

## Witnesses

### A. Competency

Competency of a witness involves whether a person called as a witness is eligible to testify. The Board has not found any person incompetent to testify. This is consistent with current legal thinking that every adult person generally is competent to be a witness even if they are mentally ill or mentally deficient. In such cases, the weight of the testimony and credibility of the witness may be open to question, but the person still may testify. Of course, the actual content of witnesses' testimony can be objected to on such grounds as relevancy and privilege. A child has never been called as a witness in a Board hearing.

### B. Sequestering Witnesses

Board hearings are open to the public unless otherwise provided by law.<sup>1</sup> This has not prevented the Board from allowing the sequestering of witnesses upon the request of a party, even if the other party does not agree.<sup>2</sup>

### C. Witness Oath

When a witness is called by a party to testify, the Board Chairperson asks the witness:

“Do you solemnly swear that the evidence you shall give, relative to the cause now under consideration, shall be the whole truth and nothing but the truth?”

Once the witness answers in the affirmative, the witness may testify.

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<sup>1</sup> 3 V.S.A. §929. Appeal of Goderre, 4 VLRB 344 (1981).

<sup>2</sup> For guidance, see Vermont Rules of Evidence, Rule 615.

#### D. Types and Scope of Examination of Witnesses

Direct Examination - This is the first examination of a witness by the party who calls the witness to testify. The scope of permissible examination generally is any relevant evidence. The best form of questioning on direct examination is nonleading, open-ended questions. Leading questions are not appropriate generally on direct examination.<sup>3</sup> Leading questions suggest the desired answer to the witness. “You were scared, weren’t you?” would be an example of a leading question.

Leading questions would be appropriate on direct examination if preliminary matters are involved, the witness is hostile, or the witness needs his or her memory refreshed.<sup>4</sup> Examples of preliminary matters would be where an employee works, the job of an employee, the employee’s supervisors, and the educational background of an employee. In order to establish an element of a claim or defense, a party may find it necessary to call as a witness a person who favors the opposing party. Such a witness is called a hostile or adverse witness. Leading questions are allowed on direct examination of such a witness because the witness is outside the control of the party conducting direct examination.<sup>5</sup> The refreshing of a witness’s memory is discussed in Section VII of this Section.

Cross-Examination - This is examination by the party who did not call the witness, and immediately follows direct examination. Generally, the scope of examination is limited to matters covered on direct examination and matters affecting the credibility of the witness, although the Board may permit inquiry into additional matters as a matter of discretion.<sup>6</sup> Leading questions generally are permitted on cross-examination.<sup>7</sup>

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<sup>3</sup> For guidance, see Vermont Rules of Evidence, Rule 611(c).

<sup>4</sup> For guidance, see Vermont Rules of Evidence, Rule 611(c).

<sup>5</sup> For guidance, see Vermont Rules of Evidence, Rule 611(c).

<sup>6</sup> For guidance, see Vermont Rules of Evidence, Rule 611(b).

<sup>7</sup> For guidance, see Vermont Rules of Evidence, Rule 611(c).

Argumentative questions may be objected to during cross-examination, and the objection will be sustained if the Board Chairperson concludes that the question is argumentative. Argumentative questions elicit no new information; they simply state a conclusion, and ask the witness to agree with it. This is instead of just asking the witness to testify to facts within the personal knowledge of the witness. The context, tone and wording of the question is important here. An example of an argumentative question is: “Since you were 80 feet away, it was dark, and your vision was blocked by cars, you couldn’t actually see whether John Jones took a swing at his supervisor in the parking lot, could you?”

Redirect Examination - This is examination of a witness by the direct examiner subsequent to cross-examination. Redirect examination may cover topics raised for the first time on cross-examination.

Recross Examination - This is examination of a witness by the cross-examiner subsequent to redirect examination. Recross examination may cover topics raised for the first time on redirect examination.

#### E. Objections to Questions Asked Witnesses

If the representative of a party objects to a question asked a witness by the representative of the other party, the representative should state the objection upon the conclusion of the question and before the witness answers the question. The specific grounds for objection should be stated. The representative asking the question than should be allowed to respond to the objection. If the question is not rephrased or withdrawn, or the objection is not withdrawn, the Board Chairperson sustains or overrules the objection.

The reasons why a question may be objected to are numerous. Some common reasons are based on relevance, hearsay, privilege or improper impeachment. These areas are discussed in detail later in this Section in Sections V - VIII. The form of

the question also may serve as a proper basis for an objection, such as a question is leading, confusing or compound. A question also properly may be objected to as: 1) being repetitious in that it already was asked and answered, 2) assuming facts not in evidence, or 3) asking the witness to speculate.

An answer may be objected to on grounds such as relevance and hearsay. A common objection to an answer in Board hearings is that the answer is unresponsive to the question. If the answer is unresponsive, the Board chairperson directs the witness to respond to just the question asked.