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I Object

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I OBJECT!

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Every trial lawyer has a duty to shield his client's cause from the crippling hurt of improper evidence. Yet many are unequipped to do so. All too often, the unfledged lawyer is found sitting before the bar in mute helplessness as his case crumbles under heavy blows from excludable testimony. Frequently he is seen sputtering a bootless "irrelevant, incompetent, immaterial" to evidence hopelessly vulnerable to a proper objection. These lamentable scenes can be the result of either ignorance of the rules of evidence, or lack of culture in the technique of objecting. Often it is both.

NECESSITY FOR OBJECTION

It is an elementary doctrine that unless challenged, improper evidence goes into the case on equal footing with the valid. Counsel must immediately strike down unallowable evidence when it is first exposed. Complaint cannot be later sounded about testimony that counsel has silently permitted into the record. The harmful consequences of improper evidence, mistakenly unopposed, are irretrievable.

Except when an answer to a question comes in too quickly, the objection must get in ahead of the response. One may not gamble on the answer, and then object if it turns out to be unfavorable.

STATING THE OBJECTION

Objections are addressed to the court. Counsel must therefore rise. The grounds for the objection are then stated precisely, without undue embellishment or argument.

ADVERSE COUNSEL: Why did he come to your house?

COUNSEL: I object, Your Honor. That calls for a conclusion.

THE COURT: Sustained.

Argument on the objection should ordinarily be withheld unless

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invited by the court or is compelled by argument thrust in by adverse counsel.

Where a question shows frailty in more than one aspect, all apparent grounds may be stated. Throwing in a few extra, though, accomplishes nothing. Enlarging every objection with "incompetent, irrelevant and immaterial" is a tiresome waste. It is usually a manifestation of the insecurity of the objector.

When an objection in the presence of the jury would have an adverse effect, permission should be sought to approach the bench.

ADVERSE COUNSEL: At that time and place did you have a conversation with the defendant?

WITNESS: Yes, I did.

ADVERSE COUNSEL: Please relate that conversation.

COUNSEL: May we approach the bench, Your Honor?

THE COURT: Certainly.

COUNSEL: (At bench) I wish to object to any testimony touching that conversation on the ground it is privileged. It involved a settlement attempt. Would the Court hear me further in chambers?

THE COURT: Very well.

Merely stating general grounds for an objection may not be enough. The precise defect should be indicated.

ADVERSE COUNSEL: What did the defendant tell you?

COUNSEL: Objection, Your Honor. Improper foundation. There has been no indication of time, place or persons present.

THE COURT: Sustained.

This is especially true in objecting to hypothetical questions.

COUNSEL: I object to the hypothetical question. It fails to state essential facts now in the record. The following facts are absent . . .

GROUNDS FREQUENTLY USED IN OBJECTING

Of the many grounds used to screen objectionable matter, the ones most frequently heard in court are these:

argumentative	incompetency
hearsay	improper foundation
immateriality	leading
irrelevancy	not the best evidence

calls for conclusion
invades jury province
outside scope of direct
improper cross-examination
exhibit speaks for itself
assumes facts not in evidence
repetitious
prejudicial
too broad and indefinite
multiple question
outside scope of pleadings
improper rebuttal
improper comment by counsel
privilege
lacks probative value
impeaching own witness
parol evidence affecting writing

While illustrations of each of these grounds is not practicable here, a few typical examples may prove instructive.

1. Leading

ADVERSE COUNSEL: (Direct examination) As a matter of fact, Mr. Smith, you then told the defendant to stop, did you not?

COUNSEL: I object. The question is leading.

THE COURT: Sustained.

2. Hearsay

ADVERSE COUNSEL: Did someone answer the doorbell?

WITNESS: Yes.

ADVERSE COUNSEL: Who did?

WITNESS: John's mother.

ADVERSE COUNSEL: Did you talk to her?

WITNESS: Yes. She said . . .

COUNSEL: I object! Any conversation of this witness with John's mother would be hearsay.

THE COURT: Sustained.

3. Improper Foundation.

ADVERSE COUNSEL: What did you do next?

WITNESS: I made a telephone call.

ADVERSE COUNSEL: To whom?

WITNESS: To the defendant.

ADVERSE COUNSEL: Give us the substance of your conversation.

COUNSEL: I object, Your Honor. No proper foundation has been established for a telephone conversation. Further proof of identity is required.

THE COURT: Sustained.

4. Calls For A Conclusion

ADVERSE COUNSEL: Did it appear the defendant could have stopped the car?

COUNSEL: Objection! That calls for a conclusion of the witness.

THE COURT: Sustained.

5. Argumentative

ADVERSE COUNSEL: (Cross-examining) Now if two former employees of yours were to come here and testify the doors were sticking badly, they would be lying, is that right?

COUNSEL: Objection, Your Honor. This is argumentative.

THE COURT: Sustained.

6. Not The Best Evidence

ADVERSE COUNSEL: When did you receive the letter?

WITNESS: About April 15.

ADVERSE COUNSEL: Did you read it?

WITNESS: Yes.

ADVERSE COUNSEL: What did it say?

COUNSEL: I object upon the grounds that the witness' testimony as to the contents of the letter would not be the best evidence.

THE COURT: Sustained.

7. Improper Cross-Examination

ADVERSE COUNSEL: (Cross-examining) How many times have you been in jail?

COUNSEL: Objection, Your Honor. This is improper cross-examination. It is immaterial and improper even for

impeachment. I ask that counsel be admonished for asking a question so inferentially loaded with prejudice.

THE COURT: That question is certainly improper, and counsel, you had no right whatsoever to put it to the witness. The objection is sustained.

IMPROPERLY STATED OBJECTIONS

Improperly put objections are heard constantly in court. Typical examples are:

I.

COUNSEL: I object. Counsel knows perfectly well that's not a proper question.

THE COURT: You have stated no grounds, counsel.

II.

COUNSEL: Now, Your Honor, if we are going to go into stuff like that we will be here until next week.

THE COURT: Please state the grounds of your objection.

III.

COUNSEL: Your Honor, I have been very lenient with counsel on all these leading questions. But he knows how to ask proper questions. I am going to object to his questions as leading.

THE COURT: We will have to take them one at a time. Overruled.

IV.

COUNSEL: I object. If counsel wants to testify, then why doesn't he get on the witness stand?

THE COURT: You have stated no grounds, counsel.

V.

COUNSEL: Your Honor, what has that got to do with this case?

THE COURT: Is that inquiry to be construed as an objection?

COUNSEL: Yes, Your Honor.

THE COURT: Then please state your grounds.

ATTITUDE WHILE OBJECTING

Sincerity and earnestness should characterize counsel's attitude while objecting. Regardless of provocation he should maintain his dignity and remember his manners. A feigned indignation and a caustic tongue lose more points than they gain. The courtroom is not a forum for attorneys to insult one another. Such intramural obloquy cheapens the profession and hurts the image of the judicial system. Bickering of counsel may amuse the jury, but rarely the judge.

COUNSEL: I object. Why don't you stop trying to put words in the witness' mouth?

ADVERSE COUNSEL: Don't try to tell me how to examine.

COUNSEL: You could certainly use a lesson or two.

ADVERSE COUNSEL: Not from the likes of you.

THE COURT: (Sternly) Gentlemen, please. Now let us get on with this case. You will please address objections to the Court.

CONTINUING OBJECTIONS

When the Court has permitted entry into subject matter over objection, a continuing objection should be sought. Otherwise, all succeeding questions touching the matter must be individually challenged. With foreknowledge of the fate of such objections, it is prudent to ask for a standing objection.

ADVERSE COUNSEL: I offer State's Exhibit No. 4.

COUNSEL: I object, Your Honor. The foundation is inadequate.

THE COURT: In what way do you feel it is deficient?

COUNSEL: The integrity of the blood sample has not been demonstrated in that it has been established that it remained unattended, unlabeled and unsealed in an unlocked refrigerator for over 48 hours.

THE COURT: Mr. States Attorney?

ADVERSE COUNSEL: Testimony shows access to the refrigerator was limited solely to hospital personnel. We have established that this was the only blood sample stored there during that period, and that the procedures followed eliminate the possibility of any mixup.

THE COURT: The objection is overruled. State's Exhibit 4 is received.

COUNSEL: Your Honor, may I have a continuing objection to all testimony relating to Exhibit 4?

THE COURT: Yes, you may.

PREMATURE OBJECTIONS

Objections should await the probative question. Premature objections to preliminary inquiries will be overruled.

ADVERSE COUNSEL: Do you have an opinion as to the fair market value of the property on July 1, last?

COUNSEL: Objection, Your Honor. No proper foundation has been established qualifying the witness to give an opinion on commercial real estate values.

THE COURT: The witness was merely asked if he had an opinion — not what the opinion was. Overruled. The witness may answer "yes" or "no".

WITNESS: Yes, I do.

ADVERSE COUNSEL: What is that opinion?

COUNSEL: (Chastened) Now I object, Your Honor, upon the grounds the witness has not been shown to be an expert appraiser or otherwise qualified to give an opinion on commercial real estate values.

THE COURT: Sustained.

MOTIONS TO STRIKE

Where there has been an intrusion of improper testimony or comments of counsel into the record, a motion to strike may be made. It is frequently made in conjunction with an objection. Counsel must designate exactly what portion of the record he wishes eliminated.

ADVERSE COUNSEL: Just answer the questions. Don't try to show us how smart you are.

COUNSEL: I object to that last remark of counsel as improper, and move that it be stricken.

THE COURT: The objection is sustained, and the motion to strike is granted.

When a witness responds to a question before a nobjection can be interjected, a motion to strike is in order.

ADVERSE COUNSEL: Now, Doctor, did she have pain in her arm?

COUNSEL: Now, just . . .

WITNESS: Yes.

COUNSEL: . . . a moment. Your Honor, I move the answer be stricken so that I may make an objection.

THE COURT: The motion to strike is granted.

Volunteered statements of the witness not within the legitimate scope of the question will be stricken on motion.

COUNSEL: (Cross-examining) As a matter of fact, you did not use your brakes, did you?

WITNESS: I'd like to see you hit your brakes in the time there was. The way she darted out . . .

COUNSEL: Your Honor, I object to the answer and move it be stricken as unresponsive.

THE COURT: The motion is granted, and the answer will be stricken.

COUNSEL: I would ask that the jurors be instructed to disregard the answer.

THE COURT: Yes. Members of the jury, you are to wholly disregard all testimony ordered stricken by the Court.

COUNSEL: I asked you if you used your brakes. As a matter of fact you did not, did you?

WITNESS: No, I didn't.

KNOWING THE JUDGE

Not every judge is an evidence expert; and even the expert will face trying moments of indecision. It is well to know and remember that judges, especially in civil cases, are inclined to the doctrine:

"When in doubt, let it in."

The burden is thus squarely upon objecting counsel to demonstrate why an exclusionary rule is to be invoked. The objection must be sound and the argument in its favor persuasive. The judge wants to be shown that logic and law support his ruling.

Attorneys would do well to keep antennae out for signals from the judge. No court likes to watch an unhampered flow of improper evidence into the record. He may cast a significant glance at counsel

table, especially if it is peopled with the young or inexperienced, when an objection should be forthcoming.

It is neither wise nor proper to take issue with the Court on an adverse ruling.

COUNSEL: Do I understand from that ruling that the Court is not going to permit me to examine on that subject matter?

THE COURT: Yes. That is precisely the effect of the ruling!

THE COUNSEL: But, Your Honor, this is very important to . . .

THE COURT: The Court has ruled. Now proceed, if you please.

However, if the adverse ruling comes without opportunity for argument, it is perfectly proper to ask to be heard. The Court will usually listen (though seldom recant).

Prejudicial remarks from the bench must be objected to if the error is to be preserved for appeal. Here the lawyer usually proceeds with great care, for jurors, naive in such things, seldom think the judge could do any wrong.

ADVERSE COUNSEL: Objection, Your Honor. Repetitious.

THE COURT: Sustained! Why don't you get down to brass tacks here and stop this tomfoolery and quit wasting everybody's time!

COUNSEL: I must most respectfully except to that comment of the Court. I fear it might convey an undue impression to the jury that I am designedly doing something improper here.

FORCING A RULING

A judge, unsure of his proper tack, may try to maneuver around an objection without ruling. This should not be permitted. A ruling should be forced. Otherwise error may be waived.

COUNSEL: I object, Your Honor. That is a collateral matter outside the issues of this lawsuit.

THE COURT: Well, counsel may sail a ways further on that bearing and we will see where he is heading.

ADVERSE COUNSEL: Thank you, Your Honor.

COUNSEL: Is the objection overruled, Your Honor?

THE COURT: Yes. Overruled.

ASKING LEAVE TO CROSS-EXAMINE

Permission is often sought to interrupt the direct examination of adverse counsel for the purpose of laying a foundation for possible objection.

STATE'S ATTORNEY: (At preliminary hearing) I show you what has been marked as State's Exhibit 3, and I ask you to identify it.

WITNESS: It is a signed statement I took from the defendant.

COUNSEL: Your Honor, may I inquire for the purpose of laying a possible foundation for objection?

THE COURT: You may.

COUNSEL: Officer, on the date you took this alleged statement, was my client in custody?

WITNESS: Yes.

COUNSEL: Who was present?

WITNESS: Me and Lieutenant Nelson and the defendant.

COUNSEL: Are you familiar with what is known as the *Miranda* warning?

WITNESS: Yes.

COUNSEL: As a matter of fact, no such warning was given my client before you took this alleged statement, was it?

WITNESS: Well, he just said he wanted to make a clean breast . . .

COUNSEL: I object, and move the answer be stricken as unresponsive.

THE COURT: Sustained. The motion to strike is granted.

COUNSEL: Now officer, the question was did you give the *Miranda* warning?

WITNESS: No.

COUNSEL: I object to the exhibit and to any further testimony on it. It was illegally obtained and was not voluntary.

THE COURT: Sustained.

This device is also used by some attorneys to buy time when they want to halt certain evidence, but are not sure how to do it.

ANTICIPATING OBJECTIONABLE EVIDENCE

The diligent lawyer will have anticipated much of the evidence he wants excluded. Prescience gained through preparation, investigation, research, depositions, interrogatories and pre-trial conference (preliminary hearing in criminal cases) forewarn him of possible dangers. He therefore comes to the trial armed and steadied for attack, fair or foul, from almost any evidentiary quarter.

Counsel may also find profit in alerting the Court to problems of evidence likely to arise during the trial. This should be done in a trial brief, filed before the trial date.

STAYING ATTENTIVE

Culling out objectionable testimony demands unflagging vigilance. Counsel's mind cannot wander for even a moment. Nothing should distract. Whispers from co-counsel should be waived off; coattail tugs from the client ignored. Let them write notes — provided they have promised abridgement to six words or less. Adverse counsel may have a devastating question set carefully aside for sudden use when hot whispered breath is claiming his opponent's ear. Unyielding to fatigue and impervious to distraction, trial counsel must stand unremitting guard against all possible foul blows.

REAL AND DOCUMENTARY EVIDENCE

Documentary and other tangible evidence moves ponderously toward admission. In contrast to the acute pressures upon counsel to intercept verbal evidence, an exhibit can be challenged at comparative leisure. After it is marked by the reporter, identified by the witness and offered, it may be inspected by counsel. The careful lawyer takes his time.

ADVERSE COUNSEL: We offer Plaintiff's Exhibit 8.

COUNSEL: May I have a minute to examine the exhibit, Your Honor?

THE COURT: Yes, certainly.

COUNSEL: Thank you. (Examines exhibit, taking notes) Thank you for your patience. Plaintiff's Exhibit 8 is objected to upon the grounds that it . . .

For complex exhibits, a recess may be necessary. But in any case, counsel examines the exhibit front and back. He reads the

document with deliberation. He studies every detail that a photograph portrays. He looks for concealed traps with scrupulous care. And all the while he is taking notes for possible use in making objection.

OBJECTING DURING SUMMATION

It is a favored rule of law that great latitude is granted counsel in his summation. Any urgings to object during closing argument should be reined accordingly. Summation is not the time for picayune intrusion.

But should arguing counsel exceed the generous bounds accorded him, objection becomes necessary. Critical misstatements of evidence, appeals to prejudice, the use of abusive epithets should be checked. Failure to object to prejudicial argument is fatal to a later claim of error.

> ADVERSE COUNSEL: . . . and I say to you, and the cross-examination bears me out, that the defendant is a charlatan and a bald-faced liar . . .
>
> COUNSEL: Objection! Such argument is grossly abusive and improper.
>
> THE COURT: Sustained. Members of the jury, these characterizations just made by counsel are not proper. They should not have been spoken, and I instruct you to disregard them completely. Counsel, you are to refrain from indulging in such language. Now proceed.
>
> ADVERSE COUNSEL: I apologize, Your Honor. If I erred, it was in the heat of the moment.
>
> THE COURT: You erred.
>
> ADVERSE COUNSEL: I am sorry if I exceeded the bounds of propriety, and I want to retract any words that may appear offensive.
>
> THE COURT: Very well.

WHEN NOT TO OBJECT

Moderation, as in other things, should be the rule in objecting. Seldom is any purpose served in objecting to admissible evidence. Yet there are lawyers who feel compelled to resist all harmful evidence, whether it is admissible or not. It is to no avail. The admissible evidence goes in anyhow, reinforced by the judge's adverse ruling on the objection.

Not every question vulnerable to objection need be challenged. Even when grounds are apparent there is a hazard in objecting

excessively. The hair-trigger objector can become a nuisance, resented by judge and jury. He is cast as an obstructive pedant. His case suffers. Objections relating mainly to inartistic phrasing of questions can often be waived. They expand the record, kill time, and only result in rephrasing of the same inquiry.

The objector should decide not only if grounds to object exist, but also whether harm would come if the objection is waived. He should adhere to these rules:

Don't object when the question is objectionable but harmless.

Don't object when the question is harmful but not objectionable.

Do object when the question is objectionable *and* harmful.

FINALE

In barring improper testimony the lawyer's professional dexterity is put to its sternest test. Only a vital split second separates question and answer. In that fleeting instant counsel must parry a sudden thrust that his adversary may have spent hours preparing. He must instantly comprehend the question, recognize its vulnerability, pick the grounds for objection, and speak out. This is rough jousting ground for the neophyte or the slow-witted. Here is no forum for the careless or the inattentive. This is the practice of the profession at its very crown.

Impromptu scenes of dramatic controversy enacted in trial courts wherever venued, often match the studied works of the most skilled of playwrights. Incomparable is the courtroom clash of wits and words, the matching of blow with counterblow, the stimulated tempo and electric atmosphere involved in objection, rejoinder and ruling. In this rugged but fascinating arena, no trial advocate should be found wanting.