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Précis Paper

The Ten Commandments of Evidence in Chief

Building upon Irving Younger's "Ten Commandments of Cross Examination", Judge Peter Berman SC of the District Court of NSW shares invaluable advice on evidence in chief.

Discussion Includes

- The purpose of examination in chief
- The importance and art of persuasion
- Preparation and planning
- Communication skills and barriers to communication
- The use of exhibits
- Questioning techniques

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The Ten Commandments of Evidence in Chief

1. In this edition of BenchTV, Judge Peter Berman SC (Judge, NSW District Court) and Ian Benson (Solicitor, AR Conolly & Company) discuss how to conduct an effective examination in chief. To assist advocates in preparing for trials and hearings, Judge Berman has proposed the following ten commandments of examination in chief.

2. *Persuasion should not be left to the final address.* Although a key purpose of examination in chief is to get material out and build one's case, Judge Berman considered that its primary purpose is in fact to persuade the judge or jury that the advocate should win the case. He noted that the tribunal of fact often makes up his or her mind before the final address, and it is therefore important not to leave the task of persuasion to the closing part of a trial or hearing. If an advocate waits until the end of the case before starting to act persuasively, it might be too late. Psychologists refer to the phenomenon of "confirmation bias", which indicates that once a person has formed an opinion, they tend to disregard information that contradicts that opinion and place greater emphasis on material that confirms the opinion. This reiterates the importance of seeking to persuade the trier of fact in all aspects of advocacy, not just the closing address.

3. *Plan a good opening address and prepare evidence in chief in advance.* Like all advocacy, a good opening in examination in chief is important, and an advocate should try to grab the listener's attention and make them want to hear more. Judge Berman suggested that while examination in chief is often done in a chronological manner, it can be more powerful to start with the interesting points of a witness's evidence, in order to make the listener want to hear more. In addition, like all aspects of advocacy, Judge Berman advised advocates not to leave the planning of examination in chief until they are on their feet.

4. *Don't rely on witness statements when structuring examination in chief.* An advocate must determine what to leave out and the structure to follow, and this means that they should not use a witness statement as a script. The notes given to an advocate in the form of a witness statement or affidavit are not usually prepared from an advocate's point of view, and will not necessarily be the most useful or persuasive structure to follow.

5. *You can't persuade if you can't communicate.* Judge Berman noted several barriers to communication put up by lawyers. First, lawyers tend to use language that is difficult to understand when examining witnesses. A lawyer's choice of language can cause harm to their case where the witness does not understand the meaning of the question. Judge Berman noted a few examples of questions that could be phrased in a more straightforward way to make them more easily understood by a witness, including "what

can you say about the demeanour of the two men?"; and the use of the word "prior" instead of "before", such as in the question "had you discussed the matter with Jane prior to that time?".

6. The other barriers to communication often put up by lawyers are the failure to look at a witness while the witness is answering a question and the failure to listen to what the witness is saying. Once an advocate finishes asking a question, there is a tendency to look at notes, or start thinking about the next question, rather than listening to the answer and give their full attention to the witness. Judge Berman urged advocates to listen to witnesses rather than falling into the trap of concentrating on what comes next, as advocates can miss important information contained in a witness's answer. Advocates should not be afraid of pauses or silence, and in fact a pause after an answer can help the judge or jury to internalise the answer.

7. *Focus on who you are communicating with and who is listening.* An advocate needs to communicate with and persuade the judge or jury, not the witness. If the judge or jury are not paying proper attention, this is a problem for the advocate, and so the advocate needs to remember to keep the judge or jury's attention. Judge Berman recommended the use of phrases like "just tell his or her Honour" or "just tell the members of the jury", in order to engage the trier of fact. An advocate can also be as specific as "turn and face the members of the jury" to ensure there is direct communication between the witness and the jury.

8. *Use non-leading questions.* Although leading questions in examination in chief are not allowed under the rules of evidence, the real reason that advocates should not use leading questions is because they are not persuasive. The advocate should remember that it is not his or her story to tell, but the witness's. Judge Berman referred specifically to the use of leading questions in sentencing hearings, and considered that they do not assist the court as they do not help to persuade the judge.

9. *Use exhibits well.* Judge Berman indicated that exhibits are not used enough by advocates, and when they are used, they are not used well. He suggested that an effective technique is to get a witness to communicate with the judge or jury by asking them to point out aspects of their evidence in relation to an exhibit. For example, on a photograph or a plan, an advocate can ask a witness "show his Honour where you first saw X". This leads to direct communication with the trier of fact. In addition, an exhibit can be used to tell a story more than once, which can reiterate the witness's evidence and implant it in the mind of the judge or jury. For instance, once a witness has recounted an aspect of his or her evidence, the advocate can ask the witness to repeat the evidence with reference to the exhibit.

10. *Use piggy-back questions.* A piggy-back question is one which takes part of the information that was given in the witness's previous answer and incorporates it into the next question. For example:

Witness: I was walking down the street one day

Q: When you were walking down the street, which way were you heading?

A: Towards the intersection

Q: When you were heading towards the intersection, what did you see?

A: I saw that the red man on the pedestrian crossing was facing me.

Q: Did you wait very long at the intersection with the red man facing you?

A: No I waited a few minutes and then the green man appeared.

Q: When the green man appeared, what did you do?

A: I started to walk across the road

Q: When you started to walk across the road, what happened?

A: The car hit me

This example demonstrates the use of piggy-back questions. The technique assists in the narrative flow, and helps the listener follow the evidence and understand the story.

11. *Fake sincerity.* Judge Berman noted that often, advocates do not appear interested in the answer to a question because they know what the answer given by the witness will be. However this means that the advocate becomes dull or unenthusiastic. Judge Berman therefore advised advocates to try to make people think that the questioning is exciting, and in order to do this, they must fake being sincere. The best advocates are those who put down their notes and treat examination in chief as a conversation.

12. *Don't ask stupid questions.* This reiterates the point that lawyers should carefully consider the language that they use and make their questions accessible and easy to understand.

BIOGRAPHY

Judge Peter Berman SC

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Ian Benson is a solicitor at AR Conolly and Company and holds a first class honours degree in law.