MASSACHUSETTS LAWYERS WEEKLY

Checklist of common objections

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As a practical matter, of course, most objections have to be made at high speed in the heat of battle, with little or no time for reflection. But that doesn't mean that you can't prepare yourself to make objections when you have to. One of the best ways to do that is to familiarize yourself with the most common objections and their short-hand descriptions.

Questions may be objectionable because they violate one of the "big four" evidentiary principles (relevance, authentication, hearsay, privilege) or because they violate Rule 403 (generally, because the answer would be unfairly prejudicial). Those types of objections tend to be case-specific, and tied to the facts and the specific requirements of the evidentiary rules (for example, the various exceptions to the hearsay rule).

Because of pre-trial discovery and other disclosure requirements, you can usually anticipate how you might want to object to your opponent's evidence, and what he or she might say about yours.

It's harder to anticipate questions that have an improper form, or that are improper only because of their context (for example, a repetitive question). Still, it helps a lot to know the basics. Here are some typical ways in which a question might draw an objection:

1. **Ambiguous**

The question is capable of more than one interpretation. This problem often arises from the use of ambiguous pronouns, particularly the word "that." An objection for "vagueness" is similar. Example: "Did you see that?"

2. **Argumentative**

The question is not designed to elicit facts but to argue the case. Example: "Isn't it true you ran the red light because you were drunk and didn't have control of your car?"

3. **Assumes fact not in evidence**

The question assumes a fact is true as to which no evidence has yet been elicited. Example: Counsel asks, "Where were you when you signed this document?" before it has been established that the witness in fact signed the document.

4. **Calls for expert opinion**

The question asks a lay witness to give an opinion that properly may be given only by an expert. Example: "Why do you think your leg took so long to heal?"

5. **Calls for narrative response**

The question is open-ended and general. Whether such a question is permissible depends on context; such a question is normally permitted if the answer is likely to be relatively short (for example, a single sentence) and not permitted if it would invite the witness to talk at length. Example: "What happened?"

6. **Compound**

The question has multiple parts or gives the witness a limited range of alternatives (usually two). Compound questions usually include the word "or" or "and." Examples: "Was the car blue and was the traffic light green?" "Was the car blue or yellow?"

7. **Confusing**

   The question makes no sense.

8. **Cumulative**

   Sufficient evidence has been heard on the subject, making further testimony unnecessary and repetitive.

9. **Lack of foundation**

   Counsel has not established that witness is in a position to answer the question from personal knowledge. Example: Counsel asks, "What color was the traffic light?" before asking, "Were you at the intersection?" and "Where were you standing?" The term "lack of foundation" is also used to describe a failure to meet evidentiary requirements for admission of an exhibit (for example, that the exhibit is authentic).

10. **Leading**

    The question improperly (for example, on direct with a friendly witness) suggests the desired answer. Example: "Isn't it true the traffic light was red?"

11. **Mischaracterizes evidence**

    The question does not accurately quote testimony or reflect the evidence. Example: A witness who testified on direct examination that she was standing on a street corner is asked, "As you were walking across the street, did you notice the color of the traffic light?"

12. **Repetitive**

    The same witness has answered essentially the same question. Also called "asked and answered."

13. **Speculative**

    The question invites the witness to guess, speculate or conjecture. Example: "Isn't it possible the traffic light was green?"

As an aside, lawyers seem to object on the ground of "asked and answered" more than all other categories put together. It's not uncommon for a lawyer to sit motionless as dozens of improper questions go by — for example, leading questions on direct — and then leap to his feet when a single repetitive question is asked. It's not at all clear why that would be so. Asking a witness to repeat a bit of testimony may be a sin, but usually a relatively minor one in the overall scheme of things. And if it helps clarify things, most judges will allow it anyway.

As with everything that happens in a courtroom, you have to pick your spots; you can't effectively object to everything. Try to save your objections for things that matter. And the best way to avoid objections from your opponent is to ask proper questions in the first place.

Previous installments of Tried & True can be found here. Judge F. Dennis Saylor IV sits on the U.S. District Court in Boston. Prior to his appointment to the bench, he was a federal prosecutor and an attorney in private practice. Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. He is a former federal prosecutor and teaches CLE programs across the country.