Oral Presentation by:

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OBJECTIONS

Black's Law Dictionary, 6th Edition, 1990, defines "objection" as:

> The act of a party who objects to some matter or proceeding in the course of a trial, or an argument or reason urged by him in support of his contention that the matter or proceeding objected to is improper or illegal. Used to call the court's attention to improper evidence or procedure. Such objections in open court are important so that such will appear on the record for purposes of appeal.

Purpose

On the same subject, Former Judge Robert S. Hunter says:

> The burden is on the attorney to preserve his record, so that all improper evidence is excluded and all proper evidence is admitted. To do so, he must normally object to improper evidence and obtain a ruling in a way that the question is preserved for review, both by the trial court at a later stage of the case, and by the courts of review. Similarly, if he offers evidence that is denied admission, he must be sure that the question is preserved for further consideration, as at the hearing on a motion for new trial, and by the courts of appeal. This normally requires an offer of proof.

Robert S. Hunter, Trial Handbook for Illinois Lawyers - Civil, 7th Edition, 1997, §22.1.

There are many reasons for objecting to evidence, whether oral or documentary, and each objection has its own set of rules. It is well beyond the scope of this presentation to provide a comprehensive guide to the rules of evidence, but we can point you in the right direction. Reference was made earlier to the objections list drawn from Professor Mauet's trial technique handbook, and as stated there, the list is not totally complete, but it does include most of the objections that will most commonly arise. First and foremost on every list of objections will be the question of relevance.

Used to be one would hear objections that certain evidence is not "relevant and material" to the issues before the court. In recent years, the concept of "materiality" has been subsumed by the expanded concept of "relevancy". "Only relevant evidence is admissible. `Relevancy is established where a fact offered tends to prove a fact in controversy or renders a matter in issue more or less probable.'" Avery v. State Farm Mutual Automobile Insurance Co., 321 Ill.App.3d 269 (2001).

The concept of relevancy is basic to the law of evidence as it circumscribes admissibility. In 1977, the Illinois Supreme Court adopted Rule 401 of the Federal Rules of Evidence. Rule 401 provides that: "'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Modelski v. Navistar International Transportation Corp., 302 Ill. App.3d 879 (1999).

It is so fundamental as to need no citation of authority that admission of evidence is a matter largely within the discretion of the trial judge. Because of this broad and well-recognized discretion, we have Rule Number Seven: When the judge has ruled on your objection, all argument is over. This will be mentioned again.

It must be noted that the court's rulings on objections are always subject to reconsideration. Be careful, however. This is a concept that can easily be abused and can result in serious violations of Rule Number One. The concept of relevancy is basically defined by the issues presented by the pleadings. In our chosen area of practice, there are other ways of defining issues. In many jurisdictions in Illinois the courts require Pre-Trial Memoranda, many of which ask the attorneys to set forth the issues they see in the case. Many times the motion or trial judges will hold pre-trial conferences in which they ask the same question: What are the issues you see in this case? So by the time the average domestic relations case comes to trial, the contested issues are usually clearly defined. Grounds contested? No! It would then seem that marital misconduct (that's what grounds really is, right?) is therefore not relevant. Custody in issue? Well maybe some aspect of mom or dad's conduct may be relevant. The problem is that it is more difficult early in the trial to determine what is or is not relevant than it will be later on once the flow has been established. This brings us to our first discussion of the proponent's burden.

Generally, as a matter of law, when dealing with relevance, the burden is on the opponent to show that the offered evidence is not relevant. Once a party has asked a question, that party becomes the "proponent" of that inquiry. The person objecting, quite obviously, is the "opponent". Once the opponent has jumped to his or her hind legs and said the magic words, "Objection. Relevance.", the burden tends to shift to the proponent of the question to explain just why the proffered evidence is in fact relevant. That will usually engender a dialogue between the judge and the ***proponent*** , the opponent having served his purpose. For example:

Ms. Olson: "Mr. Bicker, what color are your son's eyes?"

Mr. Paulson: "Objection. Not relevant."

The Court: "Ms. Olson, how is this relevant?"

Ms. Olson: "Beats me, Judge."

The Court: "Sustained."

The Five-Word Rule

A quick look at Professor Mauet's list of objections will demonstrate the genesis of the Five-Word Rule. Simply stated, there is no objection that can't be stated in five words or less. "Hearsay" is one word. "Assumes facts not in evidence" is five words. Basically, the purpose of an objection is to call to the court's attention the proposition that evidence being offered is improper for any one of several reasons, all of which have to do with the rules of evidence. Sometimes the question is so obviously inane that everyone in the courtroom will chorus, "sustained". But that does not preserve the record.

In order to preserve the record, it is exceedingly good practice to object, and then in five words or less, state the simple evidentiary basis for your objection. Like Mr. Paulson, above, "Objection. Not relevant." The rule here is **KISS**: **K**eep **I**t **S**hort and **S**imple. Yes, there is another variation, and it also applies, but this is a family seminar. If you remember **KISS**, you are less likely to put your foot in your mouth.

It is inappropriate, rude, and a violation of Rule Number One to make a speech or attempt to argue your case when making an objection. Most trial judges will look upon you with great disfavor if you attempt to argue when making an objection. The procedure that will endear you to any judge is, as above, to simply stand, say "objection", state the evidentiary basis in as few words as possible, and sit down. Let the judge carry the ball. And remember, if you just say, "objection", without stating a basis, it is assumed as a matter of law that the objection goes to relevance.

A good trial judge will ask the proponent of the question to respond and explain why the evidence will be relevant, why it is *not* hearsay, why it is not privileged, etc. As I said, the discussion will then be with the proponent whose job is to convince the judge that the rules of evidence – i.e. one of the myriad hearsay exceptions – do in fact allow the proffered testimony. The judge's job is then to rule on the objection and, occasionally, explain the ruling. Let's talk about that for a minute.

The trial judge is as intent as you are on protecting the record. That is a key part of the judge's job. Some judges will explain each and every ruling, some will explain those they believe to be important, some will simply rule. Because of this, and because of the court's broad discretion, we have Rule Number Seven: When the judge has ruled on your objection, all argument is over. Just as it is inappropriate, rude, and a violation of Rule Number One to make a speech or attempt to argue your case when making an objection, it is inappropriate, rude, and a violation of Rule Number One to argue with the judge about his or her ruling on an objection. Now it may come to pass, especially on questions of relevance, that you may wish to make a motion for the court to reconsider an earlier ruling if evidence has developed that shows the relevance of the previously excluded evidence. There are ways to overcome this problem without arguing with the court.

Connecting

If you are unable to convince a judge that certain evidence is relevant, you may ask the court to reserve ruling on the objection and allow the testimony on the basis that you will connect it up later, either by developing the instant witness's testimony, or by the testimony of a witness yet to come. Remember, however, that you are making a promise to the court. If you fail to keep that promise, somewhere along the line your opponent will call your bluff and remind the court that ruling on the objection was reserved. The request at that time will be, of course, be to ask the court for a ruling on the objection, and to strike all of the irrelevant testimony. So...never make a promise to connect the testimony to an issue in the case unless you are absolutely certain that you can.

Offers of Proof

Now suppose that there is nothing coming later that will connect the apparently irrelevant evidence to an issue, and the judge doesn't see the relevance and has sustained the objection. Simply ask for leave to make an offer of proof. But beware the pitfalls.

Where there is no satisfactory indication to the trial judge, opposing counsel, and to the reviewing court, as to the substance of the proof to be made, an offer of proof is necessary. However, if it is clear that the judge understands the objection and the character of the evidence, but will not admit it, an offer of proof is not necessary.

> When evidence is excluded, the offer of proof is the key to preserving error. The purpose of the offer of proof is to disclose the nature of the evidence offered to the trial judge and opposing counsel, and to the reviewing court in order that it may determine whether the exclusion of evidence was erroneous.

Little v. Tuscola Stone Co., 234 Ill.App.3d 726 (1992).

An offer of proof is only useful if it demonstrates that the question asked would have produced relevant testimony. But because of the important functions that an offer of proof fulfills, it is generally considered error for a trial court to refuse an offer.

> If an offer of proof is necessary, it is error for the trial court to refuse counsel an opportunity to state what was proposed to be proved through the evidence. Each party is entitled to present evidence which is relevant to his theory of the case and which has any tendency and reason to prove any material fact in issue.

In re Marriage of Marcello, 247 Ill.App.3d 304 (1993).

We must always remember that domestic relations cases are being tried to judges, not to juries. Therefore, in almost all cases, a seasoned judge, not prone to considering incompetent evidence and improper argument of counsel, will know enough to disregard any such testimony or argument. So why ring the bell if the judge is tone deaf? Some domestic relations lawyers believe that they can get inflammatory and prejudicial testimony into the record – and into the judge's consciousness – simply by having someone recite it. Judges are naturally inclined to exclude such testimony. But then comes the smart lawyer who demands to make an offer of proof, so that the judge will hear the nonsense anyway. The judge, knowing that the testimony is not admissible for any purpose, will sit through the tirade, sustain the objection once again, and refuse or reject the offer of proof.

In those rare cases where the offer of proof does turn out to present competent, relevant evidence, the judge will overrule the previously sustained objection and accept the offer of proof. But those cases are indeed rare. What usually happens is that everyone, including the judge, will become extremely annoyed at having to waste valuable trial time by listening to the offer. The judge will reject the offer, and the only result is that you will reap the penalties associated with a violation of Rule Number One. And for what purpose? Just to hear yourself speak?

Be aware that excessive attempts to elicit prejudicial and inadmissible testimony, and repeated offers of proof of the same stuff can, and most likely will, result in adverse treatment when your fee petition is being heard. Trial time is valuable, use it wisely.

Let us suppose that you have a perfectly valid point which the judge just plain does not see. You ask to make an offer of proof. The judge grants your request. How do you make the offer?

First, the offer must consist of facts, not conclusions, and it should be sufficiently complete to show that the offered testimony is competent. Don't forget, the purpose of the offer is to preserve the testimony for the reviewing court. To accomplish this, the best way to present an offer of proof is to ask the witness questions and elicit testimony. It is appropriate for the lawyer to recite what the testimony would be, but good practice says that, if the witness is available, the witness should testify. An informal offer which summarizes or paraphrases the witness' testimony in a conclusory manner is not sufficient to preserve error. The offer of proof must show what the offered proof is, or what the expected testimony will be, by whom or how it is to be made, and what its purpose is. Don't forget to state the purpose of the offer before it is made, and remember to notify the court when the offer is concluded, and ask for a ruling.

Burden and Common Mistakes

In spite of the practicalities we discussed earlier, and contrary case law, the opponent of a question usually has the burden of establishing that the evidence elicited is not relevant or otherwise does not conform to the rules of evidence. As this is not a seminar on evidence, I only want to point out a couple of areas where domestic relations lawyers tend to make mistakes. The most frequent are hearsay and cumulative evidence ("asked and answered").

Hearsay has been defined as an out-of-court statement that is offered to prove the truth of the matter asserted and depends for its value on the credibility of the out-of-court declarant. People v. Elizabeth H. Tolbert, 323 Ill. App. 3d 793 (2001). Hearsay is inadmissible unless it falls within one of the recognized exceptions to the rule.

The two most frequently asserted exceptions in domestic relations cases are: (1) statement by a party, (2) state of mind. The other argument is that the statement is not hearsay because it's not being offered for the truth of the matter asserted.

As for the first exception, any statement made out-of-court by a party to an action or attributable to a party to an action, which tends to establish or disprove any material fact in a case, is admissible as an exception to the hearsay rule and is competent evidence against that party. Pavlik v. Wal-Mart Stores, Inc., 323 Ill. App. 3d 1060 (2001). The key here is that the statement was allegedly made by a party, and that person is likely to be present in open court and available for cross-examination regarding the statement. Which brings us to the most important question in determining if a statement is hearsay. Simply ask yourself, "Who is the real witness?" If your answer is that the real witness is the person who made the statement, and that person is not a party to the action, it's hearsay.

The next area for goofiness is the "state of mind" exception.

Mr. Johnson: And what did little Johnny say when he returned from visitation with his father?

Ms. Olson: Objection, hearsay.

The Court: Mr. Johnson, why is this not hearsay?

Mr. Johnson: State of mind exception, Judge.

The Court: Whose state of mind?

Mr. Johnson: Why my client's, of course. When little Johnny told her how his dad had treated him she became very upset and ran her car into a tree. That's how Johnny's arm got broken.

The Court: Overruled.

All too often lawyers forget that in order for the state of mind exception to apply, the statement must not be offered to prove its truth, but the effect of the statement on either the declarant or the listener. That is, the hearsay statement is being offered to show the state of mind of the person making or hearing the statement at the time it was made. For example, assume that Mr. Johnson's client testified that she picked up little Johnny at dad's house after visitation, and in the car he was sullen and withdrawn, and she asked him why, and he said, "Daddy hit me." She then drove into a tree and Johnny's arm was broken. Dad, of course, argues that this is neglect, so mom must explain. Mustn't she?

That statement by Johnny is clearly hearsay, but it would be admissible not to prove that dad hit Johnny, the truth of the matter, but to show why Johnny was sullen and withdrawn, his state of mind, or why mom hit the tree, her state of mind. You would be amazed how often something like this pops up.

The final hearsay adventure for this section deals with, “it’s not hearsay”. With stunning regularity, the hearsay objection is met with the assertion that it is not being offered for the truth of the matter asserted. The judge then has one simple question: if not for the truth of the matter, then for what purpose?

> The distinction between admissible testimony and that which is barred by the hearsay rule is well illustrated by Wigmore's example of the witness A testifying that "B told me that event X occurred". If A's testimony is offered for the purpose of establishing that B said this, it is clearly admissible -- if offered to prove that event X occurred, it is clearly inadmissible, for the only probative value rests in B's knowledge -- and B is not present to be cross-examined.

People v. Carpenter, 28 Ill. 2d 116 (1963).

Asked and Answered

The objection commonly phrased as, “asked and answered”, is basically a suggestion to the court that the evidence offered is or will be cumulative. This objection is not necessarily based on a rule of evidence. That is because the admission of cumulative evidence is in the discretion of the court. Yes. The question was in fact asked before. And, yes. It has already been answered. But the point is one of context. As the evidence has unfolded, perhaps the context of things has changed, and the judge just might want to hear the answer to the question in the new context. So don’t get too bent out of shape when the judge overrules this objection. *Including* evidence during a bench trial is nowhere near the basis for reversal that *excluding* it is.

The points to be drawn from all of this are quite simple. Objections are simply motions to the court for the purpose of excluding certain evidence. They are **KISS** motions. That is, they should always be kept short and sweet, and the easiest way to do this is to adhere to the five-word rule. As all objections are based on rules of evidence, it is imperative that you know and understand the rules and their application. The first result of failure to know and understand the rules of evidence is embarrassment. The second result is losing cases.

Finally, you should know when to object. Sometimes your opponent has the IQ of celery, and every question is properly objectionable. Know when to draw the line, and when to sit back and let him make a fool of himself. Also, understand that the judge knows that some objections are intended only to break your opponent's momentum when he is on a roll. It's a bit tacky to raise that kind of an objection, but it beats having your client slug you, and judges understand.