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MAKING OBJECTIONS DURING JURY TRIALS

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James D. Vilvang
Vancouver

Trial Lawyers Association of British Columbia, Advocacy Track

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In any discussion of objections, three fundamental issues have to be considered:

1. What to object to?

2. When to object?

3. How to object?

The first question obviously involves a detailed discussion of the Rules of Evidence. That is beyond the scope of this paper (and probably its writer).

I will try to provide counsel with some useful advice on the other two issues.

1. WHEN TO OBJECT

(a) Necessity – Counsel are often rightly concerned that excessive objections during a jury trial will cause the jury to believe that you are being obstructionist and are trying to hide something. That will certainly be the impression jurors form if your objections are frequently overruled. On the other hand, if your objections are proper and are upheld, I believe that it is more probable that the jury will form the impression that the opposing counsel is not playing by the rules and that they will subsequently form a negative perception of that lawyer or her case.

In other words, do not worry about the number of objections. Just make sure that your objections are proper and necessary.

It is not necessary to object even if an improper question is asked if it will not harm your case. For example,

700 - 401 W GEORGIA ST.
VANCOUVER, BC V6B 5A1
CANADA
TELEPHONE
604 682 3664
FAX
604 688 3830
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a witness may be asked in direct examination, "you were taken by ambulance to St. Paul's Hospital, correct?". As put, that question is clearly leading, but where the matter is not in issue and you already know the answer, there is no need to object. It is important that you understand the significance of the improper question and the potential answer in order to make the right decision as to whether or not to object. Obviously, there is no need to object to a question unless the potential answer might have a detrimental effect on your case.

(b) "Rescuing a Witness – Sometimes, when things are going badly for your client or one of your witnesses during cross examination, it is tempting to try to object just to break up the cross examination and give your witness some time to gather his or her thoughts. I know I have done that. I do not know if it is effective or not. I fear that it may highlight to the jury the fact that your witness is having difficulties and I fear that they may sense that you are obstructing the other counsel (which you are). The jury may form an even more negative impression of your witness' performance if they sense that you are trying to help them wiggle out of a tight spot.

Some counsel take this practice a step further and, while stating their objection, try to give the witness a clue as to the problem and/or possible answer which might be a better way out. Obviously, this is completely inappropriate. My advice to counsel who are tempted to use this tactic is never underestimate the wisdom of the jury. Chances are they will see right through this ploy and form a very negative impression of you and your client.

(c) Do not Interrupt Your Own Witness – Occasionally, a situation like the following question will arise.

"Q. What happened to your leg?

A. Dr. Smith told me it was broken.

Counsel: Don't tell us what anyone told you."

In my view, that is unnecessary and inappropriate. Although in a technical sense that could be considered hearsay, it is more likely that no one in the Courtroom will regard that statement as being offered for the truth of the contents. Chances are that you have already filed a report from Dr. Smith confirming his diagnosis that the leg was broken. If it is being tendered to prove the truth of Dr. Smith's statement, it is the responsibility of opposing counsel to object.

(d) Major Objections – Often, prior to the commencement of a trial, you will know that you will be objecting to a significant piece of evidence. For example, you may be objecting to the admissibility of a certain expert's opinion on the basis of the principles in the *Sengbusch* case. In my view, if you are aware that such

an objection is to be made, you should thoroughly prepare your objection, perhaps even going so far as to prepare a written outline of your argument together with a Brief of Authorities on the subject.

I recommend that you raise the issue with opposing counsel prior to the commencement of trial and that you notify the Judge of the objection prior to the commencement of the trial in the absence of the jury. The Judge can then schedule a convenient time for the hearing of the objection so that the jury will not be inconvenienced.

For example, if you anticipate objecting to a major portion of the evidence of Dr. A who is going to be called tomorrow morning at 10:00 a.m., it is not a good idea to wait until Dr. A has been called to the stand, sworn in and begun his testimony before rising with a major objection at 10:15 which may take two hours to argue. The jury would then have to sit in the jury room and may even be out for the rest of the day if the Judge wants to consider her decision overnight. What a waste of the jury's time.

A far better approach would be to raise the issue at the end of the preceding day (or earlier) so that the Judge could advise the jury not to attend until 2:00 p.m. or whenever appropriate.

(e) Not During Argument – When you hear opposing counsel say something in their closing address to the jury that is inaccurate or inflammatory, there is a very strong urge to rise immediately. Fight the urge. The times when it would be appropriate to object during opposing counsel's addresses to the jury are so rare that I can almost safely state that it should never be done.

2. HOW TO OBJECT

(a) Stay Cool – If you hear an improper question, do not roll your eyes or fall back in your chair or throw up your arms (I know I have done all of these things). I do not think juries appreciate over dramatization.

Even more importantly, if an improper question produces a damaging answer, DO NOT REACT. If you let your face or your body language reveal that a very damaging answer has been given, the jury will probably pick up on that. If you do not react at all, the jury may well miss the significance of the answer.

It is also a good idea to instruct your client not to react to any evidence which is given.

(b) Stand Up – This sounds pretty simple, but I know that I quite often raise my rear end out of my seat by about six inches when making an objection. I am trying to break the habit.

(c) Speak Up – "Do not mumble" is good advice to any trial lawyer at any time, but it is particularly important when making an objection.

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604 682 3664
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The best thing to do is state “I object” then briefly state the grounds for your objection.

If, to effectively make your objection (or to effectively reply to an objection made by opposing counsel), it will be necessary for you to refer to evidence which may have been given or may be given, it is always appropriate to ask to have the jury excused. Failing to do this is the single biggest mistake civil lawyers make. I presume that is because until fairly recently, juries were rare in civil cases. Criminal lawyers, more used to dealing with juries, seem to have a better grasp of the necessity for having the jury excused.

(d) Talk to the Judge – Always make your objection to the Judge. Do not get into a dialogue with opposing counsel. Even worse, if the Judge is against you, do not get into a dialogue with the Judge. Accept the ruling and sit down. However, if another similar question comes up which you believe is improper, do not simply assume that the Judge would rule against your objection again. You should make your objection again, stating your grounds briefly, unless you have something new to submit on the subject of why your objection should be sustained.

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FAX
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