

Witness Examination in Finnish Criminal Trials

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1 Background

On 1 October 1997 the Criminal Proceedings Act entered into force in Finland and the Code of Judicial Proceedings was simultaneously amended in part. As a result witness examination proceedings were subject to a total reform.

Legislation prior to the reform dated from 1948 and it was by nature inquisitorial. Witness examination was mainly performed by the presiding judge. This system practically forced the judge to read the pre-trial examination report closely before the trial. An active presiding judge was a necessity also because the previous legislation did not provide for a mandatory defence lawyer. Further, the roles of the public prosecutor and the defence lawyer (if there was any) were unclear and ambiguous as far as the examination of witnesses was concerned. In many cases the parties did not perform any proper examination at all but instead asked only a few supplementary questions after the presiding judge had finished his/her questioning. The worst form of the previous system consisted of merely asking whether the statement given to the police was true or not.

The benefits of adversarial proceedings were lacking to a great extent in the previous system. The main concern with the system was however the impartiality of the tribunal, which became subject to increasing criticism prior to the reform. Finland's accession to the European Convention on Human Rights (ECHR) on 10 May 1990 made it increasingly important to amend Finnish procedural legislation in order to fulfil all the requirements of fair trial. The amendment of the Constitutional rights on 1 August 1995 had similar effects on, *e.g.*, issues of procedural fairness.

Witness examination proceedings were, naturally, only a small piece of a much more comprehensive procedural reform. Questions of evidence however embody essential features of a judicial system – the thorough-going nature of the said reform implies that the old system was regarded as fundamentally out-dated.

The current system has now been in force for almost a decade. There has been little empirical research into the experiences amongst litigating professionals, but it can be safely maintained that the new system has been a welcome modernization of the Finnish legal proceedings. There have been and there still are shortcomings in judges' and parties' readiness to settle in a wholly different manner of performing witness examination. The process of adopting a new way of handling questions of evidence is still on-going.

In the following I will try to briefly illustrate the basic structures of the witness examination proceedings.¹ It can be noticed that the system adopted in Finland resembles closely other adversarial systems (such as the Swedish). As the focus in the new system has shifted from the courts to the parties I will also

1 I shall not give a comprehensive picture of the provisions pertaining to main hearings and witness examination. The provisions are contained in Chapter 17 of the Code of Judicial Proceedings and in the Criminal Procedure Act (these Acts are available in their official form in Finnish and Swedish and as unofficial English translations at www.finlex.fi). For an overall view of the Finnish criminal procedural system (in English) see Joutsen, Matti - Lahti, Raimo - Pölönen, Pasi: *Finland. Criminal Justice Systems in Europe and North America*. The European Institute for Crime Prevention and Control affiliated with the United Nations (HEUNI). Helsinki 2001 (available at www.heuni.fi).

give an overall view of the functions and the tasks of the public prosecutor and the defence lawyer.

2 Developing Legal Arguments for Witness Examination

2.1 *Establishing the Facts*

In criminal matters it is crucial for both the prosecutor and the defence to prepare carefully to the main hearing and to the execution of oral evidence. Taking into account the long-established legal practices prior to the major law reform in the law of evidence in 1997 it is understandable that there are still no generally applicable rules governing the parties' and the presiding judge's duties and actions during the witness examination.² Consequently, litigating lawyers still face various difficulties in preparing one's witness examination, as practices may vary between different courts and even more between individual judges. This may, for its part, contribute to the general importance one is likely to attach to questions concerning witness examination.

One should nevertheless try to formulate a solid basis for witness examination in general, and separately a strategy for each trial. The pre-trial report and the facts contained therein is a natural point of departure for both the public prosecutor and the defence lawyer. In the literature the concept of *the theory of the case* is most often used to point to that end. It is crucial to establish the facts of the case before the trial starts in order to be able to perform satisfactorily at the trial.

In addition to the documentary material contained in the pre-trial report client interviews form a useful tool for the defence lawyer in his/her preparation of the case.³ The information gained from one's client form the basis for the defence one way or the other.⁴ There are considerable differences in the manner and the scope of obtaining information from one's client as well as in the way in which the defence lawyer includes and excludes these client-facts in the planned process strategy. The defence lawyer may choose be more or less active in this fact finding phase. The bounds of good professional conduct and ethics are very broad and flexible in this respect.⁵

2 For the purposes of this paper the term "witness examination" is used to refer to the examination of all persons in a main hearing regardless of the person's legal classification as witness, defendant, victim or other.

3 At a practical level client interviews are more useful for the defence lawyer than for the public prosecutor. The latter may feel lesser need for such interviews as his/her possibilities (and duties) to gain information about the case in earlier phases of the criminal proceedings are superior to those of the defence lawyer's. It is also a customary method of prosecution work not to engage in too many personal interviews.

4 A lawyer is obliged to examine the veracity of the client's assertions only exceptionally, and always based on his/her own discretion. *See, e.g. ECHR Steur v. the Netherlands* (28.10.2003) and *Nikula v. Finland* (21.3.2002).

5 *See Ebervall, Lena: Försvarens roll. Ideologier och gällande rätt. Doktorsavhandling i rättsvetenskap. Norstedts Juridik AB. Stockholm 2002.*

The establishment of the facts enable the parties to detect the relevant legal elements. The facts also demarcate the area in which the prosecutor or the defence lawyer is able to manoeuvre later in the proceedings. They also highlight the starting point for the parties' further legal analysis in the preparation that takes place before the trial.

2.2 *Legal Analysis of the Facts (Associating Facts with Legal Elements)*

The analysis of the relevant legal issues at hand is equally important to any party to judicial proceedings as is the clear establishment of the factual basis (the theory of the case). The legal elements *i.e.* the abstract requisite provided for in a legal provision (such as the Penal Code) must be identified and, preferably, isolated from each other. This is necessary as the function of any given piece of evidence is to provide information which may be used to verify an assertion included in the party's theory of the case and which is relevant to the applicability and application of a corresponding legal element. To put it in another way, each piece of evidence must be *associated with an abstract legal element*. As the parties may disagree in their factual assertions, their theories of the case may also have different sets of legal elements, the existence of which the parties try to convince the court.

It is self-evident that evidence supporting the prosecutor's theory of the case must be separated from such pieces of evidence that tend to lead other conclusions. This is an essential task in the parties' preparation before the trial. Each party should primarily focus in identifying facts that are beneficial to his/her assertions. It is however also important to analyse the evidence also from the opposing party's point of view. This analysis should disclose whether all of the parties' assertions are supported by evidence in the first place or whether some legal elements lack proper evidence. It may also help the parties to realise how one piece of evidence may be associated (linked) with one or several legal elements in one's legal framework, or – as is the case in particular as regards circumstantial evidence – with legal elements included in both parties' theory of the case, *i.e.* with different outcomes (factual or normative conclusions).⁶

The legal analysis described above presupposes good mastery of the applicable material legislation (be it criminal, civil or administrative in nature). Analytical legal thinking is even more important in the next phase of the analysis of the evidentiary issues. At this point one should "break down" the legal elements into distinct sub-elements. For instance, one may distinguish the identity of the culprit, the principal list of events, the time of the events, the intent of the culprit or other person etc. as separate sub-elements. There is no fixed list of sub-elements that one could use; they must be identified in the light of the wording of the legal provision in question. In criminal trials the elements are derived principally from the Penal Law.

⁶ Circumstantial evidence does not prove relevant facts directly but instead indirectly by facilitating certain conclusions. It is therefore often useful to construe a more general interpretation (such as the motive or planning of the crime). Several facts may imply a motive for the crime and it should be easier to prove a legal element via such an explanatory model.

Fraud (Chapter 36, Section 1 of the Penal Code of Finland) is an example of a complex legal element. In order to have the defendant convicted of fraud the prosecutor must be able to establish a number of different sub-elements. Even in the least complex case these include a) intention to obtain unlawful financial benefit or to harm another, b) an act of deceit, c) which leads a person to do something or refrain from doing something and d) which causes economic loss. Questions of e) identity, f) *mens rea*, g) timing of events etc. often add further to the complexity of the case.

When the party has developed his/her theory of the case with proper accuracy it is easy to identify each legal element relevant in the case from both party's point of view. This in turn enables the sorting of relevant factual assertions and their detailed linking with various legal sub-elements. Without such detailed analysis one can not properly assign the planned evidence for the court.⁷ The lack of proper preparation also tends to lead to inexact and cursory presentation of evidence at the trial and hampers the adaptability and overall effectiveness of witness examination.

3 Preparation for the Examination-in-Chief and for the Cross-Examination

3.1 Direct Evidence

Direct evidence and circumstantial evidence normally require different approaches. Direct evidence has a verbal content making an *explicit argument* about a relevant fact (e.g. "I saw A strike B with a knife"). Eye-witness testimony supporting the prosecutor's assertions or a witness providing an alibi for the defendant are common examples of direct evidence.

Direct evidence typically raises questions of credibility of the witness or the feasibility of a witness's narrative. When two or more testimonies are mutually inconsistent the evaluation of evidence is often decided by answering the following question: which of the witnesses is most trustworthy, or; who can be trusted? It is therefore recommendable for the parties to rely in their witness examination to facts pertaining to issues of credibility in a particular case and, more generally, to apply empirical rules of witness-psychological character.⁸

In a word-against-word situation it is particularly founded for the questioner to guide the testimony into background facts and to point out small, detailed historical facts, which may cast light upon the accuracy of the witness's perceptions and recollections. This may be a useful approach in particular for the defence lawyer, who may freely pursue to show that the prosecutor has not been able to prove certain issues beyond reasonable doubt. It should be kept in mind

7 Chapter 5, Section 2, subsection 1 (7) provides that the application for summons shall indicate the evidence that the prosecutor intends to present and what he/she intends to prove with each piece of evidence.

8 Witness-psychological issues are studied at length by Haapasalo, Jaana – Kiesiläinen, Kari – Niemi-Kiesiläinen, Johanna: *Todistajanpsykologia ja todistajankuulustelu*. Kauppakaari Oyj. Helsinki 2000.

that even the most honest witness may be in error for one reason or the other. A defence lawyer would be negligent if he/she did not examine all error sources that seem relevant in a given case.⁹

3.2 *Circumstantial Evidence*

Examination tactics may be noticeably different if the prosecutor can not rely on direct evidence concerning certain relevant legal issues. The possibility to strengthen or weaken the credibility of a witness is still respectively open for the parties, but there are also additional possibilities particularly beneficial for circumstantial evidence.

Circumstantial evidence makes (only) *an implicit argument* about a relevant fact (e.g. “I saw A chase B with a knife in his hand”). By contrast to direct evidence, circumstantial evidence does not by its verbal content expressly verify or falsify a legally relevant fact. Instead it allows such inferences be made by way of conclusions. This makes circumstantial evidence by definition ambiguous. Although it might not be as strong as direct evidence, circumstantial evidence nevertheless plays an important role in witness examination. A skilful examiner knows how to make his/her theory of the case more plausible by picking out bits of information that together make a certain factual assertion more probable or even plausible. On the other hand, the opposing party may concentrate on different facts, portraying a different picture, or he/she may argue that the same bits of information can and should be given another kind of interpretation.

When dealing with circumstantial evidence it might not be at all relevant for the parties to try to deny the existence of a fact as such (which is often the case with direct evidence). What the parties may be in disagreement are the conclusions derivable from the facts. This can be pursued either in a negative way by showing that some conclusion are impossible or unlikely or, in on a more positive fashion, by showing that the same piece of information may also be interpreted in support of an alternative hypothesis.

Irrespective of the tactical choice mentioned above, the prosecutor, the victim’s counsel and the defence lawyer are in any case faced with similar tasks. In all forms of examination concerning circumstantial evidence the examiner must have (preferably already before the trial) *identified an empirical rule* that is used in reaching the intended conclusion. This means, to put it in a simple way, that one should clearly define the mechanism of thought (generalization) that leads us to connect the evidence to a factual proposition and thus to draw a certain conclusion.

It is useful to conceive the preparation for circumstantial evidence as a two-phased process. As the thinking pattern has first been clarified it is much more effective in the second phase to search from the case file at hand pieces of

9 A long tradition of very passive questioning, that in many cases consisted of merely asking a witness whether his/her previous testimony given to the police and as reported in the pre-trial protocol was true, is still hampering the development of a more modern trial culture. Some presiding judges may be regarded as rather eager to prevent the parties’ examination tactical efforts.

information (so called “especially whens”) that support the mechanism of thought/thinking pattern.¹⁰

4 Objective: Consistent Process Strategy

Thorough preparation of the evidence enables the party to follow a consistent *process strategy*. Establishing the facts, distinguishing the relevant legal elements as well as classification and linking the pieces of evidence to support each individual legal element and sub-element gives the party a comprehensive general view of the issues that require his/her attention at the trial.

In an ideal situation the party should be able to present all his/her arguments, pleadings and pieces of evidence in a consistent manner in all phases of the main hearing, *i.e.* in the opening statement, during the examination of witnesses and in the closing arguments. In order to be consistent one should clearly state for the court already in the *opening statement* the party’s view concerning the principal events in the case. This can be done in the form of a concise historical narrative. In practice, for the prosecuting party this usually means the reading of the charges. The prosecutor may however decide to go beyond this rather long-winded method and present the principal events in the form of a narrative. The defence lawyer is also free to adopt a similar, illustrative method in stead of just stating whether the defendant pleads guilty or not guilty.

It is useful to bring out the crucial factual assertions as soon as possible as this helps the court to follow the party’s presentation of evidence from the point of view as to whether the party succeeds to prove the assertions made in the opening statement. In fact, the parties’ pleadings should always aim to the conclusions in the *closing arguments*. This helps to concentrate on a main thread throughout the entire proceedings.

5 Examination Tactics for Examination-in-Chief and for Cross-Examination

5.1 Importance of Distinguishing Between Examination-in-Chief and Cross-Examination

Examination tactics principally depend upon the position as the examiner in chief or as the cross-examiner. In Finnish criminal proceedings the public

10 See, Moore, Albert J. – Bergman, Paul – Binder, David A: *Trial Advocacy: Inferences, Arguments and Techniques*. West Publishing Co. St. Paul, Minn. 1996, p. 24–27. In their example the writers elaborate a “late for meeting” argument in support of a factual proposition according to which the defendant was driving a car in excess of the allowed speed limit. They maintain that a generalization: “people who drive when they are X minutes late to a business meeting sometimes drive in excess of the speed limit” can be strengthened by pointing out (some) details such as a) they have arranged the meeting themselves, b) the person they are going to meet has been reluctant to meet with them previously, c) the meeting is with a potential new customer and d) they are unable to let the potential new customer know that they will be delayed.

prosecutor is the examiner in chief as the main rule and the defence lawyer has the position as cross-examiner.

According to Chapter 17, Section 33 of the Code of Judicial Proceedings the questioning of the witness shall be begin by the party who has called the witness, unless the court otherwise orders (examination-in-chief). After this the witness shall be questioned by the opposing party. If the opposing party is not present or if the court otherwise deems this necessary, the witness shall be questioned by the court (cross-examination). Thereafter, the court and the parties may put questions to the witness. The party who has called the witness shall be reserved the first opportunity to put a question to the witness (re-examination).

From the wording of the Chapter 17, Section 33 of the Code of Judicial Proceedings the order of examination would seem rather clear-cut. Practices in Finnish courts are however varied. From the examiner's point of view it may be frustrating if one does not know with certainty whether, *e.g.*, he or she will be allowed to examine the defendant or the client in chief or whether the main rule is going to prevail in that the public prosecutor will be trusted with the said task. As the whole approaches in the two phases of examination are entirely different from each other – or they are at least supposed to be different – this will undoubtedly weaken the planned effectiveness of the examination.

There are variations both to the question as to who is the right party to perform the examination-in-chief and to the more precise manner and “latitude” allowed to the examiner. There may be problems of deciding who should begin in a situation where both parties have called the same witness (or each party, if there is an active injured party). In particular, if both parties have called the defendant to be heard, there may be problems in ordering the examiner-in-chief.

The Government Bill indicated a surprisingly negative attitude towards the defence lawyer's possibility to perform the examination-in-chief of his/her own client. It was preferred that the defendant be examined by the presiding judge. An examination-in-chief was however seen as possible also by the public prosecutor. The defence lawyer's role in this capacity was mentioned only as the third, last, possible choice. The reluctance to allow the defence lawyer to examine his/her client in chief was mainly built on the argument that it could weaken the trust the defendant places on his or her legal representative if it were to happen that the defendant disclosed some fact or facts that prove to be harmful to the defence as a result to a question put by the defendant's own lawyer.¹¹

The defence lawyer is however in the best position to bring out facts that are relevant for the defence hypothesis and, thus, for the defence in general. From the point of view of the right to proper defence as guaranteed in Section 21 of the Finnish Constitution and Article 6 of the ECHR one should strive to fulfil these rights as effectively as possible (taking however competing interests such as the protection of the injured party properly into account). It is not irrelevant for the effectiveness of the defence's possible efforts to introduce an alternative

11 *See*, Government Bill (HE 82/1995) p. 88–89.

hypothesis whether the defence lawyer is given an opportunity to put questions to his/her client in the examination-in-chief or in the cross-examination.

It is however not uncommon in Finnish courts to allow the defence lawyer to put questions to his/her client only in re-examination phase after the public prosecutor has finished putting questions to the defendant as both the examiner-in-chief and as the cross-examiner. This kind of system is not optimal from the defence's point of view, but it may be regarded as inherent in a legal culture that has traditionally allowed the parties to litigate without a legal representative. One should, nevertheless, try to reach practices that take the rights of the defendant properly into account not only as to their content but also to their uniformity.

5.2 Examination-in-Chief

Examination tactics should always be flexible enough in order to be able to adjust to changing situations. It should nevertheless be clear in the planning phase that there are certain legal elements that need to be covered, and the pre-trial examination report normally gives a good overview of the relevant issues for each witness's testimony. Whilst the main topics of the examination should be known to the examiner from beforehand, the manner in which the examination should be conducted may be decided just before the examination begins or during the examination.

The most essential goal for the examination-in-chief is to generate a comprehensible and comprehensive overall picture of the relevant facts. Advancement in a chronological order often helps the court ("the fact-finder") to follow the testimony more effectively. All kind of visualization of the testimony also helps, *i.e.* detailed questioning of facts and the use of drawings, charts, photographs etc. Thorough preparation may also enable the examiner to touch upon some facts that he or she believes the opposing party intends to bring out in the cross-examination. This way it is possible to introduce those facts in a different context or otherwise in a more beneficial way from the examiner-in-chief's point of view.

For the public prosecutor it is important to repeat the facts from the pre-trial examination report. The prosecutor should strive to introduce verbally the same pieces of information that (usually through documented interrogations) led the prosecutor to believe that there is enough proof of the defendant's guilt in order to bring charges. The goal setting of the defendant's lawyer is often similar with respect to the witnesses that the defence has called. If the defendant denies the charges it may be necessary to present evidence in support of some alternative hypothesis that cast doubt upon the plausibility of the prosecutor's arguments.

Irrespective of the goals and means of the examination-in-chief it is always mandatory to begin the examination by giving the witness a possibility for a *free narrative*. Witness psychological research indicates that a freely given testimony has high probative value as it is likely to contain authentic and reliable information more often than answers to questions, which may be (mis)leading in some way. A free narrative is however often incomplete because the witness does not always remember to narrate all the information he or she may possess. Specific questions supporting and following the free narrative are most likely to give the best overall result (taking into account both the quantitative and the

qualitative aspects). It is nevertheless important to avoid leading questions during the examination-in-chief. The questions at this stage should as a main rule only aim to support the witness to continue his/her train of thought, to specify some details concerning the events mentioned by the witness etc.

So called *foundation rule* is a useful tool in an effort to help the witness to give a coherent narrative that may be followed easily. It also helps the examiner to avoid leading questions. The foundation rule is in itself very simple: one should first ask the witness how he or she came to have the opportunity to make the perceptions or observe the relevant events/things, and only then should the witness be asked about the content of the perceptions. The narrative is likely to adopt a logical, often chronological structure if one applies this kind of how-what –rhythm.¹² Another way of achieving similar results is to first ask questions at a general level and then in a more concrete way (e.g., “You have told that you were in the restaurant X on 6 July – Did you see there anyone you could recognise? – Yes – Would you tell the court who you saw – I saw the defendant...”). The witness should be helped to give the free narrative in the above mentioned order. Otherwise there is a risk for a testimony in which the witness testifies about his or her opinions or conclusions without first testifying on the facts on which they are based (“*lack of foundation*”).¹³

An easy way of conducting the examination-in-chief is to “*set the scene*”, i.e. to first introduce the time and the place of the events in detail. This is especially important if there is a shift in time or place during the narrative. Once there is enough information about the surrounding circumstances it is easier to follow the testimony concerning the events.

Anticipation of the cross-examination is another function for the examination-in-chief, albeit not equally central as building a comprehensive picture of the events. If the examiner however has a strong ground for believing that the cross-examiner will concentrate on particular topics, it might be justified to ask the witness about those topics already in the examination-in-chief in order to, e.g., avoid the element of surprise or to introduce those facts in a more beneficial fashion.

5.3 *Cross-Examination*

As the public prosecutor is most often entrusted with the task of examination-in-chief the defence lawyer consequently often acts in the role of the cross-examiner. This order is quite natural because the burden of proof lies on the public prosecutor and in many cases it suffices for the defence to try to weaken the strength of the incriminating evidence. Unlike in examination-in-chief, there may thus be no need to create an overall picture of the events; the crux of the cross-examination may instead be placed on certain specific topics.

The main rule for the cross-examiner is to *keep control* over the whole examination at all times. Keeping control basically means that the witness

12 See, Lie, Nils Erik, *Parts- og vitneavhør – i straffesaker og sivile saker*. J. W. Cappelens Forlag a.s., Oslo 2002, p. 215.

13 See, Moore, Albert J. – Bergman, Paul – Binder, David A: *Trial Advocacy: Inferences, Arguments and Techniques*. West Publishing Co. St. Paul, Minn. 1996, p. 149.

should only give an answer to the questions that are put to him/her. Open questions allow the witness to give a more or less free narrative and they should therefore be avoided at this phase of the examination. Questions should be precise, narrow and, often, leading. This enables the cross-examiner to restrict the narrative to preferred topics only. From the face-value this may seem like a hindrance to the effort to attain the so-called material truth, but from the perspective of the whole witness examination proceedings it is a well founded practice. Reasons are both empirical (witness psychological) and judicial. It is in everyone's interests to control the veracity of the witness's narrative by, *e.g.*, questions that cast doubt upon the credibility of the witness – this is also a right embedded in the defendant's right to effective defence.

Another important maxim for the cross-examiner is to refrain from commencing the cross-examination in the first place if there is no apparent *reason for the cross-examination*. It is useless and often even contra-productive to give the witness an opportunity to repeat his/her previous statements made during the examination-in-chief – this is likely to be the case if the cross-examiner merely asks about the same events without some “angle” or argument planned to weaken the strength of the opposing party's evidence, either directly or indirectly. A cross-examination is usually called for only in cases where the examiner aims either at weakening the opponent's arguments or strengthening his/her own arguments.

There are several *examination tactics* available for the cross-examiner. Tactical choices and the manner of performing the examination should however always be subordinate to the general strategy planned before the trial. Judicial arguments come first and the closer manner of asking questions should follow this strategic decision, not the other way around. In some cases it may be advisable for the cross-examiner to follow more or less the same tactics as in the examination-in-chief whereas in other cases an approach with more juxtaposition and scepticism may be called for.

Constructive cross-examination tactics include, *inter alia*, emphasizing facts that are beneficial to the cross-examiner, introducing facts and details that can be used to support a different conclusion (argument) than that of the opponent's and introducing wholly new facts. The cross-examiner can also assert certain arguments and demand an answer to them from the witness. This is necessary in order to effectively reveal possible sources of error or, *e.g.*, to introduce an alternative hypothesis for the court.

At this point Finnish legal doctrine is divided. Lappalainen maintains that cross-examination does not have an independent function as it only aims at controlling the veracity of the testimony given at the examination-in-chief. He also maintains that for this reason it is in his opinion not allowed to ask questions that are directed at different topics as those in the examination-in-chief.¹⁴ – This opinion overlooks entirely the constructive functions of the cross-examination, which are recognized widely in different legal cultures, even in those that are close to the

14 See, Lappalainen, Juha, in *Prosessioikeus*. WSOY Lakitieto, Helsinki 2003, p. 521–522. I have held a contrary opinion in my dissertation “*Henkilötodistelu rikosprosessissa*” (Oral evidence in Criminal Trials), Helsinki 2003.

Finnish legal system. It would not serve the purpose of finding out the material truth if the cross-examiner was prevented from going into events and topics beyond the examination-in-chief as there are really no guarantees that the first part of the examination is comprehensive enough.

Destructive cross-examination tactics are typically divided into confrontation, probing and insinuation.¹⁵ The cross-examiner can also choose between direct and indirect tactics.

In *direct tactics* the examiner asks upfront the relevant question without attempting to disguise the real goal of the question. The cross-examiner may, *e.g.*, directly put forward an argument contrary to that given by the witness in the examination-in-chief. Direct tactics usually require an explicit strategy or a specific goal and its field of application may therefore be regarded as somewhat limited in a system where also the defence lawyers are principally dependent on the information contained in the pre-trial investigation report.

Indirect tactics may be used more freely in various situations. The basic method is to approach the actual question only gradually or in any case somehow covertly so that it is not apparent from the start of a given line of questioning where the examiner intends to go. The cross-examiner may choose to adopt this kind of method equally well in “strong” cases where the examiner has a specific strategy as in “weaker” cases where there is no apparent ground for believing that there is a possibility to reveal a contradiction or some other flaw or weakness in the witness’s narrative. In the latter cases the cross-examiner may nevertheless suspect that it could be called for to test whether the witness is mistaken. This can be done relatively safely by, *e.g.*, asking narrowly formulated questions about some details about or surrounding the suspected event or topic. Answers to those details may indicate a stronger possibility for bringing out a relevant and beneficial new fact or some other beneficial argument for the cross-examiner; if this seems to be the case after this preliminary inquiry (probing), the cross-examiner may then go into the relevant issue directly (and without risking that the witness is going to give a “damaging” answer).¹⁶

It is also a generally recognized method of cross-examination to “tie” the witness to his/her narrative closely so that there will be no way out later if and when the cross-examiner confronts the witness with a contradicting fact. This tactic may naturally be deployed only in those (rare) instances where there is actually such contradicting evidence at hand. From an examination tactical point of view it is advisable to slow down the tempo of the examination in these kind of cases and to make as big a “number” of the issue as possible.

15 See, *e.g.*, Munkman, John H., *The Technique of Advocacy*, Stevens & Sons Limited, London 1951, p. 68, Samuelson, Per E., *Att förhöra ett vittne – en handbok i förhörsteknik*, Nerenius & Santérus, Stockholm 1997, p. 93 and Lie, Nils Erik, *Parts- og vitneavhør – i straffesaker og sivile saker*. J. W. Cappelens Forlag a.s., Oslo 2002, p. 258–262.

16 As the Finnish prosecutor is bound by the principle of objectivity (which obliges him/her to find out the truth and sometimes to act in favour of the defendant to meet this end) it is not entirely fitting to speak of “damaging” answers from the prosecutor’s point of view.

If the cross-examiner has no recourse to any such strong method he or she may limit the scope of the cross-examination into asking some insinuating questions that briefly highlight some doubtful aspects of the narrative, introduce a possibility of a mistake *etc.* In Finnish legal tradition there is however only limited scope for such line of questioning – the manner of questioning is usually rather formal and it is not typical to show strong expressions of emotion or zeal.

Composed and polite conduct should naturally be the principal style of both examination-in-chief and cross-examination. It is a matter of common sense that it will be more effective to choose a “softer” method amongst different possible approaches (*e.g.* to maintain that the witness is mistaken in stead of alleging that the witness is lying). It is also advisable to refrain from argument with the witness; it is often more appropriate to present one’s comments in the closing speech.