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Trial Objections

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Objection	Explanation	Authority
<u>Accountant (or Attorney)-Client privilege</u> That question calls for evidence that is barred by the accountant (or attorney)-client privilege.	While there was an attorney-client privilege at common law, there was none for accountants. Many states have statutes providing an accountant-client privilege, and Federal courts will look to state law to see whether a privilege exists.	<u>Attorney-Client:</u> 8 Wigmore, Evidence § 2292; FRE 501. <u>Accountant-Client:</u> FRE 501; state statutes, e.g., 225 ILCS 450/27 (Ill.); <i>Erie R. Co. v. Tompkins</i> , 304 U.S. 64 (1938).
* <u>Admission</u> That question calls for an admission by a non-party and as such is hearsay.	Admissions by a party are non hearsay and admissible even if: a) the party has no personal knowledge, b) it is not against the party's interest, or c) it is only an opinion. Even assertive conduct can suffice.	For admission by a party, see FRE 801(d)(2); <i>Northern Oil Co. v. Socony</i> , 347 F.2d 81 (2d Cir. 1965). For admissions by a non-party see FRE 801(c).
* <u>Ambiguous</u> The question is unclear.	An ambiguous question may confuse the witness, mislead the jury, or elicit a vague answer that is not susceptible to a motion to strike as non-responsive.	Rule 403, FRE. see § 411
* <u>Arguing the Case</u> Counsel is improperly arguing the case in opening statement.	Opening statement is a time to introduce the parties and the facts of the case, not to argue how those facts should be interpreted.	<i>Schwartz v. System Software Assoc., Inc.</i> , 32 F.3d 284 (7th Cir. 1994); for rulings on evidence generally, see FRE 103 and 104.
* <u>Asked and answered</u> The question has already been asked and answered.	Permitting excessive repetition places undue emphasis on particular evidence and wastes time.	Rule 403, FRE. see § 413.

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<p><u>Accountant (or Attorney)-Client privilege</u> That question calls for evidence that is barred by the accountant (or attorney)-client privilege.</p>	<p>While there was an attorney-client privilege at common law, there was none for accountants. Many states have statutes providing an accountant-client privilege, and Federal courts will look to state law to see whether a privilege exists.</p>	<p><u>Attorney-Client:</u> 8 Wigmore, Evidence § 2292; FRE 501. <u>Accountant-Client:</u> FRE 501; state statutes, e.g., 225 ILCS 450/27 (Ill.); <i>Erie R. Co. v. Tompkins</i>, 304 U.S. 64 (1938).</p>
<p><u>Admission</u> That question calls for an admission by a non-party and as such is hearsay.</p>	<p>Admissions by a party are non hearsay and admissible even if: a) the party has no personal knowledge, b) it is not against the party's interest, or c) it is only an opinion. Even assertive conduct can suffice.</p>	<p>For admission by a party, see FRE 801(d)(2); <i>Northern Oil Co. v. Socony</i>, 347 F.2d 81 (2d Cir. 1965). For admissions by a non-party see FRE 801(c).</p>
<p><u>Ambiguous</u> The question is unclear.</p>	<p>An ambiguous question may confuse the witness, mislead the jury, or elicit a vague answer that is not susceptible to a motion to strike as non-responsive.</p>	<p>Rule 403, FRE. see § 411</p>
<p><u>Arguing the Case</u> Counsel is improperly arguing the case in opening statement.</p>	<p>Opening statement is a time to introduce the parties and the facts of the case, not to argue how those facts should be interpreted.</p>	<p><i>Schwartz v. System Software Assoc., Inc.</i>, 32 F.3d 284 (7th Cir. 1994); for rulings on evidence generally, see FRE 103 and 104.</p>
<p><u>Asked and answered</u> The question has already been asked and answered.</p>	<p>Permitting excessive repetition places undue emphasis on particular evidence and wastes time.</p>	<p>Rule 403, FRE. see § 413.</p>

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<p><u>Assuming facts not in evidence</u> Assumes facts not in evidence.</p>	<p>The question assumes the existence of essential facts not previously established or testified to by the witness. The question infers the truth of the assumed facts and therefore is misleading.</p>	<p>Rule 403, FRE. <i>see</i> § 414.</p>
<p><u>Authentication</u></p>	<p>The document has not been properly authenticated. Authentication is a condition to the admissibility of all documentary evidence. The proponent must introduce evidence that the document is what it purports to be.</p>	<p>Rule 101, FRE. <i>see</i> § 317.</p>
<p><u>Best Evidence</u> The document offered is not the best evidence of the content of the writing, recording or photograph.</p>	<p>Best Evidence exceptions include: <u>copies</u> (FRE 1003), <u>computer documents</u> (FRE 1001(c)), <u>original unavailable</u> (FRE 1004(1)), <u>original unobtainable by process</u> (FRE 1004(2)), <u>original in possession of opponent</u> (FRE 1004(3)), <u>original a public record</u> (FRE 1004(4)), a <u>summary</u> (FRE 1006), and <u>testimony or written admission of a party</u> (FRE 1007).</p>	<p>FRE 1002. For X-rays, for example, you may always need the original. <i>Daniels v. Iowa City</i>, 183 N.W. 415 (Iowa 1924). For duplicates, <i>see</i> FRE 1003.</p>
<p><u>Beyond the Scope of the Direct</u> That question calls for evidence beyond the scope of the direct examination.</p>	<p>Most states follow this rule; the federal courts allow the trial court discretion with respect to matters affecting the credibility of the witness.</p>	<p>FRE 611(b); <i>United States v. McLaughlin</i>, 957 F.2d (1st Cir. 1992).</p>
<p><u>Bolstering</u> The question calls for evidence supporting the credibility of a witness whose believability has not been impeached.</p>	<p>Introduction of evidence of the truthfulness and honesty of a witness is irrelevant unless the witness's credibility has been impeached.</p>	<p>Rule 608(a), FRE. <i>see</i> § 418.</p>
<p><u>Business Record</u> The document offered is not a business record because it was not made in the regular course of the business, or it is unreliable because it contains other hearsay.</p>	<p>Regularly conducted business records are admissible as an exception to the hearsay rule under FRE 803(6). The problem arises when the document contains opinions or statements from third persons, or was prepared with an eye to litigation.</p>	<p>FRE 803(6); <i>Palmer v. Hoffman</i>, 318 U.S. 109 (1943); <i>Johnson v. Lutz</i>, 253 N.Y. 124 (1930).</p>

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<p>Character Evidence The question seeks evidence which is neither habit nor routine practice.</p>	<p>With limited exceptions, character evidence is generally not admissible to prove action and conformity therewith on a particular occasion.</p>	<p>FRE 404, 607, 608 & 609. <i>see</i> § 418.</p>
<p>Competence The competence of the witness has not been established.</p>	<p>Witnesses may lack competence to testify due to a lack of capacity, prior conviction, infancy, or other common law competency requirements.</p>	<p>Rule 601, FRE. <i>see</i> § 400-406.</p>
<p>Compound Question The question is compound because it asks for two or more facts of the witness simultaneously.</p>	<p>A question with too many predicates often confuses the witness or calls for a conclusion, and always creates a questionable response.</p>	<p>FRE 611(a); <i>United States v. Leon-Leon</i>, 35 F.3d 1428 (9th Cir. 1994).</p>
<p>Conclusion Called For The question calls for a conclusion.</p>	<p>At common law, witnesses could only testify to facts they observed. Today, some lay witnesses can testify to conclusions if their testimony is based on their perception and the testimony will assist the trial of fact.</p>	<p>FRE 701</p>
<p>Doctor-Patient Privilege That question calls for evidence that is barred by the doctor-patient privilege.</p>	<p>Like the accountant-client privilege, there was no doctor-patient privilege at common law. The vast majority of states, however, have enacted statutes protecting some communications between physicians and their patients. Federal courts will look to state law to see whether a privilege exists.</p>	<p>FRE 501; state statutes, e.g., 735 ILCS 5/8-2101(III.); <i>D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.</i>, 315 U.S. 447, 471 (1942).</p>
<p>Dying Declaration The question calls for testimony that does not fall within the dying declaration exception to the hearsay rule.</p>	<p>Dying declarations are an exception to the hearsay rule and are admitted on the assumption that someone who is about die will speak truthfully. Obviously, the physical condition of the speaker and the time between the statement and the injury or death is highly relevant.</p>	<p>FRE 804(b)(2). <i>See also</i> FRE 804 generally for other hearsay exceptions, FRE 803(l) for present sense impression, and FRE 803(2) for excited utterance.</p>
<p>Evasive Witness Counsel is leading the witness and the witness is not being evasive.</p>	<p>Leading questions are usually not permitted on direct examination unless the witness is hostile, evasive or an adverse party. When the witness is hostile to</p>	<p>For leading questions of an evasive witness, <i>see</i> FRE 611(c). For impeachment of your own witness, <i>see</i> FRE 607.</p>

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	you, do not hesitate to begin asking leading questions on direct. This is true even with your own witness.	
<p><u>Excited Utterance</u> That question calls for hearsay and does not qualify as an excited utterance.</p>	Excited utterances are an exception to the hearsay rule because they are generally considered trustworthy. Their trustworthiness, however, arises directly from their spontaneity. Watch for a time lapse between the statement and the event.	FRE 803(2). Keep in mind that under FRE 104(a) a federal court judge is not limited by the hearsay rule in passing upon preliminary questions of fact. Also, contrast the different standards for a present sense impression under FRE 803(1):
<p><u>Foundation, Expert Witness</u> Counsel has not laid an adequate foundation for the admissibility of the expert witness' opinion.</p>	Foundation for expert testimony is generally derived from either first hand observation, information presented to the expert during the trial, or documents, statements, or experiments obtained outside the trial which an expert would ordinarily rely on. The federal rules require that the expert testify to either scientific, technical or other "specialized" fields.	FRE 702 and 703. <i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i> , 113 S.Ct. 2786 (1993). Keep in mind that the expert opinion must also meet the relevancy standards of FRE 401, 402 and 403.
<p><u>Foundation, Fact Witness</u> Counsel has not laid an adequate foundation to establish the witness's personal knowledge of the subject matter.</p>	A witness may not testify to any matter unless sufficient evidence is introduced to support a finding of the witness's personal knowledge of the subject matter.	Rule 602, FRE. <i>see</i> § 429.
<p><u>The Golden Rule</u> Counsel is asking the jury to place themselves in the position of the plaintiff.</p>	Although one of the easiest ways to have a jury assess damage is to ask them to stand in the shoes of the plaintiff, or to ask them to place a reasonable person in the shoes of the plaintiff, both arguments are improper and highly prejudicial. Ask the jury to use their collective common sense instead.	<i>Burke v. Deere & Co.</i> , 6 F.3d 497 (8th Cir. 1993). You must object to a "Golden Rule" argument or the appellate review is one for plain error only. <i>Fleming v. Harris</i> , 39 F.3d 905 (8th Cir. 1994).
<p><u>Habit Evidence</u> The evidence does not establish a routine practice.</p>	In order to satisfy the admissibility for habit or routine practice, the proponent must establish that the behavior in question is a regular response to a repeated specific situation.	FRE 406. <i>see</i> § 418.

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<p>Hearsay That questions calls for the witness to testify to hearsay.</p>	<p>The universal factors to be considered in evaluating the testimony of a witness are perception, memory, narration and perhaps sincerity. In order to allow the trier of fact to consider these factors, it is imperative that no out of court statement offered to prove the truth of the matter asserted is allowed into evidence.</p>	<p>FRE 802; 5 Wigmore § 1367, p. 29. Note that statements which are not hearsay include prior statements by the witness under oath, and admissions by a party-opponent. FRE Rule 801(d)(1) and (2).</p>
<p>Hearsay Within Hearsay That question (document) calls for the admission of hearsay within hearsay.</p>	<p>Hearsay included within hearsay is also excluded under the hearsay rule unless each part of the combined hearsay conforms with an exception to the hearsay rule. This is true in most states and under the Federal Rules of Evidence.</p>	<p>FRE 805. <i>Arnbruster v. Unisys</i>, 32 F.3d 768 (3d Cir. 1994).</p>
<p>Hearsay Exceptions That question (document) calls for the admission of hearsay that does not fall within any hearsay exception.</p>	<p>Although exceptions to the hearsay rule have nearly swallowed the rule itself, if purported evidence does not fall within one of the exceptions, it should be excluded.</p>	<p>FRE 803 and 804. Note that different rules apply depending on whether the declarant is available or unavailable. Note also that the "catchall" exception provides for admission of reliable evidence that would otherwise be hearsay.</p>
<p>Insurance Coverage That question (or argument) makes improper reference to the presence or absence of insurance coverage in this matter.</p>	<p>The federal rules, and some states, make exceptions to this rule if the mention of insurance is offered for another purpose such as proof of ownership or control, or to show a bias or prejudice of the witness.</p>	<p>FRE 411. <i>City of Cleveland v. Peter Kiewit Sons' Co.</i>, 624 F.2d 749 (6th Cir. 1980).</p>
<p>Leading Questions Counsel is leading the witness.</p>	<p>An attorney is prohibited from asking leading questions on direct examination except to lay a foundation. Leading questions suggest the answer the examiner desires and can generally be answered "yes" or "no." Leading questions are frowned on because it allows counsel to testify instead of the witness.</p>	<p>FRE 611(c). Note that this principle does not apply when a party calls a hostile witness, an adverse witness, or a witness identified with an adverse party. FRE 611(c).</p>
<p>Medical Diagnosis That question (document) is hearsay because it is not admis-</p>	<p>Statements made by a person for purposes of medical diagno-</p>	<p>FRE 803(4); <i>White v. Illinois</i>, 502 U.S. 346 (1992).</p>

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sible under the medical diagnosis exception.	sis or treatment are an exception under the hearsay rule in federal court and most state courts. The reason is that statements of physical symptoms made to a physician arises from a motivation to be cured and thus carries a great deal of trustworthiness.	
Mental, Emotional or Physical Condition (State of Mind) That question calls for hearsay that is not admissible under the state of mind exception because it calls for a statement of memory or belief.	The exception relies on the statement's spontaneity to guarantee its trustworthiness. Keep in mind the exception generally only applies to prove the declarant's conduct, not the conduct of a third party, and wills are specifically included.	FRE 803(3). <i>United States v. Macey</i> , 8 F.3d 462 (7th Cir. 1993); <i>Mutual Life Ins. Co. v. Hillmon</i> , 145 U.S. 285 (1892).
Misleading The question calls for evidence that will mislead the jury.	Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.	Rule 403, FRE. see § 426
Narrative Called For That question calls for a narrative response.	Narrative testimony often contains irrelevant, objectionable, inadmissible and sometimes irresponsible evidence. Nevertheless, whether to allow this type of testimony is almost always within the sound discretion of the judge and is thus rarely overturned on appeal.	FRE 611(a); McCormick § 5.
Non-Responsive	The questioner is entitled to have the witness respond to the question being asked.	Rule 103(a)(1), FRE.
Opinion The question calls for improper opinion testimony from a lay witness.	Lay witnesses may only offer opinions which are rationally based on their perception and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. They may not testify, for example, to legal conclusions or opinions that require special expertise or training. The answer did not respond to the question.	Rule 701, FRE. see §§ 416, 424.1

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<p><u>Document Not Original</u> That document does not qualify as an original.</p>	<p>Many documents qualify as "originals" even though they are not the actual original document. Keep in mind that many "copies" can qualify as an original, but what is an original for some purposes may be a copy for other purposes.</p>	<p>FRE 1001, 1002, 1003. Rule 1004 sets forth the requirements when an original is not required, and Rule 1006 allows summaries of voluminous documents.</p>
<p><u>Prejudicial</u> The question calls for the introduction of prejudicial evidence.</p>	<p>Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.</p>	<p>Rule 403, FRE. see § 426</p>
<p><u>Prior Inconsistent Statement</u> That statement is hearsay and does not qualify as a prior inconsistent statement.</p>	<p>The use of prior inconsistent statements taken under oath by a witness who either denies making them, or denies the truth of the statement, as <u>substantive evidence</u>, is highly controversial. Remember that in addition to admitting a prior inconsistent statement as substantive evidence, you can always impeach the witness with it.</p>	<p>FRE 801(d)(1); <i>Gilbert v. California</i>, 388 U.S. 263 (1967).</p>
<p><u>Recorded Recollection</u> That question calls for hearsay which does not qualify as a recorded recollection exception to the hearsay rules.</p>	<p>A document is considered trustworthy because a record made at the time events are still fresh in the author's mind are usually accurate. The problem arises, of course, when people record matters with an eye towards litigation. This is the reason generally given for why a witness must testify to no longer having a recollection of the events recorded in order to read the document into evidence.</p>	<p>FRE 803(5); <i>United States v. Kelly</i>, 349 F.2d 720 (2d Cir. 1965). Multiple authors may not affect the admissibility of the document or testimony. <i>Rathbun v. Brancatella</i>, 107 A. 279 (N.J. 1919).</p>
<p><u>Relevance</u> The question calls for evidence which is not relevant</p>	<p>Only relevant evidence is admissible - that is, evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.</p>	<p>FRE 401. see § 423</p>

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<p>Reputation That question calls for hearsay which does not qualify as reputation evidence under the exception to the hearsay rule.</p>	<p>Note that reputation evidence is different from character evidence. It would seem that reputation evidence is the most blatant example of hearsay, yet whether a family pedigree, land boundaries or character, it has uniformly been an exception to the hearsay rule.</p>	<p>For reputation evidence, see FRE 803(19), (20) and (21). As to character evidence in general, see FRE 404, 405, and 608. Note that reputation and character evidence are different from habit evidence. See FRE 406.</p>
<p>Self-Serving The question calls for a self-serving consistent statement of the witness.</p>	<p>Prior consistent statements cannot be introduced until the witness' testimony is attacked by a claim of recent fabrication.</p>	<p><i>Miller v. Field</i>, 35 F.3d 1088 (6th Cir. 1994); see § 427.</p>
<p>X Speculation The question calls for the witness to speculate or guess.</p>	<p>A lay witness may only testify about facts within his personal knowledge or matters he personally perceived.</p>	<p>Rule 602, 701 FRE.</p>
<p>Summaries The question calls for the introduction of a summary of voluminous documents without satisfying the foundation required by Rule 1006.</p>	<p>The contents of voluminous records may only be presented in summary form if they are voluminous and have been made available for examination and copying by the opposing party.</p>	<p>Rule 1006, FRE.</p>
<p>Verbal Acts That question calls for hearsay not admissible as a verbal act.</p>	<p>Verbal conduct to which the law attaches duties and liabilities is not hearsay. Examples include offers, acceptances, slander, conspiracies, and signed instruments such as wills, contracts and promissory notes.</p>	<p><i>Kepner-Tregoe, Inc. v. Leadership Software</i>, 12 F.3d 527 (5th Cir. 1994). For a criminal case allowing conversations proving a conspiracy, see <i>United States v. Lim</i>, 984 F.2d 331 (9th Cir. 1993).</p>