

AN APPROACH TO CROSS-EXAMINATION

Emmanuel Ikedinobi

1.0. INTRODUCTION

The concept of Cross examination, like most concepts of law defies the art of absolute comprehension. For me, it is loaded with apparent contradictions that tend to negate its true objectives. But if one is equipped with the rules and principles— constant practice is an added advantage too—one may become a true expert in cross examination.

As a litigation lawyer, the ability to properly cross examine will be the largest weapon to your arsenal, even larger than your ability to speak fluently and persuasively. The same is applicable to a law student who is active in moot trials.

Now, the big question is—what is CROSS-EXAMINATION? The concept of cross examination means a lot of things; hence it has sometimes been described as an engine of truth, and a bulwark of liberty. Some say it is the most devastating weapon man has discovered, including things nuclear. It is non-violent substitute for the sword and gun. It is used everywhere in daily life, albeit in primitive forms. You have probably used it yourself, without being aware. It is used in virtually every walk of life where there is human communication.¹

In the legal sense of it, cross-examination is done by the opposing party or his counsel. The object is to discredit the evidence-in-chief by showing from the witness's mouth that he is unworthy of belief; to discredit a witness by demonstrating that his evidence is inconsistent with other testimonies; or to discredit another witness on the same side; or to extract facts favorable to the cross-examiner from the adverse party; and to give the court an advance notice of the theory of the cross examiner's case.²

2.0. AIMS AND OBJECTIVES

The major aim and objective of cross examination is to destroy the witness's credibility. There are numerous ways to do such, and it depends on the witness and what you hope to establish.³

1. **Attack the Witness's ability to perceive:** A witness's testimony is only as strong as his ability to perceive the events relevant to the testimony. Where you are confronted with a seemingly honest witness with no axe to grind who has damaging evidence to present, attack the witness's ability to perceive the events at issue. Particularly, as to time, dates and persons present at the place the incident occurred.

¹F. L.Bailey; *To be a Trial Lawyer* (John Wiley & Sons, Inc, Publishers1994)

²D. I. Efevwerhan; *Principles of Civil Procedure In Nigeria*(Chenglo Ltd, Publishers 2007)

³Kelin & Wilson "The Art Of Cross-Examination(2010) FAL <<https://www.kleinandwilson.com/publications/the-art-of-cross-examination/>>

2. **Attack Reliability:** Sometimes, a witness may be truthful but the testimony is not reliable. For example, a witness who previously made mistakes regarding dates, times, and places may be attempting to tell the truth, but there is a question as to whether the witness can accurately testify to events. In this type of approach, the intent is not to show the witness is lying but that the witness cannot be counted upon to testify accurately to what occurred.

3. **Attack Truthfulness:** The most effective attack on a witness is an attack on the witness's truthfulness. Where a witness is proven liar, the testimony will not be accepted by the court and it will be disregarded.

The most effective attacks on truthfulness come from showing a witness has testified inconsistently under oath. Thus, where testimony at trial is contradictory to testimony at deposition, such impeachment can be devastating to the Judge's willingness to believe that witness.⁴

Now, in the case of an expert witness, cross examination is also done with the aim of discrediting or casting a doubt on the qualifications of the witness and consequently, his expertise. It should be tactful and probing, geared towards achieving the above objectives.

It is pertinent that I categorically state that, there is no school in this country where it is taught in any depth. It is a talent one is going to have to develop on one's own, and the time to start is now. If by the time you make your first appearance in court, you have mastered even the fundamentals of good cross-examination; you will tower above your colleagues.

Most often than not, there is always a hackneyed expression from Lawyers whom I have seen as a result of going to court to observe proceeding. This expression is, ***"in cross-examination, the sky is the limit"***. Lawyers hide under this premise to ask irrelevant questions and waste the precious time of the court. Such irrelevant questions waste the precious time of the court. Such irrelevant questions have no bearing on the case, and the court cannot make use of evidence procured therefrom, unless the fact established by such evidence was pleaded.

In **Olumosola v. Olariawo**⁵ Per Niki Tobi, JCA(as he then was) put it succinctly thus:

One cliché or aphorism has always worried me in the profession and it is that in cross examination, the sky is the limit. Counsel loves it. It is almost a song in the judicial process. Apart from the fact that the judicial process has nothing to do with the sky, which is not within the reach of the ordinary man, the statement is not correct in law. In law, it is not cross-examination which is said not to have any inhibition or limitation, but considered. ... evidence procured from cross examination can only be admitted if it is irrelevant to the live issues before the court. Counsel may decide to ask irrelevant questions (and some do) but the trial

⁴See footnotes 3

⁵Olumosola v. Olariawo(2002)CA 2 NWLR (Pt. 750) 113 at 123 – 124,

*judge cannot make use of evidence procured from such questions because they are outside the live issues in the matter*⁶

From the above, it can be ascertained that even a relevant fact procured from cross examination will not be admissible, if it cannot be located within the issues arising from the pleadings. But a Lawyer can elicit relevant evidence from a witness during cross examination even where such facts were not testified about during examination-in-chief provided it is a fact arising from issues raised in pleadings.⁷

3.0. INGREDIENTS

Now, a good cross examination has a long list of ingredients, which will grow as you mature and ripen in the art. We will be considering the following ingredients:⁸

1. Control
2. Speed
3. Memory
4. Precise articulation
5. Logic
6. Timing
7. Manner
8. Termination

I will proceed to give a brief explanation of what is meant by each in the context of cross examination.

1. **Control:** A cross examiner must control his witness tightly, and not let him run away with long, self-serving narrative answers; he must also control the direction and pace of the questioning.
2. **Speed:** A witness telling less than the perfect truth needs time to think up and fashion his answers, time that he must not be allowed to have. Effective cross examination must be conducted at a pace nothing short of relentless, which will have one who is fabricating his answers insufficient time to do so.
3. **Memory:** The cross examiner must have his head stuffed with a plethora of facts and information, including every prior statement the witness has made, the testimony other related witnesses have given or are expected to give, all relevant documents and other kinds of evidence, and a clear image of the details of the scene of the event if there is one. His hands must be empty most of the time, and his eyes must be riveted on the witness. If he needs to constantly refer to notes and other written materials, he will sacrifice something essential, which is speed.

⁶ Ibid at 124 per Niki Tobi, JCA (as he then was)

⁷E-Act 2011 S 215 (2)

⁸ See footnote 1

4. **Precise Articulation:** Questions must be formulated swiftly, but with care. They must be clear and unambiguous, simple and not compound, in a form that is not objectionable legally, and structured to elicit a yes or no answer most of the time.

5. **Logic:** Most questions—even those intended to ridicule—must be put together within a logical framework. They may be, and often are, put out of order, or in juxtaposition to one another, but the goal should be to play the witness's total testimony off against a logical sense of what he should have said if he were recounting reality.

6. **Timing:** A cross examiner must exercise excellence in timing throughout his performance. Once he has backed a witness into a corner, he must go for the jugular moments before the witness has girded himself to repeal the attack. If he can, before every break in the trial, he must leave the air heavy with doubt and suspicion about the witness's testimony, allowing this last impression to sink into the Judge's mind during the recess.

7. **Manner:** The manner in which the cross examiner deals with a witness must be appropriate to the circumstances. One does not use a heavy-handed tone of voice, tinged with sarcasm, on an attractive and pleasant elderly person or child.

8. **Termination:** A cross examiner must know when to quit, on a high point and without insisting that all subjects within a witness's possible knowledge be covered exhaustively. As Alice in Wonderland was advised, "Knowing when, where, and how to stop a cross examination is one of the last things trial lawyers learn."

4.0. RULES

It is pertinent that I state that there are some rules that govern cross examination. They are:⁹

1. Don't cross examine
2. Don't ask questions when you don't know the answer; the truthful answer, at least.

1. **Don't cross-examine:** That's right. Disappointed? If your disappointment is acute, you will probably break this rule at the first opportunity, as most young lawyers do. The phrase "***No questions, Your Lordship***" is the hallmark of a seasoned pro. It takes more experience, courage and self-confidence to use this phrase than to follow the natural impulse to dive in. Do not cross examine a witness unless you have to. If he is the only witness to a critical issue in the trial, you may have to ask him some questions merely to preserve your opportunity to argue against his credibility, but if you sense that he is telling essentially the whole truth, be prepared to make your effort brief. When a witness does a little more under cross examination than repeat what he has said on direct examination, his credibility is apt to be buttressed in the minds of the judges, because he is consistent under attack. If this is the substance of your accomplishment on cross examination, you have harmed your case rather than helped it.

⁹See footnote 1

Don't cross examine unless you have thought your objective through and decided that you have something to gain. If a witness hasn't hurt you, don't cross-examine him, even if you think you can show minor points in his testimony to be inaccurate.

An Example¹⁰

A defendant was charged in a criminal case with maiming which is a serious felony that requires proof of physical disfigurement in most jurisdictions. In this case, the victim had lost an ear; the defendant was charged with having bitten it off in the course of an altercation. The victim was a psychotic person, incompetent to testify himself. The prosecutor (who had not done his homework) therefore called to the stand the only bystander who had been at the scene. He described seeing the fight start, and the two combatants fall to the ground. Then came the following:

QUESTION: Then sir, did you see the defendant do something with reference to the left ear of the victim?

The Witness: No, actually I did not.

The Prosecutor, stunned by this unexpected answer, mumbled "No further questions", and sat down, knowing that within moments the Judge would dismiss the case for lack of sufficient evidence. The young defense lawyer, however, who should have been overjoyed at his unanticipated good fortune and left well enough alone, was troubled. He wanted to perform for his client, partly because he thought he should justify his fee. Furthermore, his favorite girlfriend was sitting in the front row. He rose to cross examine.

QUESTION: Now then, sir, if you didn't see my client bite off the victim's ear, why do you have the bad manners to come forward as a witness in this case?

The Witness: Because, even though I couldn't actually see your client bite the man's ear off, I did see him spit it out.....

You see what I mean? Don't!!!

Leading questions may be asked during cross examination.¹¹

Also, Lawyers should avoid asking open-ended questions, so as not to give the witness opportunity to do explanation. The questions should be closed ones demanding a "yes" or "no" answer.

¹⁰See footnote 1 pg 76

¹¹E-Act 2011 S221 (4)

2. Don't ask questions when you don't know the answer-the truthful answer, at least:

This rule is very important, In other words, don't ask questions you don't know the answer. I mean, this is a cross examination and you are not there on a voyage of discovery; you are there to get what you want to hear.

(Below is an illustration from this mock trial write up I stumbled into. It has to do with traffic rules. I have tried tracing the source for referencing but I couldn't)

The writer explained it well.

This rule seems simple enough. If you do not know how a witness will answer a question, do not ask it. Do not go on a "fishing expedition" during cross examination. Resist every temptation to ask a witness any variation of a "how" or "why" question.

If you already know the explanation, you should use leading questions to tell it to the witness. If you do not already know the explanation, then cross examination surely is not the time to learn it.

No matter how assiduously you have prepared, no matter how well you think you know the limits of the witness's testimony, a witness can always surprise you by explaining the seemingly unexplainable.

Observe the following scenario.

QUESTION: Your parking garage was located three blocks from your office, correct?

ANSWER: Yes.

QUESTION: And the sidewalks are always very crowded between 8:00 and 8:30 in the morning?

ANSWER: That's right.

QUESTION: You usually have to wait for one or more traffic lights between the garage and your office, don't you?

ANSWER: I do.

QUESTION: So you have to plan on at least ten minutes to get from your garage to your office, right?

ANSWER: No, that is not right. I usually make it in three to five minutes.

QUESTION: Please explain how you can travel that distance, under those circumstances, in only three to five minutes.

ANSWER: It's simple. There is an express bus that travels that route in a bus lane. I get on in front of the garage and its next stop is right in front of the office. Even in heavy traffic, it never takes more than five minutes since the bus lane is always clear and the traffic lights are coordinated.

Okay! Pause!!!!

Can you see now why it would have been better not to ask the witness to explain? Even if the testimony about the express bus was not included in the witness's affidavit or anywhere else in the case file, the witness is allowed to draw reasonable inferences from the case file.

The bottom line is that you should never give a witness the opportunity to explain during cross examination. Refrain from asking the witness to explain. Instead, he should ask you if he may explain.

Again, you must resist the temptation; if a witness is volunteering an explanation, there is no chance the answer will help your case. The best way to handle this awkward situation is to politely decline to respond to the witness's question.

For Example:

QUESTION: So you have to plan on at least ten minutes to get from your garage to your office, right?

ANSWER: No, that is not right. I usually make it in three to five minutes. Would you like me to explain how?

QUESTION: Your lawyer can ask you to explain that. I have other questions I'd like to ask you instead

See?

In summary, asking or allowing a witness to explain is the equivalent of saying, "I've grown tired of controlling this cross examination. Why don't you take over for a while?"

5.0. CONCLUSION

Effective cross-examination can make the difference between winning and losing a trial. Although cross examination can be the part of trial that is the most fun for experienced trial lawyers, preparing good cross examination takes a lot of thought and hard work.¹² Hence, it can be boldly said that the importance of having and being equipped with the mastery of cross examination cannot be overemphasized as it will help one win or lose his case.

¹²See footnote 3