

Ruling on Objections (Virtually) Without Anxiety¹

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I. The Purpose or Function of Objections

- A. The function of objections for the raising parties:
 - 1. Exclude evidence believed to be inadmissible or unreliable;
 - 2. Make a record for appeal; and
 - 3. Protect their witness from harassment or embarrassment.
- B. The function of objections for the trier-of-fact:
 - 1. Ascertain the truth;
 - 2. Avoid needless waste of time by
 - a. Eliminating irrelevant and/or unduly repetitious evidence and
 - b. Eliminating or reducing remands from appellate reviewing bodies.

II. The Basic Rules for Raising an Objection

- A. Timeliness: Every objection must be made on a timely basis. When a question is improper, the objection should be made before the answer is given. But the objection should be stated only when the question has been completed. Objections that are not timely are deemed waived.
- B. Grounds: The party raising the objection must state the grounds for the objection.
- C. The three P's: If you have any questions regarding the *party* who is raising the objection (or against whom the objection is raised), the *part* of the evidence that is objectionable, or the *purpose* (ground) on which objecting counsel relies, be sure to clarify these issues for the record and for the purpose of making your ruling correctly.
- D. Addressing the Court: All attorneys/parties must address the objection and the response to it to the judge. Arguing between the parties is not permitted.

¹ Because studies have shown that administrative hearing officials engaged in continuing judicial education/training prefer printed materials in a format that promotes their use as a "Bench Book," the following information is presented in outline form to facilitate its future use as a reference guide.

- E. No arguing with the Court: Attorneys may state their disagreement on your ruling **once** for the purpose of making a record. They should not continue to argue their position nor should you allow them to do so. If they wish to continue arguing, advise them they'll have another opportunity to argue the matter at the appellate level.

III. The Two Basic Types of Objections

- A. Objections to the Form of a Question.
- B. Objections to the Admission of Evidence.

IV. Objections to the Form of a Question

- A. Ambiguous or Unintelligible — Question capable of being understood in two or more ways or not capable of being understood at all.
- B. Argumentative. (Attorney may not argue or pick quarrel with witness.)
 - 1. Calls for an argument in answer to argument contained in a question.
 - 2. Calls for no new facts; asks witness to agree to conclusions of the questioner.
 - 3. Question to persuade the trier of fact rather than to elicit information.
- C. Asked and Answered.
 - 1. Applies when an answer has been given or the witness has stated he/she does not know or remember the matter.
 - 2. Avoids giving undue emphasis to particular portions of the evidence.
 - 3. Exceptions:
 - a. To refresh the memory of a witness;
 - b. To clarify a point;
 - c. To lay a foundation for impeachment by way of prior inconsistent statement.

- D. Assumes Facts Not in Evidence.
1. Question that assumes unproved facts to be true.
 2. An attempt to present (alleged) facts to which no evidence has been introduced.
 3. May traps a witness into unintentionally affirming the truth of an assumed fact.
 4. Exceptions:
 - a. A fact in question may be assumed temporarily upon a representation that evidence of the assumed fact will soon be presented.
 - b. It's common to assume facts when cross-examining experts to try credibility of their opinions, even if evidence of the facts won't be forthcoming.
- E. Compound: Question that actually contains two or more questions (single answer would be confusing; witness might answer part in the negative and part affirmative).
- F. Confusing: Question so complicated or muddled that it only serves to obscure the facts rather than clarify them.
- G. Harassing: Question asked merely to embarrass, badger or bully the witness.
- H. Leading a Witness:
1. Question that suggests an answer the examiner desires;
 2. Question that describes an incident in detail and asks if it happened that way, thus providing a natural inference or specific answer.
 3. Exceptions:
 - a. Refresh recollection of witness (hazy recollection affects testimony's weight).
 - b. When witness is hostile (when party calls hostile witness as its own witness).
 - c. To deal with handicapped witness (very young, very old, mental disability).
 - d. To establish preliminary foundational matters—identify exhibits, establish preliminary foundational facts not at issue such as address, employment, etc.
 - e. To sanitize an answer; if part of statement is admissible and part inadmissible, a leading question can be used to focus the witness on the admissible portion.
 - f. On cross-examination (unless witness favors cross-examiner's client).

- I. Narrative Testimony: Question inviting a narrative answer so broad, general, or indefinite that it affords the witness an opportunity to inject inadmissible material.
- J. Repetitious: Question not likely to elicit additional evidence of probative value (due to its repetitiveness) and tending to waste time.
- K. Speculation: A lay witness may testify only to matters of which he/she has personal knowledge. Questions that invite a witness to speculate are contrary to the personal knowledge requirement. Expert witnesses may give opinions based on facts not yet introduced nor personally perceived if those facts are relied upon by other experts in that field and if reliance is reasonable. Questions inviting speculation on facts not reasonably reliable attempt to elicit an opinion beyond the witness's expertise.

V. Objections to Admission of Evidence

A. The **Three R's of Admissibility** in an Administrative Hearing—Is the evidence:

1. **Relevant** (materiality is defined within meaning of relevant)
 - (a) Irrelevant evidence does not influence the issues;
 - (b) Irrelevant evidence has no probative value in proving a fact;
 - (c) Irrelevant: has no tendency to make a material fact more or less probable.
2. **Repetitious**: excessive in number, redundant, burdensome, so excessive in number that it tends to obscure the facts rather than clarify them.
3. **Reliable**: “the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs.”

B. Weight Rather than Admissibility

In an administrative hearing, the emphasis is on the weight of the evidence of the evidence rather than its admissibility.

“When there is evidence more than a scintilla, and not unbelievable on its face, it is for the administrative officer to determine its credibility and its weight. *Merchants' Warehouse Co. v. United States*, 283 U.S. 501, 508, 51 S.Ct. 505, 508 (1931); *Federal Trade Commission v. Education Society*, 302 U.S. 112, 117, 58 S.Ct. 113, 115 (1939); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 59 S.Ct. 216 (1938); *NLRB v. Nevada Copper Co.*, 316 U.S. 105, 62 S.Ct. 960 (1942); *Marshall v. Pletz*, 317 U.S. 383, 388, 63 S.Ct. 905, 910 (1943); *Medo Corp. v. NLRB*, 321 U.S. 678, 681, 64 S.Ct. 830, 831, 832 (1944).”

C. Objection to Admission of Evidence for Failure to Provide Prehearing Discovery

There is no constitutional right to prehearing discovery in an administrative proceeding. *Kelly v. U.S. Environmental Protection Agency*, 203 F.3d 519 (7th Cir. 2000) and *Alexander v. Pathfinder, Inc.*, 189 F.3d 735 (8th Cir. 1999). Typically, the rule requiring the provision of prehearing discovery is found in the Rules of Civil Procedure, which may or may not be applicable to a given administrative proceeding. While fairness demands that a party be provided with information regarding the evidence to be presented against him or her, so that he/she can defend against it, they are not constitutionally entitled to it. For this reason, evidence that is not provided prior to an administrative hearing is rarely excluded from it. There are many ways to “level the playing field” without excluding the evidence (*e.g.* hold the record open for the party to offer evidence to rebut that which he/she did not have prior knowledge of or access to).

VI. Objections to the Admission of Opinion Evidence

A. An opinion that lacks sufficient foundation is incompetent and inadmissible.

1. Incompetent Evidence: fails to meet legal requirements as to validity; demonstrating reliability of evidence is referred to as “laying a foundation.”
2. Incompetent Witness: Not shown to be qualified to give an opinion. A lay witness is incompetent if lacking in mental capacity, unable to articulate answers, lacks personal knowledge or cannot understand duty to tell the truth.

B. Lay Opinion Testimony

1. Rationally based on the witness’s perception.
2. Restricted to instances in which the opinion would help the ALJ to determine a fact in issue or to understand the testimony of another witness
3. Admissible lay opinion testimony includes such things as:
 - (a) The apparent physical health of a person;
 - (b) The apparent sanity of a person;
 - (c) Alcohol intoxication;
 - (d) Measures of speed, distance, size, etc.;
 - (e) Noise heard (*e.g.*, gunshot, tires squealing, crash, etc.);

- (f) Smells (e.g., such a dynamite smell following an explosion);
- (g) Appearance or demeanor (*e.g.*, nervous, angry, distraught, etc.);
- (h) Value of the witness's own property;
- (i) The witness's own intent, motive, or knowledge;
- (j) Age and parentage;
- (k) Ownership and possession; and
- (l) Value of service provided by the witness.

C. Expert Opinion Testimony

1. Necessary if scientific, technical, or other specialized knowledge will assist the trier-of-fact to understand evidence or determine a fact in issue.
2. Expert is qualified by knowledge, skill, experience, training, or education
 - (a) Testimony is based upon sufficient facts or data
 - (b) Principles and methods underlying the testimony are reliable
 - (c) Witness has applied principles/methods to the facts of the case reliably.

VII. Handling Continuing Objections

- A. Can be appropriate when the objection is applied to documents/exhibits.
- B. With respect to testimony, a continuing objection typically should not:
 1. Carry over to all witnesses.
 2. Be general or vague; objection must be stated very explicitly in order for ALJ to know how to apply the objection to evidence yet to be offered.

VIII. Issuing Your Ruling

“The presiding officer may rule on the objection at the time it is made or may reserve ruling until the written decision.”²

² Wording is typical of that found in most Administrative Procedures Acts. This is from Indiana's APA § 4.17(5).

IX. Your Safety Net: The Harmless Error Doctrine

The burden is on the Petitioner to demonstrate that the error about which he or she complains actually prejudiced his or her substantial rights. If the Petitioner made no such showing, he or she is not entitled to the presumption that his or her rights would actually be prejudiced simply because the error exists. In the absence of a showing of prejudice, any objection to the admission of evidence alleged to contain an error should be overruled. On appeal, even if it was error to admit the evidence, admission of the evidence would be deemed *harmless* error, not grounds for reversal or remand, absent a showing of prejudice.

TABLE OF OBJECTIONS, RESPONSES AND RULES

Objections to Form of Question:

Ambiguous Question	(Rule 611(a))
Argumentative Question	(Rule 611(a))
Asked and Answered	(Rule 611(a))
Assumes Facts Not in Evidence	(Rule 611(a))
Compound Question	(Rule 611(a))
Confusing	(Rule 611(a))
Harassing the Witness	(Rule 611(a))
Leading Question (Direct Examination)	(Rule 611(c))
Leading Question (Cross-Examination)	(Rule 611(c))
Narrative Testimony, Calls for	(Rule 611(a))
Repetitious Question	(Rule 611(a))
Unintelligible Question	(Rule 611(a))

Objections to Admissibility:

Authentication Insufficient	(Rules 901 and 902)
Best Evidence Not Being Offered	(Rules 1001 and 1002)
Bolstering	(Rules 607,608 and 801(d)(1)(B))
Chain of Custody Not Established (Real Evidence)	(Rule 901)
Character Evidence in Form of Opinion Testimony	(Rule 405)
Character Evidence Inadmissible	(Rule 404(a))
Character Evidence, Specific Acts Inadmissible	(Rule 405)
Character Witness, Improper Cross-Examination as to Specific Acts	(Rule 405)
Character Witness Not Qualified to Testify as to Reputation/Opinion	(Rule 405)
Compromise of or Offer to Compromise a Civil Claim	(Rule 408)
Conclusion of Law, Expert Witness	(Rules 702 and 704)
Conclusion of Law, Lay Witness	(Rules 701 and 704)
Confusion of the Issues	(Rule 403)
Cross-Examination, Beyond Scope of Direct	(Rule 611(b))
Cumulative	(Rule 403)
Dead Man's Act Renders Witness Incompetent	(Rule 601)
Exclusion of Witness, Violation of	(Rule 615)
Expert Lacks Sufficient Basis for Opinion	(Rules 702, 703 and 705)
Expert Not Qualified	(Rule 702)
Expert Opinion Based Only on Hearsay Not Reasonably Relied Upon	(Rule 703)
Expert Opinion Is Speculative, Conjectural	(Rule 702)
Expert Opinion Not Helpful	(Rule 702)
Habit Evidence Not Admissible	(Rule 406)
Hearsay	(Rules 801 and 802)
Hypothetical Question Includes Facts Not in Evidence	(Rule 705)
Hypothetical Question Not Helpful	(Rule 705)
Identification Insufficient	(Rules 901 and 902)
Impeachment, Bias	(Rules 607 and 611)
Impeachment, Extrinsic Evidence of Prior Conduct Inadmissible	(Rule 608)
Impeachment of Own Witness	(Rule 607)
Impeachment of Own Witness with Prior Inconsistent Statement	(Rules 403, 607)
Impeachment on Collateral Matter	(Rules 403 and 607)
Impeachment, Prior Conviction Inadmissible	(Rule 609)

Incompetent; Witness Is Incompetent.....	(Rules 601 and 403)
Insurance.....	(Rule 411)
Irrelevant (Immaterial, Not Probative)	(Rules 401 and 402)
Judge as Witness.....	(Rule 605)
Juror as Witness at Trial	(Rule 606(a))
Juror as Witness to Impeach Verdict	(Rule 606(b))
Lay Opinion Testimony	(Rule 701)
Medical, Hospital, or Similar Expenses, Payment of	(Rule 409)
Mental State or Condition of Accused.....	(Rule 704(b))
Misleading the Jury	(Rule 403)
Non-responsive Answer	(Rule 611)
Other Accidents	(Rules 401-403)
Other Claims by Plaintiff.....	(Rules 401-403)
Other Contracts or Transactions Involving a Party.....	(Rules 401-403)
Other Crimes Evidence; Inuff. Notice of Intent to Offer	(Rules 404(b), 413-415)
Other Crimes Evidence Not Adequately Proven	(Rules 104(b), 404(b), 413-415)
Other Crimes Evidence Not Admissible/Prove Character	(Rules 404(b), 413-415)
Other Crimes Evidence Offered/Undisputed Point.....	(Rules 403, 404(b), 413-415)
Personal Knowledge Lacking	(Rule 602)
Photograph Inflammatory and Unfairly Prejudicial.....	(Rule 403)
Photograph, Motion Picture, Videotape, Recording Not Authenticated.....	(Rule 901)
Pleas and Plea Bargaining	(Rule 401)
Prejudicial Effect Outweighs Probative Value	(Rule 403)
Prior Consistent Statement Not Admissible to Rehabilitate	(Rule 613)
Prior Inconsistent Statement; Extrinsic Evidence Inadmissible.....	(Rule 613(b))
Prior Inconsistent Statement/Disclose Contents of Writing	(Rule 613)
Privilege, Comment/Adverse Inference from Invocation	(Rule 513)
Privileged.....	(Rules 501-513)
Privileged Attorney Client Communication	(Rule 503)
Privileged Clergy-Communicant Privilege.....	(Rule 506)
Privileged Marital Communication	(Rule 505)
Privileged Marital Testimonial Privilege.....	(Rule 505)
Privileged Physician-Patient Communication	(Rule 504)
Privileged Psychotherapist-Patient Communication.....	(Rule 504)
Privileged Required Report	(Rule 502)
Religious Belief or Opinion.....	(Rule 610)
Scientific Evidence Not Admissible	(Rule 702)
Sexual Conduct/Predisposition Victim Sexual Misconduct-Civil Case	(Rule 412)
Sexual Conduct/Predisposition Victim Sexual Misconduct-Crim. Case	(Rule 412)
Speculation, Question Calls for	(Rules 602, 701 and 702)
Subsequent Remedial Measure.....	(Rule 407)
Summary Not Admissible.....	(Rule 1006)
Truthfulness of Another’s Testimony	(Rules 608, 701 and 702)
Ultimate Issue	(Rule 704)