

As an example of an inappropriate question you should avoid asking unintentionally ambiguous questions.

Recognise that everyone has their own unique 'frame of reference'; the culmination of all their experiences up to a particular moment in time. This means that whilst we may know what we are seeking to convey that is not necessarily what the recipient may interpret what we have said to have meant.

Here's an example of an ambiguous question:

'You've recently become friends with John, haven't you?'

Why is this ambiguous? Basically because two of the words may be interpreted in different ways by different people: 'recently' and 'friends'.

Another type of inappropriate question is the unintentional multiple, multi-part, or compound question, ie one where the advocate asks about more than one fact.

For example:

'You got in your car, drove home and went indoors, correct?'

If the witness were to simply answer 'Yes', what will they have actually agreed to – all of the facts listed, most of the facts or just the last fact? Only they know!

Value judgement questions are also often inappropriate.

For example:

'Is it fair to say you like your job?'

This asks for an opinion on the 'fairness' of the assertion rather than simply asking whether the witness likes their job.

What may be the most dangerous type of inappropriate question is the 'imperfect syllogistic' question.

Don't worry, I'll explain what this term means!

A syllogism means the adding together of two or more propositions to reach a deductive conclusion.

For example:

Proposition 1 – Socrates is a man.

Proposition 2 – All men are mortal.

Conclusion – Therefore Socrates is Mortal.

Here's an example of when an imperfect syllogistic question could be asked:

Q. You've worked at the company 20 years, correct?

A. Yes.

[Now comes the Imperfect Syllogistic Question]

Q. So, you like your job?

This is faulty logic. It has occurred because the questioner has received the fact that the witness has worked at the company for 20 years and then has applied their frame of reference concluding that if 'they', the advocate, had worked somewhere for so long it would be because they liked working in that job. They have then put this assumption/conclusion to the witness when there is every possibility that this may be a flawed conclusion and the witness does not like their job.

Imperfect Syllogistic questions occur where advocates rush. They take a fact, add their 'frame of reference', reach an assumption (often being an assumption which will assist their case) and they then put this assumption to the witness.

Imperfect syllogistic questions can usually be identified in that they start with either 'So...' or, 'I don't want to put words in your mouth but...'

Another type of potentially inappropriate question is the hypothetical question. This is where the advocate, rather than asking a question seeking to generate a fact, is instead asking a question which requires speculation or guesswork.

For example:

'I know you say that this didn't happen but why would Mr Cuthbert say that it did?'

This is a hypothetical question because the advocate is asking the witness to look into the mind of the other person as to their reason for not giving the same account as the witness. This is not to suggest that the issue is not a relevant one but the possible explanation needs to be obtained as a result of asking factual questions, eg 'How would you describe your relationship with Mr Cuthbert?' or 'You've never had any kind of disagreement with Mr Cuthbert, have you?'

As far as possible seek to use active verbs in questions, ie 'You possessed' rather than 'You were in possession of'. It keeps the question short and will help to focus both the witness and decision maker's attention.

Be willing to smile at the decision maker. Research studies suggest that smiling is the highest positive emotional gesture we can make.

When you make mistakes, as we all do, don't beat yourself up over them. Reflect on them and learn from them.

As Piet Hein put it:

'The road to wisdom? Well, it's plain and simple to express:
Err, and err, and err again. But less, and less, and less.'

When questioning witnesses always remember to KISS:

Keep

It

Short and

Simple.

Make use of wide open questions.

One way to remember wide open questions is by use of the acronym TED which stands for: **T**ell, **E**xplain and **D**escribe.

[On a separate note all good advocates should be familiar with the website www.ted.com. Not only will you see examples of excellent advocacy, presentations and rhetoric but you will also learn information about other subjects that will assist you as an advocate!]

A second set of questions used in direct examination/examination-in-chief can be classed as open.

A further simple way to remember open questions is by the acronym 5WH which stands for:

Who,

What,

Where,

When,

Why,

How.

(Or if you prefer you may want to memorise the following extract from Rudyard Kipling's poem "*I keep six honest...*")

'I keep six honest serving-men

(They taught me all I knew);

Their names are What and Why and When

And How and Where and Who.'

Also appropriate for direct examination/examination-in-chief are what may be described as 'closed' questions.

The purpose of closed questions is to clarify or confirm a fact that the witness has already given.

For example:

'Was anyone else present?'

'Did you say anything else?'

A difficult habit to avoid is the 'OK' syndrome.

If you're in need of self-assurance you'll say 'OK' as a response to almost every answer you receive from a witness.

This sounds and appears needy and may not help to build your credibility with the decision maker.

Ban yourself from asking the unfocused and complacent:

'And what happened next?'

when conducting either direct/examination-in-chief or cross-examination, as to do so risks losing control of the witness's evidence.

One particular type of witness you may encounter is someone who is narcissistic (ie they have an overly inflated view of their abilities, personality or character). There are a variety of ways to deal with this witness but fundamentally they can be summed up either as exposing them as being flawed in some way or by belittling them.

There is said to be a 'classic format' for structuring the cross-examination of a witness:

Start friendly.

Get points that build your case rather than attack your opponent's.

Bring out anything which is incontrovertible which helps you or hurts your opponent.

Challenge the witness's recollection.

Impeach them where possible and appropriate.

End on a high.

Never forget – more cross-examinations are suicidal than they are homicidal! Always ask yourself whether or not you really do need to cross-examine a particular witness.

Cross-examination has been described by some people as 'the firing of bullets with the intention to inflict damage'. Realise that sometimes you will miss the target!

Whilst first impressions are important so too are final impressions. Don't finish a cross-examination after receiving an adverse answer.

If you get an answer that may be helpful to you in cross-examination leave it alone. Resist the inevitable temptation to follow it up with another question because the witness may well realise that they have made a mistake and somehow seek to qualify the previous answer that they gave to you.

Resist the temptation to offer several alternative theories and avoid becoming bogged down in reviewing uncontested or trivial matters (see Tip 15).

During a trial, make it a habit to get to court not just early but always before your opponent, every day. This may have the beneficial effect of making your adversary perceive you as perpetually ready!

Should the opposing advocate falter or blunder during a hearing don't gloat – you could be next! However, if they are 'digging a hole' for themselves, let them carry on – you're not there to save them.

As a general rule, when you run into a non-responsive witness, get control of them yourself. Don't ask the court to control the witness for you ie don't ask the judge to make the witness answer the question. Doing so may make you appear weak or unable to control the witness.

Tip 250

Trial strategy

When you want the jury to see something make sure that all the jurors can see it.

Trial strategy

Tip 251

In trials help your client to maintain control of their emotions – without resorting to the use of alcohol or some other form of medication!

Clarify a witness's non-verbal conduct and gestures in case the decision maker hasn't spotted it, perhaps because their attention is temporarily focused elsewhere, eg:

'You have raised your right hand with a closed fist, is that correct?'

Don't pass notes, whisper or tug the sleeve of co-counsel or lead counsel when they are examining a witness. It distracts both the examiner and any jurors and gives the appearance that you may lack confidence in the person carrying out the examination.