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RE-EXAMINATION – SOME PRACTICAL HINTS

ANY RE-EXAMINATION MUST ARISE FROM CROSS-EXAMINATION

1. The starting premise is that the court will not permit counsel to have a second opportunity to examine-in-chief his or her witness. Accordingly, any re-examination must arise from answers given during the witness's cross-examination.

WHEN TO RE-EXAMINE

2. Not always will a witness's evidence under cross-examination warrant re-examination. Sometimes a witness rebuffs the cross-examination in such a manner that re-examination is unnecessary.
3. Conventional orthodoxy holds that counsel is permitted to re-examine a witness in any one of the following three circumstances.

THE FIRST SCENARIO

4. The first arises where the cross-examining counsel stops the witness thereby preventing the witness from further answering the question in cross-examination. When that happens counsel who calls the witness can re-examine the witness so as to permit the witness to finish his or her answer.

HOW TO DO IT

5. The usual form of words applied in re-examination in that circumstance are these - "Mr Smith, you were asked by my learned friend about your conversation with Mrs Jones immediately prior to your executing the

contract but you were stopped before completing your answer. What did you want to say?"

THE SECOND SCENARIO

6. The second scenario arises where the witness being cross-examined gives two wholly different answers to the same question during the course of the witness's cross examination. For example, when asked if anyone else was present at a particular time the witness says that someone else was yet when asked the same question later in the cross-examination the witness says that no one else was present

HOW TO DO IT

7. The usual form of words applied in re-examination in that circumstance are these - "Mr Smith, earlier this morning when you were asked whether anyone else was present when plaintiff was struck you said Mr Blue was present. When you were asked the very same question later this afternoon you said no one was present. So that there is no misunderstanding of the evidence you wish to give in this case, was anyone present when the plaintiff was struck and if anyone was present, tell us who that person was?"

THE THIRD SCENARIO

8. The third scenario arises where the witness's answers to one of more questions in cross-examination are contradictory or confused and, unless supplemented or explained, the court will be left with a distorted complexion of the witness's account of the facts. In that circumstance the court will permit re-examination but only in relation to the areas of confusion or contradiction.

HOW TO DO IT

9. The usual form of words used to address this situation is this - "Mr Smith, you gave the court a variety of responses to the question why you relied

on the advice of your broker. Do you call your answers? Which were the most important reasons why you relied upon your broker's advice?"

A FINAL WORD

10. There may be situations where counsel makes a perfectly valid and proper forensic decision not to re-examine, for example where the witness did an outstanding job at resisting each and every assault made in cross-examination. Those occasions are rare. In any of the three scenarios covered above counsel should re-examine.

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