

# Trial Objections

By Stephen B. Nebeker

## INTRODUCTION

At trial, counsel will confront testimony under oath and writings offered to prove the existence or non-existence of a disputed fact. Utah R. Evid. 401, 402.

Under our adversarial system it is each party's obligation to object to improper evidence. To challenge inadmissible evidence there must appear of record either:

- an objection timely made on the specific ground;
- a motion to strike;
- an offer of proof. Utah R. Evid. 103(2).

Absent such challenge the error in admission of such evidence is waived. Utah R. Evid. 103. Waiver may occur by failure to object; an untimely objection; or an objection that fails to state a specific and proper ground.

Of all the things you do to get ready for trial, your efforts to shape the case by offering and objecting to evidence are among the most important. This article is a quick reference source for objections and motions challenging admissibility. There are some preliminary comments about foundations and objections generally, and sample offers and objections follow. The types of evidence and objections are listed in alphabetical order. The code references are to Utah Rules of Evidence.

## MAKING OBJECTIONS

There are many reasons for making objections: to exclude improper evidence; to make a record for appeal; to protect one's witness from harassment or embarrassment; to expose the opposing party's unfair tactics; to prevent confusion of the jury; and to streamline the interrogation. Utah R. Evid. 403.

Good reasons for not objecting are: Danger of alienating the trier of fact; danger of highlighting harmful evidence; where the harm threatened by the evidence is negligible; and where reversal on appeal is unlikely. Note: The consequence of allowing inadmissible evidence to be



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received without a timely objection is that the error is waived and may not be used as a basis for a new trial or an appeal. Utah R. Evid. 103; *Board of County Commissioners v. Ferree*, 844 P.2d 308 (Utah 1992).

When counsel has decided to object, make sure to state the specific ground for the objection. Utah R. Evid. 103. Additionally, objection to inadmissible evidence must be made at the earliest opportunity. This means at the time it is offered in evidence. *State v. Schreuder*, 726 P.2d 1215 (Utah 1986); *Szarak v. Sandoval*, 636 P.2d 1082, 1084 (Utah 1981). Opposing counsel may not

speculate on obtaining a favorable answer to an improper question and then object after the answer proves unfavorable. Counsel is not expected, however, to object to a question before it is answered if it is not apparent until the answer that the evidence is inadmissible. On hearing the answer, counsel must immediately move to strike the evidence. (However, in *State v. Velasquez*, 672 P.2d 1254, the court found a motion to strike is not an adequate substitute for an objection.)

The rules for objecting may create the impression that objecting is something you do only at trial. However, even before trial you may object to evidence through a motion in limine. Objections outside the presence of the jury before trial should be carefully considered. *If you must object at trial, only do so if it is worth it.* When objecting at trial, be polite, since you are interrupting when someone else is speaking. Do not take the objectionable questions or answer personally. *If jurors can see that you have a good reason for objecting it minimizes any lessening of your credibility.*

Occasionally, in the objections set forth below, it is suggested that counsel first approach the bench before making an objection. This is particularly true of objections seeking to exclude evidence where the jury might draw significant inferences from the making of the objection.

## OBJECTIONS TO THE FORM OF THE QUESTION

### Argumentative

*Objection, Your Honor. The question is argumentative.*

This objection is available when the question does not elicit information, calls for an argumentative answer or asks the witness to agree to inferences drawn by the lawyer. An answer may also be objectionable as argumentative. (Use a motion to strike such an answer.) Undue harassment or embarrassment of a witness may also be objectionable as argumentative.

### Asked and Answered

*Objection, Your Honor. The witness has already answered that question.*

This objection is available where a question is repeated after having been previously asked. (Note: Distinguish from objection as "cumulative" which applies where the proposed evidence merely adds to other similar evidence on a point.)

### Assumes Facts in Dispute/Not in Evidence

*Objection, Your Honor. The question assumes facts [in dispute/not in evidence]. I ask that the jury be instructed that statements of counsel are [in dispute/not in evidence].*

This objection is available when a question either 1) asserts or assumes a fact in dispute has been proved or 2) asserts or assumes a fact for which no evidence has been introduced. The question may also be objectionable as "leading". (Note: Be cautious with questions prefaced with "Did you know...").

### Complex

*Objection, Your Honor. The question is too complex for a witness to understand.*

This objection will more likely be available if the witness is very young, very old, or handicapped.

### Compound

*Objection, Your Honor. The question is compound. (Optional - I have no objection to having the question rephrased, Your Honor).*

This objection is available if there are two questions conjoined in one question with the disjunctive "or" or the conjunctive "and".

### Cross Examination

*Objection, Your Honor. This question exceeds the scope of direct examination.*

Note: Courts generally permit wide latitude on cross-examination, however, some limit cross-examination strictly to matters brought out on direct. The modern view allows cross-examination as to any matters that have a logical tendency to rebut an unfavorable inference which might be drawn from the direct examination — any matter relevant to the subject matter of the direct. Very broad latitude is given where a witness is a party, an expert, or a witness against defendant in a criminal case.

"Opening the door": The fact that no objection was made on direct examination to inadmissible evidence may give the cross-examiner the right to cross-examine regarding matters within the scope of direct

examination of the witness.

### General

*Objection, Your Honor. The question is too general.*

If it cannot be determined from the question what specific admissible testimony is being sought, the question is too general. Questions which are too general normally are also objectionable as vague and ambiguous or as calling for narration.

### Harassment

*Objection, Your Honor. The question is unduly harassing.*

This objection is available if the question is insulting to or constitutes undue harassment or embarrassment to the witness. (Note: Questions on cross-examination are often harassing and non-objectionable. The question must be unduly harassing.)

### Incompetent, Irrelevant, Immaterial is Not Sufficient

Such an objection fails to meet the required specificity.

### Lack of Foundation is Not Sufficient

This objection is too general to identify the specific reason the foundation is inadequate. *State v. McCarrell*, 652 P.2d 942 (Utah 1982).

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## Leading

*Objection, Your Honor. The question is leading.*

A question is leading if it suggests the answer that the examining party desires from the witness. Leading questions are objectionable on direct or redirect examination, except they are allowed:

- to establish preliminary matters;
- to refresh the witness' recollection;
- to question expert witnesses;
- to question hostile witnesses;
- to question witnesses who change their stories; and
- to identify exhibits.

Leading questions are proper on cross or recross-examination, except where the witness is biased in favor of the cross-examiner.

## Misquoting the Witness

*Objection, Your Honor. Counsel is misquoting/misquoting the witness.*

Misquoting generally occurs in a prefatory statement before a question is asked. Often a subsequent question will also be objectionable as "argumentative" and/or "irrelevant".

## Motions to Strike

An expert may not be allowed to answer a hypothetical question that incorporates assumptions not presently in evidence, subject to a motion to strike.

## Narration

*Objection, Your Honor. The question calls for a narrative answer.*

This objection is available when the question invites a witness to narrate a series of occurrences. (A judge may allow a witness to give a narrative answer.)

## Non-Responsive

*Objection, Your Honor. The witness' answer is non-responsive. ["Sustained"]. I move the court to strike the answer and I request the court to instruct the jury to disregard the witness' answer.*

This objection is available when the answer is non-responsive, or responsive but the witness adds non-responsive matter, or the witness volunteers testimony when no question is pending.

## Offer of Proof

Made out of the jury's presence — the party offering evidence may make an offer of proof to explain its substance and relevance. Utah R. Evid. 103(2); *Bradford v. Alvey & Sons*, 621 P.2d 1240 (Utah 1980).

## Prejudicial Comment

*Objection, Your Honor. There is no question pending; or, Objection, Your Honor. The comment is prejudicial.*

This objection is available when a lawyer makes a statement to a witness that is not a question or is prejudicial to the party.

## Preliminary Fact Determinations

Where there is a dispute about admissibility of particular evidence which depends upon a determination of some factual issue regarding the preliminary facts, the court may hold a separate hearing out of the jury's presence to determine the admissibility of the proffered evidence. Utah R. Evid. 103(c).

## Speculation

*Objection, Your Honor. The question calls for speculation by the witness.*

A lay witness is allowed to state his opinion only about a matter he has personally perceived and only if it is helpful to a clear understanding of his testimony. Utah R. Evid. 602. A properly qualified expert witness may state an opinion within the field of his expertise even if he has no personal knowledge of the facts. Utah R. Evid. 703, 705. However, if the data on which an expert bases his opinion included many varying or uncertain factors that he is required to guess, surmise or conjecture about that data, the expert's opinion is speculative.

## Vague and Ambiguous/Unintelligible

*Objection, Your Honor. The question is ambiguous in that (state reason) or, Objection Your Honor. The question is unintelligible.*

## PLAIN ERROR

If a trial court's action constitutes plain error affecting substantial rights of a party, an appellate court may consider an issue of evidence not brought to the attention of the trial court on the ground the judge should have acted sua sponte. Utah R. Evid. 103(d).

## PRELIMINARY QUESTION OF FACT

Preliminary questions concerning qualification to be a witness, privilege, or admissibility of evidence are to be determined by the court. Utah R. Evid. 104(a)(b).

## SUBSTANTIVE OBJECTIONS

### Authentication

*Objection, Your Honor. A sufficient foundation has not been laid showing this exhibit as authentic.*

There must be a showing that a writing was made or signed by its purported maker and sufficient evidence that it is the writing that the proponent claims it to be. Utah R. Evid. Article IX, X. A writing includes letters, words, pictures, sounds, symbols, or combinations of them.

## Best Evidence Rule

*Objection, Your Honor. This is not the best evidence of the contents of . . . [describe the writing, e.g., the lease]. See § 78-25-16, U.C.A. (1953).*

Response: *Your Honor, an original is not required, and other evidence of a writing/recording/photograph is admissible if:*

- *The original has been lost or destroyed without fraudulent intent by the party offering the copy (Utah R. Evid. 1003);*
- *The original is not reasonably procurable (Utah R. Evid. 1004);*
- *The original is under control of an adverse party and wasn't produced after suitable notice (Utah R. Evid. 1004);*
- *The instrument is not closely related to a controlling issue (Utah R. Evid. 1004(4));*
- *The original instrument is voluminous and the evidence concerns only "the general result of the whole" (Utah R. Evid. 1006).*

## Competency

*Objection, Your Honor. This person is incompetent to be a witness because he cannot express himself so as to be understood.*

*Objection, Your Honor. This person is incompetent to be a witness because he cannot understand his duty to tell the truth.*

## Experiments

*Objection, Your Honor. The experiment counsel wishes to present before the jury is not admissible because it was not conducted under conditions substantially similar to those existing at the time and place of the accident.*

## Hearsay

*Objection, Your Honor. The question calls for inadmissible hearsay.*

Response: *Your Honor, this [describe evidence] is not hearsay, because [state why evidence is not hearsay — e.g., it is not offered to prove the truth of the matter asserted].*

or

*Your Honor, I am prepared to present evidence to establish that [identify testimony or exhibit] is admissible under the hearsay rule because [specify facts establishing foundation]. These facts are not in dispute and in the interest of saving everyone's time, I think a stipulation would be appropriate. [Turning to opposing counsel] Counsel, will you stipulate that [specify facts that will establish foundation].*

or

*Your Honor, please allow me to lay the foundation to permit the introduction of this evidence under the [state applicable exception] to the hearsay rule.*

Hearsay evidence is a statement made

other than by a witness while testifying at the hearing and offered to prove the truth of the matter asserted. Utah R. Evid. 801.

#### **Hearsay Exceptions — Declarant Unavailable**

The following hearsay exceptions require the declarant be "unavailable as a witness," Utah R. Evid. 804, which covers declarants who are privileged, disqualified, dead, ill, or absent. Most notable exceptions requiring unavailability are:

- Declaration against interest;
- Dying declaration;
- Statement of personal or family history;
- Former testimony.

The following are several commonly applicable hearsay exceptions:

- Declaration Against Interest

Under Utah R. Evid. 804(b)(3), a statement by unavailable declarant who had sufficient knowledge of the subject is admissible if a reasonable person would not have made the statement without believing it to be true (statements against declarant's pecuniary or proprietary interest, subjected him to civil/criminal liability, rendered a claim invalid, subjected declarant to disgrace).

- Former Testimony

Under Utah R. Evid. 804(b)(1) a statement by unavailable declarant is not excluded by Hearsay Rule if:

Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

#### **Hearsay Exceptions — Availability of Declarant Immaterial**

- Past Recollection Recorded

A witness' prior out of court statement is admissible if:

- he has insufficient recollection to testify fully;
- prior statement in writing;
- writing made when event fresh in memory;
- writing by witness/under witness' direction by third person;
- witness testifies statement true;
- writing authenticated as accurate record of statement.

Utah R. Evid. 803.

- Spontaneous Declarations

A statement is admissible if it describes an act, condition or event perceived by the declarant and was made while declarant was under the stress of the excitement caused by that perception. Utah R. Evid. 803(2).

#### **Hearsay Exceptions — Even Though Declarant is Available as a Witness**

- Business Records

*Objection, Your Honor. The exhibit has not been properly authenticated.*

*Objection, Your Honor. The exhibit is hearsay as it constitutes an out of court statement offered to prove the truth of the matter stated and no exception to the hearsay rule applies.*

*Response: Your Honor, these records meet the business records exception under Utah R. Evid. 803(6). They have met the foundational requirement of this exception because:*

- Made in the regular course of the business;
- Made at or near the time of the event;
- A qualified witness will testify to its identity and mode of preparation;
- The information sources and preparation method and time indicate trustworthiness.

Utah R. Evid. 805 provides:

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Hospital records are business records.

Police Reports:

The requirement of personal knowledge as a basis of a record is the chief barrier to the introduction of a police report of an accident. The report is a record of an act, condition or event but is often made by an officer who did not see the accident and includes both hearsay statements of others and opinions of the officer. If so, it is inadmissible.

However, officers who prepared a police report, if called as witnesses, are properly allowed to use the report to refresh their recollections on all matters of which they had knowledge and as to which the report would have been admissible.

- Vital Statistics

Birth certificates, death certificates, and marriage records are admissible hearsay if the maker is required to file the record in a public office, and the record was made and filed as required by law. Utah R. Evid. 803(9). See § 78-25-2, U.C.A. (1953)

A death certificate is prima facie evidence of the facts stated in it. Conclusory statements on the record, for example, statements

as to the cause of death, are admissible when the record is made in a jurisdiction in which such conclusions are among the required data to be inserted.

Public records are self-authenticating. Therefore, it is not necessary to lay a foundation regarding identity and mode of preparation.

- State of Mind

*Objection, Your Honor. That question calls for hearsay.*

*Response: Your Honor, this evidence fits under the Utah R. Evid. 803(3) exception to the hearsay rule in that it constitutes a statement of the declarant's then existing state of mind, emotion, or physical sensation and it is offered to prove the declarant's state of mind, emotion, or physical sensation as an issue in the case (or it is relevant to prove or explain acts of the declarant in conformity with such state of mind, emotion, or physical sensation).*

*Rejoinder: Your Honor, that exception does not apply because this is a statement of memory or belief offered to prove the fact remembered or believed.*

*Response: Your Honor, it is not a statement of the declarant's existing memory or belief concerning a past event but rather a statement of declarant's then existing state of mind, emotion, sensation, or physical sensation.*

*Rejoinder: Then, Your Honor, I move the court to instruct the jury that this testimony can be considered only as it reflects on the state of mind [etc.] of the declarant, and that it cannot be considered in any way to prove a fact supposedly remembered or believed.*

#### **Judicial Notice**

*Objection, Your Honor. The court cannot take judicial notice of the fact as requested by counsel because under Utah R. Evid. 201 a judicially noticed fact cannot "reasonably be the subject of dispute" in that it is either 1) common knowledge within the territorial jurisdiction of the court, or 2) is capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. The point raised by counsel doesn't meet with these criteria.*

A court may take judicial notice on its own motion. A party who requests judicial notice should supply the court with necessary information. The opposing party is entitled to be heard before the taking of judicial notice. Upon taking judicial notice, the court should instruct the jury to accept as conclusive any fact judicially noticed.

Utah R. Evid. 201.

#### Limited Purpose

When counsel has offered evidence and an evidentiary objection has been sustained, then try offering the evidence for a limited purpose other than the purpose which led to the objection.

*Your Honor, I would like to offer this evidence for the limited purpose of establishing \_\_\_\_\_.*

When evidence is inadmissible for one purpose but admissible for another purpose, the court can let it in "for a limited purpose". The court should state what the limited purpose is, and what the evidence cannot be considered for. The opponent of the evidence should request that the jury be instructed not to consider the evidence for X but to consider it only for Y.

#### Opinion (Expert)

General Rule: Must have special knowledge about the subject of his testimony and this subject must be sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. Utah R. Evid. 702. *State v. Rimmasch*, 775 P.2d 388 (Utah 1989). Compare *Daubert v. Merrill Dow*

*Pharmacy*, 113 S.Ct. 2786 (U.S. S.Ct. 1993).

#### Basis for Opinion Unreliable

*Objection, Your Honor. The witness is basing his opinion on improper matter. There has been no showing that matter on which the expert bases his opinion may reasonably be relied on. Utah R. Evid. 703.*

#### Assist Trier of Fact

*Objection, Your Honor. This is not a proper subject matter for expert testimony since the jury is equally competent to form an opinion.*

Utah R. Evid. 704. The ultimate test is whether the field of inquiry is "one of such common knowledge" that persons "of ordinary education could reach a conclusion as intelligently" as the expert witness.

#### Not Qualified as an Expert

*Objection, Your Honor. Insufficient foundation has been laid showing that the witness is qualified as an expert by special knowledge, skill, experience, training or education as required by Utah R. Evid. 702.*

Unmistakable trend in recent years has been towards liberalizing the rules relating to testimonial qualification of medical experts.

#### Relying on Inadmissible Data

*Objection, Your Honor. The witness is*

*relying upon inadmissible data. There has been no showing that experts in the field reasonably rely upon such data.*

The matter upon which the expert bases his opinion need not itself be admissible in evidence. Utah R. Evid. 703. The test is whether it is the type of matter that may reasonably be used by experts in forming an opinion on the subject to which the expert testimony relates. Utah R. Evid. 703.

Be on guard against the use of an expert simply as a conduit for getting hearsay before the jury. A hearing outside the jury's presence may be the safest way to determine whether inadmissible hearsay was necessarily part or all of the basis for the opinion. Move to strike the expert's testimony as soon as it is apparent the hearsay evidence is inadmissible.

#### Opinion (Lay Witness)

*Objection, Your Honor. The question calls for inadmissible opinion.*

Utah R. Evid. 701 limits the opinion testimony of a lay witness to such an opinion that is (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony. Personal

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knowledge is a prerequisite to any lay witness' competency. Utah R. Evid. 701. To be "perceived," the event must be observed with the witness' senses. Thus, a lay witness cannot express an opinion or draw an opinion that is partially based on hearsay.

#### **Personal Knowledge**

*Objection, Your Honor. There is no showing that this witness has personal knowledge of that matter as required by Utah R. Evid. 602.*

A witness can testify to an issue only if he has personal knowledge of the matter.

#### **Prior Inconsistent Statement**

Under Utah R. Evid. 613 it is not necessary to disclose to the witness any information concerning a prior inconsistent statement when the witness is being examined about such statement. However, there are circumstances where opposing counsel is entitled to the information.

#### **Privileges**

##### **Attorney-Client**

*Objection, Your Honor. The question calls for the disclosure of communication protected by the attorney-client privilege.*

Utah R. Evid. 504 protects from disclosure of information transmitted between a client and his lawyer within the course of that relationship and which, so far as the client is aware, discloses the information to no third persons other than those present to further the client's interest in the communication or reasonably necessary to do so. The client is the holder of the privilege but either client or lawyer can claim it on the client's behalf.

##### **Physician-Patient**

*Objection, Your Honor. The question calls for the disclosure of information protected by the physician-patient privilege.*

The patient is the holder of the privilege (Utah R. Evid. 506). Under the patient-litigant exception, there is no privilege as to communication relevant to an issue concerning the condition of the patient if such issue was tendered by the patient.

To lay a proper foundation, counsel must show:

- person to whom patient made communication was licensed medical practitioner;
- patient consulted physician for medical purposes;
- the communication made as part of physician-patient relationship.

##### **Marital Communications**

*Objection, Your Honor. The question calls for disclosure of information pro-*

*tected by the confidential marital communications privilege.*

The party asserting the privilege must show that:

- the spouses were legally married;
- communication in dispute was made between spouses during time of marriage;
- communication in dispute was made in confidence.

The proponent of the evidence has the burden of proving communication not made in confidence, or was waived, or falls under an exception.

#### **Remedial measures**

*Your Honor, may we approach the bench? . . . Your Honor, counsel is eliciting evidence about subsequent remedial measures, and subsequent remedial measures are inadmissible to prove negligence or culpability.*

Utah R. Evid. 407 provides that repair measures taken after an event (that is, measures that would have made the event less likely to occur) are not admissible to prove negligence or culpable conduct because without this provision defendants would tend to postpone making repairs. Subsequent remedial measures may, however, be admitted for a limited purpose such as impeachment (i.e., to show prior inconsistent acts or statements), ownership, control or feasibility.

#### **Summaries**

Utah R. Evid. 1006 provides that "the content of a writing is not made inadmissible by the Best Evidence Rule if the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time and the evidence sought from them is only the general result of the whole . . ." The court in its discretion may require that such accounts or other writings be produced for inspection.

#### **Videotapes**

*Authentication: Objection, Your Honor. This videotape has not been properly authenticated.*

*Relevancy: Objection, Your Honor. This videotape contains evidence that is not relevant.*

*Hearsay: Objection, Your Honor. This videotape contains inadmissible hearsay.*

Utah R. Evid. 403: *Your Honor, may we approach the bench? . . . Your Honor, under Utah R. Evid. 403 of the Evidence Code, the court should exclude evidence where its probative value is substantially outweighed by the danger of undue prejudice, confusion of issues, or misleading the jury. Counsel is offering a videotape that [describe prejudicial evidence]. The prejudicial effect of this videotape against my client would be great*

*and would outweigh the probative value of the evidence.*

*Unduly Inflammatory: Your Honor, may we approach the bench? . . . Your Honor, the videotape counsel is about to offer is unduly inflammatory and has no probative value at all, because [describe inflammatory nature].*

*Cumulative: Your Honor, may we approach the bench? . . . Your Honor, under Utah R. Evid. 403, the court should exclude evidence to avoid undue delay or needless presentation of cumulative evidence.*

#### **Computer Simulated Accident Reconstruction:**

To date no reported Utah case has ruled on the admissibility of computer simulation. Computer simulations will likely be treated like other scientific tests. The admissibility may depend on a showing that (1) the computer is functioning properly; (2) the input and underlying equations are sufficiently complete and accurate; and (3) the program is generally accepted in the scientific community.

#### **Writings**

Writings may be direct or circumstantial evidence of disputed fact. They may also be demonstrative evidence illustrating or explaining other evidence. Writings include motion pictures, videotapes, photographs, tape recordings, computerized records, artists' sketches, credit cards, graffiti. Generally, foundation requirements are authentication, i.e., the writing is what it purports to be. (Utah R. Evid. Art. IX).

With the court's permission counsel may use maps, charts, diagrams, graphs, etc. that have not been received in evidence in examining a witness to illustrate testimony in closing argument to the jury subject to the court's discretion.

(Practice pointer: Before spending large sums on trial exhibits, meet and confer with counsel and the trial judge to ascertain their attitude toward use of the contemplated exhibits.)

#### **CONCLUSION**

For an excellent review of the Utah Rules of Evidence, see Utah Rules of Evidence 1983 - 1985 Utah Law Review 63; Utah Rules of Evidence 1983 - Part II, 1987 Utah Law Review 467. Part III of the Utah Rules of Evidence 1983 will be published in the fall of 1995. (Articles written by Professor Ronald N. Boyce and Professor Edward L. Kimball.)