

Taking Notes and Other Tips on Observation at Trial

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TAKING NOTES AND OTHER TIPS ON OBSERVATION AT TRIAL

By the time you get to trial, you will know everything you can about your case. You will have studied the documents, the discovery transcripts, and the timeline. You will know the case law, and you will be prepared to tie the case law to the evidence in support of the theme and theory of your client's case. But during a trial, many things can change – for better or for worse. For example:

- Your witness may not respond to your questions on examination-in-chief in the manner you prepared for;
- Your witness may struggle on cross-examination, failing to give the complete, or even what you know to be the correct, answer, either because of the questions they are being asked, or the pure stress of being cross-examined;
- Opposing counsel may take an unexpected approach on direct or cross such that a new theme or theory develops, either in your client's favour or against;
- The opposing party's witnesses will "perform" better or worse on their examination-in-chief or on cross-examination than expected; and / or
- The Judge may ask the witnesses questions signalling a point of interest or concern for the court which you did not previously anticipate.

All this to say, barristers must be nimble during a trial, observing and absorbing new information as it becomes known. Further, they must understand the new information in the context of the record going into trial, and understand how to amplify or diminish it through redirect, chief or cross during trial as appropriate.

The starting point for observing and responding to new information during trial (or in any situation) is to know and recall what the new information is. In the stress and busyness of a trial, it can be difficult to take organized, real time notes which will allow you to recall, synthesize, and respond to what you are hearing. The following are some practical tips for doing just that.

FOCUS

- It is a trite reminder but important: we need to stay focused on what is happening in the moment, whether it is an examination-in-chief, a cross-examination, or a question from the bench.