



By Gerard Mullins

# Evidence-in-chief: a checklist

**A**lthough cross-examination is commonly seen as the 'high noon' of the trial, a judge is more likely to be persuaded by the evidence-in-chief of the plaintiff rather than the cross-examination of the defendant. The plaintiff holds the forensic advantage of being able to open the case and present a cogent and persuasive picture of the facts in evidence-in-chief before the defendant's counsel can intervene. Structured, credible

and persuasive evidence-in-chief is the cornerstone on which successful case presentation is achieved.

Persuasive evidence-in-chief is realised by helping plaintiffs and their witnesses to tell the plaintiff's story in the best possible way. They can't do that without significant help and input from their lawyer. Here's a checklist for preparing evidence-in-chief from John Romano, a trial lawyer from Florida.<sup>1</sup>

- |  |  |
|--|--|
| <b>1</b> ✓ Each witness must be thoroughly prepared by the trial lawyer.   | <b>11</b> ✓ Order the witnesses' evidence-in-chief in terms of logic and common sense and present it accordingly.  |
| <b>2</b> ✓ Never put a witness in the witness box unless you have met them beforehand and discussed the case with them. You need to be thoroughly familiar with the evidence they will give on each aspect of the case.  | <b>12</b> ✓ If the witness is 'weak' but essential for the chain of evidence, make the evidence brisk and to the point. Keep the evidence brief. Avoid questions that call for a narrative answer. Control is important.   |
| <b>3</b> ✓ Familiarise the witness with the courtroom and the trial procedure.   | <b>13</b> ✓ Questions that call for a narrative answer may be best for strong and persuasive witnesses. The more evidence they can give without the input of the lawyer (in the courtroom) the greater you will enhance the evidence and make it more believable and persuasive.   |
| <b>4</b> ✓ Explain to the witness any restriction on their ability to give evidence on a particular topic because of relevance, hearsay, etc.  | <b>14</b> ✓ Remember the laws of primacy and recency (people tend to believe and accept as accurate that which they hear and understand first and last). Don't bury your important points in the detail.   |
| <b>5</b> ✓ Advise the witness about appropriate dress, how to speak to the judge and how they should conduct themselves in the witness box.  | <b>15</b> ✓ Finish the evidence-in-chief strongly. Don't let the evidence drift off as if you're not sure what else to ask.  |
| <b>6</b> ✓ Interview and prepare witnesses separately.   | <b>16</b> ✓ Use demonstrative evidence wisely, effectively and efficiently. Visualisation and explanation is very important. Plan where it will be presented in evidence. Space the demonstrative evidence out so that longer passages of oral evidence are broken up by reference to demonstrative evidence. Don't show the witness the diagram or photograph in the witness box if they have never seen it before. The witness must be familiar with any demonstrative evidence you want them to consider. |
| <b>7</b> ✓ Provide the witness with a copy of any statements, interrogatories or other documents they have given or may be cross-examined about. Make sure they understand the significance of the document in the context of the trial.   | <b>17</b> ✓ Pre-empt any weakness in the evidence by exposing it though the witness in evidence-in-chief. This will minimise the impact of any cross-examination on the point. Leaving the weakness in the hope that the defence may not seize on it is a dangerous strategy. If they do raise the point (and they probably will) they will appear to have discredited the witness.  |
| <b>8</b> ✓ The first witness will generally be the plaintiff. But in most jurisdictions this is not mandatory. Sometimes a strong liability witness may make for a persuasive opening to the case. For example, this may be appropriate in a medical negligence case where the procedure was performed when the plaintiff was under anaesthetic and the plaintiff is unable to contribute to the narrative relating to the performance of the surgery. |  |
| <b>9</b> ✓ Evidence-in-chief should be direct and to the point. Know what you're going to ask, ask it, and sit down. Don't get into the court room and 'wing it'.  |  |
| <b>10</b> ✓ Refine your questions on critical points by preparing them carefully. Ensure that they are not subject to objection. In conference, tell the witness the questions (in sequence) that you will ask them.   |  |

**Note: 1** Presented at the ATLA Annual Convention, San Francisco, 2003. John F Romano, Romano Eriksen Cronin & Mullins, West Palm Beach, Florida.

**Gerard Mullins** is the Australian Lawyers Alliance's Queensland President and a barrister at Ronan Chambers, Brisbane.

PHONE (07) 3236 1882. EMAIL [gerrymullins@ozemail.com.au](mailto:gerrymullins@ozemail.com.au)