

Federal Criminal
Practice Seminar



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Evidence

Making and Responding to Objections at Trial

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Overview

- Making Objections
 - Practical considerations
 - Legal requirements
 - FRE 103
 - Pepto Bismol moments
- Responding to Objections
 - BARPH the evidence!

Making Objections: Practical Considerations

- 3 critical questions
 - Is it objectionable?
 - Does it hurt?
 - Can I win it?

Is It Objectionable?

- Does the Constitution, a statute, or a rule of evidence, or other rule prescribed by SCOTUS exclude the evidence?
 - FRE 402 declares all “relevant” evidence admissible unless excluded by one of the above.
 - Common law exclusions and state law exclusionary rules do not apply in Federal trials. *Leitman v. McAusland*, 934 F.2d 46, 50 (4th Cir. 1991).
 - “Other rules:” Fed.R.Civ.P; Fed.R.Crim.P.

Does It Hurt?

- No rule of evidence excludes evidence merely because it “hurts” your case!
- Cost-benefit analysis
 - Some of the opponent’s evidence *may*, depending upon other facts, help you more than it hurts.
 - Can you use the otherwise inadmissible evidence to your advantage?
 - If your advantage outweighs the potential harm, why seek to exclude?

Can I Win It?

- Cost-benefit analysis:
 - If you don't win the objection at trial the odds of winning it on appeal are long.
 - In the overall scheme of things is objecting to this evidence worth stopping the proceedings and adding to the jury's perception that you're trying to hide facts.
 - Does the objection bring attention to the evidence?
 - Do I need to object to preserve the record even though I'm certain the judge will overrule?

Making Objections: Legal Requirements

- 3 critical questions:
 - Why object?
 - When to object?
 - How to object?

Making Objections: Legal Requirements

- Why object?
 - Legitimate reasons:
 - Keep inadmissible evidence away from the jury
 - Protect the witness
 - Protect the record
 - Illegitimate reasons
 - Break up the flow of opposing counsel's examination
 - Communicate with the jury
 - Coach the witness

Making Objections: Legal Requirements

- FRE 103(a): Preserving a claim of error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:
- (1) if the ruling admits evidence, a party, on the record:
 - (A) ***timely*** objects or ***moves to strike***; and
 - (B) states the specific ground, unless it was apparent from the context; or

Making Objections: Legal Requirements

- What is *timely*?
- Depends upon when the grounds become apparent.
 - Real or documentary evidence: when the item is offered. *U.S. v. Cabrera-Beltran*, 660 F3d 742, 751 (4th Cir. 2011).
 - Oral testimony: Normally, after the question and before the answer. *Hutchinson v. Groskin*, 927 F.2d 722, 725 (2d Cir. 1991). *But see, Benjamin v. Peter's Farm Condo Owner's Ass'n*, 820 F.2d 640, 642 n.5 (3d Cir. 1987) (listing other circumstances).

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Making Objections: Legal Requirements

- “Specific” encompasses 4 aspects:
 - Legal grounds found in the rules of evidence, e.g., hearsay;
 - Parts of an offer, e.g., declarant’s statement that includes portions that fit within an exception and other portions that meet the hearsay exception but are barred by other rules.
 - Parties; some evidence admissible against one party but not another, e.g., admission not admissible against co-defendant.
 - Purposes; admissible for one purpose but inadmissible for other purposes, e.g., admissible to impeach but not as substantive evidence. FRE 105

Making Objections: Legal Requirements

- How *specific*?
- Specific enough to give trial judge notice of the alleged error and opportunity to address it.
 - *U.S. v Parodi*, 703 F.2d 768, 783 (4th Cir. 1983) (party must “object with that reasonable degree of specificity which would have adequately apprised the trial court of the true basis for his objection and would have clearly stated the specific ground now asserted on appeal”).
 - *U.S. v. Cabrera-Beltran*, 660 F3d 742, 751 (4th Cir. 2011) (Hearsay objection doesn’t preserve Confrontation Clause).

Making Objections: Legal Requirements

- “apparent from the context” exception
 - Specificity requirement is met and error preserved if basis is apparent.
 - E.g., Q: Please tell the jury what you heard Mr. Jones tell the police officer?
 - Def Cnsl: Objection!
 - *Probably* preserves an objection to hearsay.
- *Compare U.S. v Dukes, 2007 WL 1962954 (4th Cir. 2007) with Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980)*

Responding to Objections

- FRE 103(a): Preserving a claim of error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and: . . .
- (2) if the ruling **excludes** evidence, a party informs the court of its substance by an **offer or proof, unless the substance was apparent from the context.**

Responding to Objections

- How to make the offer of proof
 - Documents and real evidence:
 - Photographs
 - Copies
 - Testimony:
 - Q&A outside presence of jury (FRE 103(c)).
 - Written summary
 - Oral representation by counsel
- Not required if “apparent from context”

Responding to Objections

- **B**est Evidence: FRE 1001-1008
- **A**uthentication: FRE 901-903
- **R**elevance: FRE 401-415; 601-615; 701-706
- **P**rivilege: FRE 501
- **H**earsay: FRE 801-807



Responding to Objections

- **Hearsay: FRE 801-807**
- **Authentication: FRE 901-903**
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- **Privilege: FRE 501**
- **Original Document: FRE 1001-1008**



Responding to Objections

Original Document:

FRE 1001-1008

Privilege: FRE 501

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