

Overcoming Counterfeit Objections and Preserving Evidence for Review

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Overcoming Counterfeit Objections and Preserving Evidence

Aaron Bundy and Kathleen Egan



The Importance of Making Timely Objections

- Keep bad evidence out
- Preserve evidentiary issues for appellate review

The Importance of Making Timely Objections

- Objecting, or not, is ultimately a judgment call
- A proper objection may serve to highlight the evidence or allow the other side to correct the issue

What is a 'Counterfeit' Speaking Objection?

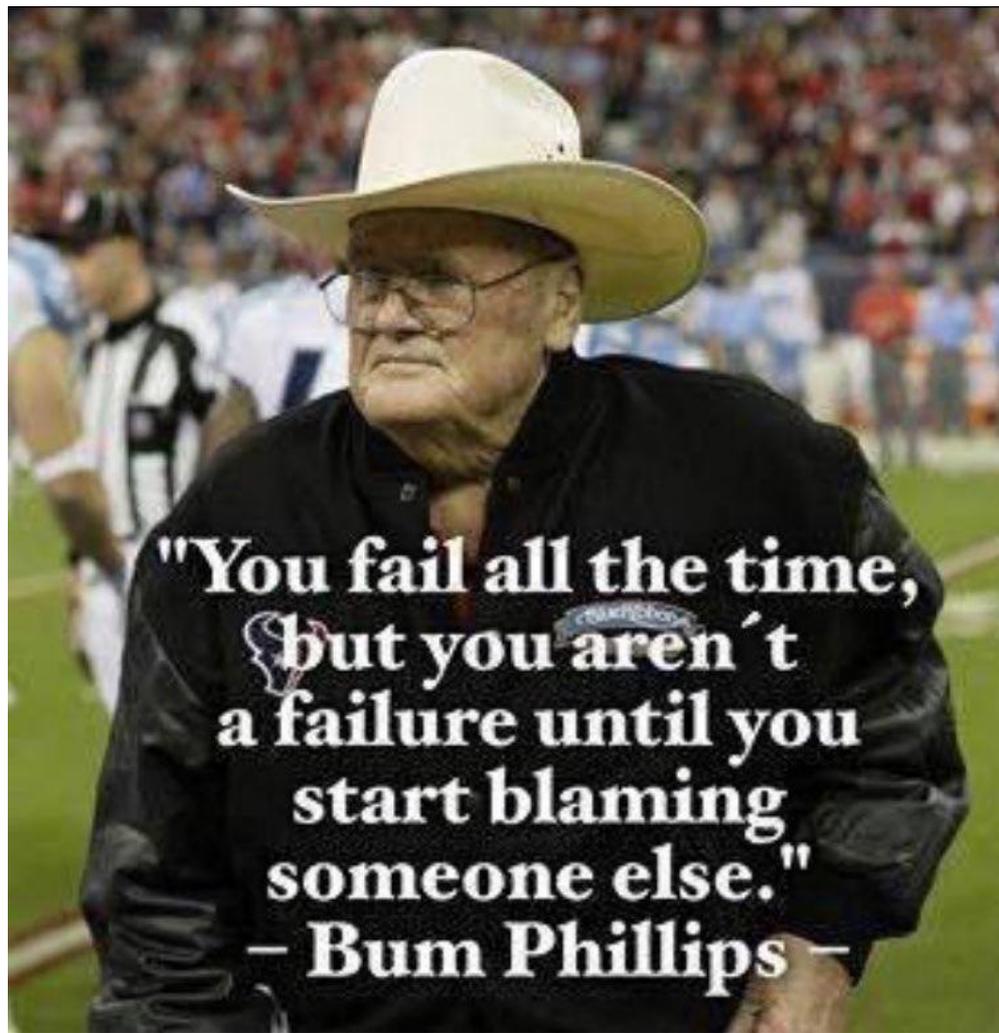
- Objection that is followed by a speech concerning the issue
- 'Objection' that is not really an objection but argument
- Argument that is not even disguised as an objection
- Attempt to get evidence in through the lawyer as opposed to a witness
- Attempt to instruct or 'coach' the witness about what to say

Legitimate Objections versus Counterfeit Objections



Why Attorneys Make 'Speaking Objections'

- Anxiety
- Lack of preparation
- Distrust
- Unskilled
- Malice
- Counter speaking objections by opponent



**"You fail all the time,
but you aren't
a failure until you
start blaming
someone else."
— Bum Phillips —**

What's Wrong with Counterfeit 'Speaking' Objections

- Improper form of objecting
- Improper argument
- Disruptive interruption of other side's presentation
- Increases time and cost of the trial
- Signals distrust of court
- Invites reciprocal bad behavior including lengthy "responses" to objections
- Coaching the witness

What's Wrong with Counterfeit 'Speaking' Objections

- When you're talking, you're not listening
- Improvisation (which speaking objections are) is generally not ideal
- May have reverse effect (backfire)

Ethics

ABA Model Rule 3.2: Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

ABA Model Rule 3.4: Fairness to Opposing Party & Counsel

A lawyer shall not:

- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

ABA Model Rule 3.7: Lawyer as Witness

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
 - (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work substantial hardship on the client.
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Dealing with Speaking Objections in Different Settings

- Depositions
- Interlocutory hearings or bench trials
- Jury trials

Depositions

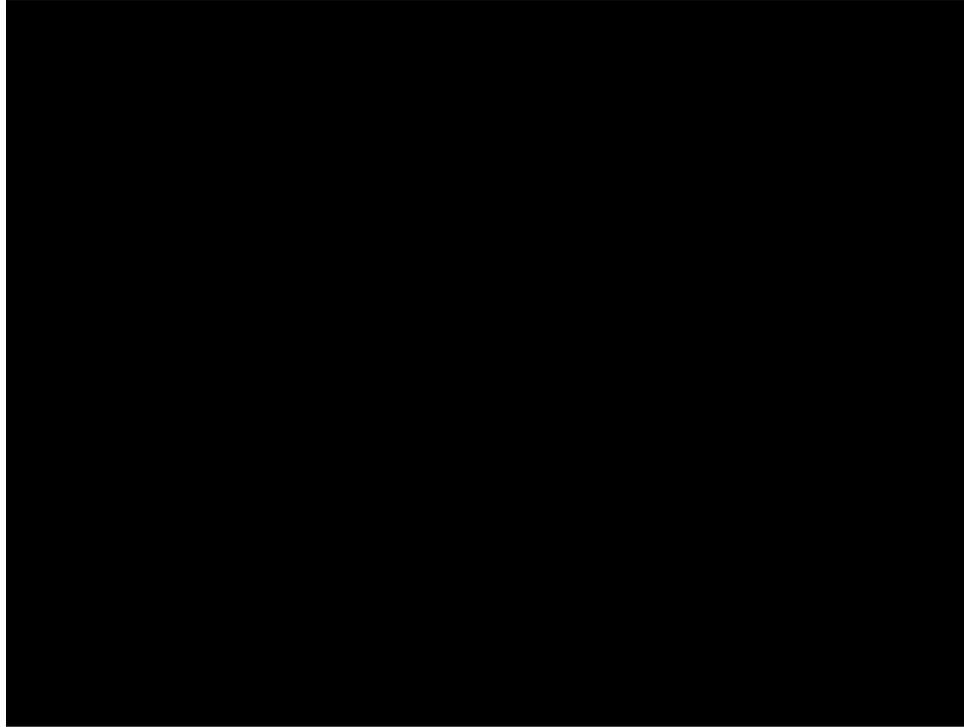


Depositions

- Be prepared
- Ignore misconduct
- Call the judge
- Adjourn the deposition

Bench Trials

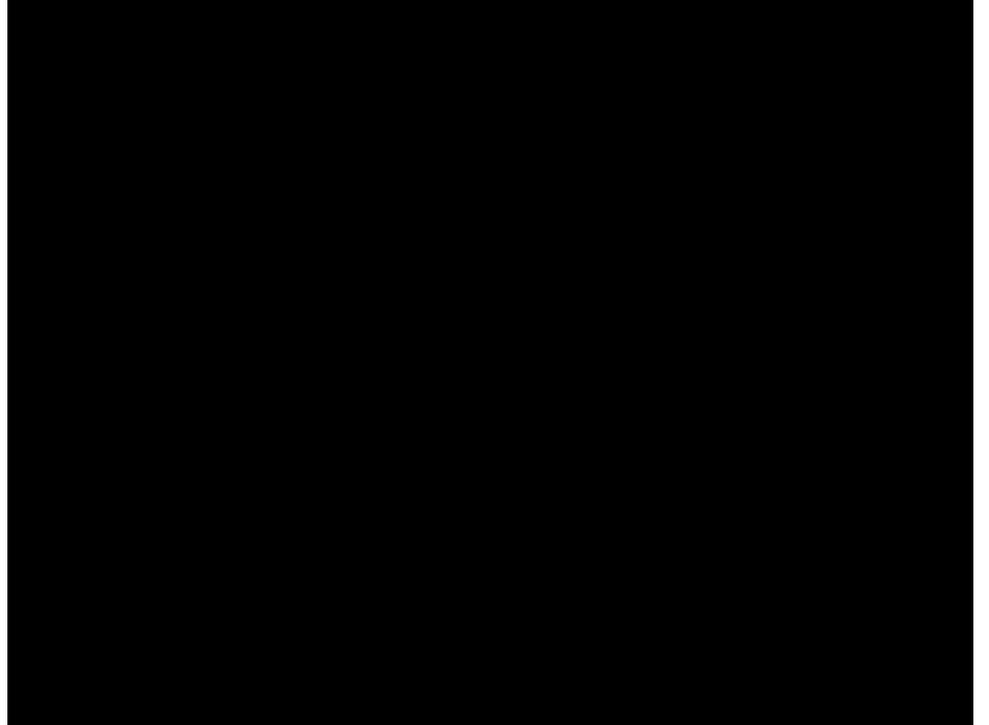
Jury Trials



Potential Consequences Associated with Counterfeit Objections

Short-Term

- Money sanction
- Adverse inference
- Loss of credibility in trial
- Loss of trial
- Mistrial
- New trial



Potential Consequences Associated with Counterfeit Objections

Long-Term

- Loss of credibility in that courtroom
- Loss of credibility in the legal community
 - Pro hac applications
- Loss of opportunities



Dealing with Counterfeit Objections before Trial

- Local Rules
- Pretrial Motions
- Final Pretrial Conference

Dealing with Counterfeit Objections during Trial

- Object
- Bench Conference
- Response

When to Make a Lengthy Objection

- Outside the presence of the jury
- When the judge has requested argument
- When the objection is based on a pretrial ruling or an issue not covered succinctly by a rule of evidence

What is an Offer of Proof

FRE Rule 103. Rulings on Evidence

(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(c) Court's Statement About the Ruling; Directing an Offer of Proof. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. **The court may direct that an offer of proof be made in question-and-answer form.**

(d) Preventing the Jury from Hearing Inadmissible Evidence. To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

(e) Taking Notice of Plain Error. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

The “Informal” Offer of Proof

The attorney makes a representation regarding the proposed evidence.

This is the most common form of offer of proof.

The Formal Offer of Proof

Counsel offers the proposed evidence or testimony by placing the witness on the stand, outside the jury's presence, and asks questions to elicit with particularity what the witness would testify to if permitted to do so.

A trial court is never required to settle for less than a formal offer of proof.

Types of Offers of Proof

1. Formal offer of proof (testimony)
2. Written statement by counsel (or witness statement signed by the witness)
3. *Cross-examination questions
4. Oral statement by counsel

Benefits of Formal Offer of Proof

- Eliminates any questions about accuracy of counsel's representations or writings
- Completely preserves the issue and the evidence for appellate review
- Gives trial judge the best opportunity to change its mind and admit the evidence

Summary

Thank You

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