Trial Objections and Strategies

BY JAMES A. JOHNSON

"The trying of cases in court calls for acute intelligence, the capacity for instantaneous thought and for deciding what to do in the twinkle of an eye."[1]

To master trial objections, one must be conversant with the rules of evidence. The reasons for objecting are to shape the testimony heard by the jury and to preserve the record for a directed verdict, judgment not withstanding verdict, motion for a new trial, and appellate review. Many lawyers are oblivious to bringing law school methodology into the courtroom. This is not a law school examination where an objection must be raised to every technical violation of the rules of evidence. Judges like to move things along without delay or interruptions. To that end, this article focuses on how attorneys can effectively present or exclude evidence through the judicious use of objections and various other trial strategies.

Objections at Trial

An objection must be timely and specific; otherwise it is waived. To be effective, the opponent must specify both what they are objecting to and why they are objecting. For example:

- "Your Honor, I object to the admission of Exhibit A on the ground that there has been insufficient authentication."
- "Objection, Your Honor, Relevancy-Rule 401."
- "Your Honor, counsel is putting words in the mouth of the witness."

CRE 103(a)(1) requires the opponent to state the specific ground of objection "if the specific ground was not apparent from the context."[2] But the consummate trial lawyer will

consider whether to object at all. If you want to stay in good standing with the judge through a trial, limit objections. Do not make any objection without a good reason for it, and only object to the most important issues. Lengthy objections in open court are counterproductive. Moreover, do not make repetitive objections. Repetitive objections are annoying when a single objection to a line of questioning will suffice, and they signal to the jury that you are attempting to hide information from them. Asking for a running objection is sufficient. Unless it is necessary to preserve the record, it is usually unwise to object unless you believe you will be sustained. Do not make objections when the evidence is harmless.

Request to Take a Witness on Voir Dire

Voir dire means to speak the truth. While typically associated with jury selection, voir dire can also be used for witnesses when there is a question of preliminary fact, such as a question about the authenticity of a document, the presence of hearsay or opinion, or the competency of a witness. Voir dire is functionally a cross-examination during the proponent's direct examination. The opponent interrupts by requesting the judge's permission to take the witness on voir dire. The opponent will ask the witness a series of questions to ascertain the admissibility of the proffered evidence. The questions to be asked depend on the issue. Voir dire is limited to the competency of the witness or evidence. It has a limited scope, and the opponent may not conduct a general cross-examination on the case's merits under the guise of voir dire. CRE 104(a) provides that the trial judge makes the final decision regarding these types of questions.

Motion to Strike

A motion to strike applies when a witness answers a question so rapidly that the opponent does not have a fair opportunity to interpose an objection or the answer is improper. The opponent in these instances should move to strike rather than to object. The motion to strike must be timely and specific.[3] If the answer contains non-responsive hearsay, the motion should be based both on non-responsiveness and on hearsay to protect an appeal.

Offer of Proof

When the trial judge sustains an objection at trial, the judge precludes the proponent from a line of inquiry. The proponent should make an offer of proof stating what the witness would have testified to and why the proponent wanted to elicit that testimony.[4] CRE 103(a)(2) requires that the proponent ensure that "the substance of the evidence was made known to the court by offer . . . ." CRE 103(b) allows the court to "direct the making of an offer in question and answer form."[5] CRE 103(c) directs that the proponent make the offer of proof outside the presence of the jury's hearing. Benefits to the proponent are twofold: the judge may reconsider and change the ruling, and you have protected the record for appellate review.

Motion in Limine

If counsel anticipates an evidentiary issue at trial, counsel need not wait until trial to object. The trial attorney may raise the objection by a pretrial motion in limine to obtain an advance ruling of the evidence's admissibility.

A motion in limine can be used in civil and criminal cases to offer or exclude evidence, though it is more frequently used to exclude evidence. It could be used, for example, to prevent mention of liability insurance, to exclude evidence of a defendant's prior criminal record convictions, or to offer or exclude a video or movie.

Procedurally, a motion in limine must state the grounds with the same specificity as a trial objection. Unless otherwise ordered by the court, it should be filed at least 35 days before trial, and a response should typically be filed no more than 14 days later.[6]

Advance rulings have several advantages. A successful motion in limine can preclude a proponent from even mentioning prejudicial evidence during trial. Further, the opponent may need an advance ruling to make strategy decisions for trial. For example, if the judge grants a pretrial motion in limine to exclude the defendant's convictions, defense counsel can consider placing the defendant on the stand.

Conclusion

The consummate trial lawyer is adept at anticipating potential evidence problems, both offensive and defensive, and strategic in making and meeting objections. To master these skills, you must commit to learning all the rules of evidence and the distinctions between state and federal courts. Knowledge of the rules of evidence is priceless. Read and then reread Colorado Rules of Evidence and Federal Rules of Evidence 103, 104, 401, 403, 801, 803, 804, and 901 in their entirety. Moreover, re-read this article a few times and then periodically refer back to it. Attend seminars on evidence and trial practice. Eventually you will gain confidence and skill in the courtroom. CL

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NOTES

1. Several authors have attributed this quote to Clarence Darrow, though its exact origin is unclear. *See, e.g.*, Ross, *Advocacy* 4 (Cambridge University Press 2007); Gravett, "The Fundamental Principles of Effective Trial Advocacy" 4 (Juta 2009).
2. CRE 103(a)(1); *People v. Renfro*, 117 P.3d 43 (Colo.App. 2004).
3. CRE 103(a)(1).
4. CRE 103(a)(2); Low, "Preserving Issues for Appeal," 20 *Colo. Law.* 879 (May 1991); Burtzos, "Offers of Proof," 31 *Colo. Law.* 85 (Jan. 2002).
5. CRE 103(b); *People v. Hoover*, 165 P.3d 784 (Colo.App. 2007).
6. CRCP 16(c); CRCP 121 § 1-15(1)(b).