**Unlikely Sources for Curing the Foundational Objection Blues**

*By: Seth I. Harrington*

## I. A Hypothetical or Perhaps Not-So-Hypothetical Scenario

It's your first time questioning a witness. You're not nervous, but confident; after all, you've spent hours prepping, drafting questions, and brainstorming with the partner-in-charge. You know exactly what you need to do and how to do it. You breeze through the background questions, maybe even leading your witness a bit. But that's okay. It's now time to delve into questioning going to the heart of your case. As you ask your next question, you can feel the tides of the case changing in your favor. And then opposing counsel hits you with, "objection, foundation." That's one punch. The court rules, "sustained." That's another punch. And you're – figuratively – on the floor.

But you get back up. After all, you're a professional, dammit. You rack your brain for the lack of foundation. You pinpoint where you went wrong. You proceed with questioning but are soon hit with the two same punches: "Objection, foundation." "Sustained."

By now you're frustrated, maybe even lost. A similarly-situated attorney might abandon the line of questioning to avoid further embarrassment. But you don't. Why? Because you remember reading a poorly-written article in the winter 2017 volume of *Hearsay*. You remember that article contained an explicit public service announcement in bold letters: **"PSA: when faced with a sustained foundational objection, you are entitled to an explanation from either opposing counsel or the court as to where your foundation is lacking."** That's right, you can require opposing counsel to articulate the hole in your foundation. So, instead of panicking, you turn to opposing counsel and ask: "Can you explain where my foundation is lacking?"

## II. Why is Laying Foundation for Testimony Difficult?

Trick question. It's not. Laying proper foundation is accomplished by demonstrating the witness has a sufficient knowledge base for certain testimony. In other words: how does a witness know what he or she knows? For example, a witness testifying to the presence of black ice on a roadway might first need to testify that he or she was driving on the roadway.[1] Without some sort of personal knowledge (driving on the roadway) the witness could not competently testify as to the condition of the roadway.

However, laying a foundation can nevertheless pose problems for new attorneys. The reason for this is fairly simple: courtroom inexperience. New attorneys are more likely to rush through direct examination – or, at the very least, rush through background questions that are necessary to lay foundation. Further, even well-prepared new attorneys often fail to realize the court is not as well-versed in the facts and legal theories of the case. Oftentimes, young attorneys focus too much on the testimony and facts that prove the attorney's legal argument, failing to flesh out the trivial – but again, necessary – background information.

## III. *Adelmann*: Saving Attorneys from the Foundational Objection Blues

[1] *Lambert v. Abid*, No. A09-2071, 2010 WL 3220084, at *2 (Minn. Ct. App. August 17, 2010).

Whatever the reason for an attorney's foundational issues, the Minnesota Supreme Court has provided both new and more seasoned attorneys with a simple solution. In *Adelmann v. Elk River Lumber Co.,* counsel was engaged in a direct examination of an expert witness.[2] After requesting the expert to assume the truth of certain facts, counsel posed a hypothetical question.[3] Opposing counsel objected to the question for several reasons, one of which was improper foundation.[4] The court sustained the objections, but instead of attempting to fix the question or move on from the line of questioning, the offering attorney addressed the court: "Might I inquire of the Court which of the numerous objections Counsel has propounded is within the point resulting in the sustaining of the objection[?]"[5] The court simply responded: "Well, the objection is sustained, you heard the objection."[6]

The Minnesota Supreme Court found the trial court's response in *Adelmann* improper, stating: "Whenever counsel is in doubt as to why the court sustained an objection to his hypothetical question, he should be informed so that his errors, if any, may be corrected."[7] Further, "defendant's counsel should . . . have been required to state the theory upon which he regarded such questions objectionable."[8] The *Adelmann* court went on to quote *Colburn v. Chicago, St. P., M. & O. Ry. Co.*, which stated: "when counsel . . . is unable to comprehend the ground or reason for excluding evidence, and in good faith appeals to the court to specifically indicate such ground . . . in our judgment, it becomes the duty of the court to indicate such ground or reason specifically."[9] In other words, opposing counsel has a duty to specify the grounds of the foundational objection and the court has a duty to specify the grounds for sustaining the foundational objection, beyond a formulaic recitation of the type of objection.

While inquiring as to the specifics of a flawed foundation should not be employed regularly – imagine how a jury might react to an attorney *frequently* asking the court what's wrong with his or her questions – the ruling in *Adelmann* is nonetheless an important weapon in every young attorney's arsenal. Further, other case law has bolstered the *Adelmann* holding in both civil and criminal contexts.[10]

So the next time you're faced with a sustained foundational objection – don't panic. First, try and fix the question. If you can't, then turn to the nail-in-your-side opposing counsel or the stone-faced judge and simply ask where your foundation is lacking.

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[2] 65 N.W.2d 661, 665-66 (Minn. 1954).
[3] *Id.* at 665.
[4] *Id.*
[5] *Id.* at 665-66 (internal quotations omitted).
[6] *Id.* at 666 (internal quotations omitted).
[7] *Id.*
[8] *Id.*
[9] 85 N.W. 354, 355 (Wis. 1901).
[10] *See, e.g., Higgins v. Hicks Co.,* 756 F.2d 681, 685 (8th Cir. 1985) (overruling an objection to foundation when it lacked specificity in a personal injury and wrongful death case); *U.S. v. Michaels,* 726 F.2d 1307, 1314 (8th Cir. 1984) (stating foundational objections require specificity in a case).

Seth Harrington is an associate attorney with Gislason & Hunter LLP. He practices in the areas of agricultural law, banking law, and business litigation.

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