

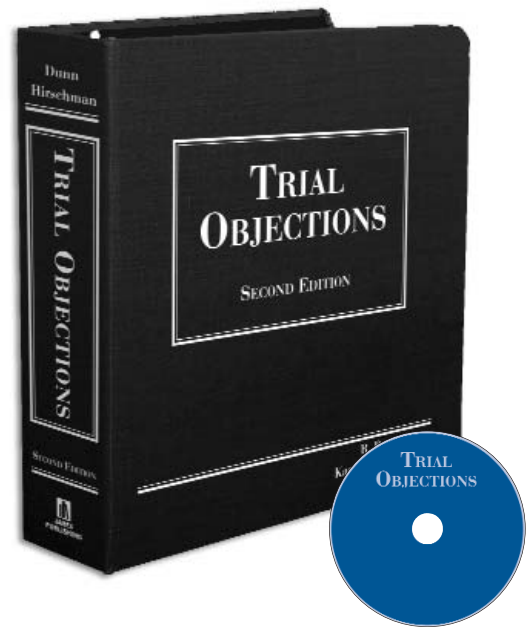
# Admit Your Evidence and Exclude or Minimize Theirs

Objections, responses, foundations, cases, and strategies in quick-reference format

**M**ost evidentiary rulings are within the judge's discretion, and are made in seconds. Bad rulings are rarely reversible.

As a result, you need to bring all your admissibility ammunition to bear at the moment of objection. Rogge Dunn and Karen Hirschman's *Trial Objections* increases your firepower with pattern objection language, explanatory comments, tactics for exclusion, arguments for admission, foundational elements, supporting authority, and practice tips for:

- *Voir dire*
- Opening statements
- Documentary evidence
- Demonstrative evidence
- Hearsay evidence
- Attorney misconduct
- Examination of witnesses
- Privileges
- Closing arguments
- And much more...



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- ✓ Lists each objection, with brief explanation and authority
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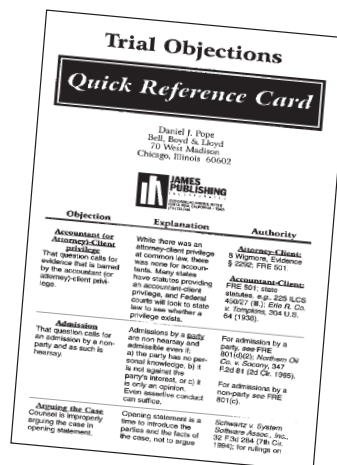


Table of contents, author biography, and sample pages inside...

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# Organized for Quick Reference

3-33 – DOCUMENTARY EVIDENCE

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examine them. Remember that the use of summaries resides totally within the court's discretion and if rejected, there is no basis for an appeal on the issue.

## Tactics

If you want to exclude a summary altogether:

- Argue that the proponent did not make the contents available to you in a **timely** manner.
- Develop the inconsistencies and inaccuracies of the summary and then ask the court to exercise its **discretion** to require production of the originals.

If you want the jury to avoid attaching undue weight to the summarized evidence:

- Attack the **credibility** of the authenticating witness, either independently or with reference to the summary.
- If the summary was not prepared by an expert, attack the **competence** of the preparer.

## Response

Have a **credible authenticating witness** lay a solid foundation.

Explain to the court that the summary has more probative value than the original because it is easier to understand.

Maintain that the court should only exercise its discretion to exclude the evidence if the summary is prejudicial or inaccurate, and that opposing counsel has the **burden** of showing prejudice or inaccuracy.

## Foundation

- The original underlying documents are **admissible** in evidence.
- The original underlying documents are **voluminous** and bulky and it would be inconvenient for the judge or the jury to use them or review them in court.
- The testifying witness is qualified to review the records.
- The testifying witness actually **reviewed** the records.
- The witness, based upon his or her review, prepared a summary of the records.
- The summary is a fair and **accurate summary** of the underlying records.

## Tactics

Use these arguments to fight admission of the opposition's evidence, or to minimize its impact. Included are alternative strategies and what you need to put on the record.

## Response

Never let an unforeseen objection catch you flat-footed again. Anticipate, preclude and meet objections with the author's expert strategies for counter-attack.

## Foundation

Here are bulleted steps for laying foundations. Frequently included are model questions for trouble-free admission. Use these lists to look for omissions when opposing foundations.

## Pattern Objections

Model language for over 110 objections. Use the language provided... or tailor it to fit your situation. Big headings and logical organization take you to the right objection in seconds.

## Comments

Authors Rogge Dunn and Karen Hirschman explain the application, scope, and purpose of the governing rules. He also offers practical advice based on his decades in the courtroom to help you anticipate possible problems.

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had any control over the tapes. Where the original recording is missing, a transcript may be used to prove the content of the recording.

*Neier v. United States*, 127 B.R. 669 (D. Kan. 1991). Originals of an I.R.S. document regarding unemployment tax liabilities would not be required, and other evidence of contents of those documents would be admissible, if originals were lost or destroyed, unless they were lost or destroyed in bad faith.

## State Cases

### ILLINOIS

*Scars Roebuck and Co. v. Seneca Ins. Co.*, 254 Ill. App. 3d 686, 627 N.E.2d 173 (Ill. App. 1993). "To introduce secondary evidence of a writing, the proponent must show: 1) the prior existence of the original, 2) the loss, destruction or unavailability of the original, 3) the authenticity of the substitute, and 4) its own diligence in attempting to procure the original.

### NEW YORK

*Brar Hill Apts. Co. v. Taperman*, 165 A.D.2d 519, 588 N.Y.S.2d 50 (N.Y. App. 1991). A power company's computer printout of an apartment's electrical usage was admissible over the tenant's argument that the best evidence would have been original bills sent to the tenant; notice had been served on the tenant to produce the bills but he had not complied.

### TEXAS

*Jensen Constr. Co. v. Dallas County*, 920 S.W.2d 761 (Tex. App. 1996). In accordance with the best evidence rule, the original writing itself must be produced when proving the contents of the original writing.

## §312.4 Summary of Original

**Objection, Your Honor. The summary of the original offered violates the best evidence rule and does not qualify under the exception for summaries.**

## Comments

Voluminous writings that cannot conveniently be examined in court are excepted from the best evidence rule if a summary of the contents was prepared. The original documents must be available for examination by both the court and opposing counsel.

The sooner you indicate you are going to use summaries, the greater likelihood they will be received into evidence. Prior notice is very important, both in allowing the judge to know that you are using summaries and to put your opponent on notice. If the summaries were prepared prior to trial, make them available to your opponent so your opponent cannot assert that there was inadequate time to

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**PRACTICE TIP:** Do not underestimate the advantages of using a summary under Rule 1006 of the Federal Rules of Evidence, particularly in combination with Rule 104(a) (Question of admissibility generally) and expert testimony under Rule 702. The Federal Rules of Evidence provide the judge with wide latitude for the admission of evidence, including summaries, especially when authenticated by an expert witness. The combination can be extraordinarily effective. Use summary charts to present expert opinion, for timelines, glossaries of terms, to analyze numerical data, and to summarize testimony about key events. Work closely with your witnesses in preparing these to ensure accuracy and completeness. Make one main point with each summary. Show the summaries to someone not involved in the case to see if the point you want to make comes across clearly.

See also §301.1, Summaries of Voluminous Documents

## Cases

### Federal Cases

*United States v. Nivica*, 887 F.2d 1110 (1st Cir. 1989), cert. denied, 494 U.S. 1005, 110 S. Ct. 1300 (1990). A summary admitted under Rule 1006 of the Federal Rules of Evidence must be based upon evidence independently established in the record.

*United States v. Leo*, 941 F.2d 181 (3d Cir. 1991). Summaries obtained and prepared by an auditor were admissible in a criminal action, even though the summaries may have contained opinions on the ultimate issue of defendant's mental state.

*United States v. Bray*, 139 F.3d 1104, 1109-10 (8th Cir. 1998). Commentators and other courts have agreed that **Rule 1006 requires the proponent of the summary to establish that the underlying documents are admissible in evidence.** In order to be admissible, a summary document must be accurate and non-prejudicial. Nothing should be lost in the translation or embellished by or annotated with the conclusions or inferences drawn by the proponent. Once a Rule 1006 summary is admitted, it may go to the jury room, like any other exhibit. In order to lay a proper foundation for a summary, the proponent should present the testimony of the witness who supervised its preparation.

*United States v. Robbins*, 197 F.3d 829, 836-37 (7th Cir. 1999). The trial court did not abuse its discretion in admitting an exhibit which summarized documentary evidence supporting the testimony of a government witness who allegedly transported marijuana at the defendant's direction. The court held that the summary did not improperly permit the government to vouch for the witness despite the labeling of documented trips as "marijuana" trips. Each entry listed specific exhibit numbers of the original documents, and the headings merely summarized the testimony of the witnesses.

*United States v. Possick*, 849 F.2d 332 (8th Cir. 1988), denial of habeas corpus aff'd, 975 F.2d 866 (8th Cir. 1992). The rule does not require that it be literally impossible to examine all the underlying records but only that an

## Practice Tips

Elevate your advocacy with the cautions, strategies, and effect of related rules provided here.

## Foundation

Organized by jurisdiction, these federal and state authorities speed trial preparation and help you cite supporting law in the courtroom.

## Table of Contents (partial listing)

### Introduction

**Objections in General:** Objection Procedure, Making a Record, Key Cases; **Motion in Limine:** Advantages and Disadvantages, Types of Motions, Key Cases, Sample Form and Order; **Motion to Strike:** When to Make a Motion to Strike; **Curative or Limiting Instruction:** Sample Curative Instruction, Sample Limiting Instruction, Rules and Key Cases; **Offer of Proof:** Procedure, Key Cases, Response; **Pocket Briefs**

### Preliminaries

**Introduction to Voir Dire:** Arguing the Case, Educating the Jury, Indoctrinating the Jury, Legal Matters, Repeating *Voir Dire*, Peremptory Challenges; **Opening Statement:** Arguing the Case, Financial or Family Circumstances, Insurance Coverage, Matter Precluded by Order in Limine, Repairs, Settlement Negotiations, Unsupported Matter;

### Evidence

**Demonstrative Evidence:** Chart, Diagram, Graph or Map, Model, Photograph, Videotape or Motion Picture, X-Ray, Demonstrations/Re-creations/Experiment; **Documentary Evidence:** Best Evidence Rule, Best Evidence Exceptions, Parol Evidence, Public Records, Remainder of Writings or Recorded Statements, The Document Speaks for Itself; **Hearsay Evidence:** Hearsay Within Hearsay; **Non-Hearsay Evidence:** Admission, Co-Conspirator's Statement, Motive, Plan or Design, Non-Assertive Statement, Notice or Knowledge, Prior Inconsistent Statement, Verbal Act; **Hearsay Exceptions: Availability Immaterial and Declarant Unavailable:** Ancient Document, Business Record, Excited Utterance, Marriage or Baptismal Certificate, Medical Diagnosis, Mental or Physical Condition (State of Mind), Present Sense Impression, Property Interest, Public Record, Recorded Recollection, Reputation, Residual

Exception, Against Interest, Dying Declaration, Former Testimony, Personal or Family History, Recent Perception

### Witness

**Competence of Witness:** Conviction, Dead Man's Act, Infant, Necessity of Oath, Religious Belief, Spouse; **Examination of Witness:** Ambiguous or Unintelligible, Argumentative, Asked and Answered, Assuming Facts Not in Evidence, Beyond Scope of Testimony, Conclusion Called For, Compound, Character and Habit, Immaterial, Impeaches Own Witness, Irrelevant, Narrative Called for, Non-Responsive, Prejudicial, Self-Serving, Limited Admissibility, Lacks Personal Knowledge; **Expert Witness:** Foundation, Hypothetical Question, Qualifications, Specific Experts, Fees; **Leading Question:** Assuming Facts Not in Evidence, Children and Other Special Circumstances, Cross-Examination, Hostile, Evasive, or

Adverse Witness, Preliminary Question; **Privilege:** Attorney-Client, Attorney Work Product Doctrine, Doctor-Patient, Husband-Wife, Others;

### Misconduct

**Attorney Misconduct:** Arguing in Jury's Presence, Failure to Comply with Order, Improper Comment, Improper Witness, Presenting Non-admitted Matter to Jury; **Judicial Misconduct:** Commenting on Evidence, Embarrassing Counsel, Examining Witness, Judicial Notice of an Adjudicative Fact

### Summation

**Closing Argument:** Attacking Opposing Counsel, Party or Witness; Collateral Source, Failure to Testify, Golden Rule Argument, Per Diem Argument, Personal Belief; Racial, Political or Religious Comment; Self Interest, Similar Case, Wealth or Poverty

### Index of Objections

## About the Book

*Trial Objections* has over 600 pages measuring 5-1/2 x 8-1/2 inches in a sturdy linen 3-ring binder. 18 tabbed and color-coded dividers quickly take you to the relevant section. A detailed key-word index plus an alphabetical index of objections pinpoint your searches.

Also included is a fold-out pocket guide to objections. Measuring 34 x 11 inches and printed on durable card stock, this cheat sheet describes the most common 27 objections, provides pattern language for making each objection, and cites the key supporting authority.

*Trial Objections* is updated annually for \$59. Updates issued within three months of book purchases are free. The book costs \$99 and may be returned for any reason within the first 30 days.

## Civil and Criminal

*Trial Objections* is written for use in both civil and criminal cases. Rules, cases, tactics and responses for criminal evidentiary questions are sprinkled liberally throughout the book.

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- 3 spoliation letters
  - 4 direct examinations of expert witnesses
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  - 10 trial briefs
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## About the Authors

**R. Rogge Dunn** is a trial lawyer who loves trying cases. A partner in the Dallas firm of Clouse Dunn Hirsch LLP, he has litigated complex business, employment, partnership, and insurance disputes throughout the country. He has tried cases to a jury verdict in four states.

Although approximately two-thirds of his practice involves representing corporate defendants, Mr. Dunn has won settlements and judgments that have netted more than \$250 million for his plaintiff clients, including million-dollar jury verdicts in Texas, Louisiana, and Arkansas.

Mr. Dunn is one of only approximately 25 attorneys in Texas who is Board Certified in both Civil Trial Law *and* Labor and Employment Law. He received his JD, with honors, from the University of Texas in 1983, where he served as a note editor of the *Texas Law Review* and was a member of the Board of Advocates. He clerked for the Honorable Reynaldo Garza of the U.S. Fifth Circuit Court of Appeals from 1983 to 1984, and taught at Southern Methodist University as an adjunct professor for 14 years. He enjoys exchanging ideas and strategies with other trial attorneys. He can be reached at [rdunn@trialtested.com](mailto:rdunn@trialtested.com).

**Karen L. Hirschman** is a partner at Vinson & Elkins in Dallas where she specializes in large and complex business disputes.

She has tried cases involving antitrust, patent, trade secret, legal and accounting malpractice, business torts, and employment discrimination disputes. Her most recent trial involved the successful defense of Ernst & Young against a \$300 million claim for alleged fraud and accounting malpractice.

Ms. Hirschman is a frequent lecturer at ABA and State Bar seminars, and co-chairs the Women's Career Development Council at Vinson & Elkins.

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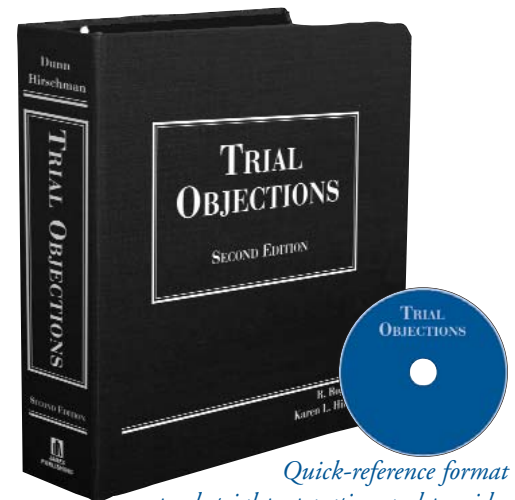
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# How to Make and Meet Objections

Use Rogge Dunn and Karen Hirschman's *Trial Objections* to help get your evidence in and keep your opponent's out. It provides the following courtroom ammunition for over 110 objections:

1. Pattern objection language in boldfaced type
2. Authoritative comments explaining the rule
3. Tactics to help get your objection sustained
4. Responsive strategies to overcome objections
5. Foundations for introducing documentary evidence
6. Supportive cases to cite to the judge
7. Practice tips learned from decades in the courtroom

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