WINNING STRATEGIES SEMINAR

Evidence Meets Hollywood: Training the Litigator's Ear to Make, Meet, and Win Trial Objections

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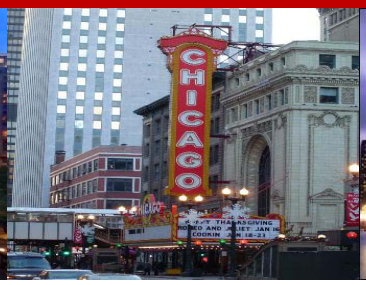

EVIDENCE MEETS HOLLYWOOD:

Training the Litigator Ear to Make, Meet, and Win Trial Objections

By:

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I. GENERAL OBSERVATIONS ABOUT OBJECTIONS

A. SPEAK UP!!!

1. Too often, I see too many attorneys half-rise to make an objection, only to sit down and not say anything at all. First, and foremost, we have to make objections to evidence we think is improper. If we say nothing, we lose automatically.

B. STAND UP!!!

1. Of course, one should always stand to address the court. But, a half-hearted rise not only signals weakness and insincerity, but it also telegraphs your equivocation.

C. STATE YOUR OBJECTION CLEARLY AND CONCISELY

1. You don't need to state evidence rules by their number. Lord knows I can't remember my cell phone number, much less the number of the Rule of Evidence I am invoking. That said, state with some precision the general rule of evidence that you think is being violated (e.g., hearsay, leading, foundation, authentication, etc.)

D. IF RESPONDING TO AN OBJECTION, MAKE SURE IT FITS

1. Your response to an objection should be tailored to the objection made. For example, if you receive a hearsay objection, you shouldn't say that it's just fair to allow the evidence. You should have an exception to hearsay ready to go.

E. TRIUS[1] INTERRUPTUS

1. Even if you know you are right on an objection, do you want to interrupt the trial 450 times with scholarly and timely objections? Of course not. You run the risk of the jury getting pissed off and hating you and then turning around and hating your client. Transference[2] in this context is professional suicide. So, object when it means something. Let the little stuff pass. Pick your battles and everyone will know you are deadly

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[1]I don't think there is such a word as 'trius.' I am trying to Latinize the word 'trial' since it would work best with 'interruptus.'

[2]Transference is a psychological term which describes one's misapplied response to stimulus. In this context, the jury may hate your interruptions and take it out against your client.

serious when you interrupt.

F. SOMETIMES LOSING IS WHAT YOU WANT.

1. It is very rare in federal court that your objection will be overruled (especially if you are defense counsel).[3] But, in the rare occasion that your objection is overruled, take the decision in stride. Write it down in your notes as a trial error and save it for appeal. Don't argue with the judge. It lets the jury know you just got stomped. Same goes for evidentiary bench conferences. Walk away from the bench with a confident smile, no matter how the conference evolved. As is so often the case, defeated counsel walks away from a bench conference looking like he just gave birth...to an accountant.

II. OFFERING EXHIBITS

A. There are four easy-as-pie steps to offering exhibits into evidence. And, someone has taken the time to come up with an pneumonic device. Remember MIAO, pronounced 'meow.'

1. **M**ark the exhibit. Then, show it to opposing counsel. Ask to approach.

2. **I**dentify the exhibit. Ask if the witness recognizes what you have marked as...whatever you numbered or lettered the exhibit.

3. **A**uthenticate the exhibit. Ask if the identified exhibit fairly and accurately represents what the witness previously identified it as.

4. **O**ffer the exhibit into evidence.

EXAMPLE: **Let's say I was about to cross Karl Rove. Hypothetically speaking, let's say I had an email memo from Rove that proved he orchestrated the disclosure of Valerie Plame as a CIA agent. I would mark (place a sticker on the exhibit) and give it a number. Let's say Plaintiff's Exhibit #1. I would show the marked exhibit to opposing counsel and ask to approach.**

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[3]This is, of course, tongue-in-cheek.

I'd show Rove Plaintiff's Exhibit #1 and ask if he could identify it. Assuming he will tell the truth, he would identify as an email he wrote which discussed disclosing Valerie Plame's name. Next, ask him if Plaintiff's Exhibit #1 fairly and accurately represents the email he sent. Assuming he tells the truth again, now you can move to offer Plaintiff's Exhibit #1 into evidence.

If opposing counsel has an objection to the admission of the piece of evidence, they'd make that objection now.

III. SPECIFIC RULES OF EVIDENCE AND THEIR USE AND MISUSE.

A. FRE 401. RELEVANCE. Evidence having a tendency to make any fact of consequence to the action more or less probable than without it.

Example: Evidence exists that Johnny met with his co-conspirators before the ring was busted tends to show that it is more probable that he is involved and, therefore, this is relevant evidence.

Example: Evidence exists that Johnny made racial epithets against the arresting officers when arrested.
OBJECTION. Irrelevant.

PRACTICE NOTE: Be careful airing relevance objections before the trier of fact. A relevance objection will often be met with the theory under which it is sought to be introduced and gives the opposing side more face time with the jury and, potentially, an imprimatur of the court. You don't want something like this to occur:

AUSA: When you arrested Johnny, did he say anything?
DEFENSE: (Knowing that the previously mentioned racial epithets might be disclosed...)...what is the relevance of this?
AUSA: This is relevant to show defendant's state of mind.
COURT: Overruled.
WITNESS: He said blacks are the cause of all

the problems.

DEFENSE: Objection.

So, now what? Your black jurors may have a slightly less favorable impression of your client...(i.e., "GUILTY!!!"). And, worst of all, the court seemed to have given its imprimatur. Sometimes you may not know what the extent of these statements, sometimes you do. If you know this might be an issue, file a motion in limine. If you don't know where this might go, ask to approach and discuss the relevancy at the bench.

As a corollary, oftentimes during our part of the case, the government has no idea where we are going and they wield the relevancy objection because they want a clue about where you are going. Should they ask for relevancy, give it to them.

For example: COUNSEL: What was my client wearing?

AUSA: Objection. Relevancy?

COUNSEL:Your honor, this witness will testify that my client was wearing his *academic mathlete letterman jacket* (which is only given to the best students in the school) which does not match the clothing worn by the perpetrator.

See, that feels so much better. But, the question the prosecutor poses should, in your head, be immediately followed by Handel's *Messiah*[4], followed by your response. Don't fall prey, but make them pay.

B. FRE 403. PREJUDICIAL EFFECT OF EVIDENCE. Although relevant, evidence whose unfairly prejudicial effect substantially outweighs its probative value can be excluded.

Usually, the government's entire case is prejudicial to us, especially when they are making points with their blows. I just wish that sometimes I could stand up and yell, "Objection. Prejudicial. This whole case is prejudicial to my client." But, I can't. FRE 403 only protects against evidence that is *unfairly* prejudicial. So,

[4]Although named *Messiah,* this song is probably best known as the Hallelujah song.

reserve your 403 objections for truly bad stuff that seeks to confuse issues, mislead the jury, and otherwise prejudice the jury against your client.

C. FRE 404 (a), (b). Character evidence. Character evidence is not admissible for the purpose of proving action in conformity with that character.

Example: Johnny has been known to do drugs. At his trial for distribution of drugs, the government wants to elicit testimony of his drug use. **OBJECTION.** Improper character evidence.

FRE 404(b). Other crimes, wrongs, or acts can be used for some other purpose (e.g., motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that advance, reasonable notice is given by the prosecution, after requested by the accused of the general nature of any such evidence.

Example: Same as above, except this time the prosecution seeks to admit evidence of drug use to show motive for the current offense. Johnny has a drug habit to support. He needs to sell to keep on buying. This is probably admissible, provided advance notice was given in due order. Damn.

1. Preserving the character evidence objection.

   a. If you believe one of your cases is going to trial, request notice of the government's potential use of 404(b) evidence.

   b. File a motion in limine to keep the evidence out.

   c. Assuming your motion in limine is denied or taken under advisement, ask that the prosecution approach the bench before it intends to pursue this line of questioning.[5]

   d. Object when the line of questioning begins.

   e. Request of the Court (probably best outside the hearing of the jury) an explanation from the proponent of the purpose for the introduction of such evidence.

   f. If the explanation isn't very good, object to the evidence on the

[5]Your justification for the request is well-founded. Even the mere asking of other wrongs evidence will hurt your client. And, you will compound the problem by having to object to the question. It will look like you have something to hide.

grounds that the proponent did not give sufficient specificity under which the judge can undertake its mandated balancing test. Remember, in the Fifth Circuit, the other bad act must be relevant to an issue other than the defendant's character AND the evidence must possess probative value which is not outweighed by undue prejudice. *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978)(en banc); *United States v. Duffaut*, 314 F.3d 203 (5th Cir. 2002).

g. If the judge still allows the evidence, ask for a limiting instruction. If you don't believe that the limiting instruction is good enough, ask for a mistrial, stating that the instruction has not cured the inference of improper character evidence and conforming behavior.

Remember that F.R.E. 404(b) is ripe for potential error. In a recent case, the Fifth Circuit put the reigns on the judge's ability to allow other bad acts evidence. *United States v. Jones*, 484 F.3d 783 (5th Cir. 2007). The 404(b) process is slightly different from circuit to circuit. However, the process is remarkably similar, with mostly different language. *United States v. Varoudakis*, 233 F.3d 113 (1st Cir. 2000); *United States v. Downing*, 297 F.3d 52 (2nd Cir. 2002); *Becker v. ARCO Chemical Co.*, 207 F.3d 176 (3rd Cir. 2000); *Westfield Ins. Co. v. Harris*, 134 F.3d 608 (4th Cir. 1998); *United States v. Jenkins*, 345 F.3d 928 (6th Cir. 2003); *United States v. Knox*, 301 F.3d 616 (7th Cir. 2002); *United States v. Betterton*, 417 F.3d 826 (8th Cir. 2005); *United States v. Beckman*, 298 F.3d 788 (9th Cir. 2002); *United States v. Morris*, 287 F.3d 985 (10th Cir. 2002), cert. denied, 536 U.S. 933, 122 S.Ct. 2612 (2002); *United States v. Lecroy*, 441 F.3d 914 (11th Cir. 2006).

2. **FRE 405. CHARACTER EVIDENCE THAT MIGHT HELP YOU**

A. A side can put their client's character in issue by proving evidence of good character, law abidingness, truthfulness/veracity, or honesty or integrity. Where character is not an element of a charge, claim, or defense, a side can still present evidence of these aspects of a person's character by reputation or opinion evidence only and not specific acts of conduct. FRE 404(a), 405(a), (b).

1. Let's say you have that rare circumstance where your client has no criminal history and is otherwise law-abiding. It would not kill you to present a witness to testify to that. First, it helps in front of the jury. Second, you get an instruction on it. See Fifth Circuit Pattern Jury Instruction No. 1.09. Moreover, if you have a client who is testifying,

bring in a character witness to talk about their honesty and truthfulness. Remember you can only prove this by reputation or opinion where that character trait is not in issue.

A. Where character is an essential element of the offense, claim, or defense, specific instances of conduct can be elicited.

2. REPUTATION. Witness must have sufficient familiarity with the defendant to be able to express an be able to address the person's reputation. For example, the witness should know the community where he lives and works, and the circles in which he has moved to be able to speak with authority about that person's reputation.

3. OPINION. As long as the person has sufficient familiarity with the defendant, they can testify to their known traits.

B. Specific instances of conduct can be relied upon on cross examination to test a person's opinion and/or reputation evidence.

1. For example, Johnny's lawyer calls Johnny's mother to the stand. She testifies that she has known Johnny all of his life, knows the circles he runs in, and knows the community in which he has lived and/or worked. She testifies that he has a good reputation for law-abidingness. On cross-examination, the prosecutor asks, "Mam, did you know that Johnny was arrested for rape?" Since Johnny is on trial for drug running, the rape has little or nothing to do with drug running, your objection should so state. And, incidently, you should move for a mistrial.

A. There are two important limitations upon judicial discretion in terms of cross-examination in terms of reputation and opinion testimony: there must be a good faith basis for the question and the incidents inquired about have to be relevant to the character traits involved at trial.

D. FRE 613. PRIOR STATEMENTS OF WITNESSES

1. Sometimes you hear a government witness is testifying different than other previous statements that they have made. The best case scenario involves

sworn testimony given by a witness which is different from sworn testimony given in a different proceeding, deposition, etc. Under FRE 810(d)(1)(a) this prior statement, since it meets the burden for allowable hearsay, is substantive evidence. If, on the other hand, a person makes a prior inconsistent statement which is not sworn, that inconsistency is not considered substantive evidence (ie, it is not admitted to prove the truth of the matter asserted), it is considered merely impeachment.

2. Requirements for impeaching a witness with a prior inconsistent statement

A. The witness must be afforded an opportunity to explain or deny the inconsistency; and

B. The opposing party must be afforded the opportunity to question about the statement.

For example: Louie, Johnny's co-defendant, testifies at trial that Johnny was involved in this conspiracy. Unfortunately for the government, at the time of Louie's arrest, Louie said Johnny was not involved.

LOUIE: Johnny was involved.
AUSA: Pass the witness.
COUNSEL: Louie, didn't you tell the DEA on the day you were arrested that Johnny wasn't involved?
LOUIE: No.

C. Since the witness was afforded an opportunity to explain or deny, evidence that he made statements inconsistent with his trial testimony can be admitted for the purpose of impeachment. It can be introduced through the person who heard the statement.

D. Let's say that one of your witnesses has been impeached in the manner listed above, but you are aware of prior consistent statements that corroborate the statement he/she made in court....you can rehabilitate.

1. On re-direct, bring out the other prior consistent statements to rebut the claim of recent fabrication or undue influence. The only caveat: The prior consistent statements need to have been made before the recent fabrication made or the undue influence exerted.

E. FRE 702. SCIENTIFIC EVIDENCE

1. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

2. FRE 702 was amended in 2000 to codify the principles discussed in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579 (1993).

3. If the testimony's factual basis, data, principles, methods, or application are called sufficiently into question, the trial judge must act as gatekeeper to determine whether the testimony has a reliable basis in the knowledge and experience of the discipline. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

4. Practically speaking, we run into several uses of so-called expert testimony in our cases:

   A. Opinion about whether a quantity of drugs was for distribution or personal use;

   B. Opinion about the value of drugs as they make their travel from outside of the United States to the interior of the United States; and

   C. Opinion about common drug courier conduct.

5. Consider a distinction between opinions made about general criminal practices and knowledge of the particular defendant's mental processes. If an opinion is based on what the "expert" knows about how the defendant thinks or has said this might be prohibited. *See United States v. Mendoza-Medina*, 346 F.3d 121, 125 (5th Cir. 2003)(condemning expert testimony that comes too close to the use of evidentiary profiling).

6. An expert may not testify with respect to mental state or condition that a certain person did or did not have the requisite mental state constituting an element of the offense. FRE 704(b). This might come up in drug courier cases where an 'expert' opinion is given about someone's knowledge of the presence of drugs, for example.

F. FRE 801/803. HEARSAY. THE RULE OF *CHISME*[6]

1. Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.

2. If you are going to make a hearsay objection, also object to the lack of confrontation. This objection gives your argument an extra dimension—constitutional umph. When you object on confrontation grounds make sure that you have an argument ready to cite that addresses how the hearsay is testimonial.[7]

3. Spotting hearsay. The litigator has to be paying very close attention

   A. AGGRESSIVE HEARSAY---The form of the question. Sometimes the examiner will ask a "what did he say?" or "what was said?" type of question. As soon as you hear that question, you know there is going to be hearsay coming down the pike. Get ready to spring to your feet and yell: Objection. Hearsay and Confrontation.

   B. PASSIVE HEARSAY—The form of the answer. But, what if the form of the question is fine, but the answer was phrased in terms of hearsay. For example,

AUSA:	Did he look at you?
Witness:	Yes.
AUSA:	After he looked at you, what happened?
Witness:	He said, "Hasta la vista, baby!"

   Here, the question posed itself did not present a hearsay problem. But, the answer was full of it (hearsay, that is). Immediately jump to your feet and object to hearsay and confrontation.

3. Using "hearsay" in your favor. Often, our clients make statements which

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[6]*Chisme* is a term that comes from the old country—any majority hispanic city. It refers to gossip about people, places, and things. *Chisme* was often shared over tacos, coffee, or while watching Cristina on Univision.

[7]The Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004) essentially boiled down the definition of 'testimonial' by approving several definitions. A statement is testimonial, for example, if it was made under circumstances which would lead an objective witness reasonably to believe that it would be used at a later trial.

tend to corroborate their story or form the basis of their defense.[8]

A. Consider using hearsay and its exceptions in these areas:

1. Attempted illegal re-entry. Hearsay statement made by someone other than defendant that his intent in approaching the poe was to get information, not attempt to re-enter illegally. This hearsay has an exception under FRE 803(3) for then-existing state of mind. This is used to prove conduct in conformity with that intent.

2. Dope case. Any statements made by defendant detailing where defendant was headed to show innocent conduct. Again, FRE 803(3) can be used to show up statements made as to state of mind in crossing bridge (ie, going to the store, borrowing a vehicle, etc.) These statements will illustrate innocent intentions.

3. Transporting case. Any statements made by defendant to any person regarding intentions in moving illegal aliens. FRE 803(3) Then-existing state of mind.

4. Mistaken Identity. Any statement by defendant made to any person regarding mistaken identity if defendant made statement while still under stress of that arrest/indictment, etc. FRE 803(2).

5. Exportation of Anything Cases. Any statement made by defendant regarding his plan after the exportation. FRE 803(3). Then-existing state of mind.

B. HEARSAY EXCEPTIONS THAT CAN HELP YOU GET YOUR CLIENT'S STORY ACROSS.[9]

1. FRE 803(1). Present Sense Impression. Can you imagine a client telling someone that a co-defendant was acting very strange and nervous around them at the time the nervousness was happening? This type of evidence might show that your client acted and perceived himself in a way that was absent of guilt.

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[8]They, like Whitman's description in *Song of Myself*, sound [their] barbaric yawp over the roofs of the world.

[9]Be very careful with FRE 806, discussed *infra*.

2. FRE 803(2). Excited Utterance. A client sometimes spurts out statements when presented with the startling news of his participation in a crime. If the statement is, of course, helpful, use this exception to get it in.

3. FRE 803(3). Then existing mental, emotional, or physical condition. A client sometimes tells people where he is going and what he is intending to do. This statement of intention or plan can often go to destroy the suggestion or inference of illegal planning and intent.

4. FRE 803(19). Especially in immigration cases where citizenship is an issue, a client might have heard things about his lineage, or birthplace from other sources. This hearsay exception would help to show that any declaration of US citizenship might be based on a good faith representation and reliance on what he knew to be the truth about his citizenship.

G. FRE 806. Attacking and Supporting the Credibility of a Declarant

1. When a hearsay statement (or a statement defined in FRE 801(d)(2)(C), (D), or (E)) is admitted in evidence, the declarant's credibility can be attacked as if the declarant had testified in court.

   A. In cases where co-conspirators have made statements that are admitted in evidence, you can use FRE 806 to attack that declarant's credibility, even if they never hit the stand. This might come in very handy where you need to attack damaging statements made by non-testifying people.

   BUT (and a very big but...) the same thing can be done against your client if you ask questions about statements that your client made. So, the moral of the story is, make sure your client is clean before getting into evidence of any of his hearsay.

H. FRE 608. Evidence of Character and Conduct of Witness.

1. Opinion and reputation evidence of a witness's character for truthfulness. Let's say you have snitch on the stand and he gives damaging testimony. The beauty of snitches is that they usually aren't really clean characters. They have baggage and many, many skeletons in the closet. Chances are, there is somebody this snitch has double-crossed, lied to, bamboozled, etc. Find that person and

have them testify as to the snitch's character for truthfulness (READ: LACK OF TRUTHFULNESS.) Lay the foundation for the basis of the person knowing either the reputation of the snitch or where the opinion comes from. In either regard, the person should have sufficient background information on the snitch, as well as familiarity with him and the community he runs in to give reputation and/or opinion testimony.

2. Specific Instances of Conduct. Instead, let's say that you have information that the snitch used to use an alias. You can inquire about that specific instance of conduct but CANNOT present extrinsic evidence of that conduct. But, through the pace and detail of your cross-examination, you can make the specific instance seem undeniable.

COUNSEL: Isn't it true, Mr. Snitch, that on at least twelve (whatever #) of occasions you used a fake name?
You used that name to appear as someone else?
To avoid using your true identity?
On one such occasion in 1998, you used that false name to avoid trouble with the police?

The only downside of this type of inquiry (ie, into specific acts of conduct) is that you are stuck with the answer.

Now, a powerful weapon in your arsenal would be a combination of the two approaches. That is, get a witness to testify to the snitch's reputation and a specific instance of conduct. Make sure the witness is squeaky clean and otherwise untouchable.

IV. PRESERVATION OF ERROR

A. The general rule about preserving error is to keep complaining until you get a negative ruling. Make your objection, state the rule or objection with sufficient specificity, get the ruling, move to strike, move for limiting instruction, move for mistrial.

1. Give enough specificity. If you object and don't cite a specific rule of evidence, at least give enough information in your objection to give the appeals court an idea about what the heck you are talking about.

2. Get a ruling. Don't let the judge off the hook. Make sure he gives you a

ruling...yea or nay to your objection.

3. If your objection is sustained, keep in mind that you have not preserved any error for appeal. Move on to the next level. Move to strike.

4. If your motion to strike is sustained, you still haven't preserved any error for appeal. Move for a limiting instruction.

5. If your motion for limiting instruction is granted, you still haven't preserved anything for appeal. Move for mistrial.

V. OPENING THE DOOR

A. Opening the door to bad evidence is one of the mortal sins[10] of criminal defense practice. It is the type of sin that will earn you the disgrace of the legal community. But, if your opponent begins any request for introduction of evidence by saying, "He opened the door" I would start tracing my footsteps. Often times we do things as lawyers because it makes sense in the scheme of our defense, but we unwittingly open the door to hell.

For example (real life story):

COUNSEL: Did you run any records checks on the defendant?
AGENT: Yes
COUNSEL: Did he have any criminal history?
AGENT: He had been arrested for burglary.

Now, the defense attorney knew that her client had never been convicted of anything. And, short of him taking the stand or her introduction of FRE 806-impeachable material, the arrest for burglary wasn't coming in. However, she did ask about criminal history. An arrest is criminal history. A good antidote to this is the practice of writing out your questions and checking them carefully for areas where you might have inadvertently opened the door. I have seen "opening the door" problems most often when an attorney is shooting from the hip or is conducting an examination off the cuff. This type of examination should be kept to a minimum since an open door is very hurtful.

B. If a prosecutor begins to argue that you have opened the door, get ready for a

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[10]A mortal sin was thought to be of such a grave nature that to commit one would separate one from the grace of God. A venial sin, on the other hand, is one of a temporary nature, a temporary separation from the grace of God. According to Marina-Thais Douenat, an AFPD in my office, the highest sin is a cardinal sin, which is a violation of the Seven Deadly Sins. However, Douenat says, "Don't quote me on that...I am a fallen Catholic."

fight.

1. Suggest that you have not opened the door to the prosecutor's inquiry.

2. To the extent that you have opened the door, argue that there will be a great amount of prejudice to the defendant (FRE 403) in allowing the evidence.

3. A risky way to help stem the tide of crap that is about to befall you is to request a limiting instruction that "(whatever the issue and evidence provided) be given no weight"

4. If the judge rules that you have opened the door, and is going to allow the prosecutor to make his inquiries, you should definitely re-direct to help re-habilitate your client/witness. Don't let them have the last word, take the sting out.

MOTION *IN LIMINE*
A MOTION TO EXCLUDE ANY REFERENCE TO ANY CRIMINAL HISTORY OF THE DEFENDANT

TO THE HONORABLE HARRY LEE HUDSPETH, SENIOR UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TEXAS:

COMES NOW the Defendant, by and through his attorney of record, Frank Morales, Assistant Federal Public Defender, and respectfully moves this Honorable Court *in limine* for an Order prohibiting the Government and all of its agents from making mention of any criminal history, together with any arrests that may be attributed to the defendant, except for the instant offense arrest. In support of this motion, defendant would show the following:

I.

Introduction of criminal history into a trial, together with any arrests, aside from the arrest for the instant offense, is violative of Federal Rule of Evidence 404b, 401, and 403. First, this evidence is prohibited by Federal Rule of Evidence 404b. To comply with Rule 404b, evidence of any other bad act must be relevant to an issue other than the defendant's character *and* the evidence must possess probative value which is not outweighed by undue prejudice. *United States v. Duffaut*, 314 F.3d 203 (5th Cir. 2002). This evidence has no relevance to any issue in this case. Additionally, there is no relevant theory under which this evidence would have bearing on the current prosecution. That is, this evidence does not fit into any of the laundry list of ways that criminal history can be made admissible without running afoul of Rule 404b (e.g., motive, opportunity, preparation, et cetera). Nor, as a matter of fact, has the Government acceded to the defense's previous request to list with particularity the theory under which it proposes to introduce any prior criminal history. Therefore, introduction of criminal history is prohibited under Rule 404b of the Federal Rules of

Evidence.

II.

Additionally, introducing criminal history into trial of this matter is not relevant in any way. That is, Federal Rule of Evidence 401 states, "[r]elevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The fact of any prior convictions does not make this fact more or less probable. Therefore, this information is not relevant under Federal Rule of Evidence 401. Should the Court deem the evidence relevant in some fashion, defendant requests that the Court place on the record its findings which show that 1) evidence must be probative of the proposition it is offered to prove, and 2) the proposition to be proved must be one that is of consequence to the determination of the action. *United States v. Hall*, 653 F.2d 1002, 1005 (5th Cir. 1981).

III.

Further, criminal history evidence, even if deemed relevant, is highly prejudicial under Federal Rule of Evidence 403. The jury might become inflamed by the testimony relating to criminal history and become unfairly prejudiced against the defendant by that evidence. Should the Court allow such evidence, defendant requests that the Court place on the record why the incremental probity of the evidence tips the scale in favor of admission as it is balanced against its potential for undue prejudice. *United States v. Beechum*, 582 F.2d 898, 914 (5th Cir. 1978).

MOTION IN LIMINE
A MOTION TO PROHIBIT THE GOVERNMENT FROM INTRODUCING "EXPERT" TESTIMONY FROM ONE OF ITS CASE AGENTS ON THE ISSUE OF "TYPICAL TRAFFICKER COURIER CONDUCT"

TO THE HONORABLE HARRY LEE HUDSPETH, SENIOR UNITED STATES DISTRICT JUDGE:

COMES NOW the Defendant, by and through his attorney of record, Frank Morales, Assistant Federal Public Defender, and respectfully moves this Honorable Court *in limine* for an Order prohibiting the Government from introducing "expert" testimony from one of its case agents on the issue of "typical drug trafficker conduct."

AS GROUNDS THEREFOR, Defendant would show the Court the following facts and circumstances:

Statement of Relevant Facts

I.

It is alleged by the Government that Defendant knowingly imported , possessed with the intent to distribute, and conspired to import and possess with the intent to distribute quantities of heroin and methamphetamine that was secreted in two female sexual organs.

II.

In order to substantiate these charges, one of the Government's burdens will be to prove beyond a reasonable doubt that Defendant knew of the presence of the contraband.

III.

Upon information and belief of defense counsel, there has been little if any evidence seized in this case which would tend to demonstrate this critical issue of knowledge. As a result, and based

upon past experiences of defense counsel with cases of this type, the Government may resort to eliciting "expert" testimony from one of its case agents concerning the typical conduct of drug couriers.[11]

IV.

The foundation for the agent's expertise typically will be his or her experience in other drug trafficking cases with similar facts. In essence the agent will testify that knowing drug traffickers comport themselves in a fashion similar to Defendant; *e.g.,* they drive cars similar to Defendant's, and their mannerisms, demeanor, and conduct are similar to Defendant's.

V.

The desired effect of such testimony will be to circumstantially prove Defendant's knowledge of the contraband "by proxy." That is, the government has apprehended knowing drug traffickers in the past who have conducted themselves in a manner consistent with Defendant's conduct. Therefore, Defendant must have known about the contraband in this case.

Argument

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[11]The Government need not specifically designate officers as experts for them to testify as experts. When the Government questions officers to establish their experience and then elicits opinion testimony based on that experience, the officers are considered to be testifying as experts. *See United States v. Buchanan,* 70 F.3d 818, 832 n.17 (5th Cir. 1995), *cert. denied,* 116 S. Ct. 1366 (1996). If the officers are not offered as experts, then their opinion is improper lay opinion testimony. Lay opinion testimony is more limited than expert opinion testimony. *Compare* FED. R. EVID. 701 *with* FED. R. EVID. 702. And lay opinion testimony is subject to the same restrictions regarding prejudice as expert testimony. *See* FED. R. EVID. 701 and 403; *see also* FED. R. EVID. 704, advisory committee note (commenting on interaction of Rule 403 and opinion rules).

VI.

Expert testimony is permitted only when "it will assist the trier of fact to understand the evidence or to determine a fact in issue." *United States v. Buchanan,* 70 F.3d 818, 832 (5th Cir. 1995), *cert. denied,* 116 S. Ct. 1366 (1996). Expert testimony is improper when it does not address an area of "a technical nature as to which specialized knowledge [is] needed for proper understanding. *United States v. Castillo,* 77 F.3d 1480, 1499–1500 (5th Cir. 1996).

VII.

The test for determining whether expert testimony is needed is commonsensical. "There is no more certain test for determining when experts may be used than the common sense inquiry into whether the trained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having specialized understanding of the subject involved in the dispute." FED. R. EVID. 702, advisory committee note (citation omitted). In this case, the jury can understand and weigh the evidence for itself and determine whether the Government has met its burden of proof. No expert testimony is needed.

VIII.

Expert testimony opining that an accused acted in a manner consistent with drug dealing is a statement whose direct implication is that the accused had the requisite mental state. Such testimony is forbidden. Experts are prohibited from "stat[ing] an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." FED. R. EVID. 704(b); *see also United States v. Masat,* 896 F.2d 88, 93 (5th Cir. 1990).

IX.

Expert opinion testimony by police officers carries a risk of unfair prejudice that significantly outweighs its probative value. *See* FED. R. EVID. 403. In drug cases, expert testimony often amounts to nothing more than telling the jury what conclusion to reach. Rule 702 forbids such testimony. *See also United States v. Flores-Chapa,* 48 F.3d 156, 162–63 & n.14 (5th Cir. 1995) (expressing "severe reservations" about testimony that "does little more than opine" about defendant's role in offense and guilt). Such testimony also creates a risk of unfair prejudice by improperly bolstering the testimony of non-expert witnesses. *See Castillo,* 77 F.3d at 1499; *United States v. Cruz,* 981 F.2d 659, 664 (2d Cir. 1992); *United States v. Angiulo,* 897 F.2d 1169, 1189–90 (1st Cir.) (permitting expert testimony about "extensive Mafia organization, but recognizing risk that "this type of testimony will be overly persuasive to the jury), *cert. denied,* 498 U.S. 845 (1990).

X.

For all of these reasons, Defendant respectfully requests that the Court bar, in this case, the use of expert and opinion testimony about drug trafficking.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant prays for all of the above-requested relief, and that his Motion in Limine be, in all respects, GRANTED.