

Object Anyway

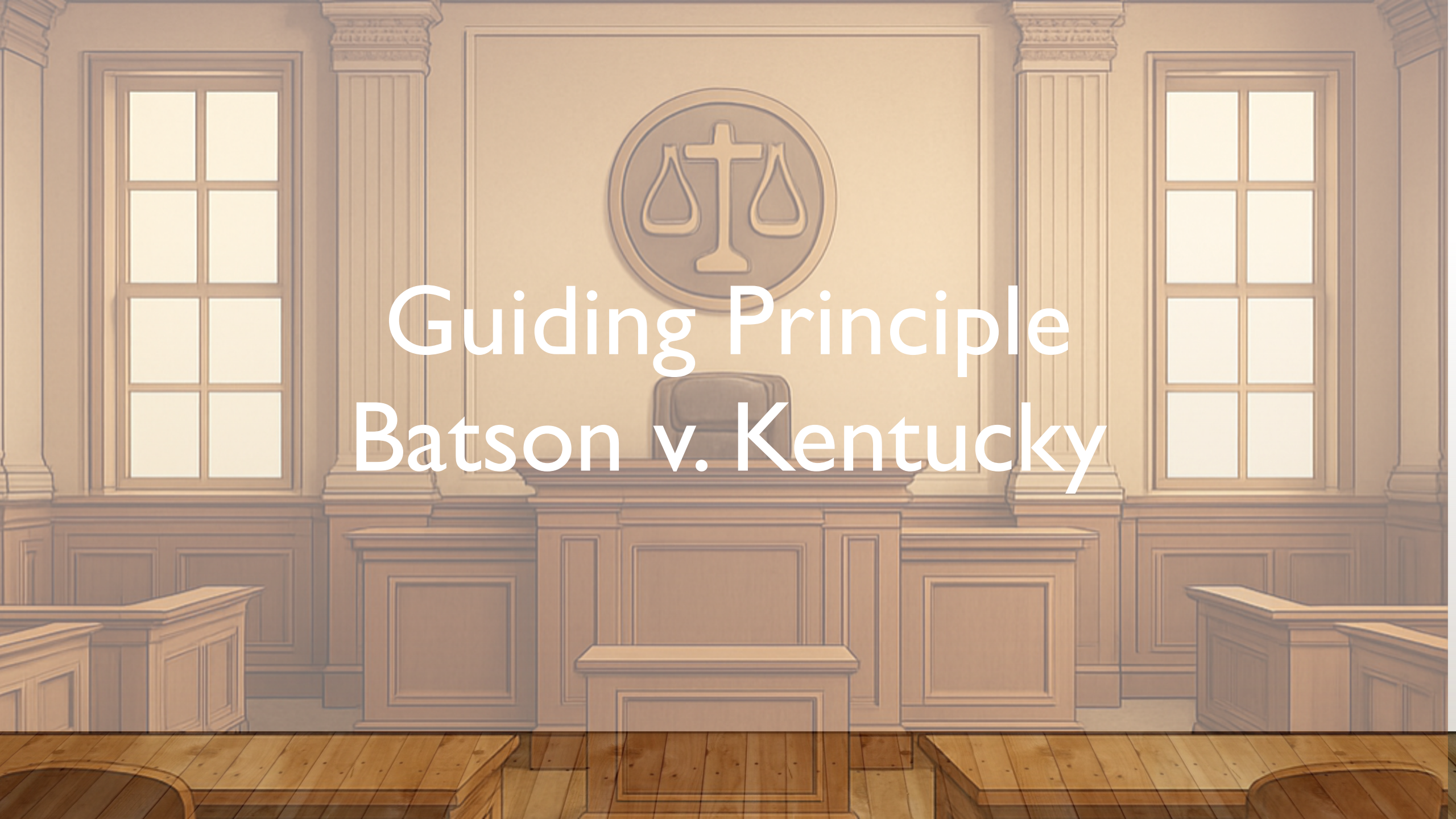


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OBJECT! OBJECT! OBJECT!

- Object early – MILs
- Object Often
 - Renew objections
 - Clearly state any/all grounds
 - File written objections
 - Ensure record is complete on objections
 - Constitutionalize





Guiding Principle Batson v. Kentucky

Take Aways

- Object!
- Feels off?
 - Object!
- Safe harbor objections
 - Relevance (401)
 - Prejudice (403)
 - Hearsay (801)
 - Improper Opinion/Foundation (ER 701-704)





- Denial or Review or worse standard of review
- In last 12 months
 - 155 cases stated defense “did not object”
 - 68 cases stated defense “failed to object”
 - 223 cases with a full denial of review or a dramatically worse standard!
 - In last 3 years it is 390 for “did not object” and 154 for “failed to object” – 544 cases.
 - 30% of appellate cases get reversed.



Why Object?



ENSURE YOU CAN GET APPELLATE REVIEW

- RAP 2.5 (a)
 - “The appellate court may refuse to review any claim of error which was not raised in the trial court.”
- On appeal, a party may not raise an objection not properly preserved at trial absent manifest constitutional error. *State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982 (2007); RAP 2.5(a)(3). We adopt a strict approach **because trial counsel's failure to object to the error robs the court of the opportunity to correct the error and avoid a retrial.** *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007).

State v. Powell, 166 Wn.2d 73, 82, 206 P.3d 321, (2009)

• PLAY FOR THE FUMBLE



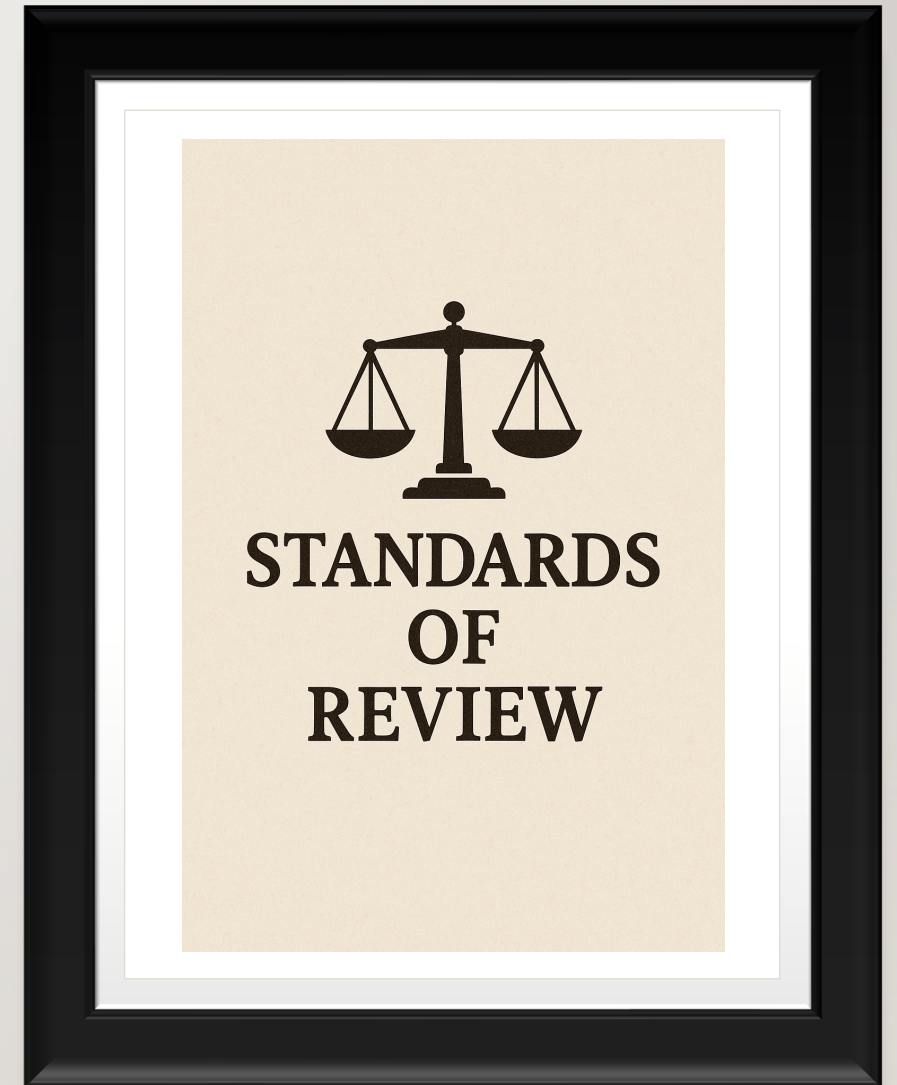
OBJECT TO PUSH THE LAW FORWARD

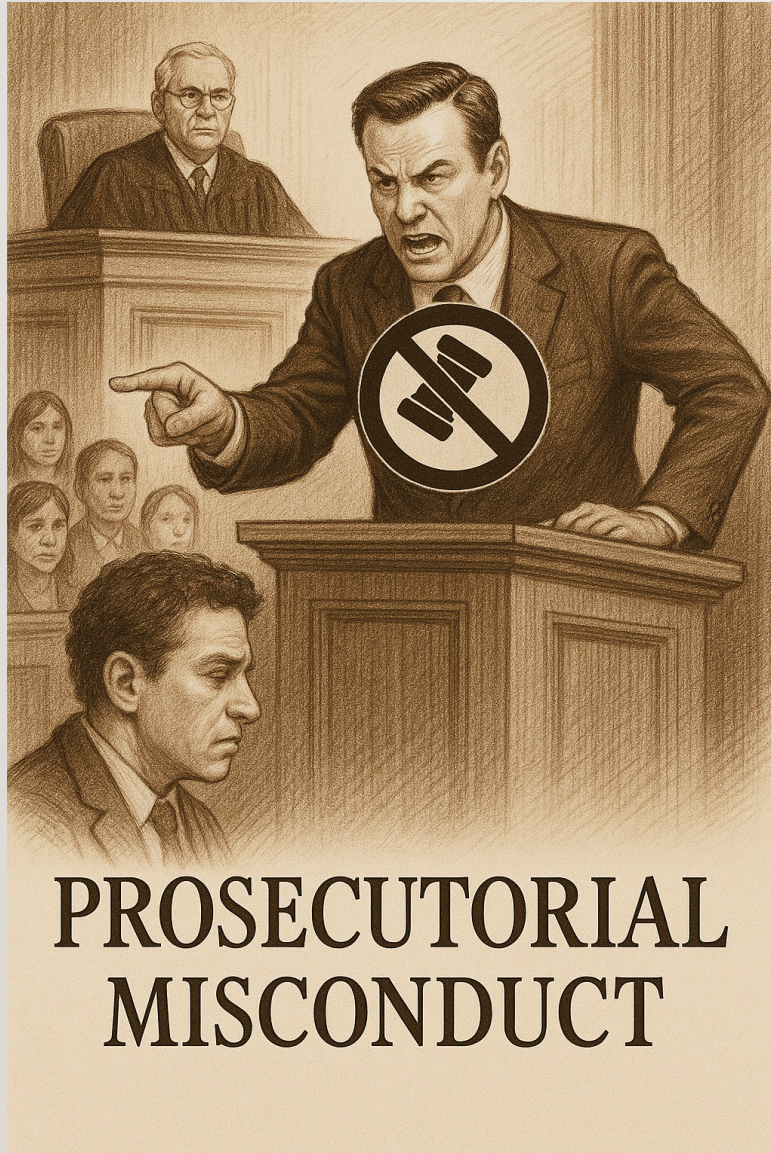
- *Batson*
- *Erickson* (Stronger *Batson* protections and incorporating GR 37)
- Eliminating Racism in general
- Attacking non-corroboration instruction in sex cases
- Eliminating 'lustful disposition' as a 404(b) exception



STANDARDS OF REVIEW

- Questions of law – de novo (example: suppression issues and written conclusion of law)
- Questions of fact – clearly erroneous (example – factual findings – verities if unobjected to)
- Rulings on the rules of evidence – abuse of discretion
- GR 37 – De Novo
- *Batson* – clear error





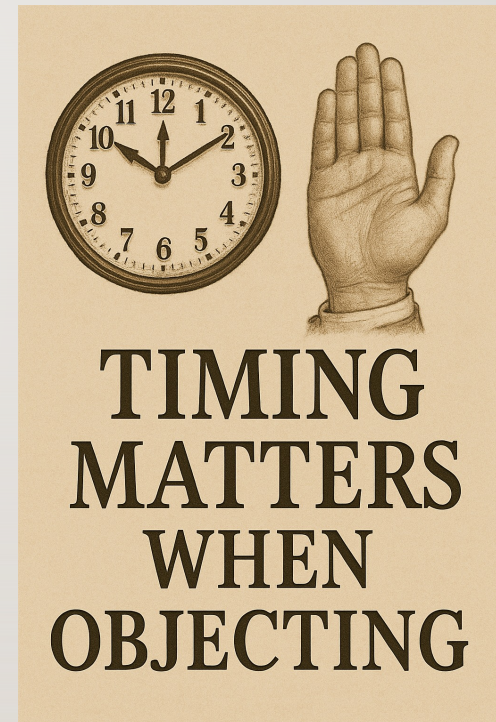
PROSECUTORIAL MISCONDUCT

STANDARDS OF REVIEW

-
- Prosecutorial misconduct:
 - Objection = misconduct was prejudicial AND likely impacted jury's verdict
 - No Objection = misconduct so flagrant/ill intentioned could not be cured.

WHEN TO OBJECT?

- **Early**
- **Often**
- Voir dire
- Opening
- Direct
- Cross
- Closing
- Findings/Conclusions
- Jury instructions



HOW TO OBJECT?



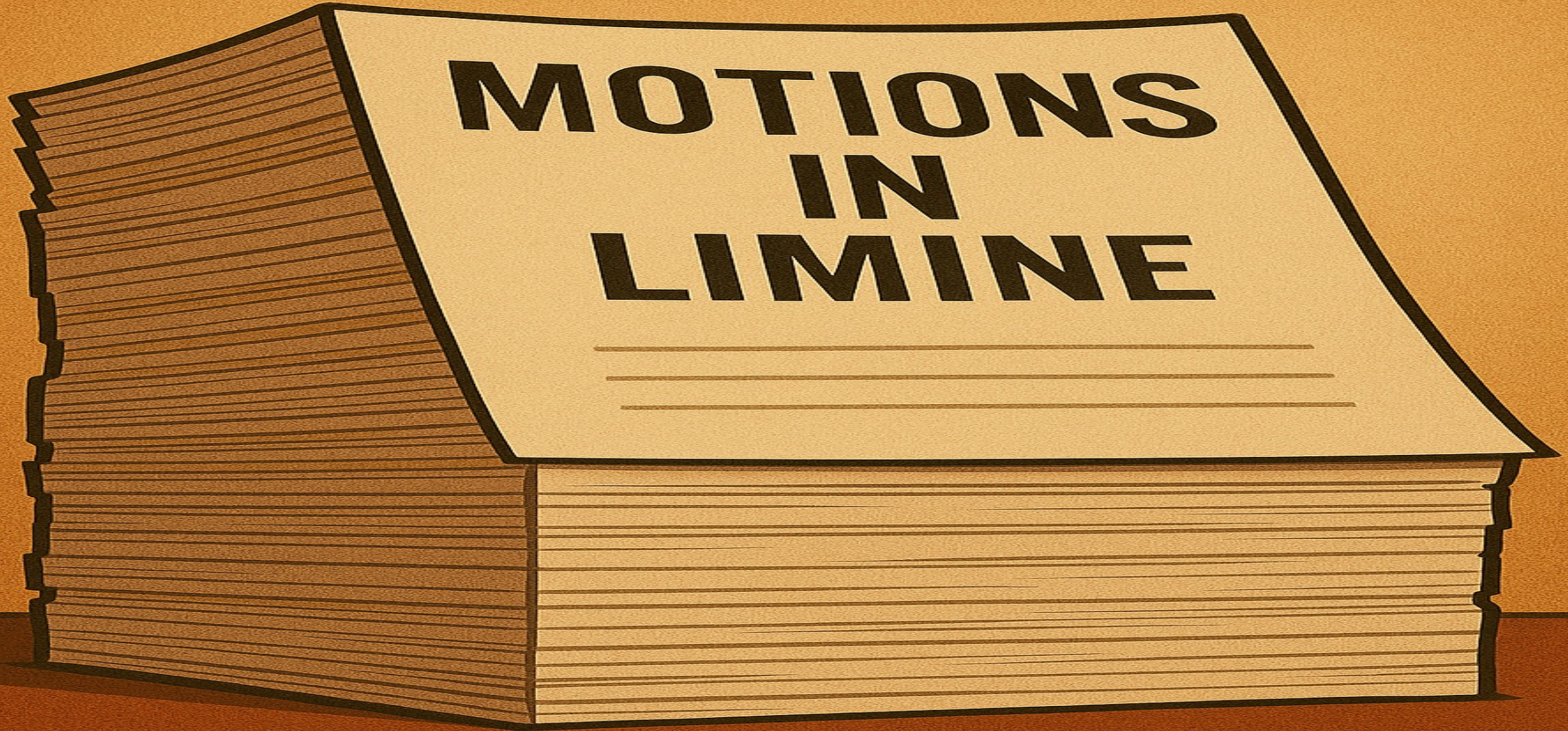
- Stand up and say it loudly!
- State grounds
- Constitutionalize
- Ask for sidebar if you need to say more
- Ask to clear the jury

HOW TO OBJECT – PERFECTING YOUR RECORD

- What if the Court won't let you make a record at the time?
- Standing objection?
- Curative instruction?
- Mistrial?
- Move to strike?

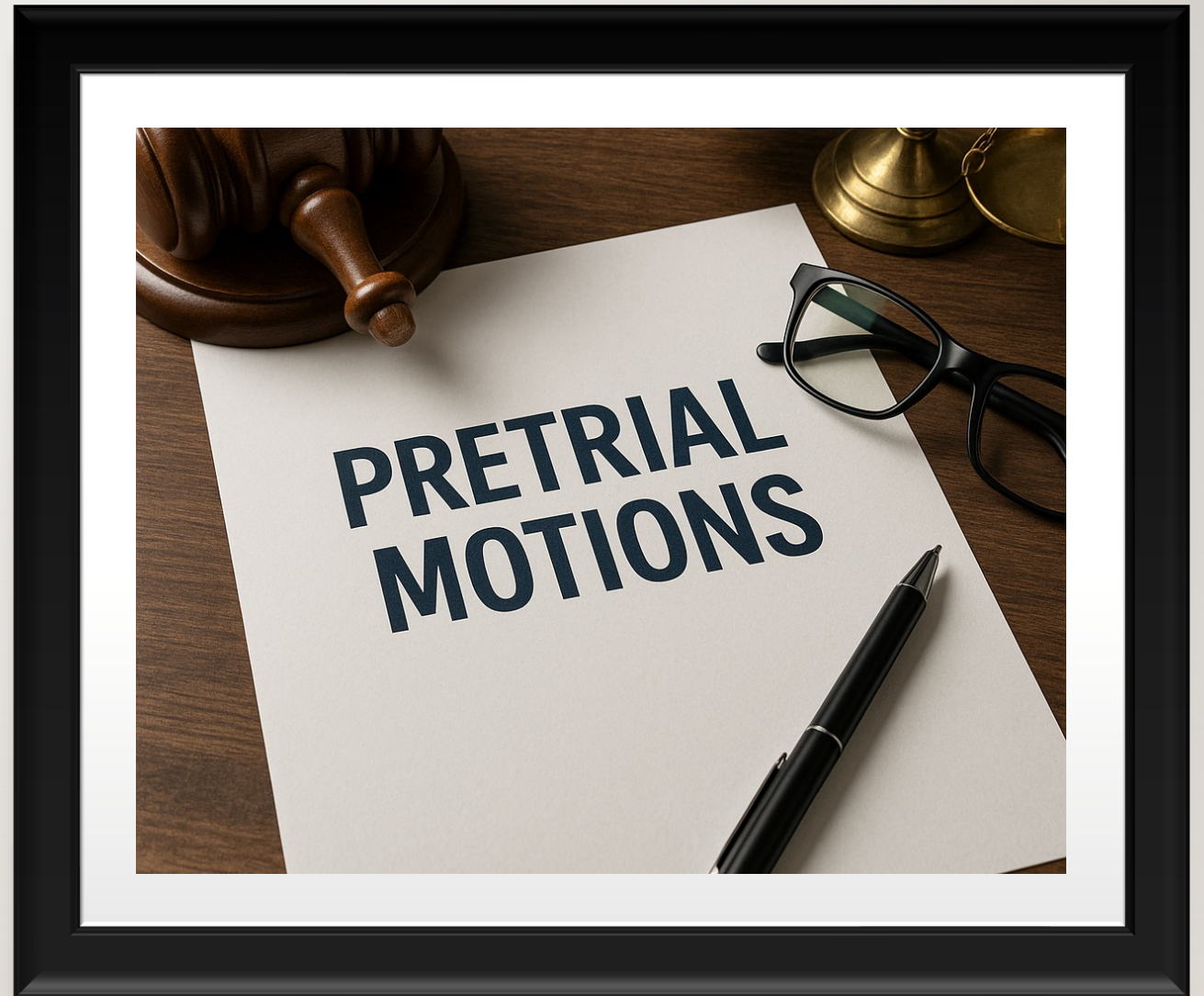


OBJECTION!

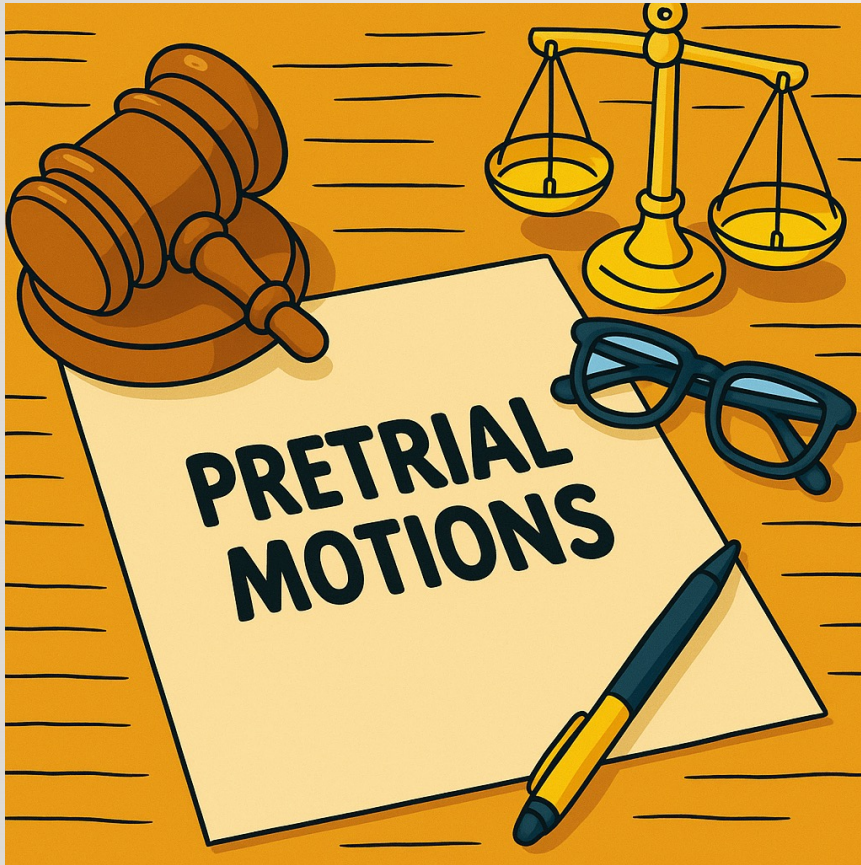


SPECIFIC OBJECTIONS – PRETRIAL MOTIONS

- Evidence blocking
- Severance
- 3.5/3.6 hearing
- Motions in limine –
evidentiary objections and
specific prosecutorial
misconduct objections



SPECIFIC OBJECTIONS – PRETRIAL MOTIONS



- Why file Motions in Limine (MILs)?
 - Time
 - Clean record
 - Avoid RAP 2.5(a) exclusion
 - Severance reminder

JURY SELECTION



VOIR DIRE - GENERALIZED OBJECTIONS

- Ability to discuss facts and circumstances of the case.
- GR 37
- Batson
- Opportunity to push the law:
 - Ask to apply objective observer to other protected class statuses – Gender, Sexual Orientation, Disability, Age, etc.
- Control the prosecutor!



BATSON - THE STANDARD

- 3 part test
 - (1) Prima Facie case of discriminatory purpose
 - (2) Race neutral explanation
 - (3) Balancing act – was this racist or not?

BATSON – HOW TO DO IT?

- Objection method:
 - State *Batson* challenge and lay out facts for prima facie discrimination.
- Timing:
 - Anytime including after jury sworn if court can “remedy” issue.
- When to object?
 - Anytime a cognizable class member **that you want on the jury** is stricken.

GR 37 - PROCEDURE

GR 37 – peremptory challenges based on race



Rule lays out very specific procedure – **could** an objective observer view race as a factor in strike? If so, deny strike.



Discussion done outside presence of jury and **before** juror is excused. GR 37(c).



Be specifically aware of presumptively invalid reasons AND conduct based reasons. Conduct must be called out early.

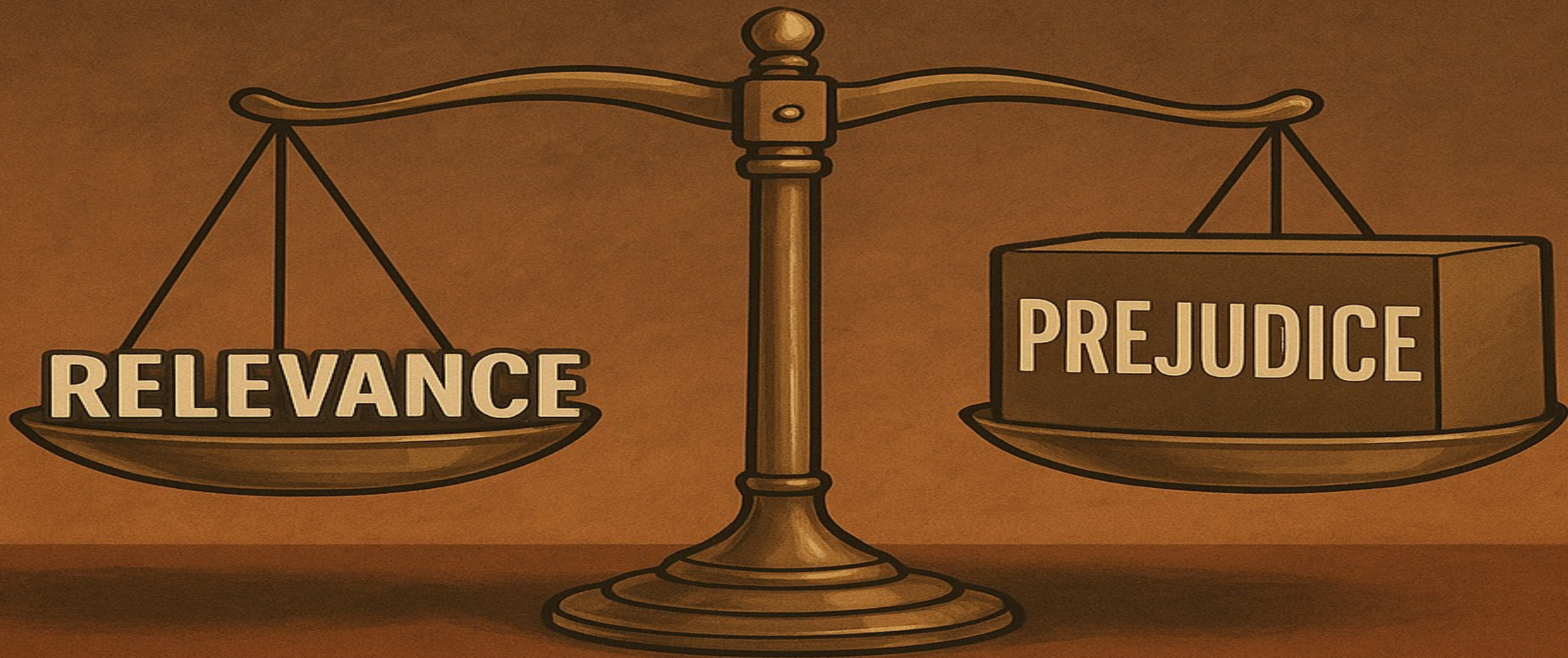
GR 37 - STRATEGY

- Strategy: use whenever there is a strike on a juror you want on the case.
- Be aggressive!
- Take good notes
- Need to be VERY CLOSE to a for cause challenge to survive.
- “[R]emedy is reversal of the convictions and remand for a new trial.”
- Ask for DPA to lose strike if they lose on GR 37!

VOIR DIRE HYPO

- In a homicide trial of a person who appears to be black (and self identifies as such) and non-binary, a white juror who self identifies as gender non-binary, states to a prosecutor that they are prison abolitionists and strong support the defund the police movement due to their experiences with the Black Lives Matter protests. They state they can set those beliefs aside and be fair and impartial in the case. The prosecution attempts to strike them for a peremptory challenge. What do you do?
- What if there was no statement about abolition and BLM?

ER 401-403

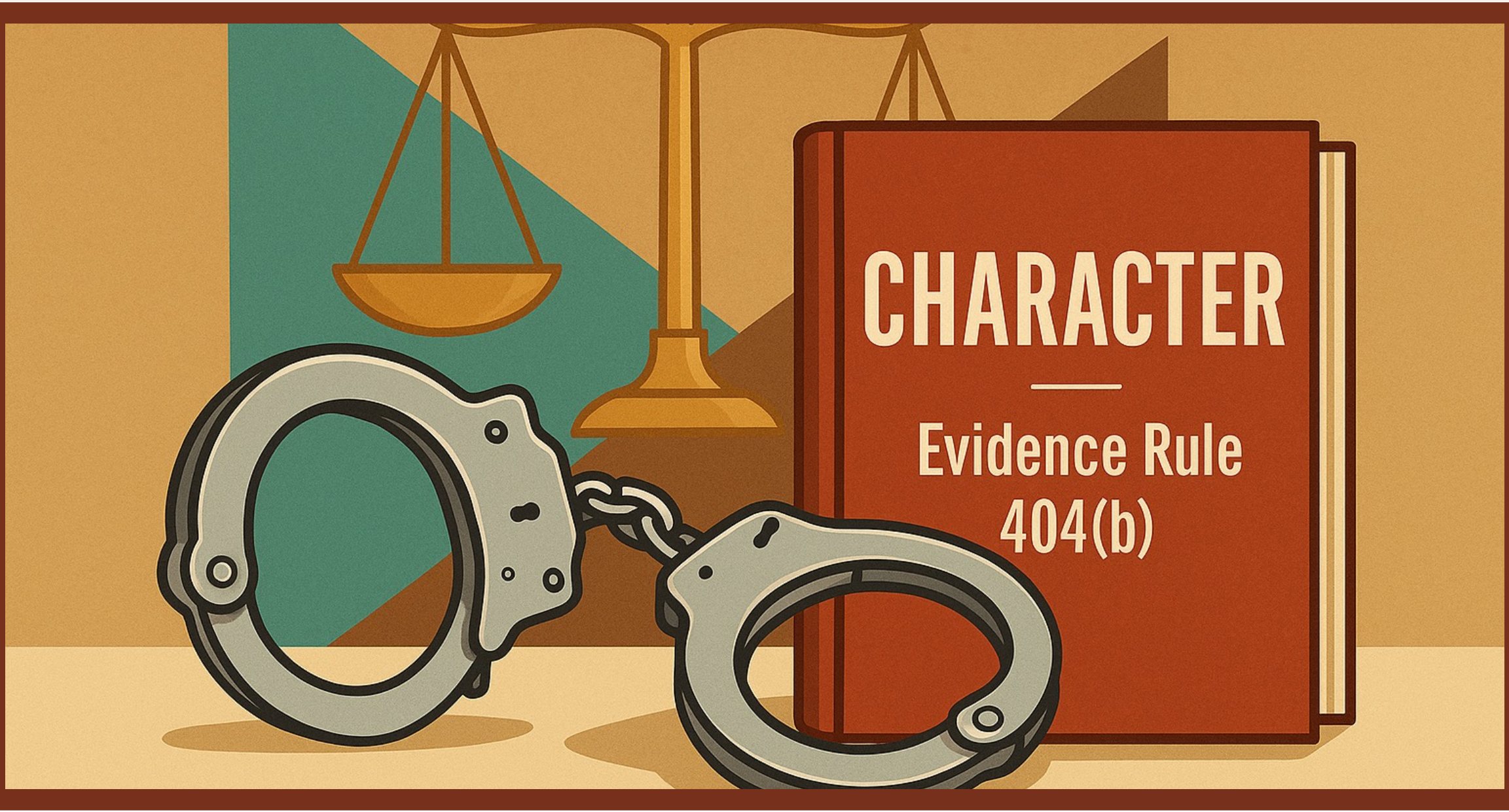


ER 401-403 RELEVANCY AND UNFAIR PREJUDICE

- ER 401
- ER 402
- ER 403
 - “probative value is substantially outweighed by the danger of unfair prejudice.”
- Timing/trigger:
 - MILs to exclude.
 - As a question is asked
- Remedy:
 - Move to strike question/answer
 - Curative instruction
 - Mistrial

HYPO - ER 401-403 RELEVANCY AND UNFAIR PREJUDICE

- In a prosecution for Assault I where the defendant is black, the prosecutor seeks to admit evidence of a shirt the defendant was wearing when arrested that says “Hennington is possible tonight” and shows a mostly naked woman. The arrest occurs 4 months after the shooting allegedly happened.
- On the night of the shooting there is a bottle of Remy Martin found at the scene. The defendant admits to have been drinking that on the night of the shooting.
- Prosecutor’s stated reason for wanting the shirt in is because if the defendant was drinking cognac as the alleged shooting victim stated it would make it more likely that the alleged victim’s statement is credible.



CHARACTER

The illustration features a red book with the title 'CHARACTER' in large white letters, followed by 'Evidence Rule 404(b)' in smaller white letters. A pair of silver handcuffs is positioned in the foreground, with one cuff resting on the book and the other on the ground. In the background, a pair of golden scales of justice is visible against a tan wall with a teal triangular shadow. The entire scene is framed by a dark brown border.

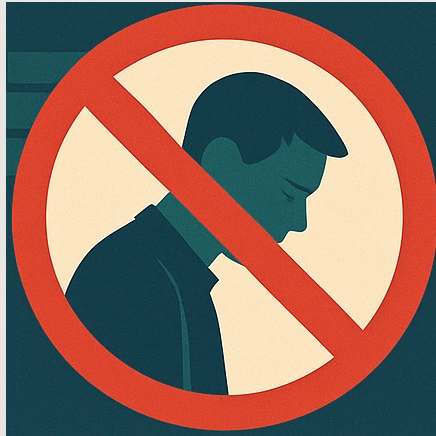
Evidence Rule
404(b)

ER 404(B) – OTHER ACTS

- 1) find by a preponderance of the evidence that the misconduct occurred,
- 2) identify the purpose for which the evidence is sought to be introduced,
- 3) determine whether the evidence is relevant to prove an element of the crime charge[d], and
- 4) weigh the probative value against the prejudicial effect.
 - *State v. Binh Thach*, 126 Wn. App. 297, 310, 106 P.3d 782 (2005).
- **Remember: Not just bad acts – other acts in general**

HYPO – ER 404(B)

- Assault 2 DV case (strangulation). There are no prior police reports, but the alleged victim claims to LE at the scene that they have been assaulted by the defendant in the past. At a witness interview, the alleged victim disclaims those statements. The state seeks to admit those prior allegations. AV is recanting.
- State also seeks to admit a prior allegation that the defendant had committed a previous assault 2 under the substantial injury prong in a bar fighting setting.



**EVIDENCE
RULE 412**

**EVIDENCE
RULE 413**

ACQUITTED



ER 412 AND ER 413 – SEX AND IMMIGRATION

- State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010)
 - Rape shield (ER 412) only applies to other sex acts – here, that the alleged victim was involved in a “drug-induced sex party” where accused claimed they had consensual sex was admissible.
 - Note – may be able to get in previous false allegations as ER 404(b) motive.
- State v Bravo, -- Wn.App. 2d --, 563 P.3d 1068 (February 18, 2025)
 - Allowed inquiry into alleged victim’s seeking of a U-Visa as evidence of bias against accused.
 - “A defendant enjoys more latitude to expose the bias of a key witness.”

WHEN TO OBJECT



IMPEACHING A WITNESS

EVIDENCE RULE 608

PRIOR CONVICTIONS

EVIDENCE RULE 609

ASKED AND ANSWERED

EVIDENCE RULE 611

ER 608 – CHARACTER AND CONDUCT OF A WITNESS

- (a) Bolstering and vouching is per se improper.
- (b) Allows for you to attack the credibility of a witness for specific instances of untruthfulness.
- specific conduct **must** touch on truthfulness/untruthfulness.
- If someone attempts to bring up extrinsic evidence of conduct not related to the case, be prepared to object!

ER 608(B) – CHARACTER AND CONDUCT OF A WITNESS - EXAMPLE

- Defense was allowed to cross examine alleged victim of child luring about two instances where child had pretended to be injured or needed help.
- These instances showed a “willingness to mislead strangers”.
- Timing of extrinsic conduct matters - considered if instances were “remote”.

ER 609 – PRIOR CONVICTIONS

- 2023 WDA Conference should be reviewed – [PowerPoint Presentation](#)
- Timing: pretrial
- Litigate the *State v. Alexis* factors.
 - (1) length criminal record; (2) remoteness of priors; (3) the nature of the prior crime; (4) the age and circumstances of the defendant; (5) the centrality of the credibility issue; and (6) the impeachment value of the prior conviction.

ER 611 – TYPES OF QUESTION AND ORDER OF QUESTIONS

- Improper question
- Asked and answered
- Leading
- Narrative
- Unintelligible question
- On cross – “beyond the scope”

ER 611 – TYPES OF QUESTION AND ORDER OF QUESTIONS



- Timing – as they occur
- Reason to object:
 - Throw the flow of a witness or prosecutor
 - Block evidence on state's cross.
 - If allowed - consider objecting to leading unless witness is deemed hostile.

EVIDENCE RULE 701, 702

**LAY
OPINION**



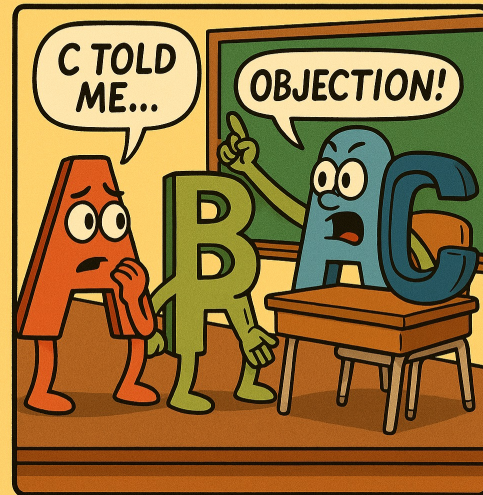
**EXPERT
TESTIMONY**



ER 701, 702- OPINION TESTIMONY

- Opinion testimony must be based on knowledge.
- Opinions must be disclosed to you under CrR(LJ) 4.7.
- Be prepared to attack credentials and/or basis of knowledge for witnesses.
- Timing – pretrial litigation and also at the time of testimony.
- If witness provides NEW opinion on the stand that was not previously disclosed, move to strike.
- Example – cop opinion without adequate foundation – *State v. Quale*.

HEARSAY ABCs



ER 801, 806 – HEARSAY AND ATTACKING HEARSAY DECLARANTS

- Challenge any and all possible hearsay pretrial in MILs.
- Listen for key words like “what did they say” or “what did you hear”.
- Object as soon as asked.
- Be prepared to also object to confrontation – Art. I, Sect. 22, 6th Amendment.
- Attack the foundation.
- If admitted over objection – do not forget ER 806.

SPECIAL NOTE: OBJECT TO “HOW DID YOU GET TO THE SCENE” QUESTIONS FOR COPS

- These questions are hearsay because they require officers to explain what dispatch/others told them.
- *State v. Aaron*, 57 Wn.App. 277, 787 P.2d 949 (1990) (what dispatch told officer did not go to ‘state of mind’ b/c not at issue what officer thought).
- *State v. Rocha*, 21 Wn.App.2d 26, 504 P.3d 233 (2022) (what dispatch told officer was irrelevant – that father and son were arguing - and resulted in only evidence of defendant’s malice toward his father).

EVIDENCE RULE 901



AUTHENTICATION

EVIDENCE RULE 1001-1004



**ORIGINAL
DOCUMENTS**

ER 901 AUTHENTICATION AND ER 1001-1004 – BEST EVIDENCE

- Both rules are foundational in nature – prosecutors must present authentic evidence.
- Object if they have not brought the right witness under 901.
- Is there concern with the documents provided? Check metadata. If originals lost, consider objecting.



**OBJECTION DUE TO
PROSECUTORIAL MISCONDUCT**

PROSECUTORIAL MISCONDUCT

- Facts not in evidence
- Burden shifting – D must put on evidence/'why didn't they call X'
- Trivializing the burden – everyday decision/puzzle
- Misstates the burden
- Appeal to passion/prejudices
- Racism
- Denigrates counsel – 'their argument is a crock'
- Comment on silence – 'you didn't hear from'
- Vouching – 'I believe, no reason to lie'
- Conscience of the community – 'send a message'.

FINAL TAKEAWAYS



Object, object,
object.



When in doubt, do it
anyway.



Remember to object
to further your
theory of the case.



Always be thinking of
how to push the law
forward.



Your clients will be
happy you fought so
hard!



You got this! Go,
fight, win!