A GUIDE TO OBJECTIONS

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Deciding whether and when to object to a question asked or argument made by opposing counsel requires both a good working knowledge of the Rules of Evidence and a sound sense of strategy because not every objectionable question is worth objecting to, especially where the answer sought doesn't hurt your case (or better yet, helps it), and lawyers should be mindful of the jury's desire to hear the story of the case unimpeded by legalistic interruptions that may be perceived as an attempt to conceal the truth.

That said, counsel has a client to represent and a record to protect, so objections (preferably the right ones) are necessary to keep out inadmissible, unduly harmful evidence and to preserve evidentiary issues for appeal in the event of an unfavorable outcome. And sometimes, an objection may even be appropriate for no other reason than to knock opposing counsel off his/her game when your witness is on the receiving end of unrelenting mortar fire on cross examination.

Whatever the reason for doing so, objections are of little value if counsel doesn't know which ones to make and when to make them (ideally, before the witness has answered the question) lest that unwelcome bell keep ringing in jurors' ears during deliberations notwithstanding the judge's instructions to disregard what they've already heard.

The following is a list of some common objections that counsel is likely to make or encounter at one point or another during the course of a trial or other testimonial proceeding. Some of them relate to the form of the question (though saying "objection, FORM" as lawyers often do in depositions, reveals NOTHING about its objectionable nature), and others are based on SUBSTANTIVE RULES OF EVIDENCE:

COMMON "FORM" OBJECTIONS:

1. LEADING QUESTION. Perfectly acceptable (and expected) on cross examination, but generally disallowed on direct examination except, perhaps, to develop background information, clarify a previous answer or assist a witness who because of age, illness, physical disability or nervousness is having trouble getting out their testimony.

   Leading questions state or suggest the desired answer ("the traffic light was green wasn't it?" (LEADING) vs. "What color was the traffic light?" (NON-LEADING).

On direct examination, counsel should generally ask NON-LEADING questions that typically begin with: “WHO, WHAT, WHERE, WHEN, HOW, DESCRIBE or EXPLAIN.”

2. ASKED AND ANSWERED: Lawyer asks the same question that was already answered or seeks to elicit the same information that the witness has already provided. (Note, it is NOT a valid objection when made by a prosecutor seeking to curtail cross examination on the subject matter covered on direct examination unless defense counsel has already questioned the witness on the matter during cross examination).

3 NARRATIVE: Asking a question that is OVERBROAD in scope: “Directing your attention to July 2019, tell the jury what happened?”

4 SPECULATION: Asking a witness to make a guess or conjecture about someone else’s unstated motivations or thought processes. “Why weren’t you invited to the party?” If the witness doesn’t know the reason, he can only speculate. If he was told, then counsel has a hearsay issue to contend with: “I wasn’t invited because the host said that I am an aggressively boring person.” (Asking a witness to explain his/her OWN thought processes, motivations, feelings, if relevant, IS NOT speculation because people generally know their own minds. “Why didn’t you go to the party?”

5 ARGUMENTATIVE: NOT the same thing as “badgering” where counsel may shout at, argue with, lean in on or otherwise try to bully or browbeat the witness. An argumentative question is one that is infused with judgment, sarcasm or conclusions more properly left to summation: “Do you really expect this jury to believe that you had no idea that there was a kilo of cocaine in the trunk of your car?”; “So, the three officers who said they found drugs in your pocket are all lying, and you’re telling the truth is that what your saying?”; “So you were just the unwitting mule, a dupe, is that right?”; “Isn’t it a fact that you couldn’t care less who had access to those drugs, not your wife not even your kids, isn’t that true?”

6 ASSUMES FACTS NOT EVIDENCE: Putting the evidentiary cart before the horse by asking a witness about one fact without first establishing its foundational predicate. “When were you released from jail?” (without first establishing that the witness went to jail in the first place).

7 UNREPONSIVE ANSWER: Witness does not answer the question asked.

8 READING FROM A DOCUMENT NOT IN EVIDENCE (unless counsel is impeaching a witness with a prior inconsistent statement).

9 REVEALING AN EXHIBIT (e.g. photograph) that is not in evidence to the jury.

10 QUESTION THAT MISREPRESENTS THE TESTIMONY OR EVIDENCE IN THE CASE.

11 COMPOUND QUESTION: One that addresses more than one fact or idea. “What time did you arrive at the party, who did you see there and how long did you stay?”

12 CONFUSING QUESTION: One that is vague, unclear or ambiguous. “When the officer was interrogating your husband, what did he say?” … “What did who say?”

13 NO FOUNDATION: to establish the authenticity of an exhibit (e.g. physical evidence); that pictorial evidence fairly and accurately represents what it depicts; that a witness has a proper basis of knowledge for his/her testimony; establish chain of custody of fungible evidence; that expert is properly qualified to give an opinion; that the subject matter is appropriate for an expert opinion.

14 IMPROPER OPINION: where a lay witness is asked to give an opinion on a matter requiring expert testimony, or if on a proper subject (e.g. recognition of another’s signature based on repeated exposure), the witness lacks personal knowledge, or an expert is asked to give an opinion on a matter that is within the knowledge and experience of average jurors.

15 IMPROPER IMPEACHMENT: where there is no true prior inconsistency or omission, or the lawyer attempts to impeach his/her own witness in a criminal case where the testimony given does not TEND TO DISPROVE the party’s position. (CPL 60.35)

16 IMPROPER BOLSTERING: where the proponent elicits prior consistent testimony from a witness whose trial testimony has not been attacked as a recent fabrication.

17 IMPROPER ARGUMENT: referencing inadmissible or unadmitted evidence in front of the jury (instead of making an offer of proof outside the jury’s presence).

18 VIOLATING THE COURT’S IN LIMINE RULING: by referencing previously excluded evidence and the door has not been opened.

19 ARGUING THE CASE IN OPENING STATEMENT.

20 IMPROPER ARGUMENT IN SUMMATION: Injecting personal opinions, commenting on evidence not admitted, implying that D has a burden of proof, appealing to jurors’ fears with “safe streets” appeals.

SUBSTANTIVE OBJECTIONS

21 RELEVANCE: The evidence does not make a material fact in the case more or less likely to be true.

22 UNDUE PREJUDICE: The probative value of the evidence is SUBSTANTIALLY OUTWEIGHED by the risk of confusing, misleading or inviting the jury to decide the case on an improper basis (e.g. the defendant's alleged propensity toward criminal conduct).

23 IMPROPER CHARACTER EVIDENCE: Offered to show D's predisposition toward crime rather than to establish an element of the crime or other relevant issue (e.g. motive, intent, identification, common scheme or plan); Eliciting OPINION testimony rather than REPUTATION EVIDENCE from a character witness.

24 INSUFFICIENT EVIDENCE OF REPETITIVE NATURE OF CONDUCT AND SIMILARITY OF CIRCUMSTANCERS TO ESTABLISH HABIT.

25 HEARSAY: Out -of -court statement offered to prove the truth of the matter asserted therein with NO EXCEPTION provided (e.g. EXCITED UTTERANCE, PRESENT SENSE IMPRESSION, STATEMENT OF A PARTY OPPONENT, DECALARATION AGAINST INTEREST, BUSINESS RECORD, PUBLIC RECORD, STATEMENT MADE FOR DIAGNOSIS AND TREATMENT, STATE OF MIND, STATEMENT OF FUTURE INTENT). If the statement is offered for a relevant, non-hearsay purpose (e.g. for the fact that it was made, for its effect on the listener, as a verbal act), there is no hearsay issue.

26 CONFRONTATION CLAUSE VIOLATION: Testimonial hearsay (whether oral or documentary) from a non-testifying witness who does not qualify as unavailable and who was not previously subject to cross examination.

27 BEST EVIDENCE RULE: Failure to introduce an original writing or to properly account for its absence before offering a copy.

28 WITNESS LACKING IN COMPETENCY to testify (e.g. due to age, lack of mental capacity or other serious infirmity).

29 SUBSEQUERNT REMEDAL MEASURE: Inadmissible to prove negligence (but may be admissible to prove ownership or control).

30 OFFERS TO SETTLE, PLEAD GUILTY (or GUILTY PLEA WITHDRAWN) or to COMPROMISE A CLAIM generally NOT ADMISSIBLE.

31 COLLATERAL MATTTERS RULE: Extrinsic evidence is NOT ADMISSIBLE to impeach a witness on a matter relevant only to W's credibility. With Prior Bad Acts, cross-examiner is BOUND by W's answer. With prior convictions, extrinsic evidence (e.g. certificate of conviction) is ADMISSIBLE only if W denies or equivocates about it.

32 PRIVILEGE: Attorney Client, Doctor-Patient, Priest-Penitent, Spouse-Spouse.

Counsel should be mindful that "PREJUDICIAL" is not a valid objection. All evidence offered in support of a party's claim or to refute the opposing party's position is prejudicial by its very nature. It is only when the probative value of the evidence with respect to proving or disproving a material fact is SUBSTANTIALLY OUTWEIGHED by its prejudicial effect that exclusion is warranted. If the evidence, while technically objectionable, does not hurt your case or can be used to your client's advantage, counsel may do well to let it go and save his/her evidentiary ammunition for when it really matters. It is in such moments, where the right balance is struck between substance and strategy, that good lawyers can shape and control the evidentiary landscape and pave the way for a favorable result for their clients.