Objecting and Responding Effectively

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Introduction

It is true that litigation results are dictated not exclusively by the merits of the case but also by the quality of lawyering. In the context of trials or hearings, and particularly in the context of jury trials, disparity in the quality of objections and responses to opponents’ objections is one manifestation of this phenomenon that surely affects the outcomes of many trials.

Most lawyers do, and all trial lawyers should, recognize that counsel knowledgeable about, and fluent with, the rules of evidence obtain superior results in constructing the body of information upon which the trier of fact will base its verdict. Courtroom style alone is rarely a substitute for education and preparation on the merits of the objections that arise at trial. Nevertheless, the way lawyers object and respond to objections—considered as a distinct variable from the merits of such objections—can have outcome-determinative significance, not only in the courts’ rulings on such objections, but also in the often overlooked reactions of jurors to the players in the contests before them.

Consequently, this Article offers some suggestions about how to make and respond to objections. It is divided into four sections: (1) general guidelines, (2) guidelines for making objections, (3) guidelines for responding to objections, and (4) guidelines for objections during opening statements and closing arguments.

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The author gratefully acknowledges the assistance of James Balcarczyk and Theresa Colbert.
I. General Guidelines

A. Pay Attention to the Jury

Most trial attorneys devote close scrutiny to jurors during jury selection. Many trial attorneys also pay attention to individual jurors while actually addressing them during opening statements and closing arguments. But perhaps because the body of the trial does not envision such direct communication from lawyer to juror, and perhaps because the lawyer's attention is otherwise focused upon the witness, opposing counsel or the judge, many lawyers are only vaguely mindful of these manifestly important persons in the jury box during the interlude between openings and closings.

Such inattention is imprudent. The idea that jurors spend their time at trial solely engaged in the open-minded collection of data and they come to closing arguments free from any predispositions formed during the previous stages of the trial is surely naive. Everything that happens in a courtroom while the jurors are present has potential consequences. Under these circumstances, counsel would be well-advised, at opportune moments, to search the faces of jurors, to gauge reactions to courtroom events, and thereafter to be guided accordingly.

In the context of objections, the danger of inattention to jurors is greatest. As a general proposition, the conduct of a trial is akin to a figure skating competition, with each competitor performing alone in alternating demonstrations. The objection is the one exception to this metaphor. Once an objection has been made, figure skating temporarily becomes ice hockey: both teams are on the ice simultaneously. There is only one puck, and a body check (hopefully only figuratively) to one's opponent might be the necessary means to secure possession of that puck.

It is during this most intensely competitive facet of the trial that the attorney's potentially exclusive focus upon winning the objection can result in a complete neglect of the reactions of the jurors. Surely a hockey player caught up in the vigor of the game cannot devote any significant attention to the assessment of the fans. In hockey, where victory is measured by goals scored on the ice and not by the reaction of the crowd, preoccupation with the contest itself is sensible. But in trials, where victory is measured by votes and not by goals, the trial lawyer, like the
figure skater, must never lose sight of the relevant bystanders. Having
won seven of eleven objections is no consolation when the verdict goes
the other way.

In practical terms, paying attention to the jury means two things. First,
in selecting strategies for determining whether to object, how to object,
and how to respond to objections, the projected impact of various tactics
upon the jury should be the predominant consideration. In the balance
of this Article, this theme will be a guiding principle in formulating
specific guidelines.

Second, recognizing the particular danger of losing touch with the
jurors when one is embroiled in the dynamics of arguing an objection,
the careful trial lawyer should be especially vigilant to consider the visible
reactions of jurors to the handling of objections in a particular trial. Do
the jurors appear to exhibit patience or disdain for objections? Do the
jurors regard the enthusiastic arguments of counsel as impressive or as
merely bombastic? What are the facial reactions of the jurors when
counsel request a sidebar? Whatever conventional wisdom about juries
and strategies that have proved to be generally effective for counsel in
prior trials, the intelligent approach to objections requires observation and
flexibility to appeal to the unique individuals that comprise each distinct
jury.

B. Maintain Professional Demeanor

It is amazing how often courteous, dignified, and even likeable trial
attorneys metamorphose into pompous, self-righteous, and emotionally
unrestrained whiners when launching or fielding objections. I suspect
this is because the correctness of each trial lawyer's position is often
manifest to himself and beyond rational dissent. If I must object to your
question, it must be either because of your abject stupidity or because of
your shameless attempt to accomplish what you know is not permitted.
And if you object to my flawless performance, you are either too banal
to appreciate my approach or are hopelessly endeavoring to blunt my
effectiveness with a frivolous interruption. Secure in the delusion that
others will see the opponent's tactic in the same light, there is sometimes
an unfounded indignancy in the language or tenor of an objection or a
response.
This attitude is almost always a bad idea. First of all, anyone in an adversarial position would be wise to discount his assuredness to accommodate his own lack of objectivity. It could very well be that one's position is flawed; it could even be the case that one's position is wrong. More importantly, it could very well be the case that the court, rightly or wrongly, will disagree. Losing an objection is a little like being pushed off a ledge to the ground below. Advancing one's position in a bellicose or histrionic manner and then losing an objection is a little like climbing up to a very high ledge before being pushed off to the ground below. Remember, the jurors will almost assuredly assume the judge's ruling to be the correct one, thereby rendering the cockiness of the now humiliated attorney all the more unappealing.

Perhaps most importantly, even if one's position is ultimately sustained by the court, it is doubtful that the jurors will have been favorably impressed by the lawyer's theatrics. From the jurors' perspective, both lawyers make objections, each winning some and losing some. Jurors probably will not perceive any justification for the abandonment of civility regarding a particular attorney or a particular objection. The more likely upshot is an uncomplimentary review of the lawyer in the minds and maybe even in the deliberations of the jurors.

So, what should counsel do to avoid such a blunder? One relatively easy goal is to try to maintain the same dignified personality in dealing with objections that one exhibits during the other aspects of the trial. One should treat opposing counsel with the same professionalism and courtesy that one confers upon one's own witnesses. For example, if it becomes necessary to interrupt opposing counsel, an initial apology and a brief explanation for the necessity for the interruption is advisable. Strident, emotional outbursts are almost certainly counterproductive.

Most importantly, refrain from attacks upon opposing counsel, including the expression of disdain for the opposing position. Unless one is supremely confident that the court will endorse one's accusation in the presence of the jury, avoid broadsides against the opponent's

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motives, and never assail the opponent’s integrity or intelligence in front of the jury.

C. Take Reasonable Positions

In a perfect world, every trial judge would be an expert on the law of evidence and every ruling on objections would be instantaneous and correct. But there exists no trial judge, as there exists no trial lawyer, who singularly knows all there is to know about the law of evidence. The better judges among this imperfect group are willing to be educated about what they do not know. Many times counsel is able to direct the court to some convincing authority on the matter. It is not unusual, however, that the issue admits no definitive answer, either because the matter is new or unsettled or is largely discretionary. In such circumstances, a trial judge exercises her own best judgment, as informed or influenced by counsel. In these many situations, the degree of trust that a judge has in a particular attorney will correspond to the success of that lawyer in persuading the court to rule in his favor.

What will cause the court to trust the positions advanced by a particular advocate? Lawyers who enjoy the tangible benefits that accompany the trust of trial judges are perceived by those judges to exhibit two key characteristics. First, such lawyers have demonstrated a reliable knowledge about the law of evidence. Typically, these lawyers have historically made representations to the court about the law which have been consistently confirmed by legal research. Second, such lawyers do not take advantage of this earned trust by attempting to persuade judges to questionable rulings.

If a trial judge develops faith in a trial lawyer’s self-restraint in advancing and responding to objections, that lawyer will likely receive more than her share of favorable rulings on close questions. In addition to advantageous rulings, the attorney with the discipline to advance only reasonable positions earns the respect of the jury, both as an independent assessment by the jury and to the extent that jurors pick up on the court’s high regard for counsel.

Consequently, an attorney’s commitment to make every available objection, advance every conceivable argument on objections and argue

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4 McElhaney, supra note 1, at 81.
vociferously on every point, all in the name of zealous representation, is extremely shortsighted. Conversely, the indiscriminate advocate will likely fare poorly with both the rulings of the court and the perceptions of the jury. As with the admonition to pay attention to the jury, the recommendation to take reasonable positions will be a recurring theme in the discussion of more specific guidelines.

D. Address the Court, Not Counsel

In the colloquy of the objection, there should be only two lines of discourse, one between the court and objecting counsel, and the other between the court and responding counsel. Objecting counsel and responding counsel should not address each other. This protocol signals respect for the court, minimizes the potential for unseemly exchanges between counsel, and avoids alienating the trial judge by excluding her from the process.

There are two corollaries which, if observed, will assist counsel in consistently complying with this most fundamental rule. First, when speaking, an attorney should refer to opposing counsel in the third person (“Mr. Smith’s position”) and never in the second person (“your position”). Second, when opposing counsel is speaking, an attorney should look at the court, not at opposing counsel. Except in the rare circumstance in which opposing counsel is showing something that an attorney needs to see, there is no reason to look at opposing counsel. Maintaining visual contact with the court keeps the attorney focused on the appropriate audience when the attorney’s turn to speak arises. Focusing on opposing counsel sends the undesirable suggestion to both the court and the jury that opposing counsel is offering something worthy of their attention.

E. Stand Up

Whenever an attorney addresses the court, the attorney should stand. Because an objection or a response to an objection is an address to the

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5 CARLSON, supra note 2, § 2.31, at 163; Lubet, supra note 2, at 238.
7 Id.; see also Smith, supra note 3, at 74.
court, all such communications should be made from a standing position.\(^8\) Even if local procedure is to conduct witness examinations while seated, counsel should rise to object or respond.\(^9\) Unless directed otherwise by the court, counsel should remain standing until the court has ruled, without regard to which attorney is addressing the court.

Even when a lawyer has no objection to a matter moved by opposing counsel (such as an oral motion that an exhibit be received in evidence or that a witness be qualified as an expert witness), the lawyer, without awaiting inquiry from the court, should stand to state that he has no objection. Finally, "standing up" does not mean merely a slight separation between one's anatomy and one's seat; "standing up" means standing erect to one's full height as an indication of respect for the court.

F. Refer to the Court Formally

When addressing the judge, refer to the judge as "Your Honor" or "the Court," not as "you." When addressing someone other than the judge and referring to the judge, refer to the judge as "His Honor" or "Her Honor" or "the Court," not as "he," "she," "him," or "her."

G. Motions in Limine

A motion in limine is a pretrial motion for an advance ruling on a matter that would ordinarily be ruled upon during the trial.\(^10\) The motion can be presented orally (usually immediately before or immediately after jury selection) or in writing (at any time prior to trial). Essentially, a motion in limine can be used pretrial to present or anticipate an objection. By resolving objections in advance of trial, trial delays otherwise necessary to resolve complex objections can be avoided.\(^11\) Moreover,

\(^8\) CARLSON, supra note 2, at 161.

\(^9\) Id.


\(^11\) Smith, supra note 3, at 72.
advance rulings enable attorneys to plan trial strategies and, if necessary, prepare alternatives if first options are foreclosed.

A motion in limine can be used offensively (for an advance ruling that evidence is admissible) and defensively (for an advance ruling that evidence expected to be offered by the opposition is not admissible). There are often sound tactical reasons for using the motion in limine defensively. An objection sustained at trial cannot prevent damage caused by an unanswered question. But the same ruling prompted by a motion in limine will keep even the question away from the jury.

By contrast, an offensive motion in limine is a far more questionable choice, and should ordinarily not be used absent some special need for an advance ruling. An offensive motion in limine runs the risk of calling the opponent's attention to an objection that might not have been made properly or at all in the turmoil of the trial. Moreover, an offensive motion in limine is a confession to the court that the proponent of the evidence recognizes that there is some reason to doubt the admissibility of that evidence.

When an objection is made during the trial, the court has only two options: sustain the objection or overrule the objection. When the same issue is presented to the court in the form of a motion in limine, the court has a third option: it can deny the motion without prejudice to the matter being raised at trial. In other words, the court always has the option of disallowing the form of the motion in limine, thereby forcing the parties to present the issue by objection at trial. This means the maker of a motion in limine must not only persuade the court to rule in his favor, but must also persuade the court to rule at all.

12 Id. For example, an advance ruling as to whether a witness's prior conviction is an impeachable conviction (a ruling that would ordinarily only occur during cross-examination of the witness) could impact the decision to call or not call the witness to testify.

13 For example, an advance ruling that a document is hearsay and does not fall within the business records exception to the hearsay rule allows the proponent of such evidence time to locate and subpoena the author of the document to testify as a live witness.

14 See McElhaney, supra note 1, at 81.

15 CARLSON, supra note 2, at 162-63.

16 See John C. Conti, Trial Objections, 14 LITIG., Fall 1987, at 16, 16-17.
Judicial responses to motions in limine vary from judge to judge. While some judges welcome such motions for the reasons stated above, others are reticent to rule in advance of trial, frequently citing the supposed advantage of having the issue presented in the full context of the trial as a reason for delaying resolution of the issue presented by the motion in limine.

To increase the chances that the court will actually rule pretrial on a motion in limine, the maker of such a motion should be sure to include three things in the motion. First, be sure that the motion supplies the court with all the contextual information that would have been available to the court had the issue been presented in the normal sequence of events at trial. Second, be sure that the motion explains to the court exactly why the moving party will be significantly prejudiced by awaiting a ruling at trial. And third, if applicable, be sure that the motion explains why the court's self-interest will be advanced by a pretrial ruling.\(^\text{17}\)

If, as is typically the case, the motion in limine is a defensive motion (i.e., a motion to exclude evidence expected to be offered by the opposition) and the court decides not to rule on the admissibility of such evidence until the trial, the maker of the motion in limine should consider requesting the court to direct the opponent not to include any mention of this evidence in opening statement. The argument will be that, even if the evidence is ultimately ruled inadmissible at trial, the moving party will have been prejudiced by the exposure of the jury to this now-excluded information during opening statement.

Such a request has two potentially salutary consequences. First, the moving party might get exactly what she has requested, i.e., a direction to the opponent to exclude reference to the questionable information in opening statement. Second, depending upon how much the opponent squawks about having to make the requested deletion from the opening statement, often the trial judge might be persuaded that the matter really does need to be resolved prior to opening statement and will reverse himself and rule pretrial on the merits of the motion in limine.

\(^{17}\) Examples of such inducements would include predictions that a pretrial ruling would avoid delays during the trial or a suggestion that a pretrial ruling might occasion a negotiated resolution of the matter without any trial whatsoever.
H. Approaching the Bench

A request to “approach the bench” or a request for a “sidebar” can be used in situations in which the resolution of an objection requires providing the court with information that, at least until the objection is overruled, should not be received by the jury. Most trial judges appreciate judicious use of such requests to avoid prejudicing one side or the other. However, two factors should influence counsel to make such requests only when truly necessary.

First, sidebars tend to be at least somewhat time-consuming. Consequently, if the trial judge perceives an attorney to have requested one or more sidebars unnecessarily, subsequent requests by that attorney to approach the bench might be denied, and the court’s displeasure with the attorney might manifest itself in other ways as well. Second, jurors might not appreciate either the delay or their exclusion from the conversation, and might resent the lawyer who appears to be responsible for the sidebars for either or both of these reasons.

Typically, the lawyer who expects to be prejudiced by the handling of the objection in open court will request to approach the bench. However, ethical and professional trial counsel will ask to approach the bench whenever they anticipate that what they need to say could unfairly prejudice either side.

This approach, of course, does not mean that cautious trial attorneys should rely upon their opponents to behave appropriately. During the course of the colloquy on the objection, a lawyer should be alert to opposing counsel’s remarks and should constantly consider interrupting counsel to request a sidebar. If it becomes necessary to do so, a polite request directed to the court should suffice:

Excuse me, Your Honor, I apologize for interrupting Ms. Jones, but could we take Ms. Jones’ argument at the bench?

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18 See Smith, supra note 3, at 74.
19 Conti, supra note 16, at 17.
20 Lubet, supra note 2, at 238.
21 Id.
Savvy attorneys learn to anticipate which types of objections will likely require a sidebar. For example, hearsay objections are normally resolvable without approaching the bench. Determining whether a statement is offered for the truth of the matter asserted or whether it fits within an exception to the hearsay rule does not typically require the discussion of potentially prejudicial, inadmissible information.

By contrast, objections on the grounds of relevance or unfair prejudice often cannot be resolved without revealing the very matter which the objecting attorney seeks to keep from the jury. It is often an exercise in self-inflicted frustration to try to explain to the court in abstract terms why an item of evidence will be relevant without telling the court what that evidence will be. For that reason, in responding to certain objections, and particularly in responding to objections on the ground of relevance, it is often best just to bite the bullet and ask to approach:

Your Honor, this testimony is relevant. May I make a proffer at the bench?

Once at the bench, the responding lawyer can tell the court what the anticipated testimony or item of evidence will be, and it becomes a much more manageable task to explain in concrete terms why that particular evidence is relevant.

Recognition of this problem dictates special tactics when making these types of objections. In some situations, it would be foolish to assume that responding counsel will not include at least some of the objectionable matter in her open-court response to certain objections, such as relevance. Consequently, these objections should be accompanied by a prophylactic request to approach the bench:

Objection, relevance. May we take Ms. Jones’ response at the bench?

This formulation eliminates even a portion of the excludable material from getting to the jury, makes it unnecessary to interrupt opposing counsel’s response to the objection, and suppresses the curiosity and speculation that might arise in the minds of the jurors if objecting counsel waits and is forced to interrupt responding counsel.

One final point is worth mentioning on the subject of approaching the bench. Unless the jury is removed from the courtroom (which sometimes
occurs if the resolution of the objection will require more than a few minutes), remember that the jury is still there. Approaching the bench effectively closes the ears of the jurors, but it does not shut their eyes. While at the bench arguing an objection, bear in mind that your visible behavior is still a potential object of juror scrutiny.

I. After the Court Rules

Conventional wisdom holds that once the trial judge has ruled on an objection the losing attorney should not continue to argue with the court. As a general proposition, this is certainly advice worth taking to heart. Exhibitions of frustration or anger directed at the judge in front of the jury can do nothing but lower jurors’ estimation of the attorney and, whether or not the jury is present, will not enhance the lawyer’s standing with the judge.

The codicil to the general rule stated above is that the lawyer should make every effort to present every relevant consideration to the judge. The problem arises, from the lawyer’s perspective, when the judge rules prematurely. What if your objection is overruled before you are able to state the ground? What if your opponent’s objection is sustained before you are given an opportunity to respond? Suppose your objection is overruled based upon your opponent’s response, but that response naturally leads you to a different objection?

In these situations, good advocacy requires more than mere acquiescence. Now, it is surely correct that the attorney should not merely continue arguing the objection as if there had been no ruling. That approach will almost surely draw a sharp rebuke from the bench that the court has already ruled. But if the attorney has something completely new and different to offer (as distinguished from a rehashed version of an argument that has already failed) and has not been provided an opportunity to convey this argument, the attorney should respectfully request that the matter be reopened.

22 CARLSON, supra note 2, at 163; Smith, supra note 3, at 74.

23 See McElhaney, supra note 1, at 81.

24 CARLSON, supra note 2, at 163; Smith, supra note 3, at 74.
Your Honor, may I be heard on that issue?
Your Honor, may I briefly explain the grounds of my objection?
Your Honor, I believe there is something the Court may not have considered. May I explain very briefly?
Your Honor, I do not believe I have had an opportunity to respond to Mr. Johnson’s argument. May I have the Court’s indulgence to respond very quickly?

The lawyer’s success in getting the matter reopened depends on a number of factors, including the personality of the judge. But one important factor over which the lawyer has control is the track record of the attorney in prior, similar situations. If the experience of the trial judge with a particular lawyer in the past (on this case or on prior cases) has been that granting post-ruling requests to be heard have been a waste of time because the lawyer has presented no new, or at least no worthwhile, arguments, that same lawyer’s current post-ruling request to be heard will likely be denied. If, on the other hand, the judge’s experience with the lawyer has been that his additional argument has never been redundant, has often been worthwhile, and has sometimes even been helpful in preventing the judge from committing reversible error, that lawyer’s requests to be heard will routinely be granted.

Consequently, counsel must exercise sound judgment as to when to play the “request to be heard” card and when to just throw in the cards.²⁵ In any event, if the request to be heard is granted but the judge refuses to alter her initial ruling, or if the request to be heard is denied, the lawyer, without the slightest indication of perturbation, should move on.²⁶

The respect demonstrated by these suggested responses should not be taken too far. For example, some lawyers thank the judge after every favorable ruling. Some go further and thank the judge after even unfavorable rulings. This practice is obsequious and is likely to be perceived as such by both the judge and the jurors.²⁷ If the judge grants you a personal favor, such as allowing you a recess or starting court an hour late so you can make a doctor’s appointment, then you can thank the judge. But rulings on objections are supposed to be impersonal objective legal determinations, not the bestowment of gifts, and the

²⁵ See CARLSON, supra note 2, at 163; Conti, supra note 16, at 17.
²⁶ See CARLSON, supra note 2, at 163; Smith, supra note 3, at 74.
²⁷ See Smith, supra note 3, at 74.
attorney insults the court and the process by treating such rulings as personal favors.\textsuperscript{28}

Once the trial court has ruled adversely to the trial lawyer’s interests, and no further reasonable steps remain for the lawyer to take before the trial court to reverse that ruling, the lawyer should then consider the possibility that the ruling in question could be the subject of an appeal. If such a possibility exists, the lawyer should consider whether the record from the trial court will be sufficient to advance such an appeal. Is there an actual ruling by the trial judge in the record? If not, the lawyer should politely nudge the court into making such a ruling.\textsuperscript{29}

If the opponent’s objection has been erroneously sustained, will the record allow the lawyer to withstand an argument by the opponent that any error in excluding such evidence is harmless? In order to prepare the record to demonstrate on appeal that the wrongful exclusion of evidence was reversible error, it may be necessary for the lawyer to make an offer of proof.\textsuperscript{30} With the court’s permission, an offer of proof is a representation by counsel, on the record but outside the hearing of the jury, of what the excluded evidence would have been.\textsuperscript{31} Trial judges will rarely deny counsel the opportunity to make an offer of proof (such denials themselves possibly constituting reversible error). Such offers of proof might, in addition to enhancing the chances for success on a future appeal, actually provoke the trial judge to reconsider her ruling. If, for example, the trial judge sustains the opponent’s objection, and the responding lawyer’s request to be heard for the purpose of proffering what the evidence would have been is denied, an offer of proof can be a useful device for actually getting the rejected proffer before the trial judge.

\section*{II. Guidelines for Making Objections}

\subsection*{A. Fewer Are Better}

There is an interesting sequence of behaviors that many trial attorneys progress through with regard to the making of objections. At the first

\textsuperscript{28} See \textit{id}.

\textsuperscript{29} Lubet, \textit{supra} note 2, at 239-40.

\textsuperscript{30} CARLSON, \textit{supra} note 2, § 2:37, at 168-69.

\textsuperscript{31} \textit{Id.} at 169.
stage, neophyte trial counsel often betray their own fearfulness by an almost unexceptional failure to object to anything. Motivated generally by a desire not to look foolish, and specifically by a commitment not to lose any objections, staying seated and silent is the next best thing to leaving the courtroom altogether.

After a few experiments with objections that result in some success (success being defined as anything from having one's objection sustained down to making an objection unaccompanied by laughter from the bench or the loss of one's own lunch), novice trial attorneys quickly move into stage two. Stage two is the antithesis of stage one. At stage two, everything that is conceivably objectionable draws an objection. Asking the witness if he lives in a halfway house is leading; asking him to describe his living situation calls for a narrative. Everything that sounds like hearsay requires a hearsay objection because maybe the other lawyer will not know why it is not really hearsay, and even then maybe the judge will not know that it is not really hearsay.

At the next stage—stage three—the lawyer comes to realize that not every objection that can be made should be made. Whether to object requires not only a legal assessment of whether the matter is objectionable, but also judgment as to whether, all things considered, it is advantageous to make the objection. How likely is the objection to be sustained? What are the consequences of a sustained objection? How much, if at all, does the evidence hurt me? What will be the reaction of the jurors and the judge to the objection?

The transition from stage one to stage two is almost universally quick and easy. The transition from stage two to stage three is less so. All, or virtually all, trial attorneys know that objections should be made selectively. Yet, for many of us there are at least some occasions when the irresistible seduction of waging and winning that little battle called the objection trumps our good judgment about the best course of action for waging and winning that big war called the trial.

Perhaps it is the heat of the competition. Maybe it is a conscious or unconscious desire to demonstrate mastery of the rules of evidence. Or perhaps it is an irrepressible instinct to do something right now to combat

\[32\] See, e.g., Conti, supra note 16, at 17; McElhaney, supra note 1, at 81.
\[33\] See Conti, supra note 16, at 17.
the apparent success of the opponent’s examination of the witness. Whatever the explanation, the fact is that if a lawyer errs at all in the quantity of his objections, chances are very good that the lawyer objects too frequently rather than not often enough.

In order to understand why the primary concern should be over-objecting, consider the drawbacks of objecting. First, if the objection is overruled, there is a good chance that the objection will have focused the attention of the jurors on precisely the evidence the objecting attorney hoped to have excluded. Second, objections tend to slow down the pace of the trial, and the objecting attorney may very well be perceived by both the judge and the jury as unnecessarily elongating the trial. For most jurors, jury service is not an all-expense paid trip to Disney World; therefore, a lawyer perceived as lengthening that service is not likely to be regarded fondly. Third, the jurors might be interested in hearing precisely what is the subject of the objection, and the objecting attorney may well be regarded as seeking to keep vital information from the jury. If the jurors perceive counsel as undertaking a coverup of the truth, both the personal credibility of the attorney and the legitimacy of his client’s position can be severely damaged. Fourth, even if the objection is sustained, it is likely that the jury will have heard the question. Notwithstanding a possible instruction to the contrary, the jurors might speculate on what the answer would have been, and that speculation could be more damaging to the objecting attorney’s cause than the actual answer would have been.

This is not to advocate an industry-wide regression back to stage one. Obviously some objections have to, or at least ought to, be made. There are, however, a number of principles that trial lawyers can observe in order to forestall over-objecting.

First, if at all possible, object less often than your opponent. Getting the jurors to dislike you less than they dislike your opponent may be a more attainable goal than getting the jurors to actually like you. As long

34 See Fontham, supra note 6, at 129.
36 Carlson, supra note 2, at 160; Conti, supra note 16, at 17.
37 See Conti, supra note 16, at 17; McElhaney, supra note 1, at 81.
as the rules require the jury to find in favor of someone, your relative standing in the eyes of the jurors is what is truly important.

Second, make sure the judge sustains a substantial portion of your objections. If a significant percentage of your objections are being overruled, that is a pretty good indicator that you are over-objecting.

Third, do not object to anything that does not really hurt you, regardless of the certainty that the objection is valid and will be sustained. Even a no-risk objection is not a no-cost objection. Because objections cost you a little something with the jurors, objections should be considered a limited resource. As such, you should spend them only when there is some real reason to do so.

Fourth, do not become enamored with objections as to form. Unless there is some reason to believe that the witness’s answer will be different in response to a nonleading question and the question concerns some significant point, objections such as “leading” are at best pointless and at worst counterproductive for the reasons stated earlier. In fact, many objections as to form have the unhappy consequence of improving the presentation of the opponent. A sustained objection as to form usually just results in a reformulation of the question that gives the jury a new and improved version of the evidence that harms the cause of the objecting attorney.

Fifth, if the opponent puts an improper, damaging question to your witness and you know that, if permitted to answer, the witness will give a favorable answer, do not object. It is better to have the jurors hear the witness’s denial than to leave them with the impression that you objected because the accusation in the opponent’s question was well-founded. After the witness answers the question, the attorney might wish to approach the bench to obtain some prophylactic relief from similar questions in the future.

Sixth, when objecting, be succinct. Jurors will appreciate your brevity.

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39 Id. at 53.
40 McElhaney, supra note 1, at 81.
41 Conti, supra note 16, at 17.
B. Stay Focused

To some degree, lawyers can anticipate objections that they expect to make at trial based upon depositions of the opposing witnesses and other information. But for the most part, successful use of objections requires concentrating upon the questions posed by opposing counsel. Within a very brief period of time, objecting counsel must assess the vulnerability of the question to an objection, identify the basis for the objection, and consider the wisdom of making or foregoing the objection. There is little chance of consistent success if the attorney is not fully focused on the opponent’s questions.

Trying cases is mentally exhausting. Particularly if an attorney has just concluded a difficult examination of his own witnesses, there can be a tendency to relax a little when opposing counsel’s turn to examine a witness arises. That lapse in concentration is dangerous. It can cause counsel to miss objections that should have been made. It can cause counsel to make objections in a knee-jerk fashion rather than to assess fully the wisdom of making the objections. Recognizing the importance of objections should provoke an uncompromising commitment to stay alert and focused while considering objections.

C. Positioning

Successful objecting requires processing some very recently acquired data (the question posed by opposing counsel) through several screening functions (Can I object? On what basis? Should I object?), all in the brief period prior to a witness responding to the question at issue. Obviously, this processing requires a fair amount of mental acuity. The processing also requires some degree of physical agility as well: the lawyer must quickly stand and begin speaking. The physical position of a lawyer poised to object is not unimportant, both in accomplishing the split-second movements necessary to prevent any portion of the witness’s answer from materializing and as a measure of the lawyer’s mental alertness. The lawyer should be seated with feet flat on the floor, leaning forward in his seat and with his chair pulled a bit away from the table.

42 Smith, supra note 3, at 72.
43 Fontham, supra note 6, at 129.
This will permit counsel to rise swiftly without unraveling crossed legs, coming forward from the recess of the seat, or bumping knees on the table when standing.

D. Stating the Objection

The first word out of the objecting lawyer’s mouth must be “Objection.” This must be followed immediately by a word or phrase that states a legal ground for the objection, such as “hearsay,” “relevance” or “violation of spousal privilege.” If there are multiple grounds for an objection, they should all be stated.

General complaints unattached to specific legal grounds for an objection are doomed to failure. If it takes more than just a very few words to explain exactly what the basis for the objection is, the judge will overrule the objection. Judges do not consider their function to include listening to lawyers grumble and then assisting them in identifying a legal basis for their lamentations.

It might be useful to attach a very brief explanation to the objection for the jury, at least in circumstances where the explanation might help suppress any hostility by jurors to the objection. Such explanations should be in plain English and stripped of legal formalities. Be very careful here, however, because most judges have little patience for long-winded, speaking objections. In addition, jurors may share the same intolerance for unnecessarily verbose objections, especially if the judge makes evident her displeasure.

44 Lubet, supra note 2, at 225; Smith, supra note 3, at 72.
45 FONTHAM, supra note 6, at 129; Lubet, supra note 2, at 225; Smith, supra note 3, at 74.
46 CARLSON, supra note 2, at 161.
47 FONTHAM, supra note 6, at 129.
48 Lubet, supra note 2, at 225.
49 CARLSON, supra note 2, at 160. For example, a “relevance” or “cumulative” objection accompanied by an explanation that the question is an unhelpful use of everyone’s time might actually endear the objector to the jurors.
50 McElhaney, supra note 1, at 81.
51 Lubet, supra note 2, at 226.
E. Timing

As a general rule, an objection should be made at the conclusion of the opponent's question but prior to the witness's answer. For many beginning trial lawyers, it might seem like an impossible task to listen to the question, decide whether or not it is objectionable, identify the basis for the objection, determine whether to make the objection, and then actually make the objection, all before the witness commences to answer the question. This process, of course, is actually quite manageable with a little experience. What novice attorneys must do is trust their instincts. If the question seems surely objectionable, but the basis for the objection is not immediately identifiable, have the confidence to object. It is amazing how often the acts of standing up and uttering the word "objection" brings things into focus.

If the objecting lawyer becomes a little too excited and objects prior to the completion of the question, there is a reasonably good chance that the trial judge will indicate that she cannot rule because the complete question was not heard. The objecting attorney will then have to suffer through the jury hearing the objectionable question a second time, this time from start to finish. Occasionally, an objecting attorney will be justified in interrupting the question of opposing counsel. This should be done only when the objecting party will be significantly prejudiced by the jury hearing the question, even if it is never answered. Particular alertness and sharp reflexes are needed to prevent the damage from these questions. Almost invariably, the objecting attorney should immediately ask to approach the bench, explain to the judge the necessity for the interruption, and then be sure not to block the jurors' view of what will hopefully be the judge chastising opposing counsel for attempting to prejudice the objecting party.

Occasionally, an unobjectionable question is followed by an answer which is, at least in part, objectionable. Under these circumstances,

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52 Fontham, supra note 6, at 129; Lubet, supra note 2, at 228; Smith, supra note 3, at 72.
53 Lubet, supra note 2, at 228.
54 Id. at 228-29.
55 Id.
objecting counsel should consider interrupting the witness, but only if the objectionable answer goes beyond nonresponsiveness and is actually prejudicial. Again, if the basis for the objection requires an explanation, and that explanation would expose the prejudicial information that objecting counsel wishes to keep from the jury, counsel should object and ask to state the grounds at the bench.

F. The Test Case

Sometimes the objectionable conduct of opposing counsel or of a witness is relatively minor but repetitive. For example, the lawyer asks many leading questions on direct examination of a witness. The objecting attorney has demonstrated good but not inexhaustible patience by not objecting to the questioning thus far, but has now determined that the next transgression cannot be tolerated. In the objecting attorney's judgment, the next infraction takes place followed quickly by the objection. In fact, however, the offending question is at worst only marginally leading, and the court overrules the objection. Opposing counsel is emboldened by the ruling, and objecting counsel is correspondingly discouraged. What follows thereafter is an examination conducted entirely by patently leading questions to which no objection is raised.

What just happened? The objecting attorney chose a bad "test case" to present to the court. The objecting attorney was primed by the pattern of leading questions to object the very next time a leading question was asked and did not select an egregious example to present for the court's scrutiny. The court, of course, only ruled upon the particular objection to the particular question, not opposing counsel's pattern of questions. Nevertheless, both counsel treated the court's ruling as a general imprimatur for the use of leading questions on direct examination.

What should have happened? When the objecting lawyer decided to object, the objection should have been reserved for a particularly improper question. This would have insured a favorable ruling, which would have dictated the conduct of the remainder of the examination.

56 Id. at 230.
57 CARLSON, supra note 2, at 159.
58 Conti, supra note 16, at 52.
In short, in situations in which the objectionable conduct is recurring, the objecting lawyer controls the selection of the "test case" on which the court will rule. A wise selection of a "test case" for an objection under such circumstances will have beneficial behavioral consequences.

G. Voir Dire

If the basis for an objection is not apparent from the record before the court at that time, but objecting counsel has reason to believe that the witness on the stand can testify to the information necessary to support the objection, objecting counsel can request permission to voir dire the witness in aid of the objection.\textsuperscript{59} If granted, this permits objecting counsel to interrupt the direct examination of a witness to conduct a limited cross-examination solely in relationship to the objection.

Use of the voir dire procedure is not common.\textsuperscript{60} It is most often used when opposing counsel has made an evidentiary motion, such as the admissibility of an exhibit or the qualification of a witness as an expert.\textsuperscript{61}

H. Motion to Strike

In the event that a question is benign but the answer to that question is objectionable, the objection to the answer should be accompanied by a motion to strike the answer.\textsuperscript{62} If only part of the answer is objectionable, the objecting lawyer must specify the portion of the answer that merits being stricken from the record.\textsuperscript{63} Upon request, the court will also instruct the jury to disregard the stricken portion of the answer,\textsuperscript{64} although the efficacy of that instruction is questionable.

The possibility that an inadmissible answer will follow an unobjectionable question is not limited to questions posed by one’s opponent. At

\textsuperscript{59} CARLSON, supra note 2, at 161-62; Lubet, supra note 2, at 231.
\textsuperscript{60} CARLSON, supra note 2, at 161-62.
\textsuperscript{61} Lubet, supra note 2, at 232.
\textsuperscript{62} CARLSON, supra note 2, at 162; Lubet, supra note 2, at 230; Smith, supra note 3, at 74.
\textsuperscript{63} Smith, supra note 3, at 74.
\textsuperscript{64} CARLSON, supra note 2, at 163; Lubet, supra note 2, at 231.
least on cross-examination, receiving an improper answer to a proper question is by no means unusual. Of course, if the answer is responsive to the question, the questioner has no complaint that prejudicial, inadmissible information has been elicited. Realistically then, a cross-examiner’s sole basis for moving to strike an answer to her own question would be if the answer is nonresponsive to the question.

The means by which an attorney objects to a witness’s response to a question from her cross-examination is through a motion to strike all of the answer or the nonresponsive portion of the answer. If the witness persists in providing nonresponsive answers, the cross-examiner may request that the court admonish the witness simply to answer the questions.

III. Guidelines for Responding to Objections

A. Preparation

Much of what occurs during the resolution of objections is unavoidably extemporaneous. But impromptu work in the courtroom should be the residue of thorough preparation, not a substitute for it. As with all aspects of trial work, the handling of objections will improve with quality preparation. In particular, because a lawyer, at least to some degree, prepares his own questions to be put to the witnesses at trial, counsel has a real opportunity to anticipate and prepare responses to likely objections from his adversary. Preparations for objections should proceed in three stages, particularly with regard to direct examinations, which are generally more the product of advance design than cross-examinations.

First, remove anything that is truly objectionable. In order to accomplish the general goal of taking exclusively reasonable positions, do not put yourself in the position of having to defend the indefensible. Moreover, both the handling of objections and the general conduct of the

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65 For example, if a hearsay answer is responsive to a question, the questioner will probably not complain that the answer is hearsay, although the opposing attorney might do so.

66 Conti, supra note 16, at 53.

67 Fontham, supra note 6, at 129.
examination will be superior if you have the confidence that your presentation is unassailable. This state of mind is significantly more advantageous than entering the courtroom fearful that opposing counsel will make a particular objection or merely hoping that the court will accept what you know to be a feeble response.

Second, now that you have a bulletproof direct examination, identify the questions that are nevertheless likely targets for objections. Which questions will provoke the knee-jerk hearsay objections? Which questions and exhibits do the most damage to your opponent? What conceivable objections could be raised against these questions and evidence?

Third, having identified plausible objections that might be raised by your opponent, prepare your responses. If appropriate, collect authorities that will substantiate your positions. Organize both your thoughts and your materials so that they can be retrieved quickly as needed during the trial.

**B. Quick and Confident**

Whether an objection is overruled or sustained is not determined solely by the merits of the objection. First, many objections involve close questions and the law does not unambiguously point to only one conclusion. Second, many rulings on objections are discretionary. Finally, not all judges are so thoroughly knowledgeable, or confident in their knowledge, about the law that they are beyond being influenced by how the objection and response are presented. For these and perhaps additional reasons, how a lawyer presents objections, and to an even greater degree how a lawyer responds to objections, determine the rulings on objections a significant portion of the time.

Quite apart from the substance of the response to an objection, the key to responding to objections is two-fold. First, the lawyer must respond to the objection immediately and without the slightest hesitation. Second, the lawyer must respond "with a tone of firm conviction," an absolute confidence that the objection is groundless and with just a touch of indignation that the objection was made at all.

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68 Id.

69 Lubet, supra note 2, at 239.
To illustrate this most important point, compare the following two scenarios, with "O" designating the objecting attorney and "R" designating the responding attorney.

O: Objection. Hearsay.
R: (Looks at ground and pauses) Um... uh... Your Honor... um... it's...

In the above scenario, the rest of the response probably does not matter. This objection is well on its way to being sustained by virtue of the ineffectiveness of the response in the first critical moments following the objection. Whatever else the judge might be thinking about the merits of the objection, the responding lawyer has sent the judge a message that the question or answer really is hearsay, the responding lawyer knows that the question or answer really is hearsay, and the responding lawyer is searching for some illegitimate response to attempt to prevent the departure of a ship that has already sailed. Contrast the above illustration with the following alternative.

O: Objection. Hearsay.
R: Your Honor, this is most certainly not hearsay. It's....

Without even knowing the context for the objection or what the rest of the response is, the reader can tell that the objection in the second illustration will have a much better chance of being overruled. Without being the slightest bit disrespectful to the court or opposing counsel, the responding lawyer in this second scenario has sent the judge a message that this is not hearsay and that anyone knowledgeable about the hearsay rule will immediately recognize it as such. Even a judge inclined to sustain the objection might be shaken in his confidence in that conclusion by the assuredness of the responding attorney.

This is not to suggest that quick, confident responses will enable attorneys to steal rulings that should have been sustained against them. When a question clearly calls for hearsay, no amount of bluster will forestall a sustained objection. In fact, if an attorney attempts to bluff the court into an incorrect ruling with a quick and confident rejoinder to an objection, the success of this tactic will be thereafter forever lost to that attorney. Once a lawyer has lost credibility with the court, that lawyer will be fortunate even to win her fair share of the court's rulings.
What is being suggested here is that the use of quick, confident responses to objections will substantially assist attorneys in overcoming objections that should be overruled, as well as winning more than an even share of the close calls presented to the court by the opponent’s objections. Perhaps more importantly, what is being suggested here is the corollary of this proposition. An attorney who responds to objections in a hesitating and anemic fashion will find many rulings that should have been obtained going the other way.

Responding quickly and confidently to objections is sometimes a task more easily commanded than performed. Sometimes a lawyer responding to an objection hesitates because he has genuinely been caught by surprise and requires a few moments to think of the proper response. Nevertheless, responding quickly and confidently to objections is a talent that can be acquired and perfected, much like the ability to make split-second objections is a learned skill. A good place to start is to make the commitment to respond immediately at the conclusion of the objection. Once that commitment is made, the responding attorney will no longer indulge in the costly luxury of hesitating from the shock of the interruption. Instead, the lawyer will become disciplined to listen carefully to the objection as it is stated, which is probably the first and most important ingredient in formulating a prompt reply.

One final minor contribution to the endeavor is the admonition to remember the words “Your Honor, it is . . . ,” or “Your Honor, it is not . . . .” Almost invariably, one or the other of these partial phrases will work as the initial portion of the response to any objection, such as “Your Honor, it’s not leading,” or “Your Honor, it is relevant,” or “Your Honor, it’s not barred by the rule against hearsay.” These words allow the responding attorney to begin speaking immediately in response to the objection while buying what is often a surprisingly helpful second or two to formulate the substantive response.

C. Rephrase

As indicated above, if one is going to resist an objection, one should do so with conviction. But whether or not to resist an objection requires the exercise of good judgment.

If the lawyer has done an exacting preparation, she should be able confidently to resist any substantive objections. But if the objection is
only as to form or if the objection is one that is curable (such as lack of personal knowledge or insufficient foundation) and, even if sustained, only frustrates the introduction of the evidence temporarily, the lawyer should consider simply rephrasing the question or inserting some preliminary questions to eliminate the problem.\textsuperscript{70} For example, if the objection to the question is that it is leading and it is not clear that the question is not leading, good judgment dictates responding to the question by simply advising the court that you will rephrase the question and then doing so, if the question can easily be rephrased in an indisputably nonleading form.

To take another common situation, suppose the objection is an absence of personal knowledge. The witness in fact does have personal knowledge, but the basis of the witness’s knowledge has not been elicited as well as it could be. Rather than waging a potentially difficult and time-consuming battle to persuade the court that personal knowledge has been established, the responding lawyer can simply advise the court that he will withdraw the question and lay a proper foundation. The responding lawyer shall then proceed to do so before returning to the original question.

There are several advantages to this exercise of discretion instead of indiscriminate valor. The chances are very good that the revised question or sequence of questions will be not only new, but also improved.\textsuperscript{71} The reasonable behavior of the attorney in efficiently handling the situation should be appreciated by both the jurors and the judge,\textsuperscript{72} and could pay dividends later. For example, when the same lawyer fights hard in responding to a subsequent objection, the lawyer’s resistance will appear all the more credible and legitimate because of the lawyer’s earlier acquiescence.

**D. Repeat the Question**

When the court overrules an objection to a question, it does not mean that the answer to that question is thereby in evidence. What it does mean

\textsuperscript{70} Id. at 237.

\textsuperscript{71} Id.

\textsuperscript{72} Id.
is that the answer to the question will be in evidence if, and only if, the attorney who has just won the objection repeats the question. Every practicing attorney should, through experience, know this obvious procedure. Perhaps due to an occasional failure of concentration, an attorney, flushed with the victory of defeating the opponent’s objection, immediately proceeds to the next question in the sequence. Having fought so hard to gain the court’s permission to ask a particular question, it is really a shame if the lawyer never obtains the response to that question.

The best safeguard against this unthinking blunder is to fall into the unthinking routine of repeating questions after every overruled objection. This practice should be done even if the witness seems willing and able to answer the question without having it repeated. Even if the opponent’s objection is summarily overruled, even if the court indicates that the witness may answer, and even if the witness does not appear to require repetition of the question, repeat it anyway.

The reasons for repeating are three-fold. First, by repeating the question immediately prior to the witness’s answer, there is increased assurance that the witness will really understand which question to answer. Second, repeating the question might assist any jurors whose concentration might have lapsed as a result of the objection (or who might not have been paying attention the first time the question was asked). Third, repeating the question lets the opponent know that his meritless objections are not without cost to the opponent. In the future, if the lawyer asks any other question that the opponent does not care for, the opponent should understand that raising an objection risks having to hear that question not once, but twice.

E. Do Not Conclude on a Sustained Objection

An examination of a witness bears certain similarities to a novel. One of these similarities is the importance of a good conclusion. Nobody wants to read a book to find that the last page has been removed. Likewise, no lawyer should conduct an examination that concludes with a sustained objection by the opponent (at least not unless the examining attorney hopes to provoke an objection for effect).

To avoid this tragic conclusion, sequence the questions when constructing an examination so that the examination does not end with a
question that is even potentially vulnerable to an objection. If, despite these precautions, the last planned question does become a casualty of an objection, frame at least one more safe (and hopefully not pointless) question before concluding the examination.

IV. Guidelines for Objections During Opening Statements and Closing Arguments

A. Objections Generally

Many judges are hostile to objections made during opening statements or closing arguments. Some judges disallow objections during counsel's remarks to the jury, restricting attorneys to motions to strike after the conclusion of the opening or closing. This hostility is probably a reaction to the unfortunate practice of some lawyers to raise objections during openings and closings solely to disrupt opposing counsel's presentations. Moreover, because the remarks of counsel are not evidence, and because jurors are routinely instructed to disregard anything stated by counsel that is not established by the actual evidence, judges are perhaps not nearly as concerned about policing openings and closings as they are with evidentiary objections.

In any event, because of judicial antipathy to such objections, attorneys should be especially reluctant to raise objections during openings or closings. As a general proposition, counsel should only raise such objections if they meet two criteria. First, the objection should only be raised if the objecting attorney is virtually certain that it will be sustained. Second, the objection should only be raised if it concerns a matter of substantial importance.

When responding to objections during openings or closings, it is especially important to respond immediately and authoritatively. The last thing the responding attorney wants is a long, drawn out objection that, even if overruled, will have destroyed the concentration of both the jurors and the responding attorney and totally disrupted the momentum and

73 Conti, supra note 16, at 17.
effect of the attorney’s presentation to the jury. Remember, the judge is likely to be unsympathetic to the objection and might require only some cursory response to overrule the objection.

Of sometimes greater concern is what the responding lawyer does after the objection is overruled. Trying to get back in the swing of an interrupted opening or closing is a little like trying to remount a moving horse from which one has been thrown.\(^4\) Obviously, the sooner counsel can recover and recapture the pace of the presentation, the better. If necessary, counsel can take a brief moment to collect his thoughts. If the interruption has been lengthy, counsel can rewind a bit and remind the jurors where counsel had left off when the interruption took place. Clearly, though, if one has to suffer an objection during opening or closing, the ideal scenario is to have the objection overruled expeditiously and resume the presentation to the jury as if there had been no interruption whatsoever.

**B. Closings**

Probably the two most common objections raised during closing arguments are that “counsel is arguing matters not in evidence” and that “counsel is expressing personal opinion.” In fact, counsel is permitted wide latitude in arguing any reasonable inference from the evidence, so the former objection is not particularly promising unless counsel does something blatant, such as referring to evidence which the court excluded during the trial. The latter objection is also easily avoided with a little care. Removal of the pronoun “I” from the lawyer’s vocabulary, coupled with a liberal use of rhetorical questions, should enable counsel to accomplish all there is to be accomplished and still operate within the wide ambit of a proper closing argument. So, for example, “I believe defendant ran the red light,” which is objectionable, should be replaced with, “Hasn’t the evidence proven that the defendant ran the red light?”

\(^4\) Actually, while I have had to do the former on many occasions, I have to confess that I have never had to do the latter. So, actually, I do not personally know whether the two are alike at all. Nevertheless, I liked the analogy and decided to use it.
C. Openings

Expressions of personal opinions are disallowed in opening statements just as they are in closing arguments. However, arguing the evidence, which is precisely the objective in closings, is not permitted during openings. The fact that argument is prohibited does not mean that openings cannot be persuasive. Attorneys should be careful not to object that an opening is argumentative merely because it is effectively persuasive. The test is whether the statements in the opening describe what the presenting attorney reasonably believes the evidence will show. This test is also exactly the answer the presenting attorney should give in response to an objection that the opening is argumentative. If counsel can point to any anticipated testimony or evidence that will establish what is being previewed in the opening, the objection should be overruled. Sometimes courts will overrule such objections solely on the representation of the responding attorney that there will be some unspecified evidence to the same effect as the challenged remarks of counsel. In fact, the attorney presenting the opening statement can often keep the potentially objecting attorney in her seat by inserting phrases such as “the evidence will show” before critical components of the opening statement.

As the opening statements take place, any disputes between the lawyers as to the admissibility of evidence will, in the absence of a motion in limine, not have been resolved. It is not unusual then that an opening statement will refer to evidence that the presenting attorney expects to be admitted, and evidence that the opposing lawyer will expect to be excluded. At this point, one possibility is that the court will resolve the merits of the evidentiary objection. Of course, that is the last thing the attorney presenting the opening statement wants, for such a course of action almost surely will entail a major interruption in the opening statement.

In order to prevent this minor catastrophe, there are a number of responses that should be given to persuade the court to overrule the objection for the purpose of the opening statement without resolving the merits of the evidentiary objection until it arises during the presentation of evidence in the trial itself. These include pointing out to the court that responding counsel fully expects in good faith that the evidence will be received in evidence; that objecting counsel was aware that responding
counsel would seek to introduce such evidence and should have been aware that such evidence would have been discussed in the opening statement of responding counsel; that objecting counsel had every opportunity to make the issue the subject of a motion in limine but chose not to do so; and that objecting counsel should not be permitted to interfere with responding counsel’s opening statement when objecting counsel had a chance to raise the issue earlier and will have another chance to raise the issue later.

**Conclusion**

The art of objecting and responding to objections effectively involves many more considerations than just mastering the substantive evidentiary rules that form the basis for such objections. The additional complexities, some of which have been discussed in this Article, are a part of what makes the courtroom challenging, interesting, and entertaining. Mastering these skills is an important tool for the successful trial lawyer. Awareness of these strategies, coupled with even a minimum opportunity to put them to use in the courtroom, can produce tangible benefits in the results, not only of objections, but of trials themselves.