

Kenya School of Law

ADVOCATES TRAINING PROGRAM

2015-16 ACADEMIC YEAR

Trial Advocacy

OBJECTIONS

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OUTLINE

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Statutory basis

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Forms of Objection

Objection-Defn.

Steve Lubet, “Modern Trial Advocacy”

“Means by which evidentiary disputes are raised and resolved”

Can be to:

- ❖ Attorney’s questions
- ❖ Witness’ testimony
- ❖ Introduction and use of exhibits
- ❖ Lawyer’s demeanour/ behaviour
- ❖ Conduct of judge

Statutory basis-Civil

Civil Procedure Act Cap. 21

Sec.16. No objection as to the place of suing shall be allowed on appeal unless such objection was taken in the court of first instance and there has been a consequent failure of justice.

Rules

Order 18 Rule 6. Where any question put to a witness is objected to by a party or his advocate, and the court allows the same to be put, the judge shall take down the question, the answer, the objection, and the name of the person making it.

Order 51 Rule 14. (1) Any respondent who wishes to oppose any application may file t any one or a combination of the following documents -

- (a) a notice preliminary objection: and/or;
- (b) replying affidavit; and/or
- (c) a statement of grounds of opposition;

Objections-Civil

Possible grounds:

Res Judicata

Sec 7 Cap. 21: *“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.*

Statutory basis-Criminal

Criminal Procedure Code, Cap. 75

Defectiveness of charge-(Sec.134-137)-Failure to disclose offence; failure to provide particulars; duplicity.

Autrefois acquit or convict -Sec.138

Constitution -Art. 50 -Lack of detail in charge; failure by prosecution to provide evidence wish to rely on in advance; offence not being a crime at time was committed;_Autrefois acquit or convict

Purpose and Function

At Trial: To prevent introduction or consideration of inadmissible information.

Can be to: Questions, answers, exhibits.

Can be to a leading question on examination in chief; compound questions, vague questions, argumentative questions.

Inadmissible evidence: Hearsay; irrelevant information, speculation.

Conduct: Intimidation of witness.

Before trial

Motion *in limine*.

Based on rules of evidence. Object to introduction of the evidence in trial.

If granted, will exclude all reference to such evidence.

See: *900 page affidavit in Kenya Supreme Court Petition No. 5 of 2013*

Court may rule that only a portion of the evidence will be excluded.

Decision to Object

May have to be made on split –second basis.

Need to have been paying attention

Steps

1. Recognise the objectionability
2. Formulate the objection
3. Evaluate tactfully if its worth objecting

Reasons not to Object

Judge's reaction: Impact of being overruled.

Opponent's reaction: May in turn choose to make your examination difficult by equally objecting.

Objection must be based on theory of your case (e.g. my client was not there). Ask: Does excluding the evidence advance my theory of the case?

Accommodating Harmful evidence: May do so because you'll have an explanation

Eventual admission: The evidence may eventually get in through another witness or means.

Planning for Objection

Do it as would plan for a cross examination.

Think of possible objections to witness, exhibits, documents-Your own and your opponent's.

Making the Objection

Stand, state the grounds for objecting

Speaking objections-Are longer; lay a basis .May be a paragraph long.

Repeating objections: Ask yourself whether they have repeatedly been overruled or upheld.

Timing: Will it be interruptive of a question that is not complete?

Should not be too early or too late.

Make it as soon as the intended answer is apparent.

Responding to the Objection

Most times judge will rule without hearing from opposing counsel.

Judge may invite the counsel to respond and

- i. May call for substantive arguments on the point.
- ii. May call for a specific response.
- iii. May rule that there will be limited admissibility
- iv. May conditionally admit evidence based on offer by advocate to avail a witness or explanation.

NB: Watch out for non-responsiveness by the trier of fact.

Arguing the Objection

Can raise it from the bar.

Can request to raise it *in camera*.

Let the objector raise it, listen if judge will ask the other to respond.

Avoid a two way argument between counsels that excludes the judge. Address the objection to the court.

Deliver it with conviction.

Ensure there is a ruling on it, so that have it on record in case of appeal.

Once ruling is made

For the one objected to:

Realise that is not the end; there is still a trial going on.

Remain alert.

Ensure the question is answered., especially if objection led to an interruption.

Ensure to get the evidence across.

For the objector:

Remain alert.

Continue to scrutinize the testimony

If objection sustained

Offer proof of what was objected to by:

- i. Continuing with testimony.
- ii. Providing a summary from the bar.
- iii. Submitting exhibits, statements, documents or reports.

Keep trying to get evidence in.

If were objector, don't relax in the victory.

ETHICS

Refrain from objecting to every objectionable question or answer.

Do not offer evidence that has no basis for admission.

Do not substitute testimony that can't be obtained with questions that lead to objections.

Be truly interested in excluding the evidence.

Do not object just to throw witness "off balance" or interrupt flow.

Common Objections-Form

1. Leading questions
2. Compound questions
3. Vague questions
4. Argumentative questions.
5. Narratives
6. Question already answered
7. Assuming facts not in evidence
8. Non-responsive answers

Common Objections-Substantive

- Hearsay
- Relevance
- Unfair prejudice
- Improper character-general
- Improper character-conviction
- Improper character-untruthfulness
- Improper character-reputation
- Improper character-knowledge
- Improper lay opinion
- Speculation or conjecture
- Authenticity
- Lack of a foundation
- Best evidence-explain lack of original
- Privilege
- Liability insurance
- Subsequent remedial measures
- Settlement offers

Other Important points- Presentation

(Prof. Goodno)

- Be organised
- Focus on relevant matters.
- Good delivery.
- Passion for the case

Communication techniques

(Adopted from NITA method).

Use appropriate communication techniques of

- language and vocabulary,
- demeanor,
- eye-contact,
- voice projection,
- pace, cadence and silence,
- facial expressions,
- posture and
- avoidance of distracting gestures and verbal habits.

Q and A

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