

I Object!

– James Eckert, Esq.

Cross-Examination

Often, during cross-examination, the ADA will object, and the court will simply sustain the objection.

Your client has a right to confront and cross-examine the witnesses against him at trial, and the right to a fair trial. Your client has the right to due process of law at any proceeding, whether it's a trial or hearing. So you need to plow ahead with questioning when this happens. If the nature of the objection has actually been stated by someone, you can address the substance of the argument. If no basis for the objection has been put forth by either the ADA or the prosecutor, then you might say "I'll rephrase the question" in an effort to obtain some clarification regarding what one of them thinks you did wrong. You'd be surprised at how often the Judge and ADA think that telling you what the objection is constitutes "helping" you.

I won't run through all of the reasons the prosecution is wrong in their objections, but there are basic reasons why you should be permitted to question their witnesses: "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." (*Davis v Alaska*, 415 US 308, 316 [1974]). The court has discretion to limit cross-examination, but that doesn't mean the right itself is discretionary. You must be given the opportunity to test the witness's credibility or it's a denial of confrontation, due process and a fair trial.

For example, ADA elicits testimony on direct that the witness saw the whole thing from his porch, CX "where were you when this started", ADA "objection, asked and answered", you "Judge, if you want to dismiss the charges against my client I'd be happy to ask questions about a different event, otherwise I am afraid I'm going to have to ask about the same things the DA asked about". Your cross-examination can be curtailed if it is "too remote or speculative" (*People v Cullen*, 236 AD2d 808 [4th Dept 1997]), not simply because it is too time consuming or ineffective. Make the question more precise (where on the porch were you) or change the focus slightly (where were you just before this started). The object is to get to the same material you were after via a slightly different route, while not ignoring the ruling.

You are not restricted in cross-examination to asking "are you sure" and then sitting down when the witness says yes. You can ask questions concerning the witness's ability to perceive or recall events (intoxication, brain damage); interest or bias (hates the defendant, loves the complainant, gets the defendant's truck if he is convicted [yes, I had that one - you can even prove interest or bias with extrinsic evidence])[yes, the Appellate Division ruled in favor of the prosecution; Federal Court, not so much]); prior inconsistent

statements (e.g. that the witness was at work or had been abducted by aliens that day); is not a credible person (prior bad acts or criminal convictions) or any other legitimate basis to believe either that the witness is uncertain, mistaken or untruthful.

While I don't recommend the following for all Judges or all occasions, there is much to be said for simply keeping at it. When there is a fundamental disagreement, somebody is going to give up, you can win many of these arguments if that somebody is not you. Here is one place to watch and learn from the ADAs. The judge rules that they cannot do something, they just go right back to it, often without missing a beat. This is particularly true for you where there has been no actual legal ruling beyond "objection/sustained" because if the form of the question was the basis for the objection you can, you should, simply rephrase the question.