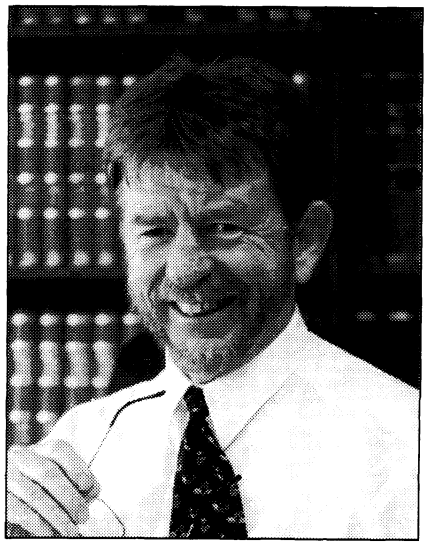
Objections to evidence

"I'm not indecisive. Am I indecisive?"
- Jim Scheibel



Hon Justice Riley

The making of an objection to evidence may call for a difficult exercise of judgment. The question "do I?" or "don't I?" must be answered in an instant. Failure to object quickly is to allow the objectionable material to be aired and often to make any objection redundant. On the other hand an objection that is made quickly and without thought for the consequences, even if successful, may lead to an unnecessary emphasis upon the information to which objection is taken. It must be remembered that the information may come before the court in other ways eg: by the rephrasing of a badly framed question or through another witness. The fact that objection was taken may indicate to the court a special sensitivity on your part to the disclosure of the information and serve to highlight it.

The prospect that an objection may be tactically unsound will be greater when the tribunal of fact is a jury rather than a judge or magistrate. Whilst a judge or magistrate is trained to ignore or put to one side information that comes before the court in an inadmissible form, it is not difficult to envisage members of a jury having difficulty in doing the same. Similarly, a judge or magistrate can be expected not to speculate as to why counsel may have been concerned to exclude inadmissible material but counsel may have a greater concern when a jury is involved.

How a jury may react is not so predictable. Where counsel has made vigorous objection to the introduction of some evidence the jury may wonder why. If the objection is successful the jury may be concerned that the advocate was seeking to keep from them information relevant to the decision that has to be made. Whilst the judge will give the jury directions as to what may and may not be considered there will be a concern that the jury will be left wondering what it was that was so important that led to the objection being made. It may be that the speculation of the jury will be even more adverse for your client than the information excluded. There will be no way of knowing what, if any, impact the objection had.

It follows from the above that in considering whether to object it is necessary for counsel to make a quick decision and, where that decision is to object, to do so immediately.

One source of guidance in the making of the appropriate decision will come from reference to the case strategy developed in your preparation. As I have observed on many occasions, all decisions relating to your conduct of the case should be guided by your case strategy. By reference to the case strategy an immediate and informed assessment can be made as to the importance of the material to which objection is taken. If you are confident that the answer to an objectionable question will not provide information inconsistent with your case strategy, or that a witness straying into irrelevant material in a non-responsive answer to a question will not impact upon your case strategy, then you may prefer to let the matter go. If you are concerned that there is no immediate problem but that there may be an ongoing danger then it may be preferable to allow the information to be provided by the witness and for you to then point out to the court that the question was objectionable or that the information provided was irrelevant. You may then ask that your opponent not repeat the error or that he or she maintains control of the witness in future. In this way you make your point without being seen to be anxious to keep information from the jury. If further objection is called for the jury will be more likely to understand and accept the basis for it.

However, if you are concerned that the information emerging is inconsistent with, or undermining of, your case strategy then you will quickly and firmly object. It may be necessary for you to interrupt or, indeed, talk over the witness to ensure that the objectionable material is not introduced before you have a chance to record and explain the objection. Of course, in many cases the position will be less than clear and the decision whether or not to object will be based upon your instincts rather than any fully considered assessment of the situation. You may be quite unsure whether or not the information called for will be inconsistent with your case strategy. A difficult exercise of judgment on your part will be called for.

The nature of the evidence that is likely to be lead and what may be necessary to exclude is something you will address in your preparation. The prospect that the other party may wish to introduce material that is inadmissible is something to be considered at that time. You may be able to reduce the stress of having to make some decisions on the run by careful preparation. Unfortunately it is unlikely that you will be able to anticipate all, or even most, of the matters for objection which will emerge in a trial and you will be called upon to make important decisions as to whether to object to evidence in less than ideal circumstances.