

Chapter 11

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§1101 *Form of Questions*

Rule

Questions must be asked in a manner which will fairly allow a witness to answer the question.

Rationale

The function of a question is to elicit an answer. Although questions may be asked in a way that will make an impression on the jury, the primary purpose of the questions must be to reveal admissible evidence.

Foundations and Cases

- **Assuming Facts Which Are Not in Evidence**

A question cannot be asked which requires the witness to assume a fact which is not in evidence. Also, questions cannot be asked which will lead the jury to assume the existence of facts if those facts are not admitted into evidence. Such questions lead the trier of fact away from the proper consideration of evidence. However, if the fact is not controverted, there is no harm in assuming it.

Gabosch v. Tullman, 21 Il. Ap. 3d 908, 316 NE2d 226 (1st Dist. 1974). A police officer was repeatedly asked if a street where a traffic accident took place was 49.6 feet across. The officer said he did not measure the street, and no other testimony was admitted about the dimensions of the street. The question improperly suggested to the jury that the street was 49.6 feet wide.

How to Object

OBJECTION:

“Objection. The question assumes facts not in evidence.”

POTENTIAL RESPONSES TO OBJECTION:

- A. “This is cross-examination. The question is intended to test the witness’ memory.”
- B. “The witness is testifying as an expert. We are allowed to explore the bases for the witness’ opinions.”
- C. “The facts have been introduced into evidence through another witness.”

● **Ambiguous Questions**

A question must be understandable, unequivocal, and capable of being answered.

McMahon v. Coronet Insurance Co., 6 Ill. Ap. 3d 704, 286 NE2d 631 (1st Dist. 1972). The following question was asked by defendant, and an objection that it was equivocal was sustained: “Now, sir, do you have a recollection as to whether or not you may have had an opinion as to whether or not that particular ‘60 Dodge had contact with any other automobile?”

How to Object

OBJECTION:

“Objection. The question is unclear.”

POTENTIAL RESPONSES TO OBJECTION:

- A. “Let me rephrase the question.” [then ask the question in a clearer manner]
- B. “I’d like the witness to answer the question if he can.”
- C. “This is a very sophisticated witness, who hasn’t had any difficulty answering questions on direct examination.”

● **Abusive Questions**

Questions must not unduly harass, intimidate, ridicule, insult, or embarrass a witness. Such questions invite the jury to decide the case upon prejudice rather than upon the facts.

Probst Construction Co. v. Foley, 63 Ill. Ap. 494, *aff’d*, 166 Ill. 31, 46 NE 750 (1896). “[A]ll persons while upon the witness stand, be they high or low, rich

or poor, ignorant or learned, of good or evil repute, leading orderly or dissolute lives, have an absolute right to respectful treatment, which it is the duty of the trial court to enforce.”

How to Object

OBJECTION:

“Objection. Counsel is badgering the witness.”

POTENTIAL RESPONSES TO OBJECTION:

- A. “This is cross-examination. I am allowed to explore the credibility of the witness.”
- B. “The question refers to the exact matter that the witness testified about. He made certain allegations about my client on direct examination, and I am trying to see if he has any basis for those statements.”

● **Compound Questions**

A question must be confined to one matter. It cannot seek answers to several matters at once because of the difficulty which a witness will have in answering such a question.

Allen B. Wrisley Co. v. Burke, 106 Il. Ap. 30 (1903), *aff'd*, 203 Il. 250, 67 NE 818.

In a single question, the examining attorney asked what the witness had seen the plaintiff do and what the plaintiff’s customary duties were. This question was found to be improper.

How to Object

OBJECTION:

“Objection. That’s a compound question.”

POTENTIAL RESPONSES TO OBJECTION:

- A. “All right. Let’s take it piece by piece.”
- B. “Actually it is an ‘either-or’ question. The witness should be able to decide what his answer is.”

● **Questions by Judge**

A judge can ask questions of a witness but should do so only in a very limited manner.

People v. Murray, 194 Il. Ap. 3d 653, 141 Il. Dec. 290, 551 NE2d 283 (1st Dist. 1990). “Judicial questioning is a relatively inefficient means of getting at the

truth since the trial judge is far less familiar with the issues and the facts of a case than are the attorneys, and is thus as likely to impair the adversary process through his or her participation as to advance it.”

People v. Rega, 271 Il. Ap. 3d 17, 207 Il. Dec. 674, 648 NE2d 130 (1st Dist. 1995).

“It was a textbook cross-examination: terse, probing, telling, using touches of **sarcasm, impeaching** by omission on material facts. It was everything a cross-examination should be—for prosecutors, not judges.”

People v. Falaster, 273 Il. Ap. 3d 694, 210 Il. Dec. 562, 653 NE2d 467 (5th Dist. 1995). “[Q]uestions from the court invariably lead at least one of the parties to the case to feel that the judge is unfairly favoring the opponent.”

People v. Falaster, 173 Il. 2d 220, 218 Il. Dec. 902, 670 NE2d 624 (1996). A single question which the judge asked to clarify a psychologist’s testimony was not reversible error.

How to Object

OBJECTION:

“May we have a sidebar?” [At the sidebar, say to the judge: “I believe that any questions your honor may have of this witness can be handled better if you will tell both me and opposing counsel what information you seek, and let us ask the questions. It may be that we will be offering the evidence through another witness, and that it will not be necessary for you to ask the question at all.” If the judge insists on asking questions, place your objection on the record, out of the presence of the jury. “Your honor, we believe that by asking this question you are depriving us of our right to present our case in the manner we deem fit. The appellate courts have been very clear that questioning by the judge can be reversible error. However unintentionally, it tends to be interpreted by the jury that the judge is disposed towards one side of the case or another. It also becomes very difficult for us to object.”]

POTENTIAL RESPONSES TO OBJECTION:

“Judge, we have no objection to your asking the question, but if you prefer we would be happy to ask it ourselves.”

● **Questions by Jurors**

A jury is never allowed to ask questions of a witness.

Gonzalez v. Prestress Engineering Corp., 194 Il. Ap. 3d 819, 141 Il. Dec. 606, 551 NE2d 793 (4th Dist. 1990).