1. Get the witness to answer the question.

   What is the problem?

   An evasive witness is par for the course in cross-examinations. The witness will dodge questions, give incomplete answers, and obstruct at every turn.

   The problem with this is that counsel may:

   (a) Inadvertently allow the witness to evade the question; or

   (b) Fail to point out the improbability of an answer. Thereby miss the opportunity to dent the witness' credibility.

   Allowing witnesses to evade questions also gives the opposing party an opportunity to extinguish issues. They do this by saying in post-trial submissions:

   'Yes, that was an issue in dispute, but counsel accepted the witness' answer in cross and did not pursue further. Therefore that is the end of the matter.'

   Why does it arise?

   The cause of the problem is (unfortunately) the cause of many a problem in the examination of witnesses: That counsel fails to listen to the witness.

   The failure arises because we are wedded to our list of questions, eager to launch the next one as soon as possible.

   This is because we are keen to bring an end to the questioning, either due to jitters or sheer unpreparedness. The cross thus resembles a monologue with counsel launching questions, instead of a dialogue between counsel and witness.

   How do we fix this?

   We fix this:

   - By listening to the witness' answers;
   - By calling out the witness for not answering the question by saying : *'That is not what I asked. I asked 'Does the letter say XXXXXX'? I did not ask whether you believe what it said.'*
   - And if the problem persists, by making the point to the judge that the witness is evasive.

2. Tell the judge why the document is important, before referring to it.

   What is the problem?

   Oral submissions in civil disputes can be replete with references to documents. Indeed, the flow of arguments is often punctuated with references to bundles, enclosures, and exhibits.

   This is all done to persuade the judge that the argument is supported by the documents. And not magicked out of thin air.

   However, this practice can be a problem if the judge does not know at the outset the reason for the reference. If she does not know the reason, she will be in the dark when the document is referred to or read out. She may be left feeling that the reference is a waste of her time.

   Why does it arise?

   The cause of the problem is our failure to put ourselves in the shoes of the judge. This is a failure to ask how this particular piece of advocacy will land with the judge, as the consumer of the argument?

   Instead, we've structured the argument through the lens of counsel. Meaning, having immersed ourselves in the documents for weeks, we've assumed that everyone in the courtroom is as well-versed with them as us.

   How do we fix this?

   We fix this by re-structuring the argument to first explain *why* the document is important, before referring the judge to it.

   Thus we first state the point, and then flesh it out. Put another way, we move from the general to the specific by funnelling the argument.

   An example of this may be:

   'My second point is that the tenant's lease had expired. [The General]

   This is clear from the tenancy agreement. Can I take the Court to Page XX which sets out the duration of the tenancy?' [The Specific]

   Instead of:

   'I would be grateful if the Court could please refer to Bundle XX, Page XX, Bundle YY, Page YY, and Bundle ZZ, Page ZZ. [The Specific]

   All three documents read together show that the tenant's lease had expired, which is my second point in these submissions.' [The General]

3. Empathize with the judge when making a difficult point.

   What is the problem?

   We sometimes have to make difficult arguments because the facts or the law is against us. Or simply because we've received peculiar instructions.

   In making these arguments we may personally come across as being difficult, out-of-sync with the judge's thinking. This is bound to happen as come the hearing day, the advocate (despite his best efforts) often identifies with the argument.

   Why does it arise?

   It arises because we've failed to communicate to the judge that we are aware of the weakness in our argument. This failure leads the judge to think that we have no respect for her time or intelligence.

   We come across as blundering into the submissions with a cleaver, taking no prisoners. Instead of wielding a scalpel to explain with nuance why we should succeed despite the hurdles.

   How do we fix this?

   It is important to bear this in mind: That the judge is simultaneously judging two things at any one time, the facts and our competence.

   Therefore it is not enough to merely master the arguments. It is equally important to master the *presentation* of the arguments. We must show that we've finely honed our judicial antenna.

   So when we sense that our argument might not land well with the judge, we should preface our argument with something like:

   - *I am sorry to belabour the point but ...*
   - *I realise that the authorities are seemingly against me. But the difference in the present dispute is ...*
   - *I know I've taken up more time than warranted. But if I could put it in a different way ….*