



CROSS-INTERROGATION IN A COURT

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Summary

The article deals with the notion and the main features of cross-interrogation in a court. The principal tactics of cross-interrogation in the conflict and non-conflict situations are justified, as well as risk value for a subject of cross-interrogation as the components of one of the most important elements of its tactics.

Key words: cross-interrogation, court, interrogation tactics, trial participants.

Аннотация

В статье рассмотрены понятие и основные признаки перекрестного допроса в суде. Обоснованы основные тактические приемы перекрестного допроса в конфликтной и бесконфликтной ситуациях и значение рисков для субъекта проведения перекрестного допроса как составляющих одного из важнейших элементов тактики его осуществления.

Ключевые слова: перекрестный допрос, суд, тактика допроса, участники судебного разбирательства.

Statement of the problem. Cross-interrogation in a court is one of the most important means of evidence research in adversarial proceedings and certainly the most difficult and the most “dangerous” for those who questioned (hereinafter, for convenience called interrogator). Detection of caution and diligence in the words selection, attention to the court and audience by interrogator are the starting positions of cross-interrogation tactics. During cross-interrogation, it is difficult to consider all factors and therefore there is always a risk, so you should constantly assess your own ability, analyze the actions executed in the process of interrogation, work hard to eliminate the identified deficiencies.

Relevance of research means the necessity for further promotion of the system of tactics and anticipation of possible risks during cross-interrogation in a court, taking into account the existing developments of forensic science and related innovations at current Criminal procedural Code of Ukraine. Permanent scientific attention to the issue of cross-interrogation in a court is due to the urgent desire of realization the ideas of court reforms into realities of Ukrainian judiciary.

The state of research. The following scientists as L.Y. Arotsker, O.S. Aleksandrov, S.P. Gryshin, Y.P. Zeikan, M.I. Porubov, M.S. Strohovich, R.D. Rakhunov, S. K. Pitertsev, O.O. Stepanov, I.D. Perlov etc. had made their contribution in resolving the problems of cross-interrogation in a court. However, there are many forensic and procedural aspects of cross-interrogation tactics in a court, which seems to be, properly, especially in the context of the innovations of the Criminal procedural code of Ukraine, non-investigated.

The purposes and the tasks of the article. Examination of the peculiarities of cross-interrogation in a court, as well as determination and disclosure of the nature of cross-interrogation tactic depending on the judicial situation are the purposes and the tasks of the article.

The main material. Cross-interrogation is one of the types of court interrogation. It is foreseen by the current criminal procedural legislation, it is one of the tactic means to establish the facts between parties of the disputes, it is limited by the object of direct interrogation, it is intended to clarify the reliability of the evidence presented by a corresponding subject of a criminal case and may be conducted by these participants of the proceedings, financial and/or procedural interest of which differs from the interests of a participant who had conduct a direct interrogation.

It seems to be true that cross-interrogation is particularly useful in situations when in a court an interrogated person suddenly and drastically changes his/her previous testimony. In such case it is very difficult for a sole prosecutor to verify a new version of testimony given by the interrogated person. It is obvious that a number of the participants are able with a greater extent than a sole one, to ensure completeness, objectivity and impartiality of all facts reported by an interrogated person [7, p. 120]

Mainly a cross-interrogation means an interrogation during which the participants of court proceedings in turn may ask the same person the questions concerning any of the episodes of his/her testimony aimed to clarify, amend and verify it. This type of interrogation begins after a person has told to everybody everything he/she knows about a case [7, p. 185].

Mainly in the literature a cross-interrogation is described very superficial, which makes it difficult to understand its essence. The scientists single out the following common features of a cross-interrogation:

- it is one of the types of court interrogation;
- is performed after direct interrogation;
- must be limited by the issues that were clarified during direct interrogation [9, p. 185].

O.S. Aleksandrov and S.P. Grishyn emphasized that a cross-interrogation may be conduct only for a person whose testimonies can be crucial for the proper clarification of the essential circumstances of a case [1, p. 65]. This approach, in our opinion, does not seem to be quite right.

Aimed to conduct an objective criminal proceedings it is necessary to cross-interrogate all witnesses, because a court may not always adequately and properly assess a role of a witness in the relevant criminal proceedings after direct interrogation. Directly a cross-interrogation is not intended to confuse an interrogated person. Its purpose is another – to study critically, verify and evaluate the testimonies that were obtained from an interrogated person previously, it means that its purpose is to obtain new truthful information and, ultimately, to ensure truth in a criminal case.

Court practice certifies that a cross-interrogation affects on the psyche of the accused, caused its difference from the usual interrogation by its increased psychological stress on a person being interrogated, it keeps them in a state of unrelenting tension, makes it possible to reveal the contradictions in the testimony of the defendant's false, identify and



demonstrate the inability of the selected by an interrogated persons position [6, p. 83–84].

However, this particular kind of court interrogation “increases the risk of suggestion associated with adoption of the same type of questions and different tactics of interrogator”.

There is another important advantage of such interrogation – it is more economic and efficient in time and efforts. As far as we know one cross-interrogation replaces several separate types of interrogations of the same particular person which were necessarily to conduct in case of absence such form of interrogation. It also resulted in the fact that cross-interrogation is the main form of court interrogation.

Tactically it is important that the person conducting an interrogation showed care and diligence in the selection of words, the attention to a court and audience. This is the tactic of interrogation. In terms of the general characteristics of interrogation tactics „brutal force” and “playful manner” are bad expressions.

Cross-interrogation tactics is the most efficient and effective organization of court interrogation conducting. Tactical scenario of a cross-interrogation is individual for each case.

Tactics developing includes assessing of various psychological factors, including motivation and the potential reaction of the opposite parties, the judge and jury.

Decisions taken in a case include penetration into the plans of an opposite side, and an understanding of internal motivation of a witness who gives some testimonies. There is an illusion about the increasing importance of external technical aspects of the process. Success can be achieved only through adherence to procedural rules and rules of the process. Therefore tactics study is also necessary.

The term „tactics” (Greek taktike – art of forces alignment) means the theory and practice of preparation for fight [11, p. 689]. In a broader sense it is a system of means directed for achievement a certain goal through struggle, conflict of interest and overcome the resistance. Term of tactics in criminology has some elements of conditionality, because it is not equivalent to the military tactics and it should not be reduced to the ways application of which can eliminates the conflict relationships and countermeasures.

The concept of „tactic method” takes central place in the criminalistic tactics and it is the most rational and most effective way of action or conduct during the collection, research, evaluation and use of evidence.

The validity of the tactic methods application depends not only on the efficiency by which an attempt to achieve the best possible result in accordance with the cost of effort, time, means is considered, but it depends on their usage in accordance with the objectives of the investigation or trial.

Tactic method of cross-interrogation is the most appropriate course of conduct in certain court cases aimed to achieve its specific purpose and is based on the psychological mechanism of its implementation.

Tactic methods of cross-interrogation in criminal justice must meet the following requirements:

1. Inadmissibility of unlawful pressure on a person in respect of whom tactic method is used.
2. Compliance with the principles of morality and ethical requirements.
3. The scientific validity.
4. Consistency.
5. The efficiency and effectiveness
6. Opportunity of choice a tactical method and practical feasibility of its use.

It is advisable that a situational approach to the selection of those or that tactic methods of cross-interrogation conduct during the criminal cases hearing in a court.

As V.V. Konin stressed, court situation is an individual information model, in which there is no cruel construction and it is able for changes [8, p. 189–210].

Tactic methods used during cross-interrogation are to be classified with regard to conflict and non-conflict court situation. That will facilitate to the further improvement of existing and development of new tactic methods, will provide practical assistance to defenders and prosecutors in mastering them.

In particular, during cross-interrogation at non-conflict situation we recommend using the following tactic methods:

- to ask an interrogated person the questions which will dismember event into its component parts;
- to ask an interrogated person the questions related to the events in the life of an interrogated person;

- demonstration of the items, videos, drawings, photos relating to the facts reported by an interrogated person;

- specification, refinement, comparison, analogy, abandoning, use of figurative thinking, ask of the reminding (additional) questions etc.;

- controlling the reaction of the interrogated person and his/her emotions;

- selection of the cross-interrogation rate.

During cross-interrogation in a court interrogator should adapts his/her tactics of a cross-interrogation to the interrogated person, paying attention to the specificity of personality type. It seems expedient to select one of two main personality types of an interrogated person, such as: sensitive subject and highly organized person. The first type includes vulnerable, impulsive, emotionally unstable people. They are characterized by the statement with the words: „fantastic”, „wonderful”, „desperately”, „awful”, etc. They can not control their emotions, which in turn depend on external influences. During cross-interrogation it is advisable for interrogator to behave calmly, deliberately with such people, to track an emotional condition of such persons.

The second type includes a highly organized person. These people are rational, serious, tend to control the situation, to think and weigh all before they are going to speak. They don't like when they are dictated the terms, and tend to make decisions independently, it is difficult to make them changing their minds. Therefore, during cross-interrogation of this type of an interrogated person, a subject of cross-interrogation must keep a distance, make an interrogated person think that he had thought through every step and provided all the details and operates in accordance with a clear plan.

It is often a conflict situation in a court during cross-interrogation, which is accompanied by an active opposition, as well as presentation of false testimony by an interrogated person.

Based on the behaviour of an interrogated person in a conflict situation, it is possible to distinguish a number of tactic methods for the situation of cross-interrogation:

- taking into account the psychological features of an interrogated person both while establishing psychological contact, and directly during an interrogation;



– personal observation by an interrogated person (fixing of emotional, facial expressions makes possible to change interrogation tactic);

– making a state of emotional tension when an interrogated person significantly reduce ability to fully exercise conscious control over the content of voice messages and his/her behaviour;

– maximum detail of testimony, because it is difficult to think about false testimony to the smallest details.

Hence, conducting a cross-interrogation in the criminal trial in a court, an interrogator must decide what position he/she will occupy while cross-interrogation of an interrogated person: being equal, preference or relations of subordination. There is no doubt that cross-interrogation affects on the psyche of an interrogated person, differs from the usual interrogation by increased psychological stress, keeps them in a state of unrelenting tension, makes it possible to reveal the contradictions in false testimony, to identify and demonstrate the inability of the selected by the interrogated person position.

We should agree with negative features of cross-interrogation, mentioned by V.O. Konovalova:

1. there is different procedural status between the trial participants, there is a complex interweaving of interests, there is different assessment of evidence;

2. danger of bona fide error made by an interrogated person would increased (fantastic layering, suggestive influence, etc.);

3. Interrogation participants ask the prohibited questions to the interrogated person (suggestive, provocative) that are to be immediately isolated by a court in the process of communication;

4. there is production of the same questions, the same questions are repeated for a few times;

5. the interrogators use the different tactics (pursuit the different goals, desire for opposite results) [9, p. 185].

In this context, F. Vellman pointed: "When we will imagine that we are being in a court and a cross-interrogation now would took place, the first question would be: whether the witness said anything that could be used against us; or did his testimonies harm us; or did he set up the jury against us; or is there a real necessity to cross-interrogate him" [3, p. 51].

The main risks for the use of appropriate methods of cross-interrogation in a court are the following (as for the interrogator):

1. Presentation during cross-interrogation to the witness earlier reported by him testimony or written documents, in which he makes statements that contradict testimony in a court – it may results in confirmation of the proof of the facts other than those that are in these protocols or documents which were not confirmed by a witness in a court; to the accidental disclosure of the existence of other obligations between the parties, which were unknown to a court or jury.

2. Intention of research during the cross-interrogation of belonging to the case a certain important facts – it may results in only in demonstration that such a possibility was, but did not bring success.

3. Trying to prove a bias witness while the cross-interrogation – can only strengthen the results of direct interrogation.

4. Interrogation is conducted with the hope that the answers will be favorable to the appropriate participant of an adversarial process, and as a result the answers are favorable to the interests of the opposite side.

5. Forcing a witness to detail his/her testimony and finding the contradictions within it, they can indirectly strengthen his testimony, if he/she finds a plausible explanation for these contradictions.

6. Question „why?“ to a witness with hope that a witness will not find a reasonable explanation, could have a favorable impression of question impropriety in this particular situation.

7. Being overly persistent in obtainment a clear answer from a bias witness can lead to unexpected and unfavorable responses.

8. Cross-interrogation of forensic expert by a barrister-defender due to the accuracy of the medical treatment of a victim may strengthen the position of a victim or claimant on the amount of harm caused by a crime.

9. Methods of cross-interrogation aimed on encouraging a witness to confirm or refute some information and it is possible only by giving false testimony by this witness, may testify before a court dishonesty of the person's motives, who will conduct this interrogation [2, p. 125–126].

The above mentioned confirms that cross-interrogation is one of the most difficult procedural actions. Indeed, in psychologically stressed conditions of public and adversarial court proceedings, within a relatively short time frame an interrogator should be able to define a psychological contact with an interrogated person, to ask questions and to get the full and truthful answers. In addition, there are cases when a subject of cross-interrogation is faced with a bona fide error made by an interrogated person, that must be overcome, or distortion or giving in conflict situation at the court trial the unlawful testimony. But this is impossible to implement without proper tactical training, the relevant recommendations should be developed by criminalistics. But it is almost absent because the developers of the issues concerning tactic of court interrogation in criminal proceedings had not related to the problem of tactical methods of cross-interrogation in a court.

Therefore, F. Velman's thought about the necessity of leaving a really lucky answer in case of its obtainment by an interrogator and quietly continue to ask more questions, seems to be true. Probably inexperienced interrogator will try to repeat the same question to make a stronger impression on the audience, instead of being consigned it to the final confirmation of the outcome of the debate [1, p. 23].

Finally, let us mention one more aspect of cross-interrogation in a court. In our opinion, the ability to timely and logical accented finish cross-interrogation is the most difficult in this kind of court interrogation. It seems that there is no need to interrogate a witness (a victim, etc.) too intensive and prolonged in time because there is always undesirable possibility that his/her further testimony may spoil all impression of the earlier testimonies, devalue the previously obtained evidence. Therefore, measure and beat of an interrogator is an important factor in the success of cross-trial interrogation.

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НОРМАТИВНОЕ РЕГУЛИРОВАНИЕ ЗАЛОГА КОРПОРАТИВНЫХ ПРАВ В ПЕРСПЕКТИВЕ (ПРЕДЛОЖЕНИЯ ПО СОВЕРШЕНСТВОВАНИЮ ЗАКОНОДАТЕЛЬСТВА)

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Summary

The main difficult questions of the forfeiture of the corporative rights (share in the registered capital of the limited liability company) as the subject of pledge are analyzed in the article. These difficulties are conditioned with the deficiencies of law under the current legislation of Ukraine. The author proposes some amendments to the current Civil Code of Ukraine as well as to the drafts of the legislative acts on the limited liability companies that are under consideration in Verkhovna Rada of Ukraine. In particular it is proposed the legal mechanics of the guaranteeing both the rights of the other shareholders of the limited liability company and the pledge-holder in the case of the forfeiture of the pledge subject – the share in the registered capital.

Key words: limited liability company, pledge, corporative rights, share, registered capital, forfeiture.

Аннотация

В статье анализируются основные проблемные вопросы обращения взыскания на корпоративные права (часть/долю в уставном капитале общества с ограниченной ответственностью) как на предмет залога, обусловленные пробелами в правовом регулировании данной сферы отношений в законодательстве Украины. Автором предлагается ряд изменений и дополнений по данной проблематике в действующий Гражданский кодекс Украины, а также в проекты законодательных актов об обществах с ограниченной ответственностью, находящихся на рассмотрении в Верховной Раде Украины. В частности, предлагается правовой механизм гарантирования как прав других участников общества с ограниченной ответственностью в случае обращения взыскания на предмет залога, так и прав залогодержателя.

Ключевые слова: общество с ограниченной ответственностью, залог, корпоративные права, доля, уставной капитал, обращение взыскания.

Постановка проблемы. Ключевой проблемой правоотношений залога корпоративных прав (доли в уставном капитале общества с ограниченной ответственностью), по нашему мнению, является, прежде всего, отсутствие четкого понимания предмета залога (доля, корпоративные права, имущество, имущественные права, личные неимущественные права или иное) и соответственно порядка обращения взыскания на такой предмет залога.

Впрочем, очевидно одно, отечественное законодательство в этой части требует изменений.

На сегодняшний день разработано и передано в Верховную Раду Украины два законопроекта, которыми урегулированы вопросы создания и деятельности обществ с ограниченной ответственностью (Проект Закона

об обществах с ограниченной ответственностью и обществах с дополнительной ответственностью [1] и альтернативный законопроект – Проект Закона об обществах с ограниченной и дополнительной ответственностью [2]). Однако ни один из них в достаточной мере не уделяет внимание урегулированию вопроса о передаче в залог корпоративных прав (доли в уставном капитале обществ с ограниченной ответственностью).

Так, первый законопроект [1] предусматривает отдельную норму, посвященную вопросу залога доли, однако предлагаемое нормативное регулирование содержит множество пробелов, которые в будущем могут быть неверно истолкованы и быть основанием для дискуссии между сторонами договора залога, а возможно, и спора в суде. Второй законопроект