How to Make In-Trial Objections Less Objectionable

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Introduction

Persuasive advocacy involves juggling many balls at the same time. Counsel must develop a plausible theory of the case. S/he must consider what evidence is available and how it should be led. Argument about inferences to be drawn from the evidence and law must be crafted to present the client's case persuasively.

The advocate's task is to choreograph a case that is most likely to produce a successful result for his/her client. Your adversary has a different theory of the case. How the case is presented in the courtroom will depend a great deal on the evidence

adduced at trial. Good advocates play out the theory of their case by casting, dare we say "spinning", the facts and evidence in the most favourable light for their client.

Enter the trial objection. A trial objection is a legally-driven attempt to prevent the admission of evidence (typically) or argument (sometimes) on the basis that the impugned evidence violates some aspect of the law of evidence or the rules of procedure. In the face of an objection, opposing counsel tries to persuade the judge the impugned evidence is admissible.

In this article, we will discuss some legal and procedural bases for objections and how objections should be made, both as to form and civility. We will discuss how to respond to objections. We will also consider when it might be better not to object, even if you are "right". Our objective is to provide pointers on how to make your objections unobjectionable --- or at least, less objectionable.

Evidence in Civil Cases

Much of the prevailing jurisprudence on the law of evidence in general is rooted in criminal law, where the admissibility or rejection of a piece of evidence may determine the guilt or innocence of the accused.[1]

[1] See G. Crisp, Case Comment on *R. v. Khelawon*, (2006 SCC 57, [2006] 2 S.C.R. 787), (2008) 39 Ottawa L. Rev. 213, which contains an excellent review of SCC jurisprudence on the exceptions to hearsay rule in the criminal context, some of which might also be applicable in civil cases; F. P. Morrison & C. Wayland, referred to in f.n. 2 below. R v. Khan, [1990] 2 S.C.R. 531, 113 N.R. 53, In R v. Starr,

In civil cases, the prevailing wisdom is that a trial judge will admit nearly any evidence ---- even hearsay, "subject to the weight" to be attributed to that evidence in the judgment or as some judges have said, "for what it's worth."[2] On this theory of objections in civil cases, there is no point objecting to the introduction of any evidence. Of course, it is never so simple. The reality is that there are many decisions in which the Court applies a principled approach to the law of evidence.[3] Therefore, to know when to object, trial counsel should be armed with a solid understanding of the jurisprudence about the exceptions to the hearsay rule and other evidentiary principles.

An objection is an interruption to the order and flow of the trial. Timely, appropriate objections, used judiciously, assist the trial judge in forming a view not only about the evidence but about the confidence the judge can repose in the advocate presenting it. The converse is also true. Counsel who objects repeatedly about innocuous matters will annoy the judge. This may impact the persuasiveness of other aspects of counsel's case. Objections that are incorrect in law or procedure have the same effect.

2000 SCC 40, [2000] 2 S.C.R. 144, 190 D.L.R. (4th) 591], the SCC created a principled exception to the hearsay rule [FN4] that allows for previously inadmissible hearsay evidence to be put before the trier of fact if it meets the twin criteria of necessity and reliability. See also R. v. Mapara, 2005 SCC 23, [2005].

[2] F. P. Morrison & C. Wayland, *Browne v. Dunn and Similar Fact Evidence: Isles of Change in a Calm Civil Evidence Sea* (2008) www.mccarthy.ca/pubs/Browne v Dunn and Similar Fact Evidence.pdf at p. 419. See further references to this article in f.n.21 below.

[3] Ontario (Attorney-General) v. Ballard Estate, 1994 CanLII 7513 (ON SC), <http://canlii.ca/s/x77f> retrieved on 2011-10-14; *Geffen v. Goodman Estate* 1991 CanLII 69 (SCC), (1991), 81 D.L.R. (4th) 211, [1991] 2 S.C.R. 353, 42 E.T.R. 97; *R. v. Khan*, 1990 CanLII 77 (SCC), [1990] 2 S.C.R. 531

In deciding whether to object at all, the advocate must reflect on one or more of the following:

- How might the evidence I hope to keep out impact on the case?
- Will the evidence I hope to keep out hurt my client's case if it is admitted?
- Is the evidence I hope to keep out relevant to the case?
- Which rule of evidence does the impugned evidence offend?
- Is the evidence or tactic my opponent is using unfairly ambushing my client?
- If I object, will the judge think I am interfering unfairly?
- If I object during my client's cross-examination, will the judge think I am trying to shelter my client unfairly?
- Can I rely on the judge to know that this evidence is not relevant?
- Is my opponent doing such a poor job in marshalling the evidence that my objection may improve the quality of his/her advocacy?
- Do I have a solid basis in the law of evidence or procedure to make this objection? Do I have case law which supports the position?
- Should I hold my objection because I have evidence which I may be unable to call if the objection is accepted?

Common Objections & Objections you might not have thought to make

The types of trial objections are as variable as the evidence in cases. Any attempt to catalogue them all would be futile. The following is a non-exhaustive list of some of the most common trial objections.[4]

Opening Statements

- The statement presumes or misstates the evidence opposing party is expected to present;
- The statement refers to inadmissible evidence;
- The statement refers to the personal opinions of counsel rather than the evidence which counsel intends to call;
- The statement refers to matters about which no evidence will be called, which cannot be proved or which cannot be judicially noticed;

Evidentiary Objections

- Counsel seeks to introduce irrelevant evidence.[5] What is relevant is a more complicated question which requires analysis of the facts of each case.

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[4] This list has been assisted by reference to the following sources: Heather McGee and Robin Leighton, *Hearsay: What is it and how to deal with it,* Evidence Law for the Civil Litigator, 2004, Osgoode Professional Development Program; Peter Roy, *Practical tips on Objections, Trial Lawyer's Evidence Notebook*, 2006; P. Durcharme, *The Art of the In-Trial Objection,* http://goo.gl/r9ztx

[5] Landolfi v. Fargione, 2006 CanLII 9692 (ON CA), http://canlii.ca/s/swr0 at para. 48: The established test for the admission of evidence at trial rests on relevancy. "Prima facie relevant evidence is admissible, subject to a discretion to exclude where the probative value is outweighed by its prejudicial effect. This is

- Counsel is breaching the "best evidence rule";[6]
- Counsel is leading the witness (where matters are not introductory or are non-contentious);
- Counsel seeks disclosure of privileged communications;
- Counsel is attempting to ambush the witness by presenting evidence on matters which have not been previously disclosed or cross-examining on matters not put to the witness;[7]
- Counsel asks a witness of fact to express an opinion;
- Counsel is attempting to split his/her case. All relevant evidence must be adduced by the plaintiff when presenting the case in chief;
- Counsel is applying the Collateral Fact Rule improperly (answers given on cross-examination concerning collateral facts are treated as final and cannot be contradicted by extrinsic evidence);[8]
- If counsel does not cross-examine a witness on a certain point, opposing counsel is not permitted to call reply evidence on that point.

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the test in both criminal and civil cases: R. v. Morris, 1983 CanLII 28 (SCC), [1983] 2 S.C.R. 190, 1 D.L.R. (4th) 385, 48 N.R. 341, 7 C.C.C. (3d) 97; and see Sopinka, Lederman and Bryant, The Law of Evidence in Canada, 2nd ed. (Toronto: Butterworths, 1999) at pp. 23-28."

[6] The best evidence rule, which has been described as "trite law" (Soye v. Corinthian Colleges Inc., 2008 CanLII 8781 (ON SC), http://canlii.ca/s/wzj7) holds that a secondary source of evidence may not be admissible when a primary source of the same evidence is available but not adduced.

[7] See f.n. 22, where the Canadian application of the rule in Browne v. Dunn is discussed.

[8] R. v. Dooley, 2009 ONCA 910 (CanLII), http://canlii.ca/s/12vf6, , paras. 151-152; Springer v. Aird & Berlis, 2009 CanLII 10401 (ON SC), http://canlii.ca/s/10beb para. 8; R. v. Babinski, 1999 CanLII 3718 (ON CA), http://canlii.ca/s/p2eg paras. 42-44.

- Parol Evidence Rule (extrinsic evidence is not permitted to vary or contradict the language of a contract);[9]
- Counsel's question calls for a hearsay response;
- Counsel's question calls for speculation by the witness;
- Counsel's question is based on a false premise or on a matter which is not evidence;
- Counsel repeats the same or similar questions;
- Counsel is asking vague, misleading or ambiguous questions;
- Counsel is asking the witness an unfair question or multiple-part question;
- Counsel's questions or evidence sought to be adduced is so prejudicial that its prejudicial effect exceeds its probative value;[10]

Objections to Demonstrative Evidence[11]

- Counsel presents a chart or diagram which is inaccurate or misleading;
- Counsel introduces irrelevant evidence;
- Counsel produces demonstrative evidence which contains inadmissible evidence, hearsay or commentary by a person not called to testify;

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[9] Hi-Tech Group Inc. v. Sears Canada Inc., 2001 CanLII 24049 (ON CA) http://canlii.ca/s/p36s para. 15-23; Shelanu Inc. v. Print Three Franchising Corp., 2003 CanLII 52151 (ON CA), http://canlii.ca/s/3ihw para. 49; and see John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd., 2003 CanLII 52131 (ON CA), http://canlii.ca/s/nqpu para. 15, which refers to the ambiguity exception as discussed in P.M. Perell, "The Ambiguity Exception to the Parol Evidence Rule" (2001) 36 Can. Bus. L. J. 21 at 29.

[10] . R. v. Morris, 1983 CanLII 28 (SCC), [1983] 2 S.C.R. 190, 1 D.L.R. (4th) 385, 48 N.R. 341, 7 C.C.C. (3d) 97; and see Sopinka, Lederman and Bryant, The Law of Evidence in Canada, 2nd ed. (Toronto: Butterworths, 1999) at pp. 23-28

[11] For an article on demonstrative evidence delivered at the 2004 Osgoode Professional Development Conference on Civil Evidence, see I. Ellyn, QC and B. Dowdall, *Illustrative Evidence in Civil Litigation - A picture is worth 1000 words.* (2004) http://goo.gl/jHGyA

- Counsel presents a photograph or video whose probative value outweighs its prejudicial effect;

Closing Statements

- Counsel refers to his/her personal opinion;
- Counsel inaccurately or misleadingly refers to the evidence;
- Counsel describes "facts" which have not been adduced in evidence.

How to object

We assume that by the time an advocate gets to trial, s/he understands the decorum and choreography of the courtroom. In the Canadian adversarial system, most civil cases are tried without a jury (juries are used overwhelmingly in personal injury cases) and only one counsel has the floor at a time. Interruptions should be the exception. Frequent interruptions may draw the rebuke, sanction or ire of the presiding judge. Nothing will shake your client's confidence in you as counsel more than the judge telling you sternly, "Sit down, Mr. Jones."[12]

Clients like to think that their lawyer is an aggressive bulldog who will cut the opponent's evidence and arguments to shreds. Some films and television shows about

[12] But even in this, there are exceptions. Experienced trial counsel may be able to get away with pressing a witness in cross-examination a little harder than a young lawyer at his/her first trial. The judge's perception of counsel's competence and the relevance of the cross-examination may be determinative.

trials lawyers in American courts,[13] invite the conclusion that anger, hyperbole and bombastic rhetoric are persuasive. We think the converse is true in Canada because fewer cases are tried by juries and due to our more reserved demeanour.

We presume that in Canada, counsel's rhetoric is more civil than the stereotype we have of trials on American television. With this in mind, you would ***not*** expect a trial objection in an Ontario court to sound like this:

> Your Honour, I object to my friend's line of questioning. He has shown a complete lack of integrity. He is cheating and intentionally defying the rules of practice. Further, he has used his right to object as a means of suggesting answers to the witnesses. He has completely abused the Rules of Civil Procedure and worse than this, he has used solicitor-client privilege as a mask for deception, to conceal misconduct, and as a manipulative device to conceal deceit. His examination of Dr. Whyte was deliberately misleading, used trickery and sleight-of-hand and was an outrage on the court. The Court is wrong to assume that my friend is competent or that he understands the Rules of Practice.[14]

Surprisingly, trial objections in these words were made in the Ontario Superior Court of Justice in the infamous 2005 case of *Marchand v. The Public General Hospital Society of Chatham*,[15] which ran for 165 trial days. The objection set out above is a

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[13] Of course, American television does not necessarily reflect the level of civility expected in the courts. In a 1997 presentation, Justice Anthony Kennedy of the U.S. Supreme Court stated: "Civility is the mark of the accomplished professional, but it is more than this. Civility has deep roots in the idea of respect for the individual…We must restore civility to every part of our legal system and public discourse. Civility defines our common cause in advancing the rule of law": as quoted by the Nova Scotia Barristers' Society Task Force on Civility, Executive Summary 2002, page 7, http://tiny.cc/4ce2g

[14] This is a paraphrase of the Court of Appeal's review of comments made by counsel in *Marchand v. The Public General Hospital Society of Chatham*, 2000 CanLII 16946 (ON CA) para.136-137, Application for leave to appeal to the Supreme Court of Canada was dismissed September 27, 2001. See http://canlii.ca/s/p33m where counsel's actual comments are set out in detail.

[15] Marchand v. The Public General Hospital Society of Chatham, 2000 CanLII 16946 (ON CA)

paraphrased sample of a much longer battle between counsel in the courtroom involving accusations about the competence, tactics and integrity of the other. The lawyers involved in the case were senior, well-known advocates, all noted experts in their fields.

The trial judge dismissed the action with costs of about $2.5 million. In the Court of Appeal, the plaintiffs argued that the trial judge showed bias, among many other matters, by failing to restrain the defendants' counsel's virulent attacks on the plaintiff's lawyer's integrity and competence. The defence lawyers accused the plaintiffs' counsel, among other matters, of "manipulating, abusing and making a mockery of the judicial system; of using the Rules of Civil Procedure as an "excuse to permit unchecked grossly improper manipulation of the whole litigation process". There were also attacks by plaintiff's counsel against the defendants' lawyers. The Court of Appeal upheld the dismissal of the action but struck out the award of costs.

Defence counsel's uncivil attacks on plaintiff's counsel cost the defendants $2,500,000. A cynic might argue that it was worth the trouble if counsel's intemperate rhetoric helped to persuade the trial judge to dismiss the action. *Marchand v. Chatham* was not a usual case. Counsel has to walk a fine line between passionate rhetoric and impropriety, rudeness and incivility.

The bounds of proper court conduct by counsel are currently the subject of hearings before the Discipline Committee of the Law Society of Upper Canada. In *Law Society v. Groia*,[16] the Law Society alleges that Toronto lawyer Joseph Groia committed numerous acts of professional misconduct by rude and offensive rhetoric.[17] Groia was counsel for geologist John Felderhof in a long-running Ontario Securities Commission hearing and criminal trial arising from the Bre-X gold mining scandal.

The Law Society alleged that Groia 1) failed to treat the Court with courtesy by his consistent pattern of rude, improper or disruptive conduct; 2) failed to conduct himself in a fair, courteous, respectful, and civil manner to the Court; 3) undermined the integrity of the profession by communicating with OSC prosecutors in an abusive, offensive manner; 4) engaged in ill-considered criticism of OSC prosecutors and 5) failed to be courteous, civil and to act in good faith toward OSC prosecutors.[18]

The Law Society's Discipline Committee dismissed a motion to quash the proceedings on the grounds of vagueness and other matters.[19] The hearing of the charges has not taken place as of the date of this paper. The lawyer has had to defend the allegations. Even if the allegations are completely dismissed, these proceedings will have cost him a lot of time, money and likely, a few sleepless nights. This is a very high price for a skilled, passionate advocate to pay.

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[16] *Law Society of Upper Canada v. Joseph Peter Paul Groia*, 2010 ONLSHP 78 http://canlii.ca/s/153x7.
[17] *R. v. Felderhof*, 2003 CanLII 37346 (ON CA), http://canlii.ca/s/pi79
[18] *R. v. Felderhof*, para. 3.
[19] Law Society of U.C. v. Joseph Groia, 2010 ONLSHP 78 http://canlii.ca/s/153x7, para. 46

In an appeal by the prosecutor in *R . v. Felderhof*, the Court of Appeal dismissed the appeal but denied Felderhof's costs on the following grounds:[20]

> 83] It is important that everyone, including the courts, encourage civility both inside and outside the courtroom. Professionalism is not inconsistent with vigorous and forceful advocacy on behalf of a client and is as important in the criminal and quasi-criminal context as in the civil context. Morden J.A. of this court expressed the matter this way in a 2001 address to the Call to the Bar: "Civility is not just a nice, desirable adornment to accompany the way lawyers conduct themselves, but, is a duty which is integral to the way lawyers do their work." Counsel are required to conduct themselves professionally as part of their duty to the court, to the administration of justice generally and to their clients. As Kara Anne Nagorney said in her article, "A Noble Profession? A Discussion of Civility Among Lawyers" (1999), 12 Georgetown Journal of Legal Ethics 815, at 816-17, "Civility within the legal system not only holds the profession together, but also contributes to the continuation of a just society. … Conduct that may be characterized as uncivil, abrasive, hostile, or obstructive necessarily impedes the goal of resolving conflicts rationally, peacefully, and efficiently, in turn delaying or even denying justice." Unfair and demeaning comments by counsel in the course of submissions to a court do not simply impact on the other counsel. Such conduct diminishes the public's respect for the court and for the administration of criminal justice and thereby undermines the legitimacy of the results of the adjudication.
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> [84] Nothing said here is inconsistent with or would in any way impede counsel from the fierce and fearless pursuit of a client's interests in a criminal or quasi-criminal case. Zealous advocacy on behalf of a client, to advance the client's case and protect that client's rights, is a cornerstone of our adversary system. It is "a mark of professionalism for a lawyer to firmly protect and pursue the legitimate interests of his or her client".[2] As G. Arthur Martin said, "The existence of a strong, vigorous and responsible Defence Bar is essential in a free Society" [emphasis added].[3] Counsel have a responsibility to the administration of justice, and as officers of the court, they have a duty to act with integrity, a duty that requires civil conduct.[4]
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> . . .
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> [100] . . . .Even with the problems in the conduct of the prosecution it seems unlikely this application would have been brought but for Mr. Groia's inappropriate conduct. The application, although novel and unsuccessful, was reasonable in light of the nature and quality of that conduct. It was necessary to review the record extensively before it became clear that his extreme conduct did

[20] R. v. Felderhof, 2003 CanLII 37346 (ON CA), <http://canlii.ca/s/pi79>

> not deprive the court of jurisdiction. To award costs to the defence in this case would be unfair to the prosecution and contrary to the public interest in the administration of justice. The behaviour indulged in by Mr. Groia should be discouraged, not encouraged by an award of costs. To award costs to the defence would carry the wrong message by rewarding him for the consequences of his unacceptable conduct.

These examples suggest that intemperate trial objections, even if delivered in the spirit of the passionate defence of the lawyer's client, are inappropriate and are likely to cost counsel and his/her clients far more than they are worth.[21]

What, then, is the appropriate way to object?

If you intend to object, stand and wait until the judge recognizes you. If your client is being cross-examined, it is wise to have prepared your client to remain silent if s/he sees you rise to object to a question. If your client blurts out the answer you were trying to keep out, the objection becomes pointless. If the judge fails to recognize you and your opponent is proceeding with the point of your objection, it is acceptable to say, "Excuse me, Your Honour, I have an objection."

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[21] In Alice Woolley, "Does Civility Matter?" (2008) 46 Osgoode Hall L.J. 174 http://tiny.cc/sf84i, the author argues that "to the extent that civility means the enforcement of good manners amongst lawyers, it is not a proper subject for professional regulation. To the extent that civility encompasses other ethical values— respect and loyalty to clients, respectfulness to the general public, and ensuring the proper functioning of the legal system— the use of "civility" as an all-encompassing ethical value obscures the real ethical principles at play."

When recognized by the judge, it is polite to apologize for "interrupting my friend's examination". State the objection succinctly, supported by appropriate legal authority, if necessary. Here are a few sample objections:

- "Your Honour, I object to my friend's question of this witness on the ground that s/he is asking the witness to testify about my client's state of mind or intention. As Lamer CJC said in *R. v. Smith* [1992] 2 S.C.R. 915 at para. 57, where he quoted Iacobucci J.: "[T]here are very good reasons behind the rule against allowing statements of present intention to be used to prove the state of mind of someone other than the declarant. …The central concern with hearsay is the inability of the trier of fact to test the reliability of the declarant's assertion. I have a copy of the case for the court and for my friend."

- Your Honour, my friend is examining this witness in chief. As my friend well knows, it is inappropriate to put leading questions to the witness in examination in chief. I ask the Court to direct my friend not to lead the witness.

- "Your Honour, I apologize for interrupting my friend's cross-examination. This is third time my friend has asked my client the same question. The witness answered the question each time. My friend may not like the answer, but to ask the same question a third time is to badger the witness and that goes beyond the scope of reasonable cross-examination."

- "Your Honour, my friend is asking this witness what Mr. Smith told her. The answer can only be material for the truth of what Mr. Smith might have said. As such, the answer would be hearsay and is inadmissible. I object to the question."

- "Your Honour, I accept that my friend is entitled to put to this witness a prior statement she made under oath. However, my friend has to be fair to the witness. My friend was attempting to quote something the witness said on discovery but she appears to have misquoted the record. Perhaps my friend would like to read Q.250 on page 45 to the witness again."

- "Your Honour, the document my friend now wishes to present to the witness has not been disclosed before now. My friend's client swore an Affidavit of Documents. This document was not included. My friend knows of a party's continuing obligation to produce documents and not to ambush the opposing party. This action began three years ago. It is unfair to permit this document to be introduced now."

- Your Honour, the evidence my friend is adducing through this witness is calculated to contradict what my client said in evidence. However, when cross-examining my client, my friend did not put this proposition to my client. I know the Court is familiar with the oft-cited House of Lords decision in *Brown v. Dunn* (1893) 6 R. 67 (H.L.), which was discussed by the Supreme Court of Canada in Palmer v. R. (1979) 50 C.C.C.(2d) 193 (SCC). The general proposition is that a witness should not be ambushed or caught by surprise. Further, a witness should be given an opportunity while in the witness box to respond to an apparent contradiction in his evidence. I submit that the line of questions my friend proposes should not be permitted.[22]

- Your Honour, my friend is asking the witness to disclose the details of conversation he had with his lawyer in preparation for this trial. As my friend knows, these conversations are subject to solicitor-client privilege and are inadmissible.

Even if the judge accepts an objection on a point as in the above examples, some opposing counsel will ask another objectionable question soon thereafter. If opposing counsel is repeatedly asking objectionable questions despite one or more successful

[22] An detailed discussion of the civil application of Browne v. Dunn in Canada is found in F. Paul Morrison and C. Wayland, *Browne v. Dunn and Similar Fact Evidence: Isles of Change in a Calm Civil Evidence Sea* (2008) http://www.mccarthy.ca/pubs/Browne v Dunn and Similar Fact Evidence.pdf. The authors note that Browne v. Dunn is no longer a rule in Canadian law but, at p. 422, referring to P. Sankoff, Mewett and Sankoff on Witnesses (Toronto: Carswell, 2000) at 2-36, they state: "as a question of strategy, counsel would be well-advised to think twice about about not cross-examining a witness on some fact in issue about which it is intended to call some contradictory evidence." See also at p. 432 of the same article where the authors refer to Rosenberg JA in R. v. P.(G.) 1993 87 CCC (3d) 363 Ont CA in reference to the requirements of s 11 of the *Canada Evidence Act*, and at p.433-434, in reference to *Hurd v. Hewitt* (1994) 20 O.R(3d) 639 (CA), where Carthy J.A. concluded that "the failure to confront a witness with contradictory evidence is relevant only to the weight of the contradictory evidence. It does not limit the evidence that may be adduced or the findings that the court or tribunal is entitled to make." See also, *Peel Financial Services Limited v. Omers Realty Management Corporation*, 2009 CanLII 42455 (ON SC) at para. 49 and Ontario Securities Commission v. S.B. McLaughlin & Company Limited, 2009 CanLII 280 (ON SC), 2009 CanLII 280 (ON SC) at para. 24. See also, M. Paterson, "*The rule in Browne v. Dunn" Adv. Soc. E-Brief, Vol 21, No. 2, Winter 2010, p.3-4,* http://www.advocates.ca/assets/files/pdf/e-brief/E-brief_Winter2010.pdf.

objections, it may be more effective not to object or make a blanket objection as suggested below.

Most of us have been trained to presume that our opponents have the advocacy skills of great advocates, such the late John Robinette or the late Doug Laidlaw, but alas, opposing counsel may be inexperienced, inattentive, unskilled or simply, "doesn't get it". This may be as true of an older lawyer who doesn't litigate as much as it is of a young barrister who doesn't quite know the ropes yet. The reality of civil litigation is that only 2 to 5% of cases get to trial.[23] This means that even experienced lawyers don't have frequent opportunities to hone their trial skills. The judge will soon "tune out" irrelevant or leading evidence and apply little or no weight to it. Moreover, the judge will appreciate that you are not objecting to every question.

When opposing counsel repeats an offending line of questions, a blanket objection like the following *may* be sufficient:

- "Your Honour, I have already objected to my friend asking the witness leading questions in chief. Your Honour accepted my objection and directed my friend. However, my friend persists in asking the witness leading questions. To avoid interrupting my friend again, I object to all questions my friend asks which suggest the answer to the witness. I

[23] See R. Graesser, Advocacy: A New Judge's Perspective: What Works and What Doesn't, p.2 (http://tiny.cc/thd6i). According to the Ontario SUPERIOR COURT OF JUSTICE 2008 – 2010 Report http://www.ontariocourts.on.ca/scj/en/reports/annualreport/08-10.pdf, there were 96,003 civil proceedings were commenced in Ontario from April 2009 to March 2010, about 3% more than the previous year. Although, we were unable to find Ontario statistics about 2010 trials, The Civil Justice Reform Project Report 2006 by the Hon. Coulter A. Osborne, QC, http://tiny.cc/d1t5y, reported at page 81 that 6,839 civil trials were heard in Ontario in 2006 for at least one day. We presume that the number of trials was proportionally less but as a result of the greater use of mediation and arbitration since 2006, the percentage of trials has undoubtedly decreased.

> ask the Court to disregard or to attribute no weight to answers given to my friend's improper questions."

Courtroom "choreography" also requires that objecting counsel sit down while the other lawyer is responding to your objection. Since your goal is to be persuasive not obstructive, it is helpful to wait your turn to respond. If you have a worthwhile objection, the judge is more likely to find favour in it if you wait patiently and make your point in a dignified manner rather than jumping up and taking offence "at my friend's scandalous questions to the witness." The judge might not agree with you and think that you are the counsel whose behaviour is inappropriate.

As mentioned above, the judicial tendency in civil cases is to let in nearly all evidence and to assess its weight at the time of argument and judgment. Therefore, an objection that signals to the judge that there is a part of the facts you would rather not be heard is unlikely to succeed. Indeed, your objection might signal that this is a problem area. Instead of objecting, it might be better to deal with the undesirable evidence in cross-examination, through another witness or in closing argument.

Respect for the court process is important. If the wording of the objection might affect the line of questions of opposing counsel or suggests a response to the witness, it is appropriate to ask the judge whether s/he prefers that the objection be made in the absence of the witness. The judge may ask the witness to step outside the courtroom while the objection is made. This process is disruptive to the flow of the trial and could

be time-consuming. It is wise to avoid objections which require the witness to leave unless you are sure that your objection is on solid legal or procedural ground.

Timing the Objection

When to make an objection is almost as important as how to make it. The best timing varies according to the nature of the objection and the status of the trial:

- Objections to hearsay evidence or leading questions should be made before the witness' answer is given. Once the answer has been given, all the judge can do is note that less weight or no weight be given to the answer but this is less effective than keeping the evidence out completely.

- Objections as to the qualifications of an expert should be made after inquiry as to the expert's qualifications and after opposing counsel has stated the area in which the expert is to be qualified to give opinion evidence.

- When opposing counsel is making submissions, it is good form not to interrupt, but to wait until the submissions are concluded. If there is a jury, objections to any part of the submissions should be made in the absence of the jury.

- When opposing counsel is reading a discovery transcript into the record, if you wish to have additional portions read in, you may ask to have them read in at the same time. Indicate to the trial judge which portions you would like to have read, and request that they be read in at the same time as opposing counsel reads in those sections s/he wishes to read in.

Responding to an objection

Examining counsel should have a plan for his/her examination in chief and cross-examination. Good counsel approaches other counsel's objections from several perspectives:

- *Preparation:* You have prepared your examination in chief and cross-examination. You know what topics you want to cover. Pay special attention to difficult aspects of the evidence, such as hearsay and extracting answers in examination in chief from an unresponsive witness. Good preparation will enable counsel to anticipate questions to which your opponent is likely to object. Judges appreciate and trust counsel who give the impression that they have a good grasp of the facts of their case, including a reasonable theory and a plan of how to marshal the evidence and the law to prove it.

- *Knowledge of law and procedure:* By anticipating potential objections, well-prepared counsel will have case law at hand for a response. The trial judge will be favourably impressed by a well-prepared, reasoned response to an objection, especially where it raises an issue in the law of evidence. If your

research doesn't support admissibility, the evidence should be adduced in a manner which avoids the objection if possible.

- *Knowing the tendencies of the presiding judge* will help your client's case. It will permit you to expand the limits of admissible evidence. If the trial judge is a stickler on hearsay or other admissibility issues, knowledgeable counsel may test the limits less than with a "laissez faire" judge who will allow most of the evidence in and then assess its weight.

- *Civility:* Whether you like or respect your opponent or not, you must still act in the best traditions of our courts by acting politely and civilly at all times. Your client may expect you to be aggressive and uncompromising, but the trial judge ---- the person you have to persuade to win the case ---- expects you to remember that there are two (or more) sides to this case. The lessons of *Marchand* and Groia referred to above should not be forgotten.

- *When opposing counsel has an objection:* stop your examination, be seated, and permit opposing counsel to make the objection. Respond on legal and procedural grounds without rancour. Don't address your comments to opposing counsel. Don't bicker with your opponent. Don't be rude or surly. Take the high road and leave it to the judge to find fault with your opponent where appropriate. Lack of civility is usually counter-productive.[24]

[24] A useful article on a judge's perspective on preparation, knowledge of law, civility and the rules of evidence in civil case is found in Hon. Robert A. Graesser, *Advocacy: A New Judge's Perspective, What Works and What Doesn't (2008)76 C.L.R. (3d) 4* (http://tiny.cc/thd6i). Justice Graesser is a judge of Alberta Court of Queen's Bench but the comments are equally applicable in Ontario.

- *Be prepared for a battle --- some counsel take a different view of civility:* Despite these suggestions, there have been some raging scenes between counsel at trial over attempts introduce evidence.

- *State your reasons for admissibility clearly:* If the evidence you wish to admit is important but ruled inadmissible by the trial judge, this may be a ground of appeal. Your objective will be to get the evidence into the record in another acceptable way. If the judge's ruling on admissibility is adverse, your argument on the subject of the objection will be important. Appellate courts tend to reject matters which were not raised at trial. Make sure your reasons for admissibility are clearly stated on the record. Make sure the court reporter is recording your argument. Consider whether to repeat the admissibility arguments in closing submissions.

- *After the judge has decided the objection,* move on with your examination.

- *If the judge refuses to allow the evidence*, consider whether to ask for reasons for the rejection. Reasons will give you, and perhaps an appellate court, guidance about why the judge ruled as s/he did. On the other hand, if the trial judge refuses to admit evidence on a crucial point, without reasons, an appeal on that ground may be stronger.[25]

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[25] In the criminal context, the failure to give reasons also has Charter of Rights and Freedoms implications. See, e.g., R. v. Cunningham, 2011 ONCA 543 (CanLII), http://canlii.ca/s/6l07b. R. v.

- *Be alert to the judge's reaction to the questions you are asking.* If the judge has accepted an objection about leading questions and counsel continues to ask leading questions, the judge is likely to disregard or give little weight to the answers. Indeed, the judge will begin to doubt either the competence of counsel or the credibility of the witness.

When not to object

The decision of whether or not to object to evidence being led at trial should be made by taking into account three factors: strategy, practicality and optics. At times these factors may oppose one another, while at times they may all favour the same course of action. The outcome should ideally achieve a balance whereby the benefits of objecting are not outweighed by the consequences.

Objections should not be used to break opposing counsel's concentration, to make opposing counsel look bad or to exhibit your superior knowledge of evidence law. Objections should be used to serve the far more noble purpose of assisting the court by ensuring that only admissible evidence and proper procedure forms the evidentiary record. Experience as a trial lawyer will make it possible for you to assess the following

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Sheppard, 2002 SCC 26 (CanLII), [2002] 1 SCR 869, http://canlii.ca/s/2xfy at para. 55; and see, R. v. Y.M. (also cited as R. v, Maharaj), 2004 CanLII 39045 (ON CA), http://canlii.ca/s/q3st. In proceedings before the Divisional Court on appeal from a tribunal decision, failure to give reasons also resulted in a reversal of the decision: *Knights Village Non-Profit Homes v. Chartier*, 2005 CanLII 20799 (ON SCDC)

factors within a matter of seconds, and come to a decision of whether to sit, or to stand and object:

Practicality

- How difficult will it be to obtain direct evidence?
- How costly will it be to obtain direct evidence?
- How much of a delay will the objection cause?
- How important is your objection to the case?

Strategy

- An objection may be motivated by the need to prevent the admission of inappropriate or inadmissible evidence.
- An objection may be motivated by the need to give the witness more time to give a considered answer, in order to break opposing counsel's rhythm, or to stop an abuse of the witness. Unless such motives are coupled with an objection that has merit, they are improper.
- Where hearsay statements are mildly inconsistent, on cross-examination you may wish to challenge the witness' ability to recall events or sincerity, rather than objecting.
- If hearsay statements are significantly inconsistent with the evidence, you may have the opportunity to attack the witness' credibility on cross-examination and gain an advantage.

- Attacking credibility requires counsel to have a sound theory of the case. If counsel has a weak theory of the case, has had to shift this theory to adapt to information that arose during trial, and the evidence in question has probative value, a vigorous objection will be warranted.

Optics

- The judge manages the progress of a trial, and may not appreciate interruptions and delays that unduly prolong proceedings. While this is a consideration, you must also meet your duty to represent your client fully and faithfully, regardless of a judge who appears frustrated by objections.
- An objection may serve to draw more attention to the weak points in your case that you wish to downplay.
- An objection could give the impression that you are trying to block the introduction of evidence that is damaging to your case. Responding to your objection will give opposing counsel a forum to highlight the importance of the evidence to which you object. If the evidence is admitted, it could receive additional attention from the judge and/or jury.
- Above all else, avoid looking disappointed, frustrated or dejected if your objection is rejected.

Unnecessary Objections

Some counsel lead their witnesses through aspects of testimony that are not controversial. This is one of the areas in which practicality, strategy and optics do not

usually support an objection. Make sure that you are attentive to the transition to controversial matters, at which point objections may be warranted if counsel continues to lead the witness.

Arguments to make on objections or in response to objections

The rules of evidence are complicated and their application at trial often depends on the circumstances. As trial counsel, you will have to consider the evidentiary problems likely to come during the trial and prepare the law to raise an objection or respond to one. Here are a few examples:

- The *Evidence Act*,[26] provides, *inter alia*, rules concerning
    - the admissibility of videotaped testimony (s.18.5);
    - proof of contradictory statements made by witness (s.20);
    - the limits on discrediting a party's own witness (s. 23);
    - how to prove statutes and other public records (ss.25-34);
    - how to prove business records (s.35);
    - how to prove judgments, notarial documents and proclamations (ss. 36-39);
    - how to prove military records (s.51);
    - how to prove medical records and doctors' reports (s. 52);
    - how to prove registered documents and instruments (ss.53-54).

[26] RSO 1990, c E.23, http://tiny.cc/5dctw

- An extensive body of law exists in respect of the proof of business records both at common law and under s.35(2) of the *Evidence Act*;[27] Thus, to be admissible pursuant to subsection 35(2) of the Evidence Act a record must: (1) be made in the usual and ordinary course of business; (2) the record must be of an act, transaction, occurrence or event; and (3) the record must be made contemporaneous with the act recorded or within a reasonable time thereafter;[28]

- A body of law exists in respect of proof of medical records and doctors' reports (s.52 of the *Evidence Act*);[29] In *Ares v, Venner*,[30] the Supreme Court of Canada held that hospital records, including nurses' notes, made contemporaneously with the events by someone having personal knowledge and under a duty to make the entry or record should be received in evidence as prima facie proof of the facts stated therein but the admissibility of the record does not impede a challenge to the accuracy of its contents. Such records might also fall under s.35 of the *Evidence Act* as "business records";[31]

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[27] Young v. RBC Dominion Securities, 2008 CanLII 70045 (ON SC), http://canlii.ca/s/zxtq; Robb Estate v. Canadian Red Cross Society, [2007] O.J. No. 4605; Ontario v. Rothmans et al., 2011 ONSC 5356 (CanLII), http://canlii.ca/s/6lds7; Soan Mechanical Ltd. v. Terra Infrastructure Inc., 2011 ONCA 371 (CanLII), http://canlii.ca/s/6kcwc; Fanshawe College of Applied Arts and Technology v. LG Philips LCD Co., Ltd., 2009 CanLII 65376 (ON SC), http://canlii.ca/s/12nte; See also, United States of America v. Anekwu, 2009 SCC 41 (CanLII), [2009] 3 SCR 3, http://canlii.ca/s/121nz, decided under s. 30 of the Canada Evidence Act.

[28] Young v. RBC Dominion Securities, 2008 CanLII 70045 (ON SC), http://canlii.ca/s/zxtq at para. 134

[29] Ares v. Venner, 1970 CanLII 5 (SCC), [1970] SCR 608, http://canlii.ca/s/tadk; Barker v. Montfort Hospital, 2007 ONCA 282 (CanLII), http://canlii.ca/s/us80; Caza v. Kirkland and District Hospital, 2003 CanLII 39169 (ON CA), http://canlii.ca/s/3uix

[30] Ares v. Venner, 1970 CanLII 5 (SCC), [1970] SCR 608, http://canlii.ca/s/tadk

[31] Pollack v. Advanced Medical Optics, Inc., 2011 ONSC 850 (CanLII), http://canlii.ca/s/16lv7, para. 39.

Conclusion

Trial objections have so many variables that our objective of making them unobjectionable is doomed to fail. Implicit in Ontario's adversarial trial system is that one counsel will attempt to stretch the bounds of admissibility while the opposing counsel will seek to narrow it. All trial counsel have attempted to introduce evidence which was objected to and was rejected by the judge. All counsel have made objections which were unsuccessful.

Most trial objections will not impact on the outcome of the case however the judge rules. Some objections will make a difference between success and failure. Understanding the principles discussed in this article could make a difference which affects the result of your case.

Toronto, October 2011.