A new handbook for all litigators

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Robert S. Harrison and Richard B. Swan
Skillful Witness Examinations in Civil and Arbitration Hearings
(Toronto: Carswell, 2023)

Robert Harrison and Richard Swan have managed to produce a volume that is both a useful learning tool for the law student or junior lawyer, and a valuable set of reminders and strategic prompts for the experienced litigator.

Their recent book, *Skillful Witness Examinations in Civil and Arbitration Cases*, is a welcome addition to the well-known guides to trial advocacy such as Pozner and Dodd's *Cross-Examination: Science and Techniques* and *Sopinka on the Trial of an Action*. Setting it apart from those classics is the book's structure. From beginning to end, we follow the witnesses, counsel, documents, and expert reports in the fictitious misuse of confidential information case of *Laveneer Inc. v Svengali Ltd*., providing a new take on a litigator's go-to handbook.

The authors use the facts and players on both sides of the *Laveneer* case, from the lawyers' initial client meetings with plaintiff and defendant, through discoveries, and on to trial, to illustrate concretely their examination techniques and strategic advice. The reader gets a front-row seat to the preparation done by both sets of counsel, excerpts of key documents, and passages of examination transcripts over the life of the whole action.

The book opens with the initial client meeting between the plaintiff's counsel, Nate McManus, and his clients at the office of the plaintiff, Laveneer Inc., in an exchange that will resonate with any commercial litigator: The parties exchanged a draft confidentiality agreement, but were too anxious to get moving on their potential deal to finalize it before the defendants (Steven Svengali and his engineering company, Svengali Ltd.) were given access to the plaintiff's software and information. The litigation gets started quickly after that, as the plaintiff suspects that Svengali has used its know-how to develop its own version of the biomedical device (a nanoprobe used to treat cancer) that Laveneer hoped Svengali would partner with them to develop.

That issue sets the stage for the rest of the demonstrations throughout the action, argued on the familiar basis of a breach of confidence claim in the vein of *Lac Minerals*.

That single-case approach might feel tiresome if done with less care – think of some of the more hastily prepared fact patterns from trial advocacy workshops in your law school days – but Harrison and Swan use it to great effect. The book balances the use of the *Laveneer* backdrop and practical, strategic explanations to get fundamental points across from different angles. The transcript excerpts are accompanied by brief, to-the-point takeaways which illustrate well the skills that are being taught. Even in the longer exchanges, there are no wasted pages.

Seeing the file unfold from the initial client meeting until the key cross-examinations at trial makes you think about the impact that early decisions can have on an action or arbitration. In the chapter on preparing for examinations for discovery, we see a damaging email thread with Mr. Svengali, which counsel decides for strategic reasons not to put to him during discovery. We then see how it could be effectively used during Svengali's cross-examination at trial, in a lesson on "leading a witness down the garden path."

The *Laveneer* transcripts are drafted in a realistic, not idealized, way that will be of particular help to junior litigators. During the examinations for discovery, we see counsel doubling back to make sure that the transcript is clear about what part of a document is being referenced. During an examination-in-chief, Mr. McManus clarifies who is being referenced when his witness uses only a first name in her evidence. These are small details, to be sure, but

helpful ones to complement the authors' broader strategic advice. We see later on a passage from a "failed attempt" to cross-examine the main Svengali Ltd. witness, which is just as instructive on the concept of control and the dangers of arguing with a witness. Throughout, the transcripts demonstrate the cadence of "being ready to question off the last answer," which is what the authors present as the "golden rule" of witness examinations. This approach gives the book the feel of a quality trial advocacy workshop in written form.

The transcript excerpts give concise, concrete examples of skills that might elude younger lawyers who haven't yet had a chance to see them all in practice. One examination-in-chief, for example, does a good job of demonstrating that open-ended questioning need not be limited to the likes of "tell me what happened at that meeting." Laveneer's counsel uses headlining, references to undisputed facts, and narrow, "bit-by-bit" questions to keep the evidence on track without leading the witness. That and other excerpts are accompanied by brief explanations, such as how to effectively elicit evidence without leading, or when to emphasize a witness's incredible lack of recollection on a key point for the trial judge. Just as importantly, there are sections on avoiding pitfalls such as improperly worded "what … if any" questions. Examples tied back to the *Laveneer* facts are thoughtfully woven throughout to illustrate how the skills might be used.

Of course, this isn't the first trial advocacy text to use transcripts to illustrate examination skills – Geoffrey Adair's *On Trial: Advocacy Skills, Law and Practice* and *Sopinka on the Trial of an Action* are good examples, deploying a wide variety of transcript excerpts both real and fictional. The benefit of the approach in *Skillful Witness Examinations* is that, once you have the fairly streamlined facts of *Laveneer* in your head, the takeaways from each transcript are easily accessible.

Much of the book is dedicated to cross-examinations. The authors provide a detailed breakdown of the purposes and objectives of cross-examination, effective preparation, and questioning skills. No doubt this is the area where most trial counsel will differ, and may have strong opinions, on the best approaches. Nonetheless, even experienced advocates are likely to find that their practices can be refined from considering Harrison and Swan's treatment of all aspects of cross-examination in and out of the courtroom. In a number of places, the authors lay out several different approaches that trial counsel commonly use, prompting you to carefully consider how you prepare for and think through that crucial part of any trial.

The cross-examination chapters in particular make the book a handy reference guide, functioning almost as a checklist of what to consider when preparing for cross. The inclusion of both basic and detailed practical points will assist first-year associates and litigation partners alike. In the sections on preparing a cross-examination outline, you are reminded to consider whether you should include verbatim language from the witness's discovery transcript to support an impeachment if necessary, or an exact phrase from a governing case to support your final argument. There are cautions to pare away the passive voice, subjective adjectives, and compound questions, and tips unique to the handling of non-party witnesses. There is a helpful (and often much-needed) refresher on the proper procedure for cross-examining a witness on a prior inconsistent statement.

While it isn't a comprehensive textbook on civil litigation, *Skillful Witness Examinations* takes care to cover not only examination techniques, but also the kinds of preparation and foresight that make effective examinations possible when the time comes. In the early chapters you observe counsel's (sometimes delicate) conversations with their clients about the different kinds of documents they will have to collect and review, from hard-copy originals to text messages between friends and business connections. Multiple pages are devoted to developing an effective cross-examination brief, which can make all the difference once you take the podium at trial. Where different considerations come into play in the arbitration context, those are canvassed as well.

The book isn't meant to be a black-letter legal treatise, either, but it includes some helpful case law references to support fundamental concepts: what is a "leading question," really? (*R v Rose*); what is the rule against splitting one's case? (*R v Krause*); how is a witness's credibility to be properly assessed? (*Alguire v Manufacturers Life Insurance Co.*); what is actually required (and not required) by the rule in *Browne v Dunn*? (*R v Quansah*); what is the evidentiary value of expert reports at trial? (*1162740 Ontario Ltd. v Pingue*). On this last point, the chapter on examining experts provides a helpful synopsis of the key procedural and evidentiary issues surrounding expert witnesses, from the principles governing the admissibility of expert evidence to the treatment of an expert's working file.

On the whole, *Skillful Witness Examinations* is an effective manual for practitioners, by practitioners. As the authors stress in their introduction, good witness examinations need to be animated by "a clear perspective on how to advance a client's case." Harrison and Swan have clearly taken a lot of care to craft a book that is concise, readable, and above all focused on being a useful tool for practising litigators. It is sure to be a welcome addition to your office shelf, or the counsel table.

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