

## Ambiguous Questions

### Objection

- *Objection. The question is ambiguous (or vague).*

### Response

None recommended.

### Cross-Reference to Texas [Rule 611\(a\)](#)

No Texas rule specifically covers forms of questions. The court has discretion to sustain the objection pursuant to [Rule 611\(a\)](#).

### Explanation

This objection should only be made when, in the judgment of objecting counsel, the question will mislead the jurors or witness to the detriment of counsel's client. This type of objection seems to encourage a speaking objection about the nature of the defect (*Objection. The question is ambiguous because ...*). The usual effect of such an objection is to make the opponent a better lawyer by forcing a more precise question. If the question seems designed to confuse the jurors, objecting may communicate to the jurors that objecting counsel is concerned with clarity and truth-finding in the trial process.

A judge may well respond to this objection by asking the witness if the witness understands the question. If the witness understands the question, the question will be allowed to stand. Otherwise, questioning counsel will be required to rephrase the question.

## Argumentative Questions

### Objection

- *Objection. The question is argumentative.*

### Response

None recommended.

### Cross-Reference to Texas [Rule 611\(a\)](#)

No Texas rule specifically covers forms of questions. The court has discretion to sustain the objection pursuant to [Rule 611 \(a\)](#).

### Explanation

This objection applies to questions on both direct and cross-examination. It may be appropriate where counsel attempts, in question form, to summarize the testimony of the witness, comment on the evidence, or draw inferences from the evidence, essentially making an argument to the jurors during the questioning process. This objection may also be proper when the witness has answered the question, but counsel continues to make the same inquiry, usually in louder or more strident tones. An alternative objection may be “asked and answered.”

Deciding whether counsel is arguing with the witness via question is subjective and will depend on the judge’s perception and counsel’s demeanor and prior conduct, and it may vary significantly from court to court. The line between good, aggressive cross-examination and improper argumentative interrogation is a fine one.

### Practice Tip

Research your judge by asking other attorneys who have tried cases in that court about the judge’s preferences, patience, and tolerance for argument in questions.

## Asked and Answered/Cumulative

### Objection

- *Objection. The question seeks testimony that is cumulative.*
- *Objection. The question has been asked and answered.*

### Response

- *The witness has not answered the question.*
- *Rather than being cumulative, the witness's testimony corroborates other testimony.*
- *This witness's testimony is additive, not cumulative because (state what makes this particular witness's testimony distinctive or needed for the jurors).*

### Cross-Reference to Texas [Rule 403](#)

### Explanation

While “asked and answered” is technically not grounds for exclusion, it may have practical juror appeal. Use this objection when a witness is being badgered on a topic on which the witness has already testified. It can also be effectively used to point out that the questioning attorney is wasting the court's and the jurors' time by asking needlessly repetitive questions.

### Practice Tip

Adopting a world-weary tone of voice can add to the jury appeal of this objection: “Your Honor, we have heard this same question over and over and over. It has been asked and answered.”

## Assuming Facts Not in Evidence

### Objection

- *Objection. The question assumes a fact not in evidence. There has been no testimony (or exhibit) that establishes (insert facts that have been assumed).*

### Response

- *I will prove that fact in my next question.*
- *That fact has been proved during the earlier testimony of (assert name of witness).*
- *This fact will be proved during the testimony of (assert name of witness).*
- *This fact has been established by exhibit (give the number).*
- *This fact helped form the basis of this expert's opinion.*

### Cross-Reference to Texas [Rule 611\(c\)](#)

### Explanation

This objection should be made when objecting counsel is confident that the witness cannot testify to the assumed fact and that the fact has not been established through an admitted exhibit. If the witness can testify to the assumed fact and questioning counsel knows how to ask the question, the objection may highlight an unfavorable fact or diminish the credibility of the objecting attorney. In addition, the objection may have the unintended effect of making the opponent a better lawyer or providing a firmer foundation for the fact.

## Compound (Multifarious) Questions

### Objection

- *Objection. The question is multifarious (or compound).*

### Response

- *None is recommended.*

### Explanation

The vice of a multifarious question lies in its tendency to cause the jurors to be confused by the testimony. A “yes” answer to a two-part question leaves the jurors (and record) unclear about whether the witness is affirming the first query, the second, or both. The potential for confusion is obvious. Not only are the jurors confused, the appellate record may be unclear as well.

As with many objections to the form of a question, the effect may be to sharpen the question into a clearer and more effective one for the questioner. Because the question is easily rephrased, the objection often gives the appearance that objecting counsel is being hypertechnical. The objection, then, is best made only when the multifarious question is likely to mislead the jurors to the detriment of the objecting party or when failing to clarify creates proof problems.

# Form Objection

## Generally

### Cross-Reference to Texas [Rule 611](#)

#### Explanation

Objections to the form of a question usually are employed to control opposing counsel. That is, they can be used to require opposing counsel to proceed in question and answer form, asking one clear question at a time, with answers on direct coming from the witness rather than counsel. Form objections have no utility in either excluding evidence totally or preserving error for appeal.

The ruling on a form objection is purely a matter of judicial discretion. The court has authority to exercise its discretion to control the mode of interrogating witnesses under [Rule 611\(a\)](#).

#### Practice Tip

[Texas Rule of Civil Procedure 199.5\(e\)](#) limits objections to questions in a deposition to the form of the question or to a leading question. Objecting to the form of an improper question at a deposition is mandatory or the objection is waived at the time of trial. Similarly, the rule does not permit the objecting party to state the basis of the objection during the deposition, but on request, the objecting party must give a “clear and concise explanation of an objection or the objection is waived.” A poorly phrased or incomplete basis may waive the objection.

# Character Evidence

## The Alleged Victim of Assaultive Conduct

### Objection

- *Objection.* The question calls for (or answer provides) evidence of character offered to show propensity.

### Response

- *This testimony is offered to show the character trait for violence (or peacefulness) of (specifying name of alleged victim of assaultive conduct) pursuant to [Rule 404\(a\)\(2\)](#) on the issue of self-defense.*

### Cross-Reference to Texas [Rule 404\(a\)\(2\)](#)

### Explanation

In criminal cases, this exception to the propensity rule applies to all types of prosecutions, except those that would be covered by [Rule 412](#) (sexual assault, aggravated sexual assault, attempt to commit sexual assault, or aggravated sexual assault). Most commonly, however, it is invoked when the defendant is charged with assaultive conduct and the defendant alleges self-defense (see, e.g., *Torres v. State*, [117 S.W.3d 891 \(Tex. Crim. App. 2003\)](#)). In civil cases, [Rule 404\(a\)\(2\)](#) permits a party accused of assaultive conduct, usually the defendant, to offer evidence, by way of opinion or reputation, regarding the victim's violent character.

### Rebuttal Evidence

When the defendant puts in issue the character of the victim, the prosecution—or the plaintiff in a civil case—may rebut with contrary evidence of the victim's character (*Reyna v. State*, [99 S.W.3d 344 \(Tex. App.—Fort Worth 2003\)](#)). Rebuttal evidence must concern the victim's character and not the defendant's. Evidence of the defendant's character for violence used to rebut the inference that

# Character Evidence

## Character of the Accused Party

### Objection

- *Objection. The question calls for (or answer provides) evidence of character offered to show propensity.*

### Responses

- *This evidence is offered to show the character trait for (specifying pertinent character trait) of (specifying name of party accused of conduct involving moral turpitude) pursuant to [Rule 404\(a\)\(1\)](#).*
- *They have opened the door on character by offering evidence of the pertinent character trait.*

### Cross-Reference to Texas [Rule 404\(a\)\(1\)](#)

### Explanation

#### **Criminal Cases**

[Rule 404\(a\)\(1\)\(A\)](#) allows a defendant in any criminal case to offer character evidence, by reputation or opinion, to show his own good character, but only regarding a character trait pertinent to the case. Thus, the defendant is allowed to show that based on past behavior, he would not have been likely to commit the crime. For example, a defendant accused of driving under the influence might use his reputation as a teetotaler to demonstrate he would not have been drinking and driving. The state is permitted to rebut with character evidence that suggests that the defendant's past actions show he was likely to have committed the crime.

#### **Civil Cases**

[Rule 404\(a\)\(1\)\(B\)](#) allows a party charged with conduct involving moral turpitude to oppose the charge with character evidence, by

reputation or opinion witnesses, of the pertinent character trait to show his propensity to not engage in the conduct alleged.

### ***Methods of Proof***

A party's offer of character evidence under [Rule 404\(a\)\(1\)](#) is often called "putting character in issue." This is misleading because it might lead a party to believe it is proper under [Rule 405\(b\)](#) to offer character evidence by way of specific instances of conduct. This is not permitted. Only opinion or reputation testimony is admissible under [Rule 404\(a\)\(1\)](#). Rebuttal testimony offered by the opposing party to show a propensity to commit the charged conduct is also limited to opinion or reputation testimony.

Thus, a defendant accused of fraud might call a witness to establish the defendant's reputation or offer an opinion as to the defendant's honesty. The witness could not testify to specific dealings he had with the defendant in which the defendant acted honestly, but could testify on his opinion of the defendant's character for honesty or his reputation for honesty in the community. The plaintiff could then call witnesses to establish a reputation for sharp business practices or to offer the opinion that the defendant was not honest.

## Character Evidence

### Other Wrongs or Acts

#### Objection

- *Objection. The question calls for (or answer provides) evidence of character offered to show propensity.*

#### Response

- *This evidence is offered not to show propensity, but rather to prove*
  - » *motive, in that* (specifically explaining how motive is shown); or
  - » *opportunity, in that* (specifically explaining how opportunity is shown); or
  - » *intent, in that* (specifically explaining how intent is shown); or
  - » *preparation, in that* (specifically explaining how preparation is shown); or
  - » *plan, in that* (specifically explaining how plan is shown); or
  - » *knowledge, in that* (specifically explaining how knowledge is shown); or
  - » *identity, in that* (specifically explaining how identity is shown); or
  - » *absence of mistake, in that* (specifically explaining how absence of mistake is shown); or
  - » *absence of accident, in that* (specifically explaining how absence of accident is shown); or
  - » *same transaction contextual evidence; or*
  - » *dangerousness of the instrumentality (or premises), in that* (specifically explaining how dangerousness is shown).

## **Cross-Reference to Texas Rules 404 and 412, and Art. 38.37, Tex. Code Crim. Proc.**

### **Explanation**

Rule 404(b) is not an exception to the general rule forbidding the use of character evidence to show propensity. Rather, Rule 404(b) merely makes explicit what should be self-evident: evidence not offered to prove propensity is not excluded by the propensity rule. Rule 404(b) illustrates other purposes for such evidence that would not run afoul of the propensity rule. Admissibility of evidence offered to prove one of these other purposes is actually determined under the ordinary relevance rules—Rules 401, 402, and 403 (see, e.g., *Huddleston v. United States*, 485 U.S. 681, 682 (1988) (motive, opportunity, knowledge); *Porter v. State*, 623 S.W.2d 374, 376 (Tex. Crim. App. 1981) (motive, intent); *Lane v. State*, 933 S.W.2d 504 (Tex. Crim. App. 1996) (identity); *Powell v. State*, 63 S.W.3d 435 (Tex. Crim. App. 2001) (absence of mistake); *Wesbrook v. State*, 29 S.W.3d 103 (Tex. Crim. App. 2000) (same transaction, *res gestae*)).

### **Notice in Criminal Cases**

The requirement of notice of intent to use such evidence applies only in criminal cases—and only if the defendant timely requests notice before trial. If the defendant properly requests notice and the state desires to offer evidence under Rule 404(b) in its case-in-chief, then the state must provide notice and the evidence to defendant. A prosecutor's open-file policy does not satisfy the notice requirement. The state need not give notice of rebuttal evidence or same transaction contextual evidence.

### **Character of the Accused in Sexual Assault Cases**

Rule 412 is the Texas version of the rape shield law for victims of sexual assault. Under this rule, evidence of the victim's prior sexual conduct or misconduct is not admissible, other than under the express exceptions of art. 38.37.

### **Character of the Accused in Sexual Assault Cases**

## Character Evidence

### Propensity Rule; Character as an Element of a Claim or Defense

#### Objection

- *Objection. The question calls for (or answer provides) evidence of character offered to show propensity.*

#### Response

- *This evidence is offered not to prove propensity, but rather to show character for (specifying character trait at issue), which is an essential element of our claim (or defense) of (specifying claim or defense).*

#### Cross-Reference to Texas [Rules 404](#) and [405](#)

#### Explanation

##### *Propensity Rule*

[Rule 404](#) states the general rule that evidence of a person's character is not admissible as proof that such person, whether or not a party, has acted in conformity therewith. Character evidence is generally inadmissible to prove propensity. For example, in a motor vehicle accident case arising where the plaintiff claims that the defendant was speeding and thus negligent, evidence that the defendant is generally a negligent driver or generally speeds is not admissible to prove that he was negligent on the occasion in question. Similarly, evidence that the defendant is a careful driver is inadmissible to show the exercise of care on the occasion in question.

##### *Opinion and Reputation Testimony*

**Rule 405** provides that character evidence may be proved, where relevant, by way of reputation or opinion evidence—and in more limited circumstances, by specific instances of conduct. A character witness will be allowed to testify about reputation or opinion regarding the pertinent character trait only *after* an appropriate predicate is laid. With respect to reputation evidence, the character witness must testify that he has heard talk among members of the community regarding the person’s character trait. When character evidence is offered by way of opinion, the character witness must offer evidence that he knows the person whose character trait is in issue and is familiar with that person’s particular character trait.

### ***“Have You Heard” Questions***

A character witness who testifies about reputation or opinion may be cross-examined concerning specific instances of conduct by the person about whom character evidence has been given, as long as the conduct is inconsistent with the testimony of the character witness. Cross-examination utilizing specific instances of conduct to impeach the witness testifying about character; it may not, however, be used to attack the character of the witness whose character is in issue. This type of cross-examination of the character witness derives from the theory that either the character witness has incomplete information on which to base the reputation opinion or the character witness has an inappropriate notion of what constitutes good character.

## Habit and Routine Practice

### Objection

[After habit response to initial relevance objection]

- *I object. This evidence is irrelevant because it is such an isolated occurrence that it is insufficient to constitute a habit or routine practice. There has been no showing of the frequency of the situation and the regularity of the response required to constitute a habit under [Rule 406](#).*

### Response

- *This evidence is relevant because it shows a consistent habit or routine practice that raises a permissible inference that (name of party or organization) likely acted in this case according to the habit or routine practice.*

### Cross-Reference to Texas [Rule 406](#)

### Explanation

To be admissible, habit evidence must be “a regular response to a repeated specific situation” (*Oakwood Mobile Homes, Inc. v. Cabler*, 73 S.W.3d 363, 375 (Tex. App.—El Paso 2002)). In other words, the response must be the same specific one to the same set of facts (*Waldon v. City of Longview*, 855 S.W.2d 875, 879–80 (Tex. App.—Tyler 1993)). One to two examples is insufficient to demonstrate a habit (*Felix v. Gonzalez*, 87 S.W.3d 574, 579 (Tex. App.—San Antonio 2002)); *McClure v. Landis*, 959 S.W.2d 679, 681 (Tex. App.—Austin 1997); *Ortiz v. Glusman*, 334 S.W.3d 812 (Tex. App.—El Paso 2011)).

By its nature, habit or routine practice testimony is circumstantial proof that certain conduct—or an act consistent therewith—occurred (see, e.g., *Pursley v. Dretke*, 114 F. App'x 630, 633 (5th Cir. 2004)). Habit or routine practice evidence is only necessary in the absence of direct evidence of such conduct or act. However, in situations

where the direct evidence is impeachable, the habit or routine practice can have substantial tactical value. [Rule 406](#) represents a departure from the common law in two respects. First, [Rule 406](#) allows habit and routine practice evidence even where there is firsthand or direct evidence of the event in question. Second, habit and routine practice evidence is admissible without corroborating evidence. Habit may be established by opinion testimony of evidence of specific instances of conduct.

### **Practice Tip**

Setting the parameters for the “set of facts” and the “same response” can be critical to admissibility of habit evidence. Whether the set of facts/situation is defined broadly or narrowly to establish a consistent response will depend on the nature of the claims and the nature of the available evidence of a habit.