
- » *Ability to communicate:* The witness must be able to effectively communicate his or her observations and perceptions;
- » *Subject matter competency:* The witness must be competent to testify about the subject matter of their testimony. This applies to both lay and expert witnesses. Witnesses cannot testify to matters beyond their knowledge;
- » *Child competency:* Children under a certain age may not be mentally competent to testify;
- » *Elder competency:* Elderly persons over a certain age may not possess the requisite mental competency to testify;

- » *Privilege:* Certain privileges (see below) may exclude a witness from testifying. For example, a wife is not competent to testify against her husband at trial. Attorneys are not competent to testify against their clients. Religious leaders are not competent to testify against members of their congregation.
- » *Competency of the judge:* Judges are not competent to be a witness in the case. Judges cannot testify as to what they know, but must draw from the evidence on the trial record. Judges have the authority to comment on the evidence. However, there are limits. Judges may not assume the role of a witness or an advocate. A judge may analyze and dissect the evidence, but not distort or add to it.

Refreshing a Witness's Memory

It is often the case that a witness will appear in court and have difficulty recounting the events he or she may have described during an interview. If this occurs, the examiner (prosecutor or defense counsel) can refresh the witness's memory by getting the witness to acknowledge:

- » that at one time he or she remembered the events;
- » that he or she provided a statement;
- » that at the time he or she provided the statement, the events were clearer in his or her mind; and
- » that by referring to the statement, his or her memory could be refreshed.

Once the examiner has permission from the court to show the witness the earlier statement, he or she must first have the witness read the statement. The examiner must then ask the witness whether having read the statement, the witness is capable of answering the questions. If the witness recollects what he or she said on an earlier occasion, the defense counsel can then

continue with the examination of the witness. Refreshing a witness's memory can be done on either direct or cross-examination.

Recollection Recorded

If the witness, after reviewing the statement, continues to have no independent recollection of the events, with the court's permission the examiner should ask that the statement be read to the court – thus making a record. This is called "past recollection recorded." The statement should be marked and entered into the file as evidence. Once again, the examiner should go through the list of questions to establish that at the time the statement was given by the witness, the information was fresh in his or her mind and the information that he or she provided was true, accurate, and complete:

- » the witness once had personal knowledge of the writing;
- » the writing was either made by the witness or adopted by the witness;
- » the writing was made when the event was fresh in the witness's memory; and
- » the witness can attest that, when made, the writing was accurate.

Opinion Testimony

Generally, any witness can give opinion testimony provided that it is based on his or her own perception and is relevant to a fact at issue. It is important to keep in mind that with respect to certain testimony, the witness must be competent before he or she can render an "opinion". For example, a witness who observes an individual holding his stomach is not competent to give medical testimony regarding that person's medical condition (i.e., that the individual was holding his stomach because he was suffering from food poisoning).

Sequestration

In order to prevent the "tailoring" of witness testimony, witnesses should be excluded from the courtroom while other witnesses testify. Similarly, they should be prohibited from relating their testimony to what other witnesses have said and what has occurred in the courtroom. Once witnesses testify they can come back and sit unless they are going to come back to testify at a later date.

Coaching

An important part of trial preparation is helping the witness get ready to testify, but only when permitted. Counsel may prepare the witness with a general overview of how the trial proceedings are to be conducted, the basic topics for discussion, and the manner in which the witness should answer questions (example: give yes or no answers, or give narration). However, a witness must testify about his or her own experiences and perceptions. Counsel may not tell the witness *what* to say.

Witness Credibility

Impeachment. In discrediting (commonly referred to as impeaching) a witness, it may be necessary for the defense lawyer to put to the witness the nature of his/her client's case which is in contradiction to the evidence given by the witness. Simply, if the defense lawyer on cross-examination has information calling into question the witness's veracity or accuracy with respect to a relevant point or issue to which the witness has testified, the defense lawyer / cross-examiner must – out of fairness – confront the witness with that information so the witness can be given an opportunity to respond. Failing to do so may result in the judge disallowing or giving less weight to that impeachable evidence when used by the defense lawyer. Thus, in gathering evidence it is essential to identify the areas

of impeachment for particular witnesses and if the defense lawyer comes into possession of such evidence, he or she must confront the appropriate witness with such evidence

Through impeachment, the defense counsel is attacking the witness's credibility and attempting to establish:

- Bias or interest
- previous convictions
- prior bad acts
- prejudice
- inconsistencies within statements
- lack of memory
- inadequate perceptions
- inaccurate accounts of events or
- contradictions by other witness's testimony or physical evidence

For impeachment purposes, minor discrepancies in a witness's account will be insufficient. Consequently, it is essential that when attempting to impeach a witness the matters which are selected for impeachment be significant and, to the extent possible, directly related to the essence of the incident charged or the credibility of the witness. If a judge is not satisfied that a witness was entirely reliable, the judge is likely to will rely on that witness's testimony with caution, and generally only if corroborated by other evidence. Of course, judges should always resolve any ambiguity for the benefit of the accused. Though the testimony of a witness on a material fact may not require corroboration, the defense lawyer should argue that such evidence be scrutinized with great caution and that in the interest of fairness to the accused the judge should not rely on uncorroborated evidence alone to convict.

Reputation and opinion evidence may demonstrate a witness's untruthful character.

Before reputation evidence is permitted, a foundation must be laid showing that the reputation witness is acquainted with the principal witness's reputation in the community. Foundation for opinion testimony focuses on the character witness's personal relationship with the principal witness rather than on community contacts.

Rehabilitation. Once a witness's character for truthfulness has been attacked, opinion and reputation evidence showing that the witness has a good character for truthfulness are admissible. The principal issue is determining what types of impeachment constitute "attacks" on character and trigger the right to rehabilitate by evidence of truthful character.

Bolstering. After impeachment, evidence of a witness's credibility can qualify as proper rehabilitation. Standing alone, cross-examination does not permit resort to evidence of a witness's truthfulness. Rehabilitation is a form of testimony about a witness's truthfulness that is only admissible when there has been an attack on the witness's character trait for truthfulness, otherwise it would be just bolstering.

Credibility analysis has three stages: (I) bolstering before attempted impeachment; (II) impeachment, and (III) rehabilitation after attempted impeachment. As a general rule, bolstering is forbidden. It is logically relevant to support the credibility of a witness by evidence in the form of prior consistent statements, opinion or reputation, but such support is permissible only after the witness's truthfulness has been attacked. The requirement of "relevance" supports the ban on bolstering evidence; if the opposing party does not attack a witness, bolstering is a waste of time.

Example:

[Witness A testified, but was not cross-examined. Witness B now testifies to support the credibility of A.] Witness B, do you know Witness-A to be truthful and reliable?

Objection: Objection, this is an attempt to bolster the credibility of a witness who has not yet been impeached.

Ruling: Sustained.

Expert Witnesses

A witness with special knowledge, training or experience whose purpose is to assist the court in understanding the evidence or determining a fact at issue is generally considered an "expert witness." Such witnesses possess knowledge beyond an ordinary person's knowledge through their everyday experiences. Experts are used in order to apply their specialized knowledge to the facts in a case and to enable the judges to better determine/understand the issues in dispute. Generally, in common law traditions, the parties select and retain their own experts, who are then qualified as experts in court before giving any substantive evidence. This runs counter to the practice in the civil law tradition where experts are pre-qualified and are on a judicial list from which the parties would select the expert.

Before a person can be certified as an expert, he must have the requisite expertise and ability to perform independent expert evaluations, and should be willing to give findings and opinions in a rational, objective, and timely manner. However, even if the area of expertise is regulated by a legally approved agency, institution, or independent governing body that offers certification or qualification tests, the defense counsel should not underestimate

the difficulty in conducting proper direct or cross-examination of the expert witness. Likewise, the defense counsel should not overestimate the "objectivity" or "quality" of the expert witness's opinions or findings, irrespective of the fact that the expert is court certified and has an impeccable or erudite educational and professional background.

Fundamental Principles Regarding Expert Witnesses:

- » *Qualifications:* The proposed expert witness has the qualified training or experience in a recognized field of knowledge beyond the average layman;
- » *Explanation of Expertise:* The field of knowledge is of particular importance in resolving the case;
- » *Ruling on Qualifications as an Expert:* The witness is offered to the court as an expert in his field after demonstrating, during direct examination, that he or she has the requisite educational or professional background. Additionally, that he or she has been certified as an expert (or should), and that his or her expert knowledge and opinion derived from his or her tests, examinations, etc., are relevant to an issue/fact in dispute;
- » *Basis of Opinion:* The expert presents what facts were presented to him or her, what examinations he or she performed (if any), the basis for performing any examinations, and the method(s) used;
- **NOTE:** The facts used as the basis of the expert's opinion should be limited to those facts that: a) he or she personally observed; b) were elicited in the courtroom and heard by the expert; or c) were given to him or her in court hypothetically. Facts not relied on as evidence (rejected) or facts not in evidence (un-proffered) cannot be used as the basis of an expert's opinion –

- particularly when given hypothetically;
- » *Opinion:* The expert's opinion must be an opinion to a reasonable degree of certainty *within* the expert's field – NOT based on speculation or conjecture. Experts may be permitted to base their opinions on hearsay information. However, if the expert's opinion is based on facts or data not personally observed or heard in the courtroom, the hypothetical format is generally used. The hypothetical question must: a) refer only to contain facts that are in evidence (even if contested); and b) contain all relevant facts in evidence (principle of fairness);
 - » *Cross-Examination of Qualifications & Opinion:* The opponent may choose to challenge the expert as to his or her qualifications, irrespective of whether he or she is court certified. There may be reasons to dispute the objectivity or professionalism of the expert based on prior conduct. Moreover, while the expert may be fit to testify about a particular area, his or her opinion in the case may deal with an area beyond the expert's knowledge, training, or expertise. The expert may also be challenged as to his or her opinion based on the facts in the case, his or her opinions in previous cases under similar factual circumstances where his or her testimony was different, and through published articles in learned treatises that are recognized as authoritative in the field of expertise;
 - » *Scientific Evidence:* Scientific expertise should meet the applicable standard for scientific evidence generally recognized by the scientific community, specifically within the scientific field of the expertise. As a rule, the expert's methodology should be generally accepted in the field;

» *Ultimate Issue:* Expert witnesses should not be permitted to give an opinion as to the ultimate issue in a case (such as the guilt or innocence of the accused).

Character Evidence

Character evidence is testimony of a witness's character and personal traits. As a general rule, the defense counsel should object to the use of character evidence or traits of character when offered to prove that the accused's actions in the case before the court are consistent with his or her past character. The reason for objecting to such evidence is because the accused is entitled to have the prosecution present reliable and incontrovertible evidence to establish the accused's guilt, rather than simply relying on past behavior.

Example:

The accused is charged with murder. Unless the prosecution can establish all of the elements of murder in this particular case, he or she should be prevented from merely arguing that the accused had previously been convicted of murder, and consequently, the court should draw the inference that the accused is guilty (or likely to be guilty) of murder in this case.

Anyhow, a record of prior bad acts (such as prior assaults) to show that the accused is guilty of assault in this case can be introduced. Typically other acts evidence is admitted for various purposes:

- To show that the accused was the actor (identity);
- To show that the accused possessed the requisite mental state (*mens rea*);
- To show that a crime has been committed (*actus reus*);

- To show motive, opportunity or plan.

Other-acts evidence must tend to prove a material fact, proving some essential element of the charged offense.

While resisting the introduction or relevance of character evidence against the accused, if relevant to the defense, the defense counsel should not shy away from attempting to introduce such evidence on behalf of his or her client or against prosecution witnesses.

In order to establish one's character, the defense counsel generally will offer reputation or opinion testimony of witnesses as to one's character. For instance, if the defense counsel is trying to establish that the accused is a peaceful person, he or she must establish that the witness has known the accused for a considerable amount of time. Secondly, the witness has had an opportunity to observe the accused in various settings (social, work, etc.) and it is the witness's opinion that the accused is a peaceful individual – or has the reputation in the community/neighborhood of being peaceful. Another way of establishing character is by introducing a specific instance. This sort of testimony is generally reserved for when a character or trait is an essential element of the charge or defense.

Habit Evidence

Establishing habit and routine is also another way of proving that a person acted in conformity with previous behavior. This is generally used when there is adequate evidence to establish a particular habit or routine for certain occasions. Habit evidence is a regular response to a repeated specific situation. The elements in determining whether conduct is a habit are:

- Specificity;
- Repetition;
- Duration; and
- The semi-automatic nature of the conduct.

In most instances, habit will be proved by opinion testimony or evidence of specific instances of past conduct.

Hearsay Evidence

The accused has a right of confrontation: the right to cross-examine every witness who is either testifying or supplying a statement against him. Depending on the circumstances, the absence of this witness at trial may pose a disadvantage to the defense – particularly since the defense is being denied the opportunity to test the validity of the witness's statement by cross-examining the witness as to motive, bias, memory, perception, etc. It also deprives the court of the opportunity to question and to observe the witness's demeanor, which is undoubtedly, a critical factor for the judge in deciding the credibility of any witness.

Hearsay is a statement, other than one made while testifying, that is being offered to prove the truth of what is in the statement. As a general rule, the defense counsel should object to hearsay testimony being introduced at trial.

The civil law system applies flexible rules of hearsay evidence; it is readily admitted but on its own it is generally viewed as untrustworthy. This is because hearsay is an out-of-court, un-sworn statement based on second-hand knowledge that is being offered for its truth, which, if admitted, deprives the opposing party the opportunity to challenge the veracity of the statement since the individual who uttered the statement is not available to be cross-examined.

Notwithstanding the admissibility of hearsay evidence, since it is being offered to prove the truth of its contents, before admitting hearsay evidence, the judge should be satisfied that such evidence is reliable for that purpose: that it is voluntary, truthful, trustworthy and independently supported

by other reliable evidence. The judge should consider the content of the hearsay statement and the circumstances under which the evidence arose.

In evaluating the probative value of hearsay evidence, the judge should consider the absence of the opportunity to cross-examine the declarant, and whether the hearsay is 'first-hand' or more removed. Further, the weight or probative value to be afforded to hearsay evidence should be less than that which is afforded to testimony of a witness who testified under oath and who was subject to cross-examination, and it should take into account the circumstances that surround the hearsay evidence.

While hearsay evidence for the most part is untrustworthy, where there are independent indicia supporting the hearsay evidence, it may acquire significant weight. Thus, an evidentiary argument to make during the trial – as the evidence is being admitted and during closing arguments – is ask the judge to disregard unsubstantiated second-hand knowledge as unreliable.

OTHER TYPES OF EVIDENCE

Documents

The best evidence rule applies when a party wants to admit as evidence the *contents* of a document (writing, recording or photograph) at trial. This rule requires an original be produced, as the original is the "best evidence." If no original is available, the party seeking to admit the document must provide an acceptable excuse for its absence. If the court accepts the excuse, then the party can use a duplicate to prove the contents of the document. This is unless there are genuine questions about the authenticity of the original, or if it would be unfair to admit the duplicate.

Authentication of Writings

Documents are not self-authenticating. For example, a confession purportedly signed by the accused may not be admitted solely on the basis of the accused's signature. The offering party has the burden of proving the item genuine. For a writing to be admissible, a foundation must be laid, such as by using an authenticating witness:

- A witness with first-hand knowledge (e.g., the detective who took the confession);
- A witness familiar with another's handwriting;
- Expert's comparison with known exemplars;
- Distinctive characteristics.

Before affording weight to any contested documents admitted, the judge should generally consider the reliability of the document and the probative value of it in the overall context of the evidence. If a document for which there is no evidence of authorship or authenticity is admitted, it should be deemed unreliable. Likewise,

documents tendered that do not bear a signature and/or a stamp and/or a date, or are in any other manner lacking an element that shows authenticity should not be afforded much, if any, weight, unless independently corroborated with reliable evidence. The defense lawyer should insist that the burden rests at all times with the prosecution to prove beyond a reasonable doubt that any evidence it tenders is authentic, reliable, and complete. Further, in assessing the authenticity of documents, the judge should consider them in light of evidence of their source and custody, other documentary evidence and witness testimony. Irrespective of whether the judge is satisfied that a particular document is authentic, the judge should not, *a priori*, accept the statements contained in the documents to be a true, accurate, and complete portrayal of the facts. The judge should evaluate these statements in light of the entire evidence before him or her.

Where any factual question arises as to the admissibility of a piece of evidence, the burden of proof lies on the party seeking to introduce that evidence to prove to the satisfaction of the judge that it is admissible. The defense's failure to challenge certain factual allegations contained in the indictment do not diminish the prosecution's burden of proof and the judge should not *ipso facto* accept alleged facts as proved beyond a reasonable doubt. Thus, where the judge is aware that the defense lawyer failed to recall certain evidence in the closing argument that would show that the prosecution failed to meet its burden, the judge must consider that evidence *sua sponte*.

Physical Evidence

Physical evidence is generally evidence that is related to the charges (in the criminal context); for example: the knife, the gun, the car used in a vehicular homicide, or any other instrument used in the commission of the crime. Normally physical evidence is part and parcel of the evidence required to be examined and admitted, though the weight to be given to the physical evidence may be challenged if it is proved to lack reliability.

Demonstrative Evidence

Diagrams, models, maps, blueprints, sketches, and other exhibits may assist the court in making its determinations by illustrating or demonstrating testimony. Demonstrative evidence may be admissible if it is a substantially accurate representation of what a witness is trying to describe.

Unlike real evidence (such as the bloody glove from the crime scene or a video tape of the police beating an alleged perpetrator) that has a direct or indirect significance to the case, demonstrative evidence has no independent significance. On its own it has no probative value – it proves nothing. Demonstrative evidence is used purely as a visual/illustrative aid to assist the jury (not the expert), in understanding testimony on substantive evidence being offered by the witness. It is presumed, therefore, that the substantive evidence meets the threshold requirement of establishing the existence or non-existence of a "relevant" fact.

Visual Aids

Visual aids are exhibits used by the prosecutor or defense counsel while examining witnesses, in order to assist the witnesses explain their testimonies and for the court to better understand or follow the testimony. These exhibits have no intrinsic relevance to the case. Rather, their relevance

derives from the fact that they are being used to clarify or enhance the probative value of the witness's testimony.

As with physical or demonstrative evidence, the proponent must lay a foundation. Generally, the proponent will lay a foundation establishing the relevance of the visual aid, how it will indeed assist the witness, and through its use, the court will more fully understand the value of the witness's testimony. Conversely, the opposing party should, when appropriate, argue that the use of the visual aid might be unduly prejudicial because it is misleading. The discretion always lies with the judge to decide whether the visual aid is more prejudicial than probative, whether it goes to collateral and not an essential issue to the case and that it is cumulative or a waste of time.

When the visual aid is a diagram, while it need not be to scale, the proponent must also establish that it fairly and accurately represents that which it purports to represent. As with other evidence, if it is not relevant, even if it is a fair and accurate representation, it should not be admissible/permitted to be used.

When visual aids are being used during the taking of testimony, it is incumbent on the counsel (prosecutor or defense) to make a clear record for appeal. Accordingly, witnesses should not make references to the visual aid by pointing at it and using phrases such as "over there" or "at this location" or "down here". The witness can either give a reference point such as: "at the North-East corner of the intersection of..." or the examiner should make the record by stating for instance: "let the record reflect that the witness is pointing at..." If the witness will be making several reference points, it is useful to have the witness number the points of reference. If more than one witness will be referring to the visual aid, each witness should place his initials at each point

referenced. This is especially critical during lengthy trials, since the judge will need to review the evidence and make references to the exhibits and visual aids in the judgment.

Out-of-court Experiments

Out-of-court experiments may assist the judge in better understanding certain acts or events or evidence relevant to the determination of the case. The admissibility of an out-of-court experiment depends on whether it was conducted under substantially similar circumstances as those involved in the case.

Computer Graphics

Computer graphics may assist the judge visualize difficult perspectives, such as in event reconstruction. A foundation must be established: the qualifications of the expert who prepared the simulation; the capacity of the computer hardware and software used; whether the calculations and processing of data meet the standards for scientific evidence; whether the data used to make the calculations were reliable, complete, and properly input; and whether the process produced an accurate result.

Animations and Simulations

Animations and simulations are used to convey to the judge the story the physical evidence tells. It needs to be accurate, sequential, and persuasive. Computer animation is nothing more than a drawing tool used to explain, illustrate and highlight a witness's testimony/opinion. In a computer simulation, the computer is actually used to "figure out" what might have happened. Computer animation is actually a series of still images (drawings) that are displayed sequentially on a computer screen or via videotape, creating natural looking motion – very much like a cartoon.

Still images –i.e., charts, maps, photographs, X-rays, etc. – have long been accepted in trials. Motion pictures and videos have also been equally admissible at trial for many years. The use of a computer to create and display still images is not different from any other graphic presentation. If a witness is allowed to use a blackboard to illustrate his or her opinion, then there is no substantial difference, other than the level of persuasiveness, in allowing the image to be shown with the slide or movie projector, or on a computer screen.

The foundation requirements for an animation then should be the same as with any drawing, chart, slide presentation, etc. There is, of course, the additional concern that a foundation must be laid for any expert testimony if the animation is going to be used by an expert in explaining his/her testimony. The foundation requirements for an animation are:

- the substantive testimony of the expert is admissible;
- the expert witness is familiar with the animation;
- the animation fairly and accurately reflects the expert's testimony for which it is being used;
- the animation will be of assistance to the judge in understanding/evaluating the expert's testimony.

There is no need to have the creator testify as to the creative process/software used in producing the animation.

The expert need only be familiar with the information, data, and substantive evidence relied on in creating the animation.

An animation will run into foundation problems if it does not accurately and fairly reflect the expert's opinion. It is irrelevant whether the images in the animation are to scale so long as the displayed images are

not misleading, unfairly prejudicial or not helpful to the judge's understanding of the expert's testimony.

A computer-generated simulation (for example of an automobile accident) is demonstrative evidence, not substantive evidence. The foundation requirements are somewhat more detailed than with an animation. The primary difference is that the proponent must establish the reliability of the data and of the software used. The proponent has to anticipate the often-used objection to computer-generated findings: "junk in – junk out." Since the output or result is only as good as the input, the quality of the data and software is an issue that must not be ignored. To overcome any objections at trial, go over the following with the expert and the computer animator at the design stage:

- data collected by the expert;
- means by which data was collected;
- data that might be available but ignored/excluded;
- the methodology by which this data was used;
- other available alternatives in computing data;
- software chosen by computer expert/animator;
- the scientific principles used by the software, i.e., does the software apply accepted laws of science and if so, are these applications by the software acceptable within the scientific community;
- the knowledge and expertise of the computer animator;
- to what extent will the simulation advance the expert's opinion while remaining true to the existing data;
- to what extent is the software used determinative of the expert's opinion (chicken and egg query).

The expected foundation requirements for a computer simulation are:

- the data collected was accurate and complete;
- the computer animator depicted the data accurately;
- testimony from the software designer about the formulas and scientific principles used are acceptable within the scientific community;
- the scientific principles as applied by the software in the simulation are accepted by the computer and scientific communities;
- testimony by the reconstruction/simulation expert that any adjustments or manipulations of the data contributing to the design are valid;
- the expert relying on the simulation to explain or illustrate his/her opinion, is familiar with the exhibit;
- the simulation will assist the judge in understanding the expert's presentation.

Rule of Completeness

If a party introduces all or part of a writing or recorded statement, an adverse party may request the introduction of any other part that in fairness should be considered at the same time.

Destruction of Evidence

If a party destroys evidence in bad faith while litigation is pending, the judge may use this as circumstantial evidence implying the weakness of that party's case. Documents destroyed in good faith pursuant to a valid retention policy should not be subject to this inference.

PRIVILEGES

Privileges are intended to promote some policy that is external to the goals of the trial. Privileges may hinder the goals of the trial by excluding relevant and reliable evidence. The rationale behind privileges is that they encourage and foster communication between the client and his or her lawyers, doctors, spouse, therapists, or clergy. Only the holder of a privilege may waive it.

The burden of persuasion with regard to privilege generally rests with the party asserting the privilege.

Attorney-Client Privilege

The attorney-client privilege is intended to permit clients to receive information, legal advice, and effective representation of counsel. This all depends on full communication between the attorney and client.

The attorney-client privilege should be distinguished from the attorney's obligations under the rules governing professional responsibility. The attorney-client privilege is limited to *communications*, where ethical rules cover all information arising as a result of the representation. The evidentiary privilege only applies in *legal* proceedings; the ethical rule applies outside legal proceedings.

The holder of the privilege is the client and not the attorney. Only the client has the right to invoke and waive the privilege. The attorney may claim privilege on behalf of the client.

The attorney-client privilege only applies where the communication is made for the purpose of receiving legal advice. It protects the client against disclosure of facts revealed for the purpose of litigation, as well as non-litigious consultations. The privilege extends to communication made to an attorney by a person seeking legal services, even if the attorney decides not to represent that person. If the attorney is consulted for unrelated

reasons (such as a friend or business advisor) the privilege does not apply.

Only communications are covered and not the facts that are the subject of the communication. The communication itself, not the client's knowledge, is protected by the privilege. The privilege may encompass written communications between the attorney and client. However, pre-existing documents do not become privileged merely because they are sent to an attorney. Generally, the client's identity and the fact of consultation or employment of an attorney, and fee arrangements do not fall within the client-attorney privilege.

The privilege may be waived in several ways:

- Client testifies about the communication or attorney testifies about the communication on the client's behalf;
- The client puts the communication in issue;
- Voluntary disclosure (sometimes);
- Inadvertent waiver (sometimes);

Work Product Doctrine

The work-product doctrine protects materials prepared in anticipation of trial. Attorney-client privilege should be distinguished from work-product doctrine. The work-product doctrine generally protects a broader range of materials than does the attorney-client privilege. The work-product doctrine may be overcome if the other party seeking discovery has a "substantial need" for the material and is unable to produce it without "undue hardship."

Doctor-Patient Privilege

This privilege is intended to encourage patients to disclose information to their doctors to aid the doctor in treating the patient without fear that such information will become public. The patient holds this privilege, not the doctor. Only the patient may waive it.

Spousal Privilege

In some jurisdictions there are two types of spousal privilege recognized:

Testimonial Privilege

Testimonial privilege provides that a spouse cannot be compelled to testify against a defendant-spouse in *criminal* proceedings. This privilege precludes the spouse from testifying at all. The holder of the privilege is the witness-spouse. Testimonial privileges are determined as of the start of the trial. Once the marriage ceases, the privilege *may* no longer apply.

Confidential Communications

Confidential communications between spouses are also protected. This precludes the spouse from testifying about the communications. Both spouses are holders of the communications privilege. This privilege survives the termination of the marriage.

Psychotherapy Privilege

This privilege is intended to facilitate effective psychotherapy, by allowing the patient to trust the therapist and allow for full disclosure. The patient holds this privilege, not the psychotherapist. Only the patient may waive it. Court ordered psychological examinations may not be covered.

Religious Privilege

This privilege is intended to facilitate religious discourse and disclosure between religious leaders and their congregations. The congregation member holds this privilege, not the religious leader.

OBJECTIONS

GENERAL ON OBJECTIONS

Objections are requests to the trial judge to exclude evidence because it is improper. Objections are based in law or the judge's inherent authority to control the courtroom and the flow of evidence.

Objections are used to exclude information counsel believes is inadmissible. Objections must be made to preserve a challenge to the admissibility of that evidence on appeal. Objections serve two purposes. First the objection alerts the judge to the existence and nature of an error, allowing the judge to make a ruling. Second the objection affords opposing counsel an opportunity to make corrective measures. Timely and accurate objections are necessary to preserve an issue for appellate review. Objection must clearly and expressly state the reasons for seeking the evidence excluded.

Timely

Objections must be timely. The idea of objecting is to prevent the error before it unfolds. Oral objections should be made as soon as the question has been asked and before the answer has been given. A failure to do so normally results in a waiver to object to its admission at a later stage. Another consequence of failing to object is that the admitted evidence becomes part of the trial record.

Specific

Counsel must cogently state the grounds upon which the objection is based. "Objection, your honour" is not an objection;

it does not highlight any issue for the trial judge. "Objection, speculative" is a specific objection. Be specific, but get to the point.

State All Relevant Grounds

If there is more than one ground of objection, you must state each ground. For example, if the question is leading but also violates the accused's right not to be compelled to testify against himself or herself or to confess guilt, you must state both grounds so that both grounds are properly observed on appeal.

Offers of Proof

When your attempt to proffer evidence has been excluded by a trial judge's ruling, an offer of proof is required to preserve the issue for appeal. An offer of proof may take several forms:

- » An offer of testimonial evidence takes the form of a statement by counsel as to the expected content of excluded testimony.
- » A trial judge may require or be asked to take the "offer" by an examination of the witness, including cross-examination.
- » Affidavits summarizing the witness's expected testimony and signed by the witness are another way of making an offer of proof.
- » Excluded documentary evidence should be marked for identification and appended to the trial record.

Similarly, you may object and ask for an offer of proof at the time when the adversary calls a witness that you think will be prejudicial to your case and irrelevant to the issues on trial. In doing so, you will be sensitizing the judge to your position concerning this witness. During the course of this testimony, if he or she is about to enter improper and prejudicial areas, you should renew your objection and request for an offer of proof.

Constitutionalize Your Objections

The purpose of objecting is to protect your client's fair trial rights. Ground your objections with solid legal authority from the fair trial rights guaranteed by the Constitution.

Request Relief / Get a Ruling

You must get a judicial determination on an objection. Sometimes judges are not forthcoming with their answers, and it is unclear as to whether the judge has ruled. "Objection noted" is not a ruling. You can simply ask: "may I have a ruling?" Similarly, it must be a judicial ruling, and not an administrative determination.

If the judge does not make a ruling/decision, then it is assumed that the judge overruled the objection. It is counsel's responsibility to ensure that all objections and offers of proof are recorded. Off the record objections are insufficient.

„Objection Overruled”

This is enough to preserve the issue. You've objected to the question. The judge made a ruling. The objection is overruled. The issue is preserved.

„Objection Sustained”

If the objection is sustained, it might block further questions along the same line, but it does not preserve the issue for appeal. You have to advance the complaint. You need **curative relief**. The question alone had a toxic implication and damaged your client in the eyes of the judges. You need to cure the harm that is caused by the toxic question.

If the judge denies the curative relief: You've requested something, it has been denied. The issue is preserved for appeal. If curative relief is granted, there is no issue for appeal. If the curative relief is not sufficient, you

must progress the issue further. The last level of progression is to ask for a mistrial.

Respond

Your adversary may stand up and give reasons why a question is not speculative. You have to respond, you may have to flesh out your argument further.

Door-opening

Any question you ask could open the door to a potential catastrophe. If you open the door to testimony that is otherwise inadmissible, you cannot complain about it on appeal. Door opening can either work for or against the accused. It is a two way street.

Whether to Object

Everything done in the courtroom must have reason and purpose. The manner and extent of objections depends on counsel's trial strategy. No purpose is served by making objections on minor points: you may be eroding your credibility for purpose of further objections that actually count. If the judge sustains a number of objections on minor things, he or she may later rule against you on significant matters to avoid the appearance that you are getting everything you want from the judge.

Objecting During a Party's Testimony

Object carefully, object to obvious hearsay as to important matters and, if appropriate, when important documents will be introduced through the party-witnesses. When counsel objects during the cross-examination of his or her client, it appears as if counsel is trying to hide something or the party-witness cannot endure the pressure.

Objections with Respect to Child Witnesses

Objections that would ordinarily be appropriate might seem obstructionist if made during a child's testimony. The best approach is to test the child's testimonial abilities and thus avoid prejudicial testimony.

Objecting During Counsel's Opening Statement

The principle is that the purpose of an opening statement is to announce what the party intends to prove: it is no place for argument.

Objecting During Summation

Do not object unless absolutely necessary and you are sure you are right, for example, if your opponent is arguing facts not in evidence, misstates the testimony of a witness, misstates a critical point of law, or appeals to prejudice or sympathy. You may wish to wait until summation is over and object. However, the delayed objection requires that you obtain the judge's permission "not to interrupt." Otherwise, your delay will be deemed a waiver.

Never reduce a trial to a personal confrontation between you and your adversary: rely on the strengths of your argument. Generally, lawyers will not object too much during the initial stages of summation and, therefore, their adversary may wish to stretch his or her argument early in summation to see how far he or she can go and use it to make a particularly potent argument. Object promptly and vigorously when appropriate.

Baiting

Although your opponent may be examining the witness on objectionable matters, you may decide not to object and thus the door has been opened. Now, on your

examination, you are able to inquire into an otherwise closed objectionable area. Another approach is to object, but not very convincingly so that the objection is overruled. This way, you preserve your record on appeal and have opened up a closed area of inquiry.

Judicial Control

The trial judge has judicial control over the proceedings including:

- » The order of calling witnesses;
- » Form of testimony;
- » The use of demonstrative evidence;
- » Setting time limits;
- » Other trial related issues.

In exercising this control, the judge should be guided by several objectives:

- » Ascertaining the truth (accurate fact finding);
- » Avoiding needless consumption of time;
- » Protecting witnesses from harassment and undue embarrassment.

The trial judge is authorized to protect witnesses from harassment and undue embarrassment. The trial judge should protect the witnesses from questions that go beyond the proper bounds of cross-examination and are merely to harass, annoy or humiliate. This does not foreclose attempts to discredit the witness's testimony or credibility.

BASIC TYPES OF OBJECTIONS

List of basic types of objections

- » Based on the form of the question:
 - The question leading
 - The question is asking for speculation
 - The questioner (opponent/prosecutor) is making a speech, not asking a question
 - The question compound
 - The question is argumentative
 - The question is incomprehensible
 - The question is ambiguous
 - The question is misleading
 - The question is a hypothetical being posed to a non-expert
 - The question misstates the witness's testimony
 - The question misrepresents the evidence
- » Based on the subject matter of the question:
 - The question assumes facts not in evidence
 - The question has been asked and answered
 - The question goes beyond the scope of direct examination
 - The question goes beyond re-direct examination
 - The question is objectionable because of its substance
 - The question is objectionable because the witness is not competent to answer
 - The question asks for information that has been already declared inadmissible

- » Based on substance of the answer :
 - The answer is not responsive to the question
 - The answer volunteers information beyond the question
 - The answer contains information that has been already declared inadmissible
 - Lack of Foundation
 - Privileged Information
 - The question is calling for speculation
 - The question goes beyond the expertise of the expert witness (lack of foundation)
 - Hearsay

How to Object

- » Make a clear and precise objection
- » Ground the objection with a rule or principle and offer a cogent argument
- » Do not argue with or speak to the opponent
- » Listen carefully to the response
- » Request to reply if necessary

The Process

Step 1. Stand up and state "*Objection!*"

Step 2. State the specific ground(s) for objection.

e.g., *"Your Honor, the question is irrelevant."*

Step 3. Request permission to explain the objection.

e.g., *"Your Honor, may I explain why the question is irrelevant?"*

Step 4. Request to reply to the response by the opponent.

e.g. *"Your Honor, may I reply?"*

NOTE: if the objection is from the opponent, request to respond; this is essential for the record.

e.g. *"Your Honor, May I be heard?"*

The Technique

- Your Honor, I object to this witness's testimony on the ground that he is not competent because he does not have the mental capacity to give evidence.
- Your Honor, I object to this witness's testimony on the ground that she lacks the expertise to give evidence on the issue in question – even though she is an expert. The question goes beyond her expertise.
- Your Honor, I object to this witness's testimony on the ground that he is being asked to provide an opinion and not facts. This witness has not been qualified as an expert and no foundation has been provided to show that this witness can render an opinion.
- Your Honor, I object to this question because it goes beyond the scope of direct examination.
- Your Honor, I object to this question because it is leading; it is suggesting the answer to the witness.
- Your Honor, I object to this question because it suggests facts which are not in evidence.
- Your Honor, I object to this question because it is a compound question.
- Your Honor, I object to this question because it has been asked and answered.
- Your Honor, I object to this question because it attempts to bolster the witness's credibility before it has been attacked.
- Your Honor, I object to this question because opposing counsel is improperly trying to impeach the witness by using extrinsic evidence on a collateral (non-relevant) matter.
- Your Honor, I object to this question because it seeks information that is already in evidence; it is cumulative and a waste of your time.
- Your Honor, I object to the use of the diagram because it does not fairly and accurately represent the scene in question.
- Your Honor, I object to the use of this photograph because it does not fairly and accurately depict the scene as it existed when the incident occurred.
- Your Honor, I object to this question because opposing counsel has not shown that the witness is sufficiently familiar with the accused's handwriting to identify her signature.
- Your Honor, I object to this evidence being admitted (considered) because its probative value is substantially outweighed by its prejudicial effect.
- Your Honor, I object to this question because the witness is not sufficiently qualified to testify about authenticity of the electronic evidence / emails.
- Your Honor, I object to the admission (consideration) of this evidence because it is not the best evidence (original document); opposing counsel is relying on this copy to prove the existence of a fact in the document or the authenticity of the document.

MORE ON THE BASIC TYPES OF OBJECTIONS

Question is Ambiguous

Questions that are difficult to understand due to their susceptibility to different interpretations are objectionable because their marginal value is outweighed by the likelihood of confusing the witness and the judge. The question may be technically relevant, but confusing or misleading. The ambiguous question can confuse the witness, mislead the court, or prompt a vague answer. The judge has discretionary control over the form of the question to determine the truth, avoid wasting time, and protect witnesses from embarrassment.

On occasion, you should both object and suggest the question be rephrased. But think of the consequences.

Question is Argumentative

Argumentative questions badger the witness. Argumentative questions do not seek facts; rather they challenge the witness about conclusions.

Example: *"How can you seriously expect the court to believe that...."*

Argumentative questions have two characteristics: (1) negatively, they are not intended to elicit new substantive information from the witness; and (2) affirmatively, they challenge the witness on inferences from the testimony already in the record.

Object when your opponent's argumentative questions are obviously affecting your witness and causing the witness to either be less confident or display a negative demeanor. But use sparingly. You don't want to be seen as overly aggressive.

Question is Assuming Facts Not in Evidence

Questions that assume to be true disputed facts that no witness has yet testified about. Be alert for questions that assume the existence of essential facts not previously testified by a witness.

Example: *"Did you know that your fingerprints were found on the gun?"* Although there has been no evidence on the matter, the implication is that counsel knows the statement to be true and is asking the witness if they "know." The witness may reply "no," but the judge might nevertheless accept the statement as true because counsel implied the truth of the statement.

Such questions are improper on both direct and cross-examination. It is improper to reference facts outside the record, since the witness is entitled to a fair opportunity to affirm or deny any fact.

Authentication Lacking

Authentication and identification are required for the admissibility of evidence such as documents, substances, spoken words heard by witnesses, audio recordings, and photographs. The evidence will not be admitted until the proponent makes a sufficient showing that it is what the proponent claims it is.

The authentication requirement also applies to modern technology such as faxes, e-mails, website postings, and instant messages. When the exhibit to be identified is a physical object, the proponent can rely on the object's distinctive, readily identifiable characteristics or testimony about a chain of custody. When it is about a photograph, it is not necessary that the witness have taken a photograph himself or herself or was even present when the photograph was taken so long as he or she is familiar with the scene depicted in the photograph.

Prior Bad Acts Inadmissible

Counsel may cross-examine a witness on his or her bad acts. However, opposing counsel may object if:

- » The act is not probative of the character for truthfulness or untruthfulness: the proponent cannot argue simplistically "he did it once, therefore he did it again."
- » The proponent attempts to introduce extrinsic evidence of the act to prove specific instances of a witness's conduct.

Best Evidence Rule

The best evidence rule applies when a party wants to admit as evidence the contents of a document (writing, recording or photograph) at trial. This rule requires an original be produced, as the original is the "best evidence." If no original is available, the party seeking to admit the document must provide an acceptable excuse for its absence. If the judge accepts the excuse, then the party can use a duplicate to prove the contents of the document. This is unless there are genuine questions about the authenticity of the original, or if it would be unfair to admit the duplicate.

Bolstering Before Impeachment

The party who calls a witness may not produce self-serving, favorable, bolstering information during the direct, prior to any cross-examination. Bolstering is an attempt to support the credibility of a witness's testimony before it has gone under attack. Attorneys may try to use self-serving statements to bolster the witness's credibility. For example, the attorney may ask the witness "Do you always tell the truth?" The witness of course answers, "I am always truthful."

Similarly, attorneys may attempt to use other witnesses to bolster a prior witness's testimony. "Witness-B, is Witness-A truthful?"

Counsel should object: witness credibility may not be bolstered until the witness has come under attack (impeachment). If there is no cross-examination, a subsequent witness may not bolster the principal witness.

This rule bars proof that needlessly presents cumulative evidence. Proof of the witness's prior written statement is cumulative of the witness's oral testimony. If the testimony cannot be admitted on a limited credibility theory as proper rehabilitation, the testimony is hearsay. The absence of impeachment renders the bolstering information irrelevant. The prohibition against bolstering, however, does not apply to corroboration of the facts.

However, a vigorous cross changes the results and may allow rehabilitation. Even when rehabilitation is permissible, there are restrictions on the form of the rehabilitating evidence. The proponent may not introduce extrinsic evidence of the prior witness's specific truthful acts. Witness's credibility may not be bolstered by the opinion of another, even an expert, that the witness is telling the truth. The credibility of a witness is a matter exclusively for the determination of the fact finder.

Business Record Not Established

Business records must be generated and kept in the course of a regularly conducted activity of a business or organization. Records, memoranda, or data compilation must be made in the course of regularly conducted business. It must be regular practice of the entity to have this type of record prepared by the person with knowledge at or near the time of the event. If the source of the information, the method, or circumstances of preparations indicate a lack of trustworthiness, the record will be excluded. The ultimate source of the information must have personal knowledge of the facts stated. The admissibility of a

company's records is aided by testimony from a company accountant or bookkeeper detailing the record-keeping procedures. The regularity and timeliness of the record preparation are key factors.

Character and Reputation Inadmissible

Evidence of a person's character is generally inadmissible to prove that someone acted in conformity with that character on a particular occasion. Distinguish from Bad Acts Inadmissible. Bad Acts relates to specific acts other than those alleged in the pleadings. Character inadmissible relates to reputation and opinion about character. Character evidence is normally provided by general reputation in the community where the principal witness lives. A character witness should be sufficiently familiar with the person they are to testify about, and have a reliable basis for forming the opinion. Testimony about specific events may be improper.

In criminal cases there are numerous potential objections to the use of character evidence:

- » The accused has not placed his or her character in issue. As a general proposition, such prosecution evidence is inadmissible until the accused elects to open the issue;
- » Testimony does not relate to a *pertinent* trait of character. If the accused is tried for perjury, the character trait of peacefulness is not pertinent.
- » Inadequate foundation for character or reputation testimony. When the evidence takes the form of reputation evidence, foundation must be established that the character witness and the accused are members of the same "community".
- » When the proffered evidence takes the form of opinion, the predicate must demonstrate that the character witness is personally acquainted with the accused.

If evidence of a defendant's pertinent trait is admitted, the prosecutor may offer evidence to rebut it. If a criminal defendant attacks a character trait of the victim, the prosecution may respond by either defending the victim's character trait or by attacking the same character trait of the accused;

Collateral Matter

The judge should not permit questioning on matters irrelevant to the substantive issues in the case. A matter is collateral when it is relevant only to the witness's credibility but has no relevance to the merits of the case. A witness ordinarily may not be impeached with extrinsic evidence contradicting the witness's testimony when the extrinsic evidence relates to facts that have little or no bearing on the substantive issues. Collateral matters could also be excluded to avoid confusing the issues or unduly prolonging the trial.

Competency Not Established

To qualify as a witness a person must have the cognitive ability to understand the obligation to testify truthfully under oath, and possess the mental capacity of perception, memory, and narration

Computer Graphics Inadmissible (event reconstruction)

Computer graphics may assist the judge to visualize difficult perspectives. A foundation must be established: the qualifications of the expert who prepared the simulation; the capacity of the computer hardware and software used; the calculations and processing of data meet the standards for scientific evidence; the data used to make the calculations were reliable, complete, and properly input; and the process produced an accurate result.

Computer Records Inadmissible

The proponent should show the reliability of the computer, the trustworthiness of the input procedures, and the authenticity of the printout at trial. There are several potential objections:

- » No showing of reliability of the computer used to generate the printout;
- » No showing that the business or company uses trustworthy computer procedures for inputting date;
- » The witness did not identify the exhibit proffered at trial as the printout made on the relevant occasion.

Exhibit Foundation Lacking (Physical evidence)

For physical evidence it may be necessary to establish a chain of custody: that the exhibit has been unaltered even though numerous people handled it. Under such circumstances, it might be necessary to call each witness to testify. This is most relevant when it is the weapon or instrument involved in the crime, and when forensic experts have tested the evidence and they are testifying. It stands to reason that if the evidence was mishandled, irrespective of the reasons, the results of the tests performed may be misleading or unreliable.

Authenticity, proper foundation, and a chain of custody must be established:

- » The witness's original acquisition of the object;
- » The witness's final disposition of the item (retention, transfer, or destruction);
- » The safekeeping of the item in the interim.

Expert Testimony Improper

Expert testimony should assist the judge in making findings. Experts should have the necessary professional knowledge in order to establish or evaluate an important fact. Experts may reasonably base their opinion on reliable reports of others. This reliance does not allow the in-court expert to read the other person's out-of-court report into evidence as substantive proof. There are several possible objections:

- » The expert testimony on this subject would not assist the court;
- » The witness does not qualify as an expert. The judge should closely scrutinize the expert's expertise and the subject matter of the opinion;
- » Inadequate data, methodology or studies to support conclusions reached;
- » The proponent has not demonstrated that the expert's methodology or scientific theory or technique is generally accepted. The expert must also apply that methodology correctly;
- » An expert's theory must rely on more than the expert's subjective, unsubstantiated belief. A hypothesis may constitute scientific knowledge if the proponent presents sufficient controlled experimentation or systematic observation to validate the hypothesis. (Has it been tested, was there a margin of error, was it subjected to peer review?);
- » The expert's final opinion violates the ultimate fact prohibition;
- » The expert's final opinion is a conclusion on mixed questions of law and fact;
- » The expert's opinion lacks the requisite degree of certainty.

Foundation Lacking (Personal Knowledge)

A witness called to testify about the occurrence or fact must have perceived the subject of the testimony. The witness's proponent must establish (by questions to the witness and given answers from the witness) that the witness previously perceived the fact or event, and presently remembers it.

The standard for showing personal knowledge is minimal: whether the judge could rationally infer the personal knowledge from the proffered testimony. The objecting party should specify the missing foundational element. It is not fatal that the witness qualifies his or her testimony with expressions such as "I think."

Habit, Routine, Practice Evidence Improper

Habit is practice consistently followed and repeated in specific situations. The opponent may object on the following grounds:

- » The witness lacks sufficient personal knowledge of the behavior of the person or entity in question;
- » The behavioral pattern described by the witness is not specific enough to qualify as habit or routine;
- » The behavioral pattern was not sufficiently repeated;
- » The behavioral pattern is not consistent enough;
- » The behavioral pattern is too volitional;
- » There has been no corroboration of the occasion in question;
- » There were no eyewitnesses to the incident;

Counsel should take care to observe the distinction between admissible evidence of habit or routine practice and inadmissible evidence of character.

Harassment

It is about statements which are intended to primarily unnerve or embarrass a witness. See also *Argumentative*. The judge should exercise reasonable control over the mode of examining witnesses to protect them from harassment or undue embarrassment.

Hearsay Evidence

Hearsay is an out-of-court statement based on second-hand knowledge that is being offered for truth. Hearsay denies the opposing party the opportunity to cross-examine the declarant about the statement. The opportunity to question the trial witness does not satisfy the need to cross-examine the person who issued the out-of-court statement. The out-of-court declarant is the real source of the evidence.

Hypothetical Question Improper

When a direct examiner uses a hypothetical question to interrogate a witness, ordinarily the record must already contain admissible evidence of the facts stated in the hypothesis. The trial judge has discretion to vary the order of proof and to permit the examiner to pose hypothetical questions subject to later presentation of the evidence of an essential fact.

There are a number of objections available:

- » the hypothetical question does not contain adequate facts to the expert to form a reliable opinion;
- » the hypothetical question misstates the evidence;
- » the hypothetical rests almost exclusively on the experts' opinion and not facts;
- » the question includes argumentative inferences rather than facts;
- » the hypothesis omits an essential fact.

Cross-examiners are not subject to the same restriction as direct examiners. Variations of the hypothesis may be posed on cross to test an expert, whether or not the variation is founded on testimony in the record. If the expert has been present in court, the questioner may ask the expert to assume the truth of a witness's testimony. Generally full pre-trial disclosure regarding the expert and the expert's testimony is mandatory;

Immaterial/Irrelevant

Evidence must be relevant in order to be admissible: it must be of consequence in determining the action.

Impeachment Improper

Proper bases for impeachment may include bias, mental incapacity, prior inconsistent statements, and character or reputation for untruthfulness. The general rule is that a witness may not be asked whether another witness lied. Some judges permit such questions whenever the contradiction between the accused's testimony and that of another witness can be explained only by the conclusion that someone is lying.

It may better to ask a witness if he or she knows any reason why another person would lie. Cross-examiners must have a good faith basis for their questions. For example, if the cross-examiner asks a witness, "Aren't you testifying against my client because he had harsh words with you in an argument that you had three months ago?", the cross-examiner stated a specific reason as to why the witness may be biased, but the cross-examiner may be challenged on the basis that he does not have facts to back up his assertions and insinuations.

Judicial Questioning Improper

It is improper for the judge to assume the role of an advocate or a witness. The wording of a judge's question may show partiality. Counsel should be alert to judicial statements that suggest that in finding facts, the judge is relying on his or her personal knowledge.

Leading Question

Leading questions are prohibited in direct examination. The exceptions are if it is necessary to develop a witness's testimony, if the witness is hostile, or if the witness is an adverse party. It is not only objectionable to pose leading questions on direct, it can be poor advocacy. When you have a good witness with evident honesty and intelligence, you want the witness to open up to the court and place those qualities on display. The objector should keep in mind that because the objection goes to the form of the question, the questioner may rephrase the question. The best advice is to save this objection for when it is really needed: when the questioner of a friendly witness seeks to lead on disputed, material matters.

Misconduct of Counsel

It is improper to misstate a witness's testimony. Other forms of misconduct include badgering the witness, name calling, cross-examining the witness in bad faith by misrepresenting the contents of documents, reading law books to the court in closing arguments, and mentioning facts outside the record.

Whenever at trial one party intentionally violates a rule of legal ethics and the violation causes evidentiary prejudice to the opposing party, the latter party can seek a sanction in the form of the exclusion of evidence that the former party would otherwise be entitled to introduce.

Misleading

The danger of misleading statements is that they can mislead the court. Objections based on these dangers guard against proof that will cause the trier of fact to lose sight of the main issue.

Multiple or Compound Question

If the witness answers a compound question it can be difficult to identify which precise question the witness is answering. Presenting a compound question presents a danger of confusing the witness and the court. Your opponent can be required to break up complex questions into several discrete questions.

Narrative

Example: „Now, witness, in your own words, please tell the court what you experienced that day.”

The direct examiner must draw a line between leading questions and open-ended questions which call for a narrative. The judge has discretion on whether to permit narrative testimony.

However, the judge will ask for more specific inquiries if:

- The witness's narrative becomes confusing;
- The narrative includes repeated references to inadmissible matters.

Where allowed, before trial, the defense counsel should ensure that the witness knows the chronology backward and forward and the witness knows what to avoid mentioning unless the questioner asked for that information point blank.

Opinion Rule Violated (Expert Witnesses)

Experts may be permitted to base their opinions on statements of other experts. However, there are limits as to what is permissible for a witness's opinion.

- » Experts must not phrase their opinions in legal terms nor state legal conclusions;
- » Experts must not give their opinions directly as to a person's guilt or innocence;
- » Experts may not (depending on the jurisdiction) give opinions on an accused's mental state, where the mental state is an element of the crime charged;

Note: Generally, in many jurisdiction, an expert may not give an opinion on the ultimate issue in the case. If the issue is the accused's mental state at the time of the offense, the ultimate issue would be the accused's sanity or insanity during the commission of the crime. In international criminal tribunals the question is more often not whether expressions on the ultimate issues should be allowed but whether they assist the court.

- » Experts may not speculate.

Opinion Rule Violated (Lay Witnesses)

If a witness is not testifying as an expert, his or her opinion testimony must be limited to inferences that are rationally based on the witness's personal knowledge and help the fact finder gain a clear understanding of the witness's testimony. However, lay witnesses may offer opinion on subjects:

- » Speed, age, weight, height and intoxication. The foundation required is that on the occasion in question, the witness had an adequate opportunity to observe the person or item in question;
- » Opinions such as identifying an

author's handwriting style. The required foundation is familiarity with a person's handwriting style, based on numerous prior opportunities for observation under reliable circumstances;

» Objections:

- There is no proof that the witness personally observed or otherwise perceived the facts;
- A foundation has not been laid for the lay opinion testimony.

Polygraph Inadmissible

There is no consensus that polygraph evidence is reliable.

Prejudicial

Although relevant, evidence may be excluded because the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. For example, there may be evidence about a witness' background that is highly embarrassing to the witness but is marginally probative and not useful. An objection that evidence is prejudicial can be made to exhibits, demonstrations or oral testimony. Gruesome photographs or video recordings containing emotional material that do not assist the judge in making findings of facts are generally excluded.

There is a three-step process. The judge:

- » Initially gauges the probative value of the item in evidence;
- » Identifies the dangers or countervailing factors;
- » Balances the probative value against the dangers or considerations and determines whether the potential dangers substantially outweigh the value of the evidence. If so, the evidence is excluded.

Prior Conviction Inadmissible

Interrogation about remote past crimes may be inadmissible. The prosecution has the burden of convincing the trial judge that the probative value of the conviction substantially outweighs any attendant probative dangers. For prior convictions involving dishonesty or false statements, the trial court may not have discretion to exclude these convictions. Details of past convictions are usually excluded. However, the door can be opened to questioning about additional details by a witness's misleading description of the crime during his or her own direct examination.

Prior Inconsistent Statement

Like in court witnesses, out-of-court declarants may be impeached with their inconsistent statements; that is, statements made at times other than the time he or she made the hearsay declaration admitted in court. Prior inconsistent statements can arise from many sources including reports by the witness, or documents he or she prepared.

Opposing counsel may use a writing to refresh the witness's recollection before trial or on the witness stand. A document used solely to refresh a witness's memory. Normally, only the in court testimony counts as evidence and is given weight; not the material used to refresh the memory. But what if a witness neither admits nor denies the inconsistent statement, or fails to remember? The cross-examiner may be entitled to impeach. The cross-examiner can demand to see the paper and use it to impeach the witness.

What if a witness purports to remember details that are not recorded in the prior statement? To lay the foundation for impeachment, the cross-examiner should force the witness to admit that he or she

was trained to include all important details in his or her report.

However, it is critical to distinguish between cross-examination about a prior inconsistent statement and the introduction of extrinsic evidence of the statement (especially when conducted by the opposing counsel).

Privileged communications

Communications privileges protect communications that are confidential, and occur between properly related parties, and are incident to the protected relationship, and are made for a related purpose. For example, confidential communications between a client and attorney relating to that purpose are protected under the client-attorney privilege, unless that privilege is waived.

There are also topical privileges such as governmental state secrets that protect certain types of facts.

Communications privileges protect communications that are confidential, and occur between properly related parties, and are incidental to the protected relationship. They are made for that purpose.

Insufficient Qualifications

Sufficient qualifications must be established for an expert witness's testimony to be admitted. Judges reject expert testimony where qualifications are insufficient.

The witness may be an expert on some subjects, but not in the relevant field. In analyzing the reliability of a proposed expert testimony, the role of the judge is to determine whether the expert is qualified in the relevant field and to examine the methodology the expert used in reaching his or her conclusions. An expert must stay within the reasonable confines of his or her subject area and cannot render an opinion in a different field.

Rape Cases, Prior Conduct

Inquiry into past cases of the victim's sexual behavior may result in undue prejudice and has been sharply curtailed. Courts employ a balancing test to determine whether the probative value of a victim's sexual history is outweighed by the prejudice that would be created by disclosure.

Relevancy Lacking

Relevancy is the basic requirement for the admissibility of evidence. It must be of some probative value in the case. Evidence that does not bear directly or indirectly on the issues being tried should be excluded as irrelevant.

Religion

Evidence that a person holds or does not hold a particular religious belief is impermissible to attack or enhance the witness's credibility.

Repetitive Questions

Repetitive questions waste time and can place undue emphasis on a particular subject. However, the cross-examiner is not barred from asking questions simply because the same question was asked and answered on direct.

No Scientific Evidence

See also Expert Testimony Improper. The expert's methodology or technique should qualify as reliable scientific knowledge. If the methodology is unproved and untested, the testimony will be deemed inadmissible. Testimony based on scientific proposition should not be admissible unless the technical process underlying the opinion has gained general acceptance in the particular field to which it belonged.

The judge must make a preliminary assessment on whether the expert's general theory or technique rests on adequate,

empirically valid reasoning and can be applied to the facts at issue.

The expert's testimony must be "scientific" in the sense that it is grounded in methods and procedures of science. Soft science such as psychological opinion is not subject to empirical evaluation as hard science. However, a showing of reliability applies.

Possible objections in respect to scientific evidence include:

- » The topic of opinion is not a proper subject for expert opinion; the testimony will not assist the court;
- » The witness does not qualify as an expert in the field;
- » The testimony is irrelevant;
- » There has been inadequate foundational proof that this technique qualifies as reliable scientific knowledge;
- » In the case of technical/specialized knowledge, reliability has not been established;
- » Testimony is unduly prejudicial.

Scope of Examination

The subject matter of cross-examination is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. Scope rules control other phases of examination. Re-direct is limited to subjects covered on cross-examination.

If a successful objection is made to the scope of redirect examination, the direct examiner must obtain leave from the court to explore new subjects on redirect. Re-cross examination, where allowed, is limited to the scope of matters covered on re-direct examination.

Sequestration Rule Violated

Witnesses should abide by the judge's order to stay out of the courtroom until they give their testimony. However, violations do occur. When the rule of sequestration is violated, that is not necessarily enough to render the witness's testimony inadmissible. The trial judge has the discretion to prevent the witness from testifying. Prejudice should also be shown before a witness is excluded. A party's culpability in the witness's violation is a significant factor the judge could consider.

Speculative

Lay witnesses are limited to opine about matters that they personally perceived. They cannot guess about the matter. For example, one witness may not conjecture as to another person's state of mind.

Summaries Inadmissible

The contents of voluminous records may be presented in the form of a chart or summary. Originals or duplicates of records that are summarized must be made available for examination and copying by the opposing party.

The foundation for a summary must include a showing that the chart accurately reflects the underlying records. The foundation must also include proof that summarized records are admissible and that it would be inconvenient to examine the evidence in court. The mere fact that the underlying records have been admitted does not bar the introduction of a summary.

Tainted Evidence

This is evidence that has been taken in violation of law or procedure; however, violation of a rule of sequestration goes to credibility rather than admissibility of testimony; the violation does not taint the testimony so badly that the testimony must be excluded.

Unresponsive

A witness's testimony is unresponsive when it does not answer counsel's question. Only the party conducting the examination can move to strike for unresponsiveness alone.

Sometimes, a witness called by the direct examiner is persistently unresponsive. In these situations, the judge will occasionally allow the direct examiner to lead the witness to better control the testimony.

[ANNEX 1]

APPLICATION OF EVIDENCE PRINCIPLES TO LCP

Articles of the new LCP	Possible Objections
General principles and rights of the defendant	
<p>Article 5</p> <p>The right to a fair trial</p> <p>Any person charged with a criminal offence shall have the right to a fair and public trial before an independent and impartial tribunal, in an adversarial procedure, with a possibility to challenge the accusations and tender and present evidence in his or her defense.</p>	<ul style="list-style-type: none"> • Catch-all article • Judicial questioning improper
<p>Article 12</p> <p>Legality of evidence</p> <p>(1) Extorting a confession or any other statement from the defendant or any other person who participates in the procedure shall be prohibited.</p> <p>(2) Any evidence collected in an unlawful manner or by violation of the rights and freedoms established in the Constitution of the Republic of Macedonia, the laws and international agreements, as well as any evidence resulting thereof, may not be used and may not provide the ground for a judicial verdict.</p>	<ul style="list-style-type: none"> • Motion in limine can be filed • If the evidence comes in, file a Motion to Suppress

Article 33

Reasons for exclusion

(According to the Art. 38, applies to public prosecutors and other participants in the procedure, as well as expert witnesses)

(1) A judge or a lay judge must not exercise his or her judicial obligations:

- 1) if he or she has suffered any damage as a result of the crime;
- 2) if the accused, his counsel, the prosecutor, the injured party, his legal counsel or attorney is his or hers marital i.e. illegitimate spouse or a blood relative according to the law regardless of the degree of kinship, a distant relative to the fourth degree and an in-law to the second degree;
- 3) if, with the accused, his counsel, the plaintiff or with the injured party he or she has a relationship of a guardian, a person under guardianship, one who adopts, an adopted child, foster parent or a foster child;
- 4) if, in the same criminal case he or she participated as a judge of the preliminary procedure, participated in the examination of the indictment before the main trial or participated in the procedure as a plaintiff, defense counsel, legal counsel or authorized representative for the injured party, i.e. the plaintiff, or was examined in the capacity of a witness or as an expert witness;
- 5) if, in the same case, he or she participated in the decision making process of the lower court, or if, in the same court, he or she participated in the bringing of the decision that is annulled with the appeal;

(2) Apart from the situations as referred to in paragraph 1 of this Article, a judge or a lay judge may also be excluded from performing his or her judicial obligations if there are any circumstances that would cause any doubts regarding his or her impartiality.

- **Competency**
- **Expert competency rule**

Article 70

Rights of the defendant

Every defendant shall have the following basic rights:

- to be informed on time and in detail, in a language that he or she understands, about the crimes that he or she is accused of and any evidence against him or her;
- to have enough time and possibilities to prepare his or her defense, and especially to have access to the case file and be familiar with any available incriminating or exculpatory evidence, as well as to communicate with a defense counsel of his or her own choice;
- to be tried in his or her presence and to defend in person or with the assistance of a defense counsel of his or her own choice, and if the person is indigent, to get a defense counsel free of charge when that is required by the interest of justice;
- to freely present his or her defense;
- not to be coerced into testifying against himself or herself and people that are close and plead guilty;
- to have a possibility to speak about the facts and the evidence that he or she is charged with and to present all facts and evidence that would support his or her defense case;
- to examine the witnesses of the prosecution on his or her own or through the defense counsel, as well as to be able to ensure the presence and examination of the defense witnesses, under the same conditions as is the case with the prosecution witnesses; and
- during the main hearing to be able to consult with his or her defense counsel, but not to be able to discuss the way he or she will answer individual questions.

- **Catch-all article**

Making a record

Article 91

Keeping the record

(1) The record shall be kept accurately and nothing shall be deleted, added or altered in it. Any crossed out lines shall remain legible.

(2) Any alterations, corrections and additions shall be added at the end of the record and immediately pointed out to the parties and defense counsel and they shall be certified by the persons who sign the record.

- **Object to the wrong record, incorrect or inaccurate reflection of the procedure.**

Means of Evidence

Article 208

Prohibition of the use of fraudulent, suggestive and captious questions

After the defendant has been advised on the right to keep silent and the other rights referred to in Article 206 of this Law, the questions asked shall be clear, understandable and precise so that he or she is able to fully understand them. The examination may not be conducted under the assumption that he or she admitted something that the person never did and leading questions that suggest the answer shall not be asked of the defendant. The defendant may not be deceived in order to get his or her statement or admission.

- **Object to ambiguous, vague questions**
- **Leading questions**

Article 209

Identification of objects

Any objects that are related to the crime or that may be used as evidence shall be shown to the defendant to be identified, after he or she has previously described them. If these items cannot be brought in, the defendant may be taken to the location where the objects are to be found.

- **Authentication**
- **Exhibit foundation lacking**
- **Chain of custody**

Article 210**Manner of examination of the defendant**

(1) After being advised of his or her rights, the defendant shall be asked if he or she has something to say in his or her defense. During the examination, the defendant shall be given the opportunity to freely comment on all circumstances of his or her accusation and to present all the facts that might be useful to his or her defense.

(2) The defendant shall be examined verbally. During the examination, the defendant may be allowed to use his or her notes.

(3) When the defendant completes the statement, questions shall be asked if necessary to fill in the gaps and to eliminate any inconsistencies or obscurities in his or her account of the events.

(4) The examination shall be conducted so as to respect the personality of the defendant.

(5) Force, threats or other similar means (Article 249, paragraph 4) shall not be used against the defendant in order to obtain his or her statement or confession.

(6) The defendant may be examined in the absence of a defense counsel only if he or she has explicitly waived that right, and the defense is not mandatory or if he or she does not provide for a defense counsel within 24 hours from the moment when he or she was advised of this right (Article 71, paragraph 2), except in the event of a mandatory defense.

(7) If it was acted contrary to the provisions of paragraphs 5 and 6 of this Article, any given statement by the defendant cannot be used in the procedure.

- **Object as inadmissible if it contrary to the paras. 5-6**

Article 213

Persons that may not be witnesses

The following persons shall not be witnesses:

- 1) a person who would violate the duty of keeping a state or a military secret if he or she gives a statement, unless the competent entity relieves him or her of that duty;
- 2) the defense counsel of the defendant on anything confided by the defendant in him or her as counsel, unless the defendant himself or herself demands it;
- 3) a person who would violate the duty of keeping a business secret if he or she gives a statement, regarding anything learned during the practicing of his or her profession (religious confessor, attorney and physician), unless the person has been relieved of such a duty by a separate regulation or by a written statement, i.e. or by a verbal statement given on record by the person for whose benefit the keeping of the secret was instituted, i.e. by such a statement by his or her legal successor;
- 4) a juvenile person who, bearing mind his or her age and mental development is not capable of understanding the significance of his or her right not to testify, unless the defendant himself or herself demands it; and
- 5) any person who is not capable of testifying at all, due to his or her mental or physical illness or age.

- **Competency not established**
- **Privileged material**

Article 214

Persons excused from the duty to testify

(1) The following persons shall be excused from the duty to testify:

- 1) the marital and illegitimate partner of the defendant;
- 2) any blood relatives of the defendant in a direct line, any relatives in an indirect line up to the third degree, as well as in-law relatives up to the second degree; and
- 3) an adopted child or a foster parent of the defendant.

(2) The entity conducting the procedure shall be obliged to forewarn the persons as referred to in paragraph 1 of this Article that they must not testify, before they have been examined or immediately after their relationship with the defendant has been established. The forewarning and the response shall be put on the record.

(3) Any person who has proper reasons not to testify against one of the defendants shall be excused from the duty to testify against all other defendants, if his or her statement, according to the nature of the circumstances, cannot be limited only to the other defendants.

- **Privileged material
(Family/Spousal)**

Article 215

Consequences from any violation of the witness examination rules

If a person who may not be a witness or a person who is not obliged to testify has been summoned as a witness, and was not forewarned or did not explicitly waive that right, or if the forewarning and the waiver have not been noted in the record, or if a juvenile person has been examined who cannot understand the significance of his or her right not to testify, or if the statement by the witness has been extorted by force, threat or other similar prohibited means, such a statement by the witness may not serve as a ground for the court decision.

- **Inadmissible and should be disregarded by the court**

Article 216

The right of the witness to refuse to answer certain questions

The witness shall not be obliged to answer certain questions if it is likely that by doing so, the witness would expose himself or herself or a close relative to formidable shame, significant material loss or criminal prosecution.

- **Harassment**
- **Self-incrimination**

Article 217

Questions that are not allowed to be asked of the injured party or witness

It shall be prohibited to ask the injured party and the witness questions that pertain to their sexual life and sexual predispositions, political and ideological affiliation, racial, national and ethnic origin, moral criteria and other extremely personal and family circumstances, except upon an exception, if the answers to such questions are directly and obviously related to the required clarification of the significant criterion of the criminal offense, which is the subject matter of the procedure.

- **Object to oppressive questions**
- **Collateral Matter**
- **Reputation evidence improper**
- **Character inadmissible**
- **Even if it is related, you might want to object to it as Prejudicial**

Article 219

Manner of Examination of witnesses

- (1)The witnesses shall be examined separately. As a rule, the witness shall respond verbally.
- (2)The witness shall previously be forewarned about the duty to tell the truth and elide nothing, and afterwards, he or she shall be forewarned that giving a false statement is a criminal offense. The witness shall be also forewarned that he or she is not obliged to respond to the questions as referred to in Article 216 of this Law and this forewarning shall be noted on the record.
- (3)The witness shall then be asked to state his or her first name and surname, father's name, profession, temporary or permanent place of residence, place of birth, age and his or her relationship with the defendant and the injured party. The witness shall be warned that he or she is obliged to inform the entity conducting the proceedings of any change of address or temporary or permanent residence.
- (4)When examining a witness, neither the use of deception shall be allowed, nor asking leading questions that already suggest the expected answer.

- **Sequestration Rule**
- **Leading**
- **Misconduct of counsel**

Article 220**Identification of persons or objects by the witness**

(1) If it is necessary to establish whether the witness recognizes a certain person or an object, the witness shall be first asked to give a description and to indicate any characteristics that make them distinguishable, and only then, the witness may see the person, together with some other persons that are not known to him or her, between five and eight as a rule, whose basic features are similar to the ones described by the witness, i.e. the object, together with other objects of the same or similar kind, following which, the witness shall be asked if he or she is capable to recognize the person or the object with certainty or with a certain degree of probability, and in the event of a positive response, the witness shall be asked to point to the recognized person or object.

(2) Any persons that are being identified in a line-up, shall be advised of their right to call a defense counsel of their own choice, i.e. a defense counsel shall be assigned to them and the identification shall be postponed pending the arrival of the defense counsel, but for not more than two hours from the moment when the defense counsel has been informed thereof.

(3) Before the enactment of a decision for conducting an investigation, the identification shall be conducted in the presence of the public prosecutor, so that the person who is being identified cannot see the witness, and the witness cannot see that person before he or she does the identification.

Objections to inadequate foundation

- **No Foundation**
- **No Authentication**
- **Exhibit foundation lacking**

Article 237

Expert's duties

(1) Any person summoned as an expert shall be obliged to respond to the invitation and to provide his or her finding and opinion within the deadline established in the order. For justified reasons, the deadline established in the order may be extended.

(2) The expert shall be obliged to deliver a report to the entity that commissioned the report as referred to in article 236 paragraph 3 from this Law, and the report should contain the following: evidence that he or she reviewed; any tests conducted; his or her finding and opinion and all other relevant data, considered necessary by the expert for an equitable and objective analysis. The expert shall explain how he or she reached a certain opinion...

- **Expert testimony improper**
- **Qualifications**

Main Hearing

Article 347

Rejection of tendered evidence

(1) The Presiding Judge of the Trial Chamber may reject any tendered evidence:

- 1) if the proposal refers to a manner of gathering evidence that is prohibited by law, to evidence whose use is not allowed by the law or to a fact that cannot be proven under the law (unlawful proposal);
- 2) if it is unclear, incomplete or aimed towards a significant postponement of the procedure; or
- 3) if the facts that need to be established according to the proposal are not relevant to the decision making, i.e. if there is no connection between the facts that need to be established and the decisive facts, or if such a connection cannot be established due to legal reasons (irrelevant proposal).

(2) The Presiding Judge of the Trial Chamber may summon the parties to appear before the court on a specific date in order to elaborate their proposals i.e. their objections in regard to any proposed evidence.

(3) The decision rejecting the proposal for presenting evidence must be elaborated. Upon proposal from the parties, the Trial Chamber may alter or withdraw this decision in the later stages of the procedure.

- **Tainted evidence**
- **Ambiguous, vague**
- **Not relevant**
- **Immaterial**
- **Collateral**
- **Bad acts inadmissible**
- **Prior Convictions Inadmissible**

Article 379**Opening statements by the parties**

(1) The main hearing shall commence with opening statements by the parties. The plaintiff shall speak first, followed by the defense counsel or the defendant.

(2) The defendant shall have the right not to give an opening statement.

(3) In their statements, the parties may present which are the decisive facts they intend to prove, they may speak about the evidence that will be presented and establish the legal issues that are going to be subject of deliberation. Presentation of facts regarding any prior convictions of the defendant shall not be permitted as part of the statements.

(4) In their opening statements, the parties shall not be allowed to comment on the allegations and proposed evidence by the other party.

(5) If the injured party or his or her legal representative is present, they shall give notice of any legal or property claims.

(6) The Presiding Judge of the Trial Chamber may introduce a time limit for the duration of the opening statements by the parties.

- **Arguments not allowed**
- **Facts not in evidence**
- **Appealing to prejudice**
- **Misstating law**
- **Prior convictions inadmissible**

Article 383

Examination methods

- (1) In hearing a case, examination in direct, cross-examination and re-direct examination shall be allowed.
- (2) The party that has called the witness i.e. expert witness or the technical advisor in support of its case shall conduct the direct examination.
- (3) The opposing party shall conduct the cross-examination.
- (4) The party that has called the witness i.e. expert witness shall conduct the re-direct examination and the questions asked during this examination shall be limited to the questions that have been asked during the examination by the opposing party.
- (5) After the completion of the examination by the parties, the Presiding Judge of the Trial Chamber may ask questions of the witness i.e. the expert witness.

- **Beyond the scope of examination**

Article 384

Direct, cross and re-direct examination of witnesses

(1) The witness shall be examined by the party that has called the witness pursuant to article 383 paragraph 2 of this article. The questions for the witness by the other party shall be limited and refer only to the questions that have been asked earlier during the examination of the same witness by the party that called him or her. The questions of the re-direct examination of the witness by the party that has called him or her shall be limited and refer only to the questions asked by the other party during the examination of the witness.

- **Scope of examination**
- **Leading questions**

(2) Leading questions shall not be allowed during the direct examination, except in cases when it is necessary to clarify some statements by the witness. As a rule, leading questions shall be allowed only during the cross-examination.

Article 385

Rules of the court for the evidentiary hearing

(1) The Presiding Judge of the Trial Chamber shall control the manner and order of examination of witnesses and expert witnesses and the presentation of evidence, providing for the efficiency, economics of the proceedings and as the need arises, for the establishing of the truth.

(2) Upon objection, the Presiding Judge of the Trial Chamber shall prohibit questions and answers to questions that have been previously asked, if he or she considers it inadmissible or irrelevant for the case.

(3) The Presiding Judge of the Trial Chamber shall refuse presentation of evidence if he or she considers it unnecessary and of no importance for the case and shall briefly explain the reasons for it.

(4) Upon an objection by the parties, the Presiding Judge of the Trial Chamber shall prohibit asking questions that contain both a question and an answer within, i.e. leading questions, except during cross-examination.

(5) The Presiding Judge of the Trial Chamber shall approve a cross-examination of the witness as suggested by the party that summoned that witness, if as a result of his or her testimony, he or she can no longer be considered as a witness of the party that summoned him or her.

(6) During the evidentiary hearing, the Presiding Judge of the Trial Chamber shall attend to the dignity of the parties, the defendant, witnesses and expert witnesses.

(7) During the entire evidentiary proceeding, the court i.e. the Presiding Judge of the Trial Chamber shall take care of the admissibility of questions, validity of answers, fair examination and justification of objections.

(8) The judge shall rule immediately, with a decision, on any objections raised verbally during the process of examination of witnesses, expert witnesses and the injured party at the main hearing.

Catch-all article

- **Immaterial**
- **Irrelevant**
- **Narrative**
- **Repetitive**
- **Leading questions on direct**
- **Qualifications**
- **Harassment**
- **Unresponsive**
- **Assuming facts not in evidence**

✓ **Ask for a ruling!**
See para. 8

Article 387

Examination of an expert witness and a technical advisor

(1) Before examining an expert witness, the court shall warn the expert witness about the duty to present the opinion in a clear manner and in accordance with the rules of the profession and shall warn him or her that giving false statements on the findings or opinion is a criminal offense.

(2) Before testifying, the expert witness shall give a solemn declaration as follows: "I swear on my honor that I performed the expert examination conscientiously and according to the rules of my profession and that everything I declare in that respect is true and correct."

(3) If requested by any of the parties for the expert witness to be examined during the main hearing, the written findings and the opinion shall be admitted into evidence only if the expert witness who has prepared the expert report has given his or hers statement and was cross-examined at the main hearing.

(4) The provisions used for examining an expert witness shall be applied accordingly also for

- **Basis for objection: Expert witness testimony only admissible if the expert was cross-examined.**

Article 388

Exception from direct presentation of evidence

(1) If the establishment of a fact is based on a person's observation, the same person shall have to be examined at the main hearing in person, except in the case of an examination of a protected witness pursuant to Article 228 of this Law. The examination may not be replaced either by reading out loud a record of a statement that the person provided earlier, or a written statement.

(2) Any statements given by witnesses during the investigation procedure and statements obtained through the actions of the defense during the investigation may be used during the cross-examination or to disprove any of the findings presented or in reply to the disproof, in order to evaluate the validity of the testimonies during the main hearing.

(3) With a decision by the court, any records on statements provided during the evidentiary hearing, may be presented as evidence by reading or reproducing them.

(4) If after the start of main hearing concrete evidences emerge upon which one can conclude that the witness was exposed to violence, threats, promises of financial rewards or other benefits in order not to testify or to give a false testimony during the main hearing, any statements given in front of the public prosecutor during the preliminary procedure, with a decision by the court, can be presented as evidence.

(5) Upon exception from paragraph 1 of this Article, any records on given statements before a public prosecutor, may be read or reproduced and presented as evidence with a decision by the court, if the person who gave the statement has died in the meantime, became mentally ill, or remains unavailable to the court irrespective of all the means applied in order to find the person, as provided for in the law.

- **Hearsay**
- **Prior inconsistent statements**
- **Improper impeachment**

Article 392

Exhibit records

- (1) Any exhibits such as inspection protocols, receipts for seized and returned items, books, files and all other non-repeatable items at the main hearing shall be entered into the main hearing record.
- (2) Any exhibits as referred to in paragraph 1 of this Article shall be tendered in the original.
- (3) As an exception from paragraph 2 of this Article, a certified copy or transcript of the original may also be used as a proof.
- (4) Any exhibits as referred to in paragraph 1 of this Article shall be read, unless agreed otherwise by the parties.

- **Best evidence rule**
- **Chain of custody**

ANNEX 2

BASIC ADVERSARIAL PRINCIPLES AND SKILLS

CASE PREPARATION- AN OVERVIEW

Introduction

A trial is similar to a theatrical play. It is a live, spontaneous, fluid human drama being played out by emotionally charged and competing actors (witnesses, prosecution, and defense counsel), before a panel of “impartial” judges – who like all other participants in this human drama are not beyond suffering from and acting upon their own character and personality flaws. After watching this performance, the judges will render a decision for one of the competing parties. During the trial, counsel is nothing less than the writer, producer, director and actor. While there may be a variety of methods and styles in trying a case effectively and persuasively, there is one principle that is both inviolable and universal:

Pre-trial preparation prevents poor trial performance.

The Defense Counsel as the Playwright

Just as it would be expected of the playwright to carefully work out the plot and structure the dialogues in order to articulate the central themes of the play, just as one would expect the director in a theatrical production to design the set and select the props in creating an ambiance that will have

the maximum psychological impact on the audience, and just as one would expect the actors to rehearse their lines in order to deliver a flawless yet dynamic performance, so too must counsel plot out the trial script, create the necessary demonstrative exhibits, learn every detail in the case, and rehearse every speaking role (opening statement, direct examination, cross-examination questions, arguments on legal points, closing argument, etc.). Nothing less can be expected from counsel. The judges must be informed and persuaded. Exhaustive and methodical preparation is the answer.

Preparing for and Speaking to the Appeals Chamber

Not all cases will reach the trial stage. Nevertheless, because proper pre-trial preparation is time consuming, it is incumbent on the trial team – counsel, legal assistants, investigators, and case manager – to begin the preparation process at the earliest possible moment.

Preparation begins from the moment the prosecutor is informed of the case, while for the defense it is when counsel first meets the client. Preparation ends when all appeals are exhausted. Simply stated, trial preparation is not over until the final judgment is rendered. Each case must be prepared and tried with the expectation that it will be appealed. Nothing should be taken for granted. Every pre-trial effort, every strategic and tactical trial decision, every question, statement, factual or legal argument, objection or response, written proffers, etc., made during the trial must be consistent with and be in furtherance of advancing the case toward the Appeals Chamber. Consequently, during the trial counsel should be mindful that he is not only addressing the judges at the Trial Chamber, but also the judges in the Appeals Chamber who may ultimately be reviewing the case (the file, the in-court transcript and exhibits).

Initial Review of the File

The first step for counsel in any case is to thoroughly review all the available documents. The objective is to make a preliminary assessment of the events as perceived by the respective parties and to identify the role each witness will play during the litigation process. Having a clear understanding of the available facts will assist counsel in identifying any apparent or potential issues that will need to be addressed during the pre-trial stage.

After mastering the facts, the next step is to undertake an objective review of the law. It is absolutely essential to have a clear understanding of the operative law. All legal arguments or defenses that appear relevant should be listed. In a criminal case, all the elements of each charge should be listed so as to focus counsel on what must be proved by the prosecutor, or challenged and disputed by the defense. Possible lesser-included offenses and any evidence that could be introduced by either party in furtherance of their respective positions should also be identified and listed. While it may be necessary at some later stage to conduct extensive legal research on the subtle legal points in dispute, at this juncture, the objective for counsel is to have a basic understanding of the applicable law before discussing the legal and factual issues.

Having made a preliminary factual and legal assessment of the case, the prosecutor is ready to decide whether sufficient evidence exists to meet the requisite burden of proof at the preliminary (indictment confirmation) hearing, and the defense counsel is ready to discuss with the client the case and begin formulating a trial preparation strategy.

The Theory of the Case

No case can ever be successfully tried without a "theory of the case." Unless counsel has a destination in mind and knows the available routes, he or she will never reach wherever he or she wishes to go. Unless counsel can clearly articulate what the case is about and why the accused should be found guilty (if the prosecutor) or not guilty, (if the defense), he or she is not adequately prepared for the trial.

The *Theory of the Case* is nothing more than a logical persuasive story of what happened from the prosecutor's / defense's perspective. It is the "reason," "justification," or "explanation" of why the prosecution or defense should prevail at trial. The theory of the case must be logically and consistently developed so that upon examination of the evidence and testimony from all the witnesses, the Trial Chamber can rationally render a judgment in your favor. For instance, in a murder case the prosecution may argue that the evidence demonstrates that the accused acted intentionally and with full deliberation. The defense, to the contrary, may argue or indeed suggest that the evidence, when viewed differently, demonstrates that the accused acted in self-defense, or that someone else is responsible, or that there is a mistaken identification or a false allegation, etc.

Every case has a *theory of the case*, which must be presented clearly, unequivocally, and exclusively. For the prosecutor, the theory of the case is inherent in the indictment and supporting documents. Based on the available evidence, the prosecutor will exercise his or her discretion in determining the charges to be presented at the indictment confirmation hearing.

For the defense, the theory of the case will emerge once the defense counsel has had an opportunity to dissect the prosecution evidence, conduct his or her

own investigation, and meet with the client and witnesses. Given the different roles played by counsel for the prosecution and counsel for the defense, and their different responsibilities as prescribed by law, the prosecution is basically restricted to the indictment. However, during mid-trial the prosecution does have the discretion under certain rare circumstances to amend the charges. Thus, the theory of the defense case may shift or change to adapt to the new amended charges. Defense counsel is generally restricted by the evidence as well, but, he or she bears no burden of proof unless, for example, defense counsel is arguing an affirmative defense such as self-defense. In such instance, the prosecution will need to prove that the accused did not act in self-defense or that the accused exceeded the limits of self-defense. The defense, however, will first need to establish through a threshold of evidence that based on the facts, there is a reasonable possibility that the accused acted in self-defense. If the prosecution fails to present incontrovertible evidence to the contrary, it will not meet its burden of proof.

Various theories may exist for the defense. However, those available theories may be conflicting, requiring the defense counsel to select the most persuasive one. Still, it should also be noted that alternative theories might exist that are not mutually exclusive (not inherently contradictory). Indeed, depending on the facts of the case, defense counsel may successfully argue more than one theory. Whatever the case may be, it is incumbent on defense counsel to identify the potential theories, choose the most persuasive (and therefore most plausible) one before preparing and presenting that theory of the case before the Trial Chamber.

Brainstorming in Search of the Theory of the Case

After reviewing the disclosure material and discussing the case with the trial team, counsel is prepared to start analyzing every aspect of the case. At this stage the defense will be searching for the best possible theory that will advance the case of the accused, keeping in mind, of course, that the prosecution will be doing the same: attempting to identify the possible defense theories and looking for ways to dissect and destroy any possible (probable) ones. This process, i.e., the dissection of the facts and applicable laws, and the distillation of the case to its essentials, is known as *brainstorming*.

The best starting point for the brainstorming process is with the law. Without a clear understanding of the applicable law, it is impossible to appraise the facts. One must start with the underlying charges and relevant laws. List the elements to each charge in the indictment and any available defenses. This becomes the checklist in evaluating the available facts and in determining the need for legal applications, investigative tasks, consultation with expert witnesses, etc.

At the brainstorming session, all ideas and theories that come to mind should be listed and analyzed.

It is of utmost importance to consider the following:

- » The testimony of each possible witness;
- » Identifying (and eventually briefing, if necessary) evidentiary issues;
- » A visit to the crime scene;
- » An examination of the physical evidence, and if necessary, arrange for any testing;
- » Listing possible preliminary motions;
- » Setting parameters for any investigative tasks, with deadlines;

- » The necessity of consulting with expert witnesses;
- » The use of demonstrative evidence/visual aids; and
- » Any other necessary preparatory actions that might assist in the evaluation of the case.

Every case requires such extensive brainstorming; consequently, it is important to get into the habit of approaching each case methodically and thoroughly.

If the case will require investigative efforts, it is crucial to always include the investigator in the brainstorming session. Investigators are great sounding boards. At the brainstorming sessions, the investigator's task is to challenge the positions held by counsel, point out any weaknesses in the potential theory / theories of the case, and make valuable suggestions. In other words, the investigator is there to act as the judge and as the opposing party, thus forcing counsel to logically articulate the arguments of the case.

Preparing the Trial Notebook

After meeting with the accused / injured party and witnesses, analyzing the disclosure material, filing preliminary motions, investigating the case, examining the incident scene and physical evidence, consulting with experts (if necessary), counsel is ready to write the script for the trial. By this time, counsel should be capable of outlining the closing argument. Since the final act of a trial entails the argument of the facts in conjunction with the applicable law, the elements to be proved in each charge should serve as the outline. This will allow counsel to identify the weak links in the opposing party's case, and make it the focal point of his or her strategy.

In preparing the trial notebook, it is best that counsel works backwards from the applicable laws he or she will rely on during

the closing argument to the facts outlined in the opening statement. This is the safest method in ensuring that the golden thread – the theory of the case – is woven through the entire presentation of the trial. The trial notebook should be outlined and organized to allow easy access to specific information. All anticipated evidentiary issues should be listed and briefed with memoranda of law. Each potential witness should have his or her own folder with an outline of the direct or cross-examination, a summary of any prior statement, a list of any legal issues that may need to be raised before the witness testifies – such as lack of competency, relevancy, hearsay, etc. Finally, any references or notes of counsel's pre-arranged strategy, e.g. use of demonstrative / real evidence, method of impeachment, etc., should also be kept in a separate folder.

It's good to be good, and better to be lucky, but you will be neither good nor lucky if you're not prepared.

The Ultimate Objective

Each case should be prepared in the anticipation that it ultimately will be tried and appealed. Since the defense counsel is only as good as his current performance, each case must be prepared with sufficient effort and commitment.

CHECKLIST FOR PREPARING THE CASE FOR TRIAL

Learn Every Possible Fact

- Obtain all discovery.
- List facts that are good and bad, including wishful facts you hope to develop through investigation.
- Talk to witnesses.
- Go to the scene.
- Examine the physical evidence.
- Study the statements of witnesses in detail.

Certain facts, when considered in isolation may be misleading.

Analyze the Facts by Brainstorming

- What facts will the prosecution / defense be relying on?
- Can these facts be interpreted in some other way (look at the big picture: reality)?
- Is the witness's account of the facts: biased, prejudiced or unreliable (hearsay)?
- Can the facts be disproved and, if so, how?
- What are the possible explanations to damaging facts?
- What facts are beyond change (facts that cannot be disputed or where an alternative explanation cannot be provided)?
- What possible inferences and conclusions can be drawn from the facts?
- How can the facts be pieced together to establish lack of guilt or innocence?

Carefully Examine the Applicable Law

- Study the law that the opposition will be relying on.
- List all the elements to each charge.
- Search for alternative / lesser offenses under the law.
- Search for available defenses (affirmative / partial defenses) provided by law.

List all Possible Legal Defenses

List the Anticipated Attacks for Each Possible Legal Theory

Select the Best Possible Theory of the Case

- Use every possible combination of the facts to establish guilt or lack of guilt (depending on which side you represent).
- Look for favorable and logical interpretations, inferences and conclusions that can be drawn from the facts.
- Focus on the facts by examining them from every possible angle until you can find a plausible explanation as to why the accused is guilty or not guilty (depending on which side you represent).
- Develop an argument as to how the opposition has erred by superficially looking at the facts.
- Demonstrate how, by a closer examination of the facts, the accused is guilty or not guilty (depending on which side you represent).

Counsel must identify and focus preparation on the central issues. He or she must list every possible fact that supports his or her theory, along with all the reasons and explanations. Moreover, he or she must identify the

oppositions' anticipated arguments and list the counter-arguments to every point of contention. Finally, counsel must keep in mind the Trial Chamber's concerns and find explanations for any arguments that may be raised or questions asked by the judges.

Unless the counsel can articulate clearly and concisely what the case is all about, he or she does not know his or her theory of the case.

Choose a Theme – The Dominant Human Emotion That Will Help Advance the Theory of the Case

- What feelings does the counsel wish to convey, e.g., fear, love, hate, shock, loneliness, etc.?
- The theme must advance the "plausibility" factor of the theory of the case.

Attack the Opposition's Case

- Search for inconsistencies in each witness's statements or conduct.
- Are the opposition witnesses' testimonies inconsistent with the physical facts?
- List the opposition's errors in legal analysis and application of the law.
- List the opposition's investigative omissions and commissions.
- Are there inconsistencies between the witnesses as to the time / place / events, etc.?
- Examine each witness as to motive – what reasons exist to motivate a witness's testimony and / or action?

Develop a Strategy

- What is the significance of each witness to the case (both prosecution and defense witnesses)?
- What points should be established on direct or cross-examination and why? Counsel must ask himself or herself how each point advances the theory of the case.
- What is the significance of each piece of evidence to the case?
- What motions will be filed and when?
- What evidence will be introduced at trial / what evidence will / should be excluded?
- Which witnesses will / must be called?
- What is the central point (central issue) of support / attack on the case?

Note: The best approach is to choose a single point. Counsel must develop his or her argument by listing in order of importance all the strengths of his or her case against that single point. During the trial, counsel must focus his or her efforts on this and only this point. Counsel must respond to every argument raised by the opposition, while directing the Trial Chamber's attention at all times to the central point of attack or dispute.

Conclusion

In order to develop a trial strategy, counsel must have a theory of the case. Through brainstorming, counsel will choose the best possible theory. The strongest theory in any case is based on a single issue that the case is least capable of supporting or attacking. By advancing a single theory, you maintain continuity, credibility and integrity with the Trial Chamber. When a single theory is not available, the only other option is the multiple theory approach. The significant disadvantage of this strategy is that it becomes extremely difficult if not impossible

for counsel to maintain credibility with the Trial Chamber.

Counsel must articulate why a particular witness is necessary, the substance of the witness's testimony and how this testimony will aid the Trial Chamber in reaching a conclusion. Counsel must anticipate the opposing party's and the judge's examination of the witness.

EFFECTIVE USE OF INVESTIGATORS

Know Your Case

To effectively utilize an investigator, counsel must know his or her case. Since investigative resources are always limited, it is paramount to prioritize investigative needs. In order to do so, counsel must be familiar with all documents in the file and have a general sense of the theory of the case. He or she must know who the potential witnesses are and their respective roles, understand the weaknesses and strengths of the case, and have a general idea of what efforts should be made to get the case ready for trial.

Before going over the case with the investigator, counsel should draft a memorandum to the file, outlining: the charges, facts, witnesses, possible defenses, strengths and weaknesses of the case and any other information that may be useful to the investigator. The drafting of a memorandum makes it easier to focus on the issues (legal and factual) that need to be resolved. This memorandum should contain the anticipated preliminary motions, the possible theories of the case, counsel's impressions of the complaining witnesses, client, witnesses, etc., the need of experts, inconsistencies within the documents and a general list of possible investigative assignments.

Once the memorandum is prepared, counsel should get together with the investigator and set a time when they can meet and discuss the case. If extensive investigative efforts are required, portions of the file should be copied and made available to the investigator. In most of the cases, however, the investigator need only be provided with the documents deemed necessary for the investigative assignments.

Brainstorming the Case

Discussing the case with the investigator is perhaps the single most important aspect of case development and preparation. After reviewing the memoranda and any selected documents provided, the investigator will hopefully be prepared to bring to the brainstorming session his or her knowledge and expertise, with case-specific ideas and suggestions. By going over the documents and theory of the case, the investigator will further help counsel focus on the issues. He or she will give his or her impressions of the strengths and weaknesses of the case, list and prioritize the investigative tasks and, above all, act as a sounding board and argue, hopefully, the opposing party's point of view. Both counsel and investigator must focus their attentions on the irreconcilable aspects of the case which must ultimately be addressed and explained to the Trial Chamber.

Prioritizing Your Requests

At the conclusion of the brainstorming session, the investigator should have a clear understanding of the expected tasks. Deadlines should be set with the understanding that counsel will be notified if the investigator is unable to satisfactorily complete the assignments in the order of importance. All requests should have a specific purpose and the investigator must be aware of and understand the significance of each request to the theory of the case. This enables the investigator to prioritize his or her schedule. Moreover, if the investigator understands the significance and purpose of the assignment, follow-up investigation can be accomplished without further prodding by counsel.

As the case gets closer to trial, counsel should be consulting with the investigator on a regular basis to ensure that tasks are being completed: following-up on

leads, performing last minute details, etc. Additionally, if the case progresses in a different direction than initially anticipated, or if the trial date changes, counsel must communicate this information to the investigator. In keeping the investigator informed, counsel can develop a closer working relationship, with fewer mishaps occurring.

OPENING STATEMENT

The opening statement is an important phase of the trial in that it is perhaps the only time counsel can recount the facts in the manner that he or she wishes them to be considered. Opening statement is an outline of the facts (what the evidence will show) and the issues in the case. It is not an argument; rather, it is a "story." Through this "story," the witnesses for the opposing party are exposed for their bias, prejudice and misperceptions. In addition, the facts are described in such a manner as to establish a cohesive theory of the case with a theme (the dominant human factor) that will enable the judge to identify with the theory of the case.

In the opening statement:

- Avoid including in the opening statement references to evidence that is unavailable, unreliable or inadmissible ,
- Avoid assuming an unnecessary burden of proof,
- Avoid making promises that cannot be kept.

An opening statement for the defense may be made immediately following that of the prosecution's opening or may be reserved and given at the conclusion of the prosecution's case-in-chief. Either way, the defense counsel should always consider very carefully the pros and cons of going forward immediately after the prosecution's opening statement or reserving and going after the prosecution's case-in chief.

For an opening statement to be effective, it must be a persuasive, compelling story with a beginning, middle, and end. It must follow a logical progression, leading to the ultimate resolution of the case. There is no set rule as to where the story should begin and it does not have to progress in a chronological

order. For instance, the story may begin in the middle or the end of the events, and then work backward to where everything all began. Counsel will determine where he or she wishes the story to begin, the facts he or she wishes to focus on, and how he or she wishes the story to unfold before the Trial Chamber. Naturally, every good opening must cover all the critical facts, discuss the character of the parties and witnesses, and put the evidence in perspective. The law is not argued, though it should be mentioned when necessary to add context to the story and to the theory that will eventually be developed through the testimony of the witnesses.

Counsel should use his or her imagination in structuring the opening statement so that it is persuasive and compelling. Counsel must be accurate with the facts and should not overstate his or her case, i.e., he or she must only describe what the evidence will establish. In drafting the opening statement, counsel must keep in mind that at closing argument, the sum of the evidence before the Trial Chamber must always validate the opening statement. Hence, the closing argument should be a mere reflection of the story told in the opening statement. To achieve these goals, counsel must know where he or she wants to go. Counsel must know his or her closing argument before he or she sits down to draft the opening statement.

General checklist for the opening statement

- A cohesive, succinct, and confident summary of what the evidence will REALLY show, when the facts are given an opportunity to breathe
- A brief statement of the nature of the case
- A brief statement of the issues of the case
- An acceptance of any incontrovertible issues as defined by the prosecution side, plus any additional ones that will be raised by the defense
- A reinforcement of the prosecution's obligation of bearing the total burden of proof – of going forward and of persuasion
- A conclusion indicating that at the close of the evidence the defense will be requesting that the Trial Chamber enter the only possible verdict: *guilty*, if prosecuting; *not guilty*, if defending

DIRECT EXAMINATION

Introduction

Direct examination occurs when the examiner (prosecution or defense counsel) is questioning his or her own witnesses. It is the method by which counsel advances his or her theory of the case through his or her witnesses.

In making the strategic decision on whether to present a particular witness, counsel must compare his case with and without the witness. In calling a witness, counsel attempts to produce evidence from the witness to advance his or her theory of the case. The decision by counsel of whether to call a witness generally depends on the strengths and weaknesses of the opposing party's case.

In deciding whether to call witnesses, counsel should consider:

- Which of the two cases (with or without the witness) is the most persuasive case?
- Does the witness's testimony support the overall theory of the case?
- Is the witness credible and impartial? Keep in mind that the witness is subject to cross-examination and impeachment.
- Is the witness's testimony corroborated by other witnesses or physical evidence?
- How will the witness do on cross-examination?

Preparing the Witness for Direct Examination

Once counsel has decided the reasons for calling a witness, he or she must outline the points he or she wishes to make at trial. Counsel should list the points in the order of importance, place them into chapters or segments of his or her direct examination

story and, finally, re-organize the chapters in the order which allows for the most compelling and persuasive story from the witness. Of course, in doing so, counsel must anticipate every cross-examination question the opposing party or Trial Chamber will ask, as well as the witness's anticipated answers to those cross-examination questions. This is possible only if counsel devotes the time and energy to thoroughly discuss and analyze with the witness his or her testimony.

Once counsel has identified what it is he or she wishes to establish through his or her witness, counsel must then determine the most effective sequence that will maximize a witness's testimony (story) as well as minimize the witness's exposure on cross-examination. The key areas of any direct examination are *who, what, where, when, why, how* and *explain*. Since leading questions are generally forbidden on direct examination, the best way to direct a witness to a particular area is to use "topic sentences" or "headline sentences" which introduce the subject. For example: "*Let's talk about...*" or "*Let me direct your attention to when...*" These transitional sentences are helpful in guiding the flow and direction of the direct story. Counsel should organize the direct examination so that each chapter of the direct examination is relevant, substantively and sequentially, to the preceding and following chapters.

Every chapter must be objective (result) oriented; counsel must know what points he or she wishes to establish within the chapter. Counsel should think of the cross-examination and all potential areas of impeachment. He or she should then try to pre-empt the opposing party and Trial Chamber by asking the witness to describe or explain away these potentially damaging areas. When counsel is finished with his or her direct examination of the witness, there

should be no questions left unanswered – nothing left for the opposition or the judges to ask. Again, this can only be accomplished if counsel knows the case thoroughly and has developed a strategy that recognizes that every question to every witness is interconnected to the theory and theme of the case, the opening statement, cross-examination and closing argument.

Once counsel has outlined the direct questions, he or she must then sit down with the witness and prepare him or her to testify. It is always helpful to explain to the witness what will happen in court. For example, where he or she will sit, how he or she will be expected to appear, the areas counsel expects the witness to be examined and cross-examined on, and the objective counsel intends to achieve through the witness. The more the witness understands what it is counsel wishes to accomplish, the less "mystical" the courtroom appears, and the better prepared the witness will be for both direct and cross-examination. Impress upon the witness the importance of listening to the questions and then answering each question directly, succinctly and as honestly as possible. Prepare the witness for cross-examination by conducting a mock cross-examination. Make sure that all the hard questions are asked. Stress to the witness the importance of being entirely accurate when answering questions, irrespective of whether it is on direct or cross-examination.

Re-Direct Examination

After the witness has been cross-examined, the counsel may wish to conduct re-direct examination. This is accomplished by asking follow-up questions and directing the witness to the questions posed during cross-examination in order to allow the witness to elaborate on any points raised by the opposition's examination. It is also the opportunity to re-amplify any areas counsel feels are important in advancing the theory

of the case. It must be understood that redirect examination is interlocked with the cross-examination and therefore, counsel must pay close attention to the questions asked by the opposing party. These are the specific cross-examination questions that the counsel will need to address during redirect examination. By carefully listening to the questions raised on cross-examination, counsel can anticipate the opposing party's argument and the Trial Chamber's concerns that counsel must ultimately deal with during closing argument. Consequently, redirect examination is the opportunity to deal with these areas by re-focusing the witness point by point. Use the witness's pre-trial statements or his or her in-court testimony and ask him or her to amplify or explain his or her answers and any other relevant areas brought out on cross-examination.

End the re-direct examination on a high note – the most compelling point(s) that clearly and unequivocally (if possible), advance the theory and theme of the case. Be mindful that re-cross-examination is permitted to rebut anything raised during re-direct examination.

Examination of an Adverse Witness

When counsel calls an opposition witness to testify, the format of questioning may be leading (cross-examination) if the witness is declared an *adverse witness*.

In theory, the party calling the witness (the adverse examiner) should conduct direct examination, and the opposing party should conduct cross-examination. In practice, however, the direct examination of the adverse witness generally involves the interrogation of an unwilling, biased, and unsympathetic witness, who has not been

prepared by the party who has called the witness. The circumstances are the same as in cross-examination and, therefore, leading questions are permitted – indeed, desired by the adverse examiner.

After the adverse examination by defense counsel, the prosecution has an opportunity to cross-examine the adverse witness. The form of the examination is that of cross-examination, but since the prosecution has prepared the witness, it is unlikely that he or she will be unwilling, biased, or hostile to the prosecution. Therefore, the prosecution need not restrict his cross-examination by asking only leading questions; nothing forbids the prosecution from asking open-ended questions, i.e., conducting a direct examination by asking the *who, what, where, when why, how and explain*.

Different considerations may be involved in multi-party cases. It may be necessary to analyze each issue in the case to determine if there is adversity. The co-accused may be adverse to each other on some issues and have common interests on other issues. Accordingly, the Trial Chamber should normally restrict leading questions to the areas where there are only adverse interests.

By calling an adverse witness, the examining party has the opportunity to determine the scope of the examination and thus to pick and choose what subjects are to be raised. The cross-examiner is technically limited to the scope of the adverse examination as determined by the examining party, i.e., limited to the subjects brought out during the adverse examination. In reality, however, given that the objective is to "get to the truth", the Trial Chamber is unlikely to limit the cross-examiner, and indeed the cross-examiner may question the witness in areas that the adverse examiner deliberately avoided. From a tactical sense, the adverse examiner should, as with any witness, draw out the good, the bad, and the ugly, if for

no other reason than to bolster his own credibility with the Trial Chamber, which will ultimately rule on the evidence.

Never take a risk with an adverse witness unless it is necessary.

Adverse examination should be used rarely and then only with the greatest of care and control. While the adverse examiner is not "bound" by the witness's testimony and may impeach the witness, the examiner nevertheless is eliciting the testimony during his or her case. Thus, if the adverse witness makes a good impression on the Trial Chamber, and his or her testimony is not helpful (or worse, is harmful) to the defense case, the effect on the Trial Chamber can be devastating to the defense case. The witness can and should be controlled by leading questions if there has been proper preparation.

Basic Guidelines Regarding the Examination of Adverse Witnesses

- The adverse examiner should not ask open-ended questions.
- The adverse witness should not be permitted to avoid answering questions.
- The adverse examiner should exercise control and prevent the adverse witness from rambling or volunteering information; i.e., where the witness is non-responsive.
- The adverse examiner should never ask a question to which he or she does not know the answer, and with which he or she cannot impeach the witness if the witness answers to the contrary of the expected (known) answer.
- The adverse examiner should anticipate the cross-examination, and should deal with any issues that are likely to be raised by the opposition or the judge.
- Only call an adverse witness in your case if you know that the opposing party will not call him or her.

CROSS-EXAMINATION

Introduction

The objective in cross-examining a witness is to bring out or highlight the points that advance the theory of your case, while diminishing, diluting or de-focusing the points made by the witness on direct examination. This is accomplished by short, fact-specific, leading questions (declarative statements with an inflection) that produce anticipated answers, organized in sequential order, prefaced by the heading to each chapter or segment of the cross-examination story.

Preparation

The best way to prepare for the cross-examination of any witness is to learn the facts of the case thoroughly. Counsel should first review the disclosure material, meet with the client and witnesses and, finally, brainstorm the case with other colleagues and investigators. Counsel must review all the information available, with an eye towards inconsistencies and holes in the opposing party's case. Meeting with the client and having him or her recount the facts, no matter how inconsequential they may seem, can provide insight that can be used in cross-examining a witness. The defense counsel should ask the client the hard questions, particularly his or her explanations that address the strengths of the prosecution's case. At the brainstorming session, the defense counsel must address all issues. All areas and theories that come to mind should be noted and analyzed. The testimony of each possible witness should be considered. Evidentiary issues should be identified and eventually briefed if necessary. Possible preliminary motions should be listed. Parameters for any investigative tasks should be set. A visit to the incident /

crime scene and examination of the physical evidence should be arranged.

The ultimate goal at the brainstorming session is to distill the general theory of the case into its specific factual strengths and weaknesses. Only by this process of distillation can the significance of a witness's anticipated testimony be analyzed to determine how it furthers the prosecution's case and / or affects the defense case. The weak links and shortcomings of the defense counsel's case should be listed for possible discussion with the client. At the conclusion of the brainstorming session, the defense counsel should have a general idea of his theory of the case, any weaknesses, and the potential problems posed by the witnesses.

After the defense counsel has met with the client and dissected the witness's statement(s) and any other relevant disclosure material, the next step is to meet, if possible, with the witness that he will ultimately cross-examine. The purpose of meeting with the witness is to set up the cross-examination and possible direct examination of any defense witnesses.

Assuming the defense counsel has the opportunity to meet with the witness, it is foolhardy to go into court to cross-examine a witness without a prior meeting to size him or her up and go over his or her statements. Before meeting with the witness, however, it is important for the defense counsel to first determine exactly what it is he wishes to accomplish. Certain goals and parameters should be outlined so that the questions will not reveal the strengths or weaknesses of the defense case. It is best that the defense counsel draft all the questions that he or she and his or her investigator will be asking. This will keep the interview focused.

After interviewing the witness, the defense counsel must then review and analyze the answers obtained. The defense counsel should specifically analyze the basis for the

witness's observations, knowledge of facts, and opinions. This sort of analysis will be useful for impeachment. It will also assist the defense counsel in devising a strategy of how to cross-examine the particular witness. The defense counsel should pay particular attention to how the witness answers the questions, the precision of word choice, the extent to which a question is answered, and any changes in demeanor during any portion of the interview. All this information is terribly useful in deciding how the defense counsel will approach this witness at trial. If the defense counsel does not have the opportunity to meet with the witness, then any statement given by the witness should be scrutinized and compared against the statements by other witnesses.

General Approach to Cross-Examination

Perhaps the easiest way to organize a cross-examination of any witness is to start with the general area and work into the specific. This will enable counsel to demonstrate to the witness that he or she has command of the facts. Counsel is also proving to the Trial Chamber that he or she has the requisite knowledge necessary to help the Trial Chamber understand the significance of the areas that are the focal point of the questioning. With short, leading, fact-specific questions, counsel can demonstrate his or her thorough knowledge, thus reducing the likelihood of the witness being out of control. In essence, counsel is having a dialogue with the witness, but in reality the cross-examination should be nothing short of testimonial or a narration by counsel, with the witness merely affirming (yes) or denying (no) his "testimony"; hence, the reason for declarative statements during your cross-examination.

To maximize control over the witness, each area of counsel's cross-examination should begin with a transitional statement or a title,

e.g. "Mr. Witness, I direct your attention to..." or "Let's talk about this..." Each chapter of the cross-examination should have a specific objective that is understood and is consistent with the theory and theme of the case. Once the objective is met, counsel should move on to the next area of cross-examination. Less is more.

It is critical to keep in mind that the purpose for cross-examining any witness is to draw out certain points or diffuse any impressions made on direct examination. Cross-examination is not a tool to satisfy one's intellectual curiosity, but rather, it is an opportunity to develop a chapter within the theory of the case. The "chapter" consists of the points counsel makes during cross-examination which he or she will be relying on during his or her closing argument to support the theory of the case. An unfocused, uncontrolled, unlimited cross-examination will allow the witness to, not only cover up his or her mistakes, but also to hurt counsel's case. Therefore, the Golden Rule is: Don't be greedy. Counsel should score his or her points, set up his or her own witness for direct examination, point out alternative plausible explanations, and sit down.

Cross-Examination of a Witness's Statement when the Witness does not Appear in Court: Cross-Examination of Documents

The accused has a right of confrontation – the right to cross-examine every witness who is either testifying or supplying a statement against him or her. There are instances, however, where the witness, who has provided a statement, or whose testimony has been memorialized in court, is unavailable to testify at trial. Depending on the circumstances, the absence of this witness at trial may pose a disadvantage to the defense – particularly since the defense is being denied the opportunity to test the

validity of the witness's statement by cross-examining the witness as to motive, bias, memory, perception, etc. It also deprives the Trial Chamber of the opportunity to question and to observe the witness's demeanor, which is undoubtedly, a critical factor for the judge in deciding the credibility of any witness.

When a statement is introduced without the witness, the defense counsel must always object to the introduction and consideration of the statement – unless, of course, the statement helps the defense theory of the case. The defense counsel must argue to the court why such statements are unreliable and how the witness's absence denies the court the ability to carry out its function of doing justice. If the defense counsel is unsuccessful in keeping the Trial Chamber from considering the statement, he or she can still request permission to cross-examine the document itself.

In cross-examining a document, the defense counsel should consider the document just as he or she would consider the cross-examination of any witness. This means that he or she should have a strategy. The defense counsel should know the purpose of cross-examination, the points that he or she wishes to make, and how these points fit within the framework of the theory of the case. Once the defense counsel has thoroughly analyzed the document and organized the points for cross-examination, he or she should then make a list of questions that would establish these points. The defense counsel should chapter his or her questions so that after making a point, he or she traverses to the next point with a transitional statement, thus giving the judge the opportunity to follow the flow of the questioning.

In cross-examining the document, the defense counsel should ask the Trial Chamber for permission and inform the Trial Chamber that these are the questions that he or she or the Trial Chamber would have asked if the witness were available for cross-examination.

Example:

"Mr. President (Your Honor), with your permission, I would like to have the opportunity to demonstrate to the Trial Chamber the line of questions that I would have asked the witness if the witness would have testified before us."

The defense counsel, through his questions, should be demonstrating the points that support the theory of the case. For instance, if he or she is trying to demonstrate that the witness's description is incorrect, through short, fact-specific questions (actually, declarative statements) he or she should highlight how the distance, visual obstructions, lighting conditions, etc., make it impossible for the witness's account to be accurate. In other words, the defense counsel's questions and the order in which he or she presents them, should narrate the point he or she is trying to establish.

After the defense counsel has completed asking his or her questions in a chapter-like manner, and after establishing each point he or she is asserting, once again, the defense counsel should reiterate to the Trial Chamber that he or she is being deprived of the right to question the witness. The defense counsel should argue that the points highlighted through the questions demonstrate the unreliability or insufficiency of the witness's statement thus requiring, in the interest of justice, that it be totally disregarded. Finally, defense counsel should renew his or her objection for the record.

Conclusion

The preparation of cross-examining a witness need not be an exercise in futility. This does not mean that every time counsel cross-examines a witness he or she will walk away having fully accomplished his or her goals. However, fewer mistakes will be made if counsel takes the time to know his or her case. Brainstorming, consulting with the client and witnesses, identifying the strengths and weaknesses in the opposing party's case, meeting with the opposing party's witnesses and setting up the cross-examination in a logical, consistent and concise manner, will yield better results. Cross-examination of any witness should always be focused and objective oriented.

IMPEACHMENT

Impeachment is an important part of cross-examination. Through impeachment, counsel is attempting to establish:

- bias
- previous convictions
- interest
- prior bad acts
- prejudice
- inconsistencies within statements
- lack of memory
- inadequate perceptions
- inaccurate accounts of events and / or
- contradictions by other witness's testimony or physical evidence

The technique used for impeaching a witness is identical to the technique used for cross-examining any other witness. In other words, counsel will ask short, one-fact questions (declarative statements with an inflection) in sequential order. The method used to impeach, however, requires some pre-arranged strategy. The most effective way to impeach is to use a three-step approach of:

Re-commit

By re-committing, counsel is directing a witness to a portion of his or her earlier testimony. It is the portion of testimony counsel will be relying on to impeach the witness with prior inconsistent statements.

Accredit

By accrediting, counsel is getting the witness to acknowledge or take credit for an earlier statement that he or she has made, usually outside the courtroom. The statement might have been provided to the police, prosecutor or investigator. Counsel's goal is to first have the witness acknowledge that yes, indeed, he or she has made the statement. Once that is accomplished,

counsel should establish the setting under which that statement was given. This is called “locking the witness in.” The objective is to establish that: (1) the witness gave a full, accurate and complete statement; (2) the statement was given knowing that it was going to be relied on as the truth; and (3) every opportunity was given to the witness to correct or add to the statement once it was completed.

Confront

By confronting, counsel will show the witness the statement. The witness should be directed to the particular portion of the statement that contradicts his or her testimony on direct or cross-examination, i.e. that portion which counsel has re-committed the witness. In confronting the witness, counsel should establish that the witness’s testimony on direct or cross-examination is inconsistent, inaccurate, and incomplete compared with the statement provided under circumstances when the witness had an opportunity to make a fair, accurate and complete statement. The purpose is to show that the witness today (at trial) is testifying to important details that were not included in the statement (impeachment by omission), or to show that the earlier statement contradicts the direct / cross-examination testimony.

Another goal during impeachment may be to establish that the original statement provided is untrustworthy and misleading because of bias and prejudice. The goal may also be to establish that a witness’s inadequate perception and bad memory accounts for the witness’s inconsistent and inaccurate description of the events, thus denying this witness any credibility.

Checklist on Impeachment:

Knowing when not to impeach. Counsel must not only know how to impeach, but must know when, if at all, the witness should be impeached. Just as a witness should not be cross-examined if on direct examination he or she has not adversely affected the case, counsel may also decide that, although impeaching evidence is available, it should not be used. Again, if the witness has not adversely affected your case, he or she need not and, absent a compelling reason, should not be impeached. If the testimony of a witness can be turned to the opposing party’s advantage, it is counter-productive to impeach the witness.

Impeaching requires laying a foundation. During cross-examination, counsel must confront the witness with a prior inconsistent statement, which must be specific as to time, circumstances and content of an earlier statement. Generally, the witness must be afforded an opportunity to explain or deny the prior inconsistent statement. Confronting a witness with his or her own inconsistencies have a far greater impact on the Trial Chamber than introducing evidence of the earlier statement through another witness.

Impeachment requires prior preparation. When a witness denies making an earlier inconsistent statement, counsel must be prepared to prove with specificity and accuracy the inconsistency through extrinsic evidence.

Dwelling on the impeachment matter once established is neither persuasive nor effective. Once the witness admits making an inconsistent or otherwise impeaching statement, counsel should move on to the next point of cross-examination, assuming there is a further need to cross-examine. Less is more; repetition is boring and counter productive.

Checklist on Rehabilitation of Witnesses:

Evaluate whether rehabilitation is necessary. Simply because a witness has been impeached during cross-examination, it does not automatically follow that rehabilitation is necessary. If the impeachment matter is marginal or inconsequential to the material issue before the Trial Chamber, counsel should strongly consider forgoing any efforts to rehabilitate his or her own witness.

Limit the scope of re-direct examination. As with any re-direct examination, counsel should limit the scope of questioning when attempting to rehabilitate concerning those areas / matters in which the witness needs an opportunity to explain or amplify his or her answers on cross-examination. Rehabilitation through re-direct examination is not an opportunity to repeat, once again, the direct testimony.

No need to rehabilitate. if the witness has not been effectively impeached. Before attempting to rehabilitate a witness, counsel should be absolutely certain that the witness has effectively been impeached. Attempting to rehabilitate a witness carries the risk of highlighting a weakness in the witness's testimony, and will in fact further provide the opposing party or Trial Chamber with the opportunity to re-cross-examine or question the witness.

Rehabilitation is most effective by allowing the witness to explain and put matters into context. Counsel should: a) give the witness the opportunity to explain the circumstances pertaining to the impeachment; b) elicit from the witness any exculpatory factors; and c) give the witness the opportunity to put the impeachment in context.

Rehabilitation through prior consistent statement. When a witness has been impeached with a prior inconsistent statement, counsel should, if relevant, attempt to rehabilitate the witness with any prior (out-of-court) consistent statements he or she may have given. Prior consistent statements are relevant, and should be considered by the court, when they are offered to rebut an express or implied charge of recent fabrication.

Conclusion

Ultimately, it must be understood that impeachment is merely a segment of cross-examination. The preparation involved in setting up the impeachment process at trial is no different than that required for the cross-examination of any witness. Thorough analysis of the case, understanding and identifying the points counsel wishes to establish through impeachment and a strategy in accomplishing those goals, are essential elements to the successful impeachment of any witness in court.

Impeachment
does require luck:
opportunity meeting preparation.

EXAMINATION OF EXPERT WITNESSES

A witness with special knowledge, training, or experience, whose purpose is to assist the Trial Chamber in understanding the evidence or determining a fact at issue is generally considered an "expert witness." Before a person can be certified as an expert, he or she must have the requisite expertise and ability to perform independent expert evaluations, and should be willing to give findings and opinions in a rational, objective, and timely manner.

Preparation for the Direct and Cross-Examination of the Expert Witness

As with any witness, counsel must meticulously prepare for the questioning of an expert witness. However, given the nature of the testimony being elicited / challenged, counsel must prepare in greater depth and must be mindful of the inherent pitfalls associated with either the direct or cross-examination of an expert witness.

As a general rule, it is an accepted fact that the expert, in all likelihood, has a greater understanding of the subject of his or her expertise. Moreover, it can be assumed that he or she will have an even greater appreciation of any nuances that may exist within the scope of his or her expertise as it relates to any issues in the case in which he or she will be testifying. It is axiomatic, therefore, that the expert is armed with specific knowledge that may be helpful or harmful to the case by virtue of the fact that he or she is on top of the information curve. Nevertheless, counsel should not take for granted that an expert's testimony, however persuasive, is beyond being challenged or even diminished in value either through a poor direct or a devastating cross-examination.

Preparing for and Conducting the Direct Examination

The expert is deemed an expert because of his or her specialized knowledge generally not known to the layman – including the parties and the judge. Usually, special terms are used which are often confusing or esoteric. The subject matter may involve various scientific fields, convoluted formulas, and obscure tests. All of this could, and generally does, pose problems not only for the party introducing or confronting the expert witness, but also to the judge who is ultimately tasked with making the finding of facts and conclusions of law. Therefore, the party introducing the expert witness should, as a general rule, prepare as follows:

- *Become a Mini Expert.* Learn as much as possible about the field of expertise. Counsel must sit down with the expert and go over from the general to the specific, all of the areas within the field of expertise that are relevant to the case. If tests were performed, counsel should become familiar with the methods of and reasons for the tests. A list of all of the information / evidence viewed / examined should be made. All available opinions and counter-opinions should be explained. Everything considered, whether accepted or rejected, must be known, along with the attendant reasons.
- *Keep it Simple and Direct.* As with any witness, the expert has a story (a piece of the overall story) to tell. It must be told in a simple and direct manner. It must be told in layman's terms so that even a non-educated person can follow and understand the testimony. Any special or scientific terms should be defined and explained. The testimony (story) should have a beginning – what was examined / considered and why; a middle – what examinations / tests were

performed and why; and an end – what the results were and why the results are significant to the resolution of the issue before the Trial Chamber.

- *Anticipate the Cross-Examination.* A good direct must anticipate the cross-examination that is to follow and it must defuse it by covering any issues that are likely to be brought out by the opposition (a general rule for any witness). Counsel should ask his or her expert for the weaknesses in his or her findings / testimony. Limitations may exist in the case that, when considered, have an adverse impact on the expert's ability to fully and fairly provide a definitive opinion that is not subject to being disputed. These limitations may be the result of poor investigative efforts, loss of evidence, delay in locating the evidence, etc. Generally, such limitations are not the expert's fault, and often may not be fatal to the ultimate conclusion determined by the expert. Nonetheless, it is foolhardy for counsel to avoid raising these limitations on direct, given that a prepared opposing party (or judge) will raise them on cross-examination, thus, tainting the credibility of the expert, and axiomatically, the credibility of counsel.

Preparing for and Conducting the Cross-Examination

Dissect the Expert Witness's Report. In addition to becoming a mini-expert, counsel must meticulously analyze the opposing party's expert report before any decisions can be made as to whether to cross-examine the expert, and if so, to what extent. Unless counsel possesses adequate knowledge in the expert's field, it is necessary to engage one's own expert to assist in deciphering the opposing party's expert report. Counsel should ask his or her expert to go over all of the file, examine what

was considered by the opposition's expert, the quality of information that was available, what if anything was not considered that should have been, what tests should have been performed that were not, what assumptions might have been made due to lack of evidence or just plain sloppiness, etc. The whole purpose is to determine if the opposition's expert properly conducted his or her examinations, and whether he or she was hampered due to poor investigative work or compromised forensic evidence. This is all relevant when considering that the standard of proof in determining guilt is that the court must be certain that no other conclusion can be reached from the presented evidence.

Interview the Opposition's Expert. As with any witness, whenever possible, the prosecutor / defense counsel should make the effort to interview the opposing party's expert witness. Of course, before interviewing the expert, the prosecutor / defense counsel should have his or her own expert assist in designing the questions to be asked. Nothing should be taken for granted. The interview should be conducted like a good direct examination, i.e., counsel should ask the *who, what, where, when, why, how and explain* questions designed to elicit information. It is important to ask detailed questions about the expert's background, his or her professional experience, prior cases he or she has worked on / testified in, continuing education he or she might have received in order to remain current in his or her field, etc. If possible, the interview should be tape-recorded. This is important in order to lock-in the expert to his or her answers in case he or she testifies differently at trial. As a matter of fairness, the expert should be given a copy of the tape-recorded interview.

Examination of experts, whether it is direct or cross-examination, is an acquired skill. Counsel is only limited by his or her commitment to knowledge, preparation and ingenuity.

Dissecting the Interview in Preparation for the Cross-Examination. After the interview, counsel should consult once again with his or her expert to see whether there is any material that might be useful for cross-examination. If something is worth drawing out on cross-examination, either to impeach or diminish the expert's impact at trial, counsel should ask his or her expert to assist in drafting the series of questions (with anticipated answers).

Draft the Cross-Examination from the General to the Specific. In cross-examining an expert, it is best to start by drawing out any mistakes made by others, such as in the collection of evidence, or any limitations the expert might have had due to no fault of his or her own. This area of the cross-examination is non-threatening, and consequently, the expert is more likely to be cooperative and in favor of shifting the blame on others. The next area should be to draw out any failures by the expert. It is not unusual for an expert to limit the scope of his or her work because of assumptions, lack of knowledge, laziness, etc. The whole purpose is to demonstrate that the expert's opinion may be less than reliable.

CHECKLIST FOR DIRECT, CROSS-EXAMINATION AND RE-DIRECT EXAMINATION

During the trial, the Trial Chamber must exercise reasonable control over the mode and order of the questioning of witnesses. In exercising its authority, the Trial Chamber may forbid a question, or reject an answer to a question already asked if it finds that it is irrelevant or groundless to the case.

Understanding the fundamentals is essential. The most basic skill is the ability to examine and oppose the examination of witnesses in the adversarial setting of the trial.

Basic Guidelines when Conducting Direct, Cross-Examination and Re-Direct Examination

- The purpose of any witness examination is to elicit information.
- The basic format on direct examination is narrative / conversational dialogue, while on cross-examination it is interrogative dialogue.
- The witness is probably insecure. He or she is appearing in a strange environment and is expected to perform under unfamiliar circumstances.
- Questions, whether on direct or cross-examination, should be short, simple, and understandable to the witness and the judge, because:
 - on direct examination the insecurity or anxieties of the witness will increase if he or she does not understand the question;
 - on cross-examination, complex or argumentative questions enable the witness to evade the examiner; and

- o it is imperative that the judge understands the questions so that he or she can reasonably follow the line of questioning.
- As a general proposition, counsel may not lead on direct examination except as to preliminary matters or to refresh the recollection of the witness. Both of these exceptions are within the Trial Chamber's discretion.
- On direct examination, leading questions and the perfunctory answers they elicit are neither informative nor persuasive.
- On direct examination, counsel should:
 - o have the witness introduce himself or herself;
 - o place the witness in the controversy of the case, and ask the *who, what, where, when, why, how, and explain* questions to elicit the information the witness has to offer.
- Repetitiousness is not persuasive and should be avoided.
- During cross-examination, counsel should lead the witness. It is imperative to control the witness on cross-examination.
- If counsel knows that the cross-examination will elicit unfavorable information, he or she should elicit it during the direct examination. As a general rule, it is always best to elicit all unfavorable information during direct examination, so as to avoid the impression of being evasive, and to allow the witness to explain his or her answers.
- Counsel should not conduct cross-examination that does nothing other than afford the witness an opportunity repeat his or her direct testimony.
- Counsel must listen to the witness's answer and not be thinking of the next (follow up) question while the witness is answering.
- Objections to the form of a question must be made before an answer is given. If the question reveals that the answer sought will be irrelevant and prejudicial, an objection must be made immediately after the question is asked by opposing counsel. The grounds of an objection should be succinctly and specifically stated. If the question does not reveal the potential irrelevance of the answer, but the answer given is irrelevant, a prompt motion to disregard the answer should be succinctly and specifically stated.
- Counsel should object to answers that are unresponsive or contain objectionable matters. The examiner is entitled to not only object, but to request the Trial Chamber to direct the witness to listen to and answer the questions. If an objection to the form of the question is sustained, counsel should rephrase the question to cure the improper form. Objections to the form of the question generally occur when the question is leading on direct examination, the witness is being asked to speculate, or the question is in the form of a hypothetical that presupposes facts that are not in evidence.
- If an objection to the content of the answer (e.g., relevance, hearsay, etc.) as opposed to the form of the question is sustained (ruled in favor of the party objecting), then counsel should consider the need for an "offer of proof." An *offer of proof* requires putting on the record the information deemed objectionable, so as to give the Appeals Chamber the full opportunity to determine whether the Trial Chamber erred in disregarding the proffered evidence.

MOTION PRACTICE

The purposes for filing motions are to:

- get information during the evidentiary hearing;
- get a witness's testimony on the record so that during the trial counsel can cross-examine the witness more effectively;
- develop inconsistencies – the more information counsel elicits from a witness, the more opportunities for the witness to be mistaken or overstate events;
- bolster the case and to assist the theory of the case. For example, the accused is innocent because the confession is false, resulting from police brutality, etc.; and
- assist at sentencing.

How to Determine What Motions to File

Counsel must first know what his or her theory of the case is and have a trial strategy before he or she can determine what motions to file. The trial strategy consists of:

- a theory of the case;
- knowledge of how to deal with the opposing party's evidence; and
- knowledge of the evidence that counsel will or wishes to rely on at trial.

Note: The motions that counsel files must be consistent with the theory of the case and trial strategy; they must unequivocally advance the theory and strategy.

What Should a Motion Contain?

Three T's: Tell them what you are going to tell them; Tell them; and Tell them what you told them.

Title Page Name of case, Title of motion, e.g. Motion to Suppress Statement

Opening A short paragraph telling the court what it is that the defense counsel is requesting and why. It must be simple, direct and to the point

Facts A short rendition of the pertinent facts that relate to the motion. For example, if defense counsel is trying to suppress a statement, the pertinent facts that relate to what happened after the accused was detained /arrested.

Law List the Statutory Articles, Rules and relevant case law, Briefly articulate the elements.

Argument Incorporate the facts with the law. Counsel must demonstrate how, when the law is applied to the given facts, the requested outcome is mandated under the law.

Conclusion Counsel must tell the judge what it is that he or she wants. It should be a brief paragraph.

Example:

"The facts demonstrate that Accused X was questioned by the OTP outside the presence of defense counsel, even after the Accused X expressly requested to consult with and have the assistance of his defense counsel. Under Rule 63 (A) and Rule 92, such conduct by the OTP is impermissible and unlawful. Therefore, the statement by Accused X which was elicited in a manner that is forbidden by the Rules and Procedures of the Tribunal should be suppressed and should not be considered, whatsoever, by the Trial Chamber."

CLOSING ARGUMENT

Overview

Closing argument is the last opportunity for counsel to present his or her position to the Trial Chamber: to demonstrate through the facts, inferences and legal interpretations that different conclusions can be drawn from those suggested by the opposing party, thus requiring the Trial Chamber to enter the desired judgement.

For a closing argument to be effective, it must have a beginning, middle and an end. It should be focused and well organized. Since it is being delivered to a judge (or panel of judges), it must be succinct. Every issue must be identified and analyzed by applying the law to the facts. All the issues that concern the Trial Chamber (REALITY) must be considered and persuasively addressed.

The best way to present a closing argument is by immediately focusing on the issues before the Trial Chamber. Counsel should emphasize what is in dispute, i.e., that which the Trial Chamber must consider and decide. By focusing on the relevant issues, counsel is in a position to specifically address them in the orderly fashion.

The next step for counsel should be to focus the judge on the law that must be reviewed and applied by enumerating the various elements to each count in the indictment. Counsel should cogently and objectively state the elements first, without presenting an argument. Once this is done, counsel is ready to begin articulating the argument, point by point, element by element. This method will enable counsel to remain organized and for the Trial Chamber to effortlessly follow along.

The points to be argued must be placed in the most persuasive order. The best point possible (the central issue) should be the core of the argument. All other points

should be treated separately as a chapter to the closing argument / story. Every bit of evidence that logically pertains to a point must be listed. Counsel must establish how the evidence supports the respective points being made, keeping in mind that each point is inter-connected to the overall theory of the case.

Once counsel has made a point, he or she should not circle back to re-argue it. The ultimate goal is to show how all these points together – the whole sum – proves the theory of the case.

When counsel completes his or her closing argument, he or she must end strong and on a high note – which of course will require that he or she knows his or her ending so as not to aimlessly wander about in circles without purpose.

In delivering the closing statement, counsel must be persuasive and sincere. The defense counsel must exude belief in his client's innocence. Counsel will be most persuasive if he or she modulates his or her voice, e.g. high, low, fast slow, pause, etc. Above all, counsel should avoid lecturing the Trial Chamber; rather, he or she should speak in a conversational tone, inviting the judges through rhetorical devices to reason along with him or her. Personal attacks against the opposing party, however inviting, should be avoided.

Through logic, passion, and command of the facts, issues and the law, the defense counsel will demonstrate belief in his client's innocence. The defense counsel should invite the Trial Chamber's close scrutiny and attention, with reason, common sense and respect, to the strengths of the defense case and the weaknesses in the prosecution's case, but never through disingenuousness and sycophantic obfuscation

A good closing argument is a flexible closing argument. Counsel should deliver his or her prepared outline of points (assuming he or she has successfully presented the evidence before the Trial Chamber) and then address each and every argument the opposing party has made during the trial or its closing argument. To enable counsel to do this, he or she must pay close attention and write down the particular arguments made by the opposing party. If counsel has properly brainstormed the case, he or she will have anticipated all of the possible counter arguments. Nothing heard from the opposing party should come as a surprise.

Conclusion

Unless the defense counsel is able to deliver, in general, the prosecution's closing argument at the start of his own case, he is not fully prepared for trial. The defense counsel should always remain respectful to the prosecution and judges. Shouting, jabbing fingers at the judges or acting casual, smug or arrogant can, and normally does, adversely impact on ones closing argument – irrespective of the strength of the evidence or eloquence of the argument.

