TRIAL OBJECTIONS

The Orderly Art of Making Objections

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Victory at trial is generally dictated by the quality of the evidence and not by the skills of the lawyer. It is the lawyer who racks up the best evidence who usually walks away with the verdict.

Nonetheless, the skillful trial lawyer can influence that verdict if he utilizes his knowledge of the law to shut down his opponent's flow of evidence and if he does it in an orderly way.

The lawyer's tool for shutting down that evidence is the objection. Objections are defensive rather than offensive in nature. Seldom will a lawyer win his case based on his objections alone. However, should he fail to object at critical times, he can lose his case in a heartbeat.

Making objections is an art, not a science. To make objections the trial lawyer relies on a combination of his legal knowledge, judgment and instincts. He must know when and how-to object, what objections to make, and instinctively whether to make any objections at all.

When and How-to Object

The cardinal rule for objections is to make them timely and make them specific. Objections made in an untimely fashion, or which fail to state proper grounds, or no grounds at all, are ineffective and routinely overruled.

Objections should be made immediately following the question, but before the witness begins to respond. Once the answer is given, an objection is of no value since the jury will have heard the objectionable evidence. If the answer beats the objection, counsel should ask that the answer be stricken, and the jury instructed to disregard the answer. Unfortunately, once the jury has heard the answer, it is almost impossible for them to forget it. Even when the judge instructs the jury to disregard the testimony, this act alone may reinforce or highlight the objectionable testimony rather than eliminate its danger. Once the cat is out of the bag, the jury will have observed the animal. Few jurors can go through the mental gymnastics required to erase the memory of the size and color of the cat they are not permitted to see. Can a juror, on command, forget that the cat was big and fluffy and yellow in color?

Nonetheless, if this objection is untimely, counsel should move to strike and move for an instruction to disregard.

In addition to being timely, objections should be specific. The Nebraska Rules of Evidence at Neb. Rev. Stat. § 27-103(1)(a) requires counsel to state "the specific ground of objection, if the specific ground is not apparent from the context…." Failure to do so will waive any claim of error on appeal, even if the evidence is clearly inadmissible. An

objection should be neither a narrative nor a speech. A "speaking objection" is itself objectionable. However, neither should it be terse. The objection should identify to the Court the precise reason, or reasons, the evidence is inadmissible, or why the question is improper.

For the purposes of appeal, it might be sufficient to state simply "objection – hearsay", but the trial objection should not be primarily aimed at an appellate court. The objection should be artfully phrased to persuade the trial judge to exclude the evidence so there will be no need to appeal. Accordingly, in a criminal case, counsel should tell the judge exactly what he believes the prosecutor's evidentiary violations to be.

Instead, counsel should state: "Objection, Your Honor, hearsay – the officer is improperly reading from his report", or "Objection, Your Honor, the exhibit is an improper summary designed to improperly influence the jury." An objection made in this manner accomplishes two things. First, it makes clear to the trial judge the exact grounds for the objection, increasing the likelihood that it will be sustained. Second, it tells the jury in plain language what the prosecutor is doing is simply not proper.

Accordingly, when warranted, counsel should not hesitate to characterize a "foul" as a "foul" and use such modifiers as "improper" or "unreliable". Most jurors will not grasp the meaning of "hearsay" or the impact of the "best evidence rule." However, they all understand the meaning of "improper" or "unreliable" and use of these terms will heighten the evidentiary concern of the trial judge.

Objections should also state all grounds for the trial judge and for the record. Evidence may be inadmissible because it lacks foundation, it is hearsay, it is not the best evidence, it is irrelevant, it is prejudicial and inflammatory, and it may mislead or confuse the jury – all at the same time. If so, all these grounds should be stated. By being complete as to the grounds, counsel will increase the chances of a favorable ruling from the Court and decrease the possibility of being zapped on appeal.

After objection, if the Court admits evidence for a limited purpose, or against one of the other defendants only, counsel should immediately aske the Court to clearly instruct the jury as to the ramifications of that limitation.

When objecting, counsel should state the objection both loudly and clearly enough to be heard by the Court and by the witness. It is essential that the witness, if he has begun to answer the question, hear the objection so that the objection will stop him in his tracks. If the witness answers so quickly that counsel has no time to object, counsel should ask the Court to instruct the witness not to answer any question until counsel has time to interpose an objection.

Finally, objections must be made consistently and continually throughout the trial. Even though your first objection may have been sustained, the prosecutor may try and try again. Each attempt requires an objection. If your objection is overruled, counsel may elect to ask the Court's permission to show a continuing objection to that particular line of questions. However, the continuing objection ends when the subject of the questioning changes.

To Object or Not to Object

Objections are like questions during cross-examination. They should never be made unless to accomplish a particular purpose. Objections are employed for specific reasons. First, objections keep the jury from being exposed to inadmissible evidence – evidence that can assist in convicting the client. Second, objections preserve the record for a later appeal, should the client be convicted. Third, objections can be employed tactically to break the stride of the opponent, to stop a witness on a roll, or to slow down the momentum of the case.

In a criminal case, prosecutors invariably ask improper questions or attempt to adduce inadmissible evidence. However, counsel never objects to every improper question or at every available opportunity. Counsel should object selectively. When the evidence is harmless, even though technically inadmissible, counsel may prudently elect not to object. Objections interfere with the smooth course of a trial; so, if the evidence is of no consequence, will prolong the testimony, or risk annoying the jury, counsel should refrain from objecting. Objections should be reserved for important, material or disputed matters.

Frequently, the prosecutor's evidence, even though irrelevant or otherwise inadmissible, might directly or indirectly benefit the client. To object here would be a mistake. Such evidence might provide the lawyer with the opportunity to exploit it later in some fashion. It might open up productive areas for cross-examination, provide fruit

for effective impeachment or rebuttal, or supply a helpful fact which will fit into the theory of defense when argued during closing.

Objections can sometimes be a counter-productive. If the jury has become bored or inattentive as a result of the endless presentation of unnecessary facts, or during a witness' fatiguing testimony, any objection might cause the jury to refocus their attention on the prosecutor's case. Counsel may decide to forego any objection to allow the prosecutor to continue to bore or frustrate the jury, rather than awaken them from a nap.

What Objections to Make

There is no limit to the number of objections counsel can make. For every reason that evidence might be inadmissible, or conduct improper, there are grounds for an objection. There is no exhaustive list that contains every possible objection that a lawyer might make during the course of a trial. However, there are approximately 65 frequently and commonly accepted objections made in the courtroom.

These objections fall into five categories:

1. TO THE FORM OF THE QUESTION;
2. TO THE NATURE OF THE ANSWER;
3. TO EXHIBITS;
4. TO CONDUCT OF COUNSEL;
5. TO CONDUCT OF THE COURT.

1. OBJECTONS TO THE FORM OF THE QUESTION

The most effective and frequently sustained objection is one directed to the form of the question. Your opponent has an absolute right to present evidence to prove up his or her case, but he must do it in a procedurally correct fashion. Your opponent elicits evidence by asking questions, but the questions must conform to certain rules, be in proper form, and be phrased in a particular manner. If the question is itself improper, or calls for improper evidence, it is objectionable.

If your opponent is inartful or clumsy in adducing his evidence, or is obviously unfamiliar with the methods of doing so smoothly, then counsel should exploit the opportunity. If the questions are leading or compound, are argumentative, call for speculation, or have been asked and answered, then counsel, by objecting to the form of the question, can temporarily derail the prosecutor's case-in-chief. Timely and persistent objections to the form of the question will not only prevent the jury from hearing the evidence, but it will cause them to lose confidence in your opponent by demonstrating his or her lack of skill as a litigator.

2. OBJECTIONS TO THE NATURE OF THE ANSWER

The next category encompasses objections directed at the inadmissibility of the answers and not at the propriety of the question. When the question is proper, but the answer may violate one or more rules of evidence, counsel

should object. This objection notifies the judge that he should refuse to permit the jury to hear the forthcoming answer.

Counsel should be alert and listen carefully for the first signs of objectionable testimony. Many times, even though the question is proper, it will signal to counsel that the answer will be objectionable because it is likely to be irrelevant, privileged, cumulative, call for hearsay, not be based on first-hand knowledge, or inadmissible for some other reason.

At other times, the inadmissibility of the testimony does not appear until well into the answer. Objections to hearsay, to nonresponsive, to self-serving answers, to improper opinions, to narrative responses, and to other objectionable matters which do not surface immediately, should be made in such a manner to cause the witness to abruptly halt his answer so that all inadmissible testimony will cease. The objection should be coupled with a motion to strike the inadmissible portion of the witness' answer, if any slipped past, and with a request to the Court to admonish the witness to wait for an objection before he answers future questions.

3. OBJECTIONS TO EXHIBITS

The third category of objections relates to the admissibility of particular items or objects of evidence. These objections are aimed at the exhibit itself, and not at the question or answer surrounding it.

Counsel can object in a variety of ways to items of evidence, and he may do so regardless of whether the item is marked as an exhibit or not. He can object to its offer or to its being displayed to the jury, to its being displayed to the witness or even to its production in the courtroom.

To be admissible, an exhibit must pass a two-tiered test. First, the object must be admissible in its own right. Some objects are intrinsically objectionable. If the exhibit is inflammatory, misleading, confusing, or irrelevant, it usually will not be admitted over objection if no proper foundation is laid.

Second, if an exhibit is potentially admissible, a proper foundation or evidentiary predicate must be established. If the necessary foundation is lacking, the exhibit will not be received over objection regardless of its relevance or helpfulness to the jury.

For example, firearms, bullets, knives, burglary tools, contraband and other objects of physical evidence are generally admissible, but not until they are properly identified and authenticated, shown to be lawfully obtained and subject to an unbroken chain of custody.

On the other hand, exhibits such as charts, summaries, models, photographs, diagrams or scientific tests are usually not admissible in their own right. In order to be admissible, these exhibits must be true and

accurate copies, drawn to scale, substantially similar, scientifically reliable or meet some other test.

Objections to items of physical evidence or to documents usually relate to an improper and insufficient foundation prior to introduction into evidence. The foundation required depends on the exhibit itself, so counsel must acquaint himself with the differing foundational requirements for scores of items of evidence if he hopes to make effective and persuasive objections to these exhibits.

4. OBJECTION TO CONDUCT OF COUNSEL

While the prosecutor's comments are never evidence, they may be objectionable nonetheless because of the potentially adverse impact on the jury. Trial lawyers are governed at every stage of a trial in what they can say or do by accepted courtroom procedures, common sense and common courtesy.

What lawyers are permitted to say depends upon which stage of the trial has been reached. While a lawyer is free to engage in a conversation with a juror during voir dire, he obviously is not permitted to do so during direct examination. Likewise, while a prosecutor is permitted to argue the guilt of the defendant in his final argument, it is highly objectionable if he does so in his opening statement.

The prosecutor's conduct may also be objectionable if it consists of intimidating witnesses, ignoring court rulings or in some way disrupts the civility of the courtroom process. If the prosecutor makes gratuitous editorial comments or states his personal belief, then forceful objections should be made. Counsel should also ask the court to admonish the prosecutor for such conduct and to warn him about doing it again. In important cases, counsel should follow the objection with a motion for a mistrial made outside the hearing of the jury.

5. OBJECTIONS TO THE CONDUCT OF THE COURT

Trial judges are vested with substantial amount of discretion and power in the manner in which they conduct the trial of a case. Occasionally, however, a judge, through his words or conduct, may exceed his power or abuse his discretion.

In those rare cases, counsel will find himself on the horns of a dilemma. Does he object to protect the client and the record, and then risk antagonizing the jury and alienating the judge for the rest of trial? Does he forego the objection to avoid upsetting the judge in the presence of the jury and hope that the jury will not give undue weight to the objectionable conduct or comments of the judge? After he prudently considers his decision, if counsel decides to object, he should do so respectfully in both manner and tone.

Unlike objections to the conduct of the prosecutor, counsel should never use such words as “improper”, “unreliable” or “prejudicial” in connection with this objection. These words in this context are guaranteed to annoy the judge and even the jury.

Counsel should begin his objection by saying, “with all due respect Your Honor, may we approach the bench?” Hopefully, the objection then can be made at a side bar or bench conference outside the hearing of the jury, but still on the record. If the judge refuses to allow a bench conference, then counsel should make his objection in the most respectful manner possible. He should water down the harsh sounding nature of the objection, so it will not be perceived as an insult to the judge. However, he should not dilute it so badly that the appellate court will have difficulty understanding the nature of the complaint.

Finally, at the instructional conference, counsel should object to all instructions the Court intends to give which may not be factually or legally correct. These objections, like all others, should be made on the record and should state specifically the grounds for the objections.

CHECKLIST OF TRIAL OBJECTIONS

A. OBJECTIONS TO THE FORM OF THE QUESTION

1. AMBIGUOUS, UNINTELLIGIBLE OR VAGUE
2. ARGUMENTATIVE
3. ASKED AND ANSWERED
4. ASSUMES FACTS NOT IN EVIDENCE
5. CALLS FOR A CONCLUSION
6. CALLS FOR HEARSAY
7. CALLS FOR A NARRATIVE RESPONSE
8. CALLS FOR SPECULATION
9. COMPOUND QUESTION
10. IMPROPER HYPOTHETICAL QUESTION
11. BEYOND THE SCOPE OF DIRECT (OR CROSS)
12. MISSTATES THE EVIDENCE
13. IMPROPER IMPEACHMENT
14. IMPROPER REBUTTAL
15. BOLSTERING (IMPROPER CHARACTER EVIDENCE)
16. CUTTING OFF THE WITNESS
17. REFERS TO OR ADDRESSES MATTER NOT YET IN EVIDENCE
18. IMPROPER IMPEACHMENT

B. OBJECTIONS TO THE NATURE OF THE ANSWER

1. IRRELEVANT AND IMMATERIAL
2. HEARSAY AND HEARSAY WITHIN HEARSAY
3. INCOMPETENT TO TESTIFY (A SPOUSE, AN INFANT OR UNSWORN WITNESS)
4. ANSWER IS NONRESPONSIVE (RESERVED FOR THE QUESTIONER ONLY)
5. WITNESS IS PROVIDING A NARRATIVE
6. TESTIMONY IS SELF SERVING
7. INVADING THE PROVINCE OF THE JURY (THE ULTIMATE QUESTION)
8. ANSWER IS PRIVILGED
9. CUMULATIVE
10. ANSWER WILL DISCLOSE WORK PRODUCT
11. READING FROM A DOCUMENT NOT IN EVIDENCE
12. REMOTENESS – NO FOUNDATION AS TO TIME AND PLACE
13. NO QUESTION PENDING (VOLUNTEERED STATEMENT)
14. NO PERSONAL KNOWLEDGE

C. OBJECTIONS TO FOUNDATION

1. IMPROPER AND INSUFFICIENT FOUNDATION
2. IRRELEVANT
3. PREJUDICIAL OR INFLAMMATORY

4. MISLEADING OR CONFUSING
5. NOT PROVIDED IN DISCOVERY
6. IMPORPERLY SEIZED OR OBTAINED IN VIOLATION OF THE FOURTH OR FIFTH AMENDMENT
7. NOT TO SCALE, NOT SUBSTANTIALLY SIMILAR, OR NOT A TRUE OR ACCURATE COPY
8. NOT SCIENTIFICALLY RELIABLE
9. IMPROPER CHAIN OF CUSTODY
10. IMPROPER SUMMARY (DOCUMENT)
11. NOT THE BEST EVIDENCE (DOCUMENT)
12. IMPROPER HEARSAY EXCEPTION

D. OBJECTIONS OT CONDUCT OF COUNSEL

1. ARGUING THE CASE TO THE PANEL *(VOIR DIRE)*
2. INQUIRING INTO MATTERS OF LAW *(VOIR DIRE)*
3. MISTATING THE LAW *(VOIR DIRE)*
4. INQUIRY INTO RELIGIOUS BELIEFS *(VOIR DIRE)*
5. INQUIRY INTO POLITICAL BELIEFS *(VOIR DIRE)*
6. ARGUING HIS CASE *(OPENING)*
7. REFERRING TO EXCLUDABLE MATTERS (*OPENING)*
8. PLAYING TO SYMPATHY OF THE JURY*(OPENING)*
9. BADGERING THE WITNESS
10. MAKING IMPROPER COMMENTS
11. COUNSEL IS TESTIFYING, NOT ASKING A QUESTION

12. IGNORING A RULING OF THE COURT

13. DISPLAING AN EXHIBIT NOT IN EVIDENCE

14. ATTACKING COUNSEL

15. COMMENTING ON DEFENDANT'S FAILURE TO TESTIFY *(SUMMATION)*

16. STATING PERSONAL BELIEFS *(SUMMATION)*

17. RACIAL, POLITICAL OR RELIGIOUS COMMENTS (*SUMMATION)*

18. APPEALING TO THE SELF-INTEREST OF THE JURY *(GOLDEN RULE)*

19. REFERRING TO MATTERS OUTSIDE THE RECORD *(SUMMATION)*

20. REFERRING TO SIMILAR CASES *(SUMMATION)*

21. REFERRING TO THE WEALTH OR POVERTY OF THE DEFENDANT (*SUMMATION)*

22. ARGUING SUBSTATIVE MATTERS ADMITTED FOR OTHER REASONS *(SUMMATION)*

E. OBJECTION TO CONDUCT OF THE COURT

1. ATTACKING COUNSEL
2. ATTACKING WITNESS
3. COMMENTING ON THE EVIDENCE
4. LIMITING CROSS-EXAMINATION

5. GIVING INSTRUCTIONS NOT LEGALLY OR FACTUALLY CORRECT

CONCLUSION

Throughout history, the courtroom has been the place for institutionalized civility. It is not the place for petty bickering, noisy disputes, or personal arguments between lawyers. Even though adversaries, lawyers are not belligerents. They perform in a public forum in the public eye. They should display a high degree of courtesy, good manner and mutual respect even while objecting to each other's conduct.

Like the witness, the trial lawyer takes an oath – an oath as an attorney and as an officer of the court. He, like the witness, must be careful not to violate that oath.

In the old days of American law, a person of limited intelligence was referred to by the public who observed him as an "idiot". An idiot, it was explained, was incompetent to testify because he was incapable of understanding the meaning of his oath.

When a trial lawyer makes frivolous and angry objections, constantly interrupts the proceedings, and quibbles over every adverse ruling, he violates his oath. By doing so, he risks the same dangers as that witness of earlier years. Because of his own conduct, he, too, might be referred to by the public who observes him as incompetent, an "idiot" or both.