Mark Mulholland / Photo by Bob Giglione

LI attorneys on the art of making objections

By: Bernadette Starzee November 12, 2014 Comments Off

"Objection, your honor!"

It's a line that fans of shows like "Law & Order" and "Boston Legal" have heard hundreds of times. But while TV lawyers make objections look easy, it's not so simple when there's no script or retakes.

"Young lawyers especially fear the use of objections," said Jeffrey Kimmel, a partner at Salenger, Sack, Kimmel & Bavaro in Woodbury. "You have to object in real time, and since you don't know in advance what your adversary is going to say, you don't know if it will be objectionable. You have to decide on your feet the reason for objecting, whether you should object and if you will sound silly."

To help attorneys choose their battles wisely, the Nassau County Bar Association offered a continuing legal education course entitled "Objections! When and How to Make Them" in October. It was attended by about 70 attorneys across many practice areas.

While it's true there's no script in real-life court, it is possible to prepare in advance of a trial for instances that may arise and warrant an objection.

Attorneys should prepare by reviewing the rules of evidence before every trial, said Mark Mulholland, managing partner and senior member of the litigation department at Ruskin Moscou Faltischek in Uniondale. Further, with the disclosure process, both sides generally know what their adversaries will present and what their witnesses will testify to.

"You should know what the potential objections will be before you even walk into the courtroom," said Patrick McCormick, partner and head of the commercial litigation and appellate practice groups at Ronkonkoma-based Campolo, Middleton & McCormick.

As the trial progresses, or from trial to trial, "you get a sense of your adversary and how he asks questions and what he's trying to accomplish," McCormick said. "Most experienced lawyers know whether they're going to object and what the objection will be based on before their adversary is halfway through with a question."

Mulholland finds that inexperienced attorneys typically fall into two camps: those that are uncertain about the rules

and therefore timid to stand up and object, and those that are what he called "spring-butts" – lawyers who jump to their feet for hyper-technical reasons.

The latter group runs the risk of coming across as inexperienced, naïve and/or obstructionist, he said.

"I think the most important thing to learn is just because you can make an objection doesn't mean you should," McCormick said.

There are certain objections attorneys must make in order to protect the record in case of potential appeal for BLC bankruptcy attorney san diego. But by making too many objections, an attorney can give the jury the impression he is trying to hide something, Cormick said.

Occasionally, making repeated objections may allow an attorney to gain momentum.

"Your adversary may run into trouble – he may be blocked in his attempt to put a piece of evidence in, and he may try a different approach to get the same evidence in," Mulholland said. "A seasoned lawyer can seize upon the opportunity to object again; if the judge agrees and blocks the evidence a second time, the lawyer is effectively building momentum."

In this scenario, Mulholland likened repeated sustained objections to a flurry of punches thrown late in a heavyweight boxing match.

"You can start to pummel your adversary whenever he goes back to the well again to try to get the evidence in," he said. "The jury will begin to see that the judge and you are aligned, and that's a terrific thing. Imagine in your mind's eye, by the fifth or sixth round, jury members cocking their heads, with their arms folded across their chests, wondering, 'why is the [adversary] wasting our time with this?'"

Hearsay is the most frequently cited rule of evidence in the courtroom, Mulholland said, noting it goes against the very heart of the trial process, which centers around cross-examination as a means by which a witness' credibility is tested. In the case of hearsay evidence, the speaker is not in the courtroom, so he cannot be cross-examined.

Other common objections are "relevance" and "asked and answered," said Kimmel, noting the latter can stop an adversary from repeating a point that is helpful to his side.

Another classic objection is to an adversary assuming a fact that is not in evidence, such as asking a witness, "When did you stop beating your wife?" when it has not been established that the witness has been beating his wife, Kimmel said.

Attorneys also frequently object when their adversary leads the witness. When addressing their own witness, attorneys cannot suggest an answer, Kimmel said. For instance, rather than "The light was red, wasn't it?" the question should be, "What color was the light?"

One objection that's frequently upheld is absence of a foundation, Mulholland said.

"Lawyers need to understand the technical rules required to build a foundation for different types of evidence," he said, noting, for instance, the background information needed to introduce a telephone call is different from that needed for an email. "Inexperienced lawyers are tripped up by their inability to lay foundation, and if you come ill-prepared to do so, your adversary is going to jump up and object, and the judge will agree."

Mulholland has seen judges help a young lawyer lay the foundation, but whether the judge will be willing to do so is a matter of speculation.

"It's not a good approach to go into court planning to have the judge help you get your evidence in," he said.

One of Mulholland's favorite reasons to object is for evidence that's misleading.

"This is one that can gain the judge's attention," he said. "I have had substantial success persuading the court that something my adversary was trying to present would mislead or create confusion." He said judges are very protective of juries and the jury process, noting, "If you can make a compelling argument that a piece of evidence creates a specter of confusion or may be misinterpreted, you can dramatically increase your chances of success in keeping the evidence out."

Young lawyers must keep in mind that judges are people too.

"If you have 10 judges listening to the same question, five may say 'Sustained' and five may say 'Overruled,'" Kimmel said, noting the importance of getting to know individual judges and how they have ruled in the past. A judge who is familiar with one lawyer's style may give that attorney more leeway than one he hasn't seen before,

he added.

"Many objections can go either way, and I tell young lawyers not to take them personally," he said. "If you're overruled, you have to persevere and get past it."

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