How to Win Without a Lawyer

Objections

Preserving Your Right to Appeal

Not all judges play by the rules.

Not all judges know how to apply the rules.

Some judges don't like to enforce the rules, thinking *they* can make up the rules as they go along.

A few judges abuse the rules on purpose.

Others do the best they can and still make mistakes.

Most judges I ran across in more than 25 years as a licensed attorney were fair-minded, smart, and eager to do what's right.

A few were not.

That's what objections are for.

That's why *you* must study this class thoroughly ... *if you want to win!*

Why Object?

When someone *other than the judge* makes a mistake, you object.

Why do you object?

To give the judge an opportunity to do what's right, that's why.

If the judge does what's right (and your objection is correct) the judge will sustain your objection and correct the mistake. If it was a mistake (or outright trick) of the other side, the judge will order the other side to stick to the rules. If you object in a *timely* manner, the mistake will be fixed with no harm to your cause.

If the judge doesn't do what's right (and your objection is correct) you'll have created an entry in the court record for an appellate court to review, if it becomes necessary to appeal.

Why must you object?

1. To stop a mistake (or trick) of your opponent.
2. To stop a mistake (or intentional error) of the judge.
3. To give the judge an opportunity to do what's right.
4. To create a record for appeal if the judge does wrong.

It is not the mistakes or tricks of your opponent that can be appealed. You give the judge an opportunity to do what's right by making an objection. Then, if the judge makes errors harmful to your

case, you've created a record for the appellate court to review - and the judge has no excuse!

Whose rules do we go by?

The rules we go by are the rules you're learning about in this course:

- Rules of Evidence
- Rules of Procedure

Additionally, of course, we go by statutes, constitutional provisions, and what prior appellate court decisions have to say about the statutes and constitutional provisions and how they apply to certain sets of facts ... including rulings by judges!

What do you do when someone breaks the rules in court?

You object!

You object to give the judge an opportunity to correct the violation. If the violation is by someone else, the judge will be *without excuse on appeal* if he doesn't do what's right and put a stop to the violation. If the violation is by the judge himself, he will again be *without excuse on appeal* if he does not correct himself at once and enforce the rules for everyone involved.

Get that?

You make an objection!

You do not hesitate!

If the court refuses to rule on your objection (neither sustaining or overruling) you object again *and* move the court to *rule* on your objection … and if the judge still refuses to rule *object once again for good measure ...* so there is no doubt for the appellate tribunal

that you gave the judge every possible opportunity to do "what's right".

You object to

- Put the judge on notice you are preparing for appeal.
- Make a record of every harmful judicial error.
- Show the appellate tribunal how the judge abused the essential requirements of justice.

When the judge sees you making your record for appeal and realizes the appellate tribunal will see how he is ignoring his duty, he will back off and start favoring you, instead of your opponent.

The squeaky wheel gets the oil!

The party who most effectively makes his record for appeal gets more of the court's favor!

Silence isn't good enough.

Being afraid to object is fatal.

Make your record! Be prepared to show the appellate tribunal how the judge erred and how the judge's errors were harmful to your cause, and the judge will be more favorable to your cause!

If you don't object, the judge knows you cannot win on appeal, so the judge will do whatever the judge wishes to do.

If you don't object, you cannot complain to an appellate court that you lost your case because the judge did not enforce the rules.

If you object, and the judge does not rule on your objection, it is as if you never objected, and the record for appeal has not been made.

Work diligently to make your record for appeal, *because by doing so*

you significantly reduce the likelihood that you'll be required to appeal!

This is how you win.

When you prepare for appeal at every phase of your case, the judge is much less likely to rule against you *… simply because judges don't like to be appealed!*

If you don't make *timely* objections (more on timeliness later) and get a ruling on your objections, you lose your right to complain to an appellate court that the judge allowed a rule to be broken … so you lose *two ways!*

Such losses are permanent!

You lose first because by failing to object you let the judge know you cannot win on appeal, so he knows he can rule any way he wishes without fear of being reversed.

Second, you lose because the appellate courts will *not* consider objections raised for the first time on appeal. Objections must be made in the lower court, or the right to object is forever lost.

Winning is all about preparing for appeal. [More about this throughout the course.]

In this class you'll learn the more commonly encountered objections and circumstances that trigger them.

You'll learn different types of objections.

You'll learn how to get your objections on the court's record.

You'll learn why it's critical to move the court to rule on objections when the court refuses to rule, how to move the court to rule on objections, and what to do if the court refuses to rule after being

moved to do so.

This class cannot list every possible objection because (as you will learn) opportunities for a judge or opposing party to go beyond the boundaries set by rules of our American System of Justice are "limitless".

Judges make mistakes.

Lawyers on the other side will try to get away with as much as possible to win for their clients, and you must use your objections to force the judge to stop opposing counsel from breaking the rules.

It is the *judge's* errors, not mistakes, errors, or dirty tricks of the other side, that form the basis for appeal (if appeal is needed). Keep this in mind as you make objections. Even when you object to an error on the part of the other side, what you're aiming at is to force the judge to *do his duty* – and, if he doesn't, to make a record of *his* error.

It is *always* the judge's errors that are reviewed by the appellate courts – *if you object properly and in a timely manner during proceedings in the lower court!*

While most objections result from violations of rules of evidence or rules of procedure, objections should also be made when a judge or opposing party violates *any* of our American principles of justice:

- Provisions of the United States Constitution.
- Provisions of the constitution of the state in which the court is sitting.
- Statutory legislation enacted by Congress or your state's legislature.
- Appellate court decisions that control the lower court proceedings.
- The rules of procedure.

- The rules of evidence.
- Just plain common-sense and decency.

  As you can see, opportunities for objections are truly limitless.

  This class will show you the most common objections you'll encounter and how to handle them.

  You'll gain a working understanding of objections in general.

  You'll learn how to watch for violations that require an objection.

  You'll learn how to make certain you're preserving an effective record for appeal.

  You'll learn how to *minimize the chance of appeal being necessary while insuring if appeal is required it will succeed!*

  Object to every error, mistake, and dirty trick!

  Lawsuits are nothing like a hockey game, where a player's bitter objections have little or no effect on the referee.

  In a hockey game, if a player has a beef, he can complain to the referee until he gets benched. That will be the end of that!

  In a lawsuit complaints to the referee *do* have an effect.

  Unlike a hockey referee, the typical courtroom judge *does* listen to objections.

  Usually, once an objection is made, they will listen to both sides and make decisions that may determine the final outcome of a case right then and there – *win or lose!*

  Fail to make your objections effectively, and you run a very certain risk of losing!

  When engaged in any courtroom battle (foreclosure, credit card

debt, collection, family law, fraud, slander, or anything else) expect your opponent to play every dirty trick they can to win.

Anticipate it and be prepared to object.

Lawyers are trained to push the limits. Many will intentionally break rules to get what they want. You must be on your toes. You must at all times anticipate the other side's crooked tactics.

Never count on the judge to interfere! Most of the time he won't. It's not his job to take sides. It's *your* job to object and thereby *force* the judge to interfere! Most judges sit back and let the parties battle it out between themselves.

Unlike a referee whose very duty is to "call ‘em as he sees ‘em", judges may remain silent when the other side crosses the line, waiting for you to object.

It may surprise you to look up and find the judge fiddling with his laptop computer, staring out the window, or chatting with his clerk at the table next to him. I caught one reading his newspaper during an important hearing some years ago and was forced to object *to preserve the record for appeal*.

Always get and hold the judge's attention when you speak in court. Make eye-contact. If the judge isn't looking at you, it's likely he isn't listening either.

It's *your* lawsuit, not his. He'll go home to his wife and kids at the end of the day and, whether you win or lose, his life will remain pretty much the same.

Your life will be forever changed!

If you want to win *you* must take responsibility for everything that happens ... and that includes getting the judge to pay attention.

It's *your* job to speak up.

It's *your* job to toss a red flag when your opponent commits a foul.

"Objection!" stops the proceedings until the judge rules.

"Objection!" calls foul on the other side … and sometimes calls foul on the judge!

Failure to object lets fouls go unnoticed – and prevents you from complaining later to an appellate court that those errors caused you to lose.

If you don't object to an error *when* the error is made (or as soon thereafter as possible), there is no record you called the judge's attention to it so he could rule. Appellate courts will not hear objections for the first time on appeal. [I repeat this because it's *critical* for you to concentrate all your energy on making an appealable record.]

Objections are essential to winning.

Unlike what happens at the end of a hockey game when the score is tallied and the winner declared, if you lose your case but made effective, timely objections every time the judge made or allowed errors that hurt your cause, you get a second chance to win on appeal!

This is only true *if you preserve those errors on the record*.

When a hockey game is over, the game is over.

When a lawsuit is over – if harmful errors were made – *and you objected properly to those errors in a timely manner* – the final score may be revisited by a panel of appellate justices who will review the judge's errors and, if they agree with what you say in your

appellate brief, may reverse the lower court's ruling or send the case back for another round of play.

Winning is a process of preparing for appeal.

Good lawyers (i.e., lawyers who consistently win) know this.

Fail to make an appealable record, and ...

- You gave the judge freedom to rule any way he wanted.
- It will make no difference you had law and facts on your side.
- It will make no difference your Constitutional rights were violated.
- It will make no difference you were denied due process.
- The appellate court will not hear you complain!

Many people believe you can appeal any time you lose in the lower court. They think you always have that second appellate bite at the judicial apple. This is not true!

On the other hand, do what this course teaches, planning every step to create a record for appeal, and the judge will know ruling against you means certain embarrassment. The gorilla in the black robe will know he can be reversed or have the case remanded back to him with instructions telling him to do things differently. His friends will talk about him behind his back. If he's appealed more often than his peers, he may get a reputation for being incompetent. If errors are severe, he may be thought of as corrupt … losing his standing in the community and, possibly, being removed from the bench or disbarred in disgrace.

Wise litigators know this and are constantly on guard to make clear on the record when the judge crosses the line or allows the other side to do so. They object when it happens!

No objections?

No appeal!

And, good people lose their cases … *needlessly!*

To emphasize the importance of objections, see what the United States Supreme Court said with regard to Miranda warnings police officers are supposed to give before questioning a suspect.

"In the Miranda case this Court promulgated a set of safeguards to protect the there-delineated constitutional rights of persons subjected to custodial police interrogation. In sum, the Court held in that case that unless law enforcement officers give certain specified warnings before questioning a person in custody, and follow certain specified procedures during the course of any subsequent interrogation, any statement made by the person in custody cannot ***over his objection*** be admitted in evidence against him as a defendant at trial, even though the statement may in fact be wholly voluntary." *Michigan v. Tucker*, 417 U.S. 433, 443 (1974).

Failure to object allows the court to consider statements made *before* the prisoner was Mirandized.

Failure to object may waive the right to object later.

Failure to object can literally be fatal!

When in doubt – ***object!***

When should you object?

Before it's too late!

If something just sounds fishy!

Every time you think an objection may favor your case ... even if you're wrong!

Wait too long, and opportunity is lost.

Wait too long, and irreparable damage is done.

Wait too long, and objection is useless.

Too late is too late!

However, jumping to your feet with that impressive-sounding word will have no effect at all if you aren't prepared to state the grounds for your objection (in spite of the frequency you see lawyers object without stating grounds in movies or on TV) unless the judge automatically sustains your objection without asking why you made it or the circumstances are so obvious the appellate court chooses to make an exception. (Never wise to count on exceptions when it comes to law!)

You will usually be required to state the grounds for your objections.

That's why it's so important for you to study this class carefully!

When you object, be prepared to state the legal grounds for your objection.

Many cases are won or lost simply on the strength or weakness of objections and their timeliness.

Some objections are so obvious you may not be required to state the grounds, but you should *always* be prepared to do so.

For example, if opposing counsel is badgering one of your witnesses in a particularly hostile and violent manner, your objection will likely be sustained without explanation. The judge knows the witness is being badgered. If she's a good judge she'll not stand for it in her courtroom. So, your single-word "Objection!" will stop the badgering … *without explanation*.

Most of your objections will not be obvious.

Besides, even if the judge does not demand your grounds, the opposition may insist that you state the grounds for your objection. Then, if you're unable to explain why you're objecting, the judge may safely overrule. Your objection will fail. The record for appeal for the error will not be made.

This class will help you prepare to state the grounds for your objections when required.

What if you "feel" an objection is needed to prevent the record from being polluted? What if you can't think of the legal grounds for making the objection? What do you do?

Do you sit silently letting the error do its damage?

Never!

Object anyway!

The worst that can happen is the judge will ask for your grounds, and you'll have to say, "I can't think of the grounds right now, your Honor, but I want my objection on the record anyway!"

That may sound embarrassing, but appellate courts have occasionally held it's better to object, even when you cannot state the grounds, than to let error slip in without the record being wiser for it.

Better if the word "Objection!" appears in the record for appellate justices to review on appeal, than to silently let an error corrupt the record while your opponent unfairly gains the upper hand.

Besides, some judges may have the same "feeling" you do when you object. They may sustain your objection without requiring you to

state your grounds.

The time to object is *every* time you think an objection may favor your case.

Which brings us to another point.

When Not to Object

If an objection is not going to favor your cause, *don't object!*

At depositions, hearings, or trial there will be times when the opposition asks a leading question of his own witness, an objectionable offense. [As explained elsewhere in this course.]

You may *want* the court to hear the answer.

Maybe the answer won't affect your case adversely in the slightest.

Why object?

Let testimony (or other evidence) come in without objection *if you're certain it won't adversely affect your case.*

Objecting for the sake of hearing yourself pronounce that imposing-sounding word may actually work against you if it becomes annoying or obviously time-wasting. The judge may get tired of seeing you bouncing up and down. The judge may be annoyed by your piping up every possible chance you get. The judge may decide you're wasting the court's time and decide to ignore you.

The "wolf" syndrome may set in.

Remember the story of the boy who cried "wolf" when there were no wolves, and when the wolves came and he cried nobody came to help?

Then, if you've been objecting too often, when you jump to your feet

to object to a really serious error, the court may think you're crying "wolf" again and overrule without thinking it through. What might have been a successful *and much-needed* objection is defeated. Objectionable testimony or other evidence is allowed. The record is polluted against you ... all because you objected too much.

Still, if you believe an objection is *necessary* to prevent the record from working against you, jump to your feet at once and "Object!" … *even if you don't know the grounds.*

When in doubt, "Object!"

Timeliness is *everything!*

You're trying a case on the single issue of whether a surgeon removed someone's kidney.

You represent Dr. Horace Amsterdam Cornball, a surgeon of questionable reputation. He's been sued for medical malpractice.

You're in the courtroom, dressed neat as a pin, seated at your defense table surrounded by papers and, of course, your copy of the official Rules of Court.

Opposing counsel stands to his feet, clears his throat impressively, and calls his first witness, Miss Makesumwell, a recovery room nurse from the hospital.

The judge nods to the bailiff, who obediently escorts a pretty young lady to the stand.

The nurse politely takes her seat, after raising her hand and repeating the oath, of course.

The lawyer for the plaintiff approaches the witness.

"Do you work at the hospital where Dr. Cornball does surgery?"

"Yes," the nurse politely answers.

"You're a recovery room nurse, aren't you?"

"Yes. You know that already. I told you that last week when you interviewed me at your office."

"Tell the court, young lady, what the operating room supervising nurse, Mrs. Takecontrol, said as Dr. Cornball finished surgery that day."

Nervously, the nurse replies, "She said the patient's kidney was too cancerous to remove."

"So, Dr. Cornball didn't remove the kidney?" the lawyer inquires.

"No, sir."

"Please tell the court what Dr. Cornball was thinking by leaving that cancerous kidney inside Mr. Sickman's body that day," the lawyer goes on ... while you sit there thinking about what you're going to ask when it's *your* turn to question the witness, or whether you put enough quarters in the parking meter outside.

"He probably thought Mr. Sickman was going to die anyway," the nurse answers, as your case goes down the drain.

Ooops!

"Dr. Cornball isn't very well thought of at our hospital you know. He makes all kinds of mistakes. Several of the operating room nurses refuse to work with him," the nurse adds while you shuffle papers on your table, planning what you'll ask the nurse when it's your turn.

GIANT OOOOOPS ! ! !

You've probably already lost … *needlessly*.

Can you count the errors in that short examination of the nurse?

How many opportunities for objections did you hear?

Do you see the *irreparable harm* that resulted from allowing the nurse to testify as she did?

Let's go back over it.

First objection is, "Hearsay".

The nurse should not be permitted to testify to what her supervisor said, if what the supervisor said was offered to prove the kidney was not removed. That's hearsay: an out-of-court statement made by someone not in court and offered to prove the truth of what was said. (Study the "Evidence" class in this course to learn more.)

Second objection is, "Competence".

The recovery room nurse has no first-hand knowledge whether the kidney was removed or not. She wasn't in the operating room at the time. She was in the recovery room. All she knows is what she learned from others. She lacks competence to testify as to whether or not the kidney was removed.

Third objection is, "Calls for speculation".

Neither the recovery room nurse nor anyone else has any way of knowing what the doctor or anyhone else was thinking. She may describe facial expressions or other outward behavior she saw or heard first-hand, however it's impossible for anyone to have first-hand knowledge of what someone else is thinking. Witnesses should *never* be allowed to testify to what someone else was thinking or feeling. Such testimony calls for speculation. We can

only "speculate" what's going on inside someone else's mind. We cannot have first-hand knowledge of another's self. Our thoughts are uniquely our own.

We'll examine each of these objections and many others in the following chapters.

For now, do you see why you must:

1. Be wide awake at all times.
2. Anticipate the need for *timely* objections.
3. Object *immediately* to make your record for appeal.

I recall a 3-day deposition of the wife of one of my wealthier clients several years ago. Opposing counsel tried in every imaginable way to trick her into disclosing confidential communications her husband may have shared with her about his business. He was an honest business man, but the other side was convinced he'd done something dishonest to make his millions. They tried to dig into matters beyond the scope of lawful discovery. [Study the "Discovery" class in this course to learn more.]

My client's wife was not a party to the lawsuit. She was merely a witness from whom they hoped to learn about my client's hotels, apartment buildings, and substantial sums of cash on deposit in several banks … information that threatened to open a can of evidentiary worms and reveal confidences that had nothing to do with the case.

Plaintiff in this case was from another nation where "due process protections" do not recognize the husband-wife privilege we cherish in American courts. (Study the "Evidence" class in this course to learn more.)

My client's wife, however, was a U.S. citizen residing in Florida and being deposed in Orlando. I had instructed her carefully before the deposition to count to ten before answering questions, *so I'd have time to interrupt with an objection if needed*. I also drank many cups of black coffee those three days, anticipating objectionable questions that would need my immediate response. Her counting to ten would give me time to think ... *before she could volunteer harmful information*.

Questioning went something like this.

Opposing lawyer asked, "How long did you live with your husband?"

For this question, of course, no objection was necessary. So, she answered (after counting to ten), "Eighteen years."

"And, when your husband closed his business, what reasons did he give you?"

"Objection!" I chimed in before my client's wife counted ten. "Spousal privilege! You are asking her to testify to content of communications received from her husband in confidence contrary to our evidence code."

"We don't have that rule in our nation," came the arrogant response, as the young lawyer peered pompously over the rim of her glasses and drummed impatiently on the table with her pencil.

"Well," I calmly replied, speaking slowly while eyeing the court reporter to make certain what I said was being transcribed accurately for the record, "you are in Florida at present, and we will follow the rules that apply here, not those that control in your nation. My client's wife will not testify to any fact communicated to her by her husband in confidence."

You may imagine the hateful glares and incessant pencil-drumming that followed those three days as I repeatedly refused to allow her multiple questions about confidential spousal communications to be answered.

They threatened.

They scowled.

They remonstrated in the most intense fashion imaginable.

They tried their dead-level best to sneak one in on me when they thought I'd wandered off in a daydream.

At one point they began a long line of questioning her about her fur coats, diamonds, and original oil paintings hanging in their luxurious home, then tried to sneak in another question about my client's properties and financial holdings.

I had a job to do.

I objected again and again.

I was making an appealable record and protecting my client.

You must do the same.

Protect yourself by being at-the-ready at all times prepared to object *before* anything is said or done that would allow the court record to be polluted against you.

To mix metaphors on purpose, once a cat is out of the bag, you can't un-ring the bell.

Imagine how many times and different, inventive ways those lawyers tried to trick us into giving the testimony they wanted. For three grueling days they kept at it. They asked everything from her favorite sports to how often they had guests for dinner (none of which had

any bearing on the case) just so they could sneak in a question here and there to learn what her husband might have told her about his business … *always hoping I'd be thinking of something else and miss their game.*

That's why I drank black coffee and maintained close scrutiny on every question.

That's why I had my client's wife count to ten.

I had to object or lose the right to do so.

I had to object *before* the answer blurted out by accident.

Once a witness starts testifying as to privileged facts *without timely objection,* the court may rule the right to object has been waived.

The privilege can disappear.

No appeal can cure such errors *if the errors are yours!*

"The requirement of a contemporaneous objection [Made at the time of the error, or as closely thereafter as reasonably possible under the circumstances.] is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually." *Calhoun v. State*, 721 So.2d 1180 (Fla. 1st DCA 1998).

The United States Supreme Court has said, "[The] contemporaneous-objection requirement, serves a well-recognized and legitimate state interest: avoiding flawed trials and minimizing costly retrials." *Smith v. Texas*, 05-11304 (U.S. 4-25-2007).

If you fail to make a contemporaneous objection, the appellate court may refuse to hear your appeal.

Timeliness *is* everything!

Still, in case you do go off in a daydream or thinking about those quarters in the parking meter, the old adage applies: Better late than never. Better to make a late objection than no objection at all. If you don't think in time to make your objection before the error occurs, and the cat is already out of the bag, *object anyway.*

It won't hurt you.

And, it may save the day.

The best timing, of course, is to object *before* the error whenever you can.

In many jurisdictions you may not be required to state the grounds for objections during a deposition.

Instead you may say, "Object to the form," or some similar statement that preserves the record without specifically stating grounds for your objection.

Unless the rules of your jurisdiction *specifically* forbid it, however, it is far better to state the grounds for your objections at depositions as well as at hearings and trial, just to be on the safe side!

Since there's (usually) no judge at a deposition, grounds for objections may be deferred to a later time when a judge can consider the grounds on motion of the objecting party. [In rare cases and for good cause depositions may sometimes be taken with a judge and bailiff present, such as when the safety of an individual is in jeopardy. At such times, objections should *always* be made with grounds stated, and the judge should be moved to rule on each

such objection before proceeding to the next question.]

Unless the rules *specifically* forbid it, state the grounds for your objections.

"Objection. Calls for speculation. Deponent cannot testify to what Dr. Pill Popper was thinking when he prescribed Prozac for Defendant's daughter!"

"Objection. Leading. Counsel is cross-examining *my* witness!"

"Objection. Beyond the scope. What my witness had to eat on the day of the accident has no bearing whatever on how the elephant escaped from the zoo!"

Expect a battle with opposing counsel at every deposition. Be prepared for it. Bring your official rule book. Many lawyers will waste time to make more money for themselves, asking questions about details that are "beyond the scope of discovery". (Study the "Evidence" class in this course to learn more.) Since there is no judge present to put the brakes on, you may expect him to do all he can to intimidate you and the deponent in hopes of getting testimony that will hurt your case and help his.

If opposing counsel takes any action whatever that's inappropriate or contrary to the rules in any way, object and state your grounds. (If local rules require you *not* to state grounds at a deposition, say, "Object to the form," or whatever substitute for stating the grounds is used in your jurisdiction, but do not fail to object!)

If your opponent drums his pencil demandingly on the table, leans threateningly over the table toward the deponent, or makes menacing faces as he asks his questions, it's a simple matter to stop the behavior and make your record by saying, "Objection! Counsel

for the Plaintiff is intimidating the deponent by drumming his pencil and leaning across the table at her with a menacing stare." The record will paint the picture for you, and your opponent will back off.

You won't make friends this way, but lawsuits are not a forum for making friends.

Pencil-drumming, leaning across tables, and making threatening faces cannot be recorded by the court reporter at a deposition (unless she is a videographer taping the proceeding). So, to preserve your objection for appeal, simply describe the objectionable actions and make it clear you object.

If such tactics are not curtailed after objection, you may terminate the deposition and set a hearing to relate the abuses to the judge. "Let the record reflect we are terminating this deposition and setting a hearing to present objections to the court before resuming at a date and time that will be determined by the court."

Or, it may suffice to merely *threaten* to terminate the deposition, if objection alone doesn't stop the unfair and unprofessional tactics. Threat of terminating a deposition to telephone the judge usually stops the games. I've done this dozens of times and always with the desired effect. The nonsense stops. No hearing is required. The deposition continues without the dog-and-pony show.

Failure to object at a deposition may waive your right to object later, if the other side offers to use evidence obtained at the deposition.

Be prepared to object promptly and (if the rules allow) state the grounds for all your objections.

In many jurisdictions, *preserving* objections requires you to move the court to *rule* on them … *if the court doesn't voluntarily rule on its*

own.

The judge needs to decide.

The judge's decision needs to go in the record.

Suppose opposing counsel asks his witness a leading question, "Isn't it a fact you were standing on the corner of Main and Elm at 2:30 the day of the accident?" (More on leading questions in the "Evidence" class in this course.)

"Objection. Leading," you chime in.

The judge says nothing.

The witness goes ahead and answers the leading question.

If you do nothing more, your objection may be worthless.

You must take an assertive stance when fighting in court.

Do *not* be afraid to stand up to the judge!

You must *do* whatever is required to make your winning record for appeal … or you will regret not doing it when when it's too late to fix.

If a judge fails or refuses to rule when you object, move the court to *rule* on your objection. This must be done to make the record *clear!* It shows the judge *intentionally refused to rule!*

This is obviously judicial error on its ugly, unjust face!

Appellate courts do not like to see it and will react favorably if the error was harmful to your case and you are forced to appeal.

However, you *must* make it crystal-clear on the record that the judge wasn't just hard-of-hearing or thinking of something else when you objected.

If the judge fails to rule, *move* him to do so.

Say, "Plaintiff moves the court to rule on plaintiff's objection!"

Or, "Defendant moves the court …, &c."

Merely objecting is not enough *unless the court rules*.

The object, remember, is to make a record of judicial errors for appeal. If the judge doesn't rule and you don't move the court to do so, there is nothing in the record to show the error.

Saying something polite like, "Plaintiff wishes to make a record of its objecting to the statements made by defense counsel," is insufficient! That's not an objection at all!

Wishes are wishes – not objections.

The court may ignore wishes without fear of being reversed on appeal.

Appellate courts are not required to consider wishes as objections.

If you want to object, *object!*

Stand to your feet, look at the court reporter to make sure she's still paying attention and typing away, then in a voice loud enough for the judge and court reporter to hear and record, pronounce that powerful word clearly, without apology of any kind: **"Objection, your Honor!"**

Throw a flag on the play.

Don't let the ball move another inch until the referree rules!

Do not worry about angering the judge.

Just let him stew if he chooses to. He has a job to do.

So do you!

Failed objections (i.e., those the judge overruled or ignored) should

be *renewed* to preserve them for appeal.

Here are some times when renewals might be made:

- At the close of your side's presentation, renew your objections.
- At the close of your opponent's presentation, renew your objections.
- If any of your objections during jury *voir dire* were overruled or ignored then, at the close of jury *voir dire* and prior to the jury being sworn, renew your objections.
- If any of your objections during an expert witness *voir dire* were overruled or ignored then, at the close of expert witness *voir dire* and prior to the expert's testimony, renew your objection*s.*
- At the very end of trial, before the jury retires to deliberate, renew your objections.

  With regard to renewing objections at the close of *voir dire*, the purpose of requiring renewal before the jury is sworn is to make it clear to the trial judge that the earlier objections are not abandoned and to give the judge yet another opportunity to reconsider its prior ruling. *Carratelli v. State*, 915 So.2d 1256 (Fla. 2005).

  Failure to renew may waive your right to complaint on appeal.

  If during the opposition's interrogation of a witness you make an objection that's overruled or ignored, and opposing counsel is permitted to continue asking improper questions, renew your objection with each such subsequent question … and move the court to rule if the judge refuses to rule. If it angers the judge, so be it. You have a right to make your record, and you are courting disaster if you refuse.

  Then, at the close of your opposition's questioning, renew your

objections once again!

The judge may turn surly and even threaten you, but you *must* do these things so the judge knows you are preparing to appeal him if he doesn't do what's right!

If you don't object, you can't appeal.

If the judge knows you can't appeal, the judge is free to do as he pleases without fear of being overturned or reversed by an appellate tribunal ... *not to put too fine a point on it!*

If you don't renew, it's as if you didn't object!

To properly preserve the record for appeal, you must give the judge *more* than a reasonable chance to do what's right! That's just how the system works.

If a judge overrules your objection, the record is made. But! You should still renew your objection as soon as an opportunity again presents itself.

Remember: Judicial errors are the sole basis for appeals.

Nothing else.

Read appellate decisions where a case is reversed or remanded for proceedings consistent with the appellate court's ruling, and you'll see appellate courts *never* order a party to do anything! The appellate court *always* directs its commands to what the trial judge did wrong!

Renew your objections to preserve your record for appeal.

Very important.

Objections generally fall into one of four (4) classes.

- Evidence Rule Violations
- Procedural Rule Violations
- General Law Violations
- Precedence and Common Practice

Let's look at each of these before going on to examine some of the more common objections you're likely to encounter in court.

Evidence Rule Violations

These are by far the most frequent.

Each arises when a party (or the judge) ignores an evidence rule.

The objection, "Hearsay!" is an evidence rule violation.

If you hear your opponent ask his witness, "What did the taxi driver say when you told him to 'step on it!'?", *jump to your feet at once!*

"Objection! Hearsay!"

Get a ruling on your objection!

If your opponent's lawyer begins to prompt his own witness, "Weren't you nearly out of coffee when you called the taxi to take you to the Starlight Cafeteria?", *jump to your feet at once!*

"Objection! Leading!"

The more common of these are included in following sections of this class.

To be able to use evidence rule objections effectively, you should study the "Evidence" class in this course and familiarize yourself with the official Evidence Rules that control in your jurisdiction.

Then, when you smell a rotten evidence rule violation, it'll be

second-nature to jump to your feet, object instantly, and state clearly the legal grounds for your objection.

Procedural Rule Violations

These, too, are quite common.

Any time a party (or judge) permits an action forbidden by the Rules of Procedure, an objection should be made at once - identifying the rule and how it's being violated.

Suppose your opponent moves the court for an order setting the case for trial before your motion to dismiss has been ruled upon. The rules do not permit a case to be set for trial so long as there are any pending motions directed to the pleadings.

"Objection! There are pending motions directed to the pleadings!"

Motions directed to the pleadings (motion to dismiss, motion to strike, or motion for more definite statement) must be ruled upon before a case is "ripe for trial".

If your opponent moves the court for an order setting your case for trial (or the judge on his own motion sets your case for trial) before a motion to dismiss, motion to strike, or motion for more definite statement have been ruled upon, object at once *and make your record for appeal*.

If the court sustains your objection, trial will be delayed until the requirements of the rules are met.

If the court overrules your objection or refuses to rule, you have grounds for appeal if it turns out that going forward to trial materially prejudiced your case.

General Law Violations

These arise less frequently, but they are important!

If a party (or judge) violates an ordinance, statute, appellate court decision, or any provision of controlling law whatsoever, an objection should be made at once. The objection should state the law that's been violated and how the law is being violated.

Make your record!

If a party refuses to produce certain documents, claiming they contain trade secrets, then if the party requesting to examine the documents moves the court for an order requiring an *in camera* inspection by the judge (an examination by the judge in his private chambers) the judge *must* examine the documents privately to determine if the trade secrets claim is genuine. This is the law in many jurisdictions, so the judge's failure to abide by this law is objectionable judicial error.

Any violation of general law is objectionable error, and an objection *must* be made to preserve the error for appeal.

Civility and Common-Sense Violations

These objections are based on tradition and decent behavior.

Suppose your opponent comes to court wearing a powdered wig, attired in clothing appropriate for a hearing in the 18th Century but outlandishly inappropriate for the courtrooms of today. If he's wearing a jacket, shirt, and necktie, his apparel may meet requirements of the official rules.

However, he *will* be an unwanted distraction for the witnesses and

jury.

"Objection! Counsel's historical fashion show may be appropriate for his lodge meetings, but it's not appropriate here. It will distract the witnesses and jury from attending to justice. I move the court to order him to change before we proceed."

Courts must be maintained with an atmosphere of decorum, not the colorful flair of a side-show.

Fail to object, and you won't be heard to complain on appeal when jury and witnesses are distracted and rule against you.

Suppose your opponent is sight-impaired and requires a seeing-eye dog. You might object, but your objection will likely be overruled. Civility and common-sense will be upheld, rule or no rule. Seeing-eye dogs are allowed, because it's the "right thing to do".

It is probably not a good idea to attend in cut-off jeans and Grateful Dead T-shirt.

Courts are controlled by more than rules of evidence, rules of procedure, and general law. They are controlled also by public policy, a code of decency, polite decorum, and common-sense.

If it doesn't seem proper, object and make your record. Don't let court become a three-ring circus without objecting and forcing the court to rule on your objections.

Courtrooms should be managed by judges in a manner that promotes order and a level playing field for both sides. For a judge to allow anything to disrupt this balance and prejudice one side or the other is appealable error.

Stop repetition.

"Objection! Asked and answered!"

It saves valuable court time.

But, that's not its main purpose.

Suppose your opponent wishes to emphasize the weight of certain testimony favorable to his case. He asks, "Did you witness the accident?" The witness answers. Your opponent then asks, "Did you see the cars collide?" The witness answers again. "Are you certain the cars crashed into each other?" And again the witness answers. "Did the car crash take place while you were present?" Etcetera.

Once is enough.

Twice is *more* than enough.

Three times deserves an objection.

Four times and you've fallen asleep at the switch!

You *will* encounter this. Lawyers will dwell on a topic, getting a witness to examine it from all angles in the minutest details *ad nauseum.* It is not good for *your* case! It is done to emphasize testimony.

It will seem innocent at first. You may not notice the second time. After all, the answers aren't exactly the same, and the questions are a bit different every time.

But, that's the idea! Your opponent wants to emphasize testimony without your noticing!

Don't allow it!

Once is enough.

Twise is more than enough.

Three times deserves an objection.

"Objection! Asked and answered!"

Don't let your opponent ask repetitive questions to emphasize a fact contrary to what's best for your case.

A good judge will sustain your objection immediately. He doesn't want the case to drag out any more than necessary, either. He has other cases to hear!

Attempts to emphasize testimony about a particular fact by repeatedly asking questions that elicit the same or substantially similar answers will be stopped, *if you object in a timely manner and the judge is doing his job!*

If the judge refuses to do what's right and stop repetitive questioning, and if repetitive answers are tending to harm your case, you have grounds for appeal. Make certain the judge knows you are preserving his errors for appeal.

If you don't object, your opponent will keep beating dead horse facts until they are taken as true, even when they are not true!

Drumming witnesses for redundant answers to emphasize a fact is one of the deceitful methods crooked lawyers use to *unfairly influence the court!*

Object!

Lawyer asks witness, "What time was it?"

Witness answers, "Around supper time."

Lawyer asks, "So, it was nearly dark?"

"Nearly," the witness responds.

"The light was fading?" the lawyer drones on.

"Decidedly," the witness answers.

"Would you say it was dusk?" the lawyer goes again.

"Yes, I would say so," the witness replies.

"So, the sun was going down?"

Don't let it get so far!

"Objection. Asked and answered!"

Some lawyers beat the evidentiary bushes just to keep the clock running so they can bill more hours and steal more money from their clients. The more time they spend, the more money they can demand.

Others do it to emphasize facts they want admitted as evidence, facts that tend to unjustly influence the court, facts that by repetition stand out in the mind of the court, facts that won't do *your* case any good at all.

The lawyer will be instructed, "Move on, counselor."

You cannot stop a lawyer from asking questions. That's his job. After all, you want the same privilege, don't you? Asking questions is what we do when we have witnesses on the stand.

But, we don't want lawyers using unfair tactics to influence the court.

This objection timely made should stop them dead in their tracks … or, at least, make an effective record for appeal if the judge commits the judicial error of allowing it to continue!

If you have a lawyer, don't trust him to object when needed. Many lawyers will not object. They are afraid to upset the judge! It's true.

Trust me. I've watched lawyers sell their own clients down the river rather than get on the bad side of a judge they'll have to be in front of next week and the month after and for years to come. It isn't right, but the practice is commonplace.

Go the extra mile. Command your lawyer to object (if you have one). If he won't object, jab him in the side with a sharp stick. If that doesn't work, fire him on the spot and make the objection yourself! Don't pay for services you aren't getting!

Badgering is abusive interrogation.

Insults are not allowed.

Intimidation is not allowed.

Badgering is not allowed ... *if you object!*

Objections will be sustained if made in a timely manner and *questioning is obviously abusive and unnecessary.*

Suppose you're cross-examining a witness for the other side, "Isn't it a fact you're a dope-dealer and beat your mother to death with a broom handle?"

These types of questions are perfectly permissible, so long as you don't *badger* the witness.

If the witness *is* a dope-dealer and *did* beat his mother to death with a broom handle, or if there's any evidence at all to support these allegations and the answers are relevant to material issues in the case, it's not badgering.

Otherwise, it may be.

While it's possible to politely lead a witness on cross-examination, there will be times when you must take a hard-line approach to

squeeze answers from a witness reluctant to give what you must have to win.

When cross-examining, attempt to do so in a friendly manner, at least when you first begin. You don't want a frightened animal backed in a corner. Be friendly, at least at first. Do what you can to make the witness feel safe and comfortable, at least at first. This will improve the odds of early answers being freely given and complete.

Later you may have to go on the offensive, leading witnesses with embarrassing questions.

If you anticipate this being necessary, take a *very* friendly approach at first so you can get as much voluntary information as possible. Then, once you've got all you can get by being "nice", go hard-line with the witness, squeezing the witness for all remaining facts you need.

You may ask, "How do I know where hard-line ends and badgering begins?"

Tone of voice, for one thing. Stay calm. Smile, even though you may be gritting your teeth. Don't let angry emotions show. Your questions can probe the witnesses very soul, revealing filthy laundry never before brought to the public lilght, while your tone and demeanor remain as sweet as a mother's love.

If testimony you seek is relevant to material issues, go on the attack until you get it. You cannot be objected for badgering if you stay calm while digging for relevant evidence.

It's when you go on wild excursions with rage, a razor sharp tongue, and a raspy voice that penetrates the very soul of the witness in search of every dirty deed he ever did that the judge will stop you for

badgering.

Stick to the point.

At least appear pleasant.

During cross-examination, the witness is not merely *asked* to answer. He is compelled to do so. He is told what the answer and commanded to agree or disagree. (Learn more in the "Evidence" class in this course.)

Cross-examination, by its very nature is "abusive".

It borders on intimidation, frequently crossing the line to damaging attacks on the witness' character.

But! When questioning reaches such a fevered pitch that it becomes an aggressive assault on the witness, the attack will be stopped with this timely objection.

One should never be permitted to brow-beat a witness.

Nor is it proper to *unnecessarily* insult or embarrass a witness. The goal is to get evidence. Nothing more. If a witness is being *unnecessarily* insulted or embarrassed, this objection is in order.

"Objection! Counsel is badgering the witness!"

What seems like badgering to one person may not seem like badgering to another. The seasoned trial judge hears this sort of thing day-in and day-out. Some judges permit more abuse than should be tolerated. Other judges may be too strict, requiring witnesses to be treated with kid gloves and the highest degree of politeness punctuated by occasional pleasantries.

"Miss Witness, may I ask why you were snuggling in the back room with the store manager when your duties were to watch the security

cameras? And, by the way, that's a strikingly lovely blouse you're wearing today!"

Between these two extremes lies the proper place to draw a line between fair questioning and abusive attacks that characterize badgering and give rise to this objection.

Lawyers may badger a witness they wish to discredit. Or, they may do so to shake his nerve so he'll drop his guard and give more information than he might otherwise reveal.

It is wrong.

It will not be allowed.

Unless you fail to object.

Rule 1002 of Federal Rules of Evidence (after which nearly all state evidence rules are patterned) states, "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress."

This is called the "Best Evidence Rule".

It forms a handy objection when the other side offers a copy instead of the original of a document, recording, or photograph.

Suppose your opponent offers a copy of an alleged cancelled check. He wants to prove his client paid some bill you claim is due and owing.

You stand up, "Objection! Best evidence rule."

The judge may ask your opponent, "Where is the original?"

If the other side replies, "Oh, it's back at my client's office in his company safe," or, "My client's accountant has the original," you

renew your objection and insist that the original be produced or that the copy be excluded as inadmissible evidence under the best evidence rule.

If the other side claims, "The original was destroyed," you make your record by demanding to know the circumstances of the original's destruction, since unavailability of an original results in the admissibility of a copy under the rule ... if, in fact, the original is unavailable through no fault of the side attempting to introduce a copy.

If the original of a document or thing *can* be produced through the exercise of reasonable diligence, then *only* the original is admissible … and no copy can be used as a substitute.

If the original has been destroyed or is otherwise no longer available, even with the exercise of reasonable diligence, then the copy may be admitted, in spite of the rule.

However, the copy is still a copy!

Copies *never* carry the same weight of proof as would an original.

In the case of security instruments and negotiable paper (e.g., promissory notes) a copy is no substitute and is worthless except to show what the original looked like or said. Just as you cannot spend a copy of a dollar bill, a copy of a promissory note is worthless paper, except to show what the note looked like and what it said.

Do not fail to make this distinction.

If the original is not available and the court admits a copy, make clear on the record that the copy is not equivalent to the original.

In this modern digital age, any schoolchild with a smattering of computer savvy can create exacting duplicates of almost anything

that can be replicated on ordinary paper. A will or contract can be "created" from thin air with a home computer system. Photographs can be "doctored" in indescribable ways to put people where they never were or remove them entirely from a scene.

The purpose of the best evidence rule is to control fraud on the court.

If a photograph is offered in evidence, you may object unless the negative is also produced. If the photograph is from a digital camera, of course, this is not possible. They copy is just a copy, without the evidentiary weight of an original.

The purpose of this objection is to call into question the authenticity of any copy offered by the other side. This, in turn, creates opportunity to cross-examine persons who allegedly had possession of the original as well as those who now offer the copy instead of the original and those who allegedly controlled a clear chain of custody.

Don't your opponent slip copies in as originals. Use this objection to explore the possibility of fraud.

The objection should always be based on "genuine" suspicion of fraud predicated on alternate evidence.

The best evidence rule does not exclude copies, if copies are not being offered to prove the truth of what they says. The rule applies only when the content of a copy is offered to prove (or disprove) some fact material to the outcome of the case. A copy may be produced to show that a person was alive on a certain date, having signed the original in the presence of a notary, for example. In such a case, the copy is not offered for what it says.

The best evidence objection should demonstrate that your

opponent's use of a copy will be "unfair" to you, such as where you need the original for a document examiner to determine if a signature is authentic. A document examiner cannot reach a definite conclusion about a forged signature working from a copy. If you allege forgery and declare you intend to have a document examiner scrutinize it, your argument for production of the original is much stronger than if it's only the content you challenge.

A copy of a decedent's will, for example, should not be probated by the court unless you are allowed to challenge both content and alleged signature. I had a case some years ago where the disgruntled son of a nice old lady, who died and left her lovely home to my client instead of her own children, dared challenge his mother's will by creating his own version with a copying machine. He copied his mother's signature from an old Christmas card! I found out during discovery that this incredibly stupid man had published a book detailing how to create forged documents using a copying machine!

The U.S. Supreme Court said, "The elementary wisdom of the best evidence rule rests on the fact that the [original] document is a more reliable, complete, and accurate source of information as to its contents and meaning." *Gordon v. United States*, 344 U.S. 414 (1953).

This should be obvious to us all.

If the original *can* be produced, it *must* be produced.

No copy is an acceptable substitute.

If opposing counsel asks a witness what some letter, contract, or other document "says", object at once. A witness may not tell us what a writing says, if the writing itself can be found and brought to

court.

That's what this rule does for us.

Another way to say it is, simply, "The document speaks for itself."

If a letter, contract, or other document can be produced through the exercise of reasonable diligence, the document itself is the "best evidence". Statements by witnesses claiming to tell us what a document may or may not say is excludable under the rule.

California's latest version of the rule is called the "secondary evidence rule". Courts there hold that if a litigant "seeks to introduce evidence of the words contained in a document, he must introduce the document itself, not a verbal recollection of its terms." *People v. Muhammad*, 153 Cal.App.4th 358 (2007).

Ohio list some exceptions that generally apply in all jurisdictions:

- Original lost or destroyed, unless party offering the evidence lost or destroyed the original in bad faith;
- Original cannot be obtained by any available judicial process or procedure;
- Original in possession of opponent and, at a time when original was under control of the party against whom it is offered, he was put on notice by pleadings or otherwise that contents would be subject of proof in court, and he does not produce original; or
- The writing, recording, or photograph is not closely related to a controlling issue.

Anderson v. Anderson, 147 Ohio App.3d 513 (2002).

As with all others, failure to object waives the objection, and it cannot be raised for the first time on appeal.

If your opponent attempts to "prove" the contents of a writing, recording, or photograph by offering a copy or testimony of witnesses, instead of the original, object and renew your objection to preserve your record for successful appeal.

Competence objections are based on an evidence rule requiring everyone who testifies to a fact to have first-hand personal knowledge of the fact.

Up close and personal!

Witnesses testifying to facts must have first-hand knowledge and possess sufficient mental capacity to understand what they are saying.

Otherwise, they and their testimony lack competence.

Witnesses qualified as experts may offer opinions about hypothetical facts *without* having first-hand knowledge. However, expert testimony is *always* offered only as "opinion", not a known "fact".

A person formally adjudicated senile or insane (e.g., anyone committed to an institution for mental infirmity or placed under court-imposed guardianship) lack competence to testify.

People institutionalized for mental infirmities or requiring a court-ordered guardian are, by definition, "incompetent". That's what the word means! Lacking competence.

Children also may lack competence to testify, though they personally witnessed a scene or event first-hand. For this objection to hold, the child's age comes into play. If you think a child witness should take the stand in favor of your cause, do some advance research homework in your jurisdiction to determine the age cut-off for

testimony by children. While you're at it, see what other factors apply to limit testimony of children where your case is being tried.

Not all children lack competence to testify.

A high school honors student, for example, will probably be allowed to testify.

A three-year-old, on the other hand may not.

Children who still talk to their toys lack competence. The testimony of a child old enough to be otherwise competent to testify may be excludable on other grounds.

If your opponent tries to elicit testimony of an 8-year old, object ... but be prepared to back up your objection with grounds, e.g., case law or statutory authority!

In most states young children are deemed to lack competence to testify. If you anticipate a child may be called in your case, consult the evidence rules controlling your local court *in advance*. Know the limits on age-competence. Then go beyond the evidence rules and do some case law research *in advance* to find appellate decisions on the issue, decisions of appellate courts that control the trial judge.

Clearly, a 2-year old lacks competence to testify about anything whatsoever.

An older child of 12 or 14 may be competent to testify about certain kinds of things (if they have first-hand knowledge) yet lack competence to testify about other things too complex for a younger person to accurately comprehend.

Always rely on official rules and cite case law when anticipating an objection of this kind.

The judge in your case is *not* "legal authority". Statutes, rules, and constitutional provisions as interpreted by controlling appellate court decisions are the *only* authority in our courts.

If an elderly person obviously suffering from Alzheimer's disease or other form of dementia is called to testify, object quickly.

"Objection! Competence!"

The same applies to persons using any form of mind or mood altering medication (whether prescribed or illegal).

When it's your turn to examine a witness you suspect may be "high", begin with this. "Have you taken any medications or mind altering drugs in the past 24 hours?" You'll usually get a prompt denial or refusal to answer. If they admit it, you can cross-examine further to see if a competence objection will strike them. If they deny it, and you find out later they were lying, their testimony can be stricken from the record and, if damaging to your case, you should have no problem getting an appellate court to correct the problem on appeal.

More commonly, you will encounter attempts by opposing counsel to elicit testimony from someone who has no idea – first-hand, that is – what he or she is being asked to report.

Lack of first-hand knowledge = Lack of competence to testify

Lawyer Testimony

The worst form of this competence abuse occurs when lawyers testify.

Instead of sticking to their authorized duties (asking questions to get testimonial evidence, introducing tangible evidence like documents and things, and presenting legal arguments), many lawyers *cheat*

by testifying about facts of which they have *no first-hand knowledge*.

Lawyers are not supposed to testify.

Lawyers lack competence to testify.

Lawyers should *never* be allowed to state facts outside their first-hand knowledge.

Yet, this clear violation of the letter and spirit of due process is commonplace.

You must stay on your toes to stop it before it injures your case!

A lawyer usually knows nothing beyond the facts he learned from his clients or third persons he may have interviewed. He therefore lacks competence to testify about such facts.

Yet, if you allow, it will happen again and again and again.

Instead of being required to call witnesses to tell the court what facts they heard or saw, the lawyer *cheats* by relating those facts without using witnesses. Perhaps he has no witnesses. He may know he cannot win unless he, himself, testifies. (More about lawyer testimony later in this class.)

Millions bled and died for your right to rely on the rules. They gave the ultimate sacrifice so you could enjoy a level playing field in court, to be heard, to call witnesses on your own behalf, and to stop unfair practices of unscrupulous lawyers and corrupt judges who violate the blood-bought rules that make Liberty and Justice possible for *all* of us!

Only *competent* witnesses should be allowed to testify.

Physical Competence

In the hilarious movie, *My Cousin Vinny*, an old lady testified that from the window of her backwoods Georgia living room she saw two young men robbing a convenience store across the street.

She claimed she could clearly identify them as the New York lawyer's young cousin and friend.

Vinny, the heavy-accented lawyer played by Joe Pesci, stretched a tape measure from the witness box to the back of the small town courtroom. He then challenged her to tell how many fingers he held up. She couldn't even see that short distance through her thick bifocals. She could not possibly have identified two boys at the distance she claimed.

Her testimony was stricken, because she lacked *visual* competence.

She could only testify to what she saw … not what she was told by others eager to convict a couple of New Yorkers.

Persons extremely hard of hearing, or claiming to have seen a murder committed in the moonlight on a night the almanac proves moonless (facts in a case that made Abraham Lincoln famous before his presidential election), or a person in far away city when the alleged event took place - all lack competence to testify.

If a witness was drunk at the time of making an observation and is later called to testify, jump to your feet with a hearty, "Objection! Competence! This witness was falling-down drunk at the time."

Remember: Only object to testimony you *don't* want. If testimony seems good to your case, let it in. But, if later testimony from the same witness begins to damage your case, you may have difficulty objecting on the grounds of competence, if you didn't object when the desired testimony was first offered.

Always be on-your-toes, anticipating the opposition's next move.

Don't get blind-sided!

Competence is the root of the hearsay objection discussed later in this class (and in the "Evidence" class in this course). If all one knows about a fact is what someone else said (someone who's not in court available to be cross-examined on the matter), the witness lacks the competence that might otherwise make his testimony admissible, *because no one can see through another person's eyes!*

If a witness lacks competence to testify, object.

The worst form of abuse of the competence rule occurs when lawyers testify to *unfairly* get facts into evidence.

It's cheating!

Don't allow it.

Object!

Instead of asking questions of witnesses (who *are* competent to testify) lawyers frequently try to get facts into evidence by *testifying!*

It happens all the time!

The problem is that the lawyers don't know whether what they're testifying to is true or not. They lack first-hand knowledge. And, therefore, they lack competence to testify!

You must be on guard and at all times prepared to object!

As soon as your opponent's lawyer starts to state facts outside his personal knowledge, facts he learned from clients or third persons, facts he lacks competence to testify about in court, *object at once!*

If a lawyer cannot find tangible items or witnesses to offer as evidence in support of his case, he will frequently attempt to get the evidence in anyway by being his own "witness", stating facts about which he has *no first-hand knowledge*. He will give details of the content of documents that aren't available. He will tell the court what was said by someone who isn't present for cross-examination. He will describe a scene or the actions and behavior of people he never met.

To multiply this unlawful exploitation of due process, some are adept at using the English language very persuasively, illustrating their points and positions with word-power most lay persons lack.

It matters not that they are members of The Bar.

It matters not that they finished law school, passed the bar, and enjoy a certain degree of social prestige in the community as they strut about the courtroom in expensive clothing and highly-polished shoes.

If a lawyer does not have first-hand knowledge of facts he offers in evidence, he lacks competence to testify, *and a timely objection is essential.*

Otherwise (if you allow) he will present damaging evidence, dishonestly influencing the court against you, contrary to the letter and spirit of due process.

Put a stop to it *immediately!*

Lawyers lack competence to testify!

It's a corrupt practice.

You must stop it before it begins.

The rules of professional responsibility that govern lawyers (every state has them) limit the ability of a lawyer to be both witness and counsel for his client. He cannot be both. He may serve as lawyer for his client, or he may be a witness for the client … *not both*. Either the lawyer is a lawyer and plays the part of lawyer, or the lawyer is a witness *and can no longer play the part of lawyer!*

If a lawyer insists on testifying, and the court allows it over your objection, move the court to enter an order finding that the lawyer may act as witness for the opposition. If the court rules the lawyer may be a witness, move the court a once to disqualify him to testify pursuant to the state bar's rules of professional conduct (which, of course, you will be prepared to cite scripture and verse).

If a lawyer insists on testifying, and the court allows it over your objection but will not disqualify the lawyer, move the court to order the lawyer to take the oath and submit to your cross-examination.

Anyone offered as a witness *must submit to cross-examination by the other side.* No exceptions!

Your right to rely on the rules was bought with the innocent lives of millions who died to protect and preserve your ability to require every officer and agent of our government to obey the rules of law. Lawyers and judges are no exception!

If the judge overrules your objection or refuses to rule, be sure to renew your objection every chance you get and especially before the court takes any action that would cement the damage.

Every time a lawyer states facts as a "witness", *object!*

What's good for the goose is good for the gander, as my Granddaddy used to say.

He also said, "There's more than one way to skin a cat!" If you don't get your way in court, prepare for appeal by making timely objections and renewing them at the proper time.

Beware of lawyers "reminding" the court of facts never introduced.

Sneaky tactics.

"Objection! Facts not in evidence!"

There'll have been no documents, no exhibits, no witness testimony, *nothing but the lawyer's sneaky wordwork!*

It will happen at hearings, depositions, and trial.

You'll find it in written memoranda, notices, motions, even orders prepared by the other side for the judge to sign after a hearing. Facts will be alleged *that never existed!*

Facts not in evidence.

Facts for which there is no evidence!

Stop it with instantaneous objections!

Otherwise, inadmissible facts will be sneaked in. Count on it. If the other side is represented by a lawyer or smart enough to do it on his own, *it will happen*.

It usually rears its ugly head when a lawyer doesn't have any witnesses, documents, or other things he can bring to court that might tend to establish the facts he wants to put in evidence ... *so the lawyer cheats!*

His case is weak, and he knows it.

He also knows it's against the rules for him to mention facts not in evidence ... but you should not only *expect* him to do it anyway, you

should *count on it happening!*

Be ready to object.

"Objection! Facts not in evidence!"

If a lawyer can't find a witness to get in the evidence he needs, and he can't find some tangible item or document to get the evidence in, he'll just talk about it as if a witness had testified or documents and things were presented ... *if you allow it by failing to object!*

Sometimes, a lawyer will get facts in by stating the facts while examining a witness or during closing statement ... *when there is nothing whaever in evidence to support it.*

He hopes you won't notice he offered inadmissible evidence unlawfully.

You *will* notice, however, because you're studying this course!

You will stand to your feet at once!

"Objection! Facts not in evidence!"

If the judge is honest, he will instruct the lawyer to confine his recitation of facts to those already admitted. If it's a jury case, he will instruct the jury to disregard the lawyer's statement.

Sometimes telling the jury to "Disregard that last statement," is effective. Sometimes it's not. It's usually the best you can hope for. That's why you must object as *quickly* as possible … *before* the court hears what the lawyer wants to sneak in.

Imagine yourself as defendant in a breach of contract suit. You've been accused of taking 300 gallons of red paint from plaintiff's warehouse without paying for it.

The lawyer on the other side is working hard to prove you owe his

client money. He is trying to paint his client in the best light possible, wishing to show his client is an honest fellow who would never sue someone without cause. And the lawyer is determined to do this, *even if he has to break the rules!*

He mentions casually, "My client was busy working as a volunteer at his church soup kitchen while defendant was removing paint from my client's store."

There are no facts in evidence to support this statement about the church soup kitchen or the plaintiff's angelic volunteerism. It was stated solely to make the client seem like a good person, worthy of a favorable verdict.

The lawyer didn't call any witnesses to corroborate.

The lawyer didn't offer any documents to substantiate his biased claim.

The lawyer is merely testifying.

The facts he offers have not been presented to the court by any witnesses, documents, or other things that might make those facts admissible ... and the lawyer's testimony is *inadmissible*.

"Objection! Facts not in evidence!"

It is permissible for a lawyer to remind the court what a particular witness may have testified when previously questioned. If a witness testified to seeing you load paint on your truck on such-and-such date at such-and-such time, it's perfectly permissible for the lawyer to remind the court by saying, "The court will recall the testimony of plaintiff's secretary, Miss Scarlet, who told us she was enjoying a cigarette on the loading dock when she saw defendant back his truck up to the warehouse door and carry the paint away."

It's not only permissible – it's good lawyering!

It's equally permissible for a lawyer to offer evidence his client *was* at his church serving soup to the homeless on that date and at that time, provided he does so by testimony from competent witnesses, authenticated documents, or other things tending to prove what he says *and* the plaintiff's presence at the church is relevant (which it probably is not).

If he previously called the priest or pastor of the church and obtained competent testimony reporting that plaintiff was doling out soup at the time of the alleged taking (and the testimony is *relevant*) then he may *remind* the court of evidence already admitted.

It is *never* permissible for a lawyer to offer facts that have not yet been presented to the court.

And, it is *never* permissible for a lawyer to testify!

Object on both grounds!

"Counsel is testifying."

"Facts not in evidence."

You dare not allow your opponent's lawyer to "prove" your opponent's case by giving the lawyer's own version of the facts.

Some lawyers are honest.

Many, are not.

Never trust your opponent *or* his lawyer!

No matter how clean-cut, well-dressed, and polite a lawyer may seem, there's a reason why there are more jokes about lawyers than all other professions put together!

Too many are crooks.

Too many are eager to twist the law at every opportunity if it will get them a win.

The Bar knows this and deals harshly with dishonest members on a regular routine, yet the practice is so entrenched you must *expect* it and be prepared to object!

And, don't expect a judge to control your opposition's lawyer! It's not his job.

The judge is responsible to rule on objections.

It's up to *you* to object!

So, object!

And, if the judge makes it necessary by denying your objections, renew them!

If the judge refuses to rule on your objections, *move* the court to do so!

If that doesn't work, object again – *and make certain the court reporter takes down every word!*

Hearsay is like a rumor.

The one you hear it from is not the one who starte it!

Many people "think" they know what hearsay is, but few really do - *including many judges and lawyers!*

YOU must know what it is, be able to smell it when it first appears, and be prepared to jump to your feet and object!

"Objection! Hearsay!"

The man-on-the-street's idea of hearsay is anything someone says

someone else said.

That definition omits a technical aspect you *must* understand to protect yourself in court, because hearsay *will* come in ... if you allow it.

The following definition is as simple as it gets.

Memorize it.

Repeat it until you know it by heart.

HEARSAY is:
an out-of-court statement
offered to prove the truth of what was said
by someone who cannot be cross-examined.

<

Let's look at this definition more closely.

Hearsay is

1. An out-of-court statement
2. Offered to prove the truth of what was said
3. By someone who cannot be cross-examined

#1 The person who made the hearsay statement was not in court at the time the statement was made. The term "court" includes a deposition or other official proceeding where both sides are represented and the non-calling side has an opportunity to cross-examine and make a record.

#2 The statement must be offered to prove what it says (or some part of what it says) is true. If it is offered for any other reason, it is not excludable hearsay.

#3 The person who made the statement is not available *now* to be cross-examined, so the non-calling side is unable to use leading questions to probe the witness' competence and truthfulness.

If the person who made the statement is in court, subject to cross-examination, the statement is not hearsay – even though the person who made the statement wasn't in court at the time the statement was made.

The measuring stick is whether the person who made the statement can be called to corroborate (or deny) the statement *in court,* i.e., whether the person who made the statement can be cross-examined to test the truth of what he said *in court*.

If the statement is not being offered to prove the truth of what was said, it isn't hearsay – even though the person who made the statement isn't in court and cannot be cross-examined.

An otherwise hearsay statement may on rare occasions be offered for other reasons, such as entry of an affidavit solely to prove the person who signed the affidavit was alive on the date certified by the notary. The content of the affidavit is not being offered for proof of what it says but, rather, the fact that a notary attested that the affidavit was signed on a certain date by a living soul. Such an affidavit offered for the sole purpose of showing someone was alive on a particular date is not hearsay.

If an affidavit is offered to prove the truth of what it says, however, and the person who signed the affidavit is not available to be cross-examined *in court*, the affidavit is *not admissible!* An affidavit could be witnessed by the Pope and not be admissible unless the Pope himself can be brought to court and answer questions about it under cross-examination.

A statement is inadmissible hearsay only if offered by a witness (or document) to prove the truth *of what the absent person allegedly said.*

If offered for any other reason, it is not hearsay.

Ability to cross-examine the absent person is the second test.

There are many exceptions to the hearsay rule. You need to know these before subjecting yourself to a deposition or court proceeding.

For purposes of the hearsay rule, statements made at a deposition (where both sides are present and able to examine the deponent) are considered "in-court statements" and thus not hearsay, though the statements were not, technically, made "in court.

The "dying declaration" and "excited utterance" are two of the more common exceptions. These and others are covered in the "Evidence" class in this course.

The gist of hearsay is "competence". Being unable to test the competence of the person making the out-of-court statement puts competence at issue. This, in turn, destroys the statement's reliability. Thus, hearsay is excluded - with exceptions (of which you will find the most common in the "Evidence" class in this course).

Your hearsay objections will stop a witness (or document) from being used to prove a matter that is *beyond the personal knowledge of the witness* (or the person who prepared the document).

Anyone who lacks first-hand knowledge of a fact lacks competence to testify to that fact. Anyone else who is alleged to have knowledge of a fact must be brought into court where he can be cross-examined on that alleged knowledge. Otherwise, what he said *out of court* is

inadmissible (unless the statement falls into one of the hearsay exceptions).

It's terrifying to think of the corruption that would result but for this rule. People would be allowed to fill the court record with facts they were merely "told about" by others or, in many cases, facts they simply made up to satisfy the situation, thus dishonestly turning the tables against the honest person who *should* win the lawsuit.

Lies would fly.

Justice would be perverted.

Justice refuses to hear hearsay *if and only if you object in time to stop it.*

Prepare yourself to argue against the many hearsay exceptions your opposition *will* offer. Your opponent *will* try to get hearsay admitted.

And, if the other side claims one of the hearsay exceptions, *don't believe it!* Be prepared to argue against it. Exceptions are extremely limited. Learn about them in the "Evidence" class in this course.

Hearsay is *inadmissible* … unless an exception can be shown.

"Objection! Hearsay!"

Stop hearsay *before* it pollutes your winning record.

It does very little good to object *after* testimony is heard.

If the judge instructs the jury to disregard, permanent harm to your case has been done nonetheless.

Still, better late than never. Object as soon as you can … but object!

If the judge overrules, renew your objection.

If the judge refuses to rule, move him to rule.

If he refuses to rule on your motion, object again … and renew again later.

Do not allow hearsay to go on the record without objection!

Once the pleadings are "closed", the race is on!

The pleadings are considered closed when all motions directed to the pleadings have been disposed of (e.g., motion to dismiss, motion to strike, or motion for more definite statement).

No *new* issues material to final judgment can be raised.

The only issues properly before the court are those raised by the pleadings:

- Plaintiff's Complaint
- Defendant's Answer
- Defendant's Affirmative Defenses
- Plaintiff's Reply to Affirmative Defenses

That's what the case is about.

The sides have decided what the fight is about once the pleadings are closed, and neither side can go back and change the game "in mid-stream".

Only those issues raised by the pleadings can decide the outcome.

The pleadings tell us what the parties are fighting about.

We should be able to pull the clerks' file and, by reading just the pleadings, without looking at any other documents, know that the case is about.

As Sherlock Holmes would say, "The game is afoot!"

The material issues are sealed.

They're like papers locked away in the compartment of a sunken ship. They cannot be changed without the court's permission. Everything the case is about is secure in that sunken ship, waiting for the parties to present evidence to prove the facts they alleged and make their legal arguments to determine who should be favored by the court's judgment.

We cannot add to or take anything away from the pleadings once they are closed.

Don't allow the other side to raise *new* issues halfway through the case!

Once the pleadings are closed (i.e., there remain no motions addressed to the pleadings by which they might be amended or amplified) new issues cannot be raised … *unless you fail to object!*

"Objection! Outside the pleadings!"

Suppose your spouse asked you to paint the fence white. So, you start to paint the fence white. When you're nearly finished, your spouse throws open the kitchen window and yells, "Green! I told you to paint the fence green!"

In court, changing positions once the pleadings are closed is forbidden … *unless you fail to object!*

It isn't fair fighting, so the rules forbid it.

Too frequently, however, an unscrupulous (or stupid) lawyer will try to raise new issues during the proceedings … issues never raised by the pleadings.

If an issue of material fact has not been raised by the pleadings, we say the issue is "outside the pleadings" or "beyond the four corners of the pleadings", or "not an issue in controversy and therefore not

properly before the court".

When the other side tries to hide the *real* issues by attempting to introduce *new* issues, jump to your feet!

"Objection. That issue is outside the pleadings."

I've done this successfully many times. The judge always ordered cease-fire; thumbed through the file to find the pleadings; read the complaint, answer, affirmative defenses, and replies; and finding the newly offered issue not part of the pleadings, sustained my objections ... every time. This prevented the other side from clouding the *real* issues by raising *new* issues that were never part of the case.

If I had not objected, the muddying would have been allowed, weakening my position.

This is commonly done by by unscrupulous (and stupid) lawyers.

Don't allow it.

Object!

Every case stands or falls on the parties' pleadings and their ability to *prove* what the alleged in the pleadings.

The battle-lines are set.

Both sides declare what they intend to prove by alleging those things in the pleadings. If the pleadings have holes, they cannot later be filed ... once the pleadings are closed!

You will, however, encounter this crooked tactic quite often. Object!

A crooked lawyer who cannot win fairly will often try to confuse the court with issues never raised in the first place … issues that are "outside the pleadings".

The good thing is that most judges welcome any chance to simplify cases. They don't want dockets jammed, cases running overtime, or decisions delayed. On your motion, they will gladly stop parties from introducing new issues"outside the pleadings". By doing so they make things easier for themselves, reducing the time needed to close the case and get on to the next.

But it only works if you object!

A talented but unscrupulous lawyer, given a free hand by your failure to object in a timely manner, can so completely twist the facts and confuse the court with new issues outside the pleadings that the issues originally raised by the pleadings are lost completely in the judicial waters they muddy by this clever evasion of the rules. If you aren't on the lookout for such corrupt tactics, before you know it they'll have the judge entering final judgment against you on issues *that were never part of the lawsuit in the first place!*

The days of winning by ambush are over!

If you object, that is!

Prejudice takes unfair advantage.

Tips the scales unjustly.

Casts things in a bad light.

Is frowned on by Justice.

The word comes from the Latin "*pre*" and "*judice*". To judge before.

Or, as we apply it in the law, to cause the court to judge something *before* all the evidence is in.

Understanding how to protect yourself is easy once you understand the following two factors.

All evidence has what we call a "probative" value, i.e., its tendency to prove or disprove a fact.

Some evidence has what call a "prejudicial" value, i.e., it's tendency to "shock" the court or put someone in a bad light, in addition to having some degree of probative value.

Now, if the prejudicial value outweighs the probative value, a prejudice objection should be made at once, *preferably before the prejudicial evidence comes in!*

"Objection! Prejudicial! The probative value of the offered evidence is outweighed by the prejudice."

Prejudicial facts may be offered to embarrass you or to shock the conscience of the court. We say the prejudicial effect outweighs the probative value.

A lawyer for the other side may try to prejudice the court against your witnesses or inflame the court with wild or extremely disturbing facts that attack human emotion in a way that could tend to influence the court's decision contrary to reason and the facts.

In such circumstances, you object, "Objection! The prejudicial effect of this testimony completely outweighs any probative value it might have."

Prejudicial testimony may be relevant. It may, in fact, be probative of the material issues in the case. However, if its prejudicial effect outweighs its probative value, the court should keep it out ... *if you object!*

Consider a gruesome photograph of some horrifying injuries suffered by a young child in an automobile accident caused by a drunken driver.

The fact that the defendant driver was drunk is certainly prejudicial, however the prejudicial value is outweighed by the probative value, since his drunkenness goes to the very heart of his liability.

On the other hand, graphic pictures of the jagged edges of broken bones protruding through the child's flesh would tend to shock the conscience of the court. Therefore, an objection should be made by the defendant that the prejudicial value of those shocking photographs outweighs any value they might have to be probative of a material issue in the case.

Hospital bills and testimony of physical therapists as to the degree of impairment the child will suffer are admissible evidence of the child's damages, without bloody photographs of mangled limbs that would tend to influence the court to award greater money damages than the circumstances may truly warrant.

The offer to produce a shocking photograph will trigger your complaint, "Objection! The probative value of this evidence is outweighed entirely by the shocking, prejudicial influence it is likely to have on the court."

Prejudicial evidence is frequently offered to undermine the court's confidence in a party's honesty or the merits of a party's case. You might hear something like this, as opposing counsel for the defense examines one of the plaintiff's witnesses.

"Isn't it a fact the plaintiff owes you money?"

Or, "How often in the past ten years has plaintiff failed to pay your wages on time?"

Or, worse yet, "Is it true the plaintiff cheats at golf?"

Don't let this sort of thing slip past you. If testimony is likely to be

prejudicial, if it may tend to influence emotion more than reason, if it has the unwanted effect of encouraging the court to rule against you in spite of the facts and the law, object.

"Objection! The prejudicial value of the testimony being elicited far outweighs any probative value it might otherwise have."

You may not convince the court to put a stop to it, but you will preserve your objection for appeal.

Who knows?

Any single objection could be t he turning point that wins your case!

Lay witnesses are not experts by definition.

If a lay witness is invited to offer expert "opinion" about a fact or begins to do so without being invited, object at once *and stop the testimony from coming in!*

"Objection! This witness is not a qualified expert!"

Lay testimony is limited to testimony about facts within the lay witness' personal, first-hand knowledge.

Expert witnesses, on the other hand, must be qualified by court approval. Then and only then can an expert offer an opinion.

Lay witnesses are permitted to offer opinions as to matters based on personal knowledge and observation where, according to the United States Supreme Court, they are "rationally based on perception and helpful to a determination of a fact in issue." *Lloyd v. American Airlines*, 537 U.S. 974 (2002). Thus, a lay witness may be qualified to offer an opinion by showing she has personally perceived what she is called upon to testify, if what she can offer will be "helpful to a determination of a fact in issue".

Expert opinions, however, cannot be obtained from lay witnesses.

Experts can testify as experts only if they are offered as experts and subsequently qualified as experts by the court (after both sides have an opportunity to *voir dire* the expert as to qualifications).

Voir dire is just a fancy word that means to examine by questioning *prior* to regular court proceedings.

If opposing counsel offers an "expert witness", object before questioning begins. Move the court for an order allowing you an opportunity to *voir dire* the witness outside the hearing of the jury to determine if the witness is, in fact, qualified to testify as an expert. If the court finds the witness is qualified to testify as an expert, object and renew your objection at the close of your opponent's presentation to preserve your objection (unless, of course, it's clear the witness does have the requisite qualifications to testify as to the questions asked, in which case your objections will probably be to no avail).

If opposing counsel begins questioning an expert about matters outside her qualifications, object. If the judge overrules you, renew your objection at the close of your opponent's questioning and again at the close of his presentation.

Expert opinions should not be permitted from witnesses who have not been qualified by the court, designated as expert witnesses, and authorized to testify as experts.

A lay witness should not be permitted to answer the following question. "Did your Grandmother have a brain tumor?" He may not even answer, "Dr. Cutsalot said my Grandmother had a brain tumor," because that response is hearsay.

She may testify, "There's been something wrong with my Grandmother since she fell and hit her head on the stairs in that hotel," because that does not require an expert medical evaluation.

She can say, "Grandmother doesn't seem to respond to questions like she used to," or even, "I think Grandmother has something wrong with her brain," since none of these requires a medical pathologist's education and experience. They are not "medical" opinions. They are "lay" opinions. So long as she has first-hand knowledge of the facts on which she bases her lay opinion, and her opinion does not require special education, training, or experience, she can give her lay opinion.

Spend some time in your local courthouse observing hearings and trials of other people's cases. You will see lawyers crossing the lay-expert line left-and-right and getting away with it *because the other side doesn't object!*

Don't be taken in!

If *you* don't want unqualified opinion testimony to be heard, stay on your toes and *object when it first raises its ugly head!*

What a lay witness *thinks* happened is objectionable on the grounds it calls for speculation.

What a lay witness *was told* about what happened is objectionable hearsay.

The only "opinion" testimony a lay witness should give (unless you *want* the testimony to come in anyway) is what the lay witness learned through his or her five senses, i.e., what the witness perceived through one or more of the following:

- Saw

- Heard
- Felt
- Smelled
- Tasted

and her opinions that do not require special education, training, or experience.

Don't let an expert witness give lay testimony, unless he has first-hand knowledge of the facts alleged.

Don't let a lay witness give expert testimony, unless he or she first submits to be examined and succeeds in being qualified as an expert, having specialized education, training, or experience.

If a witness, lay *or* expert, begins to testify to what she perceived by supernatural or psychic powers, jump to your feet at once *and preserve your objection for appeal*! If the judge overrules your objection, object again! Perhaps the judge reads tea leaves!

Unless a fact is relevant its inadmissible.

Unless a fact is material it lacks relevance.

Material facts fit material issues in a case, like a bolt fits the nut it was designed for ... and those that do not fit are *not* material and therefore not relevant.

Like a monkey painting on a canvas, if the colors don't contribute to a sensible picture, they don't belong. If a fact doesn't contribute to the proof or disproof of a material fact, it doesn't belong.

If it doesn't fit, it can only damage your case ... whether your opponent offers it or you do.

Any fact not relevant to the material issues in controversy is objectionable.

"Objection! Relevance!"

Facts in controversy are those alleged by the pleadings. Material facts are those tending to prove or disprove one or more facts in controversy.

Every attempt to offer an irrelevant fact should trigger an objection (unless the irrelevant fact might tend in some way to help *your* case).

Relevant facts tend to prove or disprove facts in controversy.

For example, whether Uncle Marty was a Boy Scout and earned Eagle Scout might tend to prove he is trustworthy, loyal, helpful, courteous, etc. However, his Boy Scout years probably aren't relevant to the outcome of a case involving personal injury resulting from an automobile accident.

If it isn't relevant (and it won't help *your* case) object.

"Objection! Relevance! The camping and wildlife experiences of this witness have no bearing whatever on the material issues in this lawsuit."

When your opponent tries to introduce irrelevant facts, first ask yourself, "Why?" There's likely some reason why, and it probably isn't innocent! Crooked lawyers offer irrelevant facts just to muddy the waters, to confuse the court, to take attention away from what's *truly relevant!* They will try to get the court to ponder facts having nothing to do with the issues raised by the pleadings, i.e., "what the case is all about".

At the first sign of such high-jinks, jump to your feet.

"Objection! Relevance! Counsel is trying to mislead this Honorable Court with facts having absolutely no materiality to the dispositive issues in this case!"

Do not let it continue.

Dispositive issues are those tending to "dispose" of the case, i.e., to resolve the dispute.

I remember a deposition some years ago when the lawyer on the other side got my client off on a friendly talk about how his grandmother made brownies. Really! The lawyer and my client talked recipes for a minute or two when suddenly the lawyer slipped in a question that would have damaging consequences if I'd not objected in time. His question had nothing to do with baking, but by "chatting" about innocent matters for a minute or two he disarmed my client into thinking he was a "nice young man". He wasn't a nice young man! He was a bank's lawyer out for blood!

When your opponent turns all "sugar and spice" with a witness, talking about non-relevant matters, object at once, *before irreparable damage is done*.

"Mr. Seenoevil, were you present last Tuesday when my client climbed into the sycamore tree in his front yard?" the lawyer against you begins.

"Why, yes, I was, as a matter of fact. I saw Miss Showsalot wandering in her backyard next door wearing nothing but a bikini, sunglasses, and a pair of flip-flops!"

"Was Miss Showsalot watching Mr. Seenoevil climbing his sycamore tree?" the lawyer continues.

"No, she was talking to her poodle and staring at me," the witness

responds.

"What color was her bikini?" the lawyer asks.

Had enough?

If none of this has anything to do with Mr. Seenoevil and his sycamore tree, stand to your feet and call out a confident, "Objection! Relevance!"

The judge may be enjoying his imaginations, but unless the lady next door or her fluffy dog have something to do with what your case is about, the testimony is irrelevant and, therefore, inadmissible. The judge should put a stop to it, even if he secretly wants to learn more.

But! It will continue *if you don't object!*

Some lawyers do this just to drag time so they can pad their client's bill.

Some do it to entertain the court, thinking they'll be seen as "likable", hoping their strange sense of humor may win some points for their otherwise weak position.

Others do it to distract the court from evidence that might favor you!

If testimony or tangible evidence can have no bearing on material issues in your case, object.

Explain that allowing such facts will prolong the proceedings. Most judges will do whatever is required to clear their dockets. If sustaining your objection will move your case along, the judge will be disposed to do so *for reasons personal to the judge.* Remember, some judges are human, too.

"Objection! Relevance! Counsel is offering irrelevant facts to delay these proceedings and mislead this Honorable Court!"

You'll probably get the ruling you want.

The abusive tactics will stop.

When your opponent asks a witness, "What was the doctor thinking?" jump to your feet.

"Objection! Calls for speculation!"

When your opponent asks, "Was the victim happy?", object!

"Objection! Calls for speculation!"

Watch serious court shows on TV or at the movies. Not Judge Judy or other nonsense court shows. Watch "Law & Order" and other serious shows that attempt to portray court *as it really is*. When you see opportunity for objection, state it *out loud.* Try to object before the actors do. It's good practice.
But don't be surprised if the actors get it wrong. :-)

Like all objections, you must be on-your-toes to get this one in before the witness answers.

Questions calling for speculation come out of nowhere, suddenly, without warning. Before you realize what's happening, the witness has already told the court what someone else was thinking, feeling, considering, imagining, hoping, wanting, seeking, pondering, desiring, etc.

More coffee is always good.

Don't let your mind wander! If you get a ticket for not putting enough quarters in the parking meter outside, it's no big deal. If you forgot your umbrella or what you were supposed to pick up at the grocery on your way home after court, let it go!

The business of objection is serious.

Objections are essential to winning!

Timely objections!

The only person who can tell the court what she is thinking or feeling is the person doing the thinking or feeling. If that person is not the witness, *object!*

"Objection! Calls for speculation!"

This is, perhaps, the hardest testimony to stop.

It will be stealthily woven into your opponent's witness examination in ways designed to evade your suspicion. It will happen suddenly. Hopefully not while you're daydreaming or thinking of the questions you intend to ask the witness when it's your turn.

Listen attentively and be prepared to object *before the testimony is uttered*.

What's the basis? Again, it is competence.

Who knows what you are thinking … other than you? No one!

Who knows if you are happy or sad … you or someone looking at you?

A person's state of mind or emotions may be guessed at from the look on their face or the things they say or do, but the true thoughts and feelings behind a face are known only to the soul within and the Maker who watches from on high … *not some witness in the box!*

Lawsuits are a search for truth. Everything else is inadmissible.

The only way someone can say what you or anyone else might have been thinking at a particular time is to *speculate* … i.e., to guess.

Guessing isn't evidence.

A witness who's been qualified as an expert may offer an opinion based on facts presented, however even experts lack competence to testify what another is thinking or feeling.

Don't put up with it!

Just because someone is smiling doesn't mean they're "happy".

Just because someone isn't smiling, doesn't mean they're "unhappy".

Actors on stage or screen smile brightly with mouthfuls of blindingly shiny white teeth, when they're really lonely and miserable inside, worrying about something at home or whether they'll have a job next week.

Others frown with the most despondent gloom imaginable, when they are secretly joyful and perfectly elated with how their lives are going.

A smile or frown on a person's face does not necessarily reflect the "feeling" in their heart – nor do actions or things they say in public.

Since a witness on the stand at a hearing or trial (or deposition) can only testify to facts about which the witness has first-hand knowledge, it may be proper to ask, "Was the victim smiling?" That requires no supernatural inquiry into the inner-workings of a person's heart or mind. A smile is a smile (though, of course, they come in many flavors).

But, good judges will not allow you *or* your opponent to ask a witness what someone else was feeling or thinking – *if a timely objection is made!*

The problem for you is that these questions come insidiously (like snakes in tall grass), seldom out in the open, almost never without

any advance signal.

The opposing lawyer will sneak a question in when you're least likely to catch it. If you aren't quick with your objection, the witness will answer, giving testimony you did not want the court to hear.

For example, consider the following:

"When the young doctor snapped off his rubber gloves angrily after the operation and tossed them disgustingly into the trash, what was his attitude?"

"As you stood by the side of the road that day, watching curious onlookers gather to gaze in wonder and shock at that horrible, bloody carnage, what was the emotional atmosphere like?"

"At any time during the brutal attack you suffered on the golf course that day, did you feel your assailant was trying to prove a particular point by striking you with his 9-iron?"

See?

None of these directly asks what someone was thinking or feeling, yet each is objectionable … because they require the witness to speculate.

It's impossible for a witness to know what a doctor's attitude was, what emotions a crowd of people were experiencing, or what malice might have been on the mind of a club-wielding golfer. Only the doctor, the crowd, or the golfer can answer these questions.

Competence.

No one is competent to testify about facts beyond *his own personal knowledge!*

Failure to object causes two (2) problems.

1. Testimony will be heard that could adversely influence the court against you.
2. You won't be able to object on appeal if you don't object when it happens.

   Asking a judge to strike testimony doesn't repair the damage. Once the court hears testimony, it's sheer folly to imagine memories will be erased by the judge saying, "The jury will disregard that last response." If anything, the instruction only serves to refresh their memory! Better in some cases just to let the testimony lie, rather than objecting too late and having the court tell the jury not to think about it.

   Tell someone not to think about the wart on their nose, and see what effect it has.

   On the other hand, if you let damaging testimony sneak in without objecting, you will not be allowed to complain to the appellate court later that unwanted words should not have been allowed.

   Appellate justices are not psychics. They know only what the printed record tells them. Fail to object, and you lose your right to appeal the damages.

   If the opposition asks, "When did the driver first decide to turn down the unpaved highway?" stand *immediately* to your feet and, before you reach your full height, blurt out quickly:

   "Objection! Calls for speculation!"

   The witness lacks competence to testify when the driver decided anything. It could have been mere seconds before turning the steering wheel or months earlier. Only the driver knows. And, only the driver can testify as to the time of his own decisions.

Don't allow the opposition to pollute the record of your lawsuit with testimony that lacks competence.

Testimony that calls for speculation lacks competence.

Object!

Now that you've finished this class, you hold one of the essential golden keys to winning in court: Objections!

You know how to make and respond effectively to most objections you'll encounter.

You know what they do.

You know how to make them.

You know when to make them.

The number of possible objections is far greater than covered in this class, but you've learned the ones used most offent.

Effective objections

- Prevent what's about to happen (if timely made and sustained by the judge).
- Notice the appellate court that you opposed what happened when it happened.

  Objections are like sign posts along your lawsuit highway. They notify the judge that you oppose something the other side has done contrary to the essential requirements of justice and, hopefully, they stop the court from allowing it.

  If the judge disagrees, your objection makes a record for the appellate court to see that something allowed should not have been allowed. The appellate court will consider your objection on appeal,

since you objected *in a timely manner during the lower court proceedings, preserving your record.*

You show you understand the rules.

You command the court to force your opponent to obey the rules.

You command the judge to enforce the rules.

Objections, if successful, prevent the record from being polluted with evidence that can fatally damage your case.

Objections, if not successful, establish your right to be heard on appeal.

Objections – coupled with proper pleadings, proof, and procedure – lay a strong foundation for successful appeal and encourage the lower court judge to rule in your favor, rather than run the risk of being reprimanded by a higher court.

Effective objections reduce the likelihood of appeal being necessary.

Objections put the judge on notice you're preparing for appeal, that you recognize when errors are made, and that you won't sit idly by and let the judge permit errors to pollute the record and damage your case.

Objections let the judge know he must run his courtroom in accordance with essential requirements of justice or be set straight by a panel of appellate justices whose sworn duty is to second-guess corrupt and stupid trial judges.

That's the way our system of justice works!

Indeed, that's *why* our system of justice works!

Never let the other side get away with anything that injures your case.

Object.

This *is* how you win!

MICHELLE GOMEZ: Your subscription expires October 26, 2020

Take this quiz to see how much you still need to learn.

Some items may seem like "trick questions", but there is only *one* correct answer to each.

Remember: Reading *carefully* is essential to success in court.

Take this and all quizzes as many times as you wish.

However, to be properly prepared for your battles in court, go back over the classes until you get at least a "B" on every quiz.

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