A Student's Guide to TRIAL OBJECTIONS

Charles B. Gibbons

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firmly attached to the bottom. Since then, of course, it has been all fair winds and following seas.

CHARLES B. GIBBONS

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INTRODUCTION

According to the Oxford English Dictionary, a tertiary definition of the word "trot", when used as a noun, is "a literal translation of a text used by students; a crib." As one who, back in the mists of time, passed through a Jesuit prep school allegedly reading classics, a trot was an indispensable little friend secreted in the back of our Greek and Latin texts that helped us survive the oral recitation of Xenophon, Homer and Cicero without incurring imprecation or penal servitude at the hands of our instructors.

Fortunately, the mnemonic rigor of the classicist is not indispensable to the practice of law for as the English Court said in Montriou and Jeffreys, 2 C&P 113 (1825): "No attorney is bound to know all the law; God forbid that it should be imagined that an attorney or a counsel, or even a judge is bound to know all the law."

On a substantive level, the modest ambition of this book is simply to be a "trot", a quick reference to the various ways in which the courts have translated the text of the Federal Rules of Evidence, hopefully with sufficient case authority to survive or overcome a particular objection.

Since the exclusive focus of this book is objections made at trial, I have deliberately excluded specific treatment of expert witnesses. My own experience, confirmed by discussions with my peers and a review of the cases, is that objections to expert testimony are largely dealt with in pretrial in the context of a separate *Daubert-Kumho* hearing. While I, in no way, minimize the critical nature of this body of law, *in limine* practice is the subject of another day and another book. *See, e.g.* Faigman, Kaye, Saks and Sanders, Modern Scientific Evidence, The Law and Science of Expert Testimony (West Group 1999).

As a matter of good practice, the law student who wishes to master the art of objections would do well to heed the following suggestions set forth by Judge D. Brooks Smith of the Untied States Court of Appeals for the Third Circuit[1]:

- Fed.R.Evid. 103 requires that every objection be made on a timely basis. When a question is improper, objection must be made before the

1. The Art and Etiquette of Stating Objections, Pennsylvania Lawyer, May, 1994.

answer is given. But the objection should be stated only when the question has been completed.

- When evidence is objectionable, be specific in stating the Rule and grounds why it should be excluded.
- Where an answer to a question is improper, couple the objection with a motion to strike.
- Address the court when making objections and responding to them. Objections and responses are not the occasion for a debate with your opponent.
- Avoid the indignant objection and do not argue a ruling that has gone against you.

With respect to making objections, and everything else that happens in the courtroom, as Yogi Berra once said, "90% of the game is half mental."

ABOUT THE AUTHOR

Charles B. Gibbons is a senior litigation partner at Klett Rooney Lieber & Schorling, Pittsburgh, Pennsylvania. A graduate of the Scranton Preparatory School, the University of Scranton and Boston College Law School, he is a member of the American Law Institute and Adjunct Professor of Law at the University of Pittsburgh School of Law, Gismondi Civil Litigation Certificate Program.

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ARGUMENTATIVE

See: Fed.R.Evid. 611(a)

Objection

- Objection. The question is argumentative.
- Objection. Counsel is arguing with the witness.

Response

- I have properly phrased my question to elicit evidence from this witness.

Commentary

Fed.R.Evid. 611(a) provides that the court shall exercise reasonable control over the mode of interrogating witnesses. Any question which is actually an argument is improper. Argumentative questions are those questions which are not intended to elicit new information but which are intended to argue to the jury through the witness, or which call for an argument in answer to an argument contained in the question. Typically, such a question states a conclusion and asks the witness to agree with it, or is asked in a sarcastic tenor:

"Do you mean to tell me . . ." or "Doesn't it seem strange that . . ."

The impropriety of such questions is illustrated in: *Smith v. Estelle*, 602 F.2d 694, 700 n.7 (5th Cir. 1979)("[Y]ou're kind of the hatchet man down here for the District Attorney's Office, aren't you?"); *U.S. v. Micklus*, 581 F.2d 612, 617 n.3 (7th Cir. 1978)("It wouldn't bother you any, to come in here and lie from the time you started to the time you stopped, would it?"); *U.S. v. Briscoe*, 839 F.Supp. 36, 39 (D.D.C. 1992)("Isn't what you told this jury on its face ridiculous?").

ASKED AND ANSWERED

See: Fed.R.Evid. 611(a)

Objection

- Objection. The question has been asked and answered.
- Objection. The question is repetitive.

Response

- The witness has not answered this question.
- I have not asked this question previously.

Commentary

If a question has been asked and answered, the trial court has broad discretion to limit or exclude repetitive questions. Fed. R.Evid. 611(a); *U.S. v. Perez–Montanez*, 202 F.3d 434 (1st Cir. 2000); *Price v. Kramer*, 200 F.3d 1237 (9th Cir. 2000); *U.S. v. Laboy–Delgado*, 84 F.3d 22 (1st Cir. 1996). Repetition wastes time and places undue emphasis on certain evidence through cumulative testimony. The form of the question does not have to be absolutely identical in order to raise this objection. If a new question calls for an answer which has essentially already been given, the question is objectionable as repetitious. The objection applies not only when an answer already has been given but also when a witness previously has testified that he does not know about or remember a matter.

ASSUMING FACTS NOT IN EVIDENCE

See: Fed.R.Evid. 611(a)

Objection

- Objection. The question assumes facts that have not been introduced into evidence.

Response

- The question is proper cross-examination; I am entitled to test the credibility or memory of the witness. The witness can deny the asserted facts if he disagrees with the assertion.
- Your Honor, I will establish the fact [and its relevancy] in subsequent testimony. I request that the witness assume the fact for purposes of this question.

Commentary

A question which assumes the existence of a fact not established by the evidence is improper. *U.S. v. Adames*, 56 F.3d 737 (7th Cir. 1995)(questions about alleged involvement in murder properly excluded when counsel failed to provide good faith basis for them); *U.S. v. Davenport*, 753 F.2d 1460 (9th Cir. 1985)(new trial ordered where government failed to establish factual predicate for question about planning other bank robberies); *U.S. v. Harris*, 542 F.2d 1283 (7th Cir. 1976)(improper for government to ask question that implies factual predicate which examiner knows he cannot support by evidence or which he has no reason to believe is true); *Braun v. Powell*, 77 F.Supp.2d 973, 1005 (E.D. Wis. 1999), *rev'd on other grounds*, 227 F.3d 908 (7th Cir. 2000)(improper to ask witnesses questions of the "when did you stop beating your wife?" variety). In certain situations, counsel may ask the court to permit the question to stand as asked, upon representation that the assumed fact will be proven later. Such a representation, however, should not be made if it cannot be fulfilled.

With respect to examination of witnesses, A.B.A. Standards for Criminal Justice (3d ed. 1992), The Prosecution Function, § 3–5.7(d), provides:

> A prosecutor should not ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.

The Defense Function, § 4–7.6(d), is identically worded. *See* 6 J. Wigmore, Evidence § 1808, at 371 (J. Chadbourn rev. ed. 1976)("When a counsel puts such a question, believing that it will be excluded for illegality or will be negatived, and also