



PROGRAM MATERIALS

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Evidence in Action: Making and Winning Objections at Trial

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5301 North Federal Highway, Suite 150, Boca Raton, FL 33487

Phone 561-241-1919



CLE SEMINAR

Evidence in Action: Making and Winning Objections at Trial

Michael DeBlis III, Esq.

Trial Advocacy · Evidence · Courtroom Strategy



Topics Covered

- Objection Strategy
- FRE 401–403
- Hearsay & Exceptions
- Character Evidence
- Authentication
- Expert / Daubert
- Appellate Record

TODAY'S AGENDA

8 Sections

Practice-Focused



01 The Strategic Framework for Objections

02 Relevance, Unfair Prejudice & FRE 403

03 Hearsay: Rule, Exemptions & Exceptions

04 Character & Propensity Evidence

05 Authentication & Best Evidence

06 Expert Testimony & Daubert Challenges

07 Preserving the Record for Appeal

08 The Art of Winning the Objection

SECTION 01

The Strategic Framework for Objections

When to object. When to pass. How to win.

Know the Rules

Read the Room

Control the Record



The Objection Decision Matrix

Every objection is a cost-benefit calculation. Match the situation to the right quadrant.

OBJECT — HIGH VALUE

Evidence is seriously harmful AND legal grounds are solid. Stand, name the rule, be brief. Expect to win.

CONSIDER — STRATEGIC VALUE

Exclusion possible but marginal benefit. Weigh jury perception. A silent offer of proof may be smarter.

PASS — LET IT GO

Technically objectionable but harmless. Objecting signals weakness and spotlights the evidence. Stay quiet.

PRESERVE — RECORD ONLY

No chance of exclusion but the appellate record must be protected. Object briefly, expect the overruling, move on.



Anatomy of a Proper Objection

STEP

1

STAND & IDENTIFY

Rise immediately. Say 'Objection' clearly before the witness answers. The record must capture it.

STEP

2

STATE LEGAL GROUNDS

Name the specific rule: 'Objection — hearsay, FRE 802.' Vague objections don't preserve error on appeal.

STEP

3

OFFER OF PROOF

If overruled on excluded evidence, make an offer of proof under FRE 103(b). Tell the record what was lost.



FRE 103(a): Error is not preserved unless a timely, specific objection is made. General objections waive the issue on appeal.

Relevance, Unfair Prejudice & the FRE 403 Balancing Test

The gateway rule — and the most powerful exclusionary tool in the arsenal.

FRE 401

Any tendency to make
a fact more/less probable

FRE 402

Relevant evidence
is admissible

FRE 403

Exclude if probative
substantially outweighs

FRE 403 — Winning & Defending

FRE 403: *The court may exclude relevant evidence if its probative value is **substantially outweighed** by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.*



WINNING THE OBJECTION

Quantify the specific danger — tell the judge HOW the jury will misuse the evidence

Offer to stipulate to the underlying fact (Old Chief v. United States)

Show probative value is low or achievable by less prejudicial means

Request a limiting instruction as your fallback if exclusion is denied



COMMON MISTAKES

Arguing relevance when you mean prejudice — these are separate objections

Failing to articulate HOW the jury will misuse the evidence specifically

Not requesting a limiting instruction as a fallback alternative

Confusing 'prejudicial' with 'unfairly prejudicial' — all damaging evidence is prejudicial

Hearsay:

The Rule, Exemptions & Exceptions

The most litigated evidentiary rule — and the most misunderstood.

~30

Specific exceptions
under FRE 803-807

3

Key questions every
hearsay analysis turns on

#1

Most litigated rule
in American courts



The Hearsay Decision Tree

STEP 1

Is it a statement?

An oral/written assertion or assertive conduct. Non-assertive conduct is NOT hearsay. FRE 801(a).



STEP 2

Was it made out of court?

Statements on the witness stand in THIS proceeding are not hearsay. Prior depositions, texts, emails — all out of court.



STEP 3

Is it offered for its truth?

Effect on listener, verbal acts, circumstantial evidence of state of mind — all NON-hearsay uses. This is the critical step.



STEP 4

Exemption or exception?

Run: 801(d) exemptions → FRE 803 (availability immaterial) → FRE 804 (declarant unavailable) → FRE 807 (residual).

YES to all 4 + no exception → HEARSAY → OBJECT

'No' at Step 3 or exception applies → ADMISSIBLE → No objection



Critical Hearsay Exceptions at a Glance

FRE 801(d)(2)

Party Admission

Statement by party-opponent, adopted or authorized; co-conspirator statements in furtherance of conspiracy.

FRE 803(4)

Medical Statements

Statements for medical diagnosis or treatment, including to ER staff. Includes identifying cause.

FRE 803(1)

Present Sense Impr.

Describing event while perceiving it or immediately after. Spontaneity is key.

FRE 803(6)

Business Records

Record of regularly conducted activity; kept in regular course; no indicia of untrustworthiness.

FRE 803(2)

Excited Utterance

Statement relating to startling event made while under the stress of excitement caused by it.

FRE 804(b)(1)

Former Testimony

Prior testimony where declarant unavailable and party had prior opportunity and motive to cross-examine.

FRE 803(3)

State of Mind

Then-existing mental, emotional, or physical condition. Cannot prove past facts.

FRE 804(b)(3)

Against Interest

Statement so contrary to declarant's interest that a reasonable person wouldn't make it unless true. Unavailability required.

Character & Propensity Evidence

FRE 404, 405, 412–415

The propensity ban — and its many exceptions.

FRE 404(a)

Propensity ban:
character → conduct

FRE 404(b)

Prior bad acts for
non-propensity purposes

FRE 412–415

Sex offense exceptions
and rape shield rule

- Key factors affecting character evidence rules and their application:
 - Four preliminary questions: (1) determine the *purpose* for which the evidence is being offered, (2) method of proving character, (3) type of case – civil or criminal, and (4) what trait of character is involved.

- What is purpose or offer of character evidence?
 - Character directly in issue (Person's character is a material element in the case.)
 - Character as circumstantial evidence of person's conduct at time of litigated event (Character evidence to prove conduct in conformity w/ character on occasion in issue)
 - Character to impeach the credibility of a witness (i.e. bad character for truthfulness to impeach the credibility of a witness who testifies at trial)

- What method or technique to prove character? Possibilities are:
 - Specific acts of conduct
 - Opinion (personal opinion)
 - Reputation in the community
 - Reputation or opinion is a red flag that tells you you're in the realm of character evidence

- What type of case? (civil or criminal?)
- What trait of character? (It must be the specific trait which is substantively in issue in the case)

- Character evidence is *not* admissible when offered as circumstantial evidence to infer conduct at the time of the litigated event

– Hypo: P sues D for personal injury damages alleging negligence arising out of an automobile accident. P offers a witness to testify that D has a reputation in the community for recklessness. Admissible? No. P is trying to suggest that if D has been reckless and careless in the past, then it is more than likely that D was driving his car recklessly at the time of the automobile accident

—What's good for the goose is good for the gander. Evidence that D has a reputation as a *careful* person would be inadmissible character evidence in a negligence action

- Hypo in negligence action: D seeks to testify that he has been driving for 40 years without ever being previously involved in an accident? Admissible? No. D is trying to suggest that since he's always been careful before, the jury should infer that he was careful this time
- Hypo in breach of warranty action: In a breach of warranty action, evidence that the seller was an honest man is an example of character evidence which is inadmissible

- Character evidence is admissible in a civil case when the character of a person is an essential element of a claim, defense, or cause of action – character is directly in issue

- Tip: Where knowledge of the character of *another* is in issue
- Don't be quick to assume that character is in issue!

–Three types of cases:

- Defamation where *truth* is a defense
- Negligent entrustment
- Wrongful death

- Defamation where *truth* is a defense
 - Hypo: Garrett calls Yomara “a crook.” P Yomara sues D Garrett for *defamation* seeking \$1M for damages to P’s reputation. D seeks to show that P has on three prior occasions stolen money from his employer. D also seeks to show that, even before the alleged defamation, P had a reputation for being dishonest. Admissible? Yes. Since D’s defense is truth, P’s reputation before the defamatory words were spoken is critical

–Don't get confused: Committing three larcenies is a specific act and this is a civil case where character is in issue. Specific acts come in. The testimony is admissible under 405(b). Don't confuse this example w/ impeachment of witnesses. 405 deals w/ character evidence of parties not impeachment of witnesses

- Negligent entrustment
 - Negligent entrustment is a cause of action in tort law that arises where one party (the **entrustor**) is held liable for negligence because they negligently provided another party (the entrustee) with a dangerous instrumentality, and the entrusted party caused injury to a third party with that instrumentality. The cause of action most frequently arises where one person allows another to drive their car.



FRE 404(b): Prior Bad Acts — Permitted & Excluded

✓ PERMITTED NON-PROPENSITY PURPOSES

- Motive
- Opportunity
- Intent
- Preparation or plan
- Knowledge
- Identity (modus operandi)
- Absence of mistake or accident
- Completing the narrative

✗ DEFENDING AGAINST 404(b)

- 1 Demand notice**
FRE 404(b)(3) requires prosecution to give advance notice of intended 404(b) evidence in criminal cases. Move to exclude if insufficient.
- 2 Challenge the purpose**
'Intent' cannot be a pretext when intent is not genuinely contested. If the defendant stipulates to intent, the prior act loses its non-propensity purpose.
- 3 Request a Huddleston hearing**
Prior act must be proven by a preponderance. Challenge sufficiency of proof — the act must have actually occurred.
- 4 Run the 403 filter**
Even admissible 404(b) evidence must survive FRE 403. Old conviction + uncontested issue = strong 403 argument for exclusion.

Authentication & Best Evidence

FRE 901–903, 1001–1008 — Documents, digital evidence, and the modern courtroom. To prove the content of a writing, recording, or photograph, the original is required. The BER is a rule of preference for the original. The difficulty comes in the application of the BER.

Text Messages & Emails

Account credentials, metadata,
writing style, phone records

Social Media Posts

URL + profile, platform subpoena,
IP logs — screenshot alone insufficient

Surveillance & Video

Chain of custody, accuracy
testimony, metadata preserved

Expert Testimony & Daubert Challenges

FRE 702 — Gatekeeping expert opinion in the modern courtroom.

1

Testability

2

Peer Review

3

Error Rate

4

General Acceptance

5

Fit to the Facts



The Daubert Gatekeeping Factors

1

Testability

Can the theory or technique be tested? Has it been? Untestable theories that resist falsification are red flags under Daubert.

2

Peer Review & Publication

Has the theory been subjected to peer review and publication in recognized scientific literature? Publication alone is not sufficient.

3

Known Error Rate

What is the known or potential error rate? Are there standards controlling the technique's operation and maintenance?

4

General Acceptance

Is the theory generally accepted in the relevant scientific community? The Frye factor survives Daubert as one among several considerations.

5

Reliable Application

Has the expert reliably applied the methodology to the specific facts of THIS case? A sound method poorly applied fails FRE

2023 Amendment — FRE 702

The proponent must now demonstrate admissibility by a preponderance. Courts may no longer leave Daubert questions entirely to the jury.

Preserving the Record for Appeal

Win at trial. Win on appeal. You must build both records simultaneously.

BEFORE TRIAL

Motions in limine
Definitive rulings
Sidebar transcripts

DURING TRIAL

Specific objections
Motion to strike
Offer of proof

AFTER RULING

Motion for mistrial
Limiting instructions
Renew objections



Trial Record Preservation Checklist

BEFORE TRIAL

File motions in limine on all anticipated evidentiary issues

Obtain definitive rulings — 'subject to renewal' is insufficient

Request sidebar conferences be transcribed on the record

Pre-mark all exhibits and confirm reporter has them

DURING TRIAL

Object with specificity — state the rule and grounds

Move to strike testimony admitted over your objection

Make an offer of proof for every excluded item (FRE 103(b))

Note adverse rulings for the record even when you expect to lose

POST-RULING

Move for mistrial when curative instruction is insufficient

Request limiting instructions to constrain admitted evidence

Renew objections to evidence admitted subject to connection

After verdict: move for new trial within the jurisdictional deadline

The Art of Winning the Objection

Courtroom presence, judicial psychology, and the human side of evidence.

Know the Judge

Rules are universal;
judges are individual

Credibility = Capital

Every overruled objection
costs currency with the bench

Silence as a Tool

Not every inadmissible
question needs an objection



10 Principles for Courtroom Dominance

1 Be precise, not verbose. Name the rule. One sentence is enough.

2 Stand to object — it signals conviction and commands the judge's attention.

3 Anticipate every objection before trial. Your grounds should be pre-written.

4 Know your judge. Some want the rule; some want the reason; some want brevity.

5 Never argue after a favorable ruling. Take the win and move on immediately.

6

Accept overrulings graciously. Your appellate credibility is your long-term asset.

7

Use speaking objections sparingly — but master them for jury communication.

8

Silence is a tool. Not every inadmissible question deserves an objection.

9

Use objections to disrupt rhythm when opposing counsel has momentum.

10

Every objection sends a message. What does yours say about your confidence?



Quick Reference: Common Trial Objections

OBJECTION	RULE	HOW TO OVERCOME IT
Hearsay	FRE 802	Identify applicable exception: party admission, excited utterance, business record, etc.
Relevance	FRE 401-402	Show any logical connection to a fact of consequence. Threshold is deliberately low.
Unfair Prejudice	FRE 403	Show probative value equals/outweighs prejudice. Offer to stipulate as fallback.
Leading Question	FRE 611(c)	Permissible on cross, hostile witnesses, and adverse parties — not plain direct.
Speculation / Foundation	FRE 602	Lay foundation: personal knowledge, chain of custody, authentication.
Legal Conclusion	FRE 701	Lay opinion must be based on perception. Experts may opine on ultimate issue (FRE 704).
Compound Question	FRE 611	Break into separate questions. Object when question contains two distinct inquiries.
Best Evidence	FRE 1002	Duplicates admissible (FRE 1003) unless authenticity genuinely contested.
Improper Character	FRE 404	Identify legitimate non-propensity purpose: intent, identity, motive, plan.
Asked & Answered	FRE 611(a)	Court's discretion. Move on once testimony is fully covered — don't belabor the point.

FIVE THINGS

to Do Monday Morning

1 Build your objection notebook — organized by witness and exhibit.

2 Review pending cases for FRE 403 and FRE 404(b) vulnerabilities.

3 File a motion in limine on every significant evidentiary dispute.

4 Audit your experts' opinions against the 2023 FRE 702 standard.

5 Debrief every objection decision after each day of trial.



Thank You

Michael DeBlis III, Esq.

Questions & Discussion

CLE Credit: 1.0 Hour
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