Chapter 34

Objections to Evidence; Motions for Mistrial; Proffers; Rulings on Evidentiary Questions

§ 34.01 OBJECTIONS AND MOTIONS TO STRIKE; MAKING A RECORD

Except in unusual circumstances, a claim of error in the admission of evidence will not be entertained on a postverdict motion for a new trial or on appeal or in postconviction proceedings unless an objection to the evidence was made and overruled at the time of its introduction. *See, e.g., Wainwright v. Sykes,* 433 U.S. 72 (1977). Accordingly, if counsel wants to preserve a claim of error, s/he should be sure that the record clearly shows (a) that counsel did object and (b) the grounds for the objection ("hearsay" *or* "violates the right to confrontation" *or whatever*; specificity is indispensable in order to preserve claims for appellate review (*see*, *e.g.*, *Betterman v. Montana*, 136 S. Ct. 1609, 1612 (2016)); and (c) the *legal source* that grounds the objection ("violates the state and federal constitutional confrontation clauses"; see § 7.09 *supra*) and (d) that the court did rule on counsel's objection dispositively and unfavorably.

Sometimes the judge will simply shake his or her head in negation. This doesn't do it. If the objection is worth preserving for appeal, counsel has got to politely but firmly get an audible ruling for the record. "I'm sorry, your Honor, but I'm not sure that the [court reporter] [recorder] caught your Honor's ruling overruling my objection" will usually do the job. In some jurisdictions it is also necessary for counsel to note a formal exception to the unfavorable ruling.

Judges will sometimes respond to counsel's objections with comments like: "Well, let's see where that is going [for a little longer]" or (in a jury trial) "I'll take care of that in my instructions to the jury." These are not categorical rulings on the objection; they are evasions or postponements of any ruling. If counsel wants to stand on the objection, (a) s/he must ask the court whether the court has overruled counsel's objection at this point; (b) s/he must get a verbal answer from the judge; and (c) s/he must note an exception in jurisdictions where exceptions are required. Counsel must *also* renew the objection later if the prosecution continues down the same line. Similarly, if the judge states that s/he will take an evidentiary objection "under advisement" and thereafter ignores it, counsel will need to politely insist at the close of the prosecution's case and again at the close of all the evidence that the judge rule on the reserved question.

Judges may reply to an objection by admitting evidence contingently, for example, subject to "connecting up." Counsel must later move to strike when the contingency fails, for example, when the evidence is not connected up.

Each time an objectionable item is proved, it ordinarily must be objected to. If the prosecution presents testimony of three witnesses on the same point, counsel must object to all three. Failure to object anew every time defeats *all* claims of error in the admission of the evidence, even though counsel may have properly objected once or twice.

If evidence is admitted either before an objection can be made or before the court has ruled on the objection, counsel should object (or repeat his or her objection), then move to strike the evidence. In a jury trial, counsel will also need to ask the judge to instruct the jury to disregard the stricken evidence. This will protect counsel's record if the judge overrules the objection. But it will do relatively little good if the judge sustains the objection, since jurors are not really likely to disregard anything that they have heard. If the evidence is at all harmful, therefore, counsel should consider a motion for a mistrial. See § 34.11 *infra.*

The trial transcript will reflect only what the court reporter hears or the recording apparatus captures. Counsel must therefore make his or her objections – and obtain the court's rulings on them – audibly and explicitly. Often, in the heat of the trial, the judge will see that counsel is rising to object and will rule on the objection before counsel begins to speak. Whether or not counsel gets to say anything, the court may overrule counsel by a shake of the head or by waving counsel down or by saying something ambiguous, like "Go on." Numberless viable appellate claims have been lost on account of such rulings. If something of the sort happens, counsel should say, "If the Court please, I would like to state for the record the grounds of the respondent's objection to this evidence and to have the record reflect that the objection has been overruled." Then the grounds of objection should be stated.

In jury trials, counsel also must make sure that any colloquy at a sidebar conference is being recorded by the court reporter. Counsel should tell the reporter before trial that counsel assumes all sidebar discussion will be recorded unless the judge expressly orders the discussion "off the record." If the reporter does not agree, counsel should make this arrangement with the court. Thereafter, whenever counsel approaches the bench, s/he should watch to see that the reporter comes, too; and until the reporter is within hearing distance, counsel should not start talking and should stop the judge or prosecutor from talking by pointing out that the reporter is not yet there. Any objection or ruling made during "off the record" conferences should be repeated for the record after their conclusion.

§ 34.02 TIME OF OBJECTION; QUIETING THE WITNESS

Objections to evidence must be made immediately after the question that calls for an inadmissible answer. If the witness begins to answer the question after the objection and before the court has ruled, counsel should gesture to the witness to stop and should immediately interrupt the witness by stating respectfully but loudly that an objection has been made.

Witnesses sometimes need repeated reminding that they cannot answer a question to which an objection has been made unless the court overrules the objection. If a prosecution witness appears stubborn on the subject, a request should be made to the judge to admonish the witness to that effect. A motion for a mistrial may be appropriate if the witness has made an inadmissible disclosure and its prejudicial impact is considerable. See § 34.11 *infra*.

Counsel may sometimes find self-help measures justified, particularly when a police

witness persists in ignoring defense objections. A request to the judge to admonish the witness in this situation may be coupled with the observation in open court: "This officer has testified here many times, Your Honor, and s/he knows better than that."

§ 34.03 STATEMENT OF THE BASIS FOR OBJECTIONS; ARGUMENT ON EVIDENTIARY POINTS

Counsel should always state the grounds, and all of the grounds, for objecting to an item of evidence. This does not mean that the grounds for an objection must be stated in the same breath with the objection itself. To the contrary, unless local practice or the particular presiding judge requires that the reasons for objecting be stated contemporaneously with the objection – or unless the judge is one of those who makes instant rulings on objections and then resents counsel's stating the grounds of objection for the record – it is usually better for counsel to object simply by saying, "Objection, Your Honor" and then to pause before stating the grounds. There are two reasons for this. First, judges will often sustain an objection on grounds other than those which counsel had in mind and would have stated. Second, the delay gives counsel an added moment or two to come up with the name or names of the objection or objections s/he wants to make.

The risk of delay, of course, is that the judge may rule before counsel has had a chance to influence the ruling by a persuasive statement of the grounds of objection. But most judges who do not perceive the grounds of objection will ask counsel what the objection is before ruling. If counsel still has not come up with the name of the objection by this time, s/he should start talking in nontechnical terms about whatever it is that *bothers* counsel in regard to the evidence to which s/he is objecting. Usually, the name of the objection will come to mind in a moment, when counsel starts describing what s/he senses to be wrong, in a commonsense way, with the evidence. For example: "Objection, Your Honor. . . . The prosecutor is putting words in the witness's mouth instead of letting the witness testify in [his] [her] own words – it's leading." Or: "Objection, Your Honor. . . . There hasn't been any testimony that this witness saw the respondent arrive at the bar, so the witness can't be asked what time the respondent arrived – no personal knowledge."

In most jurisdictions, it is not obligatory for counsel to come up with the technical label of the objection – "leading," "no personal knowledge" – although it helps. Counsel should use the technical terminology as soon as it comes to mind. But if it fails to come to mind quickly, counsel should make his or her point in concrete, descriptive language.

If the judge overrules counsel's objection before counsel states the grounds for it, counsel should ask respectfully, "May I state the grounds of that objection for the record, Your Honor?" Counsel has a right to state the grounds, in order to protect the record for appeal. S/he has no right to argue to the trial judge an objection that the judge has already overruled, and s/he should not appear to be doing that. If, however, the grounds that counsel states "for the record" – ostensibly to preserve the objection for appeal – convince the trial judge that counsel's objection

has merit, most judges (or at least most judges whom counsel could have won over by an earlier statement of the grounds) will reverse their rulings. In any event, before the testimony resumes, counsel must state all available grounds for the objection, in order to preserve them for appeal.

When making an objection in a jury trial, counsel should consider whether the statement of grounds for the objection and any argument of evidentiary questions that the judge invites or permits should be presented within or without the hearing of the jury. If counsel's argument includes matters that s/he wishes the jury to hear and if the prosecutor's responsive argument is not likely to contain matters that counsel does not want the jury to hear, the obvious choice is open court. Open court is appropriate, for example, when the prosecution has launched into a line of proof to which counsel objects on grounds that it lacks probative value rather than on some formalistic or exclusionary ground. Suppose that the prosecutor has established that the respondent was arrested and now asks the arresting officer whether the respondent had any money in his or her possession at the time of the arrest. Counsel may want to say: "I object, Your Honor, on the ground that it has not been shown that the amount of money taken from this complainant – 20 dollars – was an amount the respondent would not normally have of [his] [her] own money or that the bills taken from the complainant were unusual in any way. The question is irrelevant. It has absolutely nothing to do with this case." Objections that would reveal the existence of damaging prosecution evidence – or that are likely to lead to colloquies or arguments that will – should be made at sidebar. If counsel requests a sidebar conference but the judge refuses to let counsel come to the bench, counsel should state preliminarily that the grounds for his or her objection will be prejudicial (without saying to whom they will be prejudicial) if described from counsel table. If the judge persists in refusing a sidebar, counsel should state his or her objection in technical terms that will identify the grounds for the record without telling the jury more than is absolutely necessary ("the right to confrontation"; "the Privilege"; "Rule 403"). Objections of this sort will probably preserve points if the record is clear that counsel was previously refused leave to come to the bench, since that refusal has put counsel in a difficult predicament. Nevertheless, to be on the safe side, on the next occasion when the jury is out of the courtroom, counsel should ask leave "to amplify for the record the grounds of the objection that I could not develop fully in the jury's presence" and should then dictate the grounds to the court reporter. With adequate trial preparation and advance planning, counsel will find that s/he can usually state the reasons for most objections in a formally adequate but popularly unilluminating phrase or two in open court, when this seems wise.

§ 34.04 ANTICIPATORY OBJECTIONS

As discussed in § 30.02(a)(2) *supra,* if counsel knows from defense investigation, discovery, or prior hearings that the prosecutor will attempt to introduce objectionable evidence through a particular witness, counsel should consider making an anticipatory objection when the witness is first called to the stand or when the prosecutor begins any line of questioning that may lead to the objectionable matter. Study of the transcripts of the probable-cause hearing, of any evidentiary motions hearings that have been held in the respondent's case, and of any evidentiary proceedings that have been held in the cases of co-respondents or adult defendants charged in

connection with the same episode will aid counsel to forecast by what witnesses, and often at what point in the witness's testimony, the prosecutor is starting down a trail that will lead to the challengeable item. *See* § 4.36 *supra*. An indigent respondent's right to obtain transcripts of pretrial proceedings without charge is discussed in §§ 4.31(d), 4.37 *supra*.

Anticipatory objections are particularly useful in a jury trial because they serve to keep the trier of fact entirely unaware of the existence and nature of inadmissible pieces of evidence. When appropriate, counsel can ask the court to instruct a witness (or to direct the prosecutor to instruct the witness) not to go into certain matters or not to mention specified items or subjects in front of the jury.

In a bench trial, counsel may be able to persuade the judge to rule on the admissibility of a certain type of evidence (such as "other crimes" evidence, see § 30.07(a) *supra*) generically, without hearing the contents of the evidence that the prosecutor is seeking to adduce. In support of this procedure, counsel can point out that whenever it is feasible, it meets the prosecution's need for an evidentiary ruling without exposing the respondent to the prejudice inherent in a factfinder's hearing inadmissible evidence. See § 20.05 *supra.* If the prosecutor insists upon relating the contents of the evidence to the judge, counsel can suggest that this is a tactic designed to convey inadmissible evidence to the factfinder even if it is excluded and that the court should not countenance such an improper ploy.

§ 34.05 *VOIR DIRE* OF A WITNESS

Some objections to the admissibility of evidence require a preliminary determination of fact by the trial judge. For example, if counsel objects to a photograph or diagram of the scene of the crime on the ground that it does not fairly and accurately represent the scene, a ruling on the objection requires a preliminary factual determination whether the photograph or diagram *is* a fair and accurate representation. As explained in § 30.02(a)(2) *supra,* counsel can request a *voir dire* examination of a prosecution witness on the preliminary question of fact, cross-examining the witness about the specific issue raised and obtaining a ruling on that issue before the witness continues with his or her direct examination.

The *voir dire* procedure is primarily useful in jury trials, in which defense counsel can use it to (a) close off objectionable lines of inquiry before they get the jury guessing, (b) test and refine lines of potential cross-examination that might be risky if counsel pursued them in open court without knowing beforehand what the witness's answers would be, and (c) break up the flow of the prosecution's case.

The *voir dire* procedure may be useful occasionally in a bench trial, even when it does not prevent the trial judge from hearing the objectionable matter. For example, some issues raised on *voir dire* may require the testimony of more than a single witness to resolve, and defense counsel's invocation of the *voir dire* procedure may cause the prosecutor to present during the *voir dire* witnesses that s/he intended to reserve for later in the trial, thereby giving the defense

information it would not otherwise have had for use in cross-examining the earlier prosecution witnesses. *Voir dire* examination also enables counsel to ensure that inadmissible material will not make its way into the record as a legitimate basis for the judge's verdict and for appellate consideration on review of the sufficiency of the evidence.

§ 34.06 CONTINUING OBJECTIONS

If a series of questions on a specific topic or if a number of similar questions on similar subjects is obviously going to be asked by the prosecutor and the whole line of questioning is objectionable, counsel should object when the first question is asked. If the court overrules the objection, counsel may ask the court to register a continuing objection to further testimony on the same topic or to further questions of the same kind. In this way counsel can protect the record without having to object after every question that is asked. Counsel should be sure the record reflects that the court granted counsel's request for a continuing objection if it did. If counsel says s/he would like to enter a continuing objection to *X* and the judge says, "Denied," it is unclear whether the court has agreed to the continuing objection and overruled it on the merits or has insisted that counsel pursue specific objections. Counsel should respectfully ask for clarification.

§ 34.07 DECIDING WHETHER TO OBJECT

When a prosecutor asks an objectionable question or proffers an exhibit that is arguably inadmissible, or when a prosecution witness begins to give an arguably inadmissible answer, counsel has to make a very quick decision whether or not to object. The speed with which this decision must be made puts a premium upon obtaining adequate pretrial discovery of the prosecutor's case, anticipating the evidence which s/he will present, identifying potentially inadmissible evidence or lines of examination, and considering before trial both (a) whether at each foreseeable point it is tactically best to object or not object, and (b) what objection to make, and how to word and support it, if counsel decides to object. Of course, even with the best preparation, counsel can seldom anticipate every occasion for objection that will arise during a trial, and counsel will have to make spur-of-the-moment judgments. But the fewer of these, the better; and, when counsel must make them, the more s/he has pre-planned how to handle other similar potential objections, the better. See § 30.02(a)(3) *supra*.

Counsel should never object *merely* because the particular question, testimony, exhibit, or practice is objectionable. Objections should only be made if there is an affirmative tactical reason to object. This is especially the case in a jury trial. Jurors generally do not like to have evidence kept from them; they are likely to view evidentiary objections as technicalities; and they may view the lawyer who makes them as an obstructionist, attempting to conceal factual weaknesses in his or her case by standing on technicalities. This consideration should not be overblown. It does not justify passing up objections which counsel has a substantial affirmative reason to make. Jurors will expect and can tolerate some objections in any trial. But their impatience with perceived obstructionism does caution against objecting without a solid tactical reason.

The next two subsections identify the most common tactical considerations weighing in favor of making an objection (§ 34.07(a)) and against (§ 34.07(b)). Section 34.07(c) describes an approach counsel can use in a jury trial to avert or reduce the jury's irritation with defense objections.

§ 34.07(a) Tactical Reasons for Objections

The tactical reasons for making an objection include:

(1) *The expected evidence will establish a fact or create an atmosphere damaging to the defense case and probably cannot be elicited if the objection is sustained.* Objections to the form of questions (*e.g.*, "compound," "no predicate") are seldom warranted on this ground, because the prosecutor can usually reframe the question and obtain the identical information. Moreover, such objections are particularly likely to strike jurors as hypertechnical. Objections of this sort may also backfire by improving the prosecutor's direct or redirect examination. Testimony elicited by leading questions is, for instance, often less persuasive than testimony in which the witness appears to be telling his or her own story. "Leading" objections may therefore simply produce more convincing testimony. On the other hand, a "leading" objection *is* tactically advised if the words which the direct examiner is putting into the witness's mouth are significantly more damaging to the defense case than the words the witness would probably say if s/he were not led.

Even where an objection would exclude a piece of evidence completely (*e.g.*, "irrelevant," "calls for speculation"), it is not worth making unless the piece of evidence will have substantial clout on some seriously controverted issue. However, if counsel cannot deduce what evidence an objectionable question is seeking to elicit, an objection probably is in order. Sharks may lurk in unknown waters.

(2) *The objection is legally strong, but is reasonably likely to be overruled, so as to provide counsel with a claim of reversible error on appeal*. The significance of this consideration is obviously directly proportioned to the probability that the trial is likely to end in a conviction.

(3) *It appears that the prosecutor and the witness are following a pat routine, and objections may disrupt it.* If the witness has been drilled to testify according to a script, objections which force the prosecutor to deviate from the script may disorient the witness or the prosecutor or both, and result in less effective testimony. Counsel therefore should watch for signs of scripting: *e.g.*, the witness is having no trouble understanding obscure or ambiguous questions; s/he is immediately answering questions that should take thought to answer; the prosecutor is reading his or her questions, although they follow logically from the witness's preceding answers. If counsel wants to disorganize a well-rehearsed duet of this sort, a blitz of available objections may be advisable.

(4) *The objection will point up some unfairness or discreditable tactic of the prosecutor.*

E.g.: "Objection, Your Honor – counsel is misstating the record." "Objection, Your Honor – leading. The question forces the witness to make an either/or choice, but there are more than those two possibilities."

(5) *The objection will serve as an intelligence-gathering device.* An objection of irrelevancy, for instance, may cause the judge to ask the prosecutor, "Where is this going?" The prosecutor's response may provide counsel with valuable information. An irrelevancy objection to a prosecutor's question on cross-examination may also help the defense witness understand what is happening and avoid a trap. But, when making an objection of this sort in a jury trial, counsel needs to guard against the prosecutor's stating the grounds in front of the jury and thereby jaundicing the jurors. Thus, counsel will usually want to request that the prosecutor state the grounds at sidebar.

(6) *The objection will set a precedent for similar objections that counsel plans to make later.* Particularly where the application of evidentiary rules depends upon matters of degree or is subject to judicial discretion, every trial tends to develop its own conventions. If leading or other objectionable forms of questions are tolerated without objection at the outset, they can come to be accepted as a part of the standard operating procedure of this trial; and subsequent objections to them may be viewed by the judge as off-base, and overruled. If counsel foresees that s/he will need to rely later upon an evidentiary rule to exclude harmful material, s/he may want to object to earlier violations of the rule that would be harmless in themselves.

(7) *[In a jury trial:] The objection will mask from the jury the significance of later objections.* If a lawyer is largely inactive throughout the first half of the trial and then begins to make vociferous objections, the jurors may ask themselves, "What is s/he struggling so hard to keep from us, all of a sudden?" Sometimes the context will enable them to guess the answer to this question with distressing accuracy, or even cause them to exaggerate it. Earlier objections of the same sort or a few objections of other sorts at points when the testimony is not touching upon visibly sensitive subjects can provide camouflage against this danger. In a choice of evils, it may be better for a lawyer to look like a general obstructionist than for the lawyer's case to look like it is hurting badly at a peculiarly crucial juncture.

(8) *When the prosecutor is cross-examining the respondent or a defense witness in a particularly intimidating or harassing manner, counsel may wish to object in order to reduce the pressure on the witness or to at least give the witness a momentary breather.* But counsel does not want to appear overly protective of his or her witnesses, particularly the respondent, lest the jury or the judge think that counsel is worried that the witness may sink himself or herself if rattled. If counsel believes that the witness can weather the cross-examiner's objectionable questions without serious discomfort, counsel should ordinarily forego objecting. Again, however, in a choice of evils, it may be preferable to look protective rather than permit a witness to be goaded or browbeaten.

§ 34.07(b) Tactical Reasons for Foregoing an Objection

Even in the scenarios described in the preceding subsection, there may be countervailing considerations that militate against making an objection. These include:

(1) *If the objectionable evidence is received, it will open the door to cross-examination or to rebuttal evidence, otherwise inadmissible, that will bolster the defense case*.

(2) *Counsel can use the objectionable evidence effectively to discredit the witness or the prosecutor*. For example, if the prosecutor asks for a conclusion of the witness that is both objectionable and demonstrably baseless, counsel may wish to forego an objection, allow the testimony to come in, and then argue to the jury (or the judge in a bench trial) that it shows such bad judgment on the part of the witness as to cast doubt upon other (more damaging) points in the witness's testimony. Or counsel may pass up an available "speculation" objection in order to cite the objectionable answer in closing argument to the jury or the judge as support for an argument that the prosecutor's entire case is built upon guesswork and wild imagination.

(3) *The content of the objectionable evidence supports the defense's case.* Although an item of evidence may favor the prosecution on one issue, it may help the defense even more on some other issue on which counsel would not be able to elicit any evidence or evidence that is as useful as what the present witness would say. Judgment in this situation requires a carefully calibrated weighing of potential harms against potential benefits.

(4) *Counsel has similar examination tactics or evidence coming up in his or her own witness examinations, so counsel wants to avoid the risk of setting a precedent for excluding such matters.* Successful objection to a particular kind of evidence proffered by the prosecutor strongly invites and legitimates the prosecutor's making the same objection to any later, similar evidence of counsel's. Counsel's failure to object does not guarantee that the prosecutor won't, but it does (i) avoid alerting the prosecutor to a ground of objection that s/he would not otherwise have in mind, and (ii) decrease the likelihood that the prosecutor's objection will be sustained if made (by opting out of the live-by-the-sword/die-by-the-sword game that many trial judges are inclined to play), and (iii) set the stage for making the prosecutor's objection appear to the jury or the judge to be unfair or hypertechnical. (If the prosecutor does object, counsel's reply to the objection can include the observation that "this is no more hearsay than the testimony s/he elicited from Officer Jones as to what people told Officer Jones, Your Honor." This is not a compelling argument under the technical rules of evidence, but many judges and jurors supplement those rules with the Rule of Geese and Ganders.)

(5) *The evidence to which counsel is objecting – or hints of it – will probably get before the trier of fact in some other way, and an objection will underline it for emphasis or look particularly defensive*.

In a jury trial, counsel must also consider how likely it is that an objection, if made for one or more of the reasons identified in § 34.07(a) *supra*, would be overruled, and the effect that this would have on the jury. *Unsuccessful* objections are particularly likely to convey the

appearance of obstructionism, reinforced by the jury's learning immediately what counsel was trying to keep from it. Moreover, the judge's overruling of counsel's objection may (i) give the jury the impression that counsel is legally inept, ill-prepared, or getting chided by the judge for trying to do something improper; (ii) lead the jury to believe incorrectly that by overruling the objection, the judge is vouching for the worth of the evidence to which counsel objected; and (iii) prejudice counsel's chances of winning subsequent objections, by causing the judge to conclude that counsel's grip of the law of evidence or his or her judgment is poor, or to view counsel as a nuisance. However, in a case in which the charge being tried is sufficiently serious so that an appeal from conviction would be realistically in the cards, counsel who believes that an appellate court is reasonably likely to find a particular piece of evidence inadmissible and damaging should not forego objecting simply because the trial judge is likely to overrule the objection and the jury may take umbrage. *See Stone v. State*, 419 S.C. 370, 384-87, 798 S.E.2d 561, 568-70 (2017) (dictum).

§ 34.07(c) Averting or Reducing the Risk in a Jury Trial that the Jury Will Be Irritated by Defense Objections

In some trials, the cost-benefit analysis described in the preceding sections may lead counsel to object frequently – because of the potentially damaging nature of numerous pieces of dubiously admissible prosecution evidence, or the predictably over-aggressive style of the prosecutor, or the anticipated virulence of one or more of the prosecutor's witnesses. Counsel who foresees this prospect should take steps in a jury trial to forestall any bad impression that incessant defense objections may make on the jury. *Voir dire* offers a useful opportunity for doing this. During *voir dire*, counsel can ask the prospective jurors:

(1) "Now, [Mr.] [Ms.] _____, I want to ask you whether you will think it wrong of me – and whether you will hold it against me or against my client – if I make objections during the trial to items of evidence offered by the prosecutor that I believe are not legally admissible in evidence?"

(2) "You understand, then, that that is what I am supposed to do and that the only way in which [His] [Her] Honor can decide what is proper evidence for the jury to receive under the rules of evidence is if I make objections?"

(3) "And I hope you understand that I am far from perfect and that sometimes I will be mistaken about the rules of evidence, and [His] [Her] Honor will overrule my objection. Would you hold that against me or my client if I made objections and [His] [Her] Honor decided that I was not correct and overruled my objections and admitted the evidence that I was objecting to?"

(4) "So you have no quarrel with the idea that I might make an objection that I thought was a proper objection that I had to make, even though the judge might later find that I was wrong and might rule against that objection?"

Some such way of implanting in the jury's mind the propriety of counsel's making objections, even when the judge overrules them, helps to prepare the jurors to accept what might otherwise seem to be legalistic quibbling and attempted obstruction of legitimate evidence of guilt. See § 28.08 *supra*.

§ 34.08 MOTIONS TO STRIKE

Since it is not always convenient for the prosecution to prove things in a logical sequence, evidence is often admitted over defense objection, subject to "connecting up" or to a later showing of relevance. If the evidence is not connected up or shown to be relevant after the full development of the prosecution's case, counsel must move to strike it. A motion to strike is also proper if any line of testimony turns out to be inadmissible, although no objections were made when the testimony began because of appearances at that time that the testimony was unexceptionable. In addition, the court ordinarily has discretion to strike testimony to which counsel should have made but did not make timely objection. In a jury trial, counsel should follow up the granting of a motion to strike with a request that the jurors be instructed to disregard the stricken evidence.

Whether in a bench trial or in a jury trial, a motion to strike is often a futile gesture, since, even if the motion is granted, the factfinder has heard the excluded evidence (and, in a jury trial, few jurors are capable of obeying an admonition to close their ears *post hoc*). The motion to strike is nonetheless important because it serves to sift evidence on which a verdict can be based from that which, although introduced, cannot be used to support a verdict. In a close case, elimination of the stricken evidence may leave the prosecutor with too little to survive a motion for acquittal (see §§ 35.03-35.05 *infra*). And in a bench trial, counsel may be fortunate enough to be before a judge who has enough self-discipline to put the stricken evidence out of bounds in making his or her final call on the issue of guilt or innocence. In any event, a motion to strike is necessary to prune the record in anticipation of appeal, where more judges are more likely to be self-disciplined in adjudicating a claim of insufficiency of the prosecution's case to sustain a conviction.

§ 34.09 OBJECTION TO IMPROPER CONDUCT OF THE PROSECUTOR OR JUDGE

If the prosecutor or the judge makes some improper physical gesture or says something in an objectionable tone of voice, defense counsel may be advised to place this on record. Sometimes, although rarely, an appeal can be supported on this ground; more frequently, prosecutorial and judicial reluctance to see the record go up may be reflected in a lighter than usual sentence, intended to discourage appeal.

Remarks and actions of the prosecutor should be noted immediately by announcing, "If the court please, I would like to note for the record that the prosecutor has just . . . ." Counsel should describe the objectionable actions with great particularity, state the prejudicial effect that these actions will have on the defense, and request appropriate relief (for example, a mistrial (see

§ 34.11 *infra*), corrective instructions to the jury, or an admonition to the prosecutor not to repeat the offensive behavior). See also § 34.10 last paragraph *infra*.

Objections to the conduct of the trial judge must obviously be made sparingly and with considerable deference, at sidebar, and only if counsel is sure of his or her ground. For a roster of the varieties of objectionable judicial behavior, *see People v. Stevens*, 498 Mich. 162, 869 N.W.2d 233 (2015), quoted in § 20.05 concluding paragraph *supra*. Although courtesy and temperance in the phrasing of counsel's objections are wise, the accurate, detailed description of even egregious misbehavior by the judge is appropriate. *See Holt v. Virginia*, 381 U.S. 131 (1965).

§ 34.10 PROFFERS ON OBJECTIONS TO DEFENSE EVIDENCE

When the prosecution objects to a question asked of a witness by defense counsel or to the introduction of any other evidence that defense counsel has offered and when the contents and significance of the evidence are not completely obvious, counsel should ask leave of the court to make a proffer before the court rules on the objection.

If leave is granted, counsel should state:

(1) The witness's expected answer or the contents of the proposed evidence;
(2) The ultimate facts which counsel asserts that the evidence will tend to prove; and
(3) The issue or issues in the case to which those facts are relevant.

Counsel should also state his or her position on the rule or doctrine of evidence involved. If a prosecutorial objection is sustained before counsel has had a chance to make a proffer, counsel should ask leave to come to the bench for a proffer (or an "avowal" as it is called in some jurisdictions). The defense has a categorical right to make a proffer, and appellate cases can be found which hold that a trial judge's denial of that right is *per se* reversible error requiring a new trial. *See*, *e.g.*, *Perkins v. Commonwealth*, 834 S.W.2d 182 (Ky. App. 1992). Counsel's proffer should ordinarily be specific and detailed (*see, e.g., Lawlor v. Zook*, 909 F.3d 614 (4th Cir. 2018); *United States v. Tony*, 948 F.3d 1259 (10th Cir. 2020)), since on an appeal counsel will have to convince an appellate court not merely that the trial judge erred in excluding the evidence (*see, e.g.*, *Skipper v. South Carolina*, 476 U.S. 1, 4-6 (1986)) but also that the error was prejudicial – that is, that the excluded evidence might have resulted in a verdict in favor of the defense, *see Luce v. United States*, 469 U.S. 38, 42 (1984). Despite the doctrinal formulations used to define "harmless error" in a given jurisdiction, many appellate judges simply will not vote to reverse a criminal conviction or a delinquency adjudication unless the improperly excluded evidence appears both important and credible.

If the trial judge refuses to permit a proffer, counsel should reduce the proffer to writing at the first opportunity (that is, ordinarily, at the next trial recess) and request leave to put it into the record. If no opportunity occurs before verdict, counsel should write up the proffer as an

appendix to a postverdict motion for a new trial. In the event of an appeal, counsel should designate the proffer for inclusion in the clerk's record (or the pleading/motions/exhibit file) that is transmitted to the appellate court.

In the case of documentary and real evidence, counsel will have marked his or her exhibits for identification before offering them. If they are excluded, counsel should request that they be filed and retained by the clerk of court (or take similar appropriate steps dictated by local practice) to assure that the excluded exhibits go up with the record on appeal.

In a jury trial, if counsel finds that the prosecutor is couching objections to defense evidence in the form of denigrating or belittling remarks in the presence of the jury, counsel may appropriately ask the court at sidebar to instruct the prosecutor to refrain from making mid-trial arguments to the jury. The prosecutor will, of course, be permitted to get away with some of this, as will defense counsel. See § 34.03 *supra*. The judge will usually exercise a measure of control, however, and in an extreme case, a mistrial motion may be in order. See § 34.11 *infra*. Counsel may prefer to resort to self-help here by treating the prosecutor's remarks as an opening of argument and by replying. The reply might well include a paraphrase of the language sometimes found in appellate opinions (if counsel is fortunate enough to have such an opinion in counsel's jurisdiction) that when a respondent is on trial, with his or her liberty at stake, s/he should be given every latitude in presenting evidence of innocence and that it is fundamentally unfair to deny an accused person this opportunity. The constitutional decisions of the Supreme Court of the United States noted in § 33.04 *supra* contain good language. The Court has written, for example, that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'" (*Holmes v. South Carolina*, 547 U.S. 319, 324 (2006)), that "the hearsay rule may not be applied mechanistically to defeat the ends of justice" (*Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)); and that it is constitutional error to refuse the accused the opportunity to present "evidence . . . central to the . . . claim of innocence" (*Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). *See also Washington v. Texas*, 388 U.S. 14, 19 (1967) ("the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies . . . is a fundamental element of due process of law").

§ 34.11 MOTION FOR A MISTRIAL

§ 34.11(a) Grounds for a Mistrial

The most common ground for a mistrial is that an error has occurred that cannot be cured by any remedial action of the parties or the court. Situations of this kind include the prosecutor's making improper arguments or eliciting inadmissible evidence so prejudicial that the factfinder is irremediably biased; an hysterical display by a witness; or a prejudicial out-of-court communication between a witness and a juror, or between the prosecutor and the judge. In most jurisdictions there is an elaborate body of caselaw dealing with the question of what kinds of errors in the admission of evidence and what improper matters in the conduct of counsel, the witnesses, the court, and the jury in a jury-tried case are curable by instructions and which require

mistrial.

In addition to trial errors and to events during trial (such as the exposure of jurors to prejudicial publicity) that make a fair conclusion of the trial unlikely, counsel may appropriately urge as the basis for a mistrial any circumstance that makes it difficult or inappropriate to go on with the trial. In jury trials an occurrence such as counsel's illness, illness of the respondent, sudden unavailability of a defense witness, or the prosecutor's disclosure of new information necessitating additional defense investigation will warrant a mistrial if a continuance is impracticable because the anticipated delay is longer than the time during which the jury can reasonably be held over. (In bench trials these kinds of problems are ordinarily handled by a continuance.)

§ 34.11(b) The Limited Availability of the Mistrial Remedy in Bench Trials

It is very rare for a judge in a bench trial to grant a motion for a mistrial. Even when grossly prejudicial evidence is elicited or other egregious errors occur, the judge is likely to respond to a motion for a mistrial by declaring that s/he will ignore the inadmissible evidence or other improper matters and will decide the case solely on the proper facts of record.

Nevertheless, there are some circumstances under which the defense can obtain a mistrial even in a nonjury case. The categories of highly prejudicial occurrences mentioned in the third paragraph of § 20.05 *supra* as warranting recusal of a judge should also furnish grounds for a mistrial. Thus, for example, if the prosecutor introduces inadmissible evidence of the respondent's prior record and this is particularly damning, a mistrial may be granted.

In moving for a mistrial in a bench case, counsel must be sensitive to the risk of irritating the judge by implying that s/he lacks the self-control to do what judges are presumed to be capable of doing – maintaining impartiality in the face of inadmissible evidence. Whenever possible, the mistrial motion should be couched in terms of a potential for unconscious influence on any reasonable mind or in terms of the appearance of impropriety if the trial continues to judgment. See § 20.07 *supra.*

§ 34.11(c) Deciding Whether To Request a Mistrial; Procedures for Moving for a Mistrial

Whether to move for a mistrial is a strategic matter. Counsel must keep in mind (a) how the present trial appears to be going – that is, the probability of a favorable verdict; (b) whether trial errors have already been committed to which counsel has reserved appropriate objections, whether they are likely to result in a reversal of any conviction on an appeal, and the costs (in delay, expense, and so forth) of appeal; (c) the costs (in delay, expense, and so forth) of a new trial following a mistrial at this point; and (d) the likely strengths of the parties at a new trial, which will frequently be different from their relative strengths at this trial because of (1) the discovery that this trial has given each party of the other's case, (2) the extent to which each party

has learned to try his or her case better in trying it, (3) the nailing down of witness testimony in the present trial transcript, which can be used for impeachment at a new trial, (4) the possibility of a different trial judge, and so on.

If counsel decides to move for a mistrial, it is essential that counsel move quickly, making the motion as soon as the error of which counsel complains occurs or is disclosed and sufficient prejudice appears to justify the motion. This is an area in which courts are very strict in finding waiver by inaction. Frequently attorneys make objections without moving for a mistrial. Then in argument on postrial motions for a new trial, they will argue that each of their overruled objections in and of itself, and all cumulatively, caused such prejudice that a new trial is warranted. Both trial and appellate courts look on these tactics with a jaundiced eye, opining that if counsel feels an error is so prejudicial that it cannot be cured, s/he must move for a mistrial at that time rather than gamble for a favorable verdict before complaining.

A motion for a mistrial is made by declaring orally that counsel is moving for a mistrial and stating the grounds. In some jurisdictions motions for a mistrial in a jury trial are denominated "motions for the withdrawal of a juror," a phrase deriving from the common-law notion that if a juror withdraws from the jury, there remain too few jurors to decide the issues lawfully and the case must be retried before a new jury.

A motion for a mistrial should be preceded by an objection to the admission of the prejudicial and inadmissible evidence or to the prejudicial misconduct on which the mistrial motion is based. Counsel needs not rely *solely* on that error, however. S/he can strengthen the equities of his or her claim that a mistrial is warranted and can improve the record for appeal if s/he announces that the motion is based not only on this present error but also on the previous errors of which s/he has complained, whose cumulative impact is now such that the respondent will be denied a fair trial if this trial continues. After denial of a first motion for a mistrial, subsequent motions may be made by announcing that counsel is "renewing" his or her motion for a mistrial, based upon the total impact on the trial of the errors that were previously made the basis for the motion and of the additional errors of which counsel now complains. Denial of a mistrial motion is appropriately assigned as the basis for a new trial motion after verdict, under most local practice. In many jurisdictions it must be so assigned in order to preserve the contention for appeal.

§ 34.11(d) Double Jeopardy Implications of a Mistrial

§ 34.11(d)(1) Defense Motions for a Mistrial

A respondent who moves for a mistrial waives any claim that a retrial would place him or her twice in jeopardy in violation of common-law and constitutional double jeopardy doctrines, *United States v. Dinitz,* 424 U.S. 600 (1976), "so long as the Government did not deliberately seek to provoke the mistrial request," *United States v. DiFrancesco*, 449 U.S. 117, 130 (1980) (dictum). *See Oregon v. Kennedy,* 456 U.S. 667, 675-79 (1982). Defense mistrial motions should

therefore be accompanied by the statement that the respondent "has been put in the position where [s/he] can no longer obtain a fair trial by reason of the prosecutor's conduct [the court's rulings]"; and, *after* the motion has been granted, defense counsel should ask the judge to make a finding on the record that it was intentionally provoked by the prosecution *if* the judge appears to be sufficiently irritated by the prosecution's conduct so that this judge is more likely to make such a finding than the judge who would later sit on a dismissal motion prior to a new trial. In litigating the issue of prosecutorial intent, either on a request that the original trial judge make such a finding or on a motion to dismiss the prosecution prior to retrial (see § 17.08 *supra*), defense counsel should first ask the court to infer "provoking" intent from the nature of the prosecutor's conduct – that is, from the fact that it was blatant or reprehensible or repeated. *See State v. Parker*, 391 S.C. 606, 614-15, 707 S.E.2d 799, 803 (2011); *Oregon v. Kennedy*, 456 U.S. at 675 (dictum) ("[i]nferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system"). Counsel should note that counsel is willing to examine the prosecutor under oath if necessary but feels that it may not be necessary because the court can, in this case, infer the requisite intent from the record of the first trial. If the court declines to draw the inference, counsel should call the prosecutor to the stand and ask leave to examine him or her as a hostile witness. See § 33.25 *supra.* Since the sorts of prosecutorial misconduct that result in mistrials are ordinarily so gross as to be the product of either abysmal ignorance of basic trial rules or malevolence, counsel should begin the examination by inquiring about the prosecutor's legal training and experience and then proceed to question the prosecutor regarding his or her understanding of the rules that s/he violated. Thus, if the prosecutor does not wish to appear a fool, s/he may have little choice but to appear a knave. Counsel should object to, and preserve as claims of error, any rulings by the court refusing to allow counsel to examine the prosecutor, refusing to declare the prosecutor a hostile witness, or refusing to allow counsel to force the prosecutor to undergo a thorough and searching examination under oath. The Supreme Court of the United States has said that the accused's double-jeopardy rights in this situation turn upon "a standard that examines the intent of the prosecutor," *Oregon v. Kennedy,* 456 U.S. at 675, and counsel therefore has a right to litigate this issue, however painful it may be for all concerned. Note that state law may be more generous than *Oregon v. Kennedy* in barring reprosecution after a mistrial based on prosecutorial misconduct. *See Commonwealth v. Johnson*, 2020 WL 2532671, at *15 (Pa. 2020) ("Under Article I, Section 10 of the Pennsylvania Constitution, prosecutorial overreaching sufficient to invoke double jeopardy protections includes misconduct which not only deprives the defendant of his right to a fair trial, but is undertaken recklessly, that is, with a conscious disregard for a substantial risk that such will be the result. This, of course, is in addition to . . . [prosecutorial] behavior . . . [involving] tactics specifically designed to provoke a mistrial or deny the defendant a fair trial."

§ 34.11(d)(2) Prosecutorial Motions for a Mistrial or Mistrials Declared by the Court Sua Sponte

A successful mistrial motion by the prosecution, or the court's declaration of a mistrial *sua sponte,* over defense objection, creates complicated double jeopardy issues that the Supreme

Court's decisions have left singularly confused. The Court's decision in *United States v. Jorn,* 400 U.S. 470 (1971), appears to hold that any mistrial declared without the accused's acquiescence constitutionally bars retrial unless the termination of the first trial was compelled by an imperative need arising from circumstances that were not the prosecutor's fault. *Jorn* thus takes a strict view of the traditional "manifest necessity" standard derived from *United States v. Perez,* 22 U.S. (9 Wheat.) 579, 580 (1824). *See also Arizona v. Washington,* 434 U.S. 497, 505-06 (1978) (speaking of a '"high degree'" of necessity).

However, the Court has not been consistently rigorous in applying the *Perez* standard. *Compare Downum v. United States,* 372 U.S. 734 (1963) (unexplained absence of a key prosecution witness does not make out "manifest necessity," at least when the prosecutor has allowed the jury to be sworn even though the prosecutor knows at the time that service of a summons on the witness was not yet effected), *with Illinois v. Somerville,* 410 U.S. 458, 464 (1973) ("manifest necessity" is found when, after the swearing of the jury, the prosecutor notices a negligent omission of a vital allegation from the indictment – an omission that would require reversal of any conviction on appeal or postconviction proceedings; the Court explains that "the declaration of a mistrial on the basis of a rule or a defective procedure that would lend itself to prosecutorial manipulation would involve an entirely different question, *cf. Downum v. United States.*"). *See also Martinez v. Illinois*, 572 U.S. 833, 842 n.4 (2014) (per curiam) (discussing *Downum*); *Sattazahn v. Pennsylvania*, 537 U.S. 101, 120-21 (2003) (Justice Ginsburg, dissenting) (reviewing the Court's double jeopardy caselaw on mistrials requested or provoked by the prosecution or declared by the court *sua sponte*).

Although the "manifest necessity" doctrine provides an unpredictable test at best, the declaration of a mistrial at the instance of anyone other than the defense obviously sets the stage for a strong double jeopardy claim. The prosecutor's "burden of justifying the mistrial . . . is a heavy one" (*Arizona v. Washington,* 434 U.S. at 505 (dictum); *see also id.* at 507-09 & n.25, 514-16). "'The [Fifth Amendment] policy of avoiding multiple trials has been regarded as so important that exceptions to the principle have been only grudgingly allowed,'" *Breed v. Jones,* 421 U.S. 519, 532-33 (1975), quoting *United States v. Wilson,* 420 U.S. 332, 343 (1975). A defense objection to preserve the claim is therefore advised in any case in which defense counsel does not feel that affirmative defensive interests are best served by acquiescence in a mistrial and a new trial.