ITINERARY FOR THE NOVEMBER 16, 2011 MEETING
OF THE GEORGE MASON AMERICAN INN OF COURT

Program Title*: *Objections at Trial

Introduction (5 minutes)

Discussion (where to object) (15 minutes)

Case examples (30 minutes)

Virginia Rules of Evidence (proposed) (10 minutes)

Presenters

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Kandace Stroup, Student Member

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WRITTEN MATERIALS

Phoenix Wright: Ace Attorney - Nintendo game

I. INTRODUCTION

A. Anything not objected to is waived

1. Supreme Court of Virginia Rule 5:25

No ruling of the trial court, disciplinary board, or commission before which the case was initially heard will be considered as a basis for reversal **unless an objection was stated with reasonable certainty at the time of the ruling**, except for good cause shown or to enable this Court to attain the ends of justice. A mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to preserve the issue for appellate review.

2. Federal Rule of Evidence 103(a)

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

> (1) **Objection**. - In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
>
> (2) Offer of proof. - In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

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.

II. DISCUSSION (where to object)

A. Motions in limine

1. Positives (knowing is half the battle):

a. Exclude evidence at the outset

"It is a common perception among trial lawyers that prejudice once implanted in the minds of jurors can win trials, that objecting to the prejudicial material will only emphasize it, and that **traditional curative actions taken by trial judges when prejudicial material is objected to are ineffective and unrealistic**." To Argue is Human, To Exclude, Divine: The Role of Motions in Limine and the Importance of Preserving the Record on Appeal, Miller, Jennifer M., 32 Am. J. Trial Advoc. 541 (Spring 2009) (emphasis added).

b. Force opponent to educate you

"On the eve of trial you may realize that there is a gap in your discovery requests that your opponent might exploit. **A broad motion in limine to preclude issues at trial that you know little about may force your opponent to educate you**." Motions in Limine: the Little Motion that Could, Litigation, Winter 1988 (24 No. 2 Litigation 52), Christopher B. Mead.

c. Criminal issues

Prosecutors seem to be filing more. *See Crawford v. Commonwealth*, 2009 WL 230232 (Va. App. 2009) (affirming grant of motion in limine to preclude insanity defense). Even if they lose, they get discovery into the defendant's case.

d. Move along settlement

"Additionally, motions in limine have the tactical advantage of moving settlement negotiations along by obtaining the court's ruling on questionable evidence." Stein on Personal Injury Damages § 22:21 (3d ed. Oct. 2011).

2. **Negatives:**

   a. **Educate opponent**

   b. **Opponent has time to argue best theory for admissibility**

   c. **Opponent can game out workarounds**

   d. **Lose the flash of a "sustained" objection**

   e. **Expense**

3. **Examples/Roundtable discussion**

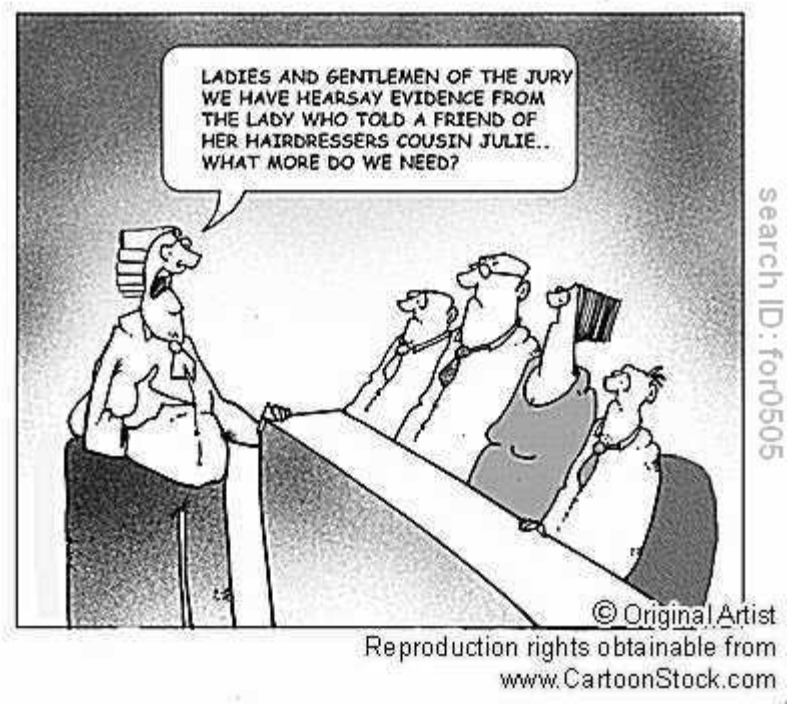
   a. **Ever regretted filing?**

   b. **Ever regretted not filing?**

   c. **Ever wished that the other side did not file?**

   d. **How to handle rotating judges with time limits re: motions in limine for day of trial?** (*i.e.*, in Fairfax, "[a]bsent leave of court, any motion *in limine* which requires argument exceeding five (5) minutes shall be duly noticed and heard before the day of trial.")

B. Opening statement



1. Positives

a. Avoid waiver

Correction of improper conduct or statements during oral argument must be sought by counsel in a timely manner. *Cheng v. Commonwealth,* 240 Va. 26, 38, 393 S.E.2d 599, 605–06 (1990). This requirement affords the trial court the opportunity to provide cautionary instructions when appropriate to correct the alleged error. In this case, Beavers did not object to any one of the allegedly prejudicial comments at the time they were uttered, but rather, waited until the entire statement was completed. At that time, Beavers moved for a mistrial. **Beavers's failure to object in a timely fashion and seek correction of the alleged errors constitutes a waiver of these claims under Rule 5:25**.

Beavers v. Commonwealth, 245 Va. 268 (1993)

b. Keep out objectionable evidence

2. Negatives

a. Do not want to be seen as obstructionist

b. Do not want to be seen as scared of the evidence

c. Risk of offending the judge

d. **Better to punish when they cannot prove up**

(but can you really? In the Casey Anthony trial, defense attorney Jose Baez opened with details that Casey Anthony was abused by her brother and her father. Mr. Baez did not present any evidence to support the claim, and was barred from mentioning it in closing. Casey Anthony was nonetheless acquitted.)

e. Think twice in a bench trial

Assuming, *arguendo,* that mother is correct and the trial court allowed father to make argumentative statements during opening argument, such error was harmless. "**[I]n a bench trial, the trial judge is presumed to disregard prejudicial or inadmissible evidence, and this presumption will control in the absence of clear evidence to the contrary.**" *Hall v. Commonwealth,* 14 Va.App. 892, 902, 421 S.E.2d 455, 462 (1992). Mother has presented no evidence demonstrating that the trial court failed to disregard any prejudicial or inadmissible evidence that father allegedly presented during opening argument, thus we must assume that any such evidence was disregarded. Furthermore, even if the trial court erred in allowing father to make argumentative statements during his opening statement, we hold that the error did not "injuriously affect" the mother's interest and is therefore harmless. *See Jenkins v. Dep't of Soc. Servs.,* 12 Va.App. 1178, 1186, 409 S.E.2d 16, 21 (1991) ("[E]rror which does not injuriously affect the interest of the party complaining is not reversible.").

Anonymous C v. Anonymous B, 2011 WL 65957 (Va. App. 2011)

C. Witness examinations (direct and cross)

"I realize that hearsay evidence isn't admissible by the court, Your Honor, but you're going to *love* this!"

"OK, I'll tell you what I know, but I can't reveal my source."

Pomp and Circumstantial Evidence.

The Basic Two Dozen (modeled on Federal Rules)

Excerpted from Building Trial Notebooks by Leonard Bucklin, available at http://jamespublishing.com/articles_forms/CivilLitigation/Essential_Objections_Checklist.htm

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1. Admitted.
2. Argumentative.
3. Assumes facts not in evidence.
4. Best evidence rule.
5. Beyond the scope of direct / cross / redirect examination.
6. Completeness.
7. Compound question / double question.
8. Confusing / vague / ambiguous.
9. Counsel is testifying.
10. Form.
11. Foundation.
12. Hearsay (rule 802).
13. Improper impeachment.
14. Incompetent.
15. Lack of personal knowledge.
16. Leading.
17. Misstates evidence / misquotes witness / improper characterization of evidence.
18. Narrative.
19. Opinion (rules 701 and 702).
20. Pretrial ruling.
21. Privileged communication.
22. Public policy.
23. Rule 403: undue waste of time or undue prejudice / immaterial / irrelevant / repetitive / asked and answered / cumulative / surprise.
24. Speculative.

General guidelines in objecting

1. Stand
2. Speak to the Court, not your opponent
3. Brevity is the soul of wit
4. If you win, stay alert (a good opponent will try to correct the defect and admit the evidence)
5. If you lose, consider asking for a limiting instruction
    a. Pros: limits the purposes for which the jury can consider the evidence
    b. Cons: draws extra attention to the unfavorable evidence

Judgment calls

If you have a basis to object, should you?

1. Argument for yes:
    a. Evidence blocking (especially important in criminal case)
    b. Interrupt flow of examination
    c. Preserve the record
2. Argument for no:
    a. Look bad in front of the jury
    b. Let the other side open the door
    c. No frivolous objections
        i. "Objection, your Honor. You can't preface your second point with 'first of all.'" - Alan Shore, Boston Legal, 2004.

"Many lawyers, and more than a few trial advocacy texts, tout the use of so-called 'tactical' objections. . . . An objection can throw the opposing lawyer off stride, or give the witness a rest, or distract the jury from the content of the testimony. This advice is usually tempered with the admonition that there must always be some evidentiary basis for the objection, but the real message is that an objection may be used for any purpose whatsoever so long as you can make it with a straight face. This view is unfortunate. It amounts to nothing more than the unprincipled use of objections for a wholly improper purpose. No judge would allow a lawyer to object on the ground that the opposition's examination is going too well. The fact that disruption can be accomplished *sub silentio* does not justify it. . . ." -Modern Trial Advocacy, Steven Lubet, National Institute for Trial Advocacy (Law School Ed. 2000).

General guidelines in responding to objections

1. An ounce of prevention is worth a pound of cure
    a. Ask unobjectionable questions
    b. Have a legitimate basis for relevance
    c. Game out bases for admissibility <u>in advance</u>
        i. (i.e., you know the other side will object to hearsay if you try to introduce an email, you better be prepared to lay foundation for an exemption or exception to the hearsay rule)
        ii. If controversial, have a case or bench-brief ready
2. If the objection is sustained, keep trying.
3. Cure objections that can be cured
    a. You can cure most form objections by rephrasing the question
    b. Know how to lay foundation: authenticity and admissibility
    c. Is the following objection curable?

Lawyer: "When he went, had you gone and had she, if she wanted to and were able, for the time being excluding all the restraints on her not to go, gone also, would he have brought you, meaning you and she, with him to the station?"

Other Lawyer: "Objection. That question should be taken out and shot."

4. If you draw an objection on cross examination, bias is a big exception
5. Consider avoiding the following responses:
    a. “I withdraw the question”
    b. “I just want to know”
6. **<u>IF EVIDENCE IS EXCLUDED - MAKE AN OFFER OF PROOF</u>**

D. Closing argument

1. Do you agree with the following?

"[I]t is rare, and stupid, for opposing counsel to object" during closing argument
- The Last Thirty Days Before Trial, Stephen D. Susman

"Don't object (unless the closing argument is really, really objectionable)."
- Mark B. Wilson

2. Exceptions for statements which give rise to mistrial

III. CASE EXAMPLES

A. My cousin Vinny

Vinny Gambini: I object to this witness being called at this time. We've been given no prior notice he would testify. No discovery of any tests he's conducted or reports he's prepared. And as the court is aware, the defense is entitled to advance notice of all witness who will testify, particularly those who will give scientific evidence, so that we can properly prepare for cross-examination, as well as give the defense an opportunity to have his reports reviewed by a defense expert, who might then be in a position to contradict the veracity of his conclusions.
Judge Chamberlain Haller: Mr. Gambini?
Vinny Gambini: Yes, sir?
Judge Chamberlain Haller: That is a lucid, intelligent, well thought-out objection.
Vinny Gambini: Thank you, sir.
Judge Chamberlain Haller: Overruled.

(reversible error under Virginia law?)

Virginia Code § 19.2-265.4

Requires compliance with Rule 3A:11, and, in the event of noncompliance, "the court may order the Commonwealth to permit the discovery or inspection, grant a continuance, or prohibit the Commonwealth from introducing evidence not disclosed, or the court may enter such other order as it deems just under the circumstances."

Virginia Rule of Criminal Procedure 3A:11

Requires disclosure, "upon written motion of an accused" of "written reports of autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine and breath tests, other scientific reports, and written reports . . ." and imposes a "continuing duty to disclose"

(NOTE: this testimony should also be precluded on the civil side. *See* Virginia Rule of Civil Procedure 4:1(b)(4); *John Crane, Inc. v. Jones*, 274 Va. 581 (Va. 2007) (affirming exclusion of expert testimony on asbestos in ambient air were not disclosed, despite the fact that the other side arguably "questioned [the expert] about the opinions during his deposition")).

B. *Lindsey v. Commonwealth*, 2011 WL 690656 (Va. App. 2011)

Criminal case. Defendant on trial for obtaining money through false pretenses and perjury. Defendant was a paralegal who hired her boss as her attorney for a real estate closing. Defendant allegedly mislead her boss into thinking she had deposited money in the firm's escrow account in excess of the amount needed for closing, and the boss authorized her to cash out the alleged excess. Defendant later took possession of the residence but the seller never received payment. Seller sued Defendant and boss. Commonwealth prosecuted Defendant.

At trial, Defendant sought to cross examine boss regarding the pending civil charges. The Commonwealth objects. What result?

C. *Rose v. Jaques*, 268 Va. 137 (2004)

Auto accident case. During closing argument, Plaintiff's counsel said the following: (1) "imagine one day to wake up and look in that mirror and think you're looking at the same person, and think that-what's wrong with these people around me? Why are they acting bad? Because that's the tragedy of the person."; (2) "I just want you to imagine what she goes through every day of her life, and imagine what you can do."

Should defense counsel object? If so, on what basis?

D. *Lawrence v. Commonwealth*, 279 Va. 490 (2010)

Criminal case. Petition requesting defendant's civil commitment as a sexually violent predator. Commonwealth sought to introduce, through a clinical psychologist, (1) her opinion that Defendant was a sexually violent predator; and (2) the information relied upon, which included "police reports concerning various unadjudicated allegations of sexual misconduct." Defendant objected as to hearsay and unfair prejudice. Commonwealth replied that (a) the expert could rely on hearsay; and (b) the basis was not offered for the truth of the matter asserted, but rather to show the basis for the opinion.

The Court overruled the objection but read a limiting instruction saying that the information was not offered for its truth. What should happen on appeal? Different result under the Federal Rules?

E. *Lamberti v. Commonwealth*, 2011 WL 4770739 (Va. App. 2011)

Criminal case. Defendant on trial for malicious wounding. Complaining witness admitted consuming "five to six beers and a shot of liquor between about 6:00 p.m. and the time of the incident at about 10:00 p.m. Defendant sought to introduce, through an expert, (1) the results of a blood test conducted on alleged victim at the hospital, which indicated a BAC of .27%; and (2) that the expert concluded that BAC meant the victim consumed twelve alcoholic beverages.

The Commonwealth objected to this testimony and the objection was sustained. Defendant is convicted. Is the ruling safe on appeal?

F. *Johnson v. Arizona*, 224 Ariz. 554 (2010)

Auto accident case. Decedent died in a collision where he struck a dump truck driving from a mining pit onto the highway. Decedent's wife sued the State for negligence. Decedent's wife sought to introduce at trial that "after the accident, the State had posted a truck-crossing sign and allowed the mining company to install a variable message board near the" intersection. Assume that "the State installed them without knowledge of, and not in response to, the decedent's accident."

The state objects. What should the judge do?

G. *U.S. v. Bonds*, 608 F.3d 495 (9th Cir. 2010)

Criminal case. Barry Bonds testified under oath that he had not taken performance enhancing drugs. The government seeks to prosecute him for perjury. The government needs to introduce blood and urine tests proving that Barry Bonds was lying. The problem: Bonds' trainer, the gentleman who allegedly took the samples in to be tested, refuses to testify, and is jailed for contempt. So the government tries to offer testimony from a lab technician that when Bonds' trainer brought the samples to the lab he said that they came from Barry Bonds.

Bonds objects to this as hearsay. What result?

H. *Rambus, Inc. v. Infineon*, 348 F. Supp. 2d 698 (E.D. Va. 2004)

Civil case. Plaintiff seeks to offer emails into evidence containing information created outside the company as business records under FRE 803(6) authenticated by declarations pursuant to FRE 902(11). Held: " Of the purported

business records at issue here, where the original source is an "outsider," there are no declarations from the outside entities and none of the proffered declarations otherwise recite any fact that shows qualification by the participant in the chain who actually supplied the information. Furthermore, most of these "outsider" records are in the form of e-mail chains and therefore their trustworthiness is not apparent on the face of the record."

Can you come up with facts that would (a) make this admissible; or (b) come up with a different theory of admissibility?

I. *Crawford v. Commonwealth*, 281 Va. 84 (2011)

Criminal case. Defendant (husband) on trial for murder. Prosecution seeks to introduce a sworn affidavit by the allegedly murdered wife filed in a preliminary protective order application against the Defendant. Defendant objects under the Confrontation Clause.

How should the prosecution respond?

J. *Brooks v. Commonwealth*, 282 Va. 90 (2011)

Criminal case. Defendant O'Callahan on trial for cocaine possession. At trial, the prosecutor moves to admit the certificate of analysis entered into evidence, citing Va. Code Section 19.2-187.1. The defense objects as hearsay objection, and the prosecutor responds by stating that Section 19.2-187.1 allows the defendant to examine the forensic analysts "as if he had been called as an adverse witness," so there is no Confrontation Clause issue. The court overruled the objection and admitted the certificate of analysis

Is this ruling safe on appeal?