

Jones Day Open Witness Examination Competition 2021

— OBJECTIONS AND RULES OF EVIDENCE —

This guide is intended to assist competitors in the First Year Witness Examination Competition by explaining what is required at each stage of the trial and providing a brief outline of the law of evidence.

The information presented must be read subject to the Rules of the competition and competitors should consider the suggestions and advice that follow in light of the criteria detailed in the Assessment Sheet.

Professional Ethics and Courtesy

- Judges and magistrates are addressed as ‘Your Honour’.
- Counsel must not mislead the judge/magistrate by deliberately concealing a case against them, presenting evidence that they know to be untrue, misquoting or misrepresenting the evidence or taking advantage of some obvious oversight by the judge/magistrate or opposing counsel.
- While counsel should not argue with the judge/magistrate, they may courteously disagree, using such formulae as, “*With respect, your Honour, I submit...*”
- Counsel must stand whenever they address, or are being addressed by, the judge/magistrate. Only one counsel should be standing at any time: when opposing counsel stands to object, counsel should sit down.
- Counsel must remain behind the bar table at all times.

Proving Cases

- In a criminal matter, the prosecution must convince the judge/magistrate that the accused is guilty beyond reasonable doubt. The “elements” of an offence are ascertained reference to the section of the Act under which the defendant is charged.

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- In a civil matter, the plaintiff must prove its version of the facts on the balance of probabilities. Counsel (for the plaintiff or the defence) must prove any fact asserted.

Persuasion

- Good communication and presentation are essential to trial advocacy. Counsel should speak confidently, ensuring that they can be heard, and speak slowly, precisely, clearly and succinctly, sitting down once they have achieved what they set out to do. Counsel should avoid repetition and eliminate potentially distracting mannerisms. Maintaining eye contact with the witnesses and the judge/magistrate is critical.
- Counsel must at all times demonstrate appropriate courtesy and respect towards the judge/magistrate, witnesses and opposing counsel.

Opening Address

- A short opening address is used to explain the issues of the case to the judge/magistrate.
- Counsel should briefly outline the relevant law and present a logical and sequential summary of the facts to be proved by summarising the nature and extent of the evidence to be called.
- A useful technique is to move from the general to the particular, starting with a short statement revealing the nature of the case and proceeding into the degree of detail necessary and appropriate to paint a full picture.
- Be confident, but be careful not to overstate your case by being too dogmatic and assertive.
- If the judge/magistrate asks a question, respond directly, accurately and succinctly.

Examination-in-chief

- The purpose of examination-in-chief is to elicit the witness's story in order to substantiate counsel's argument. Counsel should allow the witness to relate the evidence in a natural manner in the witness's own words.

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- Counsel may ask leading questions on preliminary matters not in dispute not otherwise.
- Counsel should not seek a witness's opinion unless that opinion is admissible.
- Questions should be short and unambiguous, and should guide the witness through the evidence relevant to all of the matters to be proved.
- Counsel should adopt an appropriate demeanour, speak clearly and audibly, and avoid potentially distracting mannerisms.
- Counsel should look at the witness, listen carefully and engage with the answers, using the witness's responses to shape the examination rather than giving the impression of asking a set of prepared questions.
- Counsel should encourage a witness to speak audibly, put a nervous witness at ease, and control a witness rambling or avoiding the question, as appropriate.
- Where counsel has elicited the appropriate responses from the witness, no further questions should be put, to avoid undermining the answers already given.
- The prescribed time limit is a maximum, and counsel should not take more time in examination-in-chief than is necessary to obtain evidence clearly and succinctly.
- If counsel requires a time extension, they must request it from the judge who have a discretion to grant a short time extension (note that this will likely impact negatively on the final score)

Cross-examination

- In cross-examination, counsel attempts to test the accuracy and credibility of the witness's evidence by demonstrating:
 - that the witness couldn't accurately perceive, or cannot reliably recall, the events in question; or
 - that the witness was mistaken, biased, lying or had a reputation for dishonesty; or
 - that the witness had made previous inconsistent statements.

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- Counsel should try to elicit evidence that advances his or her own case and builds towards the closing argument. If counsel will propose a different version of the facts from that related by the witness, counsel must put that version to the witness for comment per the rule in *Browne v Dunn*.
- Counsel should avoid repetition of evidence already established by the witness and should generally avoid asking open-ended questions. Counsel should always ask leading questions in cross-examination.
- Counsel may attempt to phrase questions subtly in order to disguise their full intent but may not intentionally cross-examine a vulnerable witness from a false premise.
- Counsel should not permit the witness to evade answering important questions.
- Counsel should endeavour to precede questions designed to expose the truth by using other prior questions designed to close any possible escape routes available to the witness.
- Counsel may not quarrel with or bully the witness, interrupt the witness unnecessarily or ask a number of questions at the same time without allowing the witness to answer.
- Counsel should only allege untruthfulness where the allegation is justifiable and demonstrable to the court.

Closing Address

- In the closing address, counsel will summarise the case, to highlight the strong points and make any relevant submissions on the law.
- Counsel should state the arguments clearly and succinctly and summarise the evidence to draw logical conclusions.
- Counsel for the prosecution/plaintiff will generally limit the issues to be proved to a bare minimum and then show how the evidence brought proves those issues.
- Counsel for the defence may attempt to create as many issues as possible and therefore cast doubt as to whether they have all been proved.

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- Where the evidence conflicts, counsel should demonstrate why the evidence of the witnesses for their side case should be believed.
- Counsel should use the closing address to rebut allegations made by opposing counsel and to emphasise the critical points in their favour.

Objections

- Counsel may object to evidence that is inadmissible, or questions seeking to adduce evidence that is inadmissible.
- Evidence may be inadmissible because it is irrelevant, because it is hearsay or opinion evidence or because it is character evidence.
- Counsel may also object to inappropriate use of leading questions in examination-in-chief
- Counsel may object to questions that are vague or ambiguous, questions that incorporate several questions into one and questions that assume facts not already established in evidence before the court.
- Counsel raising an objection need only stand and say, “*Objection, your Honour.*”
- Counsel must be prepared to explain their ground of objection.

Circumstantial Evidence

- Circumstantial evidence is evidence tending to explain an occurrence, from which the court is asked to make an inference of fact. Such evidence generally arises where it can be argued that certain circumstantial facts would not have occurred unless the fact that is to be inferred also occurred.
- It is possible to convict a defendant solely on the basis of circumstantial evidence, if that evidence is sufficiently compelling
- In a criminal trial, a conviction may only be based on circumstantial evidence where the guilt of the accused is the only rational inference to be drawn in the circumstances. The prosecution must therefore exclude any rational hypothesis consistent with innocence.

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Rules of Evidence: Relevance

- The fundamental rule for evidence to be admissible is that be directly or indirectly relevant to a fact that proves or disproves an element of the offence or cause of action.
- Evidence is relevant if it tends to prove or disprove a fact in issue.

Rules of Evidence: Hearsay

- The hearsay rule renders inadmissible an express or implied assertion made out of court by a person not called as a witness, where the truth of that assertion is relied upon.
- Essentially, the hearsay rule provides that a witness may not give evidence as to what somebody else observed.
- Important exceptions to the hearsay rule include:
 - where the evidence is adduced not to establish the truth of the assertion but in order to establish that the assertion was made;
 - where the evidence amounts to an admission; and
 - where the assertion was made in the heat of the moment such that it forms part of the overall event.

Rules of Evidence: Opinion

- Witnesses must generally give a plain account of their observations, devoid of any inference, evaluation, interpretation, belief or opinion.
- A witness may only give opinion evidence if the witness's qualifications as an expert in the relevant field have been established.
- Notwithstanding the general rule, certain opinions that do not require specialised knowledge are admissible, including evidence identifying a person or thing, apparent age, bodily plight, emotional state, the general condition of things, weather conditions and certain estimates of speed and distance.
- No witness (expert or otherwise) may express an opinion on the ultimate issue being argued in the case.

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Rules of Evidence: Character Evidence

- The prosecution/plaintiff may not adduce evidence of the bad character of a defendant unless the defendant has raised his or her own good character or has attacked the credibility of the witnesses for the prosecution/plaintiff.

Rules of Evidence: Leading Questions

- A leading question is one that suggests the desired answer or assumes the existence of a disputed fact.
- Leading questions are not permissible during examination-in-chief, other than in respect of formal matters such as a witness's name and address, matters not in dispute or in the case of questions designed to direct or focus the witness's attention.
- Leading questions are permissible and encouraged in cross-examination.