

# EFFECTIVE TRIAL OBJECTIONS

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## Trial Objections

**(a) Preserving a Claim of Error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

- (1) if the ruling admits evidence, a party, on the record:
  - (A) timely objects or moves to strike; and
  - (B) states the specific ground, unless it was apparent from the context; or
- (2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

**(b) Not Needing to Renew an Objection or Offer of Proof.** Once the court rules definitively on the record--either before or at trial--a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

**(c) Court's Statement About the Ruling; Directing an Offer of Proof.** The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.

# Objections

## ▣ Purpose

1. Exclude prejudicial evidence that is properly excludable.
2. Make a record for appeal.
3. Prevent unfair treatment of a witness.
4. Break up the testimony of an opposing witness, if you have a proper basis to object.
5. Reinforce your theme when objecting, unless the court does not allow speaking objections.

## ▣ Governed by Rules of Evidence

# Application of Rules of Evidence

## ▣ If 2(B) Notice is filed

- Strict Compliance with Rules of Evidence,
- Except for 2(B)(3)  
Regardless of whether a notice is filed under subdivision 2(B)(1):

a. Records of regularly conducted activity as defined in Rule 803(6), *Arizona Rules of Evidence*, may be admitted into evidence without testimony of a custodian or other qualified witness as to its authenticity if such document (i) appears complete and accurate on its face, (ii) appears to be relevant and reliable, and (iii) is seasonably disclosed and copies are provided at time of disclosure to all other parties and

b. Any report, document, or standardized form required to be submitted to the court for the current hearing or trial may be considered as evidence if either filed with the court or admitted into evidence by the court.

*(different than In Re Marriage of Kells, 182 Ariz. 480, 897 P.2d 1366 (App. 1995))*

## Application of Rules of Evidence

- ▣ If **NO** 2(B) Notice if filed
  - all relevant evidence is admissible, provided, however, that the court shall exclude evidence if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay, waste of time, needless presentation of cumulative evidence, lack of reliability or failure to adequately and timely disclose same. This admissibility standard shall replace Rules 403, 602, 801-806, 901-903 and 1002-1005, *Arizona Rules of Evidence*. Except as provided in subdivision 2(B)(3). All remaining provisions of the *Arizona Rules of Evidence* apply.

## Application of Rules of Evidence

- ▣ If **NO** 2(B) Notice if filed
  - 403 - Probative Value  
The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence
  - 602 - Personal Knowledge  
A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703
  - 801-806 - Hearsay
  - 901-903 - Authentication
  - 1002-1005 - Originals/Summaries

# Preparation

- ▣ Anticipate the testimony of each witness opposing counsel is likely to call at trial and determine what objections you can properly raise. Some pre-trial orders require disclosure of all such witnesses, and procedural rules require disclosure of all testifying expert witnesses
- ▣ Anticipate all documents opposing counsel will likely seek to put into the record at trial and determine what objections you can properly raise.
- ▣ File motions *in limine* when appropriate, to alert the judge before trial of key evidentiary issues, provide the judge with authorities on those issues, and seek a ruling on those issues before trial.
- ▣ If opposing counsel intends to put deposition transcripts into evidence in lieu of live testimony (as when an out-of-state witness has been deposed and will not be appearing at trial, a witness who has been deposed cannot attend the trial, or opposing counsel seeks to put in an admission of a party from a deposition transcript), carefully review the transcript to determine what excerpts from that transcript are objectionable, for which you have preserved your right to object. Improper designation of transcript.

# Form

## **Common objections as to the *form* of the question**

1. leading question during direct examination, unless preliminary question or necessary to develop the witness's testimony [Rule 104(a), 611(c)]
2. compound
3. ambiguous or unintelligible
4. already asked and answered [Rule 611(a)]
5. argumentative
6. too general or calls for a narrative answer
7. misquotes the witness or misstates prior evidence
8. assumes facts not in evidence
9. nonresponsive [Rule 611a]

# Substance

## Objections as to the *Substance*:

1. irrelevant [Rule 401, 402]
2. immaterial
3. hearsay [Rule FRE 801, *et seq.*]
4. lack of personal knowledge [Rule 602]
5. no foundation
6. speculation
7. waste of time or cumulative [Rule 403]
8. prejudice outweighs probative value [Rule 403]
9. confusing or misleading [Rule 403]
10. inadmissible opinion of lay witness [Rule 701]
11. privileged [Rule 501, 502]
12. voir dire question beyond the scope of proper voir dire
13. cross beyond scope of direct [Rule 611(b)]
14. redirect beyond the scope of cross [Rule 611(b)]
15. improper impeachment [Rule 613]
16. prior consistent statement [Rule )(1)(B)]
17. testimony admissible only for a limited purpose [Rule 105]
18. answer beyond scope of question (motion to strike)

# Documents

## Objections as to the *Substance*:

1. irrelevant [Rule 401, 402]
2. immaterial
3. waste of time or cumulative [Rule 403]
4. no foundation
5. prejudice outweighs probative value [Rule 403]
6. confusing or misleading [Rule 403]
7. inadmissible opinion of lay witness [Rule 701]
8. privileged
9. not authenticated [Rule 901, 902]
10. improper copy [Rule 1003]
11. public record not certified or insufficient supporting testimony [Rule 902(1) to (5) and 1005]
12. summary if underlying documents not made available as required [Rule 1006]
13. not disclosed as required by mandatory disclosure [ARFLP 49, 50]
14. not disclosed as required by a document request to which opposing counsel did not object in the discovery phase [Rule 49, 26.1]
15. not disclosed as required by a pre-trial order
16. document admissible only for a limited purpose [Rule 105]

## Objection Process

- ▣ When and Why
  - Ask yourself what testimony and exhibits opposing counsel will want to get into the record and whether you have a proper basis to keep out any of it.
  - Strategically, object to testimony and evidence that both hurts your case and is objectionable.
  - By picking your shots, you will find that the judge is more likely to pay close attention to the objections you *do* raise.
  - Listen carefully to the judge's words when ruling on your objections, and adjust your later objections based on what you learn.
    - ▣ This does not mean that you refrain from protecting the record

## Objection Process

- ▣ Listen Carefully
  - Is the question improperly leading?
  - Does it call for hearsay, irrelevant or immaterial testimony, assume facts not in evidence, or seek an answer for which there is no foundation?
  - Is it otherwise objectionable?
- ▣ Be poised to stand and object before the witness can answer.
- ▣ Be prepared to object on more than one ground if you can.
- ▣ State your strongest objection first.

# Objection Process

- ☐ Documents
  - When was document disclosed
  - Did you object in JPTS?
  - Have Minute Entry available
  - Have disclosure statement available

## Experts

- ☐ Rule 702
  - A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
    - (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
    - (b) the testimony is based on sufficient facts or data;
    - (c) the testimony is the product of reliable principles and methods; and
    - (d) the expert has reliably applied the principles and methods to the facts of the case.

# Leading

- ☐ Definition – A question that suggests the answer to the person being questioned.
- ☐ Rule 611(c)
  - (c) **Leading Questions.** Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:
    - (1) on cross-examination; and
    - (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.
- ☐ While not always the case, questions which can be answered either 'Yes' or 'No' are considered leading.
- ☐ Examples
  - Did he not....?
  - Isn't it true that....?
  - Won't you admit....?

## Relevance

### ▣ Rule 401

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.

## Foundation

### ▣ Rules 602, 901(a)

602 - A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

901(a) **In General.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

# Speculation

Rules 602, 701

Rule 602 - A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

Rule 701 - If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.