

35-05 P U D T**Main Points of Examination of Witness****1. Presidency of the Proceedings of a Chief Administrative Judge**

A chief administrative judge initiatively presides over the proceedings including the following item 2. and ex officio (supplementary) examination to facilitate an examination of witness (Patent Act Article 138(2), Utility Model Act Article 41, Design Act Article 52, Trademark Act Article 56(1)).

A permission of a chief administrative judge is necessary for taking a photograph, writing stenography, audio recording, video recording or broadcasting.

2. Prohibited Questions

Questions shall be asked concretely and individually insofar as possible. A chief administrative judge shall take a measure to have a person who asks questions change the way of asking the questions, etc. if the questions are not a question-and-answer format but are conclusive and abstract manner, or the questions are made that a witness tells a story (Enforcement Regulations of the Patent Act Article 58-8(1), Enforcement Regulations of the Utility Model Act Article 23(12), Enforcement Regulations of the Design Act Article 19(8), Enforcement Regulations of the Trademark Act Article 22(5)(6), Code of Civil Procedure Articles 114, 115). The following questions (1) ~ (6) are prohibited (however, except a type of (1), this does not apply if “reasonable grounds” exist). A chief administrative judge may restrict questioning by request or his/her authority if a prohibited question is asked (Enforcement Regulations of the Patent Act Article 58-8(2)(3), Enforcement Regulations of the Utility Model Act Article 23(12), Enforcement Regulations of the Design Act Article 19(8), Enforcement Regulations of the Trademark Act Article

22(5)(6), Code of Civil Procedure Articles 114, 115, Restriction of Questions (→ 35-04 7.), Opposition of Parties (→ 35-04 8.)

(1) Questions that insults or confuses a witness

(2) Leading questions

Leading questions are prohibited due to the risk of the content of testimony being manipulated by giving an unfair suggestion. However, guidance for the premise that is undisputed or guidance for memory recall has reasonable grounds and qualifies for effective proceedings.

(3) A question that is duplicate with a question being previously asked

However, when testimony that contradicts any previous testimony due to an obvious misunderstanding or oblivion, it is considered there are reasonable grounds.

(4) Questions asking for a statement of opinion

It is not allowed to ask mere opinions or impressions that are not facts, or opinions that need expert knowledge from a person without qualification (it is allowed for an expert witness). However, it is allowed to ask about determination on identity of persons or objects, handwriting, nature, ability, age, etc. Even if a witness states opinions (for example, easiness), not only are they often useless to prove factum probandum, but also a person who asks questions and a witness are likely to have unprofitable discussion, and as a result this tends to waste of time of the examination.

(5) Questions asking for a statement of facts that a witness has not directly experienced

This is a question for hearsay evidence, and it shall not be asked in principle. It is considered to have a reasonable ground if there are circumstances such as the death of the third party who has directly experienced said facts and the testimony is not available.

(6) Questions not related to points of issue

3. Smooth Progress of Examination of Witness

A chief administrative judge initiatively presides over the proceedings while paying attention to the following points to facilitate an examination of witness.

(1) A chief administrative judge encourages to promote an examination when an actual examination takes more time than originally scheduled.

(2) A chief administrative judge decides and notifies a conclusion to the parties in court or notifies a conclusion after the court is adjourned and a panel discusses in a waiting room, when the parties disagree about how to proceed the examination, etc. If a chief administrative judge may not determine due to unforeseen circumstances, the court is adjourned and a panel discusses immediately (If necessary, a panel inquires the concerned persons by telephone, etc. from a waiting room and draws a conclusion.)

(3) It is necessary to take a break once an hour or two (usually once every 45-90 minutes).

(4) A chief administrative judge shall interrupt the speech and give clear directions to the parties when they become an argument, their statements become redundant, or the content of the examination is unclear.

(5) When a person who asks questions approaches a witness for examination, a chief administrative judge encourages that person to examine from his/her own seat (Especially, it is perceived that the witness is uncomfortable).

(6) A chief administrative judge may have the specific audience leave from court during a witness makes statements after hearing an opinion of parties and intervenors for maintaining the order of the court, or for the reason that the witness may not make sufficient statements before the specific audience who intimidates the witness (Enforcement Regulations of the Patent Act Article 58-14, Enforcement Regulations of the Utility Model Act Article 23(12), Enforcement Regulations of the Design Act Article 19(8), Enforcement Regulations of the Trademark Act Article 22(5)(6)).

(7) During opening of court, it is usually prohibited from photographing, stenographing, audio recording, video recording or broadcasting provided that they are allowed with permission of a chief administrative judge. If it is found a party or an audience who does such an act, a court clerk gives a notice “please do not take a picture as it will disturb the order of the court” and keeps the person from doing such an act or orders the person to leave the court (If there is a person who has already taken photos, leave this issue to a court clerk. Video recording, photographing or audio recording is possible before opening the court.)

4. How to Testimony

(1) When a witness turns to a person who asks questions and testifies, the witness is urged to testify in facing the front (to the direction of a chief administrative judge).

(2) Since a statement of a witness should be based on memory of the witness, the statement shall be made orally in principle. However, a precise testimony may be obtained by referencing appropriate documents or by writing down drawings, figures, etc. in making statements in the case that the technical content is complicated, etc. The following examination method is accepted.

A. A witness may make statements based on documents with permission of a chief administrative judge (Patent Act Article 151→Code of Civil Procedure Article 203), and a person who asks questions may use documents, drawings, photographs, models, devices and any other appropriate articles (hereinafter referred to as “documents, etc.” in this section 35-05) with permission of a chief administrative judge for the examination (Enforcement Regulations of the Patent Act Article 58-9(1), Enforcement Regulations of the Utility Model Act Article 23(12), Enforcement Regulations of the Design Act Article 19(8), Enforcement Regulations of the Trademark Act Article 22(5)(6)). A document, etc. used for the examination should be the original or real, and if it has not

been examined as evidence, an opportunity of inspection of the document shall be given to the opposite party before the questions are made in principle. When a witness makes statements based on documents, etc., examination records shall include to that effect. Attachment of the presented documents to the records or if it is deemed necessary submission of a copy of the presented documents, etc. may be requested to the parties or intervenors.

B. A chief administrative judge may order a witness to take necessary actions such as writing characters, a numerical formula, a structural formula, schematic drawings, etc. when it is deemed necessary (Enforcement Regulations of the Patent Act Article 58-12, Enforcement Regulations of the Utility Model Act Article 23(12), Enforcement Regulations of the Design Act Article 19(8), Enforcement Regulations of the Trademark Act Article 22(5)(6)). In this case, a witness shall add a name of machine, a name of parts and a brief explanation and never fails to sign on the writing.

(3) When making an audio tape, etc. a part of trial records, a document containing the transcription of the audio tape is prepared. It is preferable that the following points should be noted to facilitate preparation of the document containing transcription and to clearly understand the content of remarks from an audio tape or a document containing transcription.

A. A chief administrative judge states a name of a person who makes examination every time the person changes.

B. When a technical term or a professional academic term is used in testimony, a chief administrative judge has a witness make the statement clearly or repeat the statement in some cases.

C. A chief administrative judge has a witness identify the target specifically as much as possible when testimony includes a demonstrative pronoun such as "it", etc. and it may make the target unclear.

5. Termination of Examination of Witness

If certain conviction has been obtained on matters to be proved and as a result, the scheduled remaining examinations has become unnecessary to conduct, the examination of witness shall be terminated at that point.

6. Others

(1) When a witness who is difficult to hear is given a question in writing, or a witness who is difficult to talk replies in writing, a chief administrative judge may have a trial clerk recite the document describing the question or the reply (Enforcement Regulations of the Patent Act Article 58-15, Enforcement Regulations of the Utility Model Act Article 23(12), Enforcement Regulations of the Design Act Article 19(8), Enforcement Regulations of the Trademark Act Article 22(5)(6), Rules of Civil Procedure Article 122).

(2) When a commissioned administrative judge (→35-11) examines a witness, the commissioned administrative judge conducts the duties of an administrative judge and a chief administrative judge (Enforcement Regulations of the Patent Act Article 58-18, Enforcement Regulations of the Utility Model Act Article 23(12), Enforcement Regulations of the Design Act Article 19(8), Enforcement Regulations of the Trademark Act Article 22(5)(6), Rules of Civil Procedure Article 125).

(3) A chief administrative judge may take various measures to protect a witness in an examination of witness (→35-01 11.)

(Revised December 2020)