

MAKING AND MEETING OBJECTIONS

What is an objection?

An objection is a request to the court to exclude evidence, whether through a witness or an exhibit based on its impropriety or illegality.

An objection is based in law, rules of court, or the court's inherent authority to control the courtroom and the flow of evidence.

An objection must either include expressly stated reasons or it must be clear to the judge from the context.

Three **Critical Things** to Know When Objecting

1. Know the Rules of Evidence
2. Know the Players

The Judge

- Is your judge law trained?
- Does he/she know the rules?
- Is he/she amenable to being educated on the rules?
- Does he/she need time to consider tricky evidentiary issues?
 - If so, be prepared to address anticipated objections
- Consider a Motion in Limine or Bench Memorandum

Opposing Counsel

- Are they likely to try to ambush you?
- Do they understand the rules?
- Are they likely to ask inappropriate questions?

Witnesses

- Remember most are out of their comfort zone, even officers
- Is your witness a lay witness? Officer? Expert?
- Are you asking appropriate questions for their age/experience?
 - Your best bet in getting admissible answers is to ask questions they understand

3. Know the Playing Field

- Are you annoying the judge/jury?
- Are objections confusing the witness/judge/jury?
- Are you helping preserve the record in case of an appeal?

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

How to Object

- Stand up

- Make a clear, concise, objection

 - Ex. Objection, hearsay, or
Objection, Rule 803

- Be prepared to support your objection with the appropriate rule/argument

- Be polite

- Do not argue with opposing counsel. This is the court's decision

- Do not argue with the judge.

 - If you disagree with the ruling and feel you need to make a further record, ask the court for the opportunity to expand your motion for the record. It may also rehabilitate you with the jury/court.

- It may be appropriate to request a bench conference

When the defense objects

- Three tactics

 - Withdraw the question

 - Wait and let the judge rule

 - Argue against the validity of the objection

- Be prepared to respond with the appropriate rule/argument

- Ask for an offer of proof regarding relevance

- Make sure you have an opportunity to argue the objection before the court rules

- If you realize the defense is correct, acknowledge it and move on

- If the objection is sustained and you believe the ruling is incorrect:

 - If it regards a critical issue, you may wish to ask the court for time to argue

 - The jury may need to be excused

 - You may wish to approach the bench for direction

 - The court may allow you to address the issue later, at a break

- If the objection is over-ruled, be prepared to pick up where you left off, or a few questions before.

Recovering from objections

- If the objection was sustained

 - Did the witness already answer?

 - Does the response need to be stricken from the record?

 - Does a curative instruction need to be given?

 - Can you voir dire the witness to change the ruling?

- Try to go back to the last question you asked

 - Make a notation, especially if the argument will take some time

 - You may want to go back a question or two to keep the frame of reference

Common Objections:

- Hearsay
- Leading questions
- Argumentative questions
- Improper character evidence
- Irrelevant
- Privilege
- Beyond the scope
- Lack of foundation

RULES OF EVIDENCE

- R 103 - Objections must be timely and specific
- R 104 - Court decides preliminary questions of qualification, privilege and/or admissibility
- R 105 - Limitation of evidence
- R 106 - Rule of completeness (writings or recorded statements)
- R 201 - Judicial Notice
- R 401 - Relevant Evidence
- R 403 - Exclusion for cumulative evidence, prejudice, confusion, waste of time, etc.
- R 404 - Character evidence
- R 405 - Methods of proving character by reputation and conduct
- R 406 - Habit
- R 410 - Plea Negotiations
- R 412 - Admissibility of victim's prior sexual behavior
- R 502 - Husband/Wife privilege
- R 503 - Communications to Clergy
- R 504 - Attorney/Client privilege
- R 505 - Government informer
- R 506 - Doctor/Patient privilege
- R 601 - General competency
- R 608 - Witnesses' character for truthfulness
- R 609 - Impeachment by use of conviction
- R 612 - Using writing to refresh memory
- R 613 - Witnesses' prior statement
- R 615 - Excluding witnesses
- R 701 - Lay Opinion
- R 702 - Expert witnesses
- R 703 - Basis of Expert opinion
- R 704 - Opinion on ultimate issue
- R 801 - 805 - Hearsay and its exceptions
- R 806 - Attacking and supporting the declarant's credibility
- R 901 - Authenticating evidence
- R 902 - Self authenticating evidence
- R 1002 - Use of original
- R 1003 - admissibility of duplicates
- R 1102 - Reliable hearsay at preliminary hearings