

Kenya School of Law

ADVOCATES TRAINING PROGRAM

2015-16 ACADEMIC YEAR

Trial Advocacy

CROSS EXAMINATION

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OUTLINE

Definitions

Statutory basis

Risks of Cross Examination

Tenets of Cross examination

Planning Cross examination

Techniques

Exercise

Statutory basis-Civil

Civil Procedure Act and Rules

Order 18 R.6: *“Where any question put to a witness is objected to by a party or his advocate, and the court allows the same to be put, the judge shall take down the question, the answer, the objection, and the name of the person making it.”*

Statutory basis-Criminal

Criminal Procedure Code, Cap. 75

Sec.150- *“...Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness. “*

Criminal –High Court

Sec. 302. *The witnesses called for the prosecution shall be subject to cross-examination by the accused person or his advocate, and to re-examination by the advocate for the prosecution.*

Case for Defence

Sec.307-(1)

*“the accused person may then give evidence on his own behalf and he or his advocate may examine his witnesses (if any), and **after their cross-examination and re-examination** (if any) may sum up his case. “.*

Evidence Act Cap. 80

Sec.148- A witness to character may be cross-examined and re-examined.

Sec. 149. Any question suggesting the answer which the person putting it wishes or expects to receive, or suggesting a disputed fact as to which the witness is to testify, is a leading question.

Sec. 151. Leading questions may be asked in cross-examination.

Evidence Act-contd.

Sec. 153. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question...

Sec.154-A witness may be asked questions...

- (a) to test his accuracy, veracity or credibility;
- (b) to discover who he is and what is his position in life;
- (c) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

Role of Cross Exam(Steve Lubet, "Modern Trial Advocacy")

Risks in Cross examination

- a) Witness being uncooperative or hostile
- b) Adding strength and sympathy to adversary's case
- c) Witness filling in gaps
- d) Cure by re-examination

Law of Cross examination

Be brief

Leading questions allowed

Limit to what was said in exam in chief

Exception :Where credibility of witness is in issue.

Other restrictions

Avoid arguing with witness.(insisting on an opinion, not fact).

Do not intimidate-by gestures, shouting, badgering ,bullying.

Do not mislead the witness(use trick questions).

Do not assume (or fill in) facts.

Avoid compound questions.

Ian Morely, QC, Devils Advocate

Witness:

- ❖ Does not want to agree with you.
- ❖ Will fight tooth and nail to confound.
- ❖ Will misunderstand the questions.
- ❖ Will give evasive answers.
- ❖ Will use question to repeat the bad facts against you.
- ❖ Therefore ask: Do I need to cross examine?

Cross examination is not a time to be cross with the witness.
Don't get personal.

Morley-10 rules.

1. Think commando
2. When you get what you want, stop.
3. Never ask question whose answer you do not already know.
4. Always leading questions.
5. Never ask witness to EXPLAIN(Never ask WHY)
6. Reserve your comment for submissions.
7. Never ask witness for help
8. One thing at a time
9. Do not “put it to “ witness.
10. Bounce off answer on witness to trier of fact

Content of Cross examination

Think of “to what extent” do I need to cross examine?

What do you expect witness to say in exam in chief?

Was the exam in chief less damaging than you expected?

Is this cross examination necessary?

Purposes of Cross examination

- ❖ Repair or minimise damage
- ❖ Enhance your case
- ❖ Detract the opponent's case.
- ❖ Establish foundation for a document.
- ❖ Discredit evidence given in chief.
- ❖ Discredit the witness as a person.
- ❖ Reflect on credibility of another witness.

Organisation Principles

- ❖ Its telling your client's story through the opponent.
- ❖ It's NOT time to get new information; it is to enhance or establish facts you already have.
- ❖ Work through innuendo and implication.

Organisation-guidelines

1. You don't necessarily have to start strong.
2. Use topical organisation.
3. Give details first. Build up incrementally.
4. Scatter the circumstantial evidence(don't show witness the killer weapon you have)
5. Spare the point you want to make for the end.

NB.The last point must be:

- Admissible
- Central to the theory of your case
- Evoke the theme
- Undeniable.
- Stated with conviction.

Classic format for Cross examination

1. Start friendly(non threatening questions).
2. Affirmative questions-that build your case, not destroy opponent's.
3. Information that cannot be controverted.
4. Information that challenges.
5. Hostile information-that which confronts witness directly.

Techniques

- a) Short, open questions. (Avoid compound questions).
- b) Leading questions.
- c) Propositions-Putting across to a in interrogative form a fact you already know.

Planning

Avoid reading pre-written questions

Use an outline-Topic, sub topics, e.g.

1. Normal day-Morning, afternoon, evening.
2. Day of incident-Morning, Time of incident
3. Events at scene-Weather conditions; which people present; their temperament.
4. Post incident-Who came; reporting to authorities; treatment.

Form of questions

Be incremental.

Sequence for impact-to show a relationship.

Sequence to “scatter” witness.

Sequence to get a commitment.

Create an “enclosure” from which witness cannot escape.

Avoid ultimate question(Why?).

Listen to witness, insist on an answer.

Questions that can lead to trouble

1. Non-leading questions.
2. “Why” or Explanation questions.
3. “Fishing” questions-in hope of getting something.
4. Long questions-witness forgets what was being asked.
5. “Gap” questions-to fill an intermediate issue.
6. Using “you testified” repeatedly.
7. Characterizing and making conclusions.

Regaining control

Where witness has refused to agree:

- Determine why has refused to agree-(may be wrong on facts).
- Go back to basic, agreed on facts.

Where witness is out to explain:

- Determine why are they out to explain.
- Ask a totally new question(seem like you have moved on).

Where is uncooperative:

- Ask for help of the Judge/Magistrate.
- Keep asking that question.
- Confront them with their won words.

Possible starting lines for Cross Exam

- ❖ You agree with me...
- ❖ It is true...
- ❖ Confirm that....
- ❖ You have testified that...
- ❖ It is your evidence that...
- ❖ It is a fact that...
- ❖, that is true?
- ❖, that is correct?
- ❖, isn't it so?

Other Important points- Presentation

(Prof. Goodno)

- Be organised
- Focus on relevant matters.
- Good delivery.
- Passion for the case

Communication techniques

(Adopted from NITA method).

Use appropriate communication techniques of

- language and vocabulary,
- demeanor,
- eye-contact,
- voice projection,
- pace, cadence and silence, (cadence-rhythmic flow of a sequence of sounds or words: a slight falling in pitch of the voice in speaking or reading, as at the end of a declarative sentence. the general modulation of the voice.)
- facial expressions,
- posture and
- avoidance of distracting gestures and verbal habits.

Q and A

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