If a document is of particular evidentiary importance, either for or against a party, this may inform whether an agreement should be made with respect to the document's admissibility. Formal proof of a document can allow counsel to highlight the circumstances in which the document was created and draw additional attention to it, and thus shape its overall evidentiary impact during the course of trial.

For example, if the entire case turns on a handwritten document that was prepared in the presence of both parties, it may be advisable for that document to be proved formally in the normal course so as to focus the court's attention on its importance. Conversely, if the plaintiff's case turns on a document of dubious reliability, it may be useful for the defendant to argue against its admissibility to highlight its weaknesses, even if it is anticipated that the objection may not succeed. Similarly, it may be advisable to agree to the admission of a challenged document without objection if counsel anticipates that it will be admitted in any event: the more attention that is paid to it, the greater the weight the trier of fact may give to it.

At the start of trial, counsel should inform the trial judge of any proposed party or counsel agreements relating to admissibility or use of evidence at trial, including document agreements for the judge's comments. Regardless of party or counsel agreements, the judge is the final arbiter and gatekeeper as to what is admitted into evidence. Written agreements can then be admitted into evidence and marked as exhibits before opening statements. Agreed statements of fact and document agreements can expand the permissible scope of parties' opening statements. At the same time, parties should briefly identify the outstanding admissibility issues anticipated to arise during trial and how and when the parties propose to address those issues.

III. WHEN AND WHETHER TO OBJECT [§12.7]

A. PRE-TRIAL EVIDENCE MOTIONS AND EVIDENTIARY HEARINGS DURING TRIAL [§12.8]

When preparing for trial and anticipating the likely evidentiary disputes that exist and need to be resolved, particular thought should be directed to whether any issues and disputes can be addressed before trial. This can be done at the TMC under Rule 12-2 or at a stand-alone application in chambers under Rule 8-1. Where the case is judicially case managed, there is an increased ability to raise and resolve evidentiary disputes prior to trial, because the case management judge will normally be the trial judge.

While there is no set list of what types of evidentiary issues can be resolved pre-trial, the following subjects commonly giving rise to evidentiary issues are particularly suitable for pre-trial resolution:

- document production, use, and admissibility (including the categorization of certain documents as business or hospital records);
- expert report file production, use, and admissibility;
- admissibility and use of demonstrative evidence;
- adverse witness notices and evidence;
- subpoenas and non-party witness evidence; and
- privilege issues.

Sometimes significant evidentiary disputes cannot practicably or procedurally be addressed and resolved before trial, often because the nature of the issue and dispute requires witness evidence or is best left to the determination and discretion of the trial judge. These types of issues should be brought to the trial judge's attention at the start of trial with a description of the issue and proposed plan and time estimate to hear and resolve. Counsel should identify whether the issue needs to be determined before the start of evidence or whether it can be addressed at some convenient point during the trial. Note that while counsel may propose that an objection should be heard first, the court may determine that it should wait until a more natural point in the trial.

Where there is a plan for discrete evidentiary hearings during the trial (with or without evidence), it is useful to have agreement or directions on the exchange of materials before the hearing. It is also important for the parties to communicate their expectations as to the timing of a decision to ensure the trial judge can accommodate them. It is unfair to expect the trial judge to hear a complex evidentiary motion with significant materials or authorities and make a determination on the fly.

B. WHEN TO OBJECT DURING TRIAL [§12.9]

The fundamental threshold decision is whether the opposing party is seeking to introduce evidence or making argument contrary to the law of evidence or rules of procedure. To make this threshold determination, counsel need to listen carefully throughout the course of the trial. This is easier said than done. Days and nights during trial are long and most lawyers will admit to sometimes losing the plot during a tedious examination. It is critical to listen to the proceedings

so that objections can be made if needed. There is no pause and rewind at trial.

When considering whether an objection ought to be advanced at a civil trial, it is important to remember there is generally a "default" leaning of trial judges to admit challenged evidence and address issues with the form, credibility, and reliability of the evidence as a matter of weight.[3] This presumption is based on the undeniable reality that more appeals are allowed because evidence was wrongfully excluded by the trial judge than cases where the trial judge improperly admitted evidence. Judges are cautious by nature and more often than not will prudently, and pragmatically, address evidentiary issues through weight rather than admissibility. On a similar note, even after argument is made on an objection, the court may determine that it would be preferable if the court ruled on the objection as part of the trial reasons.

Counsel should resist objections during the course of opening submissions or closing argument unless some type of extraordinary issue arises. Where there is an objection relating to the form or content of opening or closing submissions, counsel should wait until opposing counsel is finished. It is preferable for counsel to address the issue in the course of their own submissions rather than through an objection, if possible, as the two will likely overlap. If there is a jury, objections to openings or closing should never be done before the jury.

Courts will always be prepared to hear and rule on objections on a principled basis where there are good grounds to do so. If there is a valid basis to object, and the evidence may be harmful to their client's case, counsel should object even where the circumstances make it difficult or awkward to do so.

C. WHETHER TO OBJECT DURING TRIAL [§12.10]

The paradigm objection is one that has cogent legal merit, addresses important evidence, and has some added tactical benefit such as giving a struggling witness a pause to collect their thoughts. While easy to describe, knowing how and when to advance such an objection is part skill, part science, and part art.

In deciding whether to object, counsel should consider the following questions or factors[4]:

- the materiality or relevance of the impugned evidence;
- the impact of the evidence on the case if admitted or excluded;
- the nature and severity of the evidentiary or procedural transgression—is it merely a procedural breach on a matter of

small importance or something fundamental on a key disputed issue?;

- the clarity of the objection. Is it a clear breach supported by case law or an unusual and fact-dependent situation falling directly within the court's discretion?;
- the fairness of the contest—who is truly prejudiced and was the prejudice avoidable?;
- the trial judge's track record on evidentiary rulings. Is the judge a stickler on hearsay or expert reports or are they likely to admit evidence and address the concerns in assessing weight?;
- counsel's evaluation of the trial judge's likely assessment of the relevance and weight of the evidence if admitted;
- whether the objection will give the impression counsel is unnecessarily interfering, protecting the witness, or afraid of the effect of the evidence on the merits;
- whether the objection will have the effect of unduly focusing the court's attention on the evidence, which would not occur but for the objection;
- whether the impugned evidence (or the efforts to lead it) are the product of unprepared or disorganized counsel work by opposing counsel, which should be left undisturbed;
- whether it is better to let the transgression pass so counsel can rely on the same type of evidence in their case;
- whether the weaknesses in the witness' evidence driving the objectionable questioning (e.g., leading) is better attacked through cross-examination; and
- whether the examination is otherwise going well for the client, in which case counsel may not want to break the flow.

The most critical overarching factor is the impact of the objection itself, and the impugned evidence underlying it, on the trial judge. Where the nature of the evidentiary transgression is trivial or technical, or the importance of the evidence to the matters in issue is minor, then it is usually best to resist objecting even where there is a valid basis to do so. Counsel does nothing for their case or their relationship with the trial judge by advancing pedestrian objections. Making petty objections can give the impression that counsel are trying to be too clever by half or are seeking to impede the evidence because they are afraid of the damage it will do to their client's case.

Too many objections, even where they have legal merit, devalue the force of an objection. This is the "boy who cried wolf" fable at work.

If counsel have spent their goodwill and credibility with the court on less than critical objections, the reception they may get from the judge when they really need to persuade the court may be less than overwhelming. Prudent counsel will refrain from objecting until they really need to do so. Then they will object and forcefully. This will have a real impact on the trial judge because they will know that the objection is important.

Making an objection to potentially damaging evidence is a fraught exercise. While counsel may succeed in having the evidence excluded, or its use limited, the objection gives opposing counsel a convenient platform during the course of their examination to explain the purpose, relevance, and probative value of the impugned evidence to the judge. If the objection fails, the judge will carry opposing counsel's submissions throughout the remainder of the examination. The risk of such an outcome needs to be weighed before counsel stand up.

Equally, an objection should not be made for a purely tactical reason such as interrupting opposing counsel's cross-examination, protecting the witness, or telegraphing the issue or answer to the witness. Where these consequences are the unavoidable by-product of a meritorious objection, this does not make the objection improper. However, a thinly premised objection which has the obvious effect of interrupting opposing counsel's train of inquiry and giving a beleaguered witness pause will be seen by the judge for what it is and frowned upon. Such advocacy high-wire acts are best avoided unless the pros and cons have been carefully deliberated.

Counsel should also consider the impact of the objection on the flow of the trial. Objections interfere with opposing counsel's examination and take the judge's attention away from the evidence at hand. Raising an objection without a good reason will annoy both opposing counsel and the trial judge. This will not engender a harmonious relationship with either judge or counsel, both of which are important for the civil and orderly conduct of the trial. Counsel should keep a sharp eye on how the judge reacts to objections during the course of trial. Is the judge stoic or does the judge show annoyance and impatience? Temper objections accordingly.

While there are many reasons not to make an objection, the duty and role of counsel is to fearlessly advance their client's case within the confines of their ethical and professional obligations. This means that counsel sometimes must advance an objection (or more than one objection) in the face of stiff resistance from opposing counsel and the judge.