THE TEN COMMANDMENTS OF EVIDENCE

The Hon. Robert E. Blackburn
United States District Judge
District of Colorado
November 8, 2007

I know that you know that there are many more than just 10 commandments of evidence. But a title like the 4,321 commandments of evidence is not nearly as catchy.

I. Thou Shall Know The Rules of Evidence (11 articles and 63 rules – you have more computer passwords than that)

A. Suggested Resources:

1. K. Broun McCormick on Evidence (6th ed. 2006) [Thomson-West];

2. Weinstein's Federal Evidence [Lexis Nexis-Matthew Bender]

3. For a comprehensive comparative analysis between the Colorado Rules of Evidence and the Federal Rules of Evidence, see Colorado Handbook on Evidence, Chapter 5 (Hess and Hyatt) (2007) [West's Colorado Practice Series, vol. 22].

In a trial or hearing, whether because of rule 103(c) or otherwise, we speak in code – Relevance, or rule 401 & 402; hearsay, or rule 801(c) & 802; speculative; foundation; lay opinion, or rule 701, etc. you can not participate if you do not understand the jargon.

B. Know when the rules do not apply:

1. The rules of evidence do not apply to preliminary questions concerning:

a. the qualification of a person to be a witness;

b. the existence of a privilege; or

c. the admissibility of evidence. Fed.R.Evid. 104(a) and 1101(d)(1).

2. The rules of evidence do not apply in miscellaneous criminal proceedings. Fed.R.Evid. 1101(d)(3);

3. The rules of evidence do not apply in criminal suppression hearings. See United States v. Matlock, 415 U.S. 164, 174, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). See United States v. Merritt, 695 F.2d 1263, 1270 (10th Cir.1982) ("Therefore, we have held that the rules of

evidence do not apply at suppression hearings.").

C. Conversely, know which rules apply. [Fx: In response to my question about whether counsel was proceeding under rule 612 or 613, he replied cleverly, “Both.” However, he was too clever by half.]

II. Thou Shall Not Interpose Feckless Objections

A. Only objections that are timely interposed are deserving of judicial determination. Fed.R.Evid. 103(a)(1). For example, the objection that is prefaced, "I've been listening patiently and now wish to object to this line of questioning . . . " is not timely and should not be entertained by the court. It is clearly a case of "Use it or lose it." To object or not to object: that is the question. Do not be lulled to sleep by the seemingly salutary provisions of Fed.R.Evid. 103(a), which provides in relevant part: "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."

B. Included on my "no such objections" feckless list are

1. The question and answer are "self-serving"; and

2. The question and answer are "irrelevant, immaterial, and incompetent. [Note: the objection of choice of Perry Mason]

C. In the category of feckless objections I often include the following:

1. "Asked and answered." This objection implicates the provisions of Fed.R.Evid. 403 and 611(a)(1) and (2). Ordinarily, it is an inherently inefficient objection because it normally takes more time to discuss and resolve the objection than was involved in receiving the arguably objectionable question and answer. In any event the objection implicates the temporal economies of a trial and hearing. Therefore, unless repetition is adopted by the examiner as his or her leitmotif, the objection should be felt but not heard. [Note: However, rule 403 also has a substantive component in addition to the obvious temporal component]

2. "The answer is not-responsive." Generally, this objection is reserved to the examiner. K. Broun, McCormick on Evidence (6th ed. 2006) §52. See Also Hester v. Goldsbury, 212 N.E.2d 316 (Ill. App. 1965). Therefore, unless counsel interposing the objection has another evidentiary concern, such as relevance, there is no good reason to invite and absorb the judicial criticism, which invariably will be forthcoming.

3. "The examiner is impeaching his or her own witness": Please note that you may impeach your own witness as authorized by the provisions of Fed.R.Evid. 607, which provides that the credibility of a witness may be attacked by any party, including the party calling

that witness.

4. The premature objection, aka "ED," evidentiary dysfunction. [Fx: Q: Did you have a discussion with the declarant about the murder? Objection: Hearsay]

5. The misguided 106 objection.

a. Rule 106 is a partial codification of the common law "rule of completeness." I say partial, because it only applies to writings and recorded statements that are the functional equivalent of a written statement. Rule 106 does not apply to oral statements or conversations.

b. Rule 106 is manifested as to depositions in Fed.R.Civ.P. 32(a)(4), of which it is substantially a restatement.

D. Confused/conflated objections/concepts:

1. 401 and 403. If you intend to object because of the logical relationship between the subject of the question/answer and a consequential fact, then the objection is relevance. However, if you are protesting that the evidence implicates prejudice, confusion, or waste of time, then the objection is Rule 403. An objection based on relevance does not automatically implicate and include an objection under Rule 403.

2. Hearsay (Fed.R.Evid. 801(c)) and personal knowledge (Fed.R.Evid. 602) [Fx: The statement, "He told me that did it" is hearsay. However, the statement, "After speaking to him, it is my understanding that he did it," is not hearsay under 801(c), but instead, a statement lacking evidence ". . . sufficient to support a finding that the witness had personal knowledge of the matter" under rule 602.]

3. Fed.R.Evid. 612 and 613

a. Watch the attorney who declares that he or she is attempting to refresh the witness's recollection by reading from a document not yet admitted in evidence.

b. Know, which foundational predicate is required for which.

1. Fed.R.Evid. 612 governs the use of writings to refresh recollection. The foundational predicate requires: a) that the witness have no present recollection of the subject; and b) that the writing at issue is likely, in the opinion of the witness, to refresh his recollection.

2. Fed.R.Evid. 613 governs impeachment by prior inconsistent statements. If the witness denies or does not recall the statement, it may be proved by extrinsic

evidence, subject to the "collateral matter" rule, which requires the examiner to take the answer without resort to extrinsic evidence. If the witness admits the statement, no extrinsic evidence is admissible.

i. For a foundational predicate, I would recommend that you be guided by CRE 613. I recommend the handy pneumonic: TOPPS – Time, Occasion, Place, Person (declarant), Statement.

ii. Ordinarily, the prior inconsistent statement may be used for impeachment, but not for its substantive truth. However, a prior inconsistent statement may be used substantively via Fed.R.Evid. 801(d)(1), provided the declarant testifies during the proceeding and is subject to cross-examination.

c. Remember that almost anything may be used to refresh recollection, not just a writing or document – toilet paper, tree bark, a Jack Daniel's bottle, etc.

4. Habit, i.e., a habitual response to a specific stimulus (Fed.R.Evid. 406), and character, i.e. a generalized description of disposition (Fed.R.Evid. 404(a)) [Fx: In pi litigation involving the issue of defendant's driving, evidence that it was defendant's habit to give a hand signal for a left turn is proper to prove habit, while evidence of habitual careful driving is not evidence of habit, but instead of character.]

i. In discerning between habit and character look for "invariable regularity," "lack of volitional basis," and "habitual acts that have become semi-automatic."

III. Thou Shall Object Sparingly On The Grounds Of Relevance

A. Use objections based on relevance sparingly. Consider the expressly liberal language of Fed.R.Evid. 401.

B. Evidence implicating credibility is always relevant. Fed.R.Evid. 104(e), 401, 402,and 611(b).

IV. Thou Shall Object Even More Sparingly Under CRE 403

A. The exclusion of admittedly relevant evidence is the subject of Fed.R.Evid. 403, which authorizes exclusion on the grounds of prejudice, confusion, and waste of time. In applying the rule, the court is required to presume maximum probativity and minimum prejudice. Ofttimes, if less prejudicial or confusing alternative means of proof are available, exclusion will be upheld under Fed.R.Evid. 403. Additionally, if prejudice or confusion may be effectively extenuated or eliminated altogether by use of a cautionary or limiting instruction under Fed.R.Evid.105, then the evidence should be admitted with a concomitant limiting instruction.

B. The proffered evidence must be given its maximum probative value and its minimal

prejudicial effect.

C. "Probativity" under Fed.R.Evid. 403 is different than "Relevance" under Fed.R.Evid.. 401. [Note: “Probativity” may be thought of as the focal point of “relevance” – where relevance is most puissant.]

D. Fed.R.Evid. 403, like Fed.R.Evid. 401and 404(b), is a rule of inclusion, not of exclusion.

V. Thou Shall Know Who Does What To Whom When

A. The initial determination of admissibility of evidence is reserved for the court, which is not bound by the rules of evidence. Fed.R.Evid. 104(a) and 1101(d)(1).

For example:

Q: Did he say anything to you regarding his condition?
A: Yes-he said, "I know I haven't long to live. The doctor told me I have about five minutes left." (Note: objections based on hearsay or even multiple hearsay as to what the doctor told the victim would not be appropriate because the rules of evidence do not apply in admissibility determinations.)
Q: Did the victim say anything to you after that?
A: Yes, he told me who shot him..
OPPOSING COUNSEL: Objection, hearsay.
THE COURT: Overruled - I find the elements of a foundation for a dying declaration to have been met.

B. Fed.R.Evid. 104(b) Relevancy conditioned on fact. When relevance depends on fulfillment of a condition of fact, the court shall admit it on or subject to introduction of evidence sufficient to support a finding of the fulfillment of the condition. [Fx: Admission of co-conspirator statements as non-hearsay admissions of a party opponent under rule 801(d)(2)(E), which requires a tripartite *sine qua non*: 1) that a conspiracy existed; 2) that defendant and the declarant were members of the conspiracy; and 3) that the statement was made in the course of and in furtherance of the conspiracy. In turn, to prove a conspiracy, the government must prove (1) an agreement with another person to break the law; (2) knowledge of the essential objectives of the conspiracy; (3) knowing and voluntary involvement in the conspiracy; and (4) interdependence among the alleged conspirators. ***See United States v. Eads***, 191 F.3d 1206, 1210 (10th Cir.1999), ***cert. denied***, 120 S.Ct. 2663 (2000). **Under Tenth Circuit law, a district court can only admit coconspirator statements if it holds a James hearing or conditions admission under rule 104(b) on forthcoming proof of a “predicate conspiracy through trial testimony or other evidence.”** *United States v. Owens*, 70 F.3d 1118, 1123 (10th Cir.1995).]

C. Fed.R.Evid.1008 Functions of the Court and Jury.

D. Judicial notice is the subject of Fed.R.Evid. 201. Please note that a court may always take judicial notice of its own files, its findings of fact, and its conclusions of law.

VI. Thou Shall Know The Judge's Rule Of Evidence

A. Fed.R.Evid. 611 has been entitled by me as "the judge's rule." When no other basis for exclusion or admission is obvious or apparent, the judge may invariably invoke the almost unlimited discretion afforded the court by the sweeping provisions of Rule 611. If you were wondering which rule proscribes badgering witnesses and argumentative questions, look no more. Those objections appear fairly included within the provisions of Fed.R.Evid.. 611(a)(1) and (3). This is almost always the case as well with an objection impugning "the form of the question."

B. Fed.R.Evid. 611(b) governs the scope of examination – but not re-direct examination – and provides that "[c]ross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." However, when "new matter" is raised during subsequent examinations, an objection is ordinarily inefficient, especially when a party is examining his or her own witness. For ordinarily, there is nothing to prohibit counsel from terminating examination and then recalling that same witness for examination on the formerly objectionable "new matter." Such a practice would be obviously prodigal. [Note: Rule 611(b) does not apply directly to re-direct examination; so what does?]

C. Fed.R.Evid. 611(c) addresses leading questions. Under this rule leading questions are typically limited to cross-examination. Please note that the rule does not sanction cross-examination of your client or your witness when first called by an adverse party. In fact, if the witness appears to be biased in favor of the cross-examiner, leading questions become inappropriate. K. Broun McCormick on Evidence (6th ed. 2006) § 6.

1. According to Dean McCormick the following circumstances or contexts justify the use of leading questions:

a. To elicit preliminary matters, e.g., name, address, occupation, etc.;

b. To elicit matters not substantially in dispute;

c. To introduce or suggest a subject or topic (as distinguished from and opposed to a particular answer or response);

d. To elicit or develop, when necessary, testimony from a child, see U.S. v Littlewind, 551 F.2d 244(8th Cir. 1977); and

e. To assist a witness whose memory is "exhausted."

2. My own informal rule is "let ‘em lead," but only in any trial or hearing to the court. Judges want to hear the testimony of competent witnesses, not competent attorneys. Therefore, most judges stop writing as long as the examiner chooses to testify by way of leading questions.

VII. Thou Shall Not Cavil Captiously With The Judge In Front Of The Jury

A. Blackburn's Maxim: There is a thin line between being thorough and being ridiculous. [Note: focus on persuasive advocacy, not the record]

B. Beginning right now keep track of the cases in which a trial judge is reversed because of an erroneous evidentiary ruling. While you are keeping score, note also the number of times a trial court is affirmed on the grounds of harmless error notwithstanding an erroneous evidentiary ruling.

C. The Tenth Circuit Court of Appeals reviews rulings on evidence for abuse of discretion, which is proverbial music to the ears of a federal or state trial judge. Generally, abuse of discretion is defined in this context to mean manifestly arbitrary, unreasonable, or unfair.

D. Don't force the judge to defend his or her ruling to your detriment. For example, if you object passionately and pertinaciously on the grounds of relevance, the judge may explain the relevance to your chagrin.

VIII. Thou Shall Think Sequentially

A. Cultivate the habit of analyzing proffered evidence in relation to its logical relationship to the most common evidentiary objections:

1. personal knowledge (Fed.R.Evid.602);
2. authenticity (Fed.R.Evid. 901 and 902);
3. relevance (Fed.R.Evid. 401 and 402);
4. Fed.R.Evid.403;
5. hearsay (Fed.R.Evid.801(c) and 802);
6. improper opinion (Fed.R.Evid.701 and 702)

IX. Thou Shall Know The Bases For Impeachment

A. There are seven principal strategies for impugning credibility:

1. self-contradiction, i.e., prior inconsistent statement (Fed.R.Evid. 613), which is subject to the “collateral matter” rule when the examiner must take the answer of the witness;

2. bias, improper motivation;

3. defects affecting ability to observe, remember, and recount (in the words of the jury instruction: means of knowledge, ability to observe, and strength of memory);

4. third-party contradiction/competing evidence;

5. character for veracity (Fed.R.Evid. 608(a)) via opinion or reputation evidence;

6. specific instances of conduct bearing on credibility (Fed.R.Evid. 608(b)); and

7. felony conviction, dishonest act, or false statement (Fed.R.Evid. 609).

B. Do not conflate or confuse impeachment by prior inconsistent statement under Fed.R.Evid 613 with revival of recollection under Fed.R.Evid 612.

X. Thou Shall Conduct Proper Examination

A. No leading questions on direct examination (or redirect examination), *a fortiori*, of an expert witness. Let your expert be the expert. Save your supercilious display of personal expert knowledge for a cocktail party, because it has no proper place in a federal courtroom.

B. Conduct examination by asking non-compound questions – and asking questions only – not by making statements that you unreasonably expect the witness to convert mentally to a question, and not by making statements at the end of which you add "true" or "correct" or "right" in a feckless attempt to convert a statement to a question. The key is the verb; you must use an interrogative verb – one that conveys and expresses a question This ultra vires style of examination is especially problematic when a common jury instruction is given, which instruction requires the jury to disregard counsels' questions and instead, consider only the witnesses' answers as evidence. Exempt are proper statements of transition from one topic to the next, properly focusing the attention of the witness on the new and next topic of examination.

C. After you receive an answer, you may not properly reiterate or recapitulate the answer.

D. Do not direct the examination via fiat – tell the jury or explain to the jury, etc.

E. Eschew argumentative or ad hominem editorial comments are improper – whether in the introduction, body, or conclusion to the question or after receipt of the answer.

F. You are not in a deposition (unless, of course, you are in a deposition).

G. Preface you r questions to eschew an objection under rule 602 for lack of personal knowledge. George McGlachlan – If you know and only if you know."

H. Preface your questions to eschew an objection under rule 611(a)(1) that your question implies facts not in evidence and/or under rule 602 for lack of personal knowledge by asking, "What, if anything, . . ., or how, if at all, ...

I. Examples of improper examination from recent litigation [During one case, during the examination of one witness]

1. Counsel's clumsy, desultory, and repetitive style of direct examination borders on the painful – physically, intellectually, and legally:

- Habitual direct examination by improper leading Qs
- Habitual direct examination by statements of counsel – not by proper Qs
- Compound Qs
- Prolix Qs (Fx: a Q of 51 words – the question was so big, it had its own zip code)
- Use of grammatically and syntactically incorrect Qs (Mixing negative and positive)
- Desultory examination via "stream of consciousness"
- Repetitive Qs involving the inappropriate recapitulation of the previous Q and A
- Inability to ID exhibits by exh no. or by correct exh no.
- Conducting exam like a deposition – consistently violating the objection protocol prescribed by me in my TPC/O
- Abusive objection practice
- Habitually starting a Q and then stopping to begin another Q
- Very few "clean" questions where the Q is asked without digression or the use/injection of additional, unnecessary words
- Generally, clumsy and disorganized exam of experts, resulting in the needless consumption of time. Let your expert be the expert.

Civil Practice Do's and Don'ts of Trial Objections

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I. Commonly Used Rules of Evidence

Rule	Substance/Use
401	*Relevant Evidence* Tendency to make any fact of consequence more or less probable
403	*Prejudice, Confusion, Waste of Time, Cumulative* Useful to prevent multiple witness who will testify to the same facts
407	*Subsequent Remedial Measures* Not admissible to prove negligence, but admissible for other purposes such as ownership and feasibility Consider waiving this objection if post-accident conduct makes your client/company look safety conscious and there was no reason to expect the danger at issue previously
602	Lack of Personal Knowledge This is the typical "foundation" objection – evidence needed to prove knowledge can come from witnesses testimony
612	*Refresh Recollection* Must have no present recollection Would reviewing X help refresh your recollection?
701 and 702	*Lay Witnesses & Experts* Lay witness cannot offer opinions on scientific or other specialized knowledge - **if you have a client with specialized knowledge, disclose as a non-retained expert**

	702 objections / Daubert motions often addressed pre-trial
801-803	*Hearsay* Out of court statement offered for truth of matter asserted Common exceptions: present sense impression, excited utterance, statement for medical treatment, business records, learned treatises
1006	*Summaries* Chart, summary or calculation in lieu of voluminous documents – different than a demonstrative (see below)

II. Underutilized Rules of Evidence

Rule	Substance/Use
103	*Offer of Proof* can be made during a sidebar at trial or in writing before or during trial
404(a)(3) / 608 / 609	*Character of Witness* relates to truthfulness (608) or conviction of a crime (609) any crime, regardless of punishment, is admissible if involved dishonesty or false statement
406	*Habit; Routine Practice* Relevant to prove conduct on particular occasion in conformity with habit or routine practice – useful particularly with corporate polices/procedures
610	*Religious Beliefs or Opinion* Evidence of religious beliefs not admissible for purpose of credibility Should consider this objection in cases where plaintiff wants to discuss church

	affiliation/attendance and no other relevance to such testimony
611 (use in conjunction with 403 above)	*Mode and Order of Witnesses* Court has authority to control mode and order of witnesses "Assumes Facts Not in Evidence" "Form" "leading" Useful to ensure equal and fair time to present evidence, permit cross to go beyond direct to avoid burden on witnesses, leading questions for background/development of testimony *Demonstrative Exhibits* This rule can be used to support use of demonstratives – they are not substantive evidence, rather they are used to help jury understand evidence & may include expert opinions and conclusions "To illustrate and explain opinions you reached in this case, did you help prepare a demonstrative presentation, identified as Ex. X" "Does that presentation explain and illustrate your opinions in this case?" "Request permission to publish to the jury"
902(11)	*Self-Authentication* Certified documents of regularly conducted business activity Useful for medical records and a client/corporation's business records – must provide notice "sufficiently in advance" of trial

III. Pre-Trial Preparation

- When preparing witness outlines, identify the specific exhibits you intend to use with a respective witness and the rule that supports use of the exhibit/admissibility
- Use 902(11) to ensure admissibility of business records and avoid need to call record keepers
- Research case law and have a good handle of facts/rulings that relate to critical evidentiary issues in your case – stick to jurisdiction and judge as much as possible
- Use pretrial Motions in Limine sparingly and for truly critical evidentiary issues

IV. Rule 26 Disclosures

- Requires disclosure, without waiting a discovery request, of any witness or document that a party may use to support its claim or defenses, unless solely for impeachment. When in doubt – DISCLOSE. This includes social media evidence as there may be a substantive purpose beyond mere impeachment, for example video of a plaintiff claiming personal injuries doing activities that support a failure to mitigate defense.
- EXPERT TESTIMONY – Retained and Non-retained
    i. Retained experts must produce a written report that contains a COMPLETE statement of all opinions and the reasons for them. Consider not deposing retained experts to limit expansion of opinions.
    ii. Non-retained expert disclosures must include a summary of the facts and opinions to which the witness is expected to testify. Be wary of generic boiler plate disclosures of non-retained experts, particularly treating medical providers and consider a pretrial motion to limit treating medical providers to information contained within their medical records.

CHARACTER EVIDENCE (RULE 608)

CHEAT SHEET

Federal Rule of Evidence 608 – Witness's Character for Truthfulness or Untruthfulness

> **(a) Reputation or Opinion Evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.
>
> **(b) Specific Instances of Conduct.** Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:
>
> > **(1)** the witness; or
> >
> > **(2)** another witness whose character the witness being cross-examined has testified about.
>
> By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

*RULE 608(a) only allows evidence pertaining to the witness' character for truthfulness/untruthfulness

*admission of this evidence is left to the "sound discretion of the district court." *See United States v. Bedonie*, 913 F.2d 782, 802 (10th Cir. 1990).

I) Reputation (Community Based)

*what the community knows/says/thinks about the individual.

**Michelson v. United States*, 335 U.S. 469, 477 (1948):

> "the shadow his daily life has cast in his neighborhood … [It is] the slow growth of months and years, the resultant picture of forgotten incidents, passing events, habitual and daily conduct, presumably honest because disinterested, and safer to be trusted because prone to suspect. … It sums up a multitude of trivial details. It compacts into the brief phrase of a verdict the teaching of many incidents and the conduct of years. It is the average intelligence drawing its conclusion."

*Foundation:

> 1) that the witness knows X,
>
> 2) that the witness knows others in an identifiable community who also know X, and
>
> 3) that the witness has spoken to others in that community about X or is otherwise familiar with X's reputation for truthfulness. *See* 3 Jones on Evidence §16:20 (7th ed.)

*Important Points:

> *the testimony must relate to reputation of the witness at or near the time of trial. *See* McCormick on Evidence §43 (2020); *see also* 4 Handbook of Fed. Evid. §608:3 (9th ed.) (2021).
>
> *this evidence is not hearsay – *see* FRE 803(21)
>
> *it does not suffice for a witness to repeat what "a handful of people" have said about X – "[r]eputation is what the community as a whole says (or thinks) about a person." 3 Jones on Evidence §16:20 (7th ed.)
>
> *witness must be a member of the relevant community, not a mere acquaintance of the witness being impeached. *See* McCormick on Evidence §43.
>
> *Reputation evidence can be of a specific community, like a jail. *See* McCormick on Evidence §43 (citing *People v. Bieri*, 153 Mich. App. 696 (1986)).
>
> *Is it proper to ask: In view of that reputation, would you believe X under oath? Likely, yes, but not unanimously. *See* 4 Handbook of Fed. Evid. §608:3 (9th ed.) (2021) (citing *United States v. Bright*, 588 F.2d 504, 511 (5th Cir. 1979); *United States v. Walker*, 313 F.2d 236, 241 (6th Cir. 1963)).

***Common Objections:**

> **1) Foundation**
>
> ***be careful of specific act evidence during the foundation**
> ***testimony is not recent enough in time**

***witness does not have a wide enough basis of knowledge**

2) Relevance

***reputation evidence goes beyond truthfulness/untruthfulness**

3) FRE 403

II) Opinion (Personal)

*arguably more powerful than reputation evidence because a witness's personal opinion "is probably more convincing than an endorsement purporting to convey what nameless others think." Federal Evidence §6:30 (3d. ed.)

*Foundation:

1) witness is sufficiently acquainted with X "and that his or her opinion of X's character *will be worth listening to*." 3 Jones on Evidence §16:22 (7th ed.) (emphasis added)

2) important factors:

*the length of time the witness has known X,

*the nature of their relationship, and

*the frequency and context of their contacts. 3 Jones on Evidence §16:22 (7th ed.)

*an adequate foundation demonstrates that "the opinion witness knows the relevant witness well enough to have formed an opinion." *See United States v. Turning Bear*, 357 F.3d 730, 734 (8th Cir. 2004) (citations omitted)

*Important Points:

*testimony must relate to W's general character for truthfulness, not whether the witness's trial testimony was truthful. *See* McCormick on Evidence §43.

*the testimony must relate to an opinion of W at or near the time of trial. *See* McCormick on Evidence §43 (2020); *see also* 4 Handbook of Fed. Evid. §608:3 (9th ed.) (2021).

*Opinion must be based on enough exposure to the witness to establish that the opinion about truthfulness is rationally based. *See* 36 Southwest University Law Rev. 769, 774 (2008).

*in laying the foundation for testimony by a character witness, there may be an occasion to mention specific acts, but it may be wise to consult with the trial court in advance of doing so since specific acts are normally only allowed on cross-examination

***Common Objections:**

1) Foundation
***be careful of specific act evidence during the foundation**
***testimony is not recent enough in time**
***witness does not have enough familiarity with W**

2) Relevance
***opinion goes beyond truthfulness/untruthfulness**

3) FRE 403

III) Specific Instances of (Mis)Conduct

*allowed only on cross-examination subject to the discretion of the Court

*BE CAREFUL - no extrinsic evidence allowed (i.e. you normally cannot prove up the specific instance of misconduct with another witness/document) - the witness's answer must stand.

> EXCEPTION – if the witness makes a false statement while testifying on direct examination. *See Montoya v. Sheldon*, 898 F.Supp.2d 1279, 1293 (Dist. N.M. 2012) ("When a witness makes a false statement while providing testimony, the opposing party is allowed to prove that lie by presenting rebuttal witnesses.") (citing *United States v. Crockett*, 435 F.3d 1305, 1313 (10th Cir. 2006)); *see also New Mexico ex rel. Balderas v. Real Estate Law Center, P.C.*, 409 F. Supp. 3d 1122, 1151 (Dist. N.M. 2019).
>
> *"Courts are more willing to permit, and commentators more willing to endorse, impeachment by contradiction where, as occurred in this case, testimony is volunteered on direct examination." *United States v. Castillo*, 181 F.3d 1129, 1133 (9th Cir. 1999).
>
> *keep in mind that extrinsic evidence is always allowed when impeaching in other areas, like bias, competency, and contradiction. *See id.*

*think about using FRE 404(b) as an alternative means of introducing acts of misconduct

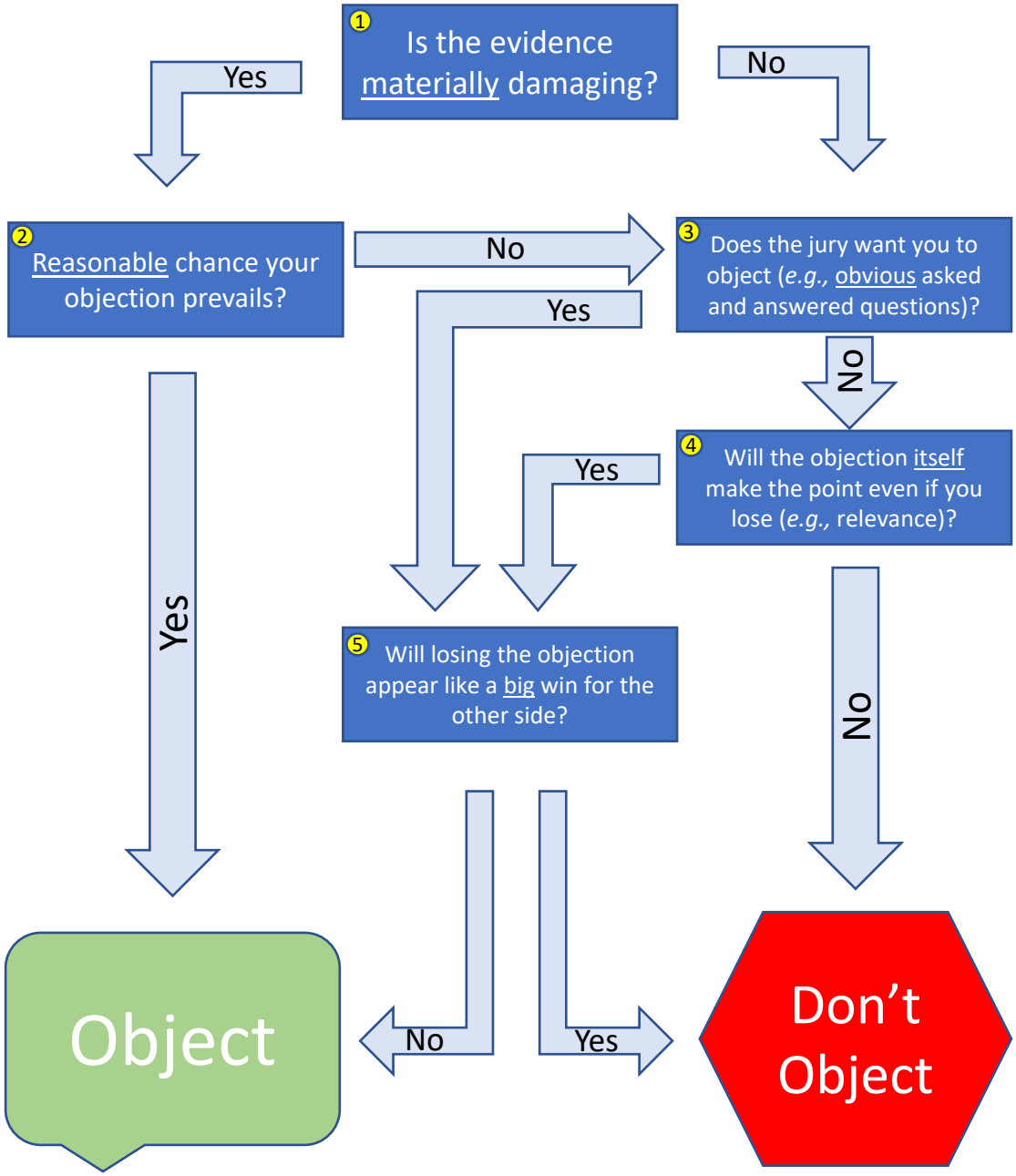
***Common Objections:**

> **1) Relevance**
>
> > ***questioning goes beyond truthfulness/untruthfulness**
>
> **2) FRE 403**

IV) Appellate Standard

> *abuse of discretion (if preserved)
>
> *plain error (if not preserved)

Should I Object?



1. Don't object solely because you can. Is the evidence (1) *actually favorable*; (2) better dealt with on cross or redirect; (3) not worth the fight. If your opponent wants to endorse plainly weak evidence: let them.

2. Will you win and actually exclude the evidence? Knowledge of your judge is important. *E.g.*, even if you believe 403 is implicated, will the judge agree? Can opposing counsel easily work around your objection?

3. Especially for form objections (leading, asked and answered), wait until you sense the jury is hoping for an objection. Only proceed when obvious.

4. Does the objection itself make the point or achieve the effect? *E.g.*, "relevance" show the weakness of the evidence (weigh against #5, below). An objection can also interrupt the flow of a cross (use sparingly).

5. Jurors are human. If one side continually objects and loses, jurors may conclude you're losing the case as well (or obstructing). Objections draw the immediate interest of the jury: use that spotlight wisely.

Every situation is different.
There are exceptions to every rule.