

## THE ETHICS OF DISCREDITING WITNESSES

### Summary

1. This is a deliberately practical address, so only essential references to authority and legislation are provided.
2. The leading case in this area is *Libke v The Queen*<sup>1</sup> (*Libke*). The relevant Barrister's Conduct Rules are 12, 66, 75, 76 and 77. The relevant section of the *Evidence Act (Qld)* is section 21; see appendix 1 and 2.
3. "Cross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story. It is entrusted to the hands of counsel in the confidence that it will be used with discretion; and with due regard to the assistance to be rendered by it to the Court, not forgetting at the same time the burden that is imposed upon the witness."<sup>2</sup>
4. The purposes of cross-examination include to gain helpful evidence, and to cast doubt on unhelpful evidence by showing that the witness is inaccurate or not creditworthy.
5. Duties of a cross-examiner - a cross-examiner does not merely have the duty to abide by those rules established by the law of evidence, but also to abide by the *ethical* duties 'flowing from the position of the cross-examiner as counsel...'.<sup>3</sup>
6. Know (or learn if you need to) your rules of evidence for the cross-examination you are conducting.

### Should the witness be discredited at all?

7. 'Cross-examination may often be futile and sometimes prove fatal, but it remains nonetheless a faithful friend in the pursuit of justice and an indispensable ally in the search for truth. At times, there will be no other way to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed'<sup>4</sup>
8. What do we mean by discrediting a witness? Does it denote only showing the witness is untruthful?
9. What part, if any, does discrediting this witness play in my client succeeding in this case?
10. Are there things that this witness has said, or I might be able to get the witness to say, which I would want to rely upon in trying to succeed in this case?

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<sup>1</sup> [2007] 230 CLR 559; 2007[HCA]30 at [71] to [82], [84], [85] per Hayne J, Gleeson CJ agreeing at [1], see also [2]; at [118] to [133] per Heydon J; at [18] to [27], [33] to [45] per Kirby and Callinan JJ, although their Honours dissented as to the result.

<sup>2</sup> Viscount Sankey LC, quoting Lord Hanworth MR with approval, in *Mechanical and General Inventions Co Ltd v Austin* [1935] AC 346 at 359, approved in *Wakeley v The Queen* (1990) 93 ALR 79 at 86; *Libke* at [120] per Heydon J

<sup>3</sup> *Libke* at [118] per Heydon J

<sup>4</sup> *R v Lyttle* [2004] 1 SCR 193; 235 DLR (4th) 244; 180 CCC (3d) 476 [196].

11. How does discrediting this witness, on the basis I am considering, interplay with other parts of the manner in which I intend to run the case? Will I open my witnesses to a similar attack?

### **If so, to what extent and how?**

12. 'A prosecutor must "conduct himself with restraint and with due regard to the rights and dignity of accused persons. A cross-examination must naturally be as full and effective as possible, but it is unbecoming in a legal representative - especially in a prosecutor - to subject a witness, and particularly an accused person who is a witness, to a harassing and badgering cross-examination".'<sup>5</sup>
13. Will I ultimately want to invite the tribunal of fact to accept some or all of the evidence of this witness and reject other parts of it?
14. If so, what are my options for achieving this? Can I do both?
15. What are the tools available to me, including cross-examination, which should be deployed in this regard?

### **Effective means of discrediting a witness by cross-examination**

16. What do I realistically expect the Judge to get out of my cross-examination? If I was assessing the witness in light of the questions I am asking, what impact would it make on me?
17. Lay an effective ground work for your cross-examination – it is not just fair, but it is also persuasive.
18. Documents or other contemporaneous markers are again both fair and persuasive.
19. Put your question fairly and accessibly.
20. Does robust denote aggressive or abrasive?

### **The professional limits on cross-examination**

21. It is the duty of counsel to ensure that the discretion to cross-examine is not misused.<sup>6</sup> In New South Wales, disciplinary proceedings have been brought against a barrister for the breach of ethical standards in cross-examination.<sup>7</sup>

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<sup>5</sup> *Libke* [122] per Heydon J

<sup>6</sup> *Wakeley v The Queen* (1990) 93 ALR 79 [86].

<sup>7</sup> *New South Wales Bar Association v Caffrey (No. 3)* [2008] NSWADT 85.

22. Applicable Rules – Bar Association of Queensland Barrister’s Conduct Rules r12
23. A thought out, effective cross-examination will not encounter ethical difficulties.
24. The questioning must be consistent with the dignity of the proceedings, and your part in that.
25. The questioning must be fair.
26. The questioning must not put to the witness discreditable conduct in a way that does not allow the witness to meaningfully demonstrate that it is not so.

#### **Publicity around the case and discrediting a witness**

27. Applicable Rules – Bar Association of Queensland Barrister’s Conduct Rules r75 to 77
28. Special responsibility falls upon the barrister in cases that are attended with publicity.
29. The function of the barrister is the professional presentation of the case in court – nothing more.

#### **Tools in addition to cross-examination for discrediting a witness**

30. Your opening and or closing are effective means of showing that the account of a witness is either unreliable or irrelevant, or some part of both.
31. The contemporaneous documents, or other events that do not rely on the frailty of human recollection, will always be important.

#### **Rehabilitating credit and your role in protecting the credit of a witness**

32. Objecting to inappropriate or improper cross-examination.
33. Re-examination – part of its purpose, but an historically stony path.
34. Examination or cross-examination of other witnesses.
35. Demonstrating that only some of the evidence of the witness is impacted by the credibility challenges.
36. Knowing how other documents aid the account of the witness.

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## Appendix 1

### Applicable Rules – Bar Association of Queensland Barrister’s Conduct Rules<sup>8</sup>

12. A barrister must not engage in conduct which is:

- (a). dishonest or otherwise discreditable to a barrister
- (b). prejudicial to the administration of justice; or
- (c). likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.

66. A barrister must not make a suggestion in cross-examination on credit unless the barrister believes on reasonable grounds that acceptance of the suggestion would diminish the credibility of the evidence of the witness.

75. A barrister must not publish or take any step towards the publication of any material concerning any current proceeding in which the barrister is appearing, has appeared, or any potential proceeding in which the barrister is likely to appear which publication-

(a) is known to the barrister to be inaccurate;

(b) discloses, save with the permission of those persons to whom the relevant duty of confidence is owed, any confidential information;

(c) appears to or does express the opinion of the barrister on the merits of a current or potential proceeding or on any issue arising in such a proceeding, other than in the course of genuine educational or academic discussion on matters of law; or

(d) constitutes conduct in breach of Rule 12.

76. A barrister must not publish or take any step towards the publication of any material concerning any current proceeding in which the barrister is appearing or any potential proceeding in which the barrister is likely to appear, save that:

(a) a barrister may supply answers to unsolicited questions concerning a current proceeding provided that the answers are limited to information as to the identity of the parties or of any witness already called, the nature of the issues in the case, the nature of the orders made or judgment given including any reasons given by the court and the client’s intentions as to any further steps in the case;

(b) a barrister may, where it is not contrary to legislation or court practice and at the request of the client or instructing solicitor or in response to unsolicited questions supply for publication

- (i) copies of pleadings in their current form which have been filed and served in accordance with the court’s requirements;
- (ii) copies of affidavits or witness statements, which have been read, tendered or verified in open court, clearly marked so as to show any parts which have not been read, tendered or verified or which have been disallowed on objection;
- (iii) copies of transcript of evidence given in open court, if permitted by copyright and clearly marked so as to show any corrections agreed by the other parties or directed

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<sup>8</sup> See also rr 57 [d], 82 to 84

by the court; or (iv) copies of exhibits admitted in open court and without restriction on access.

77. A barrister:

- (a) may if requested advise a client about dealings with the media but not in a manner which is calculated to interfere with the proper administration of justice, and
- (b) will not have breached Rule 75 or Rule 76 simply by advising the client about whom there has been published a report relating to the case, and who has sought the barrister's advice in relation to that report, that the client may take appropriate steps to present the client's own position for publication.

## Appendix 2

*The Evidence Act 1977* (Qld) at Section 21 provides:

### 21 Improper questions

- (1) The court may disallow a question put to a witness in cross-examination or inform a witness a question need not be answered, if the court considers the question is an improper question.
- (2) In deciding whether a question is an improper question, the court must take into account—
  - (a) any mental, intellectual or physical impairment the witness has or appears to have; and
  - (b) any other matter about the witness the court considers relevant, including, for example, age, education, level of understanding, cultural background or relationship to any party to the proceeding.
- (3) Subsection (2) does not limit the matters the court may take into account in deciding whether a question is an improper question.
- (4) In this section—  
improper question means a question that uses inappropriate language or is misleading, confusing, annoying, harassing, intimidating, offensive, oppressive or repetitive.

### Reputation of the Complainant - *The Sexual Offences Act 1978* (Qld) at Section 4:

Special rules limiting particular evidence about sexual offence

The following rules shall apply in relation to any examination of witnesses or trial in relation to a sexual offence whether or not the examination or trial relates also to a charge of an offence other than a sexual offence against the same or any other defendant—

- (1) The court shall not receive evidence of and shall disallow any question as to the general reputation of the complainant with respect to chastity.
- (2) Without leave of the court—
  - (a) cross-examination of the complainant shall not be permitted as to the sexual activities of the complainant with any person; and
  - (b) evidence shall not be received as to the sexual activities of the complainant with any person.
- (3) The court shall not grant leave under rule 2 unless it is satisfied that the evidence sought to be elicited or led has substantial relevance to the facts in issue or is proper matter for cross-examination as to credit.
- (4) Evidence relating to or tending to establish the fact that the complainant has engaged in sexual activity with a person or persons must not be regarded as having substantial relevance to the facts in issue only because of any inference it may raise about general disposition.

Example of inference about general disposition—

an inference that the complainant, because of having engaged in conduct of a sexual nature, is more likely to have consented to the conduct involved in the offence

Without prejudice to the substantial relevance of other evidence, evidence of an act or event that is substantially contemporaneous with any offence with which a defendant is charged in an examination of witnesses or a trial or that is part of a sequence of acts or events that explains the circumstances in

which such an offence was committed shall be regarded as having substantial relevance to the facts in issue.

(5) Evidence relating to or tending to establish the fact that the complainant has engaged in sexual activity with a person or persons is not proper matter for cross-examination as to credit unless, because of special circumstances, the court considers the evidence would be likely to materially impair confidence in the reliability of the complainant's evidence.

The purpose of this rule is to ensure that a complainant is not regarded as less worthy of belief as a witness only because the complainant has engaged in sexual activity.

(6) An application for leave under rule 2 shall be made in the absence of the jury (if any) and, if the defendant so requests, in the absence of the complainant and shall be determined after the court has allowed such submissions or evidence (sworn or unsworn) as the court considers necessary for the determination of the application.