Making and Meeting Objections

Robert L. Cosson

Chief Prosecuting Attorney, City of St. George

Types of Objections

1. The form of the question

- Is the question leading?
- Does the question ask for conjecture?
- Is it a speech, not a question?
- Is the question compound? Argumentative? Unintelligible?
- Is the question ambiguous or misleading?
- Hypothetical questions of non-experts
- Mis-states prior testimony

2. Subject matter of question

- Assumes facts not in evidence
- Is cumulative (has already been answered)
- Beyond the scope of direct or re-direct
- Insufficient foundation

3. Objectionable answer to question is required:

- Questions that are in substance objectionable
- Questions that the witness is not competent to answer

4. Volunteered Answer

- Not responsive to the question
- Response volunteers information not requested in the question

5. Properly excluded matters

- Answer would provide information already excluded by the court

6. Lack of foundation

- Are documents properly authenticated?
- Is demonstrative properly supported by witness testimony?

7. Privileged information

- Husband/Wife
- Attorney/client
- Patient/doctor

8. Hearsay

9. Opinion testimony

- Outside experience and knowledge of witness
- Expert witness is permissible with proper foundation

10. Is the questioning improperly affecting your witness?

- Can the witness handle themselves
- Is the witness sympathetic
- Is the witness about to be ambushed?
- *Sometimes it is best to allow the defense to continue and lose sympathy*

11. Improper attorney conduct

- Personal comments
- Snide commentary
- Unfair statements
- Misrepresentation of prior testimony/evidence

Part 1: Making Objections

- Objection Procedure
  - Your objection must be **timely — it must be made as soon as the** grounds become apparent.
  - Your objection must be **specific — you must tell the judge exactly** what you are objecting to, what rule of evidence or trial procedure has been violated, and exactly how it was violated.

Insufficient Objections

- “I object.”
- “I object. Why is this relevant?”
- “Objection, the evidence is very prejudicial.”
- “Objection. Counsel has not laid a proper foundation for the business record exception to the hearsay rule.”

Proper Objections

- “I object to the use of the photograph under Rule 403. This picture of the corpse has little probative value because the fact of death has been stipulated, and it will unfairly arouse the emotions of the jury.”
- “I object to the document as hearsay. Counsel has not laid a proper foundation for a business record because she has not shown that the entrant had personal knowledge of the transaction.”

How to Make an Objection

- Stand up
- Tell the judge that you object
- Describe what evidence you object to
- State the exact grounds
- Cite the legal rule
- Give a one-sentence explanation
- Allow your opponent to speak without interruption
- Remain standing until the judge rules on the objection
- Accept the judge’s ruling gracefully and sit down

Making Sure the Jury Understands

- You also should consider whether you need to add a one-sentence explanation of your objection in plain English so the jury understands its reasonableness.

Example (making sure the jury understands)

Q: You know the defendant pretty well, don't you?

ATTORNEY: I object to the question. It is leading. Rule 611 prohibits leading on direct examination. **Defense counsel is telling the witness what to say.**

COURT: Sustained

Q: How long have you known the defendant?

A: At least 10 years.

Q: Will you tell the jury what kind of man he is?

ATTORNEY: I object to testimony about what kind of person the defendant is. It would be character evidence, which is prohibited by Rule 404. **The issue is whether he stole the car, not his background.**

Responding to the Response

- If there is a response, allow your opponent to speak without interruption, and then wait for the judge to rule. The presentation should be professional and courteous.

Bad Exchange

PLAINTIFF: I object to the document. It is hearsay. It is an out-of-court statement offered for its truth without the person who wrote it being here.

DEFENSE: It is a business record.

PLAINTIFF: No it isn't, it's hearsay.

DEFENSE: The witness testified it is kept and maintained in the . . . .

PLAINTIFF: Excuse me, the witness never said "maintained."

DEFENSE: It was maintained in the regular course of business.

PLAINTIFF: But the witness never said that. All she said was that this was a standard form they filled out. She never said anything about how it was maintained.

Good Exchange

PLAINTIFF: I object to the document. It is hearsay. It is an out-of-court statement offered for its truth without the person who wrote it being here.

DEFENSE: It is a business record. The witness testified it is kept and maintained in the regular course of business.

Tactics of Making Objections

Just because an objection can be made does not mean that it should be made. Before you object, you should have specific reasons for doing so. You should engage in a quick cost-benefit analysis, weighing the benefits against the risk that you will end up harming your own case. The decision will depend on the nature of the evidence offered, the grounds you can assert, the context of the particular controversy, and whether there is an alternative way of dealing with the evidence.

Reasons to Object

- You are certain you will be sustained
- The evidence hurts your case
- You need to protect your witness
- You wish to disrupt your opponent**?????**
- You need to preserve a pretrial motion or previous objection
- You wish to make a jury argument**?????**

Reasons Not to Object

- It would emphasize harmful evidence
- The evidence will eventually be admitted anyway
- Speculation is worse than hearing the truth **?????**
- Too many objections will cause an unfavorable reaction among jurors
- Evidence may open the door to otherwise inadmissible favorable evidence
- The objection is petty

Ethics of Objections

- Objections often are used for reasons other than excluding inadmissible evidence. An attorney may make objections in order to disrupt the opponent's train of thought, tip off a witness to the answer, or distract the jury from damaging evidence**???????**
- If a valid legal ground underlies the objection, there seems to be nothing wrong with using these secondary purposes as bases for making tactical decisions about the timing of an objection**??????**
- **However, making a groundless objection solely for these purposes would seem to be unethical** because of the general prohibition in the Utah Rule of Professional Conduct 3.1 against asserting an issue "unless there is a basis for doing so," and in Rule 3.3 against making "a false statement of law to a tribunal."

The Speaking Objection

Probably the most common unethical objection is the "speaking objection" used as an excuse to present an argument to the jury.

Under the customary rules of evidence, attorneys may state the legal basis for an objection within the hearing of the jury, but must make any extended argument outside the jury's hearing.

This rule is routinely tested by attorneys who make speaking objections containing short arguments or summaries of evidence aimed at the jury. In most instances, speaking objections are clear, intentional violations of customary objection procedure, and therefore unethical.

Example (The speaking objection)

Q: What did you see next?

A: I saw a blue car drive by that looked like the defendant's car.

DEFENSE: Objection, irrelevant and prejudicial. We've already established that the defendant was home with his mother, so it couldn't have been his car the witness saw.

Not all speaking objections are clearly unethical, however. For example, an attorney might object to the opinion of a medical expert by saying:

DEFENSE: This opinion is unreliable because it is based solely on the self-serving complaints of the plaintiff, made after his lawyer told him he would need an expert to testify for him.

The Warning

The second common unethical objection is the "warning" to a witness, in which an attorney tries to signal to the witness that the other lawyer is laying a trap and to suggest a good way to answer the question.

Example (The warning)

Q: You were 60 feet away?

A: Yes.

Q: This was 11:45 pm, correct?

A: Yes.

Q: There was no moon, correct?

A: Yes.

Q: And no streetlights?

PROSECUTOR: I object. Counsel is asking trick questions, trying to insinuate that the witness could not have seen the defendant's face clearly.

COURT: Overruled.

Q: There were no streetlights, were there?

A: No, but I could see the defendant's face clearly.

Technical Objections

Technical objections are those that go solely to the procedure, not the substance, of offered evidence.

The two most common are:

- Objections to the form of questions: leading, assuming facts not in evidence, compound question, etc.
- Objections to incomplete foundations, especially for exhibits and hearsay exceptions.

Ethics of Technical Objections

As long as evidence law requires questions to be in certain forms and foundations to be laid, you have the right to insist that the procedural rules be followed, even if the outcome is that your opponent has to abandon a legitimate item of evidence. However, making groundless objections in order to fluster your opponent would clearly be unethical.

Should you make Technical Objections

You are probably already familiar with at least one of them — the rule that you cannot ask a leading question on direct examination. Objections on the technical ground that your opponent is violating one of these rules of form are unlikely to result in excluding harmful evidence (because they often can be rephrased easily) and more likely to create a bad impression with the jury. For example:

Q: Did you see the defendant enter the room?

ATTORNEY: Objection, leading the witness.

Q: I'll rephrase. What happened next?

A: I saw the defendant enter the room.

A: [Jury laughs]

Should You Make Technical Objections Continued

For these reasons, many trial practitioners do not make objections to the form of questions except for the purpose of exposing the unfairness of a pattern of misleading questioning or for the purpose of disconcerting an inexperienced opponent. The risks of making technical objections to relevant and helpful exhibits are even greater. *See FRANCIS X. BUSCH, LAW AND TACTICS in JURY* TRIALS, vol. 5, § 604 (1963).

However, Judge Keeton argues that if objections to form result in repeated rulings in your favor, the jury may begin to wonder about the ethics and motives of the examiner. ROBERT KEETON, TRIAL TACTICS AND METHODS 171–72 (2d ed. 1973).

It is also possible that a successful series of technical objections will result in your opponent's abandoning a line of questions or withdrawing the offer of an exhibit.

Part 2: Meeting Objections

Should you respond at all?

- No rule of procedure or custom requires you to respond to an objection. Some judges do not like responses, others do. Most will ask you for a response if they are unsure of the correct ruling.
- At the same time, you generally have the right to be heard on an objection whether the judge asks for it or not. The decision whether to respond is therefore generally a question of tactics.

Objection! Think it Through

- Many attorneys automatically argue against every objection, while others automatically withdraw or rephrase any question objected to.
- The first approach assumes your opponent is a complete idiot who can never be right on an evidentiary issue.
- The second assumes you are the idiot.
- You should adopt neither of these assumptions, but should make a conscious decision about how to handle each separate objection.

Three Choices when Objected to

- Withdraw or rephrase your question.
- Remain silent and let the judge rule.
- Make an argument against the validity of the objection.

Reasons to Withdraw or Rephrase a Question

- ***You agree that the objection is valid.*** You lose credibility with the judge if you make silly arguments, and with the jury every time the judge rules against you.
- ***The objection merely goes to the form of the question.*** It is often best just to rephrase it, rather than get involved in a lengthy argument over whether it was a proper question.

Reasons to Keep Silent and Let the Judge Rule

- **You are uncertain about the validity of an objection, but cannot think of a good argument.**
- **You have already withdrawn several questions.**
- **You don’t want to interrupt the flow of your examination.**
- **The judge is already taking your side.**
- **The judge does not appear to want to hear from you.**
- **The objection is to testimony from a witness rather than to your question.**

Reasons to Argue

- ***You believe the evidence is admissible.***
- ***The evidence is important to your case.***
- ***The judge expects it.***

How to Respond

- **Stand up (if you are not already standing) and face the judge.** Don't give in to the temptation to face the opposing attorney who is making the objection.
- **State your responses succinctly, being as specific as possible about the legal grounds for admissibility.** If you have extensive support for your position — cases, treatises, or memoranda — offer to show it to the judge.
- **Give a one-sentence non-legal explanation** for the benefit of the jury.
- **Remain standing** until the judge rules on the objection.
- **Accept the judge's ruling** gracefully.
- **Make an offer of proof** if you lose the objection.

Part 3: Motions to Strike (courts of record)

If you can **anticipate that inadmissible evidence** is about to be disclosed to the jury, an objection will be adequate to prevent its disclosure.

Q: How long have you known the defendant?

A: At least 10 years.

Q: Will you tell the jury what kind of man he is?

ATTORNEY: I object to testimony about what kind of person the defendant is. It would be character evidence, which is prohibited by Rule 404. The issue is whether he stole the car, not his background.

COURT: Sustained.

Continued

However, if a **witness interjects inadmissible evidence** unexpectedly, and the jury hears it, then the objection is not enough. You must also move to strike the improper evidence from the record:

Q: How long have you known the defendant?

A: For at least 10 years, ever since we met in prison. The guys's the best con man I ever met.

ATTORNEY: I object to the evidence concerning incarceration and the kind of person the defendant is, and move to strike it from the record. It is character evidence, which is prohibited by Rule 404. The issue is whether he stole the car, not his background.

Motions to Strike are Appropriate in Five Common Situations

1. **A witness gives an unresponsive answer to one of your own questions (usually on cross-examination)**

   Q: Isn't it true that you drank an entire six-pack of beer between 6:30 and 7:30 pm?

   A: Yes, but that had nothing to do with the fact that I was wrongly arrested because the police have been out to get me because they think my son is in a gang.

   ATTORNEY: I move to strike everything after the word "Yes" because it is not responsive to my question.

Continued (motion to strike situations)

2. A witness volunteers inadmissible evidence in response to a proper question asked by your opponent. If the question itself clearly called for inadmissible evidence, you must have objected to the question. You cannot resort to a motion to strike unless the improper testimony could not have been anticipated from the question.

Q: What happened next?

A: I saw the defendant come out of the store. I recognized his face from a TV show called "America's Most Wanted Child Molestors."

ATTORNEY: I object to evidence of what this witness saw on television as irrelevant and prejudicial under Rule 403. I move to strike the comment.

Continued (motion to strike situations)

3. A witness makes gratuitous or vindictive remarks.

Q: Do you recognize the man who attacked you?

A: Yes, he's sitting over there. I hope you fry in hell, you bastard.

ATTORNEY: I object to the witness's gratuitous remark under Rule 403 and move to strike it.

Continued (motion to strike situations)

4. When subsequent testimony demonstrates that previous evidence was incompetent, or if your opponent fails to connect up testimony conditionally admitted.

Q: What did you do with the gun, officer?

A: I picked up the gun, kept it in my car, and turned it over to forensics for fingerprint testing. I got it back a few days later and put it in the police evidence locker. I went and got it this morning and brought it to court.

PROSECUTOR: We move exhibit A, a handgun, into evidence.

DEFENSE ATTORNEY: I object. The chain of custody is incomplete because we do not know what happened to the gun when it was in control of forensics.

PROSECUTOR: We will call the forensics technician who handled the gun as our next witness and complete the chain of custody.

COURT: Objection overruled. I admit the gun subject to that testimony.

PROSECUTOR: We call Corey Berman from the forensics lab. . . .Handing you exhibit A, did you receive this gun at the forensics lab from Officer Beringer and return the same gun to him after testing it?

A: I don't know. We had three Smith & Wesson .38s that week, and an intern mixed them up.

DEFENSE ATTORNEY: We renew our objection to Exhibit A and move to strike it from evidence because the prosecutor has failed to connect up the chain of custody.

Continued (motion to strike situations)

5. The opposing attorney makes gratuitous or improper remarks during witness examination or argument.

Q: You were fifty feet away from the scene?

A: Yes.

Q: It was dark?

A: Yes.

Q: Were there any streetlights?

A: No. Pitch dark.

Q: And you claim to have seen the face of the man in the alley clearly enough to identify him today?

A: Yes.

Q: You have remarkable vision, Mr. van Natta. No further questions

ATTORNEY: I object to counsel's gratuitous comment as argumentative, and ask that it be stricken from the record.

Part 4: Offers of Proof (or Proffer)

When an objection is made to a question and sustained by the court, the examining attorney may place into the record (outside the hearing of the jury) the evidence he or she expected to prove. Although the primary purpose is to perfect the record for appeal, the procedure also may help the trial judge rule correctly. Offers of proof are most commonly used when the issue is relevancy, and are unnecessary if the question itself indicates the nature of the evidence sought. For that reason, offers of proof are normally inapplicable to cross-examination, when the questions themselves are leading.

Offers of Proof Take Three Forms

- The most formal offer of proof involves removing the jury from the courtroom, and then conducting the witness examination exactly as if the jury were present.
- An intermediate form involves the attorney submitting a written summary of the excluded evidence out of the hearing of the jury.
- The least formal offer of proof is the side bar conference, in which the attorney answers the judge's question, "Where are you going with this line of questioning?"

An Offer of Proof is Primarily Factual, Not Legal

You must inform the judge in detail what the excluded evidence would have been and explain its significance and the reason for offering it. This is not the same thing as an argument about why the evidence should have been admitted.

- **Too vague:** Your honor, if you would permit Mr. Kahle to testify, he would establish the defendant's alibi.
- **Too legal:** Your honor, because the phone call was occurring simultaneously with the event, Mr. Kahle's testimony should be a present sense impression.
- **Good:** If Mr. Kahle were allowed to testify, he would have said that at 10:30 p.m. on Monday, November 15, he phoned his friend Martin Montes at his home. Montes answered the phone. Mr. Kahle asked if he wanted to go out for a beer, and Mr. Montes said that he did not because he was watching Monday Night Football with the defendant. This helps establish the defendant's alibi, since the crime occurred at 10:45.

Formal Offer of Proof Example

- **PLAINTIFF'S ATTORNEY:** Officer Romankow, what happened next?
- **A:** I asked whether there were any witnesses. One man stepped forth and identified himself as Jeff Swenarton. He appeared excited.
- **Q:** What did you do next?
- **A:** I asked him to tell me what he knew about the accident.
- **Q:** What did Mr. Swenarton tell you?
- **DEFENSE ATTORNEY:** I object. The testimony would be hearsay in violation of Rule 802. Mr. Swenarton can speak for himself.
- **PLAINTIFF'S ATTORNEY:** It's an excited utterance, your honor. The witness testified Swenarton appeared excited.
- **COURT:** Sustained.
- **PLAINTIFF'S ATTORNEY:** May I make an offer of proof, your honor?
- **COURT:** Of course. Approach the bench.
- **PLAINTIFF'S ATTORNEY:?** [Out of hearing of the jury] We would like the jury excused and the witness allowed to testify to the content of Swenarton's statement.
- **COURT:** Alright. Bailiff, please escort the jury to the jury room for a few minutes. [Jury leaves courtroom]. Alright, counsel, you may proceed.
- **PLAINTIFF'S ATTORNEY:** What did Swenarton tell you?
- **A:** He told me that he had witnessed the accident. He said the driver of the blue Ford S.U.V. had gunned the engine and sped up when the light turned yellow, but the light was red by the time it got there, but he just kept on going.
- **Q:** By "he" you mean Swenarton or the driver of the S.U.V.?
- **A:** The driver. Swenarton said he, that is, Swenarton, had started to cross the street because the light had turned red for Walnut Street traffic, when the blue Ford came roaring through, almost hitting him. He said the driver of the Ford definitely ran the red light.
- **PLAINTIFF'S ATTORNEY:** That's the end of the offer of proof, your honor.
- **COURT:** Bring the jury back in. [Jury returns] You may continue.
- **PLAINTIFF'S ATTORNEY:** After talking to witnesses, what did you do next?
- **A:** I measured the skidmarks and drew a diagram of the scene of the accident . .

The Take Away

In actual practice, few lawyers make or handle objections well. Few actually comply with the rule requiring specific objections. Trial attorneys, whether because of laziness or because they are unsure of their grounds, often object simply by saying, “Objection,” and not stating grounds. Objections that are made in this general fashion *might be sustained* by the judge, but they also might be overruled. If you have neglected to follow the procedural requirements, you have no way to appeal incorrect rulings if you lose the case. Just because you see other lawyers doing it does not mean you should model your own behavior on them. It is generally a bad idea to learn trial practice by watching other lawyers until you know enough to recognize the good ones.

Most of the Information in this Presentation was Taken Directly from the Resource below

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- The Trial Process: Law, Tactics and Ethics J:\VRS\DAT\03106\5.GML --- LC3106.STY --- POST