PART IX
OBJECTIONS

OBJECTIONS

- You should remember objections are critical to preserving the integrity of your case and they are most often made during the direct and cross-examination of witnesses. Generally there are two types of objections:

Tactical Objections

- Tactical objections may be based upon a rule of evidence; but you really don't believe that the arbitrator is going to sustain your objection, rather it is used as a technique during arbitration. Reasons for use include:

  ➢ Delay questioning to allow a witness to regain composure.

  ➢ Throw an opposing advocate off balance.

  ➢ Cloud the impact of examination of a witness.

  ➢ Cue the witness' examination is reaching a critical area.

Substantive Objections

- Substantive objections are also based upon a rule of evidence, but you genuinely believe that a rule has been violated.

- Arbitrators are not technically bound by the rules of evidence; however, as the rules of evidence relate to the reliability and relevance of the issue at hand, the rules are in fact observed to varying degree by arbitrators.

- While some arbitrators conclude that unless evidence is reliable, relevant and competent, it should not be admitted, there are others who believe the arbitration process should not be held to any restrictions concerning evidentiary rules and will allow virtually any offered evidence "for whatever it is worth."

- It is important to remember, and from time to time remind an arbitrator, that the purpose of most evidentiary rules is to ensure that the evidence presented in the hearing is both reliable and relevant.

- It is equally important to remember that your objections must be made in a timely manner and that your witness is instructed during your preparation not to continue speaking once an objection is made.

- Some arbitrators will rule out evidence being offered, even without an objection being raised by the opposing side, if it is necessary to ensure a fair hearing, but this varies from arbitrator to arbitrator and case to case.

OBJECTIONS BASED UPON RULES OF EVIDENCE OR FORM OF QUESTION

- ❒ **RELEVANCE** - Evidence is only relevant if it tends to support a party's case or tends to impeach the testimony of a witness.

- ❒ **LACK OF FOUNDATION** - If a document is challenged, its authenticity and relevance must be established by the party offering the document in evidence.

- ❒ **BEST EVIDENCE** - Unlike the result under formal evidence rules, oral testimony about the contents of unproduced documents is often admissible; however, if the contents are strongly contested, the arbitrator should require the production of the document itself if it is in existence and within the control of a party.

- ❒ **LEADING QUESTIONS** - Leading questions that suggest an answer to the witness on direct examination are objectionable on important matters that are relevant to the dispute.

- ❒ **HEARSAY** - Hearsay evidence, testimony about what the witness heard from another that is introduced to prove the truth of what was heard, while often admitted subject to the arbitrators determination as to how much weight to give it, is generally not considered reliable.

- ❒ **HEARSAY DOCUMENTS** - A distinction is usually drawn between the situation where there is at least a witness giving hearsay evidence, who can be cross examined, and hearsay evidence and where there is a hearsay document that cannot be cross examined. The latter, with few exceptions, is generally ruled inadmissible.

- ❒ **OPINION EVIDENCE** - Evidence of opinion, as opposed to fact, is only admissible when it is within the competence of the witness to assert the opinion. A foundation must be laid to support expert opinion.

- ❒ **SPECULATION** - This type question asks the witness to speculate on what they would do under different circumstance or in the future. It is generally considered both unreliable and irrelevant.

- ❒ **PRIVILEGE** - Even if evidence is relevant, it may be inadmissible if it falls within a privilege. Examples are lawyer-client, priest-penitent, doctor-patient, husband-wife and increasingly steward-grievant.

- ❒ **MATERIAL OBTAINED in VIOLATION of STATUTE** - Tape recording a conversation without notification, for example could be inadmissible even if relevant.

- ❒ **OFFER TO SETTLE** - Evidence of the terms of an offered but unaccepted settlement is inadmissible.

- ❒ **INCOMPETENT** - A question where the witness has no personal knowledge of a matter he or she is asked about.

- ❒ **AMBIGUOUS** - You cannot understand what the question means or it has more than one meaning.

- ❒ **ARGUMENTATIVE** - A question not asked to get information, but is really a comment on the evidence.

- ❒ **FACT NOT IN EVIDENCE** - A question includes a statement by the questioner that assumes a certain factual situation exists before there has been any evidence that such facts actually existed.

- ❒ **MISTATES TESTIMONY** - A question, usually being asked on cross examination, which actually changes the testimony of the witnesses direct testimony.

- ❒ **CHARACTER EVIDENCE** - Evidence of character or reputation is not generally considered relevant to establish the grievant or a witness engaged in certain conduct in a specific instance.

- ❒ **UNCHARGED MISCONDUCT** - Prior acts that have not been charged as the grounds for current discipline, even if independently they have been grounds for past discipline, are generally not considered relevant.

- ❒ **UNCHALLENGED PRIOR DISCIPLINE** - Unchallenged prior discipline is a matter of record in the file and further evidence concerning it is not relevant.

- ❒ **EVIDENCE OF PRE-DISCIPLINARY MISCONDUCT** - After discipline has been issued, evidence claimed to have been discovered regarding misconduct alleged to have occurred prior to the discipline at issue may not be considered admissible by arbitrators as grounds for new or additional discipline, but may be admissible, if relevant, as support for the originally charged discipline.

- ❒ **EVIDENCE OF GRIEVANT'S POST-DISCIPLINE CONDUCT** - Arbitrators are split on whether evidence of the grievant's post-discipline conduct is relevant and admissible with respect to either the taking of disciplinary action or the degree of discipline that has been imposed.

- ❒ **PRIOR DISCIPLINE EXPUNGED FROM GRIEVANT'S RECORD** - Article 16, Section 10 and specific memoranda prohibit the USPS from relying on stale or modified discipline.

- ❒ **CUMULATIVE** - Repetitious evidence, even if otherwise admissible, may be barred because its repetition unnecessarily prolongs the hearing.

- ❒ **EVIDENCE OF "INTENT"** - Testimony of the "intent" of one party that was not officially communicated to the other part is generally considered irrelevant.

- ❒ **EXPEDITED ARBITRATION AWARDS** - These awards not specifically non-citeable and irrelevant pursuant to Article 15.5.C.4.

TIPS FOR THE ADVOCATE

- ➜ Make timely objections, based on a rule of evidence to inadmissible evidence or testimony. State the grounds for the objection.

- ➜ Do not object to everything that is objectionable. Consider whether the evidence hurts your argument as it relates to the theory of your case.

- ➜ Wait on the arbitrator to rule when objections are made.

- ➜ When management objects, do not withdraw your question or any evidence until the arbitrator rules.

- ➜ If you don't understand why an objection was overruled, ask the arbitrator for an explanation.

RULES OF EVIDENCE BASED ON FORM OF QUESTIONS

- The rules of evidence discussed thus far in this chapter are designed to exclude evidence that is considered to be unreliable or that should be rejected for policy reasons. Thus, where the rule applies, the evidence will not be admitted into the record. When applied less strictly-hearsay, for example—it may be admitted but given diminished weight or significance.

- Other rules of evidence, those regarding form, are based on the notion that the way in which information is sought from a witness, that is, the phrasing of questions, can unfairly influence the reliability and veracity of the resulting evidence and therefore should not be admitted unless the questions are reframed in such a way as to eliminate the defect that creates the unreliability or lack of veracity.

- The thrust of these rules is not so much to exclude the evidence, but to require that it be elicited in a different way. Thus, in most cases a competent advocate will be able to overcome an objection to the form of a question simply by rephrasing the question.

- In contrast to many of the traditional exclusionary rules (especially the rules concerning hearsay, opinion, best evidence, and parol evidence) discussed above, labor arbitrators are often likely to sustain objections based on the form of the question. The reason is that the effect need not be to exclude the proffered evidence, but merely to modify the way in which the evidence is produced. Some lay and/or inexperienced advocates encounter difficulty with objections as to form.

- Unless the advocate understands the basic rule on which the objection is based and the rationale underlying that rule, it is often difficult to rephrase the question to remove the troublesome aspect of the question. Consequently, all labor arbitration advocates are well advised to learn and become familiar with rules of evidence based on the form of questions.

Lack of Foundation-Lack of Competency

Statement of the Rule

⇨ In order for evidence to be admissible it must be shown that the person providing the testimony or explaining documentary or other tangible evidence is someone who has sufficient knowledge, familiarity, and perception of the evidence being offered to be a competent witness.

Rationale

⇨ The value and reliability of' evidence is based on the ability of tile witness to know about, perceive, or otherwise be capable of presenting evidence on a particular subject. The arbitrator and the opposing side should have, in advance of the pertinent questions being posed, sufficient preliminary information about the witness's connection to the evidence to determine that the witness has such qualifications.

➜ **Example.**[In a case in which a supervisor is testifying about a warehouse in which the grievance arose and is offering a photograph of one portion of the warehouse]

EA: [Questioning immediately after swearing in the witness] Ms. Bliss, I'm showing you a photograph of the ABC warehouse and asking you if you could tell us where the grievant was seen removing the articles on the day in question.

UA: Objection, lack of foundation. We know nothing of the competency of this witness to testify as to these matters, nor of the circumstances under which this photograph was taken.

A: Sustained. Would the advocate please lay a foundation for this witness's testimony, as well as for the introduction of the photograph.

EA: I'm sorry, Madam Arbitrator. Let me go back. Ms. Bliss, what is your position with the employer?

W: I'm the warehouse supervisor on the day shift. The grievant worked under my direction.

EA: Did you take the photograph that has been marked as Employer Exhibit 6?

W: Yes, I did.

EA: When did you take the photograph?

W: One week after the incident.

EA: Was there anything different about the warehouse on the day you took the photo than on the day in question?

W: No.

⇨ [The employer advocate should continue to lay a foundation to show that the witness was in a position to observe critical events related to the incident at issue and is otherwise knowledgeable about what the testimony will concern]

Discussion

⇨ The rule concerning foundation is, strictly speaking, a substantive rule of evidence, because if a proper foundation cannot be laid, the evidence to be offered by the witness will be excluded. More often, however, the rule regarding foundation is really one of form, because the advocate is usually able (as in the example above) to go back and have the witness provide the necessary information to satisfy the requirements of a proper foundation.

⇨ Novice advocates sometimes run afoul of the foundation rule, because they are so familiar with the facts in the case and the competency of the witnesses to testify that they overlook the fact that the opposing advocate and the arbitrator are not as enmeshed in the case, its facts, and witnesses and cannot as easily understand why the witness is able to provide the offered evidence.

⇨ In some other situations, particularly after the hearing is well under way and after a number of witnesses have testified, foundations may be less necessary since in the course of the case presentation, the basis for some witnesses' testimony and related exhibits will be obvious from evidence previously received. Nevertheless, it is better for the advocate to be overly cautious to ensure that a proper foundation has been laid for each witness and each piece of evidence. Not only will it avoid embarrassing sustained objections, but it will also enhance the quality and credibility of the evidence being presented.

Leading Questions

Statement of the Rule

✦ An advocate may not, except for preliminary noncritical matters, ask a question of his or her own witness if the form of the question suggests the answer desired by the advocate posing the question.

Rationale

✦ It is assumed that there is a friendly relationship between an advocate and the advocate's own witness, that the witness wishes to assist the advocate who calls that witness, and that they have spent some time in advance of the hearing preparing the witness's testimony. With that background there is no justification for questions to be framed in such a way as to suggest the desired answer. It is the truthful testimony of the witness that is desired, not the ideas and words of the advocate.

➞ **Example.** [On direct examination]

EA: During the time you were in charge of the processing department, you told your subordinates many times, didn't you, that they were never to remove any of the tape files from the computer room?

UA: Objection. That is a leading question.

A: Sustained. Would you please rephrase the question in a non-leading form.

EA: What, if anything, did you tell employees in your department concerning the subject of removal of tapes from the computer room?

Discussion

✦ Leading questions are prohibited on direct examination except for preliminary or inconsequential matters. As a practical matter, many leading questions asked during direct examination are never objected to, because they either are not detected or are asked with respect to matters that are noncontroversial or when the impact of the answer is insignificant. Leading questions, even when objections to them are sustained, can be used to signal a witness as to the correct answer.

✦ As in the above example, the witness surely knows that the correct answer to the question is that employees were frequently told not to remove tapes from the computer room. An advocate who continues to use leading questions, despite having objections to them sustained, is subject to reprimand from (lie arbitrator and is likely to lose credibility. A great deal more is said about leading questions in Chapter 12, Cross-Examination.

Assumes Facts Not in Evidence
Misquotes Testimony

Statement of the Rule

❍ A question that assumes facts that are not in evidence, that incorrectly quotes testimony of a witness, or that misstates evidence in the case, is improper, and evidence resulting from such a question is inadmissible.

Rationale

❍ When the predicate to a question is other evidence in the case, it is improper to base the question on matters not actually entered into evidence in the case or on an inaccurate representation of evidence that has been introduced. Testimony based on nonexistent or inaccurate evidence is almost certain to be inaccurate itself. Moreover, merely asking a question that presumes matters not in evidence taints the record by attempting to get matters into evidence through the back door.

➜ **Example.**

EA: Ms. Oaknoll, do you agree with Ms. Tepid's testimony that all the work was completed in satisfactory fashion by 8:15 P.M. that day?

UA: Objection. The question misstates the testimony of Ms. Tepid. She did not testify that the work was satisfactory.

A: Sustained. I believe that question does not properly characterize Ms. Tepid's testimony.

EA: Do you agree, Ms. Oaknoll, that the work was completed by 8:15 P.M. that evening?

W: Yes, it was completed by that time.

Discussion

- Many advocates like to piggyback the testimony of one witness onto that of another, especially when the second person is not a particularly strong witness, and it is easier to feed the witness prior testimony and merely have the second witness affirm it. When this is done, it is important that the testimony of the first witness not be misrepresented in any way. In most cases it is preferable to quote the first witness's actual testimony. By using that witness's exact words there is no opportunity for the opposing advocate to challenge the question.

- In the example just above, the objection was based on a misstatement of the evidence. The objection might just as well have been phrased, "Assumes facts not in evidence." Since Ms. Tepid did not testify that the work had been done satisfactorily. a question premised on that fact assumed a fact that was not in evidence.

Hypothetical Questions

Statement of the Rule

▼ Questions based on hypothetical facts are not admissible, unless the witness to whom they are posed has been qualified as an expert witness.

Rationale

▼ If a question contains certain facts that have not been established and is based on hypothetical or presumed facts or situations, any answer to such a question will be based on conjecture and surmise and is therefore not reliable. When such a question is asked of a witness who has been qualified as an expert, and the facts presumed in the question parallel those in the case, opinion testimony based on those hypothetical facts is admissible.

➜ **Example A.**

UA: Dr. Wallenburg, you have described your broad background in mechanical engineering. You have also heard the previous testimony about the failure of the thrust hammer and its piston to function properly on the day in question. If the grievant had correctly operated the thrust hammer that day, is there any way the accident could have occurred for some other reason?

EA: Objection. The question is based on a hypothetical premise that has not been proven. We will show that the grievant did not operate the machine properly.

A: Objection overruled. While you may offer evidence concerning the manner in which the grievant operated the machine, Dr. Wallenburg has been qualified as an expert and may render an opinion based on a hypothetical question. I recognize that the premise of the question has not yet been established, and I will keep that in mind.

W: I believe that the sink shaft on the throttle could, and very likely did in this case. cause the throttle to malfunction.

➜ **Example B.**

UA: If Ms. Robinson, your supervisor, had not directed you to continue working at the end of your shift, would you have nevertheless stayed on the job until the emergency was over.

EA: Objection. It's a hypothetical question. Her supervisor did direct her to work over.

A: It is, a hypothetical question, but I will allow the witness to answer.

W: Yes, I would have stayed. I have done so several times in the past under similar circumstances.

Discussion

▼ Traditionally, hypothetical questions were used to elicit opinions of expert witnesses. Under the current federal Rules of Evidence, that is not necessary. Hypothetical questions may be used for ordinary fact witnesses to show stat of mind, motivation, and patterns of conduct. Unless the hypothetical questions is too absurd and too unlikely to have occurred, arbitrators will usually permit such questions.

▼ In the second example, the employer advocate might also have based the objection on the rule discussed just above (i.e., that questions based on facts not in evidence are not admissible). There is no assurance that the arbitrator would have been any more sympathetic to that objection, but it would have added a little more ammunition in attempting to avoid having the witness speculate as to what she would have done.

Compound Questions

Statement of the Rule

- Except for preliminary or noncontroversial matters, questions are to be phrased in such a way that they only ask for information on point at a time.

Rationale

- When a question inquires about several matters in one interrogatory, it is difficult to determine to which of the questions the answer is admissible, while the other seeks inadmissible evidence and is therefore objectionable. By merging the two questions, registering a proper objection is made more difficult.

➜ Example

UA: Is it true that you punched out before Fred, and that Fred went home about 6:00 A.M.?

EA: Objection. Compound question.

A: Sustained. Please break the question apart.

UA: Did you punch out on the time clock before Fred that day?

W: Yes.

UA: Did Fred go home about 6:00 A.m. that day?

W: I don't know for sure. I never saw him leave, but he was when I left.

Discussion

- When the matters being inquired about are not controverted or not critical to the case, the opposing advocate is not likely to object to a compound question, and if he or she does, the arbitrator is not likely to sustain the objection. When, however, the matters are essential to the case and there is a probability that the answers to the two parts of the question will be different, the inquiring advocate should be careful to ask only one question at a time.

Questions Calling for Speculation

Statement of the Rule

❑ A question is improper if it calls for the witness to speculate or to otherwise testify about matters that the witness is not capable of knowing first-hand.

Rationale

❑ Witnesses are to testify about matters they know from their own knowledge, perception, or experience. They should not be asked questions attempting to elicit information that goes beyond those factors. The resulting testimony is unreliable.

➜ **Example A.**

UA: Mr. Dixon, what do you think was on Art Park's mind when you told him to start the motor?

EA: Objection. Calls for speculation. Mr. Dixon could not know what Mr. Park was thinking.

A: Sustained.

UA: Mr. Dixon, did Mr. Park say or do anything at the time you told him to start the motor?

W. He said, "I was waiting for Joe to tell me to start."

➜ **Example B.**

EA: Ms. Sampson, what's your guess as to why there were so few customers in the store that day?

UA: Objection. Calls for speculation.

A: Sustained, unless there is some foundation laid for the witness ability to have that knowledge.

EA: Ms. Sampson, did you have any information available to you that would indicate why there were so few customers in the store that day?

W: I saw an ad in the local newspaper the previous day saying that our major competitor, Gumps, was having a half-off sale that day.

EA: Do you believe that was the cause of the light turnout of customers at your store that day?

W: Yes.

Discussion

- Labor arbitrators are usually willing to allow lay witnesses to speculate and give opinions, at least when the matters the testimony concern fall within their normal work or experience competencies. Thus, in the second example above, had it been established earlier that Ms. Sampson had worked in the store for some time and had some understanding of the business, the arbitrator would likely have permitted the initial question concerning the lack of customers over the objection of the union advocate. When, however, the question calls for a witness to speculate about matters that seem to be outside the reasonable knowledge or perception of the witness (e.g., inquiring about what someone else was thinking, as in the first example), an objection is likely to be sustained.

Ambiguous, Vague, Misleading, and Unintelligible Questions

Statement of the Rule

- A question that is so ambiguous, vague, misleading, or unintelligible that a reasonable person would not understand, or would at least be confused about, the information being sought is an improper question.

Rationale

- If a reasonable person cannot understand what information is being sought from a question or is uncertain as to exactly what matters are being referred to in a question, there is a likelihood that the witness may provide an erroneous answer. If no objection is raised and if the witness does not ask for a clarification, there is a strong chance that erroneous information may be placed in the record despite the witness's intention to be truthful.

→ **Example A.**

EA: Would you tell us whatever it was that you thought someone said that might have caused you . or the rest of the crew to believe that there was something that the company should have done that would have prevented the grievance about which we are arbitrating today?

UA: Objection. Ambiguous and confusing.

A: Sustained. Would you please rephrase the question.

EA: Was there anything you heard that day that led you to believe that the company was at fault in the way the work was assigned to your crew?

➜ **Example B.**

EA: Ms. Combs, you previously testified that you worked overtime on November 22 with Juanita Gonzalez. You also testified that you found out that night that your supervisor, Stella Dallas, came in later that night to check inventory. When did she leave?

UA: Objection. Ambiguous. It's not clear who "'she" refers to.

A: I agree. Would you please clarify the question.

EA: When, if you know, did Stella Dallas leave the store?

Discussion

- More often than not, this objection is unnecessary, in that a truly ambiguous, vague, or confusing question will usually prompt the witness to ask for a clarification or a rephrasing of the question. Some questions, however, may be interpreted by a witness in such a way that the confusion or ambiguity in the question is not apparent to them, and, unless the advocate points out the problem, the witness may answer the question incorrectly based on the misinterpretation. Moreover, if an arbitrator is confused by a question, he or she will usually want it clarified so that the record (especially when a verbatim transcript is being made) is clear.

Argumentative or Badgering Questions

Statement of the Rule

- Questions that do not ask for information but are posed merely for the purpose of expressing an argument or characterizing testimony are improper and therefore objectionable. Similarly, questions that are designed to harass or intimidate a witness, rather than obtain information, are objectionable.

Rationale

- The purpose of examining witnesses is to elicit information or challenge credibility. Questions that go beyond these limits are improper. Argumentation is to be reserved until after all evidence has been received. It is not to be advanced during the evidentiary portion of the case in the form of questions or in any other form. Similarly, witnesses should not be required to undergo badgering or intimidating questions out of deference to their dignity and out of concern that they might be intimidated from giving accurate testimony in order to bring an end to the harassment.

➜ **Example A.**

UA: Mr. Stuart, why did you assign the cleanup work to the maintenance technician?

W: Because he was the only one available at that time, and because he had no other pressing duties to perform just then.

UA: Isn't it a fact that you did it just to embarrass him?

EA: Objection. The question is argumentative.

A: Sustained.

➜ **Example B.**

EA: Would you tell us why you filed a grievance about the work assignment?

W: I thought it was in violation of the contract.

EA: Did you really think that?

W: Yes, I did.

EA: The fact is that you had it in for your supervisor, and you just wanted to make his life more difficult. Correct?

UA: I object. He is badgering the witness.

A: Sustained.

Discussion

- Argumentative questions are frequently posed by inexperienced advocates who do not always understand the distinction between the. evidentiary portion of a hearing and the argumentation phase. They are not usually trying to take advantage of the witness, but are anxious to make their arguments to the arbitrator. In other cases such questions are posed simply out of frustration that the witness is not providing the answers that the advocate wants and believes are the truthful ones.

- Badgering, in contrast, usually involves more malice on the part of the interrogator. The challenging or accusatory content of the words is usually matched with a loud or sarcastic tone. Almost always used on cross-examination, this type of questioning is usually employed to degrade or embarrass a witness to try to show that the witness is not being truthful or unbiased.

- There is no clear line dividing merely aggressive questioning and badgering. Often it is a question of frequency. One or two rough questions may be permitted before an arbitrator will sustain an objection for badgering. An effective advocate will not permit his or her witness to be badgered without vehemently objecting to the arbitrator.

Questions Calling for a Conclusion

Statement of the Rule

- A question is objectionable when it calls for a witness to draw a conclusion from a set of facts and when the conclusion has a determinative effect on the case and would be expected to be drawn by the arbitrator.

Rationale

- Witnesses are to testify as to facts and not invade the province of the arbitrator by making conclusions that are judgmental and essential to deciding the case.

➜ **Example.**

UA: Ms. Jones, what happened when you finished that particular job?

W: Our supervisor sent us home, less than halfway through our shift.

UA: And was that a violation of the labor agreement?

EA: Objection. Calls for a conclusion.

A: Sustained. I believe I will have to make that determination.

Discussion

⏭ This rule, developed for civil and criminal trials, particularly jury trials, is not commonly followed in labor arbitration. Arbitrators are used to ignoring or discounting such conclusions and commonly permit witnesses to draw conclusions as long as these occurrences do not become frequent in a hearing.

Questions Calling for Explanation or Interpretation of a Document

Statement of the Rule

Questions that require a witness to explain or interpret the meaning of a document that is clear, or relatively clear, on its face are objectionable.

Rationale

A document that has significance in the final determination of a case will be read and interpreted by the arbitrator. Unless there is some arcane or technical language used in the document, no elaboration is necessary. The language in the document "speaks for itself," and no amount of embellishment by a witness can add or subtract from the meaning of the document.

➜ **Example.**

EA: I'm handing the witness a copy of Employer Exhibit 14, which has previously been identified as a letter you sent to the union vice president. Would you tell us what this letter means?

UA: Objection. The document speaks for itself.

A: I agree. I'll sustain the objection.

EA: Can you tell us what prompted you to send the letter?

W: Yes, it was in response to a discussion we had earlier that day.

Discussion

- A common failing of novice advocates is to have their witness explain documents and to try to use that explanation to argue the case. This often occurs with respect to agreements and correspondence. When an objection is made, and often sustained, the novice advocate may be puzzled. This is another example of a misunderstanding of the difference between the evidentiary and argumentation phases of the hearing. It is also a misunderstanding of the role of the arbitrator.

- The arbitrator is charged with the responsibility of interpreting agreements and drawing the significance from letters, memos, and other communications. For a witness to try to explain what the words mean or were intended to mean, is but another form of the objectionable testimony discussed just above, that is, drawing conclusions. Nevertheless, a great many arbitrators permit such questions.

Questions Previously Asked and Answered

Statement of the Rule

- When a question has been asked and answered by an advocate, that same advocate asking the same or virtually the same question is objectionable.

Rationale

- Permitting the same questions to be asked and answered prolongs hearings. Repetition of the same questions does nothing to enhance the production of facts on which a decision can be based.

➜ **Example.**

EA: Did you wait on the customer, a Ms. Lane Bryant, who later complained to the store manager?

W: Yes.

EA: Did you observe her complaining to the manager?

W: Yes, I did.

EA: Was it actually Ms. Bryant who you waited on?

UA: Objection. Asked and answered.

A: Sustained. I believe the witness just testified to that fact.

Discussion

- Advocates who repeat questions previously asked and answered by a witness do so primarily for two reasons. First, when there is a separation of some interval between the two questions, the advocate may have forgotten that the question was already asked. Second, on cross-examination the inquiring advocate will try to have the witness contradict his or her earlier testimony.

- Arbitrators are often willing to permit repetition of questions when different words are used to phrase the question and when it appears that the advocate is trying to test the accuracy of the witness' recollection or the witness' credibility.

- Thus, when the advocate uses the preamble, "Are you absolutely sure . . . ", it is likely that the question will survive an objection. If, however, the same question is later repeated, an objection is likely to be sustained.

Cumulative Testimony

Statement of the Rule

- When a question calls for a witness to testify about facts that have already been established through one or more witnesses and/or other evidence and there is little or no rebuttal evidence, the question is likely to be objectionable.

Rationale

- Hearings will be unduly prolonged by repetition of evidence when there is little or no contrary evidence. It merely accumulates more facts, without adding anything new on which a decision may be based.

➜ **Example.**

EA: Mr. Largent, you heard the testimony of Peter Graves, Silas Marner, Juanita Rosales, and Charles Choy. Do you agree that the procedure followed was the way. they said it was?

W: Yes.

EA: Would you please describe it in your own words.

UA: Objection. This evidence is simply cumulative.

A: Mr. Largent, do you have any facts that will vary from or add to those provided by the other witnesses mentioned.

W: No, I don't.

A: I will sustain the objection.

Discussion

- The rule concerning cumulative evidence is not a cut-and-dried one. In some cases the weight of evidence will be an important factor for the determination of the case. If four or five persons saw an event in the same way' an arbitrator is likely to give significant credence to their testimony. Arbitrators are wary of cutting off such testimony.

- If, however, the facts about which the cumulative evidence centers are largely undisputed by the other side, additional witnesses are of little value. One witness's testimony that is unrebutted will be accepted by the arbitrator, unless the witness's and the witness testimony are very incredible.

Questions That Call for a Narrative Answer

Statement of the Rule

- Questions that are very broad and general and call for the witness to give a long, narrative answer are objectionable.

Rationale

- When a witness is called to provide a long and expansive answer, the opposing advocate is precluded from reasonably registering an objection, because the witness is simply speaking in a manner and about subjects that he or she has chosen. Thus, inadmissible evidence may be included in the statement without the opposing counsel being able to foresee what is about to be said and without a reasonable opportunity to register an objection.

➜ **Example.**

UA: Ms. Blake, would you please tell us what you can recall about your employment with Minamax Corporation?

EA: Objection, calls for a narrative answer.

A: Could you please break your question down so that it does not cover such a broad range of subjects?

Discussion

✖ This is another objection that is made more frequently in courts than in labor arbitration. Nevertheless, advocates are well advised to try to prevent witnesses from rambling on in their testimony without intervening questions. Skillful witnesses may present a great deal of testimony, with hearsay and opinion testimony woven in among otherwise non-objectionable factual testimony, but may do it so rapidly and smoothly as to preclude an opposing advocate from objecting in a timely manner.

✖ If the arbitrator does not sustain the objection and permits the witness to give a narrative answer, the advocate is advised to request that the arbitrator instruct the witness to speak slowly so that the opposing advocate may object if and when he or she feels it necessary.

SPECIAL EVIDENTIARY ISSUES

Most of the rules of evidence fall into relatively neat categories, substantive exclusionary rules contrasted with rules related to form. There are, however, some additional principles of evidence that do not fall neatly into such categories.

Non-responsive or Volunteered Testimony

Statement of the Rule

❒ An answer to a question that does not directly respond to or answer the question asked, or testimony that is offered despite the absence of any question soliciting such testimony, is objectionable.

Rationale

- ❒ Evidentiary hearings are meant to be orderly, with the respective advocates controlling the production of evidence, subject to rulings by the arbitrator. Consequently, answers that do not respond to the question posed by either advocate, and testimony that is volunteered (i.e., information presented by the witness that was not asked for by either advocate) should not be admitted into evidence.

➜ **Example A.**

UA: Ms. Singelton, what did Mr. Gomes say then?

W: I knew that he was just going to give us more of his b.s., and I was sick and tired of everything he said. He has never told us the truth ever since he got here.

EA: Objection. Non-responsive. Move to strike the answer.

A: The objection is sustained, and the answer will be struck. Ms. Singelton, would you please answer the question that was asked of you, which was what Mr. Gomes said just then.

➜ **Example B.**

UA: When did you first realize that your paycheck did not reflect the overtime hours you had worked?

W: It was about the first payday in August. Besides, I had talked to my buddy, Jake, and he told me that the payroll department was really screwed up. He said that a year or so ago, they....

EA: Objection. The answer is non-responsive and is volunteered testimony, at least regarding all testimony following the reference to when he says he first noticed a change in his paycheck.

A: Objection sustained. Please just answer the question asked.

Discussion

- ❒ In the first example the witness completely ignored the question and said what she wanted to say. The objection of non-responsive testimony was appropriate. In the second example the witness answered the question asked but then proceeded to volunteer additional testimony that was not at all called for in the question.

- ❒ The objection of non-responsive was accurate concerning the second part of the testimony, and it is accurate that the second part of the answer was volunteered and not responsive to the question asked. Arbitrators may not be too concerned about such additional testimony, because they can usually block such non-responsive testimony from their minds and from further consideration.

- ❒ Nevertheless, the advocate must always remember that the arbitrator is a human being and is subject to the same type of stimuli and influences that affect persons who sit on juries. Consequently, witnesses should not, without objection, be permitted to launch into independent monologues about anything that strikes their fancies.

Judicial (Arbitral) Notice

Statement of the Rule

- ▼ Facts that are known to the public at large or that are available in public documents and that are not in serious dispute among learned and rational persons may be recognized as if they were evidence (i.e., judicial or arbitral notice will be taken of them), despite the absence of testimonial or other evidence establishing such facts.

Rationale

- ▼ Established facts in the realm of history, science, human nature, mathematics, medicine, weather, geography, and other such areas of knowledge need not be proven by specific introduction of evidence. The matters offered are so well understood and established in the body of common knowledge that no reasonable person could dispute them. Similarly, information contained in public documents (e.g., tide tables, census information, official maps) is admissible without further foundational evidence. Therefore, the sponsoring party need not produce specific evidence to establish them.

- ➔ **Example.**

  EA: When did you call Ms. Jones in her office in Honolulu?

W: At 3:00 P.M. in New York City.

EA: What time was that in Honolulu?

W: I'm not sure.

EA: We would ask the arbitrator to take notice of the fact that Hawaii is in the Hawaiian time zone, which is five hours earlier than Eastern Standard Time, meaning that Ms. Jones received the call at 10:00 A.M. in Honolulu.

A: Unless the union advocate has other information, I will take notice of that fact.

UA: We do not dispute that fact.

Discussion

▼ Judicial notice is seldom invoked in labor arbitration. Facts that would be proposed for judicial notice in a trial setting are frequently accepted by arbitrators without the formality of judicial notice. Nevertheless, there are cases that involve matters that might not be easily or economically proved through witnesses (especially scientific or technical matters), but that can be established through judicial notice.

▼ The advocate may need to substantiate the noncontroversial aspect of the facts offered for judicial notice through the presentation of learned treatises, encyclopedias, or other generally recognized texts. Matters suitable for judicial notice include such facts as that darkness does not immediately follow sunset (i.e., there is twilight), California is west of Arizona, things dropped from the sky fall to the ground (gravity), and water(on a smooth surface creates a slippery condition. Such commonplace matters could take some time to prove in a traditional evidentiary mode. Since they are so well understood, it is usually easier to ask the arbitrator to take judicial or arbitral notice of them.

Offers of Proof

Statement of the Rule

❍ When an advocate seeks to introduce evidence into the case, but that evidence has not been admitted because of an objection, the advocate who is propounding the evidence may make an offer of proof by describing what the witness would have testified about or what the other evidence would have shown, so as to have some record of the evidence that was rejected.

Rationale

- Developed for traditional court trials, the offer of proof was a way to preserve the record (i.e., have some record of what evidence was excluded and how that evidence might have influenced the case) for a possible appeal. In arbitration it can serve the same function if one of the parties later attempts to vacate an award. It may also have some value with respect to collateral proceedings (e.g., an NLRB hearing), where the same evidence may be involved.

→ **Example.** [In a case of discharge for theft of drugs from a hospital; the witness, Ms. Aired, is a former union steward who was recently promoted to a supervisory position]

EA: Ms. Alred, what did Mr. Peterson say to you that led you to believe he had taken hospital property?

UA: Objection. Hearsay. Moreover, it was a privileged communication. At the time of the alleged discussion Mr. Peterson was a union member and Ms. Aired was a union steward and therefore the communications between them were privileged.

A: I will sustain the objection. The employer will have to prove its case on this critical issue with direct evidence.

EA: Mr. Arbitrator, we adamantly oppose this ruling. This is testimony that is critical to our case, and Ms. Alred is a credible witness with no reason to fabricate. Although technically hearsay, it is an admission against interest. The privilege does not apply because Ms. Aired was not acting in the capacity of a union steward when the communication took place.

A: I hear you, but do not agree. The objection is sustained.

EA: We wish to make an offer of proof.

A: You may proceed.

EA: If Ms. Aired were permitted to continue her testimony, she would testify that Mr. Peterson described in detail how he was able to enter the medications room and remove three boxes of narcotics, and she would relate how he described to her the method he used to remove them from the hospital.

A: It is noted for the record.

Discussion

- The importance of offers of proof in labor arbitration is not great. Because the avenue of appeal is so narrow, virtually no cases are taken to a higher authority (at least based on an evidentiary ruling), and the value of having a record of excluded evidence is negligible. Nevertheless, many advocates (primarily lawyers) like to have the record (when a transcript is being taken) reflect the evidence they tried to get into the case.

- In the small number of cases that are appealed to the courts, such offers of proof may have some limited value, especially if the arbitrator has excluded crucial evidence in the case. Some advocates also believe that making an offer of proof is a signal to the arbitrator that adverse rulings on important matters will not be easily accepted, suggesting that the arbitrator should be very careful in making future similar rulings.

- Another advantage of offers of proof is that they are a way of getting the information to the arbitrator. Although (tic offer is not in evidence (in fact, just the opposite: it has been rejected, and the offer is simply a way of recording what was excluded from the case), the arbitrator cannot ignore what he or she has heard, and therefore some of the value of the evidence has been realized. Although the arbitrator will state that it has no effect on the decision, no one can say for certain that it did not have some influence on the arbitrator's evaluation of the case.

- There is a possibility that making an offer of proof will tend to irritate the arbitrator and work against the offering advocate. While that possibility certainly exists, if the offer is made in a deferential way, with little or no fanfare, no offense is likely to be taken by the arbitrator.

UNDERSTANDING AND USING THE RULES OF EVIDENCE

- Some advocates see the Rules of Evidence as a tool of gamesmanship, relying on them to thwart the other side's attempts to introduce evidence. Indeed, they can be used in that manner, but such tactics will usually be detected by the arbitrator and will ultimately hurt the case of the advocate who uses them simply for tactical reasons. Moreover, opposing advocates will soon learn that the game-playing advocate is not to be trusted and is only trying to gain an advantage, rather than getting the facts before the arbitrator.

- The rules of evidence are not usually strictly applied in labor arbitration, and the advocate who relies on them needs to justify their use on the basis of the unfairness that results from evidence that does not comport with the rules. An arbitrator needs to be shown that evidence objected to would be unreliable or prejudicial to the fair presentation of facts. Reliance on mere technicalities usually will not win the day.

- Not only should the labor arbitration advocate understand the rules of evidence, but it is vital that he or she knows how and when to use them. Application of the rules of Evidence through the making of objections and the defense against such objections is the subject of the next chapter.

OBJECTIONS EXERCISE

1. The grievant has testified on direct that he is an excellent employee and has been for years. On cross, management asks him about a letter of warning, suspension and removal that are over eight years old. The removal was overturned on appeal and there has been no discipline since that time.

What is the union's likely objection?

_____

_____

What is management's likely response?

_____

_____

2. In an attendance related discharge case, part of the defense has been EAP participation due to an alcohol problem. Management attempts to introduce evidence of a DUI conviction which occurred two months after the grievant was fired.

What is the union's likely objection?

POST DISCHARGE CONDUCT NOT RELEVANT.

What is management's likely response?

SHOWS CONTINUED OF PROBLEM

_____

3. In an attendance related discharge case, the Union asks the Grievant about her participation in AA meetings after the removal (she never misses a meeting) and her attendance with her new employer (her attendance is perfect).

What is management's likely objection?

_____

_____

What is the union's likely response?

_____

_____

4. Management attempts to introduce the grievant's 3972 into evidence through the supervisor. The union is not sure the 3972 is accurate and it also contains references to previous official discussions on attendance.

What is the union's likely objection?

NOT THE BEST EVIDENCE

What is management's likely response?

BOOTH E DOCUMENT

5. In an attendance case, the union attempts to introduce a medical excuse, which states the grievant was unable to work on one of the dates in question?

What is management's likely objection?

HEARSAY DOCUMENT

What is the union's likely response?

6. In a discharge case alleging falsification of medical documentation, management attempts to introduce a letter from the doctor which states the change on the medical documentation from one date to another were not made by the doctor.

What is the union's likely objection?

What is management's likely response?

7. The grievant struck another employee and caused the employee to need medical attention. The union has admitted to the misconduct but is arguing the grievant's long tenure should mitigate the penalty of discharge. Management calls the employee to testify about how he was struck and the details involving the medical attention.

What is the union's likely objection?

CUMULATIVE

What is management's likely response?

8. A window clerk was fired for misappropriating postal funds. The discharge was based upon an I.M. by the postal inspectors. Management attempts to introduce the I.M. through the supervisor.

What is the union's likely objection?

HEARSAY DOCUMENT

What is management's likely response?

SUPPORTS DISCIPLINE.

9. The union, during its closing statement, attempts to introduce synopses of several arbitration awards from the CBR to support its case.

What is management's likely objection?

NOT COMPLETE AWARD
OPINIONATED.

What is the union s response?

10. During their closing statement, management attempts to introduce the part of the ELM, which was allegedly violated by the grievant.

What is the union's likely objection?

EVIDENTIARY PORTION OF HEARING IS CLOSED.

What is management's likely response?

11. In a drug related case management attempts to introduce, through the supervisor, a lab report which shows the grievant, an MVS driver, tested positive for drugs on the day of the accident.

What is the union's likely objection?

NO FOUNDATION

What is management's likely response?

12. In a case where management has discontinued the practice of allowing clerical employees to bring coffee to their cases, the union calls the NALC president to testify that the carriers are still allowed to bring coffee to their cases.

What is management's likely objection?

RELEVANCE

What is the union's likely response?

SAME CONTRACT LANGUAGE.