

3. FORM OF WITNESS EXAMINATION

1. Judicial Discretion

The trial judge has broad discretion to control the procedure of interrogating witnesses and presenting evidence so that the trial furthers three goals: facilitating truth-determination, avoiding waste of time, and protecting witnesses from harassment.

2. Separation of Witnesses

At the request of a party, the judge must order witnesses excluded from the courtroom so they cannot hear the testimony of others and (purposely or inadvertently) alter their own testimony to be consistent. Rule 615. The order should include a prohibition against discussing testimony outside the courtroom. The rule does not apply to parties, who may remain in the courtroom. If a party is an organization, it may designate one representative to remain in the courtroom to assist the attorney. In criminal cases, this is usually the lead detective. The judge has discretion to also allow an expert witness to remain in the courtroom and assist counsel in a complex cross-examination of the opposing expert. The victim of a crime may not be designated by the State to remain in the courtroom, but may be called as the first witness and then allowed to remain after testifying.

3. Basic Procedure

The basic principle of witness testimony is that it must be presented in question-and-answer format, i.e:

- a. The attorney asks questions.
- b. The witness supplies answers.

This means three things:

a. The attorney must ask a question and not make statements and arguments. If the attorney makes a remark, such as "That's very odd, considering it was pitch dark outside," you may object that "**This is a statement, not a question.**"

b. Witnesses are supposed to answer questions not give long rambling narratives. If you ask, "What is your name?" and the witness launches into a long story about his parents immigrating from Ireland, you may object that "This is a narrative, not the answer to a question."

c. Witnesses are supposed to answer the actual question asked, not something else. If you ask a witness if she was in a tavern on the night of June 13, and she responds "I'm Mormon and I don't drink," you may object (and move to strike) that "The answer is not responsive to my question whether she was in a tavern."

4. Leading questions

The only consistently enforced rule about form is the prohibition against the use of leading questions. A leading question is one where the attorney asks the question and suggests the answer, thereby crossing the line between attorney questions and witness answers.

- Proper: Q: What did Marcy tell you?
A: She said Marvin had a gun.
- Leading Q: Did Marcy tell you Marvin had a gun?
A: Yes, I guess so.

As a general rule, leading questions are not allowed on direct examination, although the judge has discretion to permit them when they appear necessary in order to facilitate testimony. Rule 611©. Leading routinely is allowed during cross-examination and in several other common situations:

- Directing a witness's attention to a particular topic, e.g.,

Q: Officer, directing your attention to 3:00 pm on June 13, did you see the defendant in the vicinity of People's Park?
A: Yes.
Q: What happened?
- Questioning an uncooperative or hostile witnesses, the adverse party, or a witness identified with an adverse party.
- Questioning young children or weak-minded adults, if used cautiously.
- Refreshing the memory of a witness or probing for omitted details

Q: What happened next?
A: Umm, I think that's when the lights were turned out.
Q: Before that, did you hear anyone say something about a gun?
A: Oh, yes
- Asking about preliminary matters, legal formalities or evidentiary foundations.

5. Other Rules of the Proper Form of Questions

Despite the broad discretion given to judges to control the form of the interrogation, several

types of questions are generally considered improper, and most judges will sustain objections to them:

(1) *Ambiguous questions.* A question that is ambiguous or vague for lack of a reference point is improper, e.g., asking a witness to describe “the” car when several cars were involved in an accident.

(2) *Compound questions.* A compound question that asks several things at once is generally improper if different parts of it might be answered differently. E.g., Doctor did you form an opinion at the hospital about plaintiffs diagnosis and do you still hold it?

(3) *Argumentative questions.* Despite what you see in movies, rhetorical questions, sarcastic comments, and asides to the jury are improper forms of argumentation if they occur during the questioning of witnesses.

(4) *Assuming facts not in evidence.* It is improper to assume or insinuate the existence of a fact that has not been proved. The classic example is “Have you stopped smoking marijuana?”

(5) *Misquoting witness's testimony.* A question in which an attorney misquotes testimony (usually by exaggeration) is objectionable if, in the context of the question, it is difficult for the witness to correct the misstatement. For example:

Q: Was the defendant drinking?

A: Yes, he had two drinks.

Q: What did this drunken man do next?

6. Repetitious testimony.

It is improper to ask a witness to repeat testimony or answer the same question twice on direct examination and no new evidence or clarification is asked for. The objection may be phrased that the question has already been “asked and answered.” Whether to curtail repetitious questioning is a matter within the trial judge's discretion to limit “cumulative” evidence and prevent wasting time under Rule 403. However, repetition is allowed in several situations:

(A) A question asked on direct examination may be repeated as part of cross-examination.

(B) A question asked on direct may be repeated on re-direct if necessary to clear up confusion caused by the cross-examination.

(C) A question asked of one witness may be repeated to a different witness.

(D) A general question may be followed by questions eliciting specific details.

(E) General testimony may be followed up by use of a document or diagram to illustrate

specific details.

(F) The same question may be repeated if the witness gives an evasive or incomplete answer, especially on cross-examination, commonly known as “sifting” the witness.

7. Court May Participate:

The judge may also ask questions, but must do so impartially. Judges may ask for clarification or may ask additional foundational questions in aid of ruling on an objection, even if doing so benefits one side.

8. Juror Questions:

Modern trial procedure generally allows jurors to ask questions by first submitting them to the judge. Proposed questions by jurors must comply with the rules of evidence and the parties have a right to object outside the hearing of the jury.