

TO OBJECT OR NOT OBJECT, THAT IS THE QUESTION: A CRIMINAL LAW PRACTITIONER'S GUIDE TO THE "FIVE W'S" OF EVIDENTIARY OBJECTIONS

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ABSTRACT

Objections provide criminal law practitioners with power. By lodging an evidentiary objection, a practitioner can prevent an opposing party from introducing evidence, preserve appellate review of evidentiary issues, and impact the way in which the parties introduce evidence at trial. However, to be effective, practitioners must understand the "five w's" of objections; specifically, "when," "how," "where," about "what" and "why" to object. By analyzing these five penultimate questions, criminal practitioners will be able to answer the ultimate question; "if" they should object at all. By applying this methodology, criminal practitioners will be better able to lodge convincing objections, which will have a positive impact on their clients' cases.

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I. INTRODUCTION

For lawyers and layman alike, one word represents courtroom power, “objection!”¹ This one word carries the power to prevent evidence admission, protect a client’s rights, and preserve the appellate record.² Alternatively, failure to object acquiesces to the admission of evidence, waives a client’s rights, and heightens the appellate standard of review.³ Moreover, the phrase “objection,” has the power to immediately pause court proceedings, throw opposing counsel off balance, and draw attention to an otherwise overlooked point. For these reasons, one cannot overlook or overstate the power of objections.

Nevertheless, objections have transcended the legal profession and, in film and television programs, are often used, for dramatic effect.⁴ According to Hollywood, an objection is a lawyer’s primary tool; and therefore, lawyers are depicted objecting often and with great vigor.⁵ An unintended consequence of these Hollywood portrayals is that attorneys often imitate them without understanding an objection’s purpose.⁶ Consequently, Hollywood’s popularization of the dramatic objection often belies the true purpose of objecting: to achieve a strategic, as opposed to a tactical, trial advantage.

Unfortunately, law schools do not prepare law students for the everyday intricacies of criminal trial practice.⁷ Instead, newly minted criminal law

1. See e.g., Mark Anderson, *Cartoon Description*, ANDERTOONS (October 19, 2019, 12:27 PM), <http://andertoons.com/law/cartoon/6646/objection-prosecution-is-high-fiving-the-jury> (“Objection! Prosecution is high-fiving the jury!”); *Law & Order* (NBC television broadcast from Sep. 13, 1990 to May 24, 2010); *Perry Mason* (CBS television broadcast Sep. 21, 1957 to May 22, 1966).

2. Craig Lee Montz, *Trial Objections from Beginning to End: The Handbook for Civil and Criminal Trials*, 29 PEPP. L. REV. 243, 246-47 (2002).

3. *Id.* at 246-50.

4. *Law & Order*, *supra* note 1; *Perry Mason*, *supra* note 1.

5. *Law & Order*, *supra* note 1; *Perry Mason*, *supra* note 1.

6. Michael Asimow, *How I Learned to Litigate at the Movies*, ABA Journal, (October 19, 2019, 5:02 PM), http://www.abajournal.com/magazine/article/how_i_learned_to_litigate_at_the_movies (“So enjoy legal pop culture, but don’t forget that no matter how trashy, inaccurate and even downright ridiculous it often appears to be, it always affects those who consume it. Whether we like it or not, we must take that impact into account in the way we conduct ourselves as lawyers.”).

7. William T. Vukowich, *Comment: The Lack of Practical Training in Law Schools: Criticisms, Causes and Programs for Change*, 23 CASE W. RES. L. REV. 140, 142 (1971) (“While it is feasible for the medical or science-oriented schools to provide significant practical training in an educational facility which duplicates the students’ future career environment, it is patently impossible to provide any *meaningful* practical training within the existing law school facilities.”).

practitioners learn about the particulars of trial practice, including objections, both through the guidance of their law firm or government superiors and by participating in bench and jury trials.⁸ A lawyer's experience on when, how, about what, where, why, and if to object, therefore, often comes from making mistakes at trial. It is through these mistakes, however, that an attorney develops into an experienced criminal trial practitioner. In the author's experience, over time, a criminal practitioner's objection practice evolves into three phases: (1) failing to identify and object to worthy objections; (2) lodging objections without considering these objections' strategic consequences; and (3) identifying possible objection areas, but only objecting when it serves the criminal practitioner's strategic agenda.

This article serves as a practical objection guide for criminal law practitioners.⁹ In particular, this article will ask the "5 w's" of objection practice by evaluating "when and how," "where," about "what," "why" and, finally, "if" to object to an evidentiary item. First, this article will explore the importance of the timing of objections; specifically, whether to object pretrial, during trial, or post-trial. Second, the benefits of objecting either inside or outside the presence of the jury will be evaluated. Third, the article will examine the most effective and important objections: relevance, authentication, hearsay, confrontation clause, and character evidence. Fourth, the author will describe how objections effect the appellate standard of review; from abuse of discretion to plain error. Finally, this article will assess "if" a criminal practitioner should object by evaluating whether objecting serves the practitioner's strategic interests.

II. "WHEN AND HOW" TO OBJECT: THE PROPER TIMING OF OBJECTIONS

The first major challenge a criminal practitioner faces is determining "when" and "how" to object. Ultimately, a practitioner may elect to object during one of three time periods: (1) pretrial; (2) during trial; and (3) post-trial.¹⁰ However, each of these options present their own risks and rewards.

8. *Id.* at 146 ("These graduates receive practical training, which is probably far superior to any which *could* be given by law schools, under the tutelage of the experienced practitioners in the law offices with which they become associated").

9. Specifically, this article will evaluate objection practice by applying the Federal Rules of Evidence, federal case law, and federal trial procedures.

10. *See* FED. R. CRIM. P. 12(b)(2) ("A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits."); FED. R. CRIM. P. 30(d) ("A party who objects to any portion of the instructions . . . must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate."); FED. R. CRIM. P. 29(c)(1)-(d) (describing the parameters for post-trial motions for a judgment of acquittal and a new trial).

This section will articulate the mechanisms by which a lawyer may raise objections for the best possible effect.

A. PRETRIAL OBJECTIONS

Arguably, pretrial objections are the safest and most cautious objections. On the one hand, pretrial objections permit an attorney to fully research and brief an issue long before trial and obtain a court ruling.¹¹ However, on the other hand, they also allow the opposing party significant time to fully research this issue and respond.¹² The benefit of submitting a pretrial objection is that it provides an attorney with certainty by way of a court ruling issued in advance of trial. The drawback to the pretrial objection is that it removes the element of surprise and possibly waives an attorney's tactical advantage.

The mechanism for filing pretrial objections is through use of a written court filing known as a "motion in limine."¹³ A motion in limine is a common law pretrial mechanism to prevent the admission of evidence.¹⁴ These motions come in a variety of different forms including: motions to exclude evidence, motions to exclude testimony, and simply in the form of written objections. Although the term "motion in limine" does not appear in the Federal Rules of Evidence or Federal Rules of Criminal Procedure, these rules do provide lawyers with authority to issue pretrial objections through motions in limine.¹⁵ For example, pursuant to Federal Rule of Evidence 104(a), "[a] court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible."¹⁶ Therefore, it is permissible for a criminal law practitioner to request that the court issue a pretrial ruling on the admissibility of a particular evidentiary item.

Ultimately, pretrial objections allow both sides to fully flesh out a given trial issue by applying the existing law to the case related facts.¹⁷ For exam-

11. See D.N.D. Crim. L. R. 47.1; D.N.D. R. Appendix A-2 (establishing the page limitations and deadlines for filing pretrial motions; including that a criminal law practitioner may attach a twenty page memorandum in support of a pretrial motion and that an opposing party has up to fourteen days to respond to a pretrial motion).

12. See D.N.D. Crim. L. R. 47.1; D.N.D. R. Appendix A-2.

13. Montz, *supra* note 2, at 254 ("For trial purposes, the first significant objections made by counsel will be in the form of a motion in limine . . .").

14. Ryan A. Ray, *Motions in Limine: To File or Not to File?*, PROOF, Summer 2009, at 1, 1 ("A motion in limine is a pretrial request that certain evidence not be admitted or mentioned at trial.").

15. See FED. R. CRIM. P. 12(b)(2); FED. R. EVID. 104(a).

16. FED. R. EVID. 104(a).

17. Ray, *supra* note 14, at 1 ("Such a motion can also improve a client's chance of obtaining a fair trial, fostering decision based upon the case's merits as opposed to red herrings that ought never to reach the jury.").

ple, in a criminal matter, where the case hinges on a witness' important hearsay statement, filing a pretrial objection that asserts the inadmissibility of this statement permits an attorney to potentially win the case prior to trial. Contrarily, if the practitioner files, yet loses, this pretrial objection, the court will issue a ruling which spells doom for his or her case.

Strategically, a practitioner can maximize the success of pretrial objections by evaluating the strengths and weaknesses of his case. If a practitioner identifies that he or she is likely to win on an objection, by filing a successful motion in limine to exclude this evidence, it prevents the jury from ever hearing about it in an opening statement.¹⁸ As a side effect of a successful motion in limine ruling, the opposing party may offer more favorable pretrial negotiation terms. Additionally, in weaker cases, where harmful evidence is likely admissible, it is unwise to file motions in limine to exclude evidence because it may alert opposing counsel to your trial strategy.¹⁹ Instead, in these cases, the better choice is to not file a pretrial objection, but instead, to either object at trial, not object at all, or discredit the evidence.

B. TRIAL OBJECTIONS

The next period in which a criminal law practitioner can object is during trial. Trial objections may occur either in front of the jury or outside the jury's presence.²⁰ Unlike pretrial objections, trial objections are made orally, often at the time the opposing party attempts to introduce a piece of evidence.²¹

In most cases, trial objections are made in response to the opposing party attempting to introduce the following types of evidence: real evidence, documentary evidence, photographic evidence, and testimonial evidence.²² For practical purposes, due to an opposing party's duty to lay proper foundation, a practitioner will have advance notice to object to the admission of real, documentary, and demonstrative evidence.²³ This is particularly true because

18. *Id.* at 11 ("If granted, an exclusionary motion in limine would not only prohibit introduction of the evidence, but it would also prevent counsel and witnesses from even mentioning the excluded evidence to the jury during trial.").

19. *Id.* (explaining that "motions in limine may serve to educate your opponent on your trial strategy and your key evidence.").

20. Thomas A. Mauet, TRIAL TECHNIQUES AND TRIALS 521 (Rachel E. Barkow et al. eds., 10th ed. 2017) (explaining that a lawyer may lodge evidentiary objections both inside and outside the presence of the jury).

21. *Id.* at 521-23.

22. *See id.* at 288, 300, 316, 524-55.

23. *See* FED. R. EVID. 901 (explaining the process by which a practitioner may authenticate or identify evidentiary items including by: "Testimony of a Witness with Knowledge," "Comparison by an Expert Witness or Trier of Fact," and "Methods Provided by a Statute or Rule.").

an opposing party must authenticate these types of evidence, usually through a witness with knowledge by asking a series of foundation questions.²⁴

For example, in an aggravated assault trial where the defendant is accused of stabbing the victim with a knife, the prosecuting attorney will likely call the law enforcement officer who found the knife to testify on the witness stand. Thereafter, the prosecuting attorney will hand the officer the knife, question the officer if the item is the knife he found at the scene, and ask if it is in the “same or substantially same condition” as when the officer found it.²⁵ These types of preliminary questions give a practitioner advance notice that the opposing party will be moving to admit a piece of evidence. Once the opposing party requests to admit the item into evidence, a practitioner simply has to lodge an oral objection with the legal basis. Often, the entire objection can be completed by uttering less than five words; i.e., “objection, relevance,” or “objection, improper character evidence.”²⁶ However, due to the way in which practitioners formally introduce this type of evidence in the jury’s presence, a practitioner must evaluate whether it is more prudent to object to an evidentiary item prior to trial. This is generally the best practice since by objecting to an evidentiary item prior to trial a practitioner can prevent the jury from ever learning about it.²⁷

In contrast, it is often more difficult for a practitioner to prepare an objection to testimonial evidence. Through witness statements, police reports, or prior interviews a practitioner may have advanced notice that a witness may testify about a certain fact. However, when the witness is testifying at trial, it is often difficult to know if, or when, this will occur. Therefore, a criminal law practitioner should carefully listen to the opposing counsel’s question. Often, the opposing counsel will telegraph when he or she asks a question that will elicit an objectionable response. When this occurs, a lawyer must simply object after opposing counsel asks the question but prior to the witness’ answer; i.e., “objection, calls for hearsay.”²⁸ By objecting prior to the witness’ answer, a practitioner puts opposing counsel, the witness, and the court on notice that opposing counsel’s question may elicit objectionable testimony. The purpose behind objecting prior to the witness’ answer is to prevent the jury from ever hearing the objectionable testimony. While it is

24. Mauet, *supra* note 20, at 552 (explaining that “[t]he exhibit must be shown to be what it purports to be, either through the testimony of a qualified foundation witness or through the self-authentication process.”).

25. *See id.* at 289 (providing a step by step example of the proper foundation questions to admit a handgun that a law enforcement officer found in the defendant’s jacket.).

26. *Id.* at 521 (explaining that an oral objection should “state the evidentiary ground succinctly”).

27. *See Ray, supra* note 14, at 11.

28. Mauet, *supra* note 20, at 521.

possible to object after a witness testifies about an objectionable matter, such an objection is less powerful because the jury has already heard the testimony. Additionally, filing an untimely objection may negatively impact the appellate standard of review.²⁹

Moreover, witnesses, unlike their portrayal by film and television actors, do not “stay on script” and often provide testimony that: (1) contradicts their earlier statements; or (2) is new or about a subject matter never mentioned during this witness’ pretrial interviews. Therefore, when listening to witness testimony, it is paramount that criminal practitioners object the moment that the opposing party asks a question which will elicit an objectionable response.³⁰ To make a strategic impact on a client’s case, a practitioner must actively listen to all of opposing counsel’s questions. Unfortunately, criminal trials have many moving parts and it is difficult for practitioners to stay focused on a single witness’ testimony when they must prepare for dozens. However, far too often, witnesses testify about an objectionable issue simply because a practitioner is distracted by a separate matter such as preparing his cross examination of that witness or preparing the testimony for his next witness. Therefore, criminal practitioners must be disciplined and focus solely on the testimony of the witness before the court by remembering the idiom, “when you are up to your neck in alligators, it’s easy to forget that the goal was to drain the swamp.”³¹

Additionally, a practitioner’s failure to actively listen and provide a timely objection has real, practical consequences. If a lawyer objects to a witness’ testimony after the witness has already provided this testimony: (1) the jury has already heard the testimony; (2) the court may refuse to strike the testimony; (3) an appellate court may determine that the lawyer waived or forfeited his objection to this testimony; and (4) any instruction by the trial court to disregard the objectionable testimony may unintentionally highlight to the jury this testimony’s importance.³² Consequently, while it may be possible to submit a pretrial objection to witness testimony, it is impossible to

29. Montz, *supra* note 2, at 248 (“It is impossible to overstate the significance of understanding the rules governing timeliness, specificity, and waivers of trial objections; failure to conform to these rules renders virtually every single trial objection moot.”).

30. *Id.*

31. *Up to (One’s) Neck in Alligators*, THE FREE DICTIONARY BY FARLEX (last visited Oct. 20, 2019, 9:34 AM), <https://idioms.thefreedictionary.com/up+to+your+neck+in+alligators> (explaining that this idiom refers to when an individual is “so overcome or preoccupied by various tangential worries, problems, or tasks that [this individual] loses sight of the ultimate goal or objective.”).

32. *See, e.g.*, Montz, *supra* note 2, at 242-51; Mauet, *supra* note 20, at 556 (explaining the importance of lodging timely objection and stating that “[i]nexperienced lawyers frequently hesitate to make objections quickly, the result being that the witness answers the question or the exhibit is shown or read to the jury [and] [a]ny later objection will usually be untimely, and you have probably waived error on appeal.”).

predict with certainty a witness' testimony.³³ Therefore, a practitioner's best practice is to actively listen and immediately object when the practitioner hears an opposing counsel's objectionable question or a witness' objectionable answer.

C. POST-TRIAL OBJECTIONS

The final period at which a practitioner may object is after the trial's conclusion.³⁴ However, a practitioner who fails to object either at pretrial or at trial also fails to both tactically and strategically impact the trial process. Additionally, as stated above, a practitioner who fails to timely object at trial waives these objections.³⁵ Therefore, a practitioner should never plan to object post-trial, when they can instead object either pretrial or during trial.

Nevertheless, there are a few instances where a criminal law practitioner should file a post-trial objection. First, if the practitioner uncovers new, material evidence or discovers a fundamental error in the trial process, he or she should object and file a motion for a new trial.³⁶ Similarly, if the practitioner believes that there has been a miscarriage of justice, or to preserve his or her client's appeal rights, he or she can file a motion for acquittal.³⁷ However, practically speaking, these post-trial motions or objections are often not as powerful as pretrial or trial objections since, after trial concludes, an attorney is faced with an uphill *fait accompli*.

III. "WHERE" TO OBJECT: INSIDE OR OUTSIDE THE JURY'S PRESENCE

Next a practitioner must determine "where" to object; specifically, either inside or outside the jury's presence. In addition to considering the rules of evidence and rules of criminal procedure, a practitioner must also abide by the court's local rules of practice. Each court applies its own official and unofficial rules of practice, making it imperative for a practitioner to know both

33. This author has personally experienced situations where, even though the author met with a witness, prepped a witness, and thoroughly reviewed a witness' statement, at trial, the witness testified about an unexpected matter.

34. See Mauet, *supra* note 20, at 10-11; see also FED. R. CRIM. P. 29(c)-(d) (describing the parameters for post-trial motions for a judgment of acquittal and a new trial).

35. Montz, *supra* note 2, at 242-51; Mauet, *supra* note 20, at 556.

36. Judge James Cissell, FEDERAL CRIMINAL TRIALS 404-05 (Matthew Bender 8th ed. 2013) (explaining that a defendant must meet five requirements to obtain a new trial based upon newly discovered evidence).

37. *Id.* at 397-99 (explaining that "the only proper basis for [a motion for acquittal] is that the evidence is insufficient to sustain a conviction.").

these rules and the judge's preference before which he or she practices.³⁸ By knowing these rules, a practitioner can determine whether to object inside or outside the jury's presence. Importantly, prior to objecting, a practitioner must consider whether a court requires pretrial objections, limits speaking objections, or requires sidebar conferences.

A. TRIAL BRIEFS

Prior to the beginning of a jury trial, some judges require that practitioners submit trial briefs, which outline all foreseeable evidentiary issues.³⁹ In these situations, if a practitioner fails to either file a trial brief or fails to include an objection in a trial brief, a judge may determine that the practitioner waived that objection. Therefore, when judges require trial briefs, it is paramount that a practitioner file as many objections as possible outside the presence of the jury in this brief.⁴⁰ However, since trials are fluid and evolve over time, it is impossible to predict every possible objection. Consequently, when confronted with unforeseen objectionable testimony, a practitioner should determine whether a court will limit the manner of objections in front of the jury.

B. SPEAKING OBJECTIONS

In some instances, during jury trials, courts forbid practitioners from making "speaking objections," i.e., objections which include lengthy explanations, in front of the jury.⁴¹ Instead, in these jurisdictions, judges only permit practitioners to lodge the "basis" for the objection.⁴² For instance, a court may only authorize a practitioner who believes a question will elicit inadmissible hearsay to state, "objection, hearsay." The court may then permit the opposing party to respond with a short response, which forms the basis for the testimony's admissibility, i.e., "excited utterance."⁴³ In these cases, a practitioner should follow the court's instructions and provide non-speaking

38. See Mauet, *supra* note 20, at 2 (explaining that trial procedures and customs vary widely and that "a trial lawyer's first job is to learn and understand all of the 'rules' that will be applied to the upcoming trial.").

39. *Id.* (stating that "[c]riminal procedural rules vary widely . . . [and] [j]udges, particularly in federal court, may impose additional limitations on the parties . . ."); *Id.* at 520 (explaining that "[m]any judges also require that each party submit a trial brief setting out their positions on these disputed issues.")

40. *Id.* at 520.

41. *Id.* at 521-22 (explaining that "[m]ost judges will quickly reprimand lawyers who attempt to extensively argue in the jury's presence.").

42. *Id.*

43. *Id.* at 520-23 (providing examples of the typical trial objection process).

objections. If the court overrules an objection, the practitioner should consider whether to ask the court for a sidebar conference to provide additional legal authority for the practitioner's objection.

C. SIDEBAR CONFERENCES

Sidebar conferences are a trial mechanism, which limit the information presented to the jury.⁴⁴ Sidebar conferences occur when the court and both counsel meet outside of the presence of the jury to discuss aspects of the case.⁴⁵ Usually, this conference occurs at the "sidebar" of the judge's bench so that the jury is unable to hear about what the parties discuss. Most courts mandate that practitioners make certain objections at sidebar conferences to prevent the jury from learning about otherwise inadmissible evidence.⁴⁶ For example, in a case where the court has suppressed a defendant's confession as a result of Fifth Amendment violations, but defense counsel opened the door to the admissibility of this confession, the court may require that the opposing counsel request a sidebar conference prior to introducing this confession.

Additionally, courts may defer ruling on the admissibility of a particular piece of evidence until the evidence is presented at trial.⁴⁷ During these instances, courts will often request that the moving party request a sidebar conference prior to introducing, or even referring, to this piece of evidence. Consequently, a practitioner can utilize sidebar conferences to lodge objections, outside the presence of the jury, which have sound legal basis, but little practical, "jury appeal." Case in point, a practitioner should object to a witness' testimony concerning his or her client's prior bad acts, in the form of prior conviction which is similar to the crime for which the client is on trial. However, objecting to this prior conviction as "improper character evidence" may be legally permissible, the jury will likely want information that the defendant has a similar prior conviction and will not understand why this evidence is inadmissible. The jury may even believe that the practitioner is attempting to hide evidence from it. Therefore, in order to both prevent the introduction of this inadmissible evidence and to maintain creditability with the jury, a practitioner should request sidebar conferences whenever practicable to balance these two interests.

44. *Id.* at 521-22.

45. *Id.* at 522 (explaining that a "sidebar" is a hearing held outside of the jury's presence).

46. *See id.* (stating that "[s]ome judges freely allow such conference; others rarely allow them. Regardless of the judge's attitude, do not ask for a sidebar unless the evidentiary issue is substantial.").

47. *Id.* at 512 (explaining that "[w]hen in doubt as to whether the judge's ruling is definitive, you must renew the objection when the evidence is offered.").

D. OBJECTION FREQUENCY

The last consideration a practitioner must evaluate is how often to object inside the presence of the jury. Unfortunately, due to the split-second nature of objection practice during trial, there is no formula to determine the exact amount of times to object in front of a jury.⁴⁸ Oftentimes, a practitioner must simply use his or her best judgment. Although a practitioner may object as often as he or she wishes, there is a risk that he or she may alienate the jury. Specifically, in the author's experience, there are three risks to "over objecting" inside the presence of the jury. First, the jury may determine that a practitioner is acting to "obstruct" the case by preventing it from receiving important information.⁴⁹ Second, the jury may become annoyed at the practitioner and transfer their annoyance from the practitioner to the practitioner's client. Third, and most importantly, if a judge consistently overrules a practitioner's objections, the jury may conclude that the practitioner is untrustworthy and, as a result, disregard his or her arguments. Therefore, in order to alleviate these concerns, it is best to object outside the presence of the jury in the form of either pretrial objections or through sidebar conferences.

IV. "ABOUT WHAT" TO OBJECT: EFFECTIVE EVIDENTIARY OBJECTIONS

After considering "where," to object a criminal lawyer must next determine about "what" to object. A careful review of the Federal Rules of Evidence reveal that a practitioner has the ability to mount numerous evidentiary challenges.⁵⁰ However, many rules contained within the Federal Rules of Evidence are unique, fact specific, or antiquated.⁵¹ Therefore, this section will focus on what the author postulates are the five most important evidentiary objections; specifically: relevance under both Federal Rule of Evidence 401 and 403, authentication, hearsay, the Sixth Amendment Confrontation Clause, and character evidence.⁵²

48. Montz, *supra* note 2, at 318 (concluding that "[l]awyers have only a fraction of a second to formulate and decide whether to make objections during a trial.")

49. See Mauret, *supra* note 20, at 515 (stating that "[o]n the one hand, jurors resent constant objections and the lawyers who make them, because information is being kept from them and constant interruptions become annoying.")

50. See generally FED. R. EVID. 101-1103.

51. See, e.g., FED. R. EVID. 605 (Judge's Competency as a Witness); FED. R. EVID. 610 (Religious Beliefs or Opinions); FED. R. EVID. 1003 (Admissibility of Duplicates).

52. FED. R. EVID. 401, 403, 404, 801-803, 901; U.S. CONST. amend. VI (Confrontation Clause). There are other objections a practitioner may wish to file, such as, motions to exclude expert testimony under Federal Rule of Evidence 702, and motions to exclude evidence based upon privilege.

A. RELEVANCE: FEDERAL RULE OF EVIDENCE 401 AND 403

“Relevance” objections serve as a criminal practitioner’s default objection.⁵³ This occurs because relevance serves as a “smell test” for evidence admissibility. Pursuant to Federal Rule of Evidence 401, “[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”⁵⁴

1. *Federal Rule of Evidence 401*

Based upon Rule 401’s liberal definition of relevance, a practitioner may legitimately argue that most evidence is relevant so long as it relates to a fact at issue. Specifically, in the 1972 Advisory Committee Notes, it states “[p]roblems of relevancy call for an answer to the question whether an item of evidence, when tested by the process of legal reasoning, possesses sufficient probative value to justify receiving it into evidence.”⁵⁵ The Committee Notes further highlight the wide spectrum of relevant trial items by stating “[t]he variety of relevancy problems is coextensive with the ingenuity of counsel in using circumstantial evidence as a means of proof.”⁵⁶ Therefore, when a practitioner lodges a “relevance” objection it is best to focus less on Rule 401 and more on Rule 403’s “balancing test,” which prevents admission of evidence that is more prejudicial than probative.

2. *Federal Rule of Evidence 403*

Although Rule 401 provides guidance on what evidence is relevant, due to its wide applicability, practitioners should focus their objections on Rule 403’s parameters. Federal Rule of Evidence 403 states, “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”⁵⁷ Although certain evidence is inherently prejudicial to a practitioner’s case, i.e., a criminal defendant’s confession, this does not mean that this evidence is “overly prejudicial.”⁵⁸ Therefore, in the author’s

53. In this article, “relevance” refers both to Federal Rule of Evidence 401’s description of evidence and Federal Rule of Evidence 403’s “balancing test.”

54. FED. R. EVID. 401(a)-(b).

55. *Id.* (Advisory Committee Notes).

56. *Id.*

57. FED. R. EVID. 403.

58. *Id.* (Advisory Committee Notes stating that “[t]he case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance.”); *see also* Mauet,

experience, a criminal practitioner should concentrate less on the “prejudice” an evidentiary item possesses and instead concentrate more on whether the contested evidence is offered for an unfair purpose; for example, to inflame the passions of the jury, distract from the proceedings, or create mini-trials on tangential matters.⁵⁹

3. *Practical Application of Federal Rule of Evidence 401 and 403*

For example, in a sexual assault case, let’s suppose that the defendant has HIV. This evidence may be prejudicial because the jury may view the defendant in a negative light because he has HIV. However, evidence of the defendant’s HIV status is not overly prejudicial if the evidence is probative of a material fact at issue in the case and the prosecution has a legitimate purpose for offering it.⁶⁰ For example, the defendant’s HIV status may be relevant if the victim underwent a sexual assault nurse examination and the forensic evidence obtained from this examination revealed her attacker was HIV positive. In this example, the prosecution is offering the defendant’s HIV status not for a pejorative purpose, but instead to link the defendant as the victim’s attacker. Conversely, in a fraud case, let’s assume one of the fraud victims commits suicide because he lost his life savings. Although the fact that this victim is unavailable to testify may be relevant to the case, it is likely being offered for an unfair purpose. Specifically, introducing evidence that a victim committed suicide as a result of the defendant’s actions has a tendency to inflame the passions of the jury by demonstrating that the defendant is an unsavory individual.⁶¹ Therefore, although the evidence itself is prejudicial, by exploring the purpose for offering this evidence, a practitioner can identify whether it is “overly prejudicial.”

B. AUTHENTICATION

Unlike “relevance” objections, authentication objections will likely form a very small percentage of a criminal practitioner’s objections. “Authentication” is a term used to designate the way in which a practitioner demonstrates that a piece of evidence is what it purports to be. Federal Rule of Evidence

supra note 20, at 534 (explaining that “[j]udges quickly become jaded by objections that merely claim in conclusory fashion that the offered evidence is ‘prejudicial.’”).

59. FED. R. EVID. 403.

60. *Id.* (Advisory Committee Notes explaining that “[s]ituations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission.”).

61. *Id.* (explaining that “[e]xclusion for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities.”).

901 states, “[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what it purports to be.”⁶² Additionally, Rule 901 lists ten examples that satisfy the authentication requirement; including, “testimony of a witness with knowledge,” “comparison by an expert witness or the trier of fact,” and “evidence about a process or system.”⁶³

In most cases, a practitioner will be able to authenticate an evidentiary item through the testimony of a witness with knowledge.⁶⁴ For example, to admit photographs of a crime scene, a practitioner need only call the police officer who took the photograph or any other witness with sufficient knowledge to state that what is contained in the photograph depicts the crime scene.⁶⁵ Additionally, for business records, a practitioner need only call a business record custodian with knowledge about that business’ practice.⁶⁶ In the above, or similar, situations, a practitioner should not lodge an authentication objection. Instead, practitioners should attempt to stipulate, whenever possible, to the authentication of these types of evidentiary items. By stipulating to authentication in these situations, a practitioner accomplishes two goals: first, since the practitioner is streamlining the trial process, he or she will gain credibility with the court and opposing counsel; and second, by not objecting to authentication, a practitioner can focus on making authentication objections that may impact their client’s case.⁶⁷ Moreover, even when a practitioner lodges an authentication objection a court may overrule this objection and instead admit the evidence and instruct the jury that they should give the evidence the weight they believe it deserves.⁶⁸

Conversely, if an evidentiary item is scientific or complicated, a practitioner should consider lodging an authentication objection if the opposing party has failed to call an expert to authenticate this item.⁶⁹ For example,

62. FED. R. EVID. 901.

63. FED. R. EVID. 901(b)(1)-(10).

64. *See* Mauet, *supra* note 20, at 289-341 (providing examples of the foundational questions needed to authenticate evidentiary items).

65. *Id.* at 290-91 (explaining that if a witness can only say an evidentiary item “looks like” the object about which he or she is familiar, “[m]any judges will admit the exhibit with that foundation, on the basis that [Federal Rule of Evidence 901] does not require more, and that the issue is then one of weight for the jury.”).

66. *Id.* at 326-30.

67. *See id.* at 557 (stating that “[c]lose calls often go to the lawyer who establishes herself as the evidence ‘expert’ the judge learns to trust . . . They make objections only when they have solid evidentiary reasons for them.”).

68. *Id.* at 290-91.

69. *See* Cissell, *supra* note 36, at 607 (explaining that “[a]n intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge.”).

electronic evidence such as: cellular phone extractions, computer programs, and metadata require specialized, expert knowledge to authenticate.⁷⁰

Law enforcement often find incriminating evidence on defendants' computers.⁷¹ If, at trial, a prosecutor seeks to introduce evidence, in the form of metadata from the defendant's computer, that the defendant accessed a certain file on a certain date and time, the prosecutor will need to authenticate not only the computer file, but also that file's metadata.⁷² To accomplish this goal, the prosecutor should call a computer forensics expert who utilized software to examine the defendant's computer.⁷³ However, if the prosecutor does not call such an expert witness, a practitioner should lodge an authentication objection to the introduction of this metadata because the prosecutor has failed to authenticate it.⁷⁴

C. HEARSAY

Hearsay objections center around out of court statements.⁷⁵ As a result, criminal practitioners will routinely lodge hearsay objections to prevent the admission of these out of court statements. Federal Rule of Evidence 801 defines hearsay as a statement that the declarant does not make at the current trial, which a party offers "to prove the truth of the matter asserted in the statement."⁷⁶ Additionally, Federal Rule of Evidence 802 asserts that hearsay is inadmissible unless an exception is identified in "a federal statute; these rules; or other rules prescribed by the Supreme Court."⁷⁷ However, as a practical matter, the exceptions to the hearsay prohibition swallow the rule.⁷⁸ As

70. *Id.* at 612-17 (providing a list of examples of the "wide variety of matters" about which federal courts have permitted experts to testify.)

71. As both a prosecutor and defense attorney, this author routinely reviewed electronic evidence that law enforcement obtained from defendants' computers, including smart phones, through the execution of search warrants, consent searches, and subpoenas.

72. Mark D. Hansen & Tyler D. Pratt, *Follow the Audit Trail: The Impact of Metadata in Litigation*, 84 DEF. COUNS. J. 1, 10 (2017) (articulating that "[u]nder the Federal Rules, it may be necessary to retain an expert witness to authenticate metadata. This is particularly true if counsel believes the Court may be skeptical of such evidence, if questions arise regarding the chain of custody, or there is evidence that the data was manipulated or partially destroyed.").

73. *Id.*; see also John Martin, *Overcoming Authentication Hurdles to the Admission of Electronic Evidence*, PROOF, Winter 2009, at 13-14 (providing examples for how, under Federal Rule of Evidence 901(b), a practitioner may authenticate Electronically-Stored Information (ESI); specifically, that "[w]itnesses with various types of knowledge may testify that ESI is what the attorney purports it to be. A witness may testify from personal knowledge if they 'participated in or observed the event reflected in the exhibit.'").

74. Hansen & Pratt, *supra* note 72, at 10; Martin, *supra* note 73, at 13-14.

75. Cissell, *supra* note 36, at 625.

76. FED. R. EVID. 801(c).

77. FED. R. EVID. 802.

78. See FED. R. EVID. 801(d), 803(1)-(23), 804, 807; Cissell, *supra* note 36, at 623-69.

a result, criminal practitioners must be knowledgeable about all of these hearsay exceptions.⁷⁹ Specifically, Rules 801, 803, and 804, and 807 all identify exceptions to this general prohibition against hearsay.⁸⁰

For prosecutors, in the author's opinion the most important hearsay exception is admission by a party opponent.⁸¹ Since the defendant is always the opposing party in a criminal case, this hearsay exception is not fact dependent. As a result, almost all of a defendant's out of court statements will qualify under this exception. Therefore, defense attorneys should refrain from lodging hearsay objections against a defendant's statements because these statements will meet the hearsay exception. However, even though a defendant's statement may meet a hearsay exception, it is still possible that the statement runs afoul of Federal Rule of Evidence 403 or the United States Constitution. In those situations where a defense attorney believes he has a legitimate basis to exclude admission of a defendant's out of court statement, he or she should file a motion in limine to litigate these issues outside the jury's presence.⁸²

Other important exceptions to the hearsay prohibition are: (1) business records; (2) state of mind; (3) excited utterance; and (4) medical treatment.⁸³ These hearsay exceptions are much more fact dependent. Consequently, in order for out of court statements to qualify under these exceptions, the moving party will need to lay the proper foundation.⁸⁴ For example, if a party attempts to introduce a statement under the excited utterance hearsay exception, the party must establish that: the declarant experienced a startling event, "a connection between the statement and the event," and the declarant was still under the effect of this startling event when they made the statement.⁸⁵ To accomplish this goal, the moving party will have to describe the startling event, establish the time period between the startling event and the statement, and provide objective evidence, such as a description of the declarant's reactions, to demonstrate that the declarant was under the excitement of the startling event.⁸⁶ In situations where a party must lay the proper foundation to establish hearsay exceptions, like the one described above, practitioners

79. Mauet, *supra* note 20, at 537 (explaining that "[a]s the proponent of any out-of-court statement . . . you need to anticipate that your opponent may object to each statement on hearsay grounds.").

80. FED. R. EVID. 801(d), 803(1)-(23), 804, 807.

81. FED. R. EVID. 801(d)(2).

82. Mauet, *supra* note 20, at 537 (explaining that "[m]ost judges will be happy to make as many pretrial rulings as possible, knowing that the trial will run more smoothly and the jury will have fewer interruptions.").

83. FED. R. EVID. 803(6), 803(3), 803(2), 803(4).

84. See Cissell, *supra* note 36, at 623-69.

85. *Id.* at 639-40; FED. R. EVID. 803(2).

86. Cissell, *supra* note 36, at 639-40.

should consider objecting where the party has failed to establish this foundation.

D. CONFRONTATION CLAUSE

Confrontation Clause objections allow criminal defense practitioners to assert an important right in criminal cases. Although Confrontation Clause objections are similar to hearsay exceptions because they relate to out of court statements, the Confrontation Clause differs from hearsay because it relates to “testimonial hearsay.”⁸⁷ The Sixth Amendment to the United States Constitution proscribes that a defendant has the right to confront the witnesses against him.⁸⁸ However, this right is not absolute. Instead, the Confrontation Clause prohibits the prosecution from introducing a witness’ testimonial statements if that witness does not testify at trial.⁸⁹

Testimonial statements are out of court statements, such as statements to law enforcement officers, the primary purpose of which is for court proceedings or to create trial testimony.⁹⁰ If out of court statements qualify as testimonial hearsay, prior to the admission of this statement at trial, the prosecutor must call the person who made the statement as a trial witness and the defense attorney must be provided an opportunity to cross-examine this witness. However, non-testimonial statements, such as declarant statements: to 911 operators during emergency situations, excited utterances, or statements for medical treatment, do not trigger the Confrontation Clause.⁹¹ As a result, the prosecutor is not required to call the declarants who made these statements as witnesses to admit them at trial.

In criminal cases, defense attorneys must evaluate whether out of court statements are testimonial or non-testimonial. Criminal defendants have a Sixth Amendment right to confront, and cross-examine, those declarants who made testimonial statements that prosecutors offer at trial. Therefore, in situations where the prosecutor does not call a witness to testify at trial, but still attempts to admit this witness’ testimonial out of court statement, defense attorneys should lodge both hearsay and Confrontation Clause objections.

87. *Id.* at 654-57.

88. U.S. CONST. amend. VI (Confrontation Clause).

89. *See Crawford v. Washington*, 541 U.S. 36, 53-54 (2004); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009).

90. *See Michigan v. Bryant*, 562 U.S. 344, 359-60 (2011).

91. *See Crawford*, 541 U.S. at 51-52; *United States v. Santos*, 589 F.3d 759, 763 (5th Cir. 2009); *Davis v. Washington*, 547 U.S. 813, 828 (2006) (holding that 911 phone calls during an ongoing emergency are not testimonial hearsay).

E. CHARACTER EVIDENCE

Character evidence objections often occur because a defendant or victim has committed other crimes or bad acts. Since it is often possible to foresee these evidentiary items, and the opposing party must provide notice of its intent to offer this evidence, it is best to file a pretrial motion in limine to exclude introduction of character evidence.⁹² Federal Rule of Evidence 404(a)(1) states, [e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."⁹³ Additionally, Rule 404(b)(1) states "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."⁹⁴ However, similar to hearsay, the exceptions to this prohibition on character evidence swallows the rule. Specifically, Federal Rule of Evidence 404(b)(2) states, in criminal cases, character evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."⁹⁵

Character evidence is very impactful in criminal cases. Additionally, a party's introduction of negative character evidence can tip the scales in a trial by providing the jury with additional evidence about the victim or defendant. Therefore, practitioners should almost always object to character evidence that negatively affects their case.⁹⁶ Since negative character evidence is incredibly fact dependent and contains some inherent prejudice, prior to trial, practitioners should object to this evidence via a motion in limine.

V. "WHY" SHOULD I OBJECT?

Once a practitioner identifies about what he or she can object to, he or she must then determine why to object to an evidentiary item. The first reason to object is to prevent the admission of inadmissible, harmful evidence. A second reason to object is to prevent an opposing party from running afoul of the evidentiary rules. However, there is a third, equally important reason to object to evidence; to preserve the issue for appeal.

92. FED. R. EVID. 404(b)(2)(A) (stating, on request in a criminal case, the prosecutor must provide opposing counsel with reasonable notice of the character evidence he or she intends to offer at trial).

93. FED. R. EVID. 404(a)(1).

94. FED. R. EVID. 404(b)(1).

95. FED. R. EVID. 404(b)(2).

96. Mauret, *supra* note 20, at 170 (stating that "[t]he rules of evidence heavily regulate and limit the circumstances under and methods by which character evidence can be presented during trials.").

A. APPELLATE REVIEW

Federal appellate courts are courts of limited jurisdiction, meaning that they only hear matters under certain circumstances.⁹⁷ One such circumstance, is the direct appeal from a defendant in a criminal case.⁹⁸ On direct appeal, a criminal appellant is able to appeal the lower court's ruling on a variety of matters.⁹⁹ However, criminal defendants frequently appeal lower courts' evidentiary rulings.

1. Abuse of Discretion

Although appellate courts utilize multiple standards of review when they evaluate appeals, for evidentiary issues, appellate courts generally evaluate a court's decision under the abuse of discretion standard.¹⁰⁰ This is a highly deferential standard of review, which will not be overturned unless the court takes an absolutely unreasonable position.¹⁰¹ However, under an abuse of discretion standard, a criminal defendant has the ability to argue that the trial court erred and, as a result of this error, he was prejudiced.¹⁰² While appellate courts do not replace the trial court's decisions with their own, they still apply the rules of evidence to the admitted evidentiary item or the rules of procedure to the district court's ruling and, thereafter, conduct a review of the trial court's decisions.¹⁰³

Nevertheless, before appellate courts will apply the abuse of discretion standard, at the lower court, the defendant must object to and preserve his

97. THOMAS E. BAKER, A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS 12 (2009) (highlighting both that: "It is a principle of first importance that the federal courts are courts of limited jurisdiction[,] and that "[t]he Supreme Court has made this self-executing duty of the court of appeals quite clear: 'An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review.'" (quoting CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 27 (6th ed. 2002); *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)).

98. Montz, *supra* note 2, at 248 (explaining that "an appellate court corrects the legal errors of the court below.").

99. FED. R. APP. P. 4(b); FED. R. APP. P. 28(a)(6) (outlining that an appellant's brief must contain "a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record . . .").

100. *See* *United States v. White Bull*, 646 F.3d 1082, 1091 (8th Cir. 2011).

101. *Id.*

102. *Id.* at 1093.

103. *See* *United States v. Wilkins*, 139 F.3d 603, 605 (8th Cir. 1998) (holding that a federal district court did not abuse its discretion when it ordered a new trial because "[t]he District Court is in the best position to make a judgment of this kind. We do not know what we would have done in its place. We do know that the District Court did not abuse the broad discretion committed to it in matters of this kind."); *White Bull*, 646 F.3d at 1091.

objection to an evidentiary issue.¹⁰⁴ If the practitioner fails to object to an evidentiary issue, the appellate court will apply a standard of review that is more deferential than abuse of discretion.

2. *Plain Error*

Specifically, when a practitioner fails to object to an evidentiary issue, appellate courts apply the plain error standard of review.¹⁰⁵ Federal Rule of Criminal Procedure 52 permits an appellate court to consider issues, which were not objected at the trial court level. Specifically Rule 52 states, “[a] plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”¹⁰⁶ However, under a plain error standard, as opposed to an abuse of discretion standard, a criminal appellant must show a grave injustice to warrant relief.¹⁰⁷ For example, a federal appellate court described that an error rising to “plain error” would have to “shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge.”¹⁰⁸

B. OBJECTING TO PRESERVE APPELLATE ISSUES

While practitioners often focus on objections for their ability to prevent the admission of harmful evidence, for the aforementioned reasons, it is equally important to focus on the appellate implications of objecting or not objecting to evidentiary items. Failing to object to an evidentiary issue for a tactical purpose at trial will cause the appellate court to consider this issue under an unfavorable standard.¹⁰⁹ However, objecting, even if it is outside the presence of the jury at a sidebar conference, allows a practitioner to preserve this evidentiary issue under a more favorable appellate standard of review.¹¹⁰

104. Montz, *supra* note 2, at 248 (stating, “[t]herefore, the rule generally provides that, except with regard to plain error, objections to evidence must be made either before, or contemporaneously with the evidence sought to be received.”).

105. *White Bull*, 646 F.3d at 1091.

106. FED. R. CRIM. P. 52(b).

107. *United States v. Olano*, 507 U.S. 725, 736 (1993) (holding that appellate courts should only correct a plain error if the error seriously affects “the fairness, integrity or public reputation of judicial proceedings.”).

108. *United States v. Segura*, 747 F.3d 323, 331 (5th Cir. 2014).

109. *Olano*, 507 U.S. at 736.

110. *White Bull*, 646 F.3d at 1091.

VI. DECIDING “IF” YOU SHOULD OBJECT

After concluding, “when,” “how,” “where,” about “what” and “why” to object, a practitioner is finally in a position to evaluate “if” he or she should object to an evidentiary issue. Ultimately, as discussed above, a practitioner should lodge objections to accomplish one of three purposes: (1) to prevent the admission of harmful, inadmissible evidence; (2) to preserve the evidentiary issue for appeal; and (3) to prevent opposing counsel from running afoul of the evidentiary rules. Therefore, a practitioner should focus on making quality objections over quantity objections.¹¹¹

A. OBJECTING TO SERVE A CLIENT’S INTERESTS

For example, once a practitioner determines that objecting serves their client’s interest, the practitioner should object “when,” “how,” “where,” and about “what,” in a manner that best serves their client. On the other hand, if a practitioner determines that the law is not on his side, the practitioner should not object to an evidentiary issue so that he or she may maintain credibility with the court and jury.¹¹² Determining “if” to object to an evidentiary issue becomes difficult when the legal authority does not support exclusion of evidence. Although a practitioner can object to the introduction of evidence and advocate overturning the existing law, this often accomplishes little. Instead, the practitioner should focus on making objections, for which the legal authority better supports his or her position.¹¹³ In the author’s opinion, a few quality objections outweigh a large quantity of unsubstantiated objections.

B. UNINTENDED CONSEQUENCES OF LODGING OBJECTIONS

Additionally, an unintended consequence of objecting to a particular item at trial is that the jury pays closer attention to that particular objected to item.¹¹⁴ For example, during a fraud case, if defense counsel objects to a hearsay statement that qualifies under a hearsay exception, the jury may remember that statement more than had the defense counsel not objected. Since the hearsay statement was admissible, the defense counsel did not serve his client’s interest by highlighting harmful evidence. In contrast, it can be harmful for a practitioner to object to inadmissible evidence that is favorable to that practitioner’s position.

111. See Mauet, *supra* note 20, at 557.

112. *Id.* (stating “[c]lose calls often go to the lawyer who establishes herself as the evidence ‘expert’ the judge learns to trust . . . They make objections only when they have solid evidentiary reasons for them.”).

113. See *id.*

114. *Id.* at 515 (stating that “[w]hen an objection is overruled, jurors will naturally pay more attention to the testimony or exhibit.”).

Imagine defense counsel is seeking to admit evidence of the murder victim's text messages between he and the defendant. Additionally, assume that the prosecutor knows that these text messages describe a previous fight between the defendant and victim, where the defendant tells the victim, "I'm going to kill you for hitting on my girlfriend," and the victim replies "not if I get to you first." The defense attorney wants to admit these text messages to argue self-defense. The prosecutor has the option to either object to these text messages under "relevance," hearsay, or improper character evidence. However, the prosecutor also has the option to not object and argue, contrary to the defense counsel's assertions, that the text messages prove that the defendant's prior outrage at the victim demonstrates that the defendant killed the victim with premeditation. In these situations, a practitioner must evaluate the prospective evidence well in advance of trial so that he may determine whether objecting serves the practitioner's interests.

C. UNEXPECTED OBJECTIONS

However, what should a practitioner do when, during trial, an unexpected objectionable issue arises? Since trial practice is an art and not an exact, predictable science, a practitioner cannot always predict with certainty what objections he or she needs to be prepared to make. In situations when an unexpected evidentiary issue arises during trial, a practitioner does not have the luxury to evaluate all of the factors, but instead must rely upon instinct or his or her gut feeling. The best way to proceed in these cases is to treat these possible objections as if they were unexpected witnesses that you can cross-examine.¹¹⁵ Just as a practitioner prepares for cross-examination by creating an outline of potential cross-examination topics, a practitioner should create brief outlines for all possible objections.¹¹⁶ To be effective, these outlines only need to contain the possible objection, the relevant law, and the opposing party's response.

In the author's opinion, the most important rule of cross-examination for a criminal law practitioner is to not cross-examine a witness unless cross-examination will benefit the practitioner's interests. Similarly, in the author's opinion, the first rule of objections for a criminal law practitioner is not to object unless it advances the practitioner's case. Therefore, when a practitioner is confronted with unexpected, possible evidentiary objections, the practitioner should not object unless it is helpful to his or her client. For ex-

115. *Id.* at 271 (stating that a lawyer should "prepare a cross-examination outline for each witness . . . to outline the cross-examination topics . . .").

116. *See id.*

ample, if opposing counsel asks a prejudicial question that “shocks the conscience,” the practitioner must object. However, if opposing counsel simply asks a question which elicits hearsay, but is not harmful to the practitioner’s case, he or she should not object.

VII. CONCLUSION

Although Hollywood portrays objections as the quintessential lawyer function, the reality is that objections serve important legal functions, and practitioners should not make objections simply because they “can” make them. Instead, a practitioner must make objections because the objections benefit his or her client and “should” be made. However, to determine whether an objection “should” be made, practitioners must prepare to make objections in the same way he or she would prepare an appellate brief or sentencing memorandum; by researching the legal authority, evaluating the legal ramifications of objecting or not objecting, and by becoming familiar with the court in which the practitioner practices. Through this process, a practitioner can identify “when,” “how,” “where,” about “what,” and “why” to object. After the practitioner answers these five questions, he or she is in the best position to advocate on behalf of his or her client.

Additionally, after carefully considering all foreseeable objections, a practitioner is better able to decide “if” he or she should object. This foresight benefits a practitioner because it allows them to evaluate whether objecting, even to unexpected evidentiary issues, will benefit their client. Simply put, a good criminal law practitioner must object not just because they “can” but because they “should” for their client’s best interest. By following this process, when a practitioner exclaims “Objection!” he is not being theatrical for theatrics sake but is instead making a significant legal challenge to evidence. Although the practitioner may not make the objection like a Hollywood actor, he or she can rest assured that this objection will actually have a positive impact on his or her case.