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CROSS-EXAMINATION TECHNIQUES IN CIVIL AND CRIMINAL TRIALS.

By

O. A. ONADEKO, ESQ, LL.B (Ife), LL.M. (London) Barrister-At-Law,
Director-General, Nigerian Law School, Bwari, Abuja, Formerly Director
of Public Prosecutions, Republic of The Gambia.

WHAT IS CROSS-EXAMINATION?

Cross-examination is one of the fundamental principles of the Nigerian system of adversary justice. It is statutory in our justice system and is common to all common law jurisdictions.

Cross-examination is the examination of a witness by party other than the party that calls him (S.188 (2) Evidence Act Cap. 112 LFN 1990).

(a) Cross-examination is a part of trial proceedings and the answers elicited thereunder are given on oath. Consequently, where the answers so elicited are relevant and direct to the point in issue, they would be given due probative value and would not be brushed aside simply because they came through cross-examination. See OGBEIDE V OSULA (2004) 12 N.W.L.R. (Pt 886) 86. See also BAMGBOSE V OLANREWAJU (1991) 4 N.W.L.R.. (Pt 184) 132 and GAJI V PAYE (2003) 8 N.W.L.R. (Pt 823) 583.

(b) It is dramatic, exciting and in many ways defines our adversarial system of Criminal Justice. It is ultimate challenge for the counsel, i.e. can you add to your case or detract from your opponent's by exacting information from his witnesses.

If examination-in-chief provides the best opportunity to win your case, cross-examination may provide the chance to lose it.

Care must be taken in handling witness, because Court usually perceives cross-examination as contest between counsel and witness. And you can seldom afford to appear to lose.

Cross-examination is inherently risky. Witness may argue with you and he may fill in gaps left in examination-in-chief.

OBJECT OF CROSS-EXAMINATION

To weaken, qualify or destroy the case of the opponent, (See KUTI V ALASHE (2005) 17 N.W.L.R. (Pt 955); and AWOPEJO V THE STATE (200) F.W.L.R Pt 4 625); and to establish the party's own case by means of his opponent's witnesses. (See Phipson on Evidence, 13th Edition, paragraph 33-68, p. 804. See also AJAO V AJAO (1986) 5 N.W.L.R.

CONCEPTS OF CROSS-EXAMINATION

Three concepts that are basic to the organization, presentation and technique of most cross-examinations may be put as follows:

(i) Cross-examination presents you with the opportunity to put forth part of your client's case in the course of the adverse party's story. Your objective is to take focus away from the witness's evidence-in-chief to matters which are to your client's advantage;

(ii) Do not try to extract new information in cross-examination. Specifically, do not ask the witness a question just for the sake of the answer. Use cross-examination to establish or enhance facts that you have already discovered; and

(iii) Effective cross-examination often succeeds through the use of implication and innuendo. Note that it is not necessary and indeed often harmful to ask the "ultimate question". That is best left to the

address stage when you can point out the relationship between facts, make characterizations and draw conclusions based upon the accumulation of details. You should not expect an opposing witness to do this for you.

HOW EFFECTIVE IS YOUR CROSS-EXAMINATION?

See OFFORLETTE V THE STATE (2000) F.W.L.R. Pt 12, 2081

Duty of Court to accept unchallenged and credible evidence.

Failure to challenge evidence under cross-examination, but later calling another witness on the issue.

What is the effect?

SCOPE OF CROSS-EXAMINATION

- Wide latitude.

- Leading questions (S. 197). Evidence Act.

- No restriction to the facts on which the witness testified in his examination-in-chief (S. 189) (2) Evidence Act.

- No restriction to the facts of the case, but may ask questions which go purely to the credibility of the witness (S. 200) Evidence Act.

- You may test his accuracy, veracity or credibility.

- You may ask questions to discover who he is and what his position in life is, or shake his credibility by injuring his character (S. 200) Evidence Act.

- You may cross-examine him as to his previous inconsistent statement. (See Sections 119, 209 and 210 of Evidence Act).

Reason is that a person who had made a statement which is contradictory to what he says on oath is a liar not worthy of credit (See F. Nwadialo, Modern Nigerian Law of Evidence, 2nd Edition; University of Lagos Press, 1999 p. 508). See also ONIBUDU V AKIBO (1982) 7 S.C. 60; NNAJIOFOR V UKONU (1986) 4N.W.L.R. (Pt86) 505;and DAGASH V BULAMA (supra).

USE OF LEADING QUESTIONS

Use of leading questions is the most obvious distinction between cross-examination and examination-in-chief. The logic is that your adversary's witness will have little incentive to co-operate with you. Moreover, the right to ask leading questions is understood to include the right to insist on a responsive answer.

Restrictions

You should always avoid the following:

(i) Argumentative questions (Argumentative question is one that insists that the witness should agree with an opinion or characterization; as opposed to a statement of fact).

(ii) Intimidating behaviour.

(ii) Unfair characterizations (Right to lead does not include right to mislead or trick the witness).

(iv) Assuming facts not in evidence (This is distinct from inquiring as to fact not yet in evidence). For example: "Hadn't you been drinking that evening?" (acceptable) "Since you had been drinking that evening") (unacceptable).

(v) Compound and other defective questions. Compound questions contain more than one inquiry. Such always elicit ambiguous answers. Vague questions are objectionable because they elicit vague answers.

(a) **Techniques of Questioning**

It is presumed that you have established what you intend to cover in cross-Examination and the order in which to proceed. How do you ask questions that will guarantee your success?

- Essential goal of cross-examination technique is witness control. Be friendly at the onset, asking questions the witness will consider non-threatening.

- Your object on cross-examination is to tell your client's story.

- You must determine the flow of information and require answers to your questions. You must always be in control of the witness and his testimony.

- Control may be assertive or non-assertive.

- Please note that the final impression that you leave is likely to be the most lasting. Save the best for last and end on achieving that.

Questions should be short, leading (a non-leading question may make the witness wander away from your story) and propositional (proposition of fact to the witness in interrogative form, i.e. you must know the answer to your question).

(b) **Sequenced Questions**

You may use sequenced questions to achieve commitment from the witness. In this case, facts can be arranged to give their progression a logic.

Even where the initial facts in sequence are innocuous, a witness may be led on a course of concession that may be difficult to stop or deny later.

For example if an accused (Driver) in the case of causing death by dangerous driving called one of the occupants of the vehicle at the time of the accident as witness to the fact that accident was due to no fault of his, questions may be sequenced as follows:

Q: You have testified that the accident occurred suddenly.
Q: And the driver was totally oblivious to it until the vehicle hit the trailer and lost control.
Q: From that moment on things happened rather fast.
Q: You were of course concerned with your safety all the time.
Q: Indeed, your brief case which was on your lap was thrown off as a result of the Impact.
Q: So too were belongings of other passengers.
Q: The experience must have been traumatic to you and others.
Q: It was miraculous that three of you survived the accident.
Q: The extent of impact must have been suggestive of high speed because the bus was a total wreck.
Q: Also three survivors from a passenger load of thirty is suggestive of a very serious r.t.a.
Q: The trailer hit was behind a fruit stall.
Q: Two fruit vendors also lost their lives.

This type of sequencing will commit the witness to several premises to be expanded in a way to make it difficult for him to deny later. The effect is that a witness who admitted above issues can hardly attest to the non culpability of the accused regarding the accident.

FINAL ADDRESS

The final address (argument) is the Counsel's only opportunity to tell the story of the case in its entirety, without interruption, free from most constraining formalities.

Unlike the examination of witnesses etc, the address is delivered in Counsel's own words and without the need intermittently to cede the stage to his opponent.

It is the moment for pure advocacy, when all the lawyer's organizational, analytic, interpretative and forensic skills are brought to bear on the task of persuading the Judge.

The address must tell the whole story of the case, reflect and encompass the evidence in the case.

DELIVERY TECHNIQUE

Final address is generally regarded as the Counsel's finest hour. While a polished delivery will not rescue a lost cause, a forceful presentation can certainly reinforce the merits of your case.

It is important to note the following for effective and purposeful delivery.

(i) Do not read or memorize: The most effective final arguments are those delivered from an outline. The use of an outline allows you to plan your address, deliver it with an air of spontaneity and adapt to the arguments of the opposition.

(ii) Use body and hand movement: A reasonable amount of body and hand movement will enliven your final argument and increase the attentiveness of the Judge. Gestures can be used to emphasize important points or to bring to the fore the differences between your case and the opposition's.

(iii) Verbal pacing: The speed, tone, inflection and volume of your speech can be important persuasive tools. They can be used to signal transitions and maintain the Judge's attention. Care must be taken not to speak too quickly or too loudly.

(iv) Use of visuals: Visual aids can be very useful in closing address. Also, Counsel are generally free to use any exhibit that has been admitted in evidence. Visual aids may be argumentative and it may be best to think of them as argument in graphic or physical form.

(v) Use of headlines: A headline announces where the argument is going next. It can take the form of a simple statement, a rhetorical question, or a short enumeration.

Enumeration has the effect of concentrating the mind because of its analysis. For example, if a Prosecuting Counsel says "The accused was negligent in three different ways. These are....." The immediate effect is a response from the Judge to note these "three" important points.

(vi) Use simple, Active language

There is persuation in the use of simple, active language. It is one thing to assert that a crime was heinous; and quite another to describe its awful vivid details.

CONCLUSION

A Counsel's task when preparing for trial is to conceive of and structure a true story – comprising only admissible evidence and containing all the elements of a claim or defence – that is most likely to be believed or adopted by the Judge. This is a creative process, because seldom will the facts be undisputed or capable of but a single interpretation.

To carry through this process, the Counsel must imagine a series of alternative scenarios, assessing each for its clarity, simplicity and believability, as well as for its legal consequences.