CALIFORNIA TRIAL OBJECTIONS

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AN APPROACH TO EVIDENTIARY OBJECTIONS[1]

This text lists tens of potential evidentiary objections. However, having such a handy, lengthy list at your fingertips can create a dangerous temptation. Although the practitioner must be familiar with all the possible objections, we do not want to convey the message that the trial attorney should challenge every objectionable question or answer uttered at trial. For that reason, before leading the reader through the list of potential objections, we want to set out our basic approach to objections. That approach relates to three issues: whether to make the objection, where to make the objection, and how to make the objection.

Whether to Make the Objection

The trial attorney should not object to every technically improper question. In our culture, it is considered rude for a third person to interrupt a conversation

[1] *See generally* R. Carlson & E. Imwinkelried, Dynamics of Trial Practice Ch. 6 (Thomson Reuters 7th ed. 2023).

between two people. In effect, the questioner and the witness are carrying on a conversation. When the opponent objects, the opponent is interrupting. Further, frequent objections may alienate the jury. You run the risk of creating the impression that you are desperately trying to hide the truth from the jury. As Professor McElhaney has written, "A trial is not an evidence examination. You get no extra points for spotting every issue and making every proper objection." McElhaney, *Creative Objecting*, 80 A.B.A.J. 80, 81 (Aug. 1994). Consider the finding of the *National Law Journal*-LEXIS jury survey:

> When a lawyer made an objection, 46 percent of the jurors thought that the lawyer was trying to hide something the jurors felt would have been helpful to know. . . . Young jurors were particularly suspicious of objections—59% of those in the 18 to 34 age group thought that lawyers had something to hide.

Panelists Give Tips to Lawyers, Nat'L L. J. L, Feb. 22, 1993.

You certainly should not object if the probable answer to the question will be favorable to your theory of the case. In some cases, the opposing attorney is not acute enough to think through your theory of the case; he or she does not realize that the question will likely elicit an

answer supporting your theory. In closing argument, you want to be in a position to use testimony elicited by the opponent to corroborate your theory of the case. Better still, you can point out that the opposing attorney himself or herself adduced the testimony. Even if the question is objectionable, make a conscious decision to waive the objection.

In addition, you may not want to object even when the probable answer will do some, minimal damage to your case. The decision is situational. Study the jurors' nonverbal demeanor. Has the opponent has already bored them to the point that they are hardly paying attention to the witness's answers? Factor your assessment of the opponent into the calculus. Is the opponent the sort of sloppy attorney who is unlikely to fully exploit favorable testimony during closing argument? If that is the way you size up the opponent and most of the jurors are staring out the window, it makes little sense to object. If you were to object, you would call the jurors' attention to the testimony.

Moreover, in some cases it is positively counterproductive to object. Think long and hard before you make foundational authentication, secondary evidence, or hearsay objections. In many cases in which the foundation is technically deficient, you know that the deficiency is

curable. Perhaps for some reason the opponent is simply rushing. Again, factor your assessment of the opponent into the calculus. When you think that the opponent knows evidence well enough and is familiar enough with the facts to cure the deficiency, an objection will backfire. The objection will call the jury's attention to the testimony. Worse still, after the opponent lays a more complete foundation, the testimony may be even more persuasive than it otherwise would have been.

Likewise, think twice before objecting to credibility or character evidence. The opponent's introduction of inadmissible credibility or character evidence may trigger the "opening the door" or "curative admissibility" doctrine. Gilligan & Imwinkelried, *Bringing the "Opening the Door" Theory to a Close: The Tendency to Overlook the Specific Contradiction Doctrine in Evidence Law*, 41 Santa Cl. L. Rev. 807 (2001). This is especially important in civil cases in California. In civil actions, Evidence Code § 787, banning questioning about untruthful acts which have not resulted in a conviction, is still in full effect. However, by injecting inadmissible evidence, the opponent might forfeit the protection of § 787.

When then should you object? There are three situations in which it makes tactical or strategic sense to press an

objection.

First, as a matter of tactics experienced attorneys frequently object to throw a neophyte questioner off stride. We want to make our position clear. We are not urging you to make frivolous objections to interrupt the questioner's examination of the witness; that is unethical conduct. Rather, we are saying that if you have a legally sound ground for objecting, it makes tactical sense to exercise your right to object when your opponent is inexperienced. Suppose, for example, that your opponent has not mastered the art of phrasing crisp, non-leading questions on direct. A string of sustained "leading" objections may frustrate the questioner and lead him or her to abandon a line of questioning that would be damaging to your client. To be blunt, it is neither your nor your client's fault that the opposing client has chosen an incompetent counsel.

Second, object when your witness needs a "breather." By way of example, assume that the opponent has asked a series of objectionably argumentative questions. On the one hand, if your witness is weathering the storm nicely, waive the objection. The jury will be impressed that without any help, your witness is deftly fending off the opponent's attacks. On the other hand, if your witness is nervous, the argumentative questions may

be shaking him or her. Their demeanor may become less favorable, and the attacks might even prompt them to give less certain answers. In this situation, it is not only legitimate to object; you owe it to both your client and your witness to object. Give the witness some time to regain his or her composure.

Finally, an objection is strategically sound when the probable answer is objectionable and likely to do real damage to your theme in the case. The theme should embody your very best argument on prevailing on the pivotal issue in the case.[2] Above all else, at trial you have to protect that argument.

Where and How to Object

In many cases, you will want to move *in limine* before trial to exclude the opponent's evidence. If you wait until trial to object, although you might succeed in excluding the evidence, the jury may learn that some unfavorable evidence exists. You would much rather that they not discover that. An *in limine* ruling eliminates the risk that the jurors will resent your attempt to suppress seemingly relevant evidence. You do not want them to suspect that you are hiding the truth. If you decide to urge *in limine* objections, be

[2] R. Carlson & E. Imwinkelried, Dynamics of Trial Practice Ch. 3 (Thomson Reuters 7th ed. 2023).

selective. In most cases, the trial judge has discretion as to whether to rule on the objection before trial. If you announce that you have less than a handful of objections, the judge may well entertain the objections and rule on them *in limine* However, if you tell the judge that you have 40 *in limine* matters, the judge is likely to defer the matters until trial. The judge wants to try the case once, not twice.

Suppose that you either decide against raising a particular objection *in limine* or the judge defers the matter to trial. In some cases at trial, you can raise the issue at sidebar. A sidebar conference is appropriate when the argument over the objection could expose the jurors to prejudicial matter. However, realize that most jurors hate sidebar conferences. When you ask to approach sidebar and then whisper to ensure that they cannot hear your statements, you look conspiratorial; and the jurors will often leap to the conclusion that you are the typical shyster trying to hide the truth from them. Be sparing in your requests for sidebar conferences.

By process of elimination, you will end up urging most of your objections at trial in the hearing of the jury. In this situation, you need to urge a technically proper objection to preserve the issue for purposes of appeal. In most instances, it will

be legally sufficient if you name the generic evidentiary rule being violated: "improperly leading," "insufficient authentication," "inadmissible secondary evidence," or "hearsay." However, in a jury trial, you cannot be content with technically proper phrasing. The phrasing may be adequate to preserve the issue for appeal, but again the wording may leave the jury with the impression that you are endeavoring to suppress the truth. It is true that you cannot make a long-winded "speaking" objection, going on at length about the grounds for your challenge to the question. However, you can artfully add a word or phrase to make it clear to even a lay juror that there is substance to your objection: "leading, putting words in the witness's mouth" or "hearsay, a statement by a person we have never had an opportunity to question." When you object to questions on direct, try to send the message that the direct examiner is attempting to introduce unreliable evidence. When you object to cross-examination questions, attempt to convey the message that the cross-examiner is treating the witness unfairly.

The moral should be clear. The effective litigator is much more than a legal technician. A legal technician knows only what his or her client's legal rights are. In contrast, an effective litigator also has a strategic and tactical sense, enabling him

or her to answer the tougher questions: whether to exercise those rights and, if so, how best to do so. As the common saying among business consultants goes, "Intelligence comes a dime a dozen. Good judgment is what is really rare."

THE FORMAT OF THIS TEXT

This text contains material for four timeframes.

First, there is material for pretrial use. If you are a neophyte, we strongly urge you to take the time to read the "Recognizing the Objection" and "Advocacy Notes" entries. They are designed to shorten your tactical learning curve for trial.

Second, there is material for immediate use at trial when an objection arises. That material includes suggested phrasing for objections, recommended responses, and occasionally proposed counter-responses by the objector.

Thirdly, there is material for use at sidebar when there is a lengthier opportunity to argue the objection. The "Legal Commentary" section includes references to authorities, primarily cases, that you can cite on the spot at sidebar to win the argument over the objection.

Finally, there are occasions when the judge indicates that the issue is so important that he or she wants a brief recess to

think the issue through. The judge usually adds that after the recess, there will be a short argument on the issue before a final ruling. What should you consult during the recess? In our limited experience, the two texts which carry the most weight with California trial judges are Jefferson's California Evidence Benchbook (4th ed. rev. 2014) (2 vols.) and Mark B. Simons, California Evidence Manual (2014). Most of the entries in this book contains "Legal Research References" to both texts. Starting with those references, find the pertinent passages in those two texts and be prepared to marshal those passages after the recess. For comparative purposes, there are some references to the Federal Rules of Evidence. Any references to or quotations from the Federal Rules are to the restyled Rules which took effect on December 1, 2011.