Objections at Trial

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A familiar caricature of the trial lawyer is the exasperated blowhard intermittently springing up from counsel table to declaim, *"Objection! Objection! Objection!"* You can find CLE courses and speakers that teach you how to do that. I recommend you follow this approach if you wish to lose any credibility you have with the jury (and judge) in the most rapid fashion possible. If not, perhaps you will consider some contrarian advice: the first rule for objecting at trial is *don't*. The second rule is when in doubt, follow the first rule.

I'm exaggerating a bit, as of course there are times when you should (and must) object, but those times are far less frequent than the new lawyer may think. I've been through week-long trials with only a few objections (combined, from both sides), and those trials have been with top-grade advocates. There's a reason for that– better trial lawyers tend to make fewer objections than the rest. So make necessary objections, but use them sparingly, be selective, and understand that your objections may well hurt you more than help you.

How Objections Hurt You

A trial is not an evidence class: it's a battle for credibility, and the best way to lose your credibility, your *ethos*, is to come across as a yammering, querulous advocate. You, as opposed to your opponent, are supposed to be the truth-giver, and truth-givers do not object to the admission of evidence. Jurors naturally think you're objecting to keep evidence from them, and indeed you usually *are*.[1] As annoying as it sometimes can be, I have to think it helps my

[1] *"The abrupt manner in which the judge had put an end to my cross-examination of Tricia had, I suspected, aroused their curiosity. What was it that the judge didn't wish them to know? There are*

case's credibility to have an opponent who is constantly objecting: each time she opens her mouth to keep the jury from hearing something, her credibility diminishes, especially if the objections are repeatedly overruled by an irritated judge. Think about this:

1. If the evidence is *not* admissible, and your objection is *sustained,* the jury will assume the answer would have hurt you. If the defense counsel asks plaintiff, "Haven't you filed another malpractice lawsuit before?"and plaintiff's counsel objects, and the objection is sustained, it's almost impossible for the jury not to assume that the answer was "yes." Only a lawyer would think that counsel would have objected if the answer were "no." Because of the objection, the jury now assumes that plaintiff *has* sued for malpractice before *and* that her lawyer is trying to keep that (important) information from them.[2]

This is a proper objection, but is it worth making? Perhaps; perhaps not. Even if the objection is sustained, wouldn't you rather have a chance to deal with it than have the jury assume the worst? This may be better than letting the jurors think you're afraid of the answer and invoking a technicality to keep them from hearing it. Even if that's not the case, a better way of dealing with this is through a pretrial motion, which I discuss below.

2. Keep in mind that letting it in often doesn't harm you. Jurors usually don't know the rules of evidence and have no idea what's supposed to come in and what's not. If plaintiff's prior suit was perfectly reasonable, I may well welcome the door being opened for her to explain;

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moments when an objection sustained can be almost as good as evidence." JOHN MORTIMER, RUMPOLE THROUGH THE WOODS.

[2]Indeed, asking this sort of question is likely unethical under Rule 3.4 of the *Rules of Professional Conduct*, which prohibits a lawyer from "*in trial, alluding to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence . . . .*" This is inadmissible character evidence in a civil trial.

who knows, perhaps it involved another instance of incompetence by the same defendant. On the other hand, if the improper question involved a highly-sensitive area (such as collateral source payments for medical bills)[3], I *would* object, and couple that with a motion for a mistrial.

3. If the evidence *is* admissible, it will eventually come in. You may obtain a temporary delay, but the jury will likely hear the evidence in the end, despite your attempts to keep it from them. Often objections allow the evidence to come in, but in a more persuasive and powerful fashion, because the questions have been rephrased for clarity or foundation. And once your objection has been overruled, the jury will be awake and will likely assume that this must be *important* evidence, because it's something *you did not want them to hear*. So don't make admissible evidence that's bad for your case worse by making a big deal over it and losing the argument.

4. When your witness is under cross examination, your objections signal to the jury that the witness is in trouble and the testimony is damaging to your case. Otherwise, why would you try to interfere? Likewise, when you vociferously object during the direct examination of your opponent's witnesses, you give the impression that the witness must really be hurting your case. You need to think about the signals your behavior in objecting is sending.

5. Objections, especially those that are not well-articulated, can irritate judges, who have to listen more carefully. Frequent objections disrupt the flow of the case. Every objection you make, however valid it may be, may give the jurors the impression that you're slowing the case down. Trust me, few jurors complain that trials are too short.

6. Finally, you will hear experienced lawyers and teachers of trial advocacy tell you

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[3] *See*, *Wilson v. IHC Hosps.*, ____ P.3d _____, 2012 UT 54.

that you should routinely object to inadmissible evidence or poorly-phrased questions in order to "preserve your record on appeal." I think this is bad advice. While it *is* true that failure to make an objection at trial will waive your objection to the admission of evidence,[4] the reality is that you have only a small chance of winning an appeal based on an evidentiary ruling. A trial judge will be reversed on appeal for admitting or excluding evidence only if the appellate court concludes the evidence affected a substantial right of a party; that is, probably made a difference to the outcome. Otherwise the error is "harmless." Look through the annotations to Utah Rule of Evidence 103 and you'll see that 90% of evidentiary error by trial judges, at least in civil cases, does *not* result in reversal. As the Seventh Circuit put it, "*appellants who challenge evidentiary rulings of the district court are like rich man who wish to enter the Kingdom; their prospects compare with those of camels who wish to pass through the eye of a needle. Matthew 19:24.*"[5] This is too slim a reason to risk giving jurors the impression that you're trying to hide something from them.

And that's the bottom line on why you should not *reflexively* object: objections can cause you to lose your case by forfeiting your credibility. We will never know for sure, but I imagine many judges with me that many a trial has been lost because the losing lawyer employed what were seen as obstructionist tactics to hide the ball from the jury, and they knew it.

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[4]Utah Rule of Evidence 103(a)(1) requires an objection in order to claim error in admitting or excluding evidence. The appellate cases on point are too numerous to cite.

[5]*United States v Glacier*, 923 F.2d 496, 503 (1991), *cited in* Judge Ralph Adam Fine's superb short book on trial practice, THE "HOW-TO-WIN" TRIAL MANUAL at p. 123, n.1 (Juris Publishing, 2d Ed. 2001).

So When Do I Object?

There are two competing goals: the need to keep inadmissible and harmful evidence out, and the need to preserve your role as a truthful advocate who has nothing to hide. You must decide which is more important, and you must do it instantly. In the blink of an eye, a two-step decision must be made:

- First, do I have a legitimate objection under the rules of evidence or procedure?
- Second, is it worth making? This is where I must consider the potential downside to my credibility, whether the evidence hurts me, and my likelihood of success in getting the objection sustained.

Only if the answer to *both* questions is "yes" should you open your mouth. It sounds overwhelming at first, but experience makes this easier. And the reality is that you ought to be able to anticipate most areas of potential objections if you're doing your job correctly, and by that I mean thinking through the case from both your own perspective and your opponent's.

So when, exactly, is an objection *worth making*? In my opinion, only in these instances:

1. Where my chances of getting the objection sustained are high *and* the evidence is very harmful, enough to lose the case.

2. Where the opposing counsel or witness is making the judge or jury angry by misleading the court, volunteering clearly-inadmissible evidence, or violating prior orders, especially including motions in limine.

3. Where there is a case-winning objection, such as lack of foundation for an expert to give a standard of care or causation opinion, and opposing counsel is unlikely to be able to fix the problem, leading to a directed verdict.

Objections made only to confuse or trip up opposing counsel are borderline unethical but may well also engender sympathy by the jury for a novice opponent.

How to Make Objections

When you make an objection, try to do so without sounding too much like a lawyer, and give the jury some understanding of why you're objecting. Examples:

"*Objection- hearsay*" vs. "*Objection- we should hear from that witness himself*."

"*Objection- compound*" vs. "*Objection- there seem to be two questions in there*."

"*Objection- leading*" vs. "*Objection- perhaps we ought to let the witness testify*."

You have to know your judge's preferences when doing this. The rules– particularly Evidence Rule 611– give a trial judge substantial discretion on how to manage the mode of witness interrogation, and neither you nor an appellate court are likely to change it. Some judges don't allow any hint of "speaking" objections, while others will allow a very slight "explanation" in the objection. (I know of none who permit a full-blown, deposition-type speech following an objection, at least not in the presence of the jury.)

Some judges make it explicit how far they want you to go in objections. For example, this is from Senior United States District Judge Tena Campbell's form FINAL PRETRIAL ORDER:

> *In making objections, counsel should state only the legal grounds for the objection and should withhold all further comment or argument unless elaboration is requested by the court. For example, the following objections would be proper: "Objection . . . hearsay." or "Objection . . . foundation." The following objection would be improper unless the court had requested further argument: "Objection, there has been no foundation laid for the expert's opinion and this testimony is inherently unreliable."*

Obviously, in such a court, you're bound by the judge's wishes and should not push it. The Litigation Section's *Judges' Benchbook* is another place to consult for insights on your judge's

preferences on objections.[6] It's not something that I would typically raise in pretrial conference, perhaps for obvious reasons.

Sometimes a judge will rule on an objection before you're allowed to respond: "Objection!" then "Sustained!" with no chance for you to open your mouth and speak. This usually occurs when the grounds for the objection are obvious, so it's best to simply rephrase and move on. But if you really don't understand the basis for the objection, most judges these days are forgiving enough to explain it, even if a sidebar is needed.

Some other thoughts on the form of objections:

1. If you're asking the questions, and an objection is sustained, *never* exhibit childish displays of annoyance, such as throwing your pen down or rolling your eyes. The judge quite possibly (and rightfully) may rebuke you, and the jury will resent your unprofessionalism to the court.

2. Don't give up too easily. I've seen lawyers move on immediately to another topic after the first objection is sustained to a legitimate line of questioning. This is foolish, if the topic is a fair one to explore– and simply rephrasing the question may cure the problem. Rephrasing may also help the judge understand where you're going. And don't forget that every question to which the opponent objects highlights the importance of the topic, so if the answer eventually comes in with the right question, the jury is naturally going to pay more attention to it.

3. Don't be resentful about objections made by your opponent. Your question *may* indeed be objectionable, and the objection is merely a prod for you to rephrase it better, which helps you make the point more clear to the jury. Your (silent) response to some objections

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[6] http://www.utahbar.org/sections/litigation/benchbooks.html

might be "thank you, you're right– let me take the opportunity to make this absolutely clear to the jury."

4. Don't directly address opposing counsel during the colloquy on objections. The proper form of courtroom communication is “triangular,” that is, between you and the judge– never between you and your opponent. Speak to the judge, not opposing counsel.

5. Forget Perry Mason– "exceptions" to the judge's rulings on objections are unnecessary. If you "take exceptions" to rulings, you will look like a dork, as Federal Rule of Civil Procedure 46 and its state equivalent eliminated the need for exceptions before you were born.

6. If you make an objection, make sure you get a ruling on it. Some judges are quite adept at not actually *ruling* on objections.

7. If you're going to object, think and speak fast. You need to do it before the witness answers or generally it's too late. If the witness is racing with his answers, and you don't have a chance to object, ask the judge to advise the witness to slow down. And move to strike the answer if your objection is sustained.

8. Let the question be fully asked before you object, and don't interrupt *unless* improper information is being inserted into the question by counsel.

> *Example 1: Now Doctor, have you been sued for malpractice before?*
>
> (This is objectionable material, which I would normally have dealt with via a motion in limine, but if I hadn't, and it came up at trial, I would allow the question to be finished before objecting.)
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> *Example: Now Doctor, isn't it true that you've been sued for malpractice by five different patients on five different occasions, and that you paid out substantial settlements on each of those cases?*

(With such a question, it is proper *and necessary* to interrupt the question, and I would do so right after the word "you've." The poor alternative is to allow the question to be finished, ask the judge to strike the question and instruct the jury to disregard it. This really isn't much of an alternative at all; the jury is not going to "unlearn" what they've already heard.)

9. Usually objections are made by standing up at counsel table, but sometimes a sidebar at the bench is necessary, as when you don't want the jury to hear the basis for the objection, or the explanation. Sidebars substantially slow down proceedings, and neither judges nor juries like them, so ask for them sparingly. And *make sure* that a record of the sidebar is made.

10. Where indicated, prepare one or two-page "mini-briefs" in support of objections to assist the court in deciding your objection, and attach the relevant cases or rules.

11. *Don't* thank the judge when an objection is sustained or overruled- it smacks of sucking up and is inappropriate.

Dealing With Objections Before the Witness Takes the Stand

The motion in limine is your essential tool for keeping out inadmissible evidence or improper questions, especially when you take the wiser path of limiting your objections at trial. The options for the motion in limine are limited only by your imagination and the patience of your trial judge. Use discretion, anticipate the likely problem areas, raise them in your pretrial motion in limine, and eliminate the need to object in front of a jury.

In a medical malpractice case, as the defense attorney I would probably file a motion in limine asking the court to prohibit any argument, questioning, or testimony on at least the following issues: defendant’s prior lawsuits and settlements; particular hearsay evidence, my defendant’s problems with the state licensing board. As plaintiff’s counsel, my motion would

seek to prohibit any questioning or testimony on payment by collateral sources, other claims made, and the like. In short, anything I can foresee that will come up at trial and that really should be excluded without tipping off the jury to its existence by making objections in open court.

Of course, there is some strategy here, as when I sense that opposing counsel will be unable to get the key standard-of-care or causation opinions from his witnesses. A better tactic for that would be to *not* educate and prepare him by filing a motion in limine, but leave it for trial when it's too late to correct. It depends on the case, the counsel, and the judge.

On occasion, the evidence could not have been anticipated in time for a pretrial motion in limine, yet it's important enough that it needs to be excluded. In such cases, bringing it to the judge's attention during a break or other absence of the jury is the way to handle it. Note well that judges have lives outside the courtroom, and won't look favorably on lengthy memoranda dropped on them at the end of a long trial day. But brief memoranda where the need could not be anticipated before trial aren't going to draw a rebuke.

Voir Dire in Aid of Objection

If your objection goes to the qualifications or competence of a witness, the trial judge will usually permit you to "voir dire" or cross-examine the witness on foundational matters in aid of your objection. Here's an example:

Pltf's Counsel:	*How fast was the car going?*
Def Counsel:	*Objection, your honor, foundation. May I voir dire the witness?*
Court:	*You may.*
Def Counsel:	*You were in your house?*
Witness:	*Yes.*
Def Counsel:	*Your house is a hundred feet from the street?*
Witness:	*Yes.*
Def Counsel:	*You were not looking out the window?*

Witness:	*No, I was watching TV.*
Def Counsel:	*So you didn't actually see the defendant's car before the accident?*
Witness:	*No, that's true....*
Def Counsel:	*Your honor, I renew my objection. Lack of foundation.*
Court:	*Sustained.*

There you have a model voir dire in aid of an objection. *You also have a perfect example of an objection that should not have been made.* For the next set of questions (as you already know from the deposition of the witness) is going to go like this:

Pltf's Counsel:	*Were you able to reach any conclusion on how fast defendant's car was going?*
Witness:	*Yes.*
Pltf's Counsel:	*Well just how did you do that, if you weren't looking out the window?*
Witness:	*I have ears. While I was watching TV, I heard this car roaring down the street, with the engine racing. He sounded like he was going seventy miles an hour. Then I heard the squeal of tires as he skidded before the crash.*

This is likely to be admissible testimony. Defense counsel's better course would have been to not object and save the "you did not see the car" for cross examination or, maybe even better, for closing argument. Objecting only highlighted the testimony that came in anyway, and made clear the witness's reasons for thinking that the car was speeding.

Stupid Objections

There are objections that can only be called stupid, at least if the trial lawyer understands that counsel's credibility is always at issue with the jury.

1. Objections where the evidence is likely to come in anyway.

2. Objections when the evidence isn't harmful to you. This is especially important when your witness is handling the cross examination quite well on his own. Don't step in to "protect" those who don't need it.

3. "I'm very smart-- and you need to know it" objections, showing both the judge and the jury that you took an evidence class in law school.

4. "Gas bag" objections– windy, pompous objections without a substantial basis in law, as in "irrelevant, immaterial, and incompetent" or "self-serving" (the whole purpose of a lawsuit is to serve-self, and there is no rule of evidence excluding self-serving statements.)

5. "Unresponsive" objections when you're not the one asking the questions. Only the questioner gets to object to an unresponsive answer.[7]

6. "Asked and answered." This is not really a "stupid" objection, but in fact there is no such objection in the rules of evidence. It is in essence an objection that the evidence is *cumulative,* and that is something the trial judge is empowered to control. But why would anyone make such an objection in trial? If the question was indeed asked and answered, the judge and the jury will know it, and grow annoyed with opposing counsel if it continues. Let opposing counsel dig his own grave with annoying and repetitive questions– this is not a time for you to interfere with his foolishness, especially if your witness is doing well. If it reaches the point that the judge or the jury looks to you with eyes pleading for mercy, by all means object.

7. "Badgering the witness." Again, if the witness doesn't need protection, don't step in. If the witness *is* being badgered, perhaps occasionally you'll want to object, but again, consider why you want to stop opposing counsel from digging her own grave with the jury? You may need to do so at some point, just so the jury doesn't resent you for being too passive, but

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[7]"Nonresponsiveness is a problem between the questioner and the witness. It is none of the adversary's business. In other words, the only person who can move to strike a nonresponsive answer is the person who put the question." *Objectionable Objections*, Joseph M. McLaughlin, THE LITIGATION MANUAL: TRIAL (ABA 1999).

don’t jump in too early.

One Very Useful (Sort-of) Objection

Nothing is more fun than catching your opponent being sneaky and proving this to the jury. Sometimes you get a golden opportunity when your opponent reads from a deposition or document and fails to read the complete statement or testimony, leaving out important excerpts that change the entire meaning. You don't need to wait for redirect to point this out, so jump on it immediately. Evidence Rule 106 provides:

> *If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.*

An opportunity to catch a sneak in open court doesn't happen very often, but when it does, *use it*. More often than not, however, lawyers use this rule to simply include additional testimony that doesn't really change anything, and the effect is lost on the jury.

Objections in Bench Trials

Many of the considerations I've discussed regarding objections don't apply in bench trials. That doesn't mean I will object a great deal more when trying a case to a judge, because judges still tend to get annoyed with too many objections. But I don't worry about damaging my credibility if the objections are valid, as judges will understand the reason to make objections and not hold it against me in the credibility battle. But note that with most judges in bench trials there is a sense that they will be more liberal in applying the rules of evidence, and thus will hear marginally objectionable evidence, and give it whatever weight they think it deserves.

Source Books for Potential Objections

While my strong recommendation is that the trial lawyer learn to object *less* and not *more* often, it is nevertheless necessary to understand the potential objections. These texts are useful primers and refreshers on trial objections:

1. Roger C. Park, TRIAL OBJECTIONS HANDBOOK 2D (Clark Boardman Callaghan)and SHEPARD'S QUICK REFERENCE GUIDE TO TRIAL OBJECTIONS (Shepard's/McGraw-Hill, Inc., 1993)

2. Judge Robert A. Wenke, MAKING AND MEETING OBJECTIONS II (Richter Publications, 1986).

3. Anthony J. Bocchino and David A. Sonenshein, FEDERAL RULES OF EVIDENCE WITH OBJECTIONS (NITA, 2006).

4. R. Rogge Dunn and Karen Hirschman, TRIAL OBJECTIONS. (James Publications)

5. Ashley Lipson has a very entertaining series of computer games called THE OBJECTION! SERIES that tests you on your knowledge of objections.[8]

Conclusion

A jury *can* be favorably impressed by a lawyer whose crisp and well-stated objections are continually sustained. And there are times where it clearly needs to be done. I'm simply asking you to take a more sophisticated approach in using objections at trial. Think before you do it, and never object simply because you can.

FJC
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[8] http://www.objection.com/products.htm