THE ART OF THE IN-TRIAL OBJECTION

Objections Generally

No great art is achieved without sacrifice. The best actors, writers and painters labour over their materials, honing and refining them day after day, until they seem "natural" or "spontaneous". The work of the artist is the work of the trial lawyer. Good advocacy is acquired when the lawyer has the persistence, the patience and the humility to practice and re-practice until the skill she exhibits at trial *seems* as if it were naturally imparted.

Nothing is more likely to demonstrate the artistry of a trial lawyer than a timely, strategic objection. By contrast, ill-conceived, or intemperate, or irrational objections are dramatic signs of a lawyer's weakness, or worse: Competent trial lawyers learn over time that effective objections require, above all else, a keen knowledge and understanding of substantive as well as procedural law. The lawyer can never stop studying and reading and absorbing the law and its processes. In this context, I imagine the law as a large, ever-changing backdrop. The more I know of it, the more at ease I become working with it, and the more likely I am to develop what others might perceive to be "an ear for error" or what the judge might consider a helpful or, even better, a valuable interjection, steering the court away from error.

This is not to say that knowledge of the law is all the advocate needs to become skilful in the art of the objection. No. There will be times in a trial when an objection may have merit in law but be harmful tactically. In that event, despite the likely success of the objection, it is a better strategy to withhold it.

When to use or not to use an objection is difficult to define. There are so many subtle nuances to a trial. With that caveat in mind, I offer the following observations gleaned from my own experiences. I resist the temptation to object to every objectionable matter. I do not want the judge to view me as obstinate or obstructive. But I also do not want him to think I am incompetent. For me the key is to make a quick assessment of the objection's impact upon the trier of fact. If I consider that my objections, even if successful, will be seen as part of the overall scheme of hiding the truth from the judge or jury, I do not raise it.

The Impact of Objections on the Trier

Lawyers are statutorily barred from serving jury duty. This is unfortunate, because trial lawyers need to realize how jurors perceive them. My sense is that objections by trial lawyers are often viewed by jurors as irksome and condescending, an indication that the lawyer does not trust the ability of the jury members to determine for themselves what is truly relevant. I am convinced, too, that jurors tend to regard objections to the

admissibility of evidence as attempts to keep certain facts from them because to let them in on the "secret" would hurt the cause the lawyer is paid to protect.

We spend years, of course, developing an understanding of the law of evidence. Even then, some aspects of it – for instance, similar fact evidence – seem somehow stubbornly elusive. So it is in a way empowering to be able to rise and object that some fact or document proposed as evidence is "irrelevant" or "immaterial" or otherwise caught by an exclusionary rule. For jurors, though, this kind of language is obscure or elitist and often interpreted as a ruse to block the introduction of important but damaging evidence.

If there is even a remote possibility that members of the jury might perceive an objection in this way, then the first tenet of good advocacy before a jury is to ask: "Is the objection necessary?". And, second, will the evidence, even if admitted, do any substantial harm to my theory of the case? If either of these questions leaves you in any reasonable doubt, I think you should withhold the objection on the basis that it may do more harm than good.

The problem, unfortunately, is that these types of decisions must be made in an instant. That is why good objections are mostly art form. After years of practice, they become intuitive. And if the objection is made there is a premium on its success. Any particular question or answer not challenged may receive little attention from the jury. But a question or answer that is challenged, then rejected, has thundering negative potential. The rejected objection tolls like a bell, stirring jurors to full alert as they attend to an answer given by a witness with the permission of the judge over the objection of counsel.

When this happens, the best response is no response. There can be no expression of disappointment. The good trial lawyer, like the elite poker player, is stoical, impossible to read in moments like this. Any remonstration at all can be fatal. It will only highlight the very evidence the objection was designed to thwart. The good trial lawyer never reveals when or whether a ruling contrary to his or her client's interest is seriously damaging.

How to Object

Rise always: Without a hint of rudeness or rancour speak to the judge, never to the lawyer opposite. State your objection clearly, simply and directly. Every objection should have a reason and the reason should be coherent with an underlying legal rationale. In other words, the objection should be specific, not general, in nature.

When you stand, the Court will usually acknowledge you and invite your comments, at which point counsel opposite should be seated. If the court does not immediately acknowledge you, it may be necessary to say, "Your Honour, I have an objection". If counsel opposite remains standing, you may wish to add, politely: "Your Honour, I will give counsel a moment to be seated before I specify the grounds of my objection".

The exercise has two parts: first, notice. Second, grounds. Providing the grounds includes in every instance the ability to state the legal basis for the objection, with legal

authorities if necessary. In trial courts in the United States notice of an objection and the grounds are usually given simultaneously. For example, counsel may say, still sitting, "Objection: asked and answered", or, "Objection: hearsay". Trial counsel in the United States thus are trained to encode objections in few words. Whatever you may think of the U.S. system, it is at least efficient, fewer words with direct and concise reference to the grounds. Usually the law in support of the grounds is settled and beyond dispute. Canadian counsel, while generally afforded wider latitude to state the specific grounds, would do well to strive for greater and greater efficiency. Economy of expression, especially in the context of objections, is a virtue. If the evidence in question is clearly hearsay and inadmissible, no great long speech about hearsay is necessary. Remember your audience. No one likes a pontificator.

The law in support of the grounds to an objection may be so well-known that just the announcement of an objection will result in a favourable ruling to the objection. For this reason, experienced Canadian counsel often give notice of an objection, then pause momentarily affording the Court an opportunity to rule on the objection without requiring the grounds from objecting counsel.

When to Object

Timing is everything. If, for example, it is apparent that a question calls for an answer that will violate the rules of evidence or procedure, make the objection the moment the question is asked and before an answer ensues. There is no need to await the answer. If the question does not necessarily call for an answer that will violate the rules of evidence or procedure, the objection should await the answer.

Timeliness is easier to measure during examinations of witnesses. It becomes more difficult in the midst of submissions by counsel to the judge or jury. The unwritten Code of trial lawyers is that they are loathe to interrupt opposing counsel during submissions to the jury, and, although a little less problematic, are also generally loathe to interrupt opposing counsel during submissions to the presiding judge. Usually counsel will wait until opposing counsel has completed the submissions in either circumstance to register an objection. In the case of the jury, usually counsel will suggest to the presiding judge that he "wishes to make submissions to the Court in the absence of the jury". After the jury is excused by the judge, counsel will make the objection.

It is generally considered poor style to object to the manner or method of submissions of your opponent in the presence of the jury. Counsel should instead make their objections to the presiding judge, and, if the presiding judge agrees that the manner or method of submissions of the opponent are inappropriate, the presiding judge will decide upon the best method to rectify any error when the jury returns.

Legal Ramifications of Objections

Objections may be made for legal or tactical reasons or both. While failure by counsel to object at trial in relation to an error of law advanced on appeal does not foreclose its

consideration[1], the failure of counsel to make timely objections may prejudice an appeal on that ground or may cause the appellate court to apply the "no substantial miscarriage of justice" proviso in section 686 (1) (b) (iii) of the Criminal Code.[2] Appellate courts prefer not to engage in second-guessing about whether or not counsel's failure to object was intended, inadvertent or a mistake. Appellate courts generally hold that if an objection was not raised in a timely fashion then it was intentionally not raised. Therefore, the results of that tactical decision will not serve as the basis for an appropriate ground of appeal.[3]

Interestingly, the appellate court may not permit argument even if the trial judge erred in excluding evidence, if the evidence was excluded upon the objection of the appellant's lawyer at trial.[4] So counsel's failure to object clearly has consequences on appeal. And the failure to object may have consequences in the trial itself. The position taken by counsel, as a matter of law, must be taken into account by the trial judge also. The objections taken or not taken by counsel may determine the issues to be left with the jury just as significantly as the position taken by counsel may be later taken into account on appeal.[5]

Reasons to Object

The reasons to object are myriad. Tactically, an objection may be made to provide a witness more time to think about a question that has been asked, to alter or impede an opponent's rhythm, to highlight an unfair or unethical tactic, to reveal an unfairness to the jury, to stop or avoid abuse of a witness, to divert attention from a particular subject matter, or to prevent the admission of inappropriate or inadmissible evidence.

Is it appropriate to use an objection as a tactical device only to interrupt an opponent's examination, cross-examination or argument? Is it appropriate to use an objection as a tactical device to provide a witness more time to answer a troubling or difficult question? Most judges will say, without hesitation, that it is inappropriate to use objections for these reasons. But experienced counsel will admit that they have used timely objections to accomplish these very goals. The secret to accomplishing one or other of these tactical goals is to to ensure that the objection made is not without merit. Timing, as I have said, is fundamentally important. But the exquisite timing of an objection alone will not suffice. The objection itself must have merit.

Only weak advocates make objections without merit. By contrast, a meritorious or justifiable objection, timed to coincide with the additional benefit of affording a witness more time to answer a question or of interrupting the rhythm of an opponent is the mark of great skill. Trial counsel for this reason often do not rush at breakneck speed to object to obviously objectionable questions by their opponents. Instead, they wait, they hang

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[1] *R .v. Esau* [1997] 2 S.C.R. 777.
[2] *R .v .Ramos [1997] O.J. No. 2687 Ont. C.A.; R. v. Brooks [2000] 1 S.C.R. 237.*
[3] *R. v. Lomage*, (1991) 2 O.R. (Ont. C.A); *R. v. Brooks, supra note 2.*
[4] *R. v. Kimberley*, (2001) 157 C.C.C. (3d) 129 (Ont. C.A.).
[5] *R. v. Bernier*, (1993) 20 C.R. (4th) 353 (Que. C.A.).

fire. Then, when the moment is best, they seize it. That time may be best when the witness requires a pause to gather or order his thoughts or when it becomes necessary to impede or alter the good rhythm being built by the opposite side.

Reasons Not To Object

There are equally compelling reasons why counsel may choose not to object. Objections often emphasize the impugned evidence. The objection stops the trial and, at the same time, casts a floodlight on the impugned evidence. Thus, rather than deflecting attention from the evidence, the objection highlights the evidence. Jurors may think, "If this lawyer is worried about this evidence, it must be damaging." The juror may then pay more attention to it.

The most negative impact of an objection is felt when it fails. The judge determines that the objection lacks sufficient merit to uphold, or worse, rules that the objection is wrong. What the jury "hears" is that the objecting lawyer is wrong. The jury is required to take its instructions from the judge on all matters of law. When the judge tells of counsel's error in the presence of the jury, the judge subtly undercuts the confidence that counsel wishes to engender with the jury.

Worse yet is the use that can be made of a failed objection by opposing counsel. Every objection carries with it the potential to allow opposing counsel the opportunity to explain the value of the evidence objected to and to focus the trier's attention on the impugned evidence. Capable trial lawyers greet with glee the meritless objections of their opponents, objections which of course afford good counsel the justification they need to make mini-jury addresses upon the relevance and value of that very evidence.

Further, many trial judges do not like objections. Certainly, they abhor, as they should, constant objections. Counsel should watch both the judge's reaction and the jury's reaction to each objection raised. Negative reactions by either may be the best reason to curtail them. Judges manage the trial process. They chafe at interruptions and delays, especially when they decide that the proceedings are being unduly prolonged.

Still, counsel does not conduct a trial to bathe a judge in false adulation. Nor must counsel shrink from the duty to represent the client fully and faithfully. The lawyer has a positive duty to assist the court in the pursuit of a fair trial based only on relevant, admissible evidence. Consequently, even in circumstances where the trial judge seems more focused on completing the trial than ensuring only the admission of relevant, material evidence, counsel must fearlessly make objections to protect trial fairness. Failure to do so only prejudices the client's position at trial and may adversely affect the client's prospects on appeal.

So, the rule that should guide counsel when making objections is this: make your objection; make it timely, know the law that supports it, state it clearly and succinctly; then sit down to receive the ruling. And, the corollary of the rule is: hold your fire if the reasons to withhold an objection outweigh the possible benefits.

How to Receive a Ruling on an Objection

One should receive a ruling, favourable or unfavourable, with professional courtesy and dignity. There must be no overt demonstration or expression of emotion. Pound the wall of your office at the end of the day, but in court remain steadfast, stoical, poker-faced. Professionalism, showing neither elation nor disappointment. Your remedy, if any, is a successful appeal. Nothing is gained and much is to be lost by inappropriate behavior in the presence of the judge or jury.

If showing anger is offensive, so also is preening and gloating, perhaps even more so. If you are fortunate enough to persuade the judge of the merit of your objection, you will likely not react offensively, or in any way, if you tell yourself: "I am pleased with the ruling; I received it because it was founded on merit; my work is unfolding as it should because I am here to assist the court in determining what evidence is relevant and properly admissible." Then you move on. Admire yourself in the mirror later.

What to Object To

The simple answer to the question of what to object to at trial is anything that violates the rules of evidence or procedure governing the admissibility of evidence, subject always to tactical reasons for perhaps withholding the objection. Following is a short, nonexhaustive compilation of common, sustainable objections that can be made at trial:

<u>Opening Addresses</u>

- Arguing law
- Reference to inadmissible evidence
- Reference to Counsel's personal opinion
- Making argument
- Reference to Opponent's evidence
- Reference to possible penalties upon conviction
- Inflammatory comments
- Statements that cannot be supported by proof
- Statements by prosecutor referring to an accused's silence upon arrest
- Reference to prior judicial rulings at a preliminary or prior trial

<u>Closing Addresses</u>

- Reference to Counsel's personal opinion on any matter including guilt or innocence or credibility of witnesses
- Prejudicial or Inflammatory arguments
- Inaccurate References to law

- Inaccurate References to evidence
- Reference to evidence not presented
- Reference by prosecutor on the failure of the accused or spouse to testify
- Reference to a defence ruled unavailable or inappropriate by the trial judge
- Reference to evidence heard in the absence of the jury but not ruled admissible
- Reference to possible penalties upon conviction (exception: advising the jury of the consequences of a finding of "not criminally responsible on account of mental disorder")
- Counsel telling jury to disregard law
- Reference to decided cases
- Speculation as to why "potential witnesses" did not testify
- Personal attacks on witnesses or counsel
- Appeal to jurors' prejudice or bias
- Appeal to jurors to "send the message to the community" by verdict

<u>Objections to Questions Relating to Evidentiary Matters</u>

- Calling for irrelevant evidence
- Violations of the best evidence rule
- Seeking disclosure of privileged communications or the identity of a confidential informant without court order
- Requesting production of a "record" relating to a complainant or witness related to any of offenses listed in section 278.2 without court order
- Reference to sexual reputation of a complainant without court order
- Reference to evidence of recent complaint
- Calling for conclusory answers
- Seeking an unqualified opinion
- Calling for hearsay
- Calling for speculation
- Based on a false premise, eg. Assuming facts not in evidence
- Without proper evidentiary foundation eg. Asking for psychiatric opinion without presenting the evidence upon which it is based
- Leading Questions on matters that are not introductory or noncontentious
- Repetitive Questions ("Asked and Answered")
- Vague, misleading or ambiguous Questions
- Multiple part Questions requiring multiple answers
- Inviting argument
- Lacking relevance or probativeness

- Badgering or Intimidating a witness

Objections Relating to Demonstrative Evidence

- Inaccurate or Misleading
- Lacking authenticity
- Irrelevant
- Without proper evidentiary foundation
- Containing inadmissible evidence or commentary
- Altered without explanation or evidence
- Prejudicial effect outweighs probative value

Responding to Objections

Counsel is, of course, always entitled to withdraw a question or comment that is the subject of an objection if counsel concedes that the objection has merit. Tactically it is often good advocacy to withdraw an offending question or submission rather than to lose an argument on the propriety of the question or submission. Withdrawing may be interpreted as counsel's sense of fairness and also as counsel's knowledge of the law.

Assuming, however, that counsel does not agree with the objection, then he or she should immediately be seated to allow objecting counsel to be recognized by the court and to state the grounds of the objection. When objecting counsel has completed the grounds of the objection, counsel receiving the objection should be prepared to answer the objection with the law supporting the question or submission. Responding counsel must be able to demonstrate, as a matter of law, the appropriateness of the question or submission. Again, counsel should state the grounds succinctly, and then be seated to receive the ruling.

Counsel is entitled to receive a ruling. If the presiding judge is unwilling or unable to provide a specific ruling with reasons to the objection and counter-argument, counsel whose position has been overruled should insist that the judge provide the basis of the ruling. Without the reasons for the ruling, the trial record is incomplete. This can be accomplished politely but firmly by urging the judge to provide the reason(s) for the ruling, even if only in cursory form, so that the record of the objection and ruling is preserved.

When to be Objectionable: Civility and Collegiality

In the specific context of making or responding to in-trial objections, it is never acceptable to engage in conduct or advocacy which is itself objectionable. We are all aware now that over time we have witnessed a deterioration in civility among members of the profession, a sad and sobering development. Professional tradition and the public interest call for fair, civil and courteous dealings between counsel and with clients.

Failure to live up to that tradition diminishes our profession and feeds the misapprehensions and biases of those in our society who view lawyers as self interested, money-grubbing and dishonest. Trials are conducted in full view of a wary public. Misbehaving lawyers have become a menace to what once was and still ought to be the most noble profession in the world.

No doubt the reasons for increased incivility are many. Years ago lawyers were not under pressure daily to answer e-mail messages or faxed letters instantly, manage busy court schedules with computerlike precision, or compete madly in a world of information overload. In one recent case, I was sent approximately 19,000 pages of disclosure on a computer disk with a brief covering letter suggesting that the preliminary hearing on the matters disclosed in the 19,000 pages could "hopefully" be scheduled in "the next few weeks". Even had I no other file to worry about in the next few weeks, the sheer weight and volume of the disclosure made the suggested timeframe laughable. But these are the sorts of problems with which lawyers are expected to deal, promptly and efficiently. It seems that we measure our effectiveness today more by speed than by care and deliberation.

If one were to speculate on the main reason for a deterioration in civility one would likely look to the changes in the "business of law" for some part of the answer. Surely less collegiality, less convivielity, more competitiveness among lawyers is contributing to the deterioration in civility. The profession of law has given way to the business of law. Legal costs are increasing dramatically and with them client expectations. And when client expectations rise, frenetic lawyers attempting to meet those expectations are prone to abandon professional objectivity.

In one notorious case[6], now cited in law schools as an example of the worst form of incivility, the Court of Appeal summarized at length the behavior of one trial lawyer towards another in a lengthy, bitterly contested civil case, where the only things at stake were liability and damages in a medical malpractice case:

> Mr. Tait accused Mr. Wunder of "a complete lack of integrity"; of cheating and intentionally defying the rules of practice; of using the right to object to cross examination "to suggest answers to every witness who has come into this courtroom"; of abuses of the Rules Civil Procedure; of using and abusing solicitor-client privilege as a "mask for deception", to "conceal misconduct", "as a manipulative device", "to conceal the devices by which the evidence of witnesses is manipulated" and as a "shield for deceit"; of "manipulating" the evidence and facts; of deliberately misinforming an expert witness; "flatly lying" to the court; of deliberately misleading the court, showing contempt for the court, defying and deceiving the court about the evidence of Dr. Whyte; of "trickery" and sleight-of-hand"; and of committing an outrage on the court. Mr. Tait told the trial judge that he (Mr. Tait)[was] wrong to assume Mr. Wunder was competent and would comply with the Rules Civil Procedure, and he even

[6] *Marchand v. Public General Hospital Society of Chatham* [2000] 51 O.R. (3d) 97.

> suggested that Mrs. Marchand made a mistake in choosing Mr. Wunder as her counsel.[7]

Counsel referred to in this passage was not the only one who apparently checked his civility at the courtroom door. The court described as well the conduct of the second counsel:

> Mr. Liswood, too, maligned the Appellant's counsel. He accused Mr. Wunder of manipulating, abusing and making a mockery of the judicial system; of using the Rules of Civil Procedure as an "excuse to permit unchecked grossly improper manipulation of the whole litigation process"; of "flagrantly subverting" the Rules of Civil Procedure; of "suppressing" facts and information from the defence; of "contrivance and manipulation" in the delivery of expert reports; of continually withdrawing from his commitments; and of violating Rule 10 of the Rules of Professional Conduct by knowingly attempting to deceive the court and by knowingly mistaking the contents of documents.[8]

In my view, the Court had a perfect opportunity in *Marchand* to state with specificity what civility is and the sanctions the court may impose for failing to uphold the standard. Instead, it said:

> "The unprofessional conduct of counsel is a matter for the Law Society of Upper Canada".

With respect, it was not sufficient to suggest that the trial judge could have done more without saying specifically what he could or should have done in the face of such unprofessional conduct. Having essentially glossed over the subject of civility in *Marchand*, the Court of Appeal has had to grapple with issues of lawyers' abusive and acrimonious behavior at least three more times: *R. v. Felderhoff*[9];*R. v. Elliot*[10];*and R. v. Leduc*[11]. In each case, the Court deplored the ranting, reprehensible excesses of the trial lawyers as manifestations of incivility and of disrespect for the administration of justice. In each case, however, the Court chose to emphasize the duty of the judge in the exercise of his or her trial management power to control the trial process. Incivility apparently remains within the soul and sovereign domain of the Law Society. That being so, I would hope that the Law Society would begin to impose sharp sanctions for conduct falling below an acceptable standard of civility.

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[7] Note 6 at paragraph 136.
[8] Note 6 at paragraph 138
[9] *R. v. Felderhoff, [2003] O.J. No. 4819 Ont. C.A.*
[10] *R. v. Elliot, [2003]O.J. No. 4694 Ont. C.A.*
[11] *R. v. Leduc (2003), 176 C.C.C. (3d) 321 Ont. C.A.*

Justice Anthony Kennedy of the United States Supreme Court in a 1997 Address to the Annual Meeting of the American Bar Association observed:

> Civility is the mark of an accomplished and superb professional, but it is even more than this. It is an end in itself. Civility has deep roots in the idea of respect for the individual. We are civil to each other because we respect one another's human aspirations and equal standing in a democratic society. We must restore civility to every part of our legal system and public discourse. Civility defines our common cause in advancing the rule of law.[12]

The Advocates' Society has published "Principles of Civility for Advocates"[13] providing useful guidelines for lawyers interacting with other lawyers. The thrust of the guidelines is to suggest that counsel should always show courtesy toward opposing counsel and encourage those under their supervision to conduct themselves with courtesy and civility also.

As a profession it seems that we have much work to do in fostering better relationships with our colleagues. The profession ought to find ways to increase mentoring by senior lawyers with new members of the profession. Mentoring is less likely to occur as naturally as it did in the past when the pace of the business was much slower and less competitive. The Law Society must create incentives to cause that worthwhile process to be renewed.

And our law schools must be encouraged to place greater emphasis on teaching civility in law school curriculums. Articling programs and Bar Admission course programs must also take responsibility for educating our new members on the need for civility among lawyers. Lastly, programs like this, offered as part of the Continuing Legal Education of lawyers, must continue to encourage members of the profession to honour our professional tradition of courtesy and civility.

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[12] As quoted by the Nova Scotia Barrister's Society Task Force on Professional Civility Executive Summary 2002.

[13] The Advocates Society, "Principles of Civility for Advocates" http://www.advsoc.on.ca.