

APPENDIX: CROSS EXAMINATION GUIDELINES

Introduction

Cross examination can be a useful tool for determining the facts in a case. In contested cases, direct testimony is usually presented by affidavit, Bd.R. 157(a), while cross examination occurs by oral deposition. Bd.R. 157(b).

Cross examination should be a question-and-answer conversation between the examining lawyer and the witness. The defending lawyer must not act as an intermediary, interpreting questions, deciding which questions the witness should answer and helping the witness formulate answers. The witness comes to the cross examination to be questioned. It is the witness, and not the lawyer, who is testifying.

The cross-examination guidelines below are essentially the deposition guidelines set out in *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993) (Gawthrop, J.) The only significant difference, which results from Bd.R. 157(e)(4), is that certain objections must be noted on the record.

Failure to adhere strictly to these guidelines may be a basis for a sanction under Bd.R. 128, which could include a requirement that the witness, on very short notice, may be directed to appear before the Board or elsewhere, as may be appropriate, coupled with any appropriate award of compensatory damages under Bd.R. 128(b)(6). In addition, cross examination undertaken contrary to these guidelines may result in exclusion of an affidavit from evidence or in the assignment of little, if any weight, to the direct testimony of a witness who was cross examined.

Guideline [1]

At the beginning of a cross examination, the party conducting the cross examination must instruct the witness on the record to ask deposing counsel, rather than the witness's own counsel, for clarifications, definitions or explanations of any words, questions or documents presented during the cross examination. The witness must follow these instructions.

Guideline [2]

A party may not direct or request that a witness not answer a question unless:

(a) a party has objected to the question on the ground that the answer would:

(1) reveal privileged material or

(2) violate a limitation the Board has imposed and

(b) counsel immediately places a conference call to the Board official assigned to the contested case asking for a ruling on the objection.

Under these circumstances, (i) the cross examination shall be suspended, (ii) the conference call immediately shall be placed to the Board official assigned to the contested case, and (iii) all counsel must be prepared to explain their respective positions during the call. The court reporter for the cross examination shall be available to record the conference call and to read back questions to which an objection has been made.

If the Board cannot be reached, then the party directing a witness not to answer shall within **two (2) business days** file with the Board (and not to the Office Mail Room or any other part of the Office) a miscellaneous motion seeking relief. Bd.R. 121(a)(3), SO ¶ 123. Any opposition must be filed within **two (2) business days** of service of the motion. While a reply can be filed, the motion will likely be decided before the reply is filed.

Guideline [3]

Counsel must not make objections or statements that even remotely suggest an answer to a witness. Any objection to evidence during cross examination must be stated concisely and in a non-argumentative and non-suggestive manner and must include the legal basis for the objection. Examining counsel must not address the correctness of an objection, but may instead continue with questions to the witness, the objection having been noted on the record as required under Bd.R. 157(e)(4).¹

Guideline [4]

Counsel and their witness-clients shall not engage in private, off-the-record conferences during cross examinations or during breaks or recesses, except for the purpose of deciding whether to assert a privilege.²

¹ With respect to this guideline, the following observation by Judge Gawthrop, 150 F.R.D. at 530 n.10, is highly relevant:

I also note that a favorite objection or interjection of lawyers is, "I don't understand the question; therefore the witness doesn't understand the question." This is not a proper objection. If the witness needs clarification, the witness may ask the deposing lawyer for clarification. A lawyer's purported lack of understanding is not a proper reason to interrupt a deposition. In addition, counsel are not permitted to state on the record their interpretations of questions, since those interpretations are irrelevant and often suggestive of a particularly desired answer.

By way of example, the following comments by defending counsel generally are viewed as suggesting an answer to a witness:

- (a) Objection, vague.
- (b) Objection to the form of the question.
- (c) Take your time in answering the question.
- (d) Look at the document before you answer.
- (e) Counsel, do you want to show the witness the document?

² The term "witness-clients" in the context of this guideline includes all witnesses who are employed by, or otherwise under the control of, the real party-in-interest, including retained expert witnesses, as well as the individual or individuals named in the caption of the contested case. With respect to this guideline, the following observation by Judge Gawthrop, 150 F.R.D. at 528, is highly relevant:

The fact that there is no judge in the room to prevent private conferences does not mean that such conferences should or may occur. The underlying reason for preventing private conferences is still present: they tend, at the very least, to give the appearance of obstructing the truth.

CROSS EXAMINATION GUIDELINES

Guideline [5]

Any conferences that occur pursuant to, or in violation of, guideline [4] are a proper subject for inquiry by deposing counsel to ascertain whether there has been any witness-coaching and, if so, the nature of that coaching.

Guideline [6]

Any conferences that occur pursuant to, or in violation of, guideline [4] shall be noted on the record by the counsel who participated in the conference. The purpose and outcome of the conference shall also be noted on the record.

Guideline [7]

Counsel taking cross-examination shall provide to defending counsel a copy of all documents shown to the witness during the cross examination. The copies shall be provided either before the cross examination begins or contemporaneously with the showing of each document to the witness. The witness and defending counsel do not have a right to discuss documents privately before the witness answers questions about the documents.