Arbitration 101:

The Examination of Witnesses and Other Practical Guidance for Agency Labor Relations Representatives

Presented by
Hon. Eric Zaidins
Immediate Past President
New York State Administrative Law Judges Association
eric@zaidins.com
914-861-4038
November 4, 2016, Albany, NY

Introduction

Researching and preparing an administrative law case is a combination of

- knowing the law and regulations, and
- developing the facts

Prosecuting an administrative law case is all about

- Due process, and
- Understanding hearing (i.e., trial) procedures

Knowing the Law and Regulations

Civil Service Law §75(1) provides that a covered person "shall not be removed or otherwise subjected to any disciplinary penalty ... except for incompetency or misconduct ... "

Although Section 75 does not specifically define the terms "incompetency" or "misconduct," arbitration decisions and case law have led to generally accepted definitions as follows:

- Incompetence: The inability to perform resulting from a lack of aptitude, a deficiency in knowledge, or a disregard for direction, procedures or methods.
- Misconduct: An act or omission of intentional wrongdoing, deliberate violation of law, rule or regulation, improper behavior, or refusal to obey or comply.

Developing the Facts

- Handling administrative law cases requires full knowledge of what is in the employee's file at the administrative agency.
- Review the employee's employment file and disciplinary history, if any.
- Have copies made of all business record documents that are relevant to the violations the employee is accused of violating that will be used in evidence against him/her.
- A great way to learn how to prepare an administrative law case for hearing is to observe or assist with a case that is being prepared for hearing.

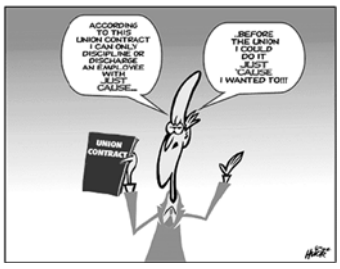
Due Process Requirements

Both the United States and New York Constitutions guarantee that no person shall be deprived of "life, liberty or property, without due process of law."

The concept of due process imposes a fundamental obligation upon all organs of government, including state agencies. At its base, due process means that no person can be subject to an individualized proceeding in which he or she stands to lose one of the protected interests – in the context of administrative law, either property or liberty – without sufficient procedures to ensure that the governmental action is fundamentally fair.

In the cases your agency will be prosecuting, our courts have held that a loss of a job constitutes a property interest which cannot be deprived without a full, fair and formal hearing.

Due Process Requirements



Due Process Requirements

Due Process and Prosecuting an Employee Disciplinary Case Begins At The Beginning…

The Investigatory Interview

- NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975)

Facts of case: During the course of an investigatory interview where employee was being interrogated by her employer about reported thefts at its store, the employee asked for but was denied the presence at the interview of her union representative. The union then filed an unfair labor practice charge with the National Labor Relations Board (NLRB). The NLRB held that the employer had committed an unfair labor practice and issued a cease and desist order which, however, the Fifth Circuit Court of Appeals subsequently refused to enforce, concluding that an employee has no "need" for union assistance at an investigatory interview.

Held: On February 19, 1975, the U.S. Supreme Court reversed the Fifth Circuit and upheld the National Labor Relations Board (NLRB) decision (*i.e.*, that employees have a right to union representation at investigatory interviews.) (420 U. S. 256-268.)

Due Process Requirements

Weingarten Rights

These rights have become known as the Weingarten Rights and the following three rules apply:

1. The employee must make a clear request for union representation before or during the interview. The employee cannot be punished for making this request.

2. After the employee makes the request, the employer must choose from among three options:
   a. grant the request and delay questioning until the union representative arrives and (prior to the interview continuing) the representative has a chance to consult privately with the employee;
   b. deny the request and end the interview immediately; or
   c. give the employee a clear choice between having the interview without representation, or ending the interview.

3. If the employer denies the request for union representation, and continues to ask questions, it commits an unfair labor practice and the employee has a right to refuse to answer. The employer may not discipline the employee for such a refusal.

Due Process Requirements

Required Procedures

- If there is individualized, governmental action at which a private party has a property or liberty interest at stake, the private party's right to "due process of law" is triggered.
- In the 1976 case of *Mathews v. Eldridge*, the U.S. Supreme Court ruled that the required due process requirements must be evaluated by balancing three factors: 1) the value of the property or liberty interest, 2) the cost to the government in providing more procedure, and 3) the risk of an erroneous decision without more procedure. The more valuable the interest the more procedure that is required; the more costly the additional procedure, the less likely it is to be constitutionally required; the greater the chance of an error without additional procedures, the more likely such procedures will be constitutionally required.

Due Process Requirements

Due Process Requirements

- Official Notice – There must be 1) a written Notice of Hearing that informs the employee that s/he has the right to legal counsel and 2) a statement of charges. The statement of charges must contain enough specificity for the employee to be able to understand what s/he has done wrong so that s/he is able to mount a legal defense, if one exists.
- Pre-Hearing Disclosure or Discovery - New York courts have routinely rejected this argument. State Administrative Procedure Act (SAPA) §305 allows agencies to adopt rules allowing for discovery, but unless the agency adopts such a rule, or some other statute requires pre-hearing discovery, parties have no such right.
- Cross-examination of adverse witnesses who appear is generally a due process right. However, the right does not extend to repetitive or entirely collateral examinations of witnesses.
- Creation of a formal record

Due Process Requirements

Burden of Proof

- The burden of proof is generally placed on the party initiating the proceeding.

Delay

- Delay between the time of the underlying incident and the date of the administrative hearing is generally not a violation of a party's due process rights.
- An agency does, however, have the duty to hold an administrative hearing reasonably promptly after the matter has been noticed.
- A very lengthy delay, which is not attributable to the private party's own actions, can be a due process violation if it manifestly prejudices the private party's ability to present his case.

Due Process Requirements

Neutral Decision Maker

- Both parties have a due process right to a neutral decision maker.
- An agency official or ALJ who has previously publicly expressed opinions relative to a matter before the agency cannot act as a decision maker on that matter.
- Agency officials who have personally participated in the development of a case against a party, or who have a significant personal stake in the outcome, are also generally prohibited from sitting in judgment on those matters.
- Substantial, off-the-record conversations by an ALJ or agency official about factual issues in a matter before the agency also preclude that ALJ or agency official from acting as a decision maker on that matter.

Due Process Requirements

Statement of Decision

- A private party who loses before the agency has a due process right to a decision that explains the reasons for the decision. Thus, an ALJ's or agency's opinion must contain enough information to show the reasoning process for the result reached, and to allow a reviewing court to understand the basis for the decision. In very simple cases less explanation is required; in more complex ones a more detailed explanation is necessary. An agency opinion need not be the equivalent of a formal judicial opinion, but it does need to contain enough explanation to show how the result was reached from the evidence presented in the case.
- Parties also have aright to an opinion that is consistent with past agency decisions, or explains the reasons for departing from precedent.
- An opinion that is inexplicably contrary to other agency decisions reached on similar facts is a due process violation.

Formal Hearing Procedures

- Opening the Hearing (the hearing officer/arbitrator will open the hearing)
- Stipulations: documents, facts, and issues
- Opening Statements
- Presentation of a case
- Presentation of proof
- Closing statements and memoranda a law

Formal Hearing Procedures

Presentation of Evidence

- Documentary Evidence
  - Introduction of business records
  - Introduction of other documents and records
- Examination of Witnesses
  - Identification of the witness for the record
  - Qualifying a witness as an expert
  - Direct examination
  - Cross examination
  - Rebuttal
  - The hearsay rule and its exceptions
  - Foundation
  - Authentication and Chain of Custody
  - Voir Dire

Formal Hearing Procedures

Presentation of Evidence

- The rules of evidence
- The hearsay rule
- Objections

Opening Statements

Structuring Your Opening Statement

Getting started can be the most difficult task, Try this formula:

- Opening Statement/Sound Bite as to why the employer should win. Typically between one and three gripping, powerful sentences getting to the heart of your case.
- The Big Picture: Maximum 10 sentences that ties in with your opening statement and provides more detail about your theory and giving context to your opening.
- Cast of Characters: Introduce the main players and provide any relevant background.
- **Tell the Story: Fill in all of the details that illuminate your power statement and theory.**
- Conclude: Call the arbitrator to action and tell her to find the employee "Guilty" of the charges.

The arbitrator had them all tethered for their own safety during their inflated opening statements.

Stipulations

During the hearing, it may be expedient for the parties to agree to certain facts or events as accepted as true or as having occurred.

Stipulations are agreements made between parties as to the existence of certain facts or events. They are useful short-cuts. They save time which would be otherwise consumed by repetitive testimony on matters of fact which are not really in dispute, which therefore add nothing but volume to the hearing.

- Stipulating to those documents which the parties plan on moving into evidence may help expedite the hearing.
- *Caveat*: If there is something about a document that you would like clarified, i.e., handwritten notes on the page, the name of the party who created the document, etc., you may wish to hold off stipulating to that document.

Entering into a stipulation can be initiated by a party, both parties or the ALJ.

The Rules of Evidence

In administrative hearings, the rules of evidence are relaxed.

- This doesn't mean that there aren't any, because the hearing officer/ALJ may rule that a particular question is inadmissible or asking a particular question may be prejudicial or not relevant
- Most evidence will be allowed provided it is relevant to the case
- Hearsay is usually admissible
- Hearsay on hearsay may or may not be admissible depending on the reason why it is being offered.

Foundation

A "foundation" is the minimum amount of facts needed to demonstrate that a particular piece of evidence is authentic enough and relevant enough that it can be admitted at trial (the hearing).

Foundation

A foundation is typically required for all pieces of evidence. A foundation for testimony is usually included in the first few questions a party or attorney asks a witness. Questions like "what is your name?," "what do you do for a living?", and "how do you know the respondent?" all provide a foundation for the witness's testimony by showing who the witness is, what her perspective is, and why she is giving testimony.

Pieces of evidence that are not testimony usually have more complicated foundation requirements. For instance, a piece of real evidence (also known as (physical evidence) used in a case cannot be considered by the HO until the party that wants to use the evidence demonstrates, by laying a foundation, that the evidence is what that party says it is.

Foundation

Make sure you lay the proper foundation for each item you intend to introduce into evidence.

Authentication of Evidence

For example, here is a series of foundation questions for sound and video recordings:

- Can you tell the arbitrator who prepared the recording?
- When did you prepare it?
- Who was in possession of the recording after you made it?
- Where did you keep it?
- Can you confirm that no alterations or deletions were made to the sound or images after verification.

Introduction of Evidence

Documentary Evidence

- Introduction of business records
- Introduction of other documents and records

Introduction of Evidence

Examination of Witnesses

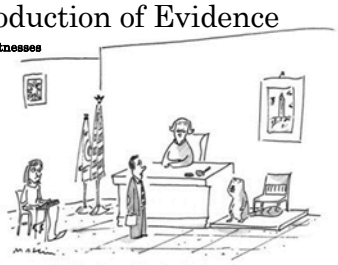
Direct Examination

DEFINITION: The primary questioning of a witness during a trial that is conducted by the side for which that person is acting as a witness.

During the course of a direct examination, the side conducting the interrogation asks specific questions that provide the foundation of the part of the case s/he is trying to prove. After a witness is directly examined, the opposing side conducts a cross-examination, the purpose of which is to impeach or test the validity of the testimony.

Introduction of Evidence

Expert Witnesses



"I ask that the record show that the witness does not presume to speak for the animal kingdom but is testifying here strictly in his capacity as a beaver."

Introduction of Evidence

Examination of Witnesses - Direct Examination

- What makes someone competent to take the witness stand? What must be present? 4 things:
  1. Witness must be able to take the OATH
  2. Witness must have PERCEIVED something (saw, heard, smelled, felt, tasted)
  3. Witness has to REMEMBER something
  4. Must be able to COMMUNICATE what s/he perceived

- Identification of the witness for the record.

Introduction of Evidence

Examination of Witnesses – Experts

Qualifying a witness as an expert.

1. What is your occupation/profession?
2. What is your educational background?
3. What degrees, certificates, or licenses do you have?
4. Have you attended or conducted continuing education seminars, conferences and related training?
5. Are you a member in any professional organizations/societies?
6. Have you received any awards or other professional recognition?
7. Have you published articles in your field?
8. How many cases involving [subject matter] have you handled?
9. How many years have you worked in this field?

Introduction of Evidence

Examination of Witnesses – Experts

Basis of Professional Opinion of expert witness:

1. Have you examined or interviewed [the subject of the opinion]?
2. Have you conducted any tests on/interviewed [the subject of the opinion]?
3. Have you reviewed any records / documents / photographs / reports / recordings of [the subject of the opinion]?
4. Have you reached any conclusions as a result of your investigation?
5. Did you rely on any other source of information in forming your opinion other than the materials that we have discussed?
   A. If so, what other sources did you rely on?
6. If the facts were [supply hypothetical], could you render an opinion regarding [theory of case]?
   A. If so, what is that opinion?

Introduction of Evidence

Examination of Witnesses

Hostile Witnesses

- Your witness
- Cross examination

"Permission, Your Honor, to treat the witness with hostility."

Introduction of Evidence

Examination of Witnesses

Cross Examination

1. Take Baby Steps – proceed step-by-step
2. Know the Rules of Evidence - Counsel must introduce EVIDENCE during cross-examination.
3. And…

Introduction of Evidence

What Kinds of Questions Should You Ask on Cross Examination?

Introduction of Evidence

Examination of Witnesses

Cross Examination

Know When to Quit: Generally, there are two times to quit.

1. The first occurs when the witness has been discredited or has made a monumental concession. There is no need for overkill. Even worse, the witness may negotiate a remarkable comeback.
2. The second time to quit is when the witness is killing the case or counsel. There is a tendency is to keep fighting against all odds. Nevertheless, you should have the judgment to admit defeat at the hands of a witness. Occasionally, this result can be calculated before trial, if the reputation or deposition performance of the witness suggests that few points can be scored on cross-examination. Sometimes, unfortunately, one learns this lesson under the bright lights of the courtroom.

Introduction of Evidence

Cross Examination

… and finally, don't ask a question to which you don't already know the answer.

Recommendation: Watch youtube.com video on **Irving Younger's 10 Commandments Of Cross Examination**: https://goo.gl/zo72VY

Rebuttal

After both parties have put on their case, the party who went first has a "rebuttal" opportunity.

- Rebuttal is generally limited to denying some affirmative fact that the other party has attempted to prove.
- It may not be used simply to put in additional proof that could have been presented during the party's initial presentation of proof.

Once a rebuttal case is made, the other party has a similar opportunity. The presentation of witnesses during rebuttal is subject to the previously described mode of examination.

Voir Dire Examination

When a party offers an exhibit, the opposing party may question the witness at that time concerning the document.

EXAMPLE: *Attorney for Charged Party*: "Madam Arbitrator, I offer into evidence which has been marked for identification as Employee's Exhibit No. 3, which the witness just identified." *Arbitrator*: "Ms. Jones, any objection?" *Management Representative*: "May I *voir dire* the witness about the letter first?" *Arbitrator*: "You may."

The *voir dire* should be limited to a few basic questions about the admissibility of the document.

- Who prepared the document?
- Is the document kept in the normal course of business?
- Do you recognize the signature?
- Whose notes are those in the margin?

Authentication of Evidence

Chain of Custody

The processes for documenting, collecting, and protecting evidence are called establishing a chain of custody. In administrative hearings, creating and maintaining a chain of custody means that a detailed account is given under oath as to where the evidence was created or found and where it was stored and anything that happens to the evidence prior to the hearing.

The Hearsay Rule

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Evidence may be admitted even though such evidence would be inadmissible at a civil or criminal trial. Thus, hearsay, single level or double level, may be received by the administrative law judge. It depends on the circumstances, its relevance, and its prejudicial effect.

The Hearsay Rule

- Out of court statements from persons absent from hearing regarding the truth of the matter asserted, although hearsay, may be admissible.

A.J. & Taylor Restaurant, Inc. v. State Liquor Authority, 214 AD2d 727, 625 NYS2d 623 (2nd Dep't (2nd Dep't 1995) (*statement from person absent from hearing regarding the purchase of alcohol by minors, although hearsay, is admissible*); and

Matter of Ribya "BB", 243 AD2d 1013, 663 NYS2d 417 (3rd Dep't 1997) (*statement from person absent from hearing regarding what someone else told her about the minor's treatment, although double-level hearsay, is admissible*).

The Hearsay Rule

- On the other hand, an ALJ may exclude offered evidence on the ground that it is hearsay.

A report of an expert witness who does not appear to testify would properly be excluded as hearsay because of the denial of the opportunity to cross examine the expert.

See, Achatz v. New York State and Local Police and Fire Retirement System, 239 AD2d 857, 657 NYS2d 521 (3rd Dep't 1997) (*medical progress reports of petitioner's non-testifying treating physician properly excluded as hearsay as counsel for respondent would have been denied opportunity to cross examine physician regarding key findings therein*); and Gross v. DeBuono, 223 AD2d 789, 636 NYS2d 147 (3rd Dep't 1996) (*ALJ did not err in precluding petitioner physician's expert from testifying as to petitioner's description of his examination of patients, as petitioner elected not to testify and he was simply trying to introduce his own self-serving statements through another witness*).

Formal Hearing Procedures

Objections - the basic two dozen

1. Admitted.
2. Argumentative.
3. Assumes facts not in evidence.
4. Best evidence rule.
5. Beyond the scope of direct / cross / redirect examination.
6. Completeness.
7. Compound question / double question.
8. Confusing / vague / ambiguous.
9. Counsel is testifying.
10. Form.
11. Foundation.
12. Hearsay.
13. Improper impeachment.
14. Incompetent.
15. Lack of personal knowledge.
16. Leading.
17. Misstates evidence / misquotes witness / improper characterization of evidence.
18. Narrative.
19. Opinion.
20. Pretrial ruling. (Not included here as inapplicable)
21. Privileged communication.
22. Public policy.
23. Undue waste of time or undue prejudice / immaterial / irrelevant / repetitive / asked and answered / cumulative / surprise.
24. Speculative.

Objections

Admitted

"OBJECTION: Your Honor, the matter already has been admitted by a stipulation which is in the record. We do not need to waste time on something that does not have to be decided."

DISCUSSION: If a matter has been admitted, it does not need to be the subject of any testimony or evidence to be considered as true. The mechanics of getting the item considered by the trier of fact depends on whether it is a bench or jury trial. If the trial is to the court, simply draw the judge's attention to the admission as being a part of the record in the case. If the trial is to the jury, formally move the court to instruct the jury that the fact is to be taken as being a part of the evidence.

RESPONSE: "Your Honor, we have a right to present undisputed evidence, even though adverse counsel does not want it in the case."

Objections

Argumentative

"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.

RESPONSE: "Your Honor, I am testing the testimony of this witness."

Objections

Assumes facts 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 hearing officer allows the question "subject to later connecting up." The hearing officer, 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."

Objections

Best evidence rule

"OBJECTION: Your Honor, this is not the best evidence. The original document is the best evidence."

DISCUSSION: For our purposes, there are two aspects to the "Best Evidence Rule."

- The first is the one most often invoked today: ordinarily a non-expert witness is not allowed to describe what is in a document without the document itself being introduced into evidence. Put the document into evidence first, then have the lay witness talk about what is in it.

Objections

Best evidence rule (*con't)*

- The second aspect is requiring the original document to be introduced into evidence instead of a copy — if the original is available. However, this is only the case where the document itself needs to be proved, as in the case of a contract where one needs originals and original signatures.
- RESPONSE: Dependent on the aspect of the Best Evidence rule involved in the objection: "Your Honor, this is admissible as a copy of a business record."

Objections

Beyond the scope of (direct, cross, redirect) examination

"OBJECTION: Your Honor, this question is beyond the scope of the direct examination (cross-examination)."

DISCUSSION: Although the court has discretion to allow it, ordinarily the scope of a cross-examination cannot exceed the scope of the direct examination. Likewise, redirect examination ordinarily cannot exceed the scope of the cross-examination. The purpose for restricting an examination to the scope of the opponent's last previous examination is to prevent an ever-enlarging and never-ending scope of testimony.

RESPONSE: "Your Honor, this is within the scope of the direct examination (cross-examination) because [explain]."

Objections

Completeness

"OBJECTION: Your Honor, we object to counsel only introducing part of the writing (conversation/act/declaration). Under the evidence rule providing for completeness, we move to introduce additional parts now.

DISCUSSION:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction *at that time* of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

RESPONSE: "Your Honor, of course when I finish reading this into the record, counsel can read whatever else she feels relevant to add."

Objections

Compound question; double question

"OBJECTION: Your Honor, this is a double question. If the witness answers, it will be confusing as to which part of the question is being answered."

DISCUSSION: A compound question asks two or more separate questions within the framework of a single question. The objection is generally reserved for situations where, if the witness answers "yes" or "no," it will be confusing as to which part of the question is being answered. It is one of those objections that falls within the rubric of the "objection as to form" (discussed below).

RESPONSE: Separate the question into the two parts.

Objections

Confusing / vague / misleading / ambiguous

"OBJECTION: Your Honor, the question is ambiguous. The witness may not know with certainty what is being asked, and we may not know with certainty what the answer tells us."

DISCUSSION: Confusing / vague / misleading / ambiguous are all words that convey the objection that the question is not posed in a clear and precise manner so that the witness knows with certainty what information is being sought. The objection appeals to the court's discretion in providing a fair trial without witnesses being confused.

RESPONSE: "Your honor, I can restate that question."

Objections

Counsel is testifying

"OBJECTION: Your Honor, counsel is trying to testify himself, instead of having the witness do it."

DISCUSSION: The objection that "Counsel is testifying" is heard so often, that we include it in this list of "the basic two dozen." However, the objection usually could just as well be phrased as "leading" or "argumentative" or "assumes facts not in evidence." The objection is to parts of the question which contain facts or opinions not in evidence.

RESPONSE: Depending on the type of question, respond, as you would to an objection for "leading" or "argumentative" or "assumes facts not in evidence."

Objections

Form

OBJECTION: "Your Honor, we object to the form of the question."

DISCUSSION: An objection that the "form" is improper is a generalization, which includes diverse problems (each of which is a specific objection). The objection is heard a great deal, and honored by courts quite often when they see the specific problem. Other times, the court does not rule on the objection, but simply directs adverse counsel to "Rephrase your question, counsel."

WARNING: Just saying "Objection to the form" or "Objection to the foundation" is a lazy indefinite generalization, which includes every possible way the form or foundation is wrong. There are dangers in making the general objection of "form" or "foundation."

Objections

Form (*con't*)

The objection of "form" should instead be a specific objection that the question:

- Is a double question.
- Is misleading or ambiguous (to either witness or jury).
- Is argumentative.
- Is prejudicial or abusive in its insinuations.
- Is leading.
- Is repetitious.
- Assumes facts not in the record.
- Fails to include relevant facts found in the record.
- Calls for a legal conclusion.
- Calls for mere speculation.
- Calls for an opinion.
- Calls for a narrative.

Objections

Form (*con't*)

RESPONSE: "Your Honor, may counsel be requested to inform the court in what specific is the form of my question insufficient, so that I can remedy any problem?" (Then, when informed, restate the question to eliminate the bad form.)

Objections

Foundation

"OBJECTION: Your Honor, we object to the lack of foundation because [*e.g.*, there is no showing of the witness's time and place of observation of the facts called for]."

DISCUSSION: Evidence is competent if the proof that is being offered meets certain traditional requirements of reliability. The preliminary showing that the evidence meets those tests is called the foundational evidence. If there is no objection made to the lack of foundation before the testimony is received, the objection is waived. If an objection to the foundation if not made; the testimony cannot later be the subject of a motion to strike.

Objections

Foundation (*con't*)

- The objecting party must identify what is necessary to correct the lack of foundation for the deponent to answer. If the questioning party asks what is wrong with the foundation, then the objector either must provide specific details of what is missing in the foundation or else be ruled to have waived the objection by making a senseless objection.
- If the witness is a layperson, the usual foundation objection is a lack of showing that the witness has personal knowledge of the facts which the question seeks. If the witness is an expert, the usual foundation objection is a lack of showing that the expert is qualified to give the opinion sought.

RESPONSE: "Your Honor, may counsel be requested to inform the court in what specific is the foundation insufficient, so that I can remedy any problem?" (Then, when informed, restate the question or otherwise provide the specific missing part of the foundation.)

Objections

Hearsay

Objections

Hearsay

"OBJECTION: Your Honor, this calls for hearsay."

DEFINITION: "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

DISCUSSION: Although not permitted in a civil or criminal proceeding (unless it comes within one of the many exceptions), as discussed earlier, in administrative law hearings hearsay is usually admissible. Therefore, there is no need to go into all the exceptions to the hearsay rule.

Similarly, written reports may be received. Additionally, statistical evidence may be received, as well as copies of documents, or documents that have been altered, even though such evidence might not be admissible at a trial under both the hearsay rule and the best evidence rule.

Objections

Improper impeachment

"OBJECTION: Your Honor, this is outside the boundary of proper impeachment."

DISCUSSION: The evidence rules generally only authorize the following methods of impeachment:

- Pointing out contradictory evidence or prior inconsistent statements;
- Showing bias or prejudice (paid witness, stands to gain by verdict one way, friend, or rival of party);
- Showing reputation for poor character for honesty;
- Showing conviction of a crime that involved dishonesty or false statement or imprisonment for more than one year;
- Showing poor memory, or lack of physical or mental ability to observe, remember, or recount;
- On cross-examination, ask the witness to agree that he committed specific instances of past conduct bearing on the witness's credibility for truthfulness. Except for criminal convictions, the witness's answer is conclusive, and extrinsic evidence is not allowed to contradict what the witness says concerning his own conduct.

RESPONSE: "Your Honor, I am asking items which bear upon the witness's credibility."

Objections

Incompetent

"OBJECTION: The witness is incompetent because…." (The exhibit is incompetent because….)

DISCUSSION: The term "competency" refers to the minimal qualifications someone must have to be a witness. In reference to an exhibit, the term "competency" refers to the minimal foundation that physical items must have to be an exhibit. For both a person and an exhibit, "competency" also refers to a lack of any statutory or other legal bar based on public policy.

In order to be a witness, a person other than an expert (experts are a special case discussed later in the text), must meet five basic requirements:

- Take some kind of oath to tell the truth.
- Have perceived something relevant to the case.
- Be able to remember what he or she perceived.
- Be able to communicate in some sensible way.
- Not be disqualified by some statutory or other legal bar based on public policy. (Nothing you'll usually need to worry about, e.g., settlement discussions, witness is attorney, etc.)

RESPONSE: "Your Honor, [respond to asserted specific lack]."

Objections

Lack of personal knowledge

"OBJECTION: Your Honor, there is no showing of personal knowledge by the witness."

DISCUSSION:

- A [non-expert] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness.
- With some qualifications, experts can testify to facts they used in their process of building an opinion, even if they do not have personal knowledge of the facts supporting the opinion.

RESPONSE: [Establish by preliminary questions that the person has actual personal knowledge.]

Objections

Leading Questions

"OBJECTION: Your Honor, counsel is leading [or coaching] the witness."

DISCUSSION: A leading question is one which, either through form or substance of the interrogation, instructs a witness, or puts words in the witness's mouth to be echoed back, or one which suggests to a witness the answer desired.

- Generally, each hearing officer has his/her own limit on how much someone is allowed to "lead" a witness.
- Leading questions or questions which assume facts not yet proven are within the discretion of the HO. Unless there appears an abuse of discretion, the appellant court will not reverse the HO's ruling.

RESPONSE: "Mr. Hearing Officer, this question is only preliminary to move us quickly to the matters in issue." OR, "Madam Hearing Officer, the witness is a hostile witness."

Objections

Leading Questions

Objections

How to Fix a Leading Question

The key to getting facts into evidence is to build a foundation. The best way to have your witness testify about the events, after establishing that she was present to the event to ask her to describe what she saw. But what if she leaves out the fact that Mr. Smith used a blue bottle to strike Ms. Jones?

- Example of a leading question: Did you see Mr. Smith hit Ms. Jones with a blue bottle? "Objection!"

You should be able to correct the problem simply by asking the same question with the phrase "whether or not" tacked onto the beginning.

- Ex., "Can you tell us whether or not Mr. Smith struck Ms. Jones with a bottle?" However, this question may also be deemed leading. A better way would be
- A better way would be asking, "Was anything used by Mr. Smith to strike Ms. Jones?" This question does not suggest an answer. The answer could be "No," it could be, "His fist," or it could be, "a blue bottle."

Objections

Misstates evidence / misquotes witness / improper characterization of the evidence

"OBJECTION: Your Honor, my adversary is misstating the evidence."

DISCUSSION: This objection is usually heard when a closing statement is made on the record.

RESPONSE: "Madam Arbitrator, it is not a misstatement, and certainly the evidence is in the record."

Objections

Narrative

"OBJECTION: Mr. Hearing Officer, the question calls for a long narrative. It can produce irrelevant or otherwise inadmissible testimony before the you can receive an objection and rule on it."

DISCUSSION: In the evidence presentation mode used in this country, the normal form (of questioning followed by direct answers to the questions) is designed to allow the adverse counsel the opportunity to interpose an objection before the witness directly answers the question in the hearing of the finder of fact, usually a jury.

- This is not an objection that you will likely ever make or hear.

RESPONSE: "Mr. Hearing Officer, this simply asks for a short description of the scene as a unified whole, before we get to detailed aspects."

Objections

Opinion (Non-expert (lay witness) vs. Expert Testimony)

"OBJECTION: Mr. Arbitrator, the question calls for an opinion, and the witness is not qualified to give it."

DISCUSSION: In regard to a non-expert (lay witness), this objection is made to the competence of a lay person giving an opinion, and a foundation to turn the witness into an expert is not possible. In regard to an expert, this objection is made to the competence of the expert because of inability of the expert to pass the gatekeeping requirements for experts.

- Non-expert witnesses are to give facts only, and it is the province of the finder of fact to make conclusions drawn from those facts.

RESPONSE (lay witness): "Your Honor, this is a matter which is within the normal range of knowledge or understanding of an ordinary layperson."

RESPONSE (expert witness): "Your Honor, the witness is an expert and entitled to draw a conclusion."

Objections

Privilege

"OBJECTION: Your Honor, the question calls for privileged matters (stating the nature of the privilege)."

DISCUSSION: A privilege is a right of an individual not to testify. In administrative hearings, there are two main exceptions to that statement regarding under Federal and NY state law: (1) one's right under the US Constitution (5th Amendment) privilege against self-incrimination†, and (2) confidential communications between the charged party and a) his/her spouse, b) physician, c) clergy and d) attorney.

† In administrative hearings, while the charged party does have the right to assert the privilege against self-incrimination, the finder of fact may draw a negative inference from his/her refusal to answer the question.

RESPONSE: "Your Honor, the matter is not privileged because * * * ."

Objections

Public policy

"OBJECTION: Your Honor, the [specify the statute, rule or common law doctrine] says it cannot be admitted into evidence. It is incompetent evidence."

DISCUSSION: The objection based on public policy refers to a non-optional class of evidence that cannot be introduced, no matter that the person who holds the evidence wants to testify. The variety of subjects forbidden by state and federal law is wide. In administrative hearings the most likely to come up are:

- Settlement Discussions.
- Witness is Attorney. Ethical rules prohibit a lawyer from serving simultaneously as a witness and an advocate.

RESPONSE: "[Depends on the statute or rule involved.]"

Objections

Relevance

"OBJECTION: Madam Hearing Officer, this calls for evidence that is not relevant."

DISCUSSION: All relevant evidence is admissible, except as otherwise provided by [the Constitution, statutes, and other court rules]. Evidence which is not relevant is not admissible.

- In administrative law hearings, the rules of evidence are relaxed.
- Objective vs. subjective judgement: the arbitrator/HO will permit evidence that s/he considers to be the type of evidence that is something that s/he ought to hear. Consequently s/he will let most things in, though there are many things that s/he may consider not appropriate and therefore may not allow into evidence.

RESPONSE: "Madam Hearing Officer, the exclusion of relevant evidence for unfairness is an extraordinary remedy. There is nothing unfair about this evidence."

Objections

Speculative

"OBJECTION: Mr. Hearing Officer, the question calls for the witness (to guess) to speculate."

DISCUSSION: Anything that invites a witness to guess is objectionable. A guess is not a fact. Speculation as to what possibly could have happened, or what possibly could happen, is of little probative value.

- However: greater freedom is allowed with expert witnesses.

RESPONSE: "Mr. Hearing Officer, this is an expert giving an expert opinion within the scope of her expertise."

Legal Ethics

RULE 3.3. - Conduct Before a Tribunal

New York State Unified Court System Rules of Professional Conduct
http://www.nycourts.gov/rules/jointappellate/ny-rules-prof-conduct-1200.pdf

(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Legal Ethics

New York State Unified Court System Rules of Professional Conduct

- http://www.nycourts.gov/rules/jointappellate/ny-rules-prof-conduct-1200.pdf

RULE 3.3. - Conduct Before a Tribunal

(b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Legal Ethics

RULE 3.3. - Conduct Before a Tribunal (*con't*)

(c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) OMITED – not applicable

(e) In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

(f) In appearing as a lawyer before a tribunal, a lawyer shall not: (1) fail to comply with known local customs of courtesy * * * or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply; (2) engage in undignified or discourteous conduct; (3) intentionally or habitually violate any established rule of procedure or of evidence; or (4) engage in conduct intended to disrupt the tribunal.

Legal Ethics

RULE 3.4. - Fairness to Opposing Party and Counsel

A lawyer shall not: (a) (1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce; (2) advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein; (3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal; (4) knowingly use perjured testimony or false evidence; (5) participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false; or (6) knowingly engage in other illegal conduct or conduct contrary to these Rules;

Legal Ethics

RULE 3.4. - Fairness to Opposing Party and Counsel (*con't*)

(b) offer an inducement to a witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the matter. A lawyer may advance, guarantee or acquiesce in the payment of:

(1) reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related expenses; or

(2) a reasonable fee for the professional services of an expert witness and reasonable related expenses;

Legal Ethics

RULE 3.4. - Fairness to Opposing Party and Counsel (*Con't*)

(c) disregard or advise the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling;

(d) in appearing before a tribunal on behalf of a client:

(1) state or allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;

(2) assert personal knowledge of facts in issue except when testifying as a witness;

(3) assert a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein; or

(4) ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person; or

Legal Ethics

RULE 3.4. - Fairness to Opposing Party and Counsel (*con't*)

(e) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

Legal Ethics

RULE 3.5. - Maintaining and Preserving the Impartiality of Tribunals

(a) A lawyer shall not:

(1) seek to or cause another person to influence a judge, official or employee of a tribunal by means prohibited by law or give or lend anything of value to such judge, official, or employee of a tribunal * * * ;

(2) in an adversarial proceeding communicate or cause another person to do so on the lawyer's behalf, as to the merits of the matter with a judge or official of a tribunal or an employee thereof before whom the matter is pending, except:

i. in the course of official proceedings in the matter;

ii. in writing, if the lawyer promptly delivers a copy of the writing to counsel for other parties and to a party who is not represented by a lawyer;

iii. orally, upon adequate notice to counsel for the other parties and to any party who is not represented by a lawyer; or * * * .

Legal Ethics

RULE 4.1. - Truthfulness In Statements To Others

In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.

RULE 4.2. - Communication With Person Represented By Counsel

(a) a lawyer shall not communicate * * * with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

RULE 4.3 - Communicating With Unrepresented Persons

Communication is allowed. However, the lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel * * *.