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Argumentative Questions

An argumentative question challenges the witness about an inference from facts in the case.

Example: Assume that the witness testifies on direct examination that the defendant's car was going 80 m.p.h. just before the collision. You want to impeach the witness with a prior inconsistent statement. On cross-examination, it would be permissible to ask, "Isn't it true that you told your neighbor, Mrs. Ashton, at a party last Sunday that the defendant's car was going only 50 m.p.h.?"

The cross examiner may legitimately attempt to force the witness to concede the historical fact of the prior inconsistent statement.

Now assume that the witness admits the statement. It would be impermissibly argumentative to ask, "How can you reconcile that statement with your testimony on direct examination?" The cross-examiner is not seeking any additional facts; rather, the cross-examiner is challenging the witness about an inference from the facts.

Questions such "How can you expect the judge to believe that?" Are similarly argumentative and objectionable. The attorney may argue the during the closing argument, but the attorney must ordinarily restrict questions to those calculated to elicit facts.

"Objection, your honor. Counsel is being argumentative." Or,
"Objection, your honor. Counsel is badgering the witness."

More information

“OBJECTION: Your Honor, the question is argumentative; counsel is arguing with the witness instead of asking for facts.”
DISCUSSION: Argumentative questions, when directed to an adverse witness, frequently are not recognized by counsel or even the court. If the same question were directed to the examiner’s friendly witness, it would be recognized as leading and not calling for any facts from the witness. Addressed to an adverse witness, a question is argumentative if it does not call for new facts, and merely asks the witness to agree or disagree with a conclusion drawn by the examiner from proved or assumed facts. See Mattfeld v. Nester, 32 NW2d 291 (Minn.1948). Argumentative questions may be proper if directed to an adverse party, as an attempt to secure a judicial admission contrary to the position of the party. Argumentative questions also may be proper if an opinion has been given by the witness. Then counsel may properly state different facts than those used by the witness in forming his/her opinion and inquire if a different conclusionary opinion is correct. Allowance of argumentative objections, like all the other objections within the rubric of “objection as to form” (which see, below) is within the discretion of the trial judge.
RESPONSE: “Your Honor, I am testing the testimony of this witness.”

More information

An attorney shall not ask argumentative questions. Comment: An argumentative question typically occurs on cross-examination when the attorney asks the witness to agree to a particular interpretation or characterization of the evidence, as opposed to a particular fact. Attorneys learn the difference between proper aggressive cross-examination and improper argumentative questions.

Asked and Answered

Asked and answered is just as it states, that a question which had previously been asked and answered is being asked again.

Example 1: On Direct Examination - Counsel A asks B, "Did X stop for the stop sign?" B answers, "No, he did not." A then asks, "Let me be sure we understand. Did X stop for the stop sign?

"Objection, your honor. This question has been asked and answered."

Counsel for X correctly objects and should be sustained, BUT…

Example 2. On Cross Examination - Counsel for X asks B, "Didn't you tell a police officer after the accident that you weren't sure whether X failed to stop for the stop sign?" B answers, "I don't remember." Counsel for X then asks, "Do you deny telling him that?"

Counsel A makes an asked and answered objection. The objection should be overruled. Why.? Counsel is not asking the same question. It is a sound policy to permit cross-examining attorneys to conduct a searching probe of the direct examination testimony.

More Information

Questions designed to elicit the same testimony or evidence previously presented in its entirety are improper if merely offered as a repetition of the same testimony or evidence from the same or similar source. Comment: This objection is often phrased, “Asked and answered.” Note also that Rule may be invoked to block the presentation of cumulative evidence.

A question is “asked and answered” if it calls for a repetition of testimony from a witness who has previously given the same testimony in response to a question asked by the same counsel. Once an inquiry has been “asked and answered” by one side in a trial, further repetition by that side is objectionable. Variations on a theme, however, are permissible, so long as the identical information is not repeated. The asked and answered rule does not preclude inquiring on cross examination into subjects that were covered fully on direct. Nor does it prevent asking identical questions of different witnesses.

PROPONENT: Mr. Burns, you killed Steve, right?
ANSWER: No, I did not.
PROPONENT: Yes, you did kill him, didn’t you?
OPPONENT: Objection, Your Honor, asked and answered.

Responses: If the question has not been asked and answered, counsel can point out to the judge the manner in which it differs from the earlier testimony. Otherwise, it is best to rephrase the question so as to vary the exact information sought.

Outside the Scope of Cross Examination

Redirect examination is limited to issues raised by the opposing attorney on cross examination. If the questions go beyond the issues raised on cross, they may be objected to as "outside the scope of cross examination."

"Objection, your honor. Counsel is asking the witness about matters that did not come up in cross examination."

I-B(2). Scope of Examination. The "scope" of cross examination (i.e., the subject of questions asked) is not limited to subjects brought out under direct examination. It may cover matters affecting the credibility of the witness, and additional matters, otherwise admissible, that were not covered on direct examination.

Following cross-examination, the counsel who called the witness may conduct re-direct examination. Attorneys conduct re-direct examination to clarify new (unexpected) issues or facts brought out in the immediately preceding cross-examination only; they may not bring up other issues. Attorneys may or may not want to conduct re-direct examination. If an attorney asks questions beyond the issues raised on cross, they may be objected to as “outside the scope of cross-examination.” It is sometimes more beneficial not to conduct it for a particular witness. The attorneys will have to pay close attention to what is said during the cross-examination of their witnesses, so that they may decide whether it is necessary to conduct re-direct. Once re-direct is finished the cross examining attorney may conduct recross to clarify issues brought out in the immediately preceding re-direct examination only.

Assumes fact not in evidence.

“OBJECTION: Your Honor, the question assumes facts not in evidence. We are here to ask for facts from the witnesses, not assume that a fact exists.”

DISCUSSION: The facts which are not in evidence cannot be used as the basis of a question, unless the court allows the question “subject to later connecting up.” A court in the interest of good administration and usage of time may allow the missing facts to be brought in later.

RESPONSE: “Your Honor, we will have those facts later in the case, but this witness is here now and it is the best use of time to ask that question now.”

Assuming Facts Not in Evidence: Attorneys may not ask a question that assumes unproved facts. However, an expert witness may be asked a question based upon stated assumptions, the truth of which is reasonably supported by evidence (sometimes called a “hypothetical question”).

More Information

Questions Assuming Facts Not in Evidence Forbidden. Attorneys may not ask a question that assumes unproved facts. However, an expert witness may be asked a question based upon stated assumptions, the truth of which is reasonably supported by evidence (sometimes called a "hypothetical question"). Comment: The hackneyed example of the question that assumes facts not in evidence is, “Are you still beating your wife?” The question is assuming facts not in evidence.

A question, usually on cross examination, is objectionable if it includes as a predicate a statement of fact that has not been proven. The reason for this objection is that the question is unfair; it cannot be answered without conceding the unproven assumption.

PROPONENT: You left your home so late that you only had fifteen minutes to get to your office, correct? (Where the witness’s departure time was not previously established.

OPPONENT: Objection, that question assumes facts not in evidence, Your Honor.

Responses: A question assumes facts not in evidence only when it utilizes an introductory predicate (“You left your home so late…”) as the basis for another inquiry (“that you only had fifteen minutes to get to your office”). Simple, one-part cross examination questions do not need to be based upon facts tat are already in evidence. For example, it would be proper to ask a witness, ”Didn’t you leave home late that morning?” whether or not there had already been evidence as to the time of the witness’s departure. As a consequence of misunderstanding this distinction, “facts not in evidence” objections are often erroneously made to perfectly good cross examination questions. If the objection is sustained by the judge, most questions can easily be divided in two.

Narration

(C) Narrative Responses Forbidden. Questions which call for long narrative responses are not permitted if they prevent opposing counsel from interposing timely objections. Comment: While the purpose of direct examination is to get the witness to tell a story, the questions must not be so broadly framed that the witness is allowed to ramble or "narrate" a whole story. Narrative questions are objectionable. Opposing counsel must be permitted to interpose objections to improper questions and responses. Timely objections are prevented by the use of narrative questions and responses. An example of a question which calls for a narrative response is: "Start at the beginning and tell me what happened the night of the party." A proper objection to this question might be phrased: "Objection, the question calls for a narrative response." When a witness launches into a long narrative answer to an otherwise proper question, a proper objection should be made quickly and might be phrased as follows: "Objection, the response is beyond the scope of the question."

Witnesses are required to testify in the form of question and answer. This requirement ensures that opposing counsel will have the opportunity to frame objections to questions before the answer is given. You can object to questions that call for a narrative answer, as well as to an answer that has become narrative. A narrative answer is one that proceeds at some length in the absence of questions. An answer that is more than a few sentences long can usually be classified as a narrative.

PROPONENT: Tell us everything you did on July 14.

OPPONENT: Objection, Your Honor, that question calls for a narrative answer.

Responses: The best response is usually to ask another question that will break up the narrative. Note that expert witnesses are often allowed to testify in narrative fashion since technical explanations cannot be given easily in question and answer format. Even then, however, it is usually more persuasive to interject questions to break up long answers.

Lack of Foundation

Nearly all evidence, other than a witness's direct observation of events, requires some sort of predicate foundation for admissibility. An objection to lack of foundation requires the judge to make a preliminary ruling as to the admissibility of the evidence.

The evidentiary foundations vary widely. For example, the foundation for the business records exception to the hearsay rule includes evidence that the records were made and kept in the ordinary course of business. The foundation for the introduction of certain scientific evidence requires the establishment of the chain of custody. The following list includes some, though by all means all, of the sorts of evidence that require special foundations for admissibility: voice identifications, telephone conversations, writings, business records, the existence of a privilege, dying declarations, photographs, scientific tests, expert and lay opinions, and many more. This subject is discussed in greater detail in Chapter 5 ("Foundations and Exhibits").

PROPONENT: (To the court) At this time the Plaintiff moves Exhibit 2 into evidence.

THE COURT: Any objections?

OPPONENT: Yes, Your Honor, we object to authenticity. Counsel has not shown that the knife is in substantially the same condition as when the witness first examined it.

PROPONENT: I'll lay the foundation, Your Honor.

THE COURT: Very well.

PROPONENT: Is this knife in the same condition as when you first examined it?

ANSWER: Other than the fact that the victim's blood has been cleaned off, yes.

Responses: Ask additional questions that lay the necessary foundation, as illustrated above.

II-F. Opinion/Speculation

Witnesses may not normally give their opinions on the stand. Judges and juries must draw their own conclusions from the evidence.
Example: A taxi driver testifies that the defendant looked like the kind of guy who would shoot old people. Counsel could object to this testimony and the judge would require the witness to state the basis for his/her "opinion."
"Objection, your honor. The question calls for inadmissible opinion testimony (or inadmissible speculation) on the part of the witness. I move that the testimony be stricken from the record."

Leading Questions

Consider Objections Carefully

In Chapter 2 (“Case Preparation”) we explained in detail how to outline your case for trial. By following this method, you have already compiled a list of all the facts to which each witness may testify and every possible substantive objection (and response) that may be raised. You have also taken this process one step further by determining which substantive objections are worth making. Knowing this information will make jour job at trial much easier since it will enable you to anticipate many substantive objections with the comfort of a planned response.

Despite this, there will always be instances in a mock trial when you will want to object to themanner in which information is sought or delivered to the court. These nonsubstantive objections are impossible to anticipate. Instead, in the heat of trial, you must consider whether to object on a split-second basis.

When deciding whether to object, ask yourself if the objection is truly necessary. Not every valid objection needs to be made. Objections can be tiresome; they interrupt the flow of the evidence, they distract attention from the real issues at hand, and they have an awful tendency to degenerate into whining. You may even lose points with the judge by incessantly interrupting your opposition only to point out your incredible grasp of the rules of evidence.

For instance, there is little point to objecting if opposing counsel will be able to rectify the problem simply by rephrasing the question, as is the case with most nonsubstantive objections that address the improper form of a question. This is particularly true of leading questions on direct examination:

PROPONENT: Isn’t it true that you had the green light as you approached the intersection?

OPPONENT: Counsel is leading his own witness.

THE COURT: The objection is sustained.

PROPONENT: What color was the traffic light as you approached the intersection?

ANSWER: It was green.

In this example, the objection to the leading question accomplished nothing in the way of excluding evidence and may actually have emphasized the witness’s testimony that the light was green. Counsel would have been just as well off not making it.

Of course, the persistent use of leading questions to feed answers to a witness is quite another matter. In those circumstances, an objection should almost always be made.