

TRIAL OBJECTIONS: THE WAY OF ADVOCACY

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I. INTRODUCTION

In 1645, arguably the world’s greatest strategist and samurai warrior, Miyamoto Musashi, died shortly after completing the influential work on swordsmanship; *The Book Of Five Rings*.² Today, Musashi’s work is known more for its enlightened path to understanding, and ultimately a path to wisdom, than for swordsmanship. Musashi did not seek ultimate wisdom, however, but a *way* to understanding—a search for enlightenment. The path to wisdom, according to Musashi, is through a process of becoming; a *way* of being.³ Today, trial lawyers can find this path through the process of lifelong learning because with humility we can each learn to become better at what we do—practicing the art of trial advocacy.⁴

Although the *way* to enlightenment in trial advocacy can be applied in many contexts, it is probably most applicable to the art of making trial objections. It has been said that “[i]f you go into any courtroom and watch a trial in progress, you probably will be struck by a disconcerting observation – most trial lawyers seem to make drawn out and poorly worded objections.”⁵ These deficiencies range from making poorly worded and drawn out trial objections (i.e. speaking objections) to making ill-advised or untimely trial objections, and failing to make well grounded trial objec-

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² MIYAMOTO MUSASHI, *THE BOOK OF FIVE RINGS* xv (Thomas Cleary trans. Shambhala Publications, Inc.) (1993).

³ DAVID BARNHIZER, *THE WARRIOR LAWYER: ENHANCE YOUR CHANCES FOR VICTORY THROUGH RISK AND DISCIPLINED STRATEGY* 16 (Bridge Street Books) (1997).

⁴ *Id.* at VIII.

⁵ J. ALEXANDER TANFORD, *THE TRIAL PROCESS: LAW, TACTICS AND ETHICS* 180 (Lexis/Nexis 3rd ed.) (2002).

tions.⁶ The solution to this perceived problem is through the *way* of trial advocacy - the process of becoming a better trial lawyer through the search for understanding, and ultimate wisdom, in the art of advocacy.

Trial lawyers can find this *way* by understanding the purpose of trial objections, the procedure for making trial objections, and the preparation necessary to make proper trial objections (i.e., knowing the “evidence of your case”). The following path to understanding is a fundamental aspect of being a good trial lawyer. Indeed it is the essence of the art of advocacy. Now, please join me in this process of becoming—a *way* of being.

II. THE PURPOSE OF TRIAL OBJECTIONS

The common law purpose of trial objections is codified in Federal Rule of Evidence 103. The basic premise behind the common law, and Rule 103, is the exclusion of inadmissible evidence at trial.⁷ Hence, Rule 103 requires that an advocate make “timely” and “specific” trial objections in order to predicate error on a court’s evidentiary ruling regarding the admission of evidence at trial.⁸ Although the underlying basis for making any trial objection is found in Rule 103, all trial objections must be made in consideration of the other evidentiary rules that are applicable to the evidence of your case.⁹ For instance, Rule 611(a) governs the mode and manner of interrogation and presentation at trial while Rules 401-03 govern the issue of evidentiary relevance. Likewise, Rules 801-07 govern hearsay evidence. Accordingly, the overall purpose of any trial objection is to invoke the applicable rules of evidence to preclude inadmissible evidence from being presented to the jury.

In this context, all trial objections can be categorized as either “content” or “form” objections.¹⁰ Content trial objections pertain to substantive evidence (e.g., calls for hearsay, speculation, or irrelevant evidence) whereas form trial objections deal with non-substantive issues.¹¹ That is, content trial objections seek to invoke the applicable rules of evidence to exclude either the witness’s anticipated answer (i.e., testimonial evidence) or the introduction of an exhibit (i.e., real, demonstrative or documentary evidence) at trial.¹² Form trial objections, on the other hand, pertain to

⁶ *Id.*; MICHAEL H. GRAHAM & EDWARD D. OHLBAUM, COURTROOM EVIDENCE, A TEACHING COMMENTARY 21 (Nat’l Inst. for Trial Advocacy) (1997).

⁷ STEVEN LUBET, MODERN TRIAL ADVOCACY, ANALYSIS AND PRACTICE 260 (Nat’l Inst. for Trial Advocacy 3rd ed.) (2004).

⁸ FED. R. EVID. 103(a)(1); J. ALEXANDER TANFORD, THE TRIAL PROCESS: LAW, TACTICS AND ETHICS 180-82 (Matthew Bender & Co. 3rd ed.) (2002).

⁹ GRAHAM & OHLBAUM, *supra* note 6, at 19.

¹⁰ STEVEN LUBET & JILL TRUMBILL-HARRIS, MOCK TRIALS, PREPARING, PRESENTING, AND WINNING YOUR CASE 9, 167 (Nat’l Inst. for Trial Advocacy) (2001).

¹¹ *Id.* at 167-168.

¹² *Id.*

anything other than the substantive evidence.¹³ In particular, form trial objections are intended to remedy the manner in which the advocate is asking questions (e.g., leading, argumentative) or the manner in which the witness is responding (e.g., narrative).¹⁴ As you can see, content trial objections address the evidence itself whereas form trial objections address the manner in which the advocate seeks to introduce evidence.

Ultimately, Rule 103 vests the responsibility for invoking the applicable rules of evidence with the advocates.¹⁵ Although trial judges have the power to decide evidentiary disputes, they rely on the advocates to identify and raise these disputes through the use of trial objections.¹⁶ As with the rules of evidence in general, this rule is intended to expedite the overall trial process by placing responsibility for invoking the rules of evidence, in the spirit of excluding inadmissible evidence at trial, with those who are in the best position to identify meritorious evidentiary disputes - the advocates, of course.¹⁷ Accordingly, the first path to understanding is recognizing that it is your responsibility and obligation, as trial lawyers, to understand this purpose.

III. PROCEDURE: MAKING & RESPONDING TO TRIAL OBJECTIONS

As a threshold matter, the fundamental mechanics of making any trial objection are precipitated by the requirement in Rule 103 that all trial objections be “timely” and “specific.” Timeliness requires that you first listen to the proponent’s question, identify and make the proper trial objection, without waiting for the inadmissible evidence being presented to the jury.¹⁸ Specificity requires that the opponent identify the exact question or answer that is objectionable, identify the applicable rule of evidence, if not readily apparent from the respective context, and explain why the trial objection is well-founded, if necessary.¹⁹

The exact process of invoking the rules of evidence require that the opponent of the evidence first stand up and simply state “objection, your honor!”²⁰ Hopefully, you can accomplish this task without inconsiderately interrupting your opponent while at the same time preventing the witness from answering the objectionable question and thus, exposing the jury to

¹³ *Id.*

¹⁴ LUBET & TRUMBILL-HARRIS, *supra* note 10, at 167-68, 188-98; LUBET, *supra* note 7, at 297-306 (presenting good examples and explanations of both form and content trial objections).

¹⁵ LUBET & TRUMBILL-HARRIS, *supra* note 10, at 167.

¹⁶ *Id.* at 167-68.

¹⁷ GRAHAM & OHLBAUM, *supra* note 6, at 20; LUBET & TRUMBILL-HARRIS, *supra* note 10, at 167-68.

¹⁸ TANFORD *supra* note 5, 180-82 (2002); Lubet, *supra* note 7, at 273.

¹⁹ TANFORD *supra* note 5, at 180-82.16.

²⁰ *Id.* at 182-84; LUBET & TRUMBILL-HARRIS, *supra* note 10, at 170-72.

potentially inadmissible evidence. If the exact rule of evidence is not readily apparent from the context of the proponent's question, then you should identify the applicable rule of evidence governing the trial objection.²¹ If asked, or prompted, by the trial court, the advocate should succinctly explain why the trial objection is well-founded.²² At this point, the trial court will either rule on the trial objection or require the proponent to respond to the trial objection.²³ The advocate should politely listen to the proponent's response without interruption while remaining erect, ready to respond in kind, if the trial court wishes.²⁴

Upon ruling on the merit of the trial objection, the advocate should accept the finality of the trial court's decision without argument.²⁵ In rare situations, the advocate may need to request a court ruling on the trial objection because the advocate cannot predicate error on an evidentiary issue if there is no court ruling on the trial objection.²⁶ Further, if the opponent merely states "objection" without identifying the specific rule, and the trial court sustains the objection, the proponent of the evidence should simply request (from the trial court) that the opponent specify the grounds for the trial objection.²⁷ Otherwise, the record is unclear as to what objection the Court has sustained.

During this process, the advocates should direct their arguments to the trial judge at all times and never address their opponent in person.²⁸ If necessary, to preclude inadmissible evidence from being presented to the jury through argument, the advocates should request permission to approach the trial court at "sidebar" to make their arguments.²⁹ Finally, when faced with a trial objection, the proponent of the evidence may choose to either withdraw or rephrase the question, or wait for the trial court to either rule or prompt a reply, and then succinctly reply as to why your opponent's trial objection is without merit.³⁰ Experienced judgment will dictate which of these options you chose to adopt in any given situation.

So, when should trial lawyers assert an objection and when is it advisable to show restraint even though a valid trial objection could be sus-

²¹ TANFORD *supra* note 5, at 182-84; LUBET & TRUMBILL-HARRIS, *supra* note 10, at 170-72.

²² TANFORD *supra* note 5, at 182-84; LUBET & TRUMBILL-HARRIS, *supra* note 10, at 170-72.

²³ LUBET & TRUMBILL-HARRIS, *supra* note 10, at 171.

²⁴ TANFORD *supra* note 5, at 182-84; LUBET & TRUMBILL-HARRIS, *supra* note 10, at 170-72.

²⁵ TANFORD *supra* note 5, 182-84; LUBET & TRUMBILL-HARRIS, *supra* note 10, at 170-72.

²⁶ TANFORD *supra* note 5, at 184.

²⁷ *Id.* at 191-92.

²⁸ LUBET, *supra* note 7, at 283; LUBET & TRUMBILL-HARRIS, *supra* note 10, at 169.

²⁹ LUBET & TRUMBILL-HARRIS, *supra* note 10, at 170.

³⁰ TANFORD *supra* note 5, at 191-92; LUBET & TRUMBILL-HARRIS, *supra* note 10, at 176-80.

tained? The appropriate strategy in any given situation is found in experienced judgment but a few general rules are helpful in establishing guidelines. First, when should you object? The most common situation is when your opponent attempts to introduce certainly inadmissible evidence, or engages in inappropriate conduct.³¹ Should you assert a trial objection? Not necessarily, because further analysis is necessary. Is the evidence detrimental to your theory of the case? If so, you should assert a trial objection. If not, however, discretion dictates that you consider not asserting a trial objection. In other words, experienced judgment dictates that you only assert trial objections when both a valid trial objection can be asserted and should be asserted.

When should you otherwise not assert a trial objection even though a valid objection could be made? In certain situations, the valid trial objection may only emphasize harmful evidence that is otherwise deemed admissible, or if successful, would only lead to jury speculation that could be more detrimental.³² In any given situation, trial lawyers must make a quick cost-benefit analysis keeping in mind your specific theory of the case. Knowing when, and when not, to assert a trial objection builds your credibility by giving up frivolous or pointless trial objections.³³

All of this begs the question, of course, of the ethics of making trial objections. Needless to say, advocates should not deliberately ask objectionable questions.³⁴ For example, it is unethical to attempt to introduce evidence that you know is inadmissible (i.e., you have no reasonable basis for the evidence) under the rules of evidence.³⁵ Similarly, it is unethical to attempt to incorporate known inadmissible facts in a question itself in order to bypass exclusion upon a certain objection by your opponent.³⁶ Likewise, it is improper to assert a trial objection when there is no valid basis for making the objection or to simply make “tactical” trial objections for the purpose of slowing down your opponent’s momentum or to protect the witness.³⁷ Although some commentators justify making tactical trial objections when they are based on valid form or content criteria, the fact remains that if your primary motivation in making the trial objection is tactical, as opposed to the legal basis of precluding inadmissible evidence, prudence and ethical standards are implicated.³⁸

³¹ TANFORD *supra* note 5, at 184-87; LUBET, *supra* note 7, at 263-69; LUBET & TRUMBILL-HARRIS, *supra* note 10, at 168-69.

³² *Id.*

³³ *Id.*

³⁴ TANFORD *supra* note 5, at 187-89; LUBET, *supra* note 7, at 296-97; LUBET & TRUMBILL-HARRIS, *supra* note 10, at 186-88.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ TANFORD *supra* note 5, at 187; LUBET, *supra* note 7, at 296-97; LUBET & TRUMBILL-HARRIS, *supra* note 10, at 188.

IV. PREPARATION - THE EVIDENCE OF YOUR CASE

The key to making and responding successfully to trial objections is through the “evidence of your case.” Preparing the evidence of your case is a continuous process throughout both the pretrial and trial of your case. Pretrial litigation will develop the evidence of your case and the court’s rulings on trial objections will alter the evidence of your case. Accordingly, case preparation is a continuous process until the jury renders a verdict and experienced judgment dictates that you reevaluate your theory of the case depending on the trial court’s rulings and exclusion of any essential evidence of your case.

Initially, you should read and outline any case.³⁹ Seek to understand the applicable law.⁴⁰ Identify the necessary witnesses for both sides of the dispute. Identify both the “good” and “bad” facts for each witness keeping in mind that the adversary system is designed for the ascertainment of the truth, not the creation of facts that only favor your side.⁴¹ Once you have preliminarily identified the facts, determine the potential admissibility of these facts.⁴² Finally, prepare a summary of the case (i.e., a factual summary) using only the admissible facts.⁴³ Pretrial litigation plans are a useful tool in accomplishing these tasks.

A case summary, however, is only the initial stage of any trial preparation. Next, you should analyze the case summary and devise a “story” of events keeping in mind both sides of the dispute.⁴⁴ A story is different from the case summary because it is organized into a comprehensible recitation of the facts that can easily be told, or explained, to another person in contrast to a mere recitation of the facts.⁴⁵ With this story in mind, you should next develop a specific case theory and theme for the jury.⁴⁶ A theory is the adaptation of your story to the legal issues in the case whereas the theme is the moral justification for your verdict.⁴⁷

Now, you are prepared to plan both the direct and cross examinations of your witnesses as well as your opponents’ witnesses.⁴⁸ As you do this, recall the potential admissibility of evidence supporting both sides of the dispute. This ultimate work product is the “evidence of your case” and is what you will use to plan all trial objections and responses. You see, trial lawyers do not need to know all the evidentiary rules, only the ones

³⁹ LUBET & TRUMBILL-HARRIS, *supra* note 10, at 14-23.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

that potentially apply to your case. It may be too much to ask a lawyer to know every potential rule in the evidentiary code but it is certainly demanded that you know the evidentiary rules that potentially apply to your case. The difference is that through case preparation, as outlined above, enables trial lawyers to learn the evidence of the case. The purpose of trial objections is to invoke the rules of evidence as *applied* to your case. Case preparation enables you to learn the evidence of the case and how the evidentiary rules apply to your theory of the case. Hence, master the rules of evidence as they apply to your case and you will be better prepared to assert and respond to trial objections.

How does this enable the trial lawyer to make better trial objections? Through rapid cognitive recognition and increasing the “moment of recognition.” In Malcolm Gladwell’s *Blink, The Power Of Thinking Without Thinking*, Gladwell explores how “thin-slicing” enhances rapid cognitive recognition ability.⁴⁹ Quite simply, “thin-slicing” of information enables you to make “sophisticated judgment(s)” quickly through unconscious analysis of any given situation that is both automated and accelerated.⁵⁰ For example, Gladwell identifies John Hinckley’s attempted assassination of President Reagan as a failure in rapid cognitive recognition.⁵¹ More specifically, Gladwell describes how the United States Secret Service failed to recognize the threat Hinckley posed to President Reagan until after Hinckley shot several people including Reagan.⁵² In other words, the moment the Secret Service recognized the threat (i.e., “the moment of recognition”) was too late to prevent the undesirable event from occurring.⁵³

In the context of trial advocacy, the moment of recognition is the moment the advocate recognizes the potential trial objection. Thin-slicing, as applied to this context, can enable trial lawyers to increase their moment of recognition and thus, make proper trial objections in a timely manner to preclude potentially inadmissible evidence from being presented to the jury. Keep in mind that trial lawyers must 1) listen to the question, 2) recognize the potential trial objection, 3) decide whether to make the trial objection, and 4) actually make the trial objection in a timely manner in a matter of a few seconds to prevent potentially damaging, and inadmissible evidence, from being exposed to the jury. After all, the common law purpose of trial objections, as codified in the rules of evidence, is to keep inadmissible evidence out of the trial.

Thin-slicing can help in this process by slicing through the mounds of irrelevant data to the critical data in the trial lawyer’s decision making

⁴⁹ MALCOLM GLADWELL, *BLINK, THE POWER OF THINKING WITHOUT THINKING* 23 (Little, Brown) (2005).

⁵⁰ *Id.* at 231.

⁵¹ *Id.*

⁵² *Id.*

⁵³ GLADWELL, *supra* note 49, at 231.

process. As a threshold matter, remember that the evidence of your case is the only important data for consideration. The next step is focused listening. Pay strict attention to the questions being asked keeping in mind the distinction between form and content trial objections. In time, experience will teach you to readily identify proper form objections. However, focused attention on the question in light of the evidence of your case will enable you to promptly identify both form and content trial objections. The decision making process is simplified and enhanced by simply decreasing the timing between the inappropriate question that potentially leads to inadmissible evidence being introduced to the jury and the making of a trial objection by enhancing the trial advocate's moment of recognition.

V. CONCLUSION

As you see, the *way* to trial advocacy is through experienced judgment and wisdom. Although Musashi's work itself is not a book of wisdom, it is a path or guide to understanding that ultimately leads to wisdom. In the context of trial advocacy, this process entails understanding the purpose of trial objections, the procedure for making and responding to trial objections, and the preparation of the evidence of your case. However, even the acquisition of this understanding and skill itself does not lead the trial lawyer to the enlightenment Musashi sought because knowledge itself is not wisdom. Knowledge combined with trial skill is not wisdom. Rather, enlightened wisdom can be attained only through the compliment of this knowledge and skill with actual trial experience which results in experienced judgment.

In the context of trial advocacy, enlightened wisdom is attained only through experienced judgment. When does one attain this wisdom - if ever? Did Musashi attain this wisdom in 1645 upon the completion of *The Book Of Five Rings*? Frankly, I think the important point is not that wisdom is attained, but rather Musashi's focus is that the *way* to enlightenment is a process of becoming - a *way* of.⁵⁴ Ah, have we not all heard the saying that "*life is a journey*"? Well, so is the art of trial advocacy. Enjoy the journey.

⁵⁴ DAVID BARNHIZER, *THE WARRIOR LAWYER, ENHANCE YOUR CHANCES FOR VICTORY THROUGH RISK AND DISCIPLINED STRATEGY* 16 (Bridge Street Books) (1997).