

TIPS ON OFFERING EVIDENCE

by Curtis E. Shirley

RELEVANCE

Indiana Evidence Rule 401: “Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

Personal knowledge
Proper opinion
Competent witness
Hearsay with exception
Authentic document or thing
Not otherwise objectionable

Once evidence is offered by one party, the door is opened to the other parties to raise questions concerning the following:

Bias (interest, prejudice, motives, etc.)
Character evidence
Impeachment

PROPER QUESTIONS

For direct examination, start with general questions, open ended questions, where you give the witness a chance to tell a story.

“Who was there ...”,
“What was said ...”,
“What did you see ...”
“When did it start ...”
“Where were you ...”,
“Why were you ...”
“How did it happen ...”
“Describe your relationship ...”

After setting a foundation that the witness had an opportunity to spend time with the decedent during his or her life, and particularly around the time he or she signed the contested document, you should ask the following questions:

“Do you have an opinion as to whether the decedent appeared to be of sound mind on [date contested document signed]?”
“What is your opinion?”
“Did it appear to you the decedent knew the names and number of his family members?”
“On what do you base your opinion?”

“Did it appear to you the decedent knew the nature and extent of her property?”

“On what do you base your opinion?”

“Did it appear to you the decedent understood how to make a judgment about what each person should inherit after considering how the heir may have treated the decedent?”

“On what do you base your opinion?”

“Did it appear to you the decedent was strong-willed?” “...afraid?”
“... coerced?”

“On what do you base your opinion?”

For cross examination, rarely ask a question you do not know the answer to. Try to limit your questions, or better yet, phrases or statements, to one simple thought at a time. The shorter the better. Long questions or long statements tend to raise objections, unless used as a hypothetical or summary.

POTENTIAL OBJECTIONS

Accrediting or bolstering witness before impeachment

Addressing juror by name

Ambiguous question

Argumentative

Asked and answered

Assumes fact not in evidence

Authentication or identification problem

Best evidence rule

Broad

Business record exception not established

Character not admissible or attacked

Child witness not competent

Closing argument

Collateral matter

Competency not established

Completeness rule

Complex, compound or multiple question

Compromise offers or settlement not admissible

Calls for conclusion

Coaching

Confusing question

Convictions of crime not admissible

Corroborative evidence not proper

Cross examination goes beyond scope of direct

Cumulative

Deadman's statute

Deceptive question

Defaming character

Discretion of the court for any reason

Document speaks for itself

Exhibit or witness not on pretrial list
Expert testimony not proper
Extrinsic evidence not admissible
First-hand knowledge not shown
Foundation lacking
 No factual predicate for witness statement
 Lay witness answering expert question
 Beyond demonstrated expertise of the expert
 Hearsay
 Witness not present for photograph, recording or telephone call
 Equipment functioned properly
 Chain of custody
Habit, routine and practice not proper
Harassment
Hearsay
Hearsay exception does not apply
 Declarant available
 Declarant not available
Hypothetical question not proper
Identification lacking
Illegally obtained evidence
Immaterial or not relevant
Impeachment not proper
Incompetent witness
Inflammatory
Insurance issue not proper
Interpreter not qualified
Irrelevant or immaterial
Jencks Act violation (FRCP 26.2)
Job offer argument
Judge cannot be a witness
Judicial notice not proper
Judicial questioning not proper
Juror cannot be witness
Leading
Liability insurance improper
Limited admissibility
Mischaracterization or misquoting of witness prior testimony
Misleading question
Missing evidence
Missing witness
Misstates the facts or law
Mistrial
Motion to strike (where objection not made)
Multiple or compound question
Must accept witness answer
Narrative not proper
Non-responsive answer

- Not relevant to issues raised in the pleadings
- Not relevant to impeachment purpose
- Not reasonably calculated to lead to admissible evidence (deposition only)
- Notes being used without foundation
- Offer of proof required
- Opening statement
- Argumentative
 - Discusses law
 - Mentions improper facts
- Opinion of witness not proper
- Original document rule
- Parol evidence rule
- Payment of medical bills
- Personal knowledge lacking
- Personal opinion of attorney
- Photograph not proper
 - Inflammatory
 - Misleading
 - Re-creation or dramatization going beyond illustration
 - Reveals evidence not admissible
- Plea bargaining not admissible
- Poverty or wealth of a party
- Prejudicial
- Presumptions
- Pretrial conference order eliminated issue
- Prior inconsistent statement not admissible
 - Witness called only for this purpose
 - Statement not inconsistent with prior testimony
 - Witness is permitted opportunity to explain inconsistent statement
 - Statement concerns a collateral matter not within issues at trial
- Privacy concerns
- Privileges
 - Accountant client
 - Attorney client
 - Crime victim counselors
 - Doctor patient
 - Executive
 - Fifth Amendment
 - Government
 - Husband wife
 - Immunity
 - Informer
 - Journalist
 - Medical provider patient
 - Priest penitent
 - Social workers
 - Trade secrets
- Rape shield Statute

Reading from document not in evidence
Redaction not proper
Redirect examination beyond the scope of cross
Refreshing recollection not proper
 Witness testifying to contents of document, not refreshed memory
 Intent to have Jury speculate about contents of inadmissible exhibit
 Witness not shown to need the document
Not relevant or material
Religious matters
Remarriage matters
Remedial matters or repairs
Repetitious question
Self-serving recollection
“Send a message” argument
Settlement offers or compromise efforts
Side bar should have been requested
Speculation
Statute of frauds
Stipulation applies
Subsequent remedial measures
Summary not admissible
 Originals not voluminous
 Source materials not admissible nor made available
 Summary not accurate
Surprise (e.g., concealed during discovery)
Attorney testifying
Unfair question
Unintelligible question
Vague
Vouching for witness not permitted
Waste of time
Witness or exhibit not on pretrial list

POTENTIAL RESPONSES TO OBJECTIONS

Objection does not apply because ...
Objection goes to weight and sufficiency, not competency
Rephrase the question
Connect it up later
Other side opened the door
Agree to limiting instruction
If objection sustained, offer of proof

Curtis E. Shirley
151 N. Delaware St., Suite 1700
Indianapolis, IN 46204
317.685.6512
curtis@shirleylaw.net