Objections Primer

> This primer includes references to materials that are not directly useful because they will never be part of your case materials. Why are they included? (1) To persuade you that the author might know what he is talking about. (2) To help you better understand how judges think about and apply the rules. (3) Because an authority can suggest an argument you might make. You don't need the authority to make the argument. You can base it on common sense and what your judges know and believe.

Introduction

Objections are the primary means for enforcing rules of procedure and evidence. This primer is about objections to questions and answers. It is divided into three parts: (1) objection procedure, (2) objections to the form of questions and answers, and (3) substantive objections.

In ruling on evidentiary objections, the primary consideration for a mock trial judge is enabling the competition, not enforcement of the evidentiary rules. A mock trial judge is not concerned that a jury may hear testimony or see evidence that the law says the jury should not consider in deciding its verdict. There isn't a real jury, or a real verdict that must be protected from the taint of improperly admitted evidence. Consequently, mock trial practice and procedure differ in at least two ways from how evidentiary objections are handled in real trials.

In real trials, lawyers for tactical reasons frequently refrain from making objections that are perfectly good. A lawyer who objects too often risks the jury thinking that she is trying to hide factual weaknesses in her case. A lawyer by objecting risks waking jurors up to evidence they would have slept through. And some objections aren't worth winning. For example, objections to the form of a question (e.g., "compound") or foundation (e.g., "no foundation showing personal knowledge") are seldom warranted when the opponent can easily reframe the question or ask additional questions to get the foundational facts. Objections to "leading" questions are often unwarranted because testimony elicited by leading questions is frequently less persuasive than testimony in which the witness appears to be telling a story.[1]

In mock trial, the incentive is to make every possible good objection because student attorneys need to demonstrate to the scoring judges that they know the rules of evidence. Student attorneys risk losing credit anytime a mock trial judge thinks the student could have objected. Of course, you don't win points from judges by making bad objections. An attorney who makes bad objections gets no credit, even if the opponent doesn't have a good response. An attorney

[1] See James W. McElhaney, *McElhaney's Litigation*, vol I, 210-214 (1995); Rich Matthews, "The Ten Commandments of Objections," *Juryology: Art & Science of Jury Persuasion*, June 13, 2013, http://juryology.com/2013/06/13/the-ten-commandments-of-objections/.

who repeatedly makes bad objections simply to embarrass an inexperienced or less prepared opponent shows poor sportsmanship.

Even in mock trial there are times it's best to forego an objection. Before you go further, stand up. Now say three times out loud:

I WILL NEVER OBJECT TO THE ADMISSION OF TESTIMONY OR AN EXHIBIT THAT HELPS MY CASE!

In addition, you should not object if the opponent could use a ruling in your favor to block the admission of evidence you will offer later. You should not object when inadmissible evidence brought up by your opponent opens the door for you to present what would otherwise be inadmissible evidence. You should not object if an opponent is just wasting part of their limited time eliciting irrelevant, unimportant testimony.

In real trials, arguments over objections tend to be abbreviated and elliptic. When a real-life attorney says "objection," the judge likely knows the ground already and doesn't need to hear argument before making a ruling. In addition, judges will not allow full argument in open court lest members of the jury learn or guess from the argument something the jury should not hear. And serious evidentiary issues usually get addressed in motions made before trial, called "motions in limine."

In mock trial, argument is central. It is where critical points are won or lost. The presiding judge will usually give each side time to argue. Within the time allowed, scoring judges want students to show that they understand the evidence rules and can think on their feet. They want to hear how well the students respond to an opponent's arguments, along with any questions posed by the presiding judge. Two attorneys face off. Very often, the winner of the objection fights gets the higher score.

Part One: Objection Procedure

● *Making Objections.*

Mock trial adheres to the traditional "one-lawyer-per-witness rule." The pair of student lawyers involved in examining a witness, one for each side, are the only team members who can make or respond to objections related to that witness.[2]

An objection is necessary to begin an evidence fight. Without an objection, the presiding judge will not keep something out of evidence. If no one cries foul, the evidence comes in.[3]

An objection must be timely.[4] It must be made as soon as the violation becomes apparent. An objection to a question should be made before the witness answers.[5] When objecting to an answer, you should make the objection as soon as the witness starts to utter inadmissible matter. Interrupt the witness. It's not a time to be polite. You must stop the witness from doing harm to your case.

An objection must be specific.[6] It must be sufficiently explicit to make clear to the judge and adversary the basis for challenging the evidence's admission.[7] General objections don't satisfy the specificity requirement. For example, "Your Honor, I think that may be objectionable." Or "I object. Surely this testimony cannot be admissible." And the words "I object on the grounds that the evidence is "incompetent, irrelevant, and immaterial" work only in reruns of the old Perry Mason show.[8] At best, a general objection can be

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[2] See, e.g., American Mock Trial Association, *AMTA Rulebook*, Rule 8.12(3).

[3] Rule 103(a); Stephen Salzburg, *Trial Tactics* 15-16 (2007).

[4] Rule 103(a)(1)(A); James W. McElhaney, *McElhaney's Litigation* vol I, 213 (1995).

[5] Jack B. Weinstein and Margaret A. Berger, *Weinstein's Evidence Manual, Student Edition* e-book loc. 2593-2597 (2015) ("Speed and alertness of counsel are essential. Once the answer to an improper question has been given, the court is likely to rule that the objection [to the question] came too late."); James W. McElhaney, *McElhaney's Trial Notebook* 379-380 (2006) ("Most judges figure you have waived your objection [to a question] if you wait until after the answer.")

[6] Rule 103(a)(1)(B).

[7] Graham C. Lilly, Daniel J. Capra, and Stephen A. Salzburg, *Principles of Evidence* 8 (6th ed. 2012).

[8] https://www.youtube.com/watch?v=19nbI_mYPag

considered the equivalent of a relevance objection, relevance being the one generally applicable requirement for the admission of evidence.[9]

An objection should be right. Once a judge overrules a wrong objection, the opportunity to make the right objection is usually lost.[10] If an attorney has several grounds for objecting, prudence says use them all. However, you need only one good objection to win, and the key in many instances is to pick the right one. You do not want to dilute the impact of one powerful, potentially winning objection by combining it with weak objections.[11]

The procedure for objecting to a question is simple: Stand and speak the word "Objection." When you speak the word, don't use an accusatory or angry tone of voice. Be polite. You might go so far as to apologize for the interruption: "Excuse me, Your Honor, I have an objection."[12]

After speaking the word "objection," state briefly the ground or grounds for the objection.[13] It's usually better to identify a ground by name, not rule number. The name is usually enough, and the number can be confusing.[14]

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[9] Rule 402. In response to a general objection, an attorney should demand the specificity required by Rule 103(a)(1)(B) and state how the evidence is relevant. If she does the second, the evidence is admissible unless the objecting attorney can point specifically to a rule that makes the evidence inadmissible.

[10] Stephen Salzburg, *Trial Tactics* 16-17 (2007); Daniel J. Capra & Ethan Greenberg, *The Form of the Question* 326-333 (2014).

[11] Stephen Salzburg, "Picking the Correct Argument," 23 *Criminal Justice* 50-53 (Summer 2008).

[12] Rich Matthews, "The Ten Commandments of Objections," *Juryology: Art & Science of Jury Persuasion*, June 13, 2013, para. 10, http://juryology.com/2013/06/13/the-ten-commandments-of-objections/

[13] Some presiding judges prefer an abbreviated objection procedure. They want the objecting attorney to stop after speaking the word "objection." The judge then decides whether to ask for the grounds and hear argument before ruling. See Judge Richard A. Posner, "On Hearsay," 84 Fordham L. Rev. 1465, 1466 (2015). At pretrial, a team should ask what procedure the judge prefers.

[14] For objections based on Rule 403, it's better to state the number, not the name. An attorney does not want jurors to hear that she doesn't trust them to learn something prejudicial to her case. Stephen A. Salzburg, *Trial Tactics* 4-5 (ABA 2007).

However, with substantive objections adding the rule number sends the message that you know the rules.[15]

Where the usual procedure is being followed, jurors hear the word "objection" and the attorney's statement of the grounds.[16] In that context, it can be helpful to insert a concise, one sentence explanation of the objection in plain English, so the jury understands that the objection is reasonable. For example: "Objection, Your Honor. Counsel is putting words into the witness's mouth. Leading." If the objection is sustained, the jury understands why. If it is overruled, the jury understands that it wasn't frivolous. Most common objections can be explained in a short sentence.[17]

Be careful that any explanatory sentence you insert does not cross the line and become a forbidden "speaking objection."[18] It's improper for an objecting attorney to assert facts about the case or start arguing the merits of the case in front of the jury.[19]

The procedure for objecting to an answer is the same as the procedure for objecting to a question, with one addition. The objecting attorney must move to "strike" testimony. Unlike questions, answers are evidence. If a witness uttered inadmissible material, you must get the matter out of evidence. You do that by objecting and asking the judge to "strike" testimony. For example: "Objection. Your Honor. I move to strike the answer. It's an Improper Opinion." When the presiding judge strikes testimony, the attorneys thereafter may not mention or rely on the answer or the part the judge struck.

As a general matter, you use objections to keep the jury from hearing harmful, objectionable evidence.[20] While objections may be made to both questions and answers, it is preferable to get a judge to close the door before the

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[15] James W. McElhaney, *McElhaney's Trial Notebook* 385 (2006); James W. McElhaney, *McElhaney's Litigation*, vol I, at 216 (1995)

[16] After the objecting attorney makes her objection, the invisible "mock trial" jury is transported immediately and magically out of earshot, only returning to the courtroom after the judge rules. There are no "sidebars" in mock trial, no occasions when a presiding judge and the attorneys must huddle and whisper so the jury cannot hear what's being said.

[17] Steven Lubet, *Modern Trial Advocacy: Analysis & Practice* 239 (4th rev. ed. 2013); Joseph F. Anderson, *Effective Trial Advocacy* e-book loc. 1069-1080 (2010); J. Alexander Tanford, *The Trial Process: Law, Tactics and Ethics* 187 (4th ed. 2009); James W. McElhaney, *McElhaney's Trial Notebook* 385-386 (2006).

[18] Joseph F. Anderson, *Effective Trial Advocacy* e-book loc. 1080 (2010); J. Alexander Tanford, *The Trial Process: Law, Tactics and Ethics* 191-192 (4th ed. 2009)
[19] Steven Lubet, *Modern Trial Advocacy* 239 (Rev. 4th ed. 2013).

[20] See Rule 103(d) ("To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.")

witness blurts out something inadmissible. What a witness blurts is in evidence. Yes, the presiding judge can strike the answer and instruct jurors to ignore it. However, as one judge memorably observed: "if you throw a skunk into the jury box, you can't instruct the jury not to smell it."[21] The more skillful attorney keeps the skunk out of the courtroom.

There's nothing wrong with making an objection to throw a little monkey wrench into an opponent's examination. However, your objections should be valid, not groundless. "Specious objections are so obvious that even the jury knows you are playing games, or you don't know the rules, or - even worse - you don't understand them."[22]

If you want for tactical reasons to argue in support of the objection before the opponent, ask to speak first. "Objection. Hearsay. May I be heard?" However, an objecting attorney should ordinarily resist the temptation to grab the floor. Let the opponent talk first. Let the judge talk. By letting everyone else talk, the attorney learns exactly what the opponent is arguing and not arguing, and what's on the judge's mind. The attorney gains time to collect her thoughts and refine her argument.[23]

There are times when you must tell the judge how a witness will answer to make an objection understandable.[24] A question can appear innocuous and unobjectionable. The judge does not know that the answer will be objectionable. Consider the case of a defendant accused of committing murder and attempted murder.

> Q. (By Prosecutor) When did you first see the defendant that night?
> A. When we met at O'Gara's bar, around midnight.
> Q. Had you ever met the defendant before?
> A. Yeah. Sure, I knew him.
> Q. What name did you know him by?
> Defense Counsel: Objection. Rule 403. May I be heard?
> Judge: You may.
> Defense Counsel: Your Honor, the witness is going to answer that he knew the defendant by the name "Psycho Killer." I object on the

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[21] *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962) (Gewin, J.)

[22] James W. McElhaney, *McElhaney's Litigation*, vol II, at 297 (2013); James W. McElhaney, *McElhaney's Litigation 383 (2006);* J. Alexander Tanford, *The Trial Process: Law, Tactics and Ethics* 189 (4th ed. 2009).

[23] NYU Lawyering Course Materials, *Witness Preparation + Examinations* 357 (undated).

[24] Before a judge rules, there's no formal procedure on the subject of telling a judge how a witness will answer. After a judge rules, Rule 103(a)(2) allows an "offer of proof" to be made for the purpose of preserving for appellate review a claim that the judge erred in excluding evidence. As evidentiary rulings in mock trial are not appealable, an "offer of proof" is never necessary.

> ground that defendant's nickname is irrelevant, and the prejudicial connotation of his nickname is inflammatory and outweighs any possible probative value it might have.[25]

As a general guideline, you should not object unless your objection deserves to be sustained – because the objection is right, or you have a good argument for why it's right. As much as possible, you want to win every objection you make. Winning identifies you as an attorney who knows her stuff. Losing repeatedly sends the message that you don't know the rules.[26]

- *Responding to Objections*

Once an objection is made, the burden is on the other side to respond. A responding attorney is expected to provide the judge with a specific reason or reasons to overrule the objection. Statements like "I think I should be able to go into this" or "I fail to see the point of the objection" are worthless. "A judge is obligated to apply the rules of evidence. What an attorney 'thinks' is not the standard of admissibility."[27]

The responding attorney may argue that the objection is wrong. For example, faced with a hearsay objection the attorney might say "Your Honor, it's not hearsay." Alternatively, the responding attorney might point to a rule that makes the testimony admissible. For example, in response to a hearsay objection, the attorney might say that the hearsay is admissible under the exception for excited utterances. The responding attorney then has the burden of demonstrating her right to rely on the exception. She must demonstrate that she has provided the foundational facts necessary for the excited utterance exception to apply.[28]

Occasionally, the best response is delay. For example, faced with a relevance objection, the examiner might say, "The relevance will appear in a few more questions, Your Honor." Or the examiner might be able to say, "It's foundational, Your Honor." This tells the judge that the expected answer to the present question is not directly relevant to the issues in the case but will supply the basis for asking further questions whose answers are relevant.

Occasionally, the best response is retreat. "Your Honor, I withdraw the question." Retreat when the objection is obviously right, and to argue otherwise

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[25] The example is adapted from *United States v. Farmer*, 583 F.3d 131 (2d Cir. Oct. 8, 2009).

[26] James W. McElhaney, *McElhaney's Litigation*, vol. I at 212 (1995).

[27] Joseph F. Anderson, *Effective Trial Advocacy* e-book loc. 1054 (2010).

[28] Stephen Salzburg, *Trial Tactics* 16-17 (2007).

would be an embarrassment. Retreat when you can easily remedy the problem by rephrasing.

● *Arguing Objections*

Objections should not be viewed as annoying interruptions, or mere sideshows to the main event. They should be seen as opportunities to argue how particular pieces of evidence substantiate your case or negate the opponent's case. To persuade a judge to exclude or include evidence, a lawyer should describe the anticipated testimony, its evidentiary basis, and its projected impact on the case.[29]

In "mock trial," a presiding judge will usually hear argument before ruling on an objection. The attorneys can expect to have at least one opportunity to argue for or against a simple objection to the form of a question or answer, and two or more opportunities to speak on more complex, substantive objections.

Your argument should always be directed to the presiding judge. The judge is your audience. Look at the judge, not at the opponent. Speak to the judge, not to the opponent. Think about what the judge needs to make a ruling. You can assume the judge knows the rules of evidence, but you cannot assume the judge has given any thought to their application to the evidence you or your opponent want to present.[30]

Objections are the one-time during trial when you want to talk like a lawyer. Your audience is the presiding judge. Your adversary is a lawyer. You are engaged in legal argument. At other times your audience is a group of jurors drawn from all walks of life. With jurors you need to speak plainly. No legalese. When the word "objection" is spoken, you must shift from one style of presentation to another.

Whether for or against the objection, an argument should be built on what the applicable rule says and what it does not say.[31] Discuss the specific language of the rule if that helps you. Point to the foundational facts that demonstrate the rule's application to the matter in controversy, or to the foundational facts that

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[29] Edward D. Ohlbaum, "Jacob's Voice, Esau's Hands: Evidence-Speak for Trial Lawyers," 31 Stetson L. Rev. 7, 9-12 (2001).

[30] Terence F. McCarthy, for 40 years the head of the Federal Defender's Office in Chicago, suggests doing three things when you want a judge to rule in your favor. "Step one: Look at the judge. Step two: Use you head [nod up and down]. You are ready for step three: With your head nodding up and down, say, "As your Honor well knows." Always use that phrase, followed by a reference to the law." *MacCarthy on Cross-Examination* 84 (2007).

[31] An attorney should always have a copy of the rules of evidence at hand. You don't want to be fumbling to find a copy if the judge asks for a part to be read, or you need to show that an adversary is misstating what a rule says.

are missing. If the rule gives the judge discretion, say so and give the judge reasons to exercise her discretion in your favor.

Evidentiary arguments too often sound "Potteresque" – each side utters its ritualistic incantations, leaving the judge to decide the winner based on whose magic was better. You must get beyond magic words. On points that matter, where the decision could go either way, the first job of an objector is to show that the other side is offering unfair evidence. The second job is to show the judge which rule justifies sustaining the objection. Unfairness is what moves a judge to rule in your favor, and you show unfairness through facts. Your opinion that the opponent is being unfair means nothing.[32]

The facts you need for your argument can be drawn from anywhere in the case materials, including witness statements, documents, and exhibits that are not yet and may never be in evidence. At the stage of ruling on objections, judges are not bound by most of the rules of evidence.[33]

If the judge asks you to talk first, begin the argument at the beginning, not in the middle. For example, if you are objecting to the admission against a company of an employee's out-of-court statement, do not begin by saying: "Counsel has not shown that Mr. Green was an employee when he made the statement." Begin by saying: "Mr. Green's statement is hearsay, Your Honor. Apparently, counsel seeks to have the statement admitted against the defendant Company as a party-opponent-statement. To be admissible under the rule, the employee must have made the statement while employed by the company. There has been no testimony showing Mr. Green was an employee when he made the statement."[34]

Anytime the judge wants to hear more from you, advance the argument. Don't repeat yourself. Judges get annoyed, even "ticked off," when you simply repeat what you've already said. They heard it once and they don't think they need to hear it again. When you get to a point where you have nothing to add, say so: "Your Honor, I have nothing to add."[35]

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[32] James W. McElhaney, McElhaney's Trial Notebook 383-385 (4th ed. 2006).

[33] Rule 104(a).

[34] NYU Lawyering Course Materials, Witness Preparation + Examinations 358-359 (undated).

[35] The oft-heard phrase "I stand by my argument" sounds like a concession of defeat. The verb "stand by" is commonly used in the sense of being faithful or loyal, in a time of need. "I stand by my injured argument." The words are also used in the sense of being present while something bad is happening but doing nothing about it. "I stand by, while my argument goes down in flames."

- *The Court Rules and Afterward*

The presiding judge will sustain or overrule an objection.[36] If the objection is overruled, the witness may answer the question, or continue the answer he was giving. If an objection is sustained, the witness may not answer the question or continue answering.

After the court rules on an objection, don't thank the court for ruling for or against you. If you thank the court for ruling in your favor, you look fawning. If you thank the court for ruling against you, you look stupid.

If the court rules against you, "[d]on't snarl, make a face, shoot daggers with your eyes . . . . Don't slam your books, crumple up a piece of paper, or adopt a testy tone of voice. Don't roll your eyes, look to heaven for help, break your pencil, or ostentatiously write a memo to yourself about the judge's unfair rulings."[37] Don't try to continue to argue. At pre-competition and pretrial meetings, mock trial judges are routinely instructed to favor the admission of evidence. Student participants should not be surprised when a judge admits evidence despite their excellent argument for its exclusion. They can also expect some truly atrocious rulings. Indeed, one hears of mock trial judges who deliberately make erroneous rulings to test participants' ability to respond to adversity.

Be sure you understand the judge's ruling. If you don't, politely ask the judge to explain. If a judge sustained an opponent's objection, you need to understand if the ruling left you a way to elicit the information by an alternative route (e.g., by rephrasing the question, or laying a missing foundation). If the judge overruled your objection, you need to understand how much room the judge left for you to reassert the objection. A judge's ruling does not mean that the next similar, but differently phrased question is not vulnerable to the objection the court just overruled. Mock trial attorneys often let a judge's prior rulings discourage them from making perfectly good objections.

If the judge sustains your objection to an answer, you may want to ask the judge to give an evidentiary instruction.[38] An "instruction to disregard" is used when the judge determines that a bit of testimony or an exhibit is inadmissible, but the jury has already seen or heard it. A "limiting instruction" is used when, as often happens, the judge rules that a piece of evidence is admissible for one

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[36] A judge may admit evidence conditionally. If evidence is offered before the facts establish its relevance or before a required foundation has been laid, the judge may admit it "subject to connecting up." The objection can be renewed if the connection is not made. See Rule 104(b).

[37] James W. McElhaney, *McElhaney's Trial Notebook* 386-387 (2006).

[38] Rule 105.

purpose but not for another.[39] In mock trial, an evidentiary instruction highlights the presiding judge's ruling. It makes it more likely that the scoring judges will notice and penalize an adversary who in later examinations or in closing argument ignores the ruling.

If you make an objection that the judge sustains, be prepared to enforce the ruling. A judge's ruling may not deter an adversary from effectively asking the same objectionable question, or the witness from giving the same objectionable answer in response to a different question, or both attorney and witness trying to evade the ruling. You may need to reassert the objection. "Objection. Your Honor sustained my objection to the previous question and in substance the present question is the same."

[39] Limiting instructions are commonly given in two situations. (1) When a piece of evidence would be inadmissible character evidence except it is offered to prove something other than a person's character. Rule 404(b). (2) When a statement would be inadmissible hearsay except it not offered to prove the truth of what the statement asserts. Rules 801 & 802.

Part Two: Objections to the Form of Questions and Answers.

A number of objections relate to the form of questions an examining attorney may ask or answers a witness may give.[40] They should be understood as enforcing basic norms governing proper trial testimony. Questions are expected to identify a specific topic and get from the witness whatever facts the witness knows about the topic. Answers are expected to state the facts called for by a question. An attorney is not supposed to use a question to urge the jury to draw an inference or reach a particular conclusion. A witness is not supposed to use an answer to tell the jury what the witness believes his testimony proves.[41]

A sign of a well-crafted witness examination is the absence of obvious opportunities for the opponent to interrupt the examination with form objections.[42] A sign of a poorly crafted witness examination is the opposite. And a student can expect to have her score lowered if she too often stays silent in the face of clear opportunities to object to badly formed questions and answers.

The following is organized to reflect that some objections to form relate primarily to direct and redirect examination, and some to cross-examination and re-cross examination. The perspective is that of an attorney looking for opportunities to object.

Direct Examination

● *Objection. Leading Question*. A leading question is one that contains or suggests to the witness the specific answer the examining attorney wants to hear. It effectively puts the examiner's words into the witness's mouth. In theory, the witness could reject the examiner's words, but a "mock trial" witness will not contradict an attorney-teammate.

Although leading questions are generally forbidden on direct examination, a judge has discretion to permit their use.[43] Judges routinely permit leading on introductory matters dealing with a witness's background and matters as to

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[40] Most objections to form are not expressly mentioned in the Rules of Evidence. They are technically based on the rules that charge the trial judge with responsibility for ensuring a fair trial and making the proceedings effective for determining the truth. Rules 102, 403, and 611.

[41] NYU Lawyering Course Material, *Witness Preparation + Examination* 181 (undated).

[42] Edward D. Ohlbaum, "Jacob's Voice, Esau's Hands: Evidence-Speak for Trial Lawyers," 31 Stetson L. Rev. 7, 20 (2001)("Questioning that respects the rules of evidence does not invite objection interruptions.")

[43] The use of the word "should" in Rule 611(c) signals a preference for non-leading questions on direct and redirect examination, not a complete bar. In addition, the rule expressly says that leading questions are permitted when "necessary to develop the witness' testimony." As to cross-examination, the rule is explicit - leading questions are ordinarily permitted.

which there is no genuine factual dispute. They permit leading questions that put a witness in the time and place about which inquiry will be made, and for the purpose of laying a legal foundation for an exhibit. Leading questions are permitted in these areas because of their efficiency in presenting uncontested facts quickly and specifically.[44]

In mock trial, you must object if an opponent blatantly leads her witness. You can't afford to let the judges think you don't know the rule. Otherwise you should keep the leading-question objection in your pocket until an adversary attempts to lead on disputed matters that are important to the resolution of the case. That's when judges take the objection seriously.[45] It's when you are more likely to win the objection.[46] And it's when you want to force the opponent to try to find a non-leading way to get the testimony heard. The objection has the tactical advantage of pointing out to the jury that the direct examiner is spoon feeding answers to the witness. A witness who must be spoon-feed loses credibility.[47]

Listen for questions that are more than four or five words long, putting aside any introductory preamble. They are probably leading.[48] For the most part, short questions are all that a direct examiner should need. E.g., "Where were you on September 11th?" "Was anyone with you?" "Did the two of you talk?" "What did you talk about?" When a direct examiner asks a longer or more complicated question, it is likely to be leading because it includes factual detail or suggestive language that the examiner wants the witness to adopt.[49]

Listen for questions that include the traditional tag words that mark a question as leading. Commonly heard tags at the beginning include "It is true that," "Don't you agree that," "and "Am I correct that." Tags at the end include "… right?" "… that's correct?" and "… didn't you?" Listen also for questions in declarative form. They are leading. There is no difference between "You ran the marathon, right?" and the tag-less "You ran the marathon?"

Listen for questions that begin with the words "So" and "Therefore," and call for a "yes" or "no" answer. They are usually leading. "So, the water was

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[44] See Daniel J. Capra & Ethan Goldberg, *The Form of the Question* 48-50, 74-76 (2014).

[45] See Thomas Mauet & Warren Wolfson, *Trial Evidence* 66 (4th ed. 2009).

[46] You want to win the objection the first time you make it. If the judge sustains the objection, she is more likely to sustain the objection the next time you make it.

[47] D. Shane Reed, *Winning at Trial* 356 (2007).

[48] See Daniel I. Small, *Preparing Witnesses* 165 (4th ed. 2014).

[49] See Daniel J. Capra & Ethan Goldberg, *The Form of the Question* 42-44 (2014).

gushing out of the broken pipe?" The question asks the witness to agree with the examiner's description of water "gushing" from a "broken pipe."[50]

Listen closely, but don't reflexively object, to questions that call for a "yes" or "no" answer. They are frequently leading, but not always. It depends on whether the question is phrased or spoken in a way that suggests to the witness that the examiner prefers either the "yes" or the "no" answer. For example, "Did he appear to be seriously injured?" is leading, because it presents only one of the many possible degrees of injury the person might have suffered. The attorney selects the one she wants to hear ("seriously") and prompts the witness to agree.[51] By way of contrast, the neutral question "Did you ever buy marijuana from the defendant?" does not suggest a preference for "yes" or "no." You may know from the case materials how the witness will answer, but the question itself does not signal a preference. It is not leading.[52]

● *Objection. The Question Calls for a Narrative Answer, or the Question is Too General.* An examining attorney is expected to ask questions that are sufficiently specific to alert opposing counsel to the possibility that the upcoming answer may include inadmissible evidence. The requirement ensures that opposing counsel has the opportunity to object before the answer is given. An unfocused question, one that does not give fair warning, is vulnerable to the objection that it "calls for a narrative" or is "too general."

"Please tell the jury what happened to you on June 23 last year?" is a question that calls for a narrative. The answer is likely to be long, but that itself is not what makes the question objectionable. It is objectionable because it is too unfocused to restrict the witness to giving admissible testimony. As the witness develops his narrative of what happened, the witness can easily slip inadmissible evidence into his answer – perhaps a bit of hearsay or an improper opinion. At that point, opposing counsel's only remedy is a motion to strike the testimony. A motion to strike, however, cannot strike the offending testimony from the minds of the jurors.

"Tell us about your conversation with the police officer?" is a question that is "too general." The topic of the question is reasonably specific, but the answer could easily include inadmissible hearsay, and the tell might include a mix of speculation and improper opinion. More precise questions are required to separate the unobjectionable from the objectionable parts of the conversation.[53]

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[50] Deanne Siemer, *Federal Rules of Evidence with Cues and Signals for Good Objections* loc. 632-636 (2016).

[51] NYU Lawyering Materials, *Witness Preparation + Examinations* 181 (undated).

[52] See Daniel J. Capra & Ethan Greenberg, *The Form of the Question* 40-41 (2014).

[53] NYU Lawyering Materials, *Witness Preparation + Examinations* 173 (undated).

Judges are inclined to give direct examiners leeway to elicit testimony in narrative form. They recognize that narrative testimony is often more persuasive and can yield a more accurate account. They sustain the objection only when it appears that the narrative answer is likely to contain inadmissible matter.[54]

In mock trial, you know from the case materials what a witness's narrative answer is likely to include. If it will not include damaging inadmissible evidence, you have no reason to object. Let the witness ramble. You object when the answer is likely to include inadmissible evidence.

Your objection should include a tag line: The question "*does not give me a fair opportunity to object to inadmissible testimony before the jury hears it*." Even better, combine the objection with a substantive objection, based on the inadmissible testimony that the witness is likely to include in the answer. For example: "Objection, Your Honor. The question is too general. It calls for testimony that will likely include inadmissible hearsay." This phrasing has the tactical advantage of forcing the inadmissible evidence into the open. In response, the opponent must describe and defend the anticipated answer.

In mock trial, direct examinations tend to be highly scripted. The examiner and the witness have a set of questions and answers they have practiced many times. When a judge sustains a "calls for a narrative" or "too general" objection to a scripted question, the opposing attorney and witness often struggle to get back on script. The examiner trying to get back on script is likely to resort to objectionable leading questions, giving the opposing attorney additional opportunities to object.

● *Objection. Non-Responsive or Narrative Answer.* A witness is expected to answer the question that's been asked. If a witness turns politician and ignores the question, his answer is non-responsive. In addition, after providing the information necessary to answer a question, a witness is expected to stop. The witness is not supposed to volunteer additional information. When a witness does not stop, the witness's answer becomes vulnerable to the objection that "the witness is volunteering non-responsive testimony," or in some instances that "the witness is testifying to a narrative."[55] The purpose of the objection is to stop the witness from smuggling inadmissible matter into the trial. It enforces counsel's right to a fair opportunity to object before the jury hears the testimony.

Consider the witness's answer on direct examination to this question: "At that time did you know Mr. Ocean?" Answer: "Yes, Danny and I corresponded frequently while he was in prison. He wrote me twice about where he thought Mr.

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[54] Daniel J. Capra & Ethan Greenberg, *The Form of the Question* 93-100 (2014).

[55] The objection that the witness is testifying to a narrative is best used when the length of the answer makes it easy to see that the answer has become unmoored from the original question.

Bloom hid the loot from the Sahara heist." The question called for a "yes" or "no" answer. It did not call for testimony showing that Mr. Ocean has a criminal record, or what Mr. Ocean said about Bloom hiding loot. The volunteered information was not responsive to the question.

Non-responsive answers are common in mock trial. In scripting direct examinations, many questions function less as questions and more as prompts for the student witness to speak the next lines in the script. Instead of answering a question and stopping, the student-witness volunteers uncalled for testimony. To be able to object you must listen carefully to each question and answer. You must spot the point when the witness shifts from answering to volunteering. You want to object as soon as it becomes clear that the witness has moved on.

The objection can be made even if the witness has not yet uttered inadmissible matter. You don't have to wait for the harm occurs.[56] While you cannot ask the judge to strike an answer that is merely non-responsive, you can ask the judge to instruct the witness to stay within the confines of the question-and-answer format.[57]

> *Objection. Non-Responsive. The witness is volunteering information that is not responsive to the question. I ask the court to instruct the witness to stop volunteering information that is not necessary to answer the questions.*

If a volunteered part of an answer included inadmissible matter, such as hearsay or character evidence, you need to combine the objection with a motion to strike the inadmissible evidence based on the ground that makes the testimony inadmissible.

> Q: At that time did you know Mr. Ocean?
> A: Yes, Danny and I corresponded frequently. He wrote me several times about where he thought the defendant hid the loot stolen during the last heist.
>
> *Objection. Non-Responsive and Hearsay. The witness is volunteering information that is not responsive to the question, and the answer included hearsay, namely the statement about what Mr. Ocean wrote to the witness. I ask the court to strike everything after the witness answered "yes." And I ask the court to*

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[56] James L. McElhaney, *McElhaney's Trial Notebook* 286 (4th ed. 2005).

[57] Only the examining attorney can move to strike a nonresponsive answer that is objectional on the sole ground that it is unresponsive. A non-examining attorney can get nonresponsive testimony stricken only if it is inadmissible on another ground. See Daniel J. Capra & Ethan Greenberg, *The Form of the Question* 229-233 (2014).

instruct the witness to stop volunteering information that is not necessary to answer the questions.

● *Asked and Answered*. The phrase "Asked and Answered" is one way to object to repetitive testimony. An alternative is the word "Repetitive." And from an older era, "Objection, Your Honor. Counsel is beating a dead horse." Rule 611(a) is the primary authority for objecting to repetitive testimony.

The objection is available when the same examiner asks the same question of the same witness.[58] The objection prevents a direct examiner from placing undue emphasis on a particular question and answer – emphasis being deemed proper in closing argument, not witness examinations.[59] Listen for questions beginning with words like "Just to be clear . . . ", and "Would you please repeat what you just said." The asked and answered objection prevents the repetition.

In mock trial, direct examiners occasionally repeat a question to prod a teammate witness who omitted part of a scripted answer. The "asked and answered" objection can deny the witness the opportunity to add to, or change, an answer. If the objection is sustained, the examiner, trying to get the omitted facts from the witness, is likely to ask objectionable leading questions.

Redirect Examination

All the rules governing the form of questions and answers on direct examination apply equally to redirect examination, with an important addition. A redirect examination is limited to the scope of cross-examination.[60] The likelihood that an opponent will ask an objectionable question on redirect is high.

● *Objection. Leading Question*. Because redirect examinations frequently begin with a leading question, the cross-examiner should be poised, on the edge of her seat, ready to object. As a practical matter, judges allow a little leading on

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[58] The objection does not bar a cross-examiner from asking questions that were asked and answered on direct examination. A cross-examiner is permitted to find out if the witness will give the same answers. In addition, most judges allow some repetition on cross-examination. They will sustain the objection only when the questioning becomes overly repetitive. Anthony J. Bocchino & David A. Sonnenshein, *A Practical Guide to Federal Evidence* 27 (9th ed. 2009).

[59] Myron Bright, Ronald Carlson & Edward Imwinkelreid, *Objections at Trial*, eBook loc. 3338-3342 (7th ed. 2015); *see* Daniel J. Capra & Ethan Greenberg, *The Form of the Question* 159-171 (2014).

[60] Under the Federal Rules of Evidence, the authority to limit the scope of redirect and re-cross examination comes from the court's general power under Rule 611(a) to control "the mode and order of interrogating witnesses." In most mock trial versions of the federal rules, the limit is made explicit. See, e.g., National High School Mock Trial Championship, Rules of Evidence, Rule 611(d) (questions on redirect examination "must be limited to matters raised by the attorney on cross-examination," and questions on re-cross examination "must be limited to matters raised on redirect examination and should avoid repetition").

redirect to focus the witness on a subject, but once that point is reached non-leading questions must be used.[61] For example, "On cross-examination, counsel asked you about a conversation you had concerning some fireworks. I'm right that this conversation took place before you ever met Mr. Washington?" The first sentence is acceptably leading, the second is not.

● *Objection. Asked and Answered.* Mock trial attorneys doing redirect examinations often try to get witnesses to repeat testimony already given on direct examination. If a question was "asked and answered" on direct examination, it is objectionable to ask it again on redirect examination.

● *Objection. Outside the scope of the cross-examination.* A redirect examination is properly used to respond to new matter brought out during cross-examination. It is not an opportunity to re-plow the ground covered in the direct examination or to get in the last word. Some judges hold to a strict view that redirect examination may only be used to respond to new matter. Others hold a somewhat broader view that redirect examination may explore any subject covered in cross-examination. All judges believe it's a matter left to their discretion.[62]

A cross-examiner sets up the objection by clearly limiting the topics she covers on cross-examination. That being done, the presiding judge can easily see when the examiner on redirect is simply repeating or expanding on matters brought out on the direct examination.

Sometimes, a direct examiner will conspicuously omit something from the examination. She is likely "sandbagging," saving part of the direct examination for redirect, anticipating that the testimony will have a greater impact at that point. A cross-examiner can counter by steering clear of the omitted topic. When the opponent tries on redirect to get in the "sandbagged" material, the cross-examiner objects that it's outside the scope of the cross-examination. If the objection is sustained, the opponent is blocked. If the objection is overruled, the cross-examiner has re-cross examination to deal with the "sandbagged" material.

Cross-Examination

You don't want to disappear from the stage during an opponent's cross-examination of your witness, and you don't want your witness to feel abandoned. You object to earn credit for yourself, but also to support your witness when he may feel besieged. If your witness needs no help, you object less. You don't want

[61] Thomas Mauet & Warren Wolfson, *Trial Evidence* 415 (4th ed. 2009).

[62] Joseph F. Anderson, *Effective Courtroom Advocacy* e-book loc. 1020-1052 (2012).

to deprive your witness of opportunities to score points against the cross-examiner.

● *Objection. Argumentative Question.* The target of the objection is a question like "You understand, don't you, that your explanation makes no sense?"[63] The question is closing argument masquerading as a question. It does not ask the witness to provide new information but challenges the witness to agree or disagree with a comment, inference, or conclusion about facts already in evidence.[64] The cross-examiner does not care how the witness answers. For the cross-examiner the question is a way to spell out to the jury a conclusion the cross-examiner wants the jury to draw.

The initial phrasing often signals that an argumentative question is on its way. Questions beginning with words such as "so," "yet," "still," "therefore," "since," "in the light of," and "given that you've testified" are usually argumentative. For example: "So, I'm correct that you are asking the jury to believe that you could see a scar on a man's cheek from fifty feet away on a dark night?" The question is argumentative because it does not seek new information from the witness.[65]

You should think of the objection as a counterpart to rules that limit the kinds of opinions a witness can give.[66] A witness on cross-examination cannot state an opinion that the witness could not state on direct examination.[67] If a cross-examiner embeds in his question an opinion, the witness who answers

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[63] The objection that a question is argumentative should not be confused with an objection that opposing counsel is "badgering" or "harassing" the witness. The latter are directed at abusive behavior, such as cross-examination questions worded to insult or intimidate the witness or delivered in a taunting tone of voice while standing close to the witness. Anthony Bocchino & David Sonnenshein, *A Practical Guide to Federal Evidence* 24-25 (9th ed. 2009).

[64] When responding to an argumentative objection, an examiner needs to identify the new fact that the question seeks to establish and what it goes to prove. It is not a persuasive response to say, "Your Honor, I am not arguing with the witness." Steven Lubet, *Modern Trial Advocacy: Analysis and Practice* 263 (4th rev. ed. 2013).

[65] A simple rephrasing of the question in the text would make it non-argumentative. "You have testified that you could see a scar on a man's cheek from fifty feet away on a dark night. Would you like to change that testimony?" The cross-examiner conveys to the jury the absurdity of the testimony, but her question seeks new information. Is the witness going to stick to his earlier answer, or back down?

[66] Rule 701.

[67] Stephen Salzburg, *Trial Tactics* 293 (2007)("[T]he cross examiner is no more entitled than the direct examiner to ask a lay witness to speculate about matters of which the witness has no personal knowledge. Once made, this point seems obvious. But, it is surprising how rarely the point is made.")

"yes" or "no" states an opinion. Whenever possible, you should pair the "argumentative" objection with an "improper opinion" objection.

> Q. You saw the driver looking to the right as he entered the intersection?
> A. Yes.
> Q. You saw that he was not looking straight ahead?
> A. Yes.
> Q. By not looking where he was going, the driver caused the accident?
>
> *Counsel: Objection. The question is argumentative and calls for an improper opinion. It seeks no new information and asks the witness to agree with opposing counsel's opinion regarding the legal issue of causation.*

As a matter of tactics, the objection has the advantage of making clear that the challenged question is an argument by opposing counsel, not testimony by the witness.[68]

● *Objection. Ambiguous Question.* An ambiguous question is one susceptible to more than one interpretation or is so vague or unintelligible as to make it likely to confuse the jury and the witness.[69]

> Q. Did you ever shoot an elephant in your pajamas?
> A. Yes, but how it got in my pajamas I don't know.
>
> - Captain Jeffrey T. Spalding (Groucho Marx), *Animal Crackers* (1930), https://www.youtube.com/watch?v=JWFaxEkYmSc

When an opponent asks an ambiguous question of her own witness, you probably don't want to object. In response to the objection, the presiding judge is likely to ask the witness if he understands his teammate's question. The witness will say yes. The judge will allow the question to stand. If, by chance, you win the objection, all you have accomplished is to force the opponent to ask a better, more precise question. That is unlikely to help your side.

When the opponent is cross-examining your witness, you make the objection to enforce your witness's right to a clear question. "Testifying is hard enough with good questions. It's almost impossible with bad ones."[70] Research shows that ambiguous questions increase the likelihood that a witness will give a wrong answer or mistakenly say "I don't know."[71]

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[68] Anthony Bocchino & David Sonenshein, *A Practical Guide to Federal Evidence* 25 (9th ed. 2009).

[69] Rule 611(a) is the primary authority in the rules for the requirement that questions be clear.

[70] James W. McElhaney, *McElhaney's Litigation* vol I, 207 (1995).

[71] See Dan Simon, *In Doubt: The Psychology of the Criminal Justice Process* 182-183 (2012).

Your objection should include a request to rephrase. "Objection, Your Honor. The question is ambiguous. I ask counsel to rephrase it." The request makes it more likely that the judge will sustain the object. It also signals jurors that you are not trying to prevent them from hearing something harmful to your case.[72]

When an opponent asks a real "headscratcher," an obviously confusing question, jurors welcome the objection. Jurors don't like to feel confused. The objection tells them that the fault is not with them or in their stars, but with the examiner's question. It also signals jurors that you are trying to be helpful.[73] It makes you more credible.

The menagerie of ambiguous questions is large and varied. To spot one of the critters you must listen carefully. As a general matter, listen for words that can mean several things. Q. I'm right that you've recently had *troubles with the law*?" The witness may answer "yes," thinking about a recent encounter with police at a "Black Lives Matter" demonstration. However, the euphemism "troubles with the law" is ambiguous. A "yes" answer invites jurors to imagine the worst kind of trouble.[74]

Listen for the words "in general," "fundamentally," "basically," "normally," "on average," "usually," "ordinarily," "commonly," and "frequently." The words are simple, but they are not clear or precise. They are ambiguous because they can mean different things to different people with different experiences.[75]

Watch for questions that fail to provide a clear frame of reference. The simple question "Who was present?" would be ambiguous if the context does not

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[72] Myron Bright, Ronald Carlson & Edward Imwinkelreid, *Objections at Trial*, eBook loc. 267-271 (7th ed. 2015).

[73] See Anthony J. Bocchino & David A. Sonenshein, *A Practical Guide to Federal Evidence* 22 (9th ed. 2009).

[74] Daniel J. Capra and Ethan Greenberg, *The Form of the Question* 112-113 (2014). The question is especially objectionable because it may prompt the witness to volunteer that he was arrested. An arrest is inadmissible character evidence, but an attorney can do nothing if her witness volunteers the damaging fact. Myron Bright, Ronald Carlson & Edward Imwinkelreid, *Objections at Trial*, eBook loc. 256-259 (7th ed. 2015).

[75] The suspect words are relative terms, words that ask a witness to place something on a continuum, with no reference point. Think about the question: "You frequently met with the accused, right"? To get clarity and precision, the response would have to take into account: Which meetings? About what? When? With whom? And were these meeting frequent? Frequent compared to what? Hourly events? Daily? Monthly? Quarterly?" Daniel I. Small, *Preparing Witnesses* 79-80 (4th ed. 2014).

make clear to the witness the date, the time, or place the examiner is talking about.[76]

Watch for questions that use negatives, double negatives, complex syntax and convoluted language. Q. "Isn't it true that you have not infrequently left open the safe where the stolen documents were kept?" The question begins with a phrase that many cross-examiners use, "Isn't it true." Does a "yes" answer mean: Yes – it isn't true, or Yes – it is true?[77] The question includes the double negative "not infrequently." Does a "yes" answer mean Yes – I did not leave the safe open, or Yes – I left the safe open some indeterminate number of times greater than infrequent, or Yes – I left the safe open frequently. And the question is vague about the time the safe was left open. Does a "yes" answer say the safe was left open at the time of the theft?

● *Objection. Compound Question*. A compound question is a question that asks a witness for two or more pieces of information. A compound question calling for a "yes" or "no" answer can easily confuse a witness. The witness may intend a "yes" answer to affirm only part of the question, but the "yes" answer on its face affirms everything. When a cross-examiner crams several factual assertions into a single question, you object to slow things down. You give your witness time to think. Your witness is more likely to answer correctly if the one long and possibly confusing question is broken into several questions.

> Q. You saw an orange-colored truck coming from the west, it was speeding, and its headlights were not turned on, right?
> Counsel. Objection, Your Honor. Compound Question. I ask that the question be broken into its parts.[78]

The use of the conjunction "and," "or," or "but" between two clauses makes a question compound, but you should also look out for adverbs whose insertion turns a simple question into a compound question. For example, "When you saw Mr. Cousins, he was bleeding profusely?" The question is really two questions. Mr. Cousins was bleeding? and Mr. Cousins was bleeding profusely? – as opposed to bleeding moderately or just a little.[79]

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[76] Daniel J. Capra and Ethan Greenberg, *The Form of the Question* 116-117 (2014).

[77] Daniel J. Capra and Ethan Greenberg, *The Form of the Question* 104-105 (2014).

[78] A compound question is permissible if the question seeks to establish a relationship between two or more facts. Steven Lubet & Jill R. Koster, *Mock Trials: Preparing, Presenting, and Winning Your Case* 228 (2nd ed. 2014). For example, "You gunned the engine, and it was right after you gunned the engine that you saw the traffic light turn red?"

[79] Daniel J. Capra and Ethan Greenberg, *The Form of the Question* 120 (2014).

● *Objection. The Question Misstates the Evidence.* Cross-examiners often preface a question with a recapitulation of part of the witness's testimony on direct examination, or part of another witness's testimony. There's nothing wrong with an accurate recapitulation, but opposing counsel often misstate, inaccurately paraphrase, or improperly characterizing the prior testimony.

> Q. You testified on direct that during the month before the accident you frequently ignored the regulation requiring you to get your truck weighed. In fact, you violated other regulations?
>
> *Counsel: Objection. Opposing counsel misstates the witness's prior testimony. The witness testified that he skipped getting his truck weighed when he was running late. He did not say that he "frequently" skipped getting his truck weighed.*

The objection has the tactical advantage of warning your witness to pay attention and it alerts the scoring judges to the fact that the earlier testimony was different. It also shows the scoring judges that you are listening carefully, in contrast to many mock trial attorneys who don't seem to be paying attention.

● *Objection. The Question Assumes Facts not in Evidence.* It is entirely proper for a cross-examiner to ask a leading question that suggests the existence of a fact not yet in evidence. For example, the leading question, "There were skid marks on the road, right?" is entirely proper. The witness has a fair chance to admit or deny that there were skid marks. The question becomes objectionable when it is phrased so the witness cannot answer "yes" or "no" without implicitly conceding the assumed fact. "You were more than 50 feet from the skid marks, weren't you?" Or "Did you know that there were skid marks on the road?" In both instances, the witness who answers "yes" or "no" implicitly concedes that there were skid marks. The phrasing seeks to induce the witness, inadvertently or by inattention, to implicitly accept the fact, and thereby give the jury the impression that the fact has been proved. You need to pay close attention to cross-examination questions beginning "Did you know," "Have you heard," or "Would it surprise you if I told you." The rest of the question is likely to assume a fact not in evidence.[80]

If the witness lacks the required personal knowledge to testify to the assumed fact, the objection should be paired with a foundation objection. "Objection, Your Honor. The question assumes a fact not in evidence, and counsel has not laid a foundation showing that the witness has the personal knowledge required to testify about skid marks." If the witness has the required

[80] The objection is not available to questions that seek to establish whether a fact is part of the witness's knowledge. Examples: "Did you ever hear (or read) that . . ." or "Were you ever told that . . ." However, such questions are often objectionable for relevance or other reasons. [citation?]

personal knowledge, the objection is not worth making because the cross-examiner can simply rephrase to get the fact into evidence.[81]

Re-cross Examination

● *Objection. Outside the scope of the redirect examination.* All the rules governing the proper form of questions on cross-examination apply equally to re-cross examination, with one important addition. Re-cross examination is limited in scope to new matter raised on redirect examination. You can expect presiding judges to strictly enforce the limit. They will quickly sustain objections to anything that sounds like mere repetition of questions asked on cross-examination.[82]

[81] Anthony Bocchino & David Sonenshein, *A Practical Guide to Federal Evidence* 29 (9th ed. 2009).

[82] See Daniel J. Capra & Ethan Greenberg, *The Form of the Question* 155-156 (2014).

Part Three - Substantive Objections to Testimony

An essential part of preparation involves identifying in advance of trial substantive objections you will likely want to make, and those your opponent is likely to raise. You search the case materials. For each potential objection you identify, you prepare an argument. You think out how you will stake out your initial position. You think out how you will counter the opponent's likely responses. And you work on the wording. The fewer words you need to make your point forcefully the better. You don't want to be thinking out the argument for the first time on your feet.[83]

Foundation Objection

● *Objection, No Foundation*. Foundation is an all-purpose objection. It's useful in a great many situations. The objection can be made any time an adversary fails to lay, in whole or in part, a required foundation. The objection can be fatal to the admission of a piece of testimony or an exhibit if the case materials do not give the opponent the means to establish the necessary foundation. Fatal or not, the objection should usually be made. You want the credit scoring judges give attorneys who demonstrate their understanding of evidentiary foundations.

The objecting attorney is expected to state specifically what's wrong with the foundation as it stands. A foundation objection must be specific enough to tell the adversary what testimony she would need to cure the problem.[84] Thus, "Objection. No Foundation. It appears that counsel is relying on the hearsay exception for "excited utterances," but there's been no testimony showing that the declarant was excited when he made the statement."

The responding attorney has two choices. She can immediately try to cure the problem by asking additional questions of the witness. "Your Honor, with your permission I will lay additional foundation." Or she can argue that the foundation has already been laid correctly. If the argument fails, she still has the option of trying to cure the problem.

A responding attorney's argument must point to testimony, by one or more of the witnesses, that establishes the necessary foundational facts.[85] A

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[83] NYU Lawyering Materials, *Witness Preparation + Examination* 79-80 (undated).

[84] Jack B. Weinstein and Margaret A. Berger, *Weinstein's Evidence Manual, Student Edition* loc. 2581 (2015).

[85] If the testimony of a later witness is necessary to establish a foundational fact, the attorney can ask the court to admit the testimony conditionally. Rule 104(b).

responding attorney cannot lay a foundation by asserting the foundational facts in argument. Foundational facts must be gotten from witnesses.

The objecting attorney should be prepared to reassert a foundational objection that the court sustains. In response to the ruling, many mock trial attorneys try to lay the foundation, but fail to cover all the elements, or their witnesses fail to give them the testimony they need. When that happens, the attorney should reassert the objection and in argument identify the element or elements that are still missing.

A foundation objection can be tactically useful. For example, the objection "lack of foundation showing personal knowledge" is useful for smoking out hearsay. You often know from a witness's pretrial statement that the witness's knowledge of a matter is based on hearsay, but the adversary's question may not obviously call for hearsay and the witness's answer may not mention the hearsay source. A hearsay objection is likely to be overruled, at least on the ground of being premature. A "lack of foundation" objection is the way to force the hearsay into the open before the witness gets a chance to testify to the substance of the out-of-court statement.

Relevance Objections

● *Objection, Relevance*. Relevance is a weak objection. Rule 401 says that evidence is relevant if it has "any tendency" to prove a fact of consequence.[86] The rule is permissive. Almost anything can be considered relevant. Faced with a relevance objection, a judge is likely to admit the evidence saying it's admitted for "whatever it might be worth, even if it turns out to be worthless."

You should make the objection when failing to make it might prompt a judge to question your competence, or when it looks like the judge will welcome the opportunity to force the examiner to move on.[87] It's possible you might win the objection. And sometimes you make the objection because, win or lose, it gives you an opportunity to make an argument that advances your side's theory and theme.

For a responding attorney, a relevance objection is a golden ticket to be seized. At a minimum a responding attorney needs to identify the issue to which the evidence is relevant and explain how the anticipated testimony affects the

[86] When responding to a relevance objection, an attorney should refer explicitly to the "any tendency" language.

[87] If at any point the presiding judge stares at you while the opponent is examining a witness, it probably signals the judge wants to hear an objection. If you make it, the judge will sustain it. Thomas A. Mauet, *Trial Techniques and Trials* 519 (10th ed. 2017).

determination of that issue. However, she should go beyond the minimum. Her argument should become the equivalent of a mini-closing argument.

> *"Your Honor. The anticipated testimony, together with other evidence, is relevant to the issue of the witness's bias. It will show that Mr. Smith has an enormous financial interest in the outcome of this case and therefore has a strong reason not to tell the whole truth. It's part of the evidence proving that Mr. Smith lied to the jury when he denied knowing about the bribe."*

A strong response the first time you get a relevance objection in important. It can deter an opponent from making more. A weak response invites an adversary to repeatedly interrupt the examination with relevance objections.

While a relevance objection standing alone is weak, it can be tactically useful when paired with other objections. The relevance objection forces the adversary to describe the anticipated testimony, a description that often makes clear why the evidence should be excluded on the other ground.

● *Objection, Relevance and Rule 403*. Whenever possible, you want to combine a simple relevance objection with a Rule 403 objection. You need Rule 403 to overcome the inclination of judges to admit worthless or almost worthless evidence. With Rule 403, the judge must consider the evidence's harmful effects. However, standing alone a Rule 403 objection "gives away too much. It starts out by conceding that the evidence is relevant, when that actually may not be the case."[88] The combination of grounds forces the opponent to establish relevance. It keeps the focus on the evidence's lack of probative value. And a judge who decides that the evidence is irrelevant is relieved of having to balance the evidence's probative value against its prejudicial effects.

When drafting an argument in support of a Rule 403 objection, consider that the words "unfair prejudice" have no persuasive value. They are simply a label for a "conclusion judges hang on a ruling that is justified by something far more specific."[89] To effectively argue a Rule 403 objection, you must tell the judge specifically the kind of harm you are asking the judge to put in the balance, combined with an attack on the opponent's theory of relevance. You also want to

[88] James W. McElhaney, *McElhaney's Trial Notebook 333-334* (2006).

[89] James W. McElhaney, *McElhaney's Trial Notebook 212* (2006).

use words such as "incendiary" or "inflammatory" to convey the harm's seriousness.[90]

> *Q. Did you notice what the motorcyclist was wearing at the time?*
> *Plaintiff's Counsel: Objection, Your Honor. Relevance and Rule 403. May I be heard?*
> *Court: "Yes"*
> *Plaintiff's Counsel: Your Honor, the witness is going to testify that the plaintiff was wearing a jacket that had a swastika on the back.*
> *Court (to defense counsel): What's the relevance of this testimony?*
> *Defense Counsel: Your Honor, it goes to the issue of identification?*
> *Plaintiff's Counsel: There is no real issue of identification in this case, Your Honor. There was only one motorcyclist at the intersection, and the defendant hit him. And it was not because of anything on his jacket. The defendant ran the red light and hit the plaintiff in the side. There is no question that the decoration on the back of the jacket was in bad taste. It was offensive. It is inflammatory. And that is exactly why the defendant is offering it in evidence.*
> *Court (to defense counsel): What issue of identification does this evidence go to prove?*
> *Defense Counsel: Well, Your Honor, identification of the parties is always one of the elements to be established?*
> *Court: Objection sustained.*[91]

Rule 602 & Rule 701 Objections

● *Objection. Speculation.* The word "speculation" is not used in the evidence rules but is recognized as one way to phrase an objection that the witness does not have the personal knowledge required by Rule 602 or Rule 701.[92] The word captures the idea that the witness is just guessing what the facts are, or offering an opinion based on guesswork. The word sounds right when it is obvious that the witness lacks firsthand knowledge.

When it is not obvious, it's tactically better to say "Objection, Foundation. There's been no testimony showing that the witness has the personal knowledge required to answer the question." In response, opposing counsel will have to persuade the judge that the foundation has been laid, or she will have to try to

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[90] Joseph F. Anderson, *Effective Trial Advocacy* e-book loc. 3084-3087 (2010).

[91] The example is based on one in James W. McElhaney, *McElhaney's Trial Notebook* 213-214 (2006).

[92] Of course, the objection can also be made using the words of the rules. For example, "Objection, the witness has no personal knowledge of the matter" (Rule 602), and "Objection, the witness's opinion is not rationally based on anything the witness saw or otherwise perceived." (Rule 701).

cure the problem by laying additional foundation. At some point, it will become clear if the witness is speculating.

A "speculation" objection is very likely to succeed in three situations. The first involves questions that ask a witness to state what another person intended to do or was thinking. No amount of personal observation can get inside another person's head. In a courtroom, questions like "What caused Cain to kill his brother?" "What motivated Arnold to betray his country?" and "Why did Earp reach for his gun?" call for speculation.

The second involves questions that ask a lay witness to state what *would* have happened *if* certain facts occurred.[93] No one can personally experience and remember things that did not happen or have not yet happened. One can only speculate about "what might-have-been" or "what-will-be." Listen for questions that begin with words like "Isn't it possible," "Suppose," and "If," and questions that use the subjunctive verb "would." Listen for answers that include words like "I guess," "I suppose," "I imagine," or "I assume."

The third involves questions that ask a witness to state an opinion when the witness was not an eyewitness to the event, or the witness saw very little or only part of the event.[94] The circumstances make clear that the opinion is just a guess. It may be a good guess, but it is still just a guess. The phrasing should include the key words from Rule 701: "Objection. Speculation. The question asks the witness to state an opinion that is not rationally based on what the witness saw."

● *Objection. Improper Opinion in violation of Rule 701.* When an opponent is examining a lay witness, you should be alert for questions that are likely to call for an improper opinion. Examples are "Why did this happen?" "How did this happen? "What do you think happened here?" "Who was at fault?" "Who caused this to happen?" and "What is your view about this?"

For judges, the decision to allow opinion testimony depends primarily on answering a single question. Will the testimony be "helpful" to the jury's deliberations?[95] Under Rule 701, only an eyewitness can give a helpful opinion. The opinion must be about what the eyewitness saw, heard, or otherwise perceived, and it must give the jury the kind of insight that only an eyewitness

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[93] An expert witness may be able to answer such a question.

[94] The opinion cannot be based in whole or in part on the observations of others. Jack Weinstein and Margaret A. Berger, *Weinstein's Evidence Manual, Student Edition* 18879-18886 (2015).

[95] "Rule 701 is judicially administered by asking the simple question whether the proffered form of testimony is *helpful*." Graham C. Lilly, Daniel J. Capra, and Stephen A. Salzburg, *Principles of Evidence* loc. 909-910 (6th ed. 2012) (emphasis in original).

can give. An opinion is unhelpful when the witness is in no better position than the jury to make the inference or draw the conclusion.[96]

Many judges incline to allow opinion testimony absent a reason to keep it out, the thinking being that cross-examination can be expected to uncover weaknesses, and jurors are able to decide for themselves what weight, if any, an opinion deserves.[97] To succeed with the objection, an attorney needs to persuade the judge that the opinion is not only unhelpful but also harmful.

An opinion becomes harmful when its admission is likely to distort a jury's deliberations. To illustrate the point, assume the accused is charged with espionage. Agent Bond, that's James Bond, led the investigation. After testifying to what he uncovered, Bond concludes, "In my opinion, Goldfinger is guilty." Mr. Bond brings to the courtroom an aura of expertise, authority, and savoir faire. The temptation for jurors is to adopt Mr. Bond's opinion, instead of deciding for themselves what the evidence proves. If jurors yield to the temptation, Mr. Bond effectively decides the case, not the jury.[98] In addition, Mr. Bond's opinion is likely infected by knowledge of inadmissible evidence that the jury will not hear, and therefore has no way of evaluating. A jury that credits Mr. Bond's opinion effectively returns a verdict based, in part, on evidence that is both inadmissible and secret.[99] Excluding the opinion is the only way to ensure that the jury's verdict is based solely on evidence admitted at trial and the jury's evaluation of that evidence.

Hearsay Objections

● *Objection. Hearsay*. Mock trial case materials come loaded with hearsay. Preparation includes identifying each out-of-court statement that you or your adversary might want to use and working out the argument(s) for or against

[96] Michael H. Graham, *Evidence Law Mastery, Hands-on-Learning* 416 (2016) ("If the jury can be put into a position of equal vantage with the witness for drawing the opinion the witness may not give an opinion.")

[97] [citation?]

[98] "When nonparty witnesses are asked to resolve the question that will be put to the jury at the end of trial, the danger is that the jury will perceive the witnesses, who were present at the scene of an event, as telling the jury how to vote. One reason for a rule limiting opinion to those that are helpful is to ensure that the jury does not defer to witnesses simply because witnesses are at the scene. Applying the law to the facts is the jury's job, not the witness's." Stephen Salzburg, *Trial Tactics* 207 (2007).

[99] See Kristine Osentoski, "Out of Bounds: Why Federal Rules of Evidence, 701 Lay Opinion Testimony Needs to Be Restricted to Testimony based on Personal First-Hand Perception," 2014 U. Ill. L. Rev. 1999, 2036-2039 (2014).

its admission into evidence. You should also consider potential, non-hearsay grounds that might be raised against a statement's admission into evidence.[100]

As a general matter, you make a hearsay objection any time a mock trial judge would expect to hear the objection. You object to a question that obviously calls for hearsay: "What did Mr. Rogers say to his neighbor?" and "What did the neighbor tell Mr. Rogers?" You object as soon as a witness volunteers what Mr. Rogers told his neighbor, or the witness or neighbor told Mr. Rogers. The only time you hold back is when it would be apparent to the judge that the opponent has an easy response, and you have no good reply.[101]

You also object when an examiner asks a question that is phrased to conceal hearsay. Be alert for questions using the verbs "learn," "understand," "know," and "aware." For example, "What did you learn from your investigation?" "What do you understand about who fired the first shot?" "Tell us what you know about the condition of the truck's brakes?" and "Were you aware that the gun that killed your neighbor was a 38-caliber pistol?"[102] The words don't distinguish between first and second-hand knowledge. The witness could have learned the facts from personal observation, or from someone else. From the case materials, you will know; the judge will not. The objection should be based on two grounds: foundation and hearsay. The first is the lack of a foundation showing that the witness can answer the question based on personal knowledge; the second is the likelihood that the answer will include hearsay. In arguing the objection, you ask the judge to require the opponent to rephrase the question to restrict the witness to testimony about what he personally observed. Judges are inclined to grant this request.

When responding to a hearsay objection, an attorney should give the judge what she needs to make a ruling. That ordinarily includes who made the out-of-court statement, its content, what the statement is being offered to prove, and why specifically the statement should come in – either because it is not hearsay, or because a hearsay exception applies.[103]

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[100] The most likely non-hearsay grounds are the declarant's lack of personal knowledge (Rules 602 & 701), and unfair prejudice (Rule 403). *See* Stephen Saltzburg, *Trial Tactics* 289-296 (2007).

[101] The primary occasion to hold back involves the out-of-court statement of a party-opponent. Rule 801(d)(2) says that statements by a party-opponent are not hearsay. It's easy for the adversary to show the rule applies, and you have no good response. See Deanne Siemer, *Federal Rules of Evidence with Cues and Signals for Good Objections* loc. 446-453 (2016).

[102] The last question "Were you aware that the gun found at the murder scene was a 38-caliber pistol?" is also objectionable on relevance grounds, if the witness's state of mind is not in issue.

[103] Examples of minimal responses include "It is being offered for the fact that the statement was made," "The statement is not offered for the truth of what it asserts," "It is being offered as background or context," and "It is being offered to explain subsequent action." These responses

> *Your Honor. A hearsay exception applies. Rule 803(3). The testimony is admissible because it is offered to show the state of mind of Countess Karenina. If permitted the witness will testify that the Countess said that she knew her husband did not love her and that she was going to tell him that she wanted a divorce. The Countess's statement that she planned to tell her husband she wanted a divorce is circumstantial proof that, in fact, she spoke to him and made him aware of her intentions before the unfortunate train incident.*

With a full response, the objecting attorney has a more difficult return to make. With less than a full response the objecting attorney gets an easy return - she points to what the responding attorney has yet to say and gains time to think. Or the objecting attorney gets the benefit of the judge intervening with questions. And once each side has had a chance to speak the judge may choose to rule – cutting short the argument.[104]

● *Hearsay – You Object and the Opponent Responds that an Exception Applies*. If the opposing attorney claims that the testimony is admissible under one of the hearsay exceptions, she has the burden of showing that she laid the necessary foundation. The first matter for argument is whether she met that burden. If something obvious is missing, the judge is likely to sustain the objection. More often, it's not clear cut. The foundation will look anywhere from strong to weak. The judge has a judgment call to make.

The challenge for the objecting attorney is to persuade the judge to require more foundation. The objecting attorney may also have to overcome an obstacle: the inclination of many judges to admit hearsay. For these judges, hearsay evidence may be unreliable, but so are other kinds of evidence that are routinely admitted, such as eyewitness accounts.[105] And there's no reason to think jurors less capable of giving appropriate weight to hearsay than they are to other forms of evidence.[106] To keep hearsay out, an objecting attorney needs persuasive

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signal on which hearsay continent the objection fight will take place, but they leave the judge without direction enough to find the arena and make a ruling.

[104] Arguments proceed at different speeds. Think of each opportunity to speak as a step. The fewer steps it takes to get to where both sides have nothing more to add the faster the argument; the more steps the slower. If the responding attorney thinks she will win after the court has heard full argument, she should develop her argument quickly. She should cram as much as possible into the first step.

[105] David Alan Slansky, "Hearsay's Last Hurrah," Supreme Court Review 1, 16-19 (2009). On the unreliability of eyewitness accounts, see Dan Simon, *In Doubt: The Psychology of the Criminal Justice System* 90-119 (2012).

[106] Empirical research shows that jurors tend to be skeptical of hearsay evidence and give it less weight that they give in-court testimony subject to cross-examination. Justin Sevier, "Popularizing Hearsay," 104 Geo. L. J. 643, 647, 652-653 & n. 54 (2016). In addition, vast quantities of hearsay are already admitted into evidence. The rule against hearsay is "a small and

counters. The available counters depend on whether the declarant is testifying at the trial.

Declarant is Testifying. When the declarant is testifying, it's an uphill battle. The primary reason for excluding hearsay largely disappears; the declarant is available to be cross-examined about what he said out of court.[107] In this situation, a weak foundation, even a wisp of foundation, may be enough to win a statement's admission into evidence. To make a fight of it, the objecting attorney needs to invoke the law's preference for live testimony.[108] Her argument starts with this proposition: There is no justification for admitting hearsay unless "the quality of the hearsay is at least as good" as the declarant's sworn testimony.[109] When a court has sworn testimony, it should not settle for inferior hearsay. If the hearsay is consistent with the testimony, its admission is unnecessary, cumulative, and possibly confusing.[110] If it is inconsistent, it's admission would allow a jury to return a verdict based on an unsworn, out-of-court statement that the witness now contradicts.[111]

Declarant is not Testifying. When the declarant is not testifying, the objecting attorney has two potential lines of argument. The first builds on the

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lonely island" in "a sea of admitted hearsay." Jack B. Weinstein, "Probative Force of Hearsay," 46 Iowa L. Rev. 331, 346-47 (1961). It's difficult to argue that jurors cannot handle hearsay when the rules already entrust them with so much. Christopher B. Mueller, "Post-Modern Hearsay Reform: The Importance of Complexity," 76 Minn. L. Rev. 367, 382 (1992).

[107] See Daniel J. Capra, "Prior Statements of Testifying Witnesses: Drafting Choices to Eliminate or Loosen the Strictures of the Hearsay Rule," 84 Fordham L. Rev. 1429, 1430-1436 (2016).

[108] See Jack B. Weinstein, "Probative Force of Hearsay," 46 Iowa L. Rev. 331, 334-335 (1961) (The preference for live testimony gives jurors "more assurance" and conveys a sense of fairness" to litigants and the public.")

[109] Edward W. Cleary, Reporter of the Advisory Committee on Evidence, quoted by Richard D. Friedman, in "Jack Weinstein and the Missing Pieces of the Hearsay Puzzle," 64 DePaul L. Rev. 449, 453-454 & n. 27 (2015).

[110] The ground for excluding the evidence effectively shifts from hearsay to Rule 611(a), which gives a judge discretion to exclude unnecessary, cumulative, and possibly confusing evidence. The rule directs judges to control the presentation of evidence so as to make it "effective for the ascertainment of the truth," and to "avoid needless consumption of time." Or it shifts to Rule 403, but the objecting attorney then has the burden of persuading the judge that the hearsay's probative value is substantially outweighed by considerations of jury confusion, "waste of time, or needless presentation of cumulative evidence."

[111] See Senator Samuel J. (Sam) Ervin, quoted by Christopher B. Mueller, in "Post-Modern Hearsay Reform: The Importance of Complexity," 76 Minn. L. Rev. 367, 387 n. 61 (1992). Senator Ervin stated that a proposal to admit into evidence a witness's prior inconsistent statement belongs on "the scrap heap of injustice." It would let a jury "find beyond reasonable doubt in a criminal case that this man told the truth when he was not sworn but told a lie when he was under oath." Of course, nothing prevents use of an inconsistent statement to impeach the credibility of a witness, it just doesn't come into evidence.

idea that the hearsay exceptions are over inclusive; they allow the admission of some untrustworthy evidence. That's because each hearsay exception is constructed on a few foundational facts that barely account for everything that's important to deciding if a piece of evidence is trustworthy.[112]

Consider a fatal collision between a car and truck. The declarant arrives home in an excited state and tells his spouse: "I just saw a horrible accident. It was all the truck driver's fault. He drove straight through a red light." The statement may qualify as an "excited utterance," but that alone does not prove the statement is reliable evidence. The objecting attorney might ask: Where was the declarant standing when the accident occurred, and was he paying attention? How good is the declarant's eyesight? Did he talk to someone at the site of the accident who may have influenced his view of how the accident happened? The objecting attorney can argue that, until these and similar questions are answered, there's no assurance that this "excited utterance" is trustworthy evidence.[113] The objecting attorney may be able to persuade the judge that more foundation should be required.

A second argument reinforces the first. It builds on the idea that it is fundamentally unfair to deprive a person of liberty or take his property based on evidence from a person who cannot be looked in the eye and cross-examined.[114] Fairness says that hearsay in this situation should be admissible only when "the choice is between that or nothing."[115] In addition to more foundation, a court should want assurance that the hearsay is necessary proof.

● *Hearsay – You Object and the Opponent Responds that the Statement is Not Offered for the Truth of What It Asserts.* When the responding attorney gives this response, she is expected to state exactly what the statement is being offered to prove and convince the court that the proof does not depend on the statement being true.

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[112] "A statement may be grossly unreliable despite the fact that it falls within the bounds of a categorical exception, in light of other information in the case." Michael L. Siegel, "Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule," 72 B.U. L. Rev. 893, 913 (1992). See Christopher B. Mueller, "Post-Modern Hearsay Reform: The Importance of Complexity," 76 Minn. L. Rev. 367, 375 (1992); Eleanor Fox, "A Foundation Fact Approach to Hearsay," 75 Cal. L. Rev. 1339, 1352-1353 (1987).

[113] See Eleanor Fox, "A Foundation Fact Approach to Hearsay," 75 Cal. L. Rev. 1339, 1355-56 (1987).

[114] Cf. U.S. Constitution, amend. VI ("[I]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"); see Justin Servier, "Popularizing Hearsay," 104 Georgetown L. Rev. 643, 655-664, 687-690 (2016).

[115] Edward W. Cleary, Reporter of the Advisory Committee on Evidence, quoted by Richard D. Friedman, in "Jack Weinstein and the Missing Pieces of the Hearsay Puzzle," 64 DePaul L. Rev. 449, 454 & n. 30 (2015).

The first matter for argument is whether the opponent's assertion is correct. Is the statement really being offered to prove something that does not depend on the truth of what it asserts? Assume a lawsuit arising from a collision between a keelboat and the gate of a river lock. Mike Phink, an eyewitness testifies that the keelboat had a green light when it started into the lock. Mr. Phink is also ready to testify that after the collision he talked to a Mr. Crockett, who agreed that the light was green when the keelboat entered the lock. In response to a hearsay objection, counsel says that Mr. Crockett's statement is not being offered to prove the light was green, but only to corroborate Mr. Phink's testimony that it was green. However, Crockett's out-of-court statement corroborates nothing if it is false. It corroborates Phink's in-court testimony only if it is true. That makes it hearsay despite opposing counsel's claim that it is not hearsay.[116]

The next matter for argument involves the morphing of a hearsay objection into a relevance and Rule 403 objection. The objecting attorney has two potential lines of arguments. (1) The ostensible non-hearsay purpose is not relevant. It's simply a cover used to smuggle inadmissible hearsay into the case. (2) If it is relevant, the risk that the jury will misuse the statement for its truth substantially outweighs the evidence's probative value.[117]

To illustrate the progression of the argument, suppose an accused is on trial for illegal possession of a firearm. The accused denies the charge. The triggering event was a 911 call in which an anonymous person reported seeing a "black male with 'poofy' hair, wearing a blue shirt, riding a bicycle, and armed with a handgun." Five officers are dispatched to the scene. They will testify to seeing the man described in the call and arresting him, but not finding a handgun.[118] The prosecution seeks to put the 911 call into evidence, saying that it is not being offered to prove the truth of what the anonymous caller said, but as background explaining why the officers were dispatched and their reason for arresting the bicyclist. To rule, the judge needs to answer two questions.

Is the hearsay relevant? The answer ordinarily is "no." Trials are about the evidence the police find. Jurors ordinarily do not need to hear why officers acted as they did. Their state of mind or reasons for acting are usually not relevant to deciding an accused's guilt or innocence.[119]

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[116] Woody Woodruff, "Prove it! Musings on advocacy, evidence, and the problems of proof at trial: Corroborate This!" Campbell Law Observer, March 9, 2013. http://campbelllawobserver.com/prove-it-musings-on-advocacy-evidence-and-the-problems-of-proof-at-trial-corroborate-this/

[117] Anne Bowen Poulin, "The Investigative Narrative: An Argument for Limiting Prosecution Evidence," 101 Iowa L. Rev. 683, 688 (2016).

[118] Modified version of the facts in *United States v. Nelson*, 725 F.3d. 615 (6th Cir. 2013).

[119] The testimony would be relevant if the accused claimed that the officers arbitrarily singled him out, or they stopped him because of his race. See Anne Bowen Poulin, "The Investigative

Is it unfairly prejudicial? Yes. The key issue for the jury is whether the accused possessed a gun. The danger is the likelihood that the jury will use the anonymous caller's statement as proof that the cyclist had a gun. On the other side of the scale, if any explanation is needed for the officers' presence or conduct, it would be enough for them to testify that they responded to a 911 call. The content of the 911 call would not have to be admitted into evidence.[120]

Character Evidence Objections

Because character evidence objections potentially involve violations of different rules, an objecting attorney should state both the name and number of the rule that has been violated.

- *Objection. Improper Character Evidence in violation of Rule 404(b).* The rule states that evidence of specific acts is not admissible if offered *solely* to prove that a person is predisposed to do something bad. However, it is admissible when offered to prove anything else that is relevant. When an opponent seeks to put in evidence of misconduct that makes the party you represent look like a bad character, you have an objection. It's easy to make.

The first matter for argument is the opponent's claim that the evidence has a legitimate purpose. The opponent is expected to explain how the evidence is relevant for a purpose other than proving propensity. The opponent cannot merely recite the rule's laundry list of possible uses. Or recite a word from the list as if its mere utterance, like a magic incantation, opens the evidentiary door.

If an opponent succeeds in explaining the evidence's non-character purpose, the objection typically turns into a Rule 403 fight. To win, the objecting attorney must persuade the judge that the prejudice the evidence will cause substantially outweighs its probative value. She must build her argument on facts and circumstances specific to the case, all working to a conclusion that the alleged non-character purpose is a cover for smuggling forbidden character evidence into the case. For a responding attorney, the task is to counter suspicion with an argument showing that the prior act is genuinely being offered to address a real and important issue in the case.

Narrative: An Argument for Limiting Prosecution Evidence," 101 Iowa L. Rev. 683, 701-703 (2016). In addition, some explanation of the officers' presence and conduct may be necessary to rebut false inferences a jury might draw from it appearing that an officer just happened on the scene. 2 McCormick on Evidence §249, at 193 (Kenneth S. Broun ed. 7th ed. 2013).

[120] 2 McCormick on Evidence §249, at 193 (Kenneth S. Broun ed. 7th ed. 2013). This compromise solution allows officers to show that they were not acting on mere whim or suspicion, while removing the damning substance of the hearsay.

The unfair prejudice comes from the likelihood that the jury will treat the prior act as character evidence, even if it is offered for another purpose.[121] It puts a party is at risk of losing his liberty or property because the jury draws the forbidden propensity inference. How grave the risk turns on factors such as the nature of the act and its similarity to the conduct at issue in the case. For example, a jury in a civil case that learns the plaintiff once molested a child is likely to think the plaintiff does not deserve relief. A jury in a criminal case is more likely to convict a defendant accused of robbing a bank if it learns that he previously robbed banks.

In criminal cases, the prejudice also includes a cost to our justice system. Under the spell of character evidence, jurors tend to strip an accused of the presumption of innocence and lower the bar of proof of guilt. They resolve doubts against the accused and fail to scrutinize the prosecution's case as carefully and skeptically as they should.[122] When that happens routinely, jurors stop being a check against police and prosecutorial abuse, laziness, and incompetence. Police and prosecutors come to rely on character evidence to make up for careless and sloppy work. The presumption of innocence is an important safeguard. To preserve its role in the criminal justice system, evidence of an accused's bad acts should be admitted sparingly and only when reasonably necessary.[123] At least, so goes the argument.

Attorneys arguing the probative value side of Rule 403's equation need to pay close attention to the facts of the case.[124] Factors affecting probative value can be grouped into four categories.

(1) *The evidence has little probative value because the proof that the person committed the prior act is weak*. At a minimum the evidence must be

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[121] Experienced trial judges and lawyers are skeptics when it comes to the effectiveness of limiting instructions to mitigate the danger of jurors using evidence of a prior act as evidence of character. See Dan Simon, *In Doubt: The Psychology of the Criminal Justice System* 185-189 (2012). If a limiting instruction will not mitigate the danger, the question for the judge is whether the danger is high enough to justify exclusion of the evidence. Stephen Salzburg, *Trial Tactics* 367 (2007).

[122] *See* Theodore Eisenberg & Valerie P. Hans, "Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Conviction on the Decision to Testify and on Trial Outcomes," 94 Cornell L. Rev. 1353, 1357 (2009) (Based on an analysis of data from more than 300 criminal trials, the authors conclude that juries appear to rely on criminal records to convict when other evidence in the case normally would not support conviction. The effect in otherwise weak cases is substantial and can increase the probability of conviction to over 50% when the probability of conviction in similar cases without criminal records is less than 20%.)

[123] Paul Milich, "The Degrading Character Rule in American Criminal Trials," 47 Georgia L. Rev. 775, 792-799 (2013).

[124] Stephen Salzburg, *Trial Tactics* 367 (2007) ("[T]o balance properly, trial judges must pay close attention to the factual context of each case. Small differences in facts may make a big difference when a judge assesses the probative value of uncharged conduct.")

strong enough for a jury to find, by a preponderance of the evidence, that the person committed the prior act.[125] An example of evidence that does not meet this standard is an arrest not followed by a criminal prosecution. The arrest shows that an officer believed he had probable cause to believe that the arrested person committed a crime, but someone else in authority determined that the matter was not worth pursuing.[126]

(2) *The evidence has no or little probative value because what it is being offered to prove is not relevant or not in dispute.* Assume the accused is on trial for robbing a bank. He says someone else committed the crime. The prosecution offers evidence that the accused was previously involved in a bank robbery. It says it is offering the evidence as proof of the accused's intent. However, the accused does not dispute that the man who went into the bank with a machine gun and yelled "hand over the money" intended to rob the bank. The accused's defense is simple: "I was not that man." Intent is not a genuine issue at this trial. The evidence has no probative value.

(3) *The evidence has little probative value because the logic connecting the act to what it is supposed to prove is weak.* Assume an accused is on trial for burglarizing a house while the owners were out attending a funeral. The accused says it wasn't him - putting in issue the identity of the burglar. The prosecution offers evidence that six years ago the accused was involved in a burglary that also took place while the owners were attending a funeral. It says it is offering the evidence as proof of identity, asserting that the similarity of the two burglaries tends to prove that it was the accused who committed the second burglary. However, it's not uncommon for burglars to target the houses of relatives who will be attending a funeral. It's not a method of committing burglary unique to just a few criminals. And the common element could easily be a just a coincidence. The probability that the same person committed both burglaries is weak.[127]

(4) *The evidence may be unnecessary because there are less prejudicial means to prove the same fact.* Suppose a prosecution needs to prove the

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[125] Rule 104(b); *Huddleston v. United States*, 485 U.S. 681, 689-90 (1988). An argument can be fashioned that a higher standard should govern, namely, proof by "clear and convincing" evidence. That's the standard used in more than a dozen states. A judge applying the higher standard is free to decide that a witness's testimony is insufficient proof because it is uncorroborated, or the witness is vague about what happened and cannot provide enough details. See Jason Tortora, "Reconsidering the Standards of Admission for Prior Bad Acts Evidence in Light of Research on False Memories and Witness Preparation," 40 Fordham L.J. 1493, 1506-1517 (2013).

[126] Michael Graham, Evidence Law Mastery, Hands-on-Learning 537 (2016). A hearsay objection may also be lodged against evidence of an arrest. The evidence becomes relevant only because of the arresting officer's implied out-of-court statement that the person committed the crime.

[127] [citation]

defendant owned a particular rifle. It has evidence that the rifle is registered to the defendant, and an officer will testify to finding the rifle during a search of the defendant's home. The prosecution, however, wants to bolster its case with evidence that the accused has a conviction for reckless use of a weapon and the conviction involved the same rifle. It offers the evidence as further proof that the defendant owned the rifle. But further proof is hardly necessary.[128]

As a tactical matter, a "mock trial" attorney should not make a character evidence objection if her witness has a good explanation for the conduct. Let the witness score the point on redirect examination. Q. On cross-examination, you admitted that you lied to a police officer. Would you tell us why you lied? A. It all happened in Russia. I was hiding a dissident's family in my attic. I wasn't going to give them up to Putin's thugs.

In real life, a party's attorneys move before trial to excluded evidence of the party's prior bad acts. The presiding judge gets written briefs from both sides, hears oral argument, and has time to think before ruling. In mock trial, the presiding judge gets the objection during trial, hears oral argument limited in time by the need to keep the trial moving along, and must decide quickly. In this situation, an argument for or against admission must be thought out in advance. It should be clear and concise. It should highlight just a few key points. Impression counts here as much as substance.

● *Objection. Improper Impeachment in violation of Rule 608*. The rule authorizes a form of impeachment. It allows a cross-examiner to inquire into conduct that shows the witness to have a character that would predispose him to disregard the oath to tell the truth. Or, to put it more bluntly, a cross-examiner is allowed to accuse a witness of being a liar. The rule expressly gives the judge discretion to prevent the accusation from being made. The challenge for an objecting attorney is to persuade the judge to exercise that discretion.

To have probative value, the witness's conduct must logically suggest that the witness has a lying character. If the act doesn't, you have an objection. For example, acts of reckless driving do not logically suggest that a witness has a lying character. A witness' involvement in bar fights show he has a short temper, not a lying character.

You may be able to object even when the conduct involved a lie or deceitful act. Afterall, most of us at one time or another have told a lie. One act of lying hardly proves that a person has a lying character. And circumstances can break the logical links that connect act to character to false testimony. An act of shoplifting may have involved deceit. But when motivated by the witness's need to feed his children it does not prove he is willing to disregard an oath to tell the truth. An act committed when the witness was a teenager, or under the influence

[128] Comment, "Wisconsin's Uncharged Misconduct Evidence Rule: An Analysis of Section 904.04(2)," 73 Marquette L. Rev. 319, 349 (1989).

of drugs or alcohol, says nothing about the character of the witness who has become a mature, sober adult.

When appropriate, an improper impeachment objection should be paired with an objection based on Rule 611(a), which empowers the court to protect witnesses from "harassment and undue embarrassment." The rule yields a premise that can bolster the objecting attorney's argument. No witness should be accused unnecessarily of having a lying character. A slur on a witness's character should not be allowed unless the cross-examiner can show that the slur is necessary.

Rule 608 allows inquiry into conduct evidencing a dishonest character; it does not authorize inquiry into the consequences a witness suffered because of the conduct. A cross-examiner could ask a police officer about his having filed a false report. You would object if the cross-examiner asked but about the officer being brought up on charges, suspended for 30 days, found guilty, and demoted. The inquiry is barred by a combination of Rules 608 and 802 (hearsay). The relevance of the evidence depends on the implied out-of-court statements by the officer's superiors that the conduct occurred and merited punishment.[129]

- *Objection. Improper Impeachment in violation of Rule 609.*

When the authors of case materials go to the trouble of giving a criminal defendant a criminal a criminal record, they are setting the stage for an objection fight. Understand that for a criminal defendant it's more than a fight. It's virtually the whole war. The usual result of allowing the impeachment is an automatic conviction.[130] Judges expect both sides to come prepared for the fight.

To arm yourself, you will need to closely read the rule. Details count. Look for technicalities. For example, subpart "d" of the rule provides that evidence of a conviction of juvenile is generally inadmissible, but a judge in a criminal case may admit the evidence when offered to attack the credibility of a witness other than the defendant. Subpart "c" has a ten-year time limit after which the judge must determine that "specific facts and circumstances" show the conviction's probative value "substantially" outweighs its prejudicial effect."

One kind argument arises when the opponent claims that the conviction is a Rule 609(a)(2) crime, one that requires proof of an act of "dishonesty or false statement." You must argue that it doesn't. If you lose the argument, the judge admits the evidence. The rule gives the judge no choice.

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[129] Advisory Committee Note to Rule 608(b); Michael Graham, *Evidence Law Mastery, Hand-On Learning* 688-689 (2016).

[130] See *United States v. Gilliliand*, 586 F. 2d. 1384, 1389-90 (10th Cir. 1978) ("[A]n obvious truth is that once prior convictions are introduced the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality.") (quoting *United States v. Burkhart*, 458 F.2d 201, 204-05 (10th Cir. 1972).

A different kind of argument arises when the prosecution concedes (or the judge decides) that the conviction is for a felony that did not require proof of an act of "dishonesty or false statement." Rule 609(a)(1) says that the prosecution must persuade the judge that the probative value of an accused's felony conviction outweighs its prejudicial effect. The prejudicial effect is often obvious. The primary matter for argument is the evidence's probative value.

An objecting attorney should want to speak first. She needs to remind the judge that the rule says the prosecution must show that the probative value of a criminal defendant's prior conviction outweighs it prejudicial effect. And she should try to frame the argument in a way that puts the prosecution on the defensive. For example:

> "As Your Honor knows, the government has the burden of persuading you that the conviction's probative value outweighs its prejudicial effect. That's Rule 609(a)(1). As you listen to the argument, the question you should ask yourself is "[w]hat does the evidence add to a jury's natural inclination to discount a criminal defendant's testimony?"[131] My opponent should have to explain why it needs the evidence. If they don't need it, you shouldn't give it to them."

An objecting attorney's argument should always point out that keeping the evidence from the jury is the only sure way to prevent the jury from misusing it. It's a common belief among judges and trial lawyers that jurors do not actually use evidence of a criminal conviction for the limited purpose of determining an accused's credibility.[132] They use it to infer criminal propensity. And it's a common belief that limiting instructions do not prevent the misuse.

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[131] *Brown v. United States*, 370 F.2d 242, 244 (D.C. Cir. 1966) ("The right question for argument is: What does the evidence add to a jury's natural inclination to discount a criminal defendant's testimony? One need not look for prior convictions to find motivation to falsify, for certainly that motive inheres in any case, whether or not the defendant has a prior record. What greater incentive is there than avoidance of conviction?")

[132] For supporting research, see Theodore Eisenberg & Valerie P. Hans, "Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes," 94 Cornell L. Rev. 1353, 1387-88 (2009) (an analysis of data from a study of 300 trials concluded that juries in fact do not use prior crimes evidence for credibility determinations.)