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COMMENTARY

Making and responding to objections at trials involving domestic violence

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Determining when and whether to object to an argument, statement or question made by opposing counsel, or to object to an answer given by a witness is an important decision to be made at trial. Doing so calls for knowledge of the Rules of Evidence and the ability to react quickly and think strategically. These assessments are particularly important in domestic violence cases. It is also important in advance of trial to

attempt to ascertain what objections may be made by opposing counsel and to be able to argue to the court in favor of the question you have asked and to argue to the court why the question is permissible. This also calls for knowledge of the Rules of Evidence and strategic planning.

The principal reason for every objection is to alert the court to potential weaknesses, bias or other problems with the witnesses' testimony before their testimony becomes a part of the evidentiary record, and to create a record for an appeal should one be necessary. The most common way to raise appealable issues is to raise those issues at the trial itself.

Note that some courts may not want speaking objections and may merely want counsel to say the word "objection." The court may inquire as to what the objection is, so it is important to know the basis for the objection should the need arise. Pertaining to domestic violence cases, these assessments are particularly important because where an issue goes awry an adult victim or child may be at risk.

Some possible objections are:

Argumentative. When attorneys get an answer they don't like, they can continue to cross-examine a witness to probe further. However, they are not permitted to argue with or badger a witness. When counsel seems to be arguing or creating an argument, the objection "argumentative" or "badgering" is appropriate to make. In domestic violence cases a victim is often testifying in the presence of the abuser about whom there may still be fear. It may be that a victim is particularly sensitive to their credibility being attacked because of threats made by the abuser. It is up to the attorney to object when the opposing counsel crosses the "argumentative" line. This alerts the court to the objection and lets the

client/victim know you understand what the victim is going through. Indeed, it may be important to alert the court to be sensitive to a victim's reaction based upon prior threats.

Best evidence rule, lack of foundation and/or lack of authentication. Sometimes attorneys seek to admit reports or other documents into evidence absent testimony or cross-examination on the report without foundation. Best evidence is testimony of a witness, not a report. Having testimony allows for cross-examination to uncover possible inconsistencies and errors. Additionally, before any document should be admitted into evidence a proper foundation for the necessity of it should be made and its integrity must be established. Witnesses can do both. Absent cross-examination on these issues none of it may be assured. It is important, for example, to be able to question the witness about the context of a writing, such as an email or a text, and not merely allow the document to become evidence. In domestic violence matters this is important because it is helpful to the trier of fact to know when a document was made, who the author was, under what circumstances it was created, and what the document was created to do. If a document is being sought to be introduced and it is a matter in which a victim agreed to something in particular, it is imperative to know if it was done under threat or duress. Context is critical. Written statements made by the parties can be another form of hearsay even when sought to be admitted by a party. Therefore, the author would need to authenticate.

Compound question. On cross-examination it is easy to inquire simultaneously about several pieces of direct testimony. When that is done an attorney is asking a compound question and an appropriate objection to raise is for the court to require questions be asked one at a

time. Absent that, it is impossible to know which part of the compound question is being responded to.

Beyond the scope and relevance. This is an objection for cross-examination where an issue has not been raised in direct testimony of a witness. It may be evidence not raised at trial or it may go beyond the issue about which the trial is scheduled. For instance, a defender of a person accused of domestic violence might seek to describe what an excellent employee the alleged perpetrator is. This is irrelevant and beyond the scope of what that person may have done in a particular circumstance. Consequently, it is beyond the scope of the hearing and not relevant.

Cumulative or 'asked and answered'. It's an old expression: "If you throw enough pasta at the wall some of it is bound to stick." In trial, we all want to be able to repeat what we believe to be important information. In that regard, the objection as to the same information being repeated, albeit rephrased, may be cumulative when it is made by counsel seeking to repeat the same information through the same or different witnesses. It is important to note, however, that asking the same question to different witnesses may not necessarily be repetitive or cumulative simply because different witnesses may provide multiple perspectives and answers.

In domestic violence cases, people may seek to put forth controversial allegations, such as parent alienation as a defense to abuse where children seek to avoid having contact with a parent. While there are foundational objections to this testimony, frequently accused abusers blame the other parent/guardian for the children refusing to see them,

claiming it is the other parent's fault for "alienating" the children. While the word alienating may seem innocuous coming from an accused, it has no sound scientific foundational basis and has not been accepted as a diagnosis. The accused should be permitted to testify only to what was seen or heard directly. The word "alienating" even used by the accused is a conclusion and inappropriate lay testimony as an opinion.

Improper characterization and improper lay opinion. This is testimony given by a lay person that does not require its presentation by an expert, but is nonetheless an opinion that does not necessarily assist the trier of fact in its understanding of the case. Lay witnesses can only offer opinions when their opinion is rationally based on the witnesses' perception of an event and the court determines it would be helpful to the court in understanding the issues and determining the facts of the case. Sometimes people characterize others as, "He or she is a bad person." This is an opinion and not a statement of fact upon which a court can determine whether the person is "bad." Absent credentials to draw such conclusions, this is inadmissible as evidence. A question might be asked in such a way as to determine what the witness "believes." This may also be objectionable by a lay person. However, a witness trying to establish the fact that their fear was rational might be admissible testimony. Sometimes, witnesses try to mention things that were said to them by others. This is hearsay. While there are some exceptions where this is permitted, generally it is an appropriate objection when someone tries to tell the court what was said to them by someone else.

Improper expert opinion. Expert opinions are governed by Rules of Evidence such as Federal Rule of Evidence 702. It is important to know the Rule so one can object to information from an expert that goes

outside acceptable rules of admissibility. An expert qualified to testify based upon training, education and experience may make comments that are not attendant to their particular expertise. It is proper for such statements to be ruled improper and sought to be stricken from the record. Depending on jurisdiction the standard may vary, but underlying all standards is the notion that opinions given by experts must be based upon accepted practice in the community and tested science. Opinions cannot be based upon subjective theories, even ones that seem to make sense, absent supporting science.

There are numerous other possible objections that can be made including:

- Improper impeachment
- Irrelevant
- Lack of foundation
- Leading
- Non-responsive
- Parol evidence rule
- Competence of the declarant
- Speculative
- Witness is incompetent

Going to court in a domestic violence matter is common. Whether this is done pro se or by using an attorney, sound knowledge about the trial process related to making objections is essential.

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