Essential Evidentiary Foundations for the Admission and Exclusion of Proof during Trial

Charles R. Mullins, Esq.
Coxwell & Associates, PLLC
Jackson, MS

"I object, Your Honor. This trial is a travesty of a mockery of a sham of a travesty of two mockeries of a sham! " Woody Allen, *Bananas* (1971)

"I object. The exhibit is confusing, unfairly prejudicial, misleading, irrelevant, barred by the exclusionary rule, and not a fair and
accurate representation of what it purports to represent."

"I don't make the rules. I just play by 'em."

"If you want to play the game, you had better know the rules of the game.
And if you want your opponent to play by the rules, you'll not
only have to recognize the infraction, you'll have to complain
to the referee and tell him/her exactly which rule was violated by the opposition."

"The rookie lawyer knows the rules; the veteran knows the exceptions."

I. Why is it so important to admit or exclude evidence (besides the obvious?) Because of the discretion given to the trial judge on appeal

A. The standard of review governing the admission or exclusion of evidence is abuse of discretion. *Catchings v. State*, 39 So. 3d 943, 950 (¶29) (Miss. Ct. App. 2009) (citing *Williams v. State*, 991 So. 2d 593, 597 (¶8) (Miss. 2008)). A circuit court's decision to admit or exclude evidence will only be reversed if it "result[s] in prejudice and harm or adversely affect[s] a substantial right of a party." *Id.* at 951 (¶34) (quoting *Hammons v. State*, 918 So. 2d 62, 65 (¶10)

B. Very difficult to show abuse of discretion which prejudices your client or a substantial right.

1. Know your evidentiary rules (Captain Obvious)

2. Object! Plain error is not walking through that door to save you!

3. Consider filing Motions in Limine to preserve your objections for appeal

II. 5 points to consider for tangible, documentary or electronical evidence:

1. Is the evidence relevant? M.R.E. 401 Does it make a fact that is of consequence to the action more or less probably than it would be without the evidence?
2. Has the evidence been authenticated?
   Has the proponent produce "evidence sufficient to support a finding that the electronic evidence is what the proponent claims?"
3. Is the evidence hearsay?
   Is the evidence offered to prove the truth of what it asserts?
   If so, does it satisfy a hearsay exception? Are confrontation rights implicated?
4. Is the evidence a writing, recording, or photograph?
   Is it offered to prove the content?
   If so, is it either the original or a duplicate (counterpart produced by the same impression as the original, or from same matrix, etc.) unless genuine questions of authenticity or fairness exist?
5. Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence?

III. **T**o exclude evidence, when you object to the admission of the other side's evidence, your objection must be (1) timely. It must also be specific as to (2) ground, (3) party, (4) part, and (5) purpose. This, your objection to the admissibility of evidence must:

- Follow rapidly in a *timely* manner after the occurrence of the objectionable act.
- State a specific ground of evidentiary inadmissibility.
- Identify the *party* against whom it is inadmissible.
- Identify the *part* of the evidence that is inadmissible.
- Object to the opponent's general unrestricted offer of evidence when it is admissible only for a limited purpose.

IV. Impeachment

A. Prior inconsistent statements

1. Rule 613: [e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interest of justice otherwise require." And "[o]ur precedent is clear that, while a prior inconsistent statement of a testifying witness can be used to impeach the witness's credibility, it is not admissible as substantive evidence . . . ." *Collier v. State*, 2016 Miss. LEXIS 56 (Miss. Feb. 4, 2016) (footnotes omitted).

2. Beware of the exceptions in M.R.E. 801(d): "This Court has more recently noted that, regardless of whether the witness has been impeached, the Mississippi Rules of Evidence, adopted in 1986, "provide that such identification evidence is not hearsay and is admissible as substantive material." Livingston v. State, 519 So. 2d 1218, 1221 (Miss. 1988). Indeed, Mississippi Rule of Evidence 801(d)(1)(C) provides that a **statement** is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the **statement**, and the **statement** is one of identification of a person made after perceiving the person." Miss. R. Evid. 801(d)(1)(C). " Smith v. State, 25 So. 3d 264, 2009 Miss. LEXIS 546 (Miss. 2009)

3. You can now impeach your own witness without a showing of "surprise or hostility" overruling Wilkins v. State, 603 So.2d 309 (Miss. 1992) and its progeny: "We hold that, to prevent abuse of Rule 607, impeachment should not be allowed where the trial court finds the purported purpose of impeachment for offering the **statement**(s) is in bad faith, or is subterfuge to mask the true purpose of offering the **statement**(s) to prove the matter asserted. See, e.g., **State** v. Hunt, 324 N.C. 343, 378 S.E.2d 754, 758 (N.C. 1989) (citing DeLillo, 620 F.2d 939; Webster, 734 F.2d 1191). Our trial judges are well-suited to make these calls. To the extent that *Wilkins* holds otherwise, it is overruled."

   Carothers v. State, 152 So. 3d 277, 2014 Miss. LEXIS 592 (Miss. 2014)

V. Practice Tips for Making Objections

+ TIP 1: IF YOU ANTICIPATE THAT OBJECTIONABLE MATERIAL WILL BE OFFERED OR INTRODUCED BY THE OPPOSITION, CONSIDER USING A *MOTION IN LIMINE* TO BRING THIS TO THE ATTENTION OF THE COURT WELL BEFORE THE JURY EVER HEARS ANY REFERENCE TO THE OBJECTIONABLE MATTER. YOUR GOAL IS TO SHIELD THE JURY FROM EXPOSURE TO INADMISSIBLE EVIDENCE.

+ TIP 2: IF YOU MOVE TO EXCLUDE OR SUPPRESS EVIDENCE AND YOUR MOTION TO EXCLUDE OR SUPPRESS IS NOT GRANTED, BE SURE THAT YOU OBTAIN A SPECIFIC PRETRIAL RULING THAT THE TRIAL JUDGE STATES IS DEFINITIVE. OTHERWISE, TO PRESERVE ERROR, YOU WILL HAVE TO OBJECT TO THE ADMISSION OF THE EVIDENCE AGAIN AT THE TIME IT IS OFFERED AT TRIAL. SEE RULE 103 (a) FRE AND MRE.

+ TIP 3: IF YOU HAVE TRIED UNSUCCESSFULLY TO KEEP THE GOVERNMENT FROM IMPEACHING THE DEFENDANT WITH A PRIOR CONVICTION PURSUANT TO THE INTERNAL BALANCING TEST OF RULE 609, YOU WILL NOT BE ALLOWED TO APPEAL THE COURT'S DECISION TO ALLOW THE IMPEACHMENT, UNLESS YOUR CLIENT TAKES THE STAND AND EXPOSES HIMSELF TO THE IMPEACHMENT. SEE *LUCE V. UNITED STATES*, 469 U.S. 38 (1984).

+ TIP 4: BE VERY CAREFUL WHEN YOU MAKE A SO-CALLED "RUNNING OBJECTION"; BE CERTAIN THAT YOUR ORIGINAL OBJECTION IS AS PERFECTLY FORMED AS POSSIBLE; DO NOT TREAT YOUR RUNNING OBJECTION AS CARRYING OVER TO ALL WITNESSES; WITH EACH NEW WITNESS WITH WHOM THE OBJECTIONABLE SUBJECT IS RAISED, EXPRESSLY STATE YOUR OBJECTION INTO THE RECORD AND ASK FOR A RUNNING OBJECTION TO ANY SUCH INQUIRIES OF THAT WITNESS.

+ TIP 5: THE *REMAINDER* RULE AND THE RULE OF *OPTIONAL COMPLETENESS* DO NOT MAKE OTHERWISE INADMISSIBLE EVIDENCE ADMISSIBLE. REMEMBER THAT THE *REMAINDER* RULE OF RULE 106 MRE AND FRE ONLY APPLIES TO WRITINGS OR RECORDED STATEMENTS; IF YOU OFFER EVIDENCE OTHER THAN A WRITING OR RECORDED STATEMENT, THE OPPOSITION DOES NOT HAVE A RIGHT *AT THE TIME* OF THAT OFFER TO INTRODUCE ANOTHER PART OF THAT EVIDENCE, EVEN IF IT IS ADMISSIBLE. THE REMAINDER RULE DOES NOT APPLY UNLESS THE EVIDENCE YOU ARE OFFERING IS A WRITING OR RECORDED STATEMENT.

+ TIP 6: IN LIEU OF ACTUAL EVIDENCE, OFFER TO STIPULATE TO OTHERWISE ADMISSIBLE PRIOR CONVICTIONS ALLEGED FOR ENHANCEMENT. ARGUE THAT THIS WILL PREVENT UNFAIR PREJUDICE, E.G., UNDER RULE 403 FRE & MRE; CITE

THE USSC CASE OF *OLD CHIEF V. UNITED STATES*, 519 U.S. 172 (1997). IF THE COURT DENIES YOUR REQUEST FOR AN AGREED STIPLATION OF THE PRIORS, OBJECT THAT THE RULING IS UNFAIRLY PREJUDICIAL IN THAT THE DANGER OF UNFAIR PREJUDICE SUBSTANTIALLY OUTWEIGHS THE PROBATIVE VALUE OF ALLOWING INTRODUCTION OF REAL EVIDENCE OF THE PRIORS.

+ TIP 7: IF YOUR OPPONENT TRIES TO INTRODUCE A SUMMARY WITHOUT MAKING ARRANGEMENTS FOR YOU TO SEE THE UNDERLYING MATERIALS AT A REASONABLE TIME AND PLACE OUT OF COURT, OBJECT TO THE SUMMARY UNDER RULE 1006 FRE & MRE.

+ TIP 8: OBJECT IF YOUR OPPONENT TRIES TO REQUIRE YOUR WITNESS TO CHARACTERIZE THE TESTIMONY OF ANOTHER WITNESS, E.G., AS WHERE A PROSECUTOR ASKS A DEFENDANT TESTIFYING IN HIS OWN BEHALF WHETHER A POLICE OFFICER WITNESS WAS LYING WHEN THE OFFICER SAID SOMETHING INCRIMINATING ABOUT THE DEFENDANT. YOUR OBJECTION SHOULD BE THAT THE QUESTION CALLS FOR IMPROPER CHARACTER EVIDENCE. YOU CAN ALSO ADD THAT THE QUESTION IS ARGUMENTATIVE. YOU CAN ALSO ARGUE THAT IT CALLS FOR IMPROPER OPINION EVIDENCE. THE REASON WHY SUCH A QUESTION CALLS FOR IMPROPER CHARACTER EVIDENCE IS THAT IT ASKS ONE WITNESS TO COMMENT ON THE CREDIBILITY OF ANOTHER WITNESS IN AN IMPROPER FORM. THE RULES OF EVIDENCE, E.G., RULE 608 FRE & MRE, MAY ALLOW ONE WITNESS TO VENTURE AN OPINION REGARDING THE TRUTH AND VERACITY OF ANOTHER WITNESS WHEN A SUFFICIENT SHOWING OF FAMILIARITY IS SHOWN; BUT THE RULES DO NOT ALLOW THE OPINION CHARACTER WITNESS TO VENTURE AN OPINION ON THE TRUTH OF THE TESTIMONY OF ANOTHER WITNESS. NEITHER LAY NOR EXPERT WITNESSES SHOULD BE ALLOWED TO TESTIFY THAT ANOTHER WITNESS IS LYING OR FAKING. THAT DETERMINATION IS FOR THE JURY. IN SUPPORT OF THE OBJECTION, ALSO CITE THE RULE 403 FRE & MRE PROHIBITION AGAINST UNFAIR PREJUDICE AND ARGUE THAT THE PROBATIVE VALUE OF SUCH EVIDENCE IS SUBSTANTIALLY OUTWEIGHED BY THE FACT THAT SUCH A QUESTION UNFAIRLY PLACES THE WITNESS IN SUCH AN UNFLATTERING LIGHT AS TO POTENTIALLY UNDERMINE HIS ENTIRE TESTIMONY. ARGUE THAT OPPOSING COUNSEL SHOULD BE ARTICULATE ENOUGH TO SHOW THE JURY WHERE THE TESTIMONY OF WITNESSES DIFFER WITHOUT HAVING THE WITNESS COMMENT ON THE CREDIBILITY OF ANOTHER WITNESS.

+ TIP 9: EVIDENCE OF UNCHARGED CONDUCT ADMISSIBLE UNDER RULE 404(b) FRE & MRE STILL MAY BE EXCLUDED UNDER RULE 403 FRE & MRE IF ITS PROBATIVE VALUE IS SHOWN TO BE *SUBSTANTIALLY* OUTWEIGHED BY THE DANGER OF *UNFAIR* PREJUDICE; NOTE THAT THE BURDEN OF PROOF IS ON THE OPPONENT OF THE EVIDENCE, I.E., THE OBJECTING PARTY, NOT THE PARTY, PROPONENT, SEEKING TO INTRODUCE THE UNCHARGED CONDUCT EVIDENCE.

+ TIP 10: RULE 602 FRE and MRE REQUIRING PERSONAL KNOWLEDGE OF ALL FACT WITNESSES OTHER THAN EXPERTS APPLIES TO HEARSAY DECLARANTS AS WELL AS IN-COURT DECLARANTS. YOU MAY OBJECT TO LACK OF KNOWLEDGE ON THE PART OF THE HEARSAY DECLARANT.

+ TIP 11: BE WARY OF DYING DECLARATIONS BY THE PROSECUTION IN JURISDICTIONS WHERE LAW ENFORCEMENT OFFICERS HAVE BEEN TRAINED TO TELL VICTIMS OF HOMICIDAL VIOLENCE, "IT DOESN'T LOOK GOOD, BUDDY. I DON'T THINK YOU'RE GONNA MAKE IT. IS THERE ANYTHING YOU'D LIKE TO SAY ABOUT WHO HURT YOU OR WHY?" The *Crawford* ruling could affect trial admissibility of other hearsay statements that "declarants would reasonably expect to be used prosecutorially," i.e., a declaration against interest made to a law enforcement officer.

+ TIP 12: IF YOU WANT TO INTRODUCE EVIDENCE THAT MAY BE CONTROVERSIAL, ANTICIPATE THE EVIDENTIARY PROBLEMS IN ADVANCE AND CONSIDER ALERTING THE JUDGE THAT YOU WISH TO MAKE AN OFFER OF PROOF; YOU CAN FILE A MOTION TO ADMIT IN WHICH YOU EXPLAIN THAT YOU PLAN TO INTRODUCE CERTAIN EVIDENCE AND ANTICIPATE A POSSIBLE OBJECTION TO SUCH EVIDENCE; LET THE COURT KNOW THAT IF THE OPPOSITION'S OBJECTION IS SUSTAINED, YOU WISH TO MAKE AN OFFER OF PROOF OR PROFFER; BE READY TO MAKE WITNESS OFFER OF PROOF, RATHER THAN A LAWYER OFFER, IF THE OTHER SIDE DEMANDS IT; BE CERTAIN TO GET A RULING ON YOUR OFFER OF PROOF (PROFFER); SOMETIMES JUDGES WILL CHANGE THEIR RULINGS AFTER HEARING THE OFFER OF PROOF AND KNOWING IT MAY NOW BE A GROUND FOR APPEAL.

+ TIP 13: BE ZEALOUS IN REQUIRING THE COURT TO ENFORCE THE RULES OF THE GAME, BUT BE CONSISTENTLY CIVIL WITH THE COURT IN MAKING YOUR OBJECTIONS. DON'T BE A HYPERCRITICAL, CARPING CENSOR TOO READY TO RAISE OBJECTIONS TO TRIVIAL MATTERS. JUDGES USUALLY HAVE WIGGLE ROOM WITH REGARD TO EVIDENCE. YOUR OVERALL ATTITUDE IN MAKING AND RESPONDING TO OBJECTIONS CAN INFLUENCE THE TRIAL JUDGE TO WIGGLE TOWARD YOU OR AWAY FROM YOU. YOUR REPUTATION AS AN ADVOCATE KNOWLEDGEABLE OF THE RULES MAY PRECEDE YOU.

+ TIP 14: OBJECT IF OPPOSING COUNSEL EXCUSES A SUBPOENAED WITNESS, BEFORE OR DURING TRIAL, WITHOUT THE COURT'S APPROVAL. ONLY THE COURT CAN EXCUSE A SUBPOENAED WITNESS.

+ TIP 15: IF YOU CALL AN ADVERSE PARTY OR A WITNESS ALIGNED OR IDENTIFIED WITH THE OPPOSITION, REMEMBER THAT YOU CAN OBJECT TO THE OPPOSITION LEADING THE ADVERSE WITNESS ON CROSS. (IN THIS SITUATION, YOU ALSO HAVE THE RIGHT TO LEAD THE ADVERSE WITNESS ON DIRECT.)

+ TIP 16: OBJECT BEFORE THE DAMAGE IS DONE.

+ TIP 17: LEARN TO WEAVE THE PHILOSOPHICAL PURPOSE OF THE EVIDENTIARY RULES INTO THE SUBSTANCE OF YOUR OBJECTION.

+ TIP 18: BE SURE TO CLARIFY THE IMPROPER NON-VERBAL GESTURES OF YOUR OPPONENT (OR THE JUDGE) FOR THE RECORD BY DICTATING A VERBAL DESCRIPTION OF WHAT HAPPENED. NEVER FORGET THAT AS FAR AS THE APPELLATE COURT IS CONCERNED *IF IT ISN'T IN THE RECORD, IT DIDN'T HAPPEN*!

+ TIP 19: AS A GENERAL RULE, DURING THE TRIAL, DON'T GO "OFF THE RECORD." THIS MEANS THAT YOU SHOULD NOT ACCEDE TO THE COURT'S REQUEST TO DISCUSS THE CASE OFF THE RECORD. IF THE COURT INSISTS THAT ITS WORDS BE OFF THE RECORD AND ORDERS THE COURT REPORTER NOT TO TRANSCRIBE ITS COMMENTS, WAIT UNTIL THE COURT IS FINISHED. DO NOT INTERRUPT THE COURT, AND DO NOT MAKE ANY OFF THE RECORD RESPONSE OR COMMENT. IF THE COURT'S OFF THE RECORD COMMENTS ARE OF SUFFICIENT CONTENT, WAIT UNTIL TESTIMONY RESUMES, AND STATE INTO THE RECORD WHAT THE COURT SAID IN ITS "OFF THE RECORD" COMMENTS TO YOU. [NOTE: THIS WILL NOT ENDEAR YOU TO THE COURT, BUT WILL PROTECT YOUR CLIENT AND SERVE AS NOTICE THAT YOU WON'T SUBMIT TO BULLYING TACTICS BY THE JUDGE.]

+ TIP 20: REMEMBER THAT YOU STILL HAVE A GOOD HEARSAY OBJECTION WHEN YOUR OPPONENT ASKS A WITNESS TO PARAPHRASE OR SUMMARIZE WHAT A DECLARANT SAID. THE CUNNING OPPONENT MAY TRY THIS PARLOR TRICK BY SAYING, "WITHOUT TELLING US EXACTLY WHAT WAS SAID, TELL US THE GIST OF WHAT YOUR INVESTIGATION REVEALED."

+ TIP 21: DON'T FORGET TO ASSERT YOUR RIGHT TO A LIMITING INSTRUCTION WHEN THE OPPOSITION'S EVIDENCE IS ADMISSIBLE ONLY FOR A LIMITED PURPOSE. BECAUSE THE LIMITING INSTRUCTION EMPHASIZES THE EVIDENCE IN QUESTION, YOUR DISCRETION MUST GOVERN WHETHER IT IS IN YOUR BEST INTEREST TO RAISE THE ISSUE OF A LIMITING INSTRUCTION. IF YOU ARE ENTITLED TO A LIMITING INSTRUCTION ON A CRUCIAL ITEM OF EVIDENCE AND THE TRIAL JUDGE REFUSES TO GIVE IT, YOU MAY HAVE A GOOD POINT FOR APPEAL.

+ TIP 22: WHEN YOU ARE OBJECTING TO YOUR OPPONENT'S FAILURE TO ESTABLISH AN EVIDENTIARY FOUNDATION OR PREDICATE THROUGH A WITNESS' ANSWERS, REMEMBER THAT THE PROPONENT OF THE EVIDENCE MUST GENERALLY CONVINCE THE TRIAL JUDGE BY A PREPONDERANCE OF THE EVIDENCE THAT THE FOUNDATION FACTS ARE *TRUE*.

+ TIP 23: CERTAIN FRONT END PREFATORY WORDS, E.G., "SO," OR PHRASES, E.G., "WOULD YOU SAY," ARE GIVEAWAYS THAT A QUESTION WILL BE LEADING. QUESTIONS THAT CONTAIN PHRASES LIKE "COULD YOU, " "WHAT IF," "DO YOU

SUPPOSE," ETC., OFTEN PRESAGE A QUESTION THAT ASKS THE WITNESS TO SPECULATE.

+ **TIP 24:** THE RULES OF EVIDENCE APPLY TO JURY ARGUMENT. THERE ARE A NUMBER OF SPECIFIC OBJECTIONS YOU CAN MAKE TO THE OPPOSITION'S JURY ARGUMENT. OBJECT TO THE OPPOSITION'S ARGUMENT SPARINGLY, E.G., WHEN YOU ARE CERTAIN THAT YOU HAVE A GOOD SUBSTANTIVE OBJECTION FOR APPEAL. REMEMBER THAT THE PROSECUTION HAS NO APPEAL FROM AN IMPROPER DEFENSE JURY ARGUMENT, BUT "WHEN YOU STRAY, YOU MAY HAVE TO PAY" UNDER THE "REPLY DOCTRINE," THE "INVITED ARGUMENT RULE," OR THE "OPENING THE DOOR" THEORY. THESE ARE THREE LABELS FOR THE RULE OF JURY ARGUMENT, RECOGNIZED IN SOME CASES, THAT ALLOWS ONE SIDE TO REPLY TO IMPROPER ARGUMENT OF THE OTHER SIDE.

+ **TIP 25:** SHARPEN YOUR OBJECTING SKILLS BY PLAYING EVIDENCE/OBJECTION GAMES. HARVARD EVIDENCE PROFESSOR NESSON'S WEB SITE http://www.law.harvard.edu/publications/evidenceiii/problems.htm HAS A LONG LIST OF EVIDENCE PROBLEMS. HOW DO YOU GET IT IN, AND HOW DO YOU KEEP IT OUT? WHAT IS THE PROPER OBJECTION AND RESPONSE? NOTE THAT THE HARVARD PROFESSOR HAS A LINK TO THE FEDERAL RULES OF EVIDENCE AT THE BOTTOM OF THE PROBLEM PAGE. USE THE RULES AS A RESOURCE IN TRYING TO SOLVE THE EVIDENCE PROBLEMS.

VI. PRACTICE TIPS FOR MEETING AND DEFEATING OBJECTIONS

+ **TIP 1:** RULE 404(b) FRE & MRE UNCHARGED MISCONDUCT EVIDENCE CAN BE OFFERED FOR ANY PROPER PURPOSE OTHER THAN PROOF OF ACTION IN CONFORMITY THEREWITH (WE CALL THIS IMPROPER PURPOSE "PROPENSITY EVIDENCE."); NOTE THAT THE STATED EXAMPLES, I.E., MOTIVE, OPPORTUNITY, INTENT, PREPARATION, PLAN, KNOWLEDGE, IDENTITY, ABSENCE OF MISTAKE, OR ACCIDENT, ARE NOT EXCLUSIVE; RATHER, THEY ARE SIMPLY EXAMPLES OF PROPER PURPOSES FOR PROOF OF UNCHARGED MISCONDUCT.

+ **TIP 2:** WHEN INTRODUCING BUSINESS RECORDS, VET THEM IN ADVANCE TO BE CERTAIN THEY DON'T INCLUDE MATERIALS RECEIVED FROM OUTSIDE SOURCES THAT DON'T COMPLY WITH THE PREDICATE REQUIREMENTS, E.G., NOT WITHIN THE KNOWLEDGE OF THE RECORD MAKER.

+ **TIP 3:** THE EXCEPTION ALLOWING HEARSAY STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT CAN BE A STATEMENT MADE TO THE "LITIGATION" DOCTOR AS WELL AS TO THE "TREATING" DOCTOR. SEE RULE 803(4) FRE & MRE.

+ **TIP 4:** AN ADOPTIVE ADMISSION (STATEMENT) UNDER RULE 801(d)(2)(B) FRE & RULE 801(e)(2)(B) MRE DOES NOT HAVE TO BE MADE IN THE PRESENCE OF THE

DEFENDANT; ALL THAT IS NECESSARY IS PROOF THAT THE DEFENDANT HAS MANIFESTED AN ADOPTION OF BELIEF IN ITS TRUTH.

+ **TIP 5:** REMEMBER THAT RULE 806 FRE & MRE ALLOWS YOU TO IMPEACH THE CREDIBILITY FOR A NON-WITNESS CO-CONSPIRATOR DECLARANT, WHOSE STATEMENT IS OFFERED AGAINST YOUR CLIENT, BY ANY EVIDENCE THAT WOULD BE ADMISSIBLE FOR SUCH PURPOSE IF THE DECLARANT HAD ACTUALLY TESTIFIED AS A WITNESS. THIS INCLUDES YOUR RIGHT TO IMPEACH THE NON-TESTIFYING DECLARANT WITH PROOF OF: (1) ADMISSIBLE PRIOR CONVICTIONS UNDER RULE 609 FRE & MRE; (2) LACK OF PERCEPTION; (3) BIAS OR ANIMUS OR INTEREST; (4) PRIOR INCONSISTENT STATEMENT UNDER RULE 613 FRE & MRE WITHOUT THE NECESSITY OF AFFORDING THE DECLARANT AN OPPORTUNITY TO DENY OR EXPLAIN; (5) BAD CHARACTER EVIDENCE RE TRUTHFULNESS UNDER RULE 608 FRE & MRE, ETC. [NOTE: IT MAKES SENSE THAT THE RULES ALL0W YOU TO MAKE THIS ATTACK ON A NON-WITNESS. OTHERWISE, YOUR OPPONENT COULD WALL OFF IMPEACHING EVIDENCE SIMPLY BY INTRODUCING THE CO-CONSPIRATOR'S OUT-OF- COURT STATEMENTS AND KEEPING THE CO-CONSPIRATOR OFF THE STAND.]

+ **TIP 6:** IF YOU PLAN TO INTRODUCE A SUMMARY OF VOLUMINOUS WRITINGS, RECORDINGS, AND/OR PHOTOGRAPHS THAT CANNOT BE CONVENIENTLY EXAMINED IN COURT, BE SURE TO MAKE ARANGEMENTS FOR THE OPPOSITION TO VIEW THE DOCUMENTS UNDERLYING THE SUMMARY MATERIALS AT A REASONABLE TIME AND PLACE. BEND OVER BACKWARDS TO ACCOMMODATE THE OPPOSITION BECAUSE THE COURT HAS THE POWER TO ORDER THAT THE MATERIALS BE PRODUCED IN COURT. SEE RULE 1006 FRE & MRE. ALSO, IF YOUR SUMMARY INCLUDES BUSINESS RECORDS, SAVE YOURSELF THE TROUBLE OF HAVING TO CALL A LIVE AUTHENTICATING WITNESS BY USING A SELF-AUTHENTICATION CERTIFICATE TO ESTABLISH THE NECESSARY PREDICATE FOR THE EXCEPTION. SEE RULE 902 FRE & MRE, CONTAINING THE FORM FOR THE CERTIFICATE.

+ **TIP 7:** IF YOUR OBJECTION TO EVIDENCE IS SUSTAINED AND THE OPPOSING COUNSEL MAKES AN OFFER OF PROOF, REQUEST THAT THE OFFER OF PROOF BE IN WITNESS FORM, I.E., THAT THE OFFER OF PROOF BE IN Q & A OF THE WITNESS. YOU HAVE THIS RIGHT UNDER RULE 103(B) MRE. HOWEVER, FRE 103(C) VESTS THE TRIAL JUDGE WITH THE DECISION OF WHETHER THE OFFER OF PROOF IS TO BE IN Q & A FORM. DURING THE PROFFER (OFFER OF PROOF), WHEN THE OPPONENT IS FINISHED WITH HIS DIRECT QUESTIONS OF THE WITNESS YOU SHOULD BE ENTITLED TO CROSS-EXAMINE THE WITNESS DURING THE OFFER OF PROOF RE THE ADMISSIBILITY OF THE DISPUTED EVIDENCE. BLUNT THE FORCE OF THE OPPONENT'S OFFER OF PROOF BY SHOWING ITS EVIDENTIARY FALLIBILITY. OTHERWISE, THE OPPONENT'S LAWYER OFFER OF PROOF MAY BE SO WHOLLY ONE-SIDED THAT THE COURT WILL REVERSE ITS RULING AND ADMIT THE HARMFUL EVIDENCE.

VII. The "Basic Two Dozen" Objections

A. Admitted. "OBJECTION: Your Honor, the matter already has been admitted by a stipulation which is in the record [or already has been established by the court's order]. Under Rule 403 we do not need to waste time on something that does not have to be decided."

DISCUSSION: If a matter has been admitted, it does not need to be the subject of any testimony or evidence to be considered as true. The mechanics of getting the item considered by the trier of fact depends on whether it is a bench or jury trial. If the trial is to the court, simply draw the judge's attention to the admission as being a part of the record in the case. If the trial is to the jury, formally move the court to instruct the jury that the fact is to be taken as being a part of the evidence.

Sometimes a party may wish to avoid having evidence with a strong emotional appeal brought before the jury and may agree to a fact to avoid the troubling evidence. Thus, for example, a defendant driver might admit that he was under the influence of intoxicating beverages to avoid the jury viewing a police videotape showing his DUI arrest and his woeful condition or his combativeness at the scene. Once having admitted the fact, the party will want to object to evidence of the fact to prevent the emphasis of the fact or the emotional component of the evidence of the fact.

The objection that "it already has been admitted" is not a valid objection *in itself.* Under Federal Rule 402 all relevant evidence is admissible, even though it is undisputed. The objection of "admitted" is correctly an objection under Rule 403 for the court to exclude relevant testimony or exhibits as needlessly cumulative and therefore as a waste of time. Rule 403 should be mentioned if you are doing the objecting.

"The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute."

Advisory Committee's Notes on Fed. Rules Evid., Rule 401.

If your adversary is making the "admitted" objection, show the judge the following language from *United States v. Grassi*:

"In *Parr v. United States*, 255 F.2d 86, 88, cert. denied, 358 U.S. 824 (1958), we held that, as a general rule, a party may not preclude his adversary's proof by an

admission or offer to stipulate." … A piece of evidence can have probative value even in the event of an offer to stipulate to the issue on which the evidence is offered. A cold stipulation can deprive a party "of the legitimate moral force of his evidence,'' 9 *Wigmore on Evidence* §2591 at 589 (3rd ed. 1940), and can never fully substitute for tangible, physical evidence or the testimony of witnesses. In most cases, a party has the right "to present to the jury a picture of the events relied upon.'' *Parr, supra*, 255 F.2d at 88."

United States v. Grassi, 602 F.2d 1192 (5th Cir. 1979), *vacated and remanded on other grounds*, 448 U.S. 902 (1980).

RESPONSE: "Your Honor, under Evidence Rule 402, we have a right to present undisputed evidence, even though adverse counsel does not want it in the case. Does the Court wish us to approach the bench and show the court an excellent citation on the point?"

B. Argumentative.

"OBJECTION: Your Honor, the question is argumentative; counsel is arguing with the witness instead of asking for facts."

DISCUSSION: Argumentative questions, when directed to an adverse witness, frequently are not recognized by counsel or even the court. If the same question were directed to the examiner's friendly witness, it would be recognized as leading and not calling for any facts from the witness. Addressed to an adverse witness, a question is argumentative if it does not call for new facts, and merely asks the witness to agree or disagree with a conclusion drawn by the examiner from proved or assumed facts. See *Mattfeld v. Nester,* 32 NW2d 291 (Minn.1948). Argumentative questions may be proper if directed to an adverse party, as an attempt to secure a judicial admission contrary to the position of the party. Argumentative questions also may be proper if an opinion has been given by the witness. Then counsel may properly state different facts than those used by the witness in forming his/her opinion and inquire if a different conclusionary opinion is correct. Allowance of argumentative objections, like all the other objections within the rubric of "objection as to form" (which see, below) is within the discretion of the trial judge.

RESPONSE: "Your Honor, I am testing the testimony of this witness."

C. Assumes fact not in evidence.

"OBJECTION: Your Honor, the question assumes facts not in evidence. We are here to ask for facts from the witnesses, not assume that a fact exists."

DISCUSSION: The facts which are not in evidence cannot be used as the basis of a question, unless the court allows the question "subject to later connecting up." A court in the interest of good administration and usage of time may allow the missing facts to be brought in later.

RESPONSE: “Your Honor, we will have those facts later in the case, but this witness is here now and it is the best use of time to ask that question now.”

D. Best evidence rule.

“OBJECTION: Your Honor, this is not the best evidence. The original document is the best evidence.”

DISCUSSION: There are three aspects to the “Best Evidence Rule.” The first aspect is the one most often invoked today: ordinarily a non-expert witness is not allowed to describe what is in a document without the document itself being introduced into evidence. Put the document into evidence first, then have the lay witness talk about what is in it.

The second aspect is requiring the original document to be introduced into evidence instead of a copy — if the original is available. The original is not available if a search for it did not find the original, or if it is in the hands of an adversary, or it is beyond the jurisdiction of the court to subpoena. Requiring the original document (the best evidence) to be available for examination insures that nothing has been altered in any way. The best evidence rule arose during the past centuries when a copy was made by hand, often by persons not trained to be careful and often not exact as to each word. Parties and courts sensibly assumed that, if the original was not produced, there was a good chance of a scrivener’s error (or fraud if the copy were handwritten by a party to the litigation). Now that “copy” usually means a photocopy, or an automatic printout of electronic data entries, the chance of a copy containing a mechanical error is slight. Courts are reluctant to require needless effort to find the original if there is no dispute about the fairness and adequacy of a photocopy. The court has discretion to allow a copy to be used instead of the original.

Fed. Rules Evid., Rule 1001, 1002, 1003, and similar state evidence code provisions allow the use of mechanically produced duplicates unless a party has raised a genuine question about the accuracy of the copy or can show that its use would be unfair. However, there is always a danger of a judge requiring the original of a document, so you must be ready to produce originals of any documents involved in your case or to produce evidence of why you can’t.

The third aspect of the best evidence rule is that in past centuries, compilations of documents only involved a few documents. Hence, at one time, the original documents had to be offered into evidence, not someone’s summarization of the decrements. Today, compilations or summaries of voluminous records (typical in printouts of individual entries of electronic entries in the format of a report of all the entries) present the problem of perhaps thousands of documents or data entries to be considered by the trier of fact. Modern evidence law has solved the problem by providing that:

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

Fed. Rules Evid., Rule 1006.

RESPONSE: Dependent on the aspect of the Best Evidence rule involved in the objection: [Offer the document into evidence] ["Your Honor, this is admissible as a copy under Evidence Rule 1003"] ["Your Honor, this is a summary admissible under Evidence Rule 1006"].

Beyond the scope of (direct, cross, redirect) examination.

"OBJECTION: Your Honor, this question is beyond the scope of the direct examination (cross-examination)."

DISCUSSION: Although the court has discretion to allow it, ordinarily the scope of a cross-examination cannot exceed the scope of the direct examination. Likewise, redirect examination ordinarily cannot exceed the scope of the cross-examination. The purpose for restricting an examination to the scope of the opponent's last previous examination is to prevent an ever-enlarging and never-ending scope of testimony.

The dictionary meaning of "scope" is "the area covered by a given activity or subject." Therefore, how you define the "scope of the examination" is important in making the objection or in responding to it. For example, an objector may be better off to define the scope of direct examination as "events on January 6th," instead of "why and how the accident happened."

In the testimony of an expert, the scope of what is within the direct examination is not limited to the exact items the expert talked about. Because the expert is an expert in an entire field and is there to explain items in the field of endeavor, the scope of direct is usually understood to be everything in the expert's field of knowledge that bears on the case in issue. Thus the cross-examination can delve into other aspects of the case, including asking questions to confirm parts of the examiner's own case.

RESPONSE: "Your Honor, this is within the scope of the direct examination (cross-examination) because [explain]."

E. Completeness.

"OBJECTION: Your Honor, we object to counsel only introducing part of the writing (conversation/act/declaration). Under the evidence rule providing for completeness, we move to introduce additional parts now.

DISCUSSION:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction *at that time* of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Fed. Rules Evid., Rule 106. [Emphasis supplied.]

Rule 106 is an expression of what Wigmore termed "the rules of completeness." VII *Wigmore on Evidence* 2094, et seq. (3d ed. 1940). The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repairing an adverse jury impression if delayed to a point later in the trial. See *McCormick on Evidence* §56. Many states have rules similar to the federal Rule 106. The longer Texas rule is given below for an example.

When part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, and any other act, declaration, writing or recorded statement which is necessary to make it fully understood or to explain the same may also be given in evidence, as when a letter is read, all letters on the same subject between the same parties may be given. Writing or recorded statement includes depositions.

Texas Rules Evid., Rule 107.

This is a good example of how federal and state rules differ. Notice the federal rule is limited to writings and recorded statements and does not apply to conversations; the Texas rule, given as an example above, goes on to add physical acts, oral declarations by one person, and conversations. Cf., *Minnesota Rules Evid*., Rule 107, Comment ("the rule is not intended to apply to conversations"). The Texas rule adds provisions that prevents arguments (which you might want to make in other states) about, whether a deposition is a writing or record statement or something else; or, whether a letter written 10 years earlier by the opposite party to the correspondence can be introduced.

The federal rule, but not all state rules, makes it mandatory for the trial court to allow objecting counsel to put their portions into evidence at the same time. The federal rule of completeness allows you to interrupt the adversary's presentation of evidence and introduce part of your own. In practice, this rule of completeness arises most often when an opposing attorney reads part of a deposition into evidence, or introduces only portions of a document. The rule of completeness does not in any way require you to introduce the other portions when your opposition does; instead you may chose to develop the matter on cross-examination or as part of your own case, which may well be preferable.

RESPONSE: "Your Honor, of course when I finish reading this into the record, counsel can read whatever else she feels relevant to add."

F. Compound question; double question.

"OBJECTION: Your Honor, this is a double question. If the witness answers, it will be confusing as to which part of the question is being answered."

DISCUSSION: A compound question asks two or more separate questions within the framework of a single question. The objection is generally reserved for situations where, if the witness answers "yes" or "no," it will be confusing as to which part of the question is being answered. It

is one of those objections that falls within the rubric of the "objection as to form" (discussed below).

RESPONSE: Separate the question into the two parts.

G. Confusing / vague / misleading / ambiguous.

"OBJECTION: Your Honor, the question is ambiguous. The witness may not know with certainty what is being asked, and we may not know with certainty what the answer tells us."

DISCUSSION: Confusing / vague / misleading / ambiguous are all words that convey the objection that the question is not posed in a clear and precise manner so that the witness knows with certainty what information is being sought. The objection appeals to the court's discretion in providing a fair trial without witnesses being confused.

RESPONSE: "Your honor, I can restate that question."

Counsel is testifying.

"OBJECTION: Your Honor, counsel is trying to testify himself, instead of having the witness do it."

DISCUSSION: The objection that "Counsel is testifying" is heard so often, that we include it in this list of "the basic two dozen." However, the objection usually could just as well be phrased as "leading" or "argumentative" or "assumes facts not in evidence." The objection is to parts of the question which contain facts or opinions not in evidence.

RESPONSE: Depending on the type of question, respond, as you would to an objection for "leading" or "argumentative" or "assumes facts not in evidence."

H. Form.

OBJECTION: "Your Honor, we object to the form of the question."

DISCUSSION: An objection that the "form" is improper is a generalization, which includes diverse problems (each of which is a specific objection). The objection is heard a great deal, and honored by courts quite often when they see the specific problem. Other times, the court does not rule on the objection, but simply directs adverse counsel to "Rephrase your question, counsel." The objection of "form" should instead be a specific objection that the question:

- Is a double question.
- Is misleading or ambiguous (to either witness or jury).
- Is argumentative.
- Is prejudicial or abusive in its insinuations.
- Is leading.
- Is repetitious.

- Assumes facts not in the record.
- Fails to include relevant facts found in the record.
- Calls for a legal conclusion.
- Calls for mere speculation.
- Calls for an opinion.
- Calls for a narrative.

RESPONSE: "Your Honor, may counsel be requested to inform the court in what specific is the form of my question insufficient, so that I can remedy any problem?" (Then, when informed, restate the question to eliminate the bad form.)

WARNING. Just saying "Objection to the form" or "Objection to the foundation" is a lazy indefinite generalization, which includes every possible way the form or foundation is wrong. There are dangers in making the general objection of "form" or "foundation." See the discussion at "State your specific grounds briefly" in §52.2 of this text.

I. Foundation.

"OBJECTION: Your Honor, we object to the lack of foundation because [*e.g.*, there is no showing of the witness's time and place of observation of the facts called for]."

DISCUSSION: Evidence is competent if the proof that is being offered meets certain traditional requirements of reliability. The preliminary showing that the evidence meets those tests is called the foundational evidence. If there is no objection made to the lack of foundation before the testimony is received, the objection is waived. If an objection to the foundation if not made; the testimony cannot later be the subject of a motion to strike.

The objecting attorney must identify what is necessary to correct the lack of foundation for the deponent to answer. If the questioning attorney asks what is wrong with the foundation, then the objector either must provide specific details of what is missing in the foundation or else be ruled to have waived the objection by making a senseless objection. ("An objection to foundation is futile unless it is sufficiently specific to afford the opposing party opportunity to cure it." *United States v. Michaels*, 726 F.2d 1307, 1314 (8th Cir. 1984).)

If the witness is a layperson, the usual foundation objection is a lack of showing that the witness has personal knowledge of the facts which the question seeks. If the witness is an expert, the usual foundation objection is a lack of showing that the expert is qualified to give the opinion sought.

RESPONSE: "Your Honor, may counsel be requested to inform the court in what specific is the foundation insufficient, so that I can remedy any problem?" (Then, when informed, restate the question or otherwise provide the specific missing part of the foundation.)

J. Hearsay (rules 801, 802, 803, and 804).

"OBJECTION: Your Honor, this calls for hearsay."

DISCUSSION: Hearsay is not admissible unless it comes within one of the many exceptions. Hearsay is evidence and can be used by itself to support a verdict if it is received without objection.

Fed. Rules Evid., Rules 801, 803, and 804 (or the equivalent state rules) must be in your trial notebook or otherwise available to you during trial. The exceptions to the hearsay objection are so important — and needed so often during trial — we are going to give you an outline in this quick reference checklist.

WARNING. The following is a partial outline (not the full text) of the Federal hearsay rule. This trial notebook outline is here only to refresh your memory when the full applicable state or federal rule is not available to you.

Rule 801. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

A statement is **not hearsay** if —

(1) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, ***and*** the statement is

(A) Inconsistent with the declarant's testimony and was given under oath;

(B) Consistent with the declarant's testimony and is offered to rebut an expressed or implied charge against the declarant of recent fabrication or improper influence or motive;

(C) One of identification of a person made after perceiving the person.

(2) The statement is offered against a party **and** is a statement

(A) Made personally by the party;

(B) Of which the party has manifested an adoption or belief in its truth;

(C) By a person authorized by the party to make the statement;

(D) By the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship;

(E) By a co-conspirator of a party.

Rule 803. The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

(1) Present sense impression. A statement describing or explaining an event or condition, made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed.

(4) Made for medical treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted business activity. A memorandum, report, record, or data compilation, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12) or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

(7) Absence of entry in records kept in regularly conducted business activity, to prove the nonoccurrence or nonexistence of the matter.

(8) Public records and reports. Records, reports, statements, or data compilations of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law and as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings, factual findings resulting from an investigation made pursuant to authority granted by law unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records of births, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry by evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) (12) and (13) Family Facts. Religious organization's statements of personal or family history, contained in a regularly kept record. Marriage, baptismal, and similar certificates issued at the time of the act or within a reasonable time thereafter. Family records of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property, if the record is a record of a public office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purposes of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents, to wit: a document in existence 20 years or more, the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history among members of a person's family, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of a person's personal or family history.

(20) Reputation concerning boundaries of or customs affecting lands in the community; or reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character. Reputation of a person's character among associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment.

(23) Judgments as to personal, family, or general history, or boundaries.

Rule 804 (A). A witness is unavailable if the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying;

(2) Refuses to testify despite an order of the court to do so;

(3) Testifies to a lack of memory of the subject matter of the declarant's statement;

(4) Is unable to be present due to death or physical or mental illness or infirmity;

(5) Is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance by process or other reasonable means.

Rule 804 (B). The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

(4) Statement of personal or family history of the declarant's own history or a statement concerning the personal or family history of another person, if the declarant was so intimately associated with the other's family as to be likely to have accurate information.

Hearsay is an objection you are bound to hear at least once in every trial. Refresh your memory of the list of exceptions before the trial.

RESPONSE: "Your Honor, this is an exception to the hearsay rule, under Evidence Rule [cite]."

K. Improper impeachment.

"OBJECTION: Your Honor, this is outside the boundary of proper impeachment."

DISCUSSION: The evidence rules generally only authorize the following methods of impeachment:

1. Point out contradictory evidence or prior inconsistent statements;
2. Show bias or prejudice (paid witness, stands to gain by verdict one way, friend, or rival of party);
3. Show reputation for poor character for honesty;
4. Show conviction of a crime that involved dishonesty or false statement or imprisonment for more than one year;
5. Show poor memory, or lack of physical or mental ability to observe, remember, or recount;
6. On cross-examination, ask the witness to agree that he committed specific instances of past conduct bearing on the witness's credibility for truthfulness. Except for criminal convictions, the witness's answer is conclusive, and extrinsic evidence is not allowed to contradict what the witness says concerning his own conduct.

Read Fed. R. Evid., Rules 404, 607, 608 and 609, or your equivalent state rules of evidence, for the exact rules, which in each jurisdiction have defined limitations on types and use of impeachment material. "Yet the trial court has discretion to exclude impeachment evidence, including a prior inconsistent statement, if it is collateral, cumulative, confusing, or misleading." *People v. Douglas*, 50 Cal.3d 468, at 509, 788 P.2d 640 (1990).

RESPONSE: "Your Honor, I am asking items which bear upon the witness's credibility."

L. Incompetent.

"OBJECTION: The witness is incompetent because…." (The exhibit is incompetent because….)

DISCUSSION: The term "competency" refers to the minimal qualifications someone must have to be a witness. In reference to an exhibit, the term "competency" refers to the minimal foundation that physical items must have to be an exhibit. For both a person and an exhibit, "competency" also refers to a lack of any statutory or other legal bar based on public policy.

In order to be a witness, a person other than an expert (experts are a special case discussed later in the text), must meet six basic requirements:

1. Take some kind of oath to tell the truth.
2. Have perceived something relevant to the case. A lay witness may only testify to matters about which the witness has personal knowledge. Fed. R. Evid., Rule 602 says "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." That means the attorney asking the questions should first establish by preliminary questions that the person has actual personal knowledge of something relevant.
3. Be able to remember what he or she perceived.
4. Be able to communicate in some sensible way.
5. Not be disqualified by some statutory or other legal bar based on public policy. See discussion, below, regarding the public policy objections.

Young children must be shown to be capable of understanding the oath and communicating in some sensible way. The usual rule is that a child is competent if the child can recollect and narrate the facts and has a moral sense of obligation to tell the truth. The judge and attorneys have to question the child to determine the communication skills of the child and also question to determine if the child understands the difference between true and false, and will tell the truth.

RESPONSE: "Your Honor, [respond to asserted specific lack]."

M. Lack of personal knowledge.

"OBJECTION: Your Honor, there is no showing of personal knowledge by the witness."

DISCUSSION:

A [non-expert] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness.

Fed. Rules Evid., Rule 602.

With some qualifications, experts can testify to facts they used in their process of building an opinion, even if they do not have personal knowledge of the facts supporting the opinion. See Fed. Rules Evid., Rule 703.

RESPONSE: [Establish by preliminary questions that the person has actual personal knowledge.]

N. Leading.

"OBJECTION: Your Honor, counsel is leading and coaching the witness."

DISCUSSION: "Leading" is the legal ritual word for the benefit of the judge and appellate court. "Coaching" is the word you might want to add to your statement of the objection in front of a jury, so the jury understands why you are preventing what may to them appear to be a reasonable question.

The problem with a leading question is that the question itself suggests the answer that the examiner wants to have. A leading question often, but not always, can be answered with a "yes." To encourage witnesses telling facts in their own way, leading questions are not allowed on direct examination when an attorney is examining his/her own friendly or neutral witness. When an attorney has called a hostile witness (which may be someone other than the adverse party) leading questions are allowed in direct examination. Leading questions are always proper in cross-examinations.

Federal R. Evid., Rule 611(c) provides that "leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness." Leading questions are most dangerous involving matters of dispute, and the danger disappears if

there is no controversy. Accordingly, leading questions are proper when the testimony sought is merely preliminary to disputed matter. *Lestico v. Kuehner*, 283 N.W. 122 (1939). The times that leading questions may be "necessary to develop" the direct testimony of the witness include not only preliminary matters, but also when questions are needed to switch topics or direct the attention of a witness to a specific event, or leading questions are needed for soft conversational approaches if the witness is a child or is emotionally disturbed, or leading questions are needed because the witness's memory needs to be refreshed.

The allowance of leading questions, or questions which assume facts not yet proven, is discretionary with the trial judge. Unless there appears an abuse of discretion, the appellant court will not reverse the trial court's ruling.

RESPONSE: "Your Honor, this question is only preliminary to move us quickly to the matters in issue." OR, "Your Honor, the witness is a hostile witness."

O. Misstates evidence / misquotes witness / improper characterization of the evidence.

"OBJECTION: Your Honor, counsel is misstating the evidence."

DISCUSSION: The trial court has inherent power to administer the trial so that it is fair. Almost universally, to the "misstating the evidence" objection, the court will respond with: "The jury has heard the evidence and can determine what the evidence was." Then, the court will overrule the objection. That reaction of the judge takes the judge out of her problem of having to judge accuracy by the standard of her own memory. It is rare that the judge's discretion on this objection will be disfavored by a reviewing court.

If the judge is 99% not likely to rule in your favor, and the judge's ruling will not make any difference on an appeal, why make the objection? The value of making this objection is to both wake up the witness to pay attention and not mindlessly answer the question, and also to call the attention of the jury to the fact that the earlier testimony was different that counsel states in her question.

RESPONSE: "Your Honor, it is not a misstatement, and certainly the court and jury have heard the evidence."

P. Narrative.

"OBJECTION: Your Honor, the question calls for a long narrative. It can produce irrelevant or otherwise inadmissible testimony before the court can receive an objection and rule on it."

DISCUSSION: In the evidence presentation mode used in this country, the normal form (of questioning followed by direct answers to the questions) is designed to allow the adverse counsel the opportunity to interpose an objection before the witness directly answers the question in the hearing of the jury. Thus, an improper item never is heard by the jury, because there is a ruling before the witness speaks. When the witness is asked to give a long narrative answer, an

improper item can be conveyed to the jury before there is an opportunity to object or the court to rule. Timely objections to volunteered inadmissable testimony contained within what otherwise is proper description of events are needed if the exclusionary system of evidence is to be preserved. After inadmissable testimony is heard, the problem is trying to effectively cause the jury to "unring the bell." The court's instruction to ignore what they just heard is psychologically ineffective.

Tactically, objecting to a long narrative by an expert witness also has the advantage of preventing an expert witness or other verbally gifted witness from captivating the attention of the audience with what could be a quarter-hour unbroken polished show.

RESPONSE: "Your Honor, the narrative simply is going to preliminary matters which I thought we all would like to hear before we get to other questions." OR, "Your Honor, this simply asks for a short description of the scene as a unified whole, before we get to detailed aspects." OR, "Your Honor, this simply asks for a short description of the science and technical maters involved."

Q. Opinion (rules 701 and 702).

"OBJECTION: Your Honor, the question calls for an opinion (conclusion), and the witness is not qualified to give the opinion."

DISCUSSION: In regard to a lay person (non-expert), this objection is made to the competence of a lay person giving an opinion, and a foundation to turn the witness into an expert is not possible. In regard to an expert, this objection is made to the competence of the expert because of inability of the expert to pass the gatekeeping requirements for experts.

R. Layperson's opinion.

Non-expert witnesses are to give facts. Generally, it is the province of the judge or jury to make the conclusions to be drawn from those facts. Fed Rules Evid., Rule 701:

> **S. OPINION TESTIMONY BY LAY WITNESSES.** If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

Some matters are within the normal range of knowledge or understanding of the ordinary layperson, but can best be reported by the layperson in terms of an opinion. "Consequently, a lay witness may testify that a person was 'drunk' or that a car was traveling 'fast.'"*Comment,* Rule 701, *Tenn. R. Evidence*. Nonexpert witnesses have been allowed to give answers in the form of opinions as to such things as physical condition and appearance of health. *See, Hoffer v. Burd,* 49 NW2d 282 (ND 1951); *Nichols v. Kluver*, 237 NW 640 (ND 1931) (wife re husband's injury).

Questions of physical condition are sometimes mingled with questions of medical or legal opinion so as to cause a court to keep the opinion out of evidence. *See, Huus v. Ringo*, 39 NW2d 505 (ND 1949) (whether plaintiff can do work he did before accident). If you have a problem looming, check the ALR annotations for material on admissibility of lay opinions. *See,*56 A.L.R.3d 575, *admissibility of nonexpert opinion testimony as to weather conditions*; 66 A.L.R.2d 1048, *admissibility of opinion evidence as to point of impact or collision in motor vehicle accident case*; 37 A.L.R.2d 967, *admissibility of opinion of nonexpert owner as to value of chattel*.

Important in many cases is the common holding that owners of property are entitled to give an opinion to the value of their own property even though they are not experts in valuation. Owners, due to that ownership, are presumed to have special knowledge of the value of their own property." *See, Tokles and Son, Inc. v. Midwestern Indemnity Company,* 65 Ohio St 3d 621 (1992); and *Evans v. Evans*(W. Va. 1997) ("we find that under Rule 701 [1994] of the West Virginia Rules of Evidence, the owner of destroyed or damaged personal property is qualified to give lay testimony as to the value of the personal property based on his or her personal knowledge"). Most courts have permitted the owner of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. *See, Lightning Lube, Inc. v. Witco Corp*., 4 F.3d 1153 (3d Cir. 1993) (no abuse of discretion in permitting the plaintiff's owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of the business). But see cases like *Jim's Hot Shot Serv. v. Continental W. Ins. Co.,* 353 N.W.2d 279 (N.D. 1984) holding that although the owner can testify, the opinion may be legally insufficient to support a verdict if the value opinion is without any valid basis.

The (c) part of the federal rule 701 ("and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702") was added when the federal courts changed their rule 702. The reason for the 701 amendment was to prevent evasion of Rule 702 requirements by offering the opinions of experts as "lay opinions" rationally based on perception. Cf., *United States v. Dulcio*, No. 04-13838 (11th Cir. Mar. 8, 2006). (Prosecution offered lay opinion testimony from drug agents re modus operandi of narcotics dealers. Because this testimony was founded on specialized knowledge, it should have been offered as expert testimony, not lay opinion.)

The distinction in the federal courts regarding admissibility of opinions used to be between lay *witnesses* and expert *witnesses.* With the 2000 amendments to rules 701 and 702, the scholarly legal distinction is now between lay *opinions* and expert *opinions.* However, trial court analysis still tends to be in terms of lay versus expert witnesses. Therefore, in any trial courtroom, you probably will still be best served if you argue to the judge in terms of the witness classification of lay versus expert. Certainly in those states who did not adopt amendments similar to the federal rules, the scholarly legal distinction regarding admissibility of opinions is still in terms of lay versus expert *witnesses*, not lay versus expert *opinion*.

T. Expert's opinion.

The federal courts and some states have a Rule 702 that reads like this:

Federal Rules Evid., Rule 702. TESTIMONY BY EXPERTS. 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 thereto in the form of an opinion or otherwise 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.

Some states have the pre-2000 version, which reads like this:

North Dakota Rules Evid. RULE 702. TESTIMONY BY EXPERTS. 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 thereto in the form of an opinion or otherwise.

The difference between the two categories of rules reflects the different methods of approach to admissibility to expert opinions: either the pre-2000 "*Frye*" standards, still used in many states, or the post-2000 "*Daubert/Kumho* tests," used in the federal courts and many states. Basically, in the federal courts and those following a like standard, the court acts aggressively as a gatekeeper, making an initial decision as to whether the expert's opinion is "good enough" to be considered by the jury. The courts following the pre-2000 version act only to determine if the witness has expert knowledge (not at the opinion) and then allow the jury to make the decision whether the opinion is "good enough" to be reliable. For a 20-page, general analysis of how to get expert witness opinions in or out see *www.bucklin.org/Daub_TofC.htm*. For a specific state-by-state analysis of expert testimony opinion admissibility and objections thereto, I heartedly recommend Peter Nordberg's excellent site at *www.daubertontheweb.com,* which contains current information and incisive analysis.

RESPONSE to objection regarding layperson: "Your Honor, this is a matter which is within the normal range of knowledge or understanding of an ordinary layperson, and can best be discussed in terms of an opinion within Rule 701."

RESPONSE to objection regarding expert: "Your Honor, the witness is an expert and entitled to draw a conclusion."

Pre-trial ruling specifically barred asking the question in open court.

"OBJECTION: Your Honor, the Court's pre-trial rulings have stated that this line of testimony is improper and should only be discussed in a further conference with the court in chambers."

DISCUSSION: Today's pretrial motions practice trial have made pre-trial evidence rulings have consequences of major proportion. It important that you understand completely the theory and practice of at-trial objections regarding evidence which was the subject of a pre-trial admissibility order. The law is confusing, but from the perspective of "been-there, done-that," after some discussion, we'll give you three rules of thumb to follow.

In the pre-trial motion rulings, the court may have made determinations of what evidence can, or cannot, be admitted. Always in some jurisdictions and sometimes in every jurisdiction, these pre-trial rulings are *not* final. Often it is required that at the trial itself the question has to be asked, or the exhibit offered, again by the counsel, even if the pre-trial ruling was against him/her. It is only the ruling at trial that is a final ruling. We cannot state this too strongly. Error is not always preserved by the granting or denying of a motion in limine. *See,Hartford Acc. & Indem. Co. v. McCardell*, 369 S.W.2d 331 (Tex. 1963). Many states insist that in every situation, it is the court's subsequent exclusion or admission of relevant evidence — at the trial, not the pretrial ruling on a motion for admission or exclusion — that is the final ruling. *See, Schutz v. Southern Union Gas Co.*, 617 S.W.2d 299, 303 (Tex. Civ. App.—Tyler 1981, no writ). Not only is the ruling at trial the only final ruling, but if you have received an adverse pre-trial ruling on admissibility, if you fail to ask the question, or offer the exhibit when you are in the trial, you may be deemed to have waived your offer of evidence! The theory of this two-stage process (pre-trial ruling is preliminary, final ruling is made only during the trial itself) is that the trial court should have a chance during the actual trial to determine if at that point the trial court wants to change its ruling.

The law of the sundry states and federal circuits is quite varied on the question of whether a losing party on an pre-trial evidentiary ruling must renew an objection or offer of proof when the evidence is or would be offered at trial, in order to preserve a claim of error on appeal. Some courts have held that a renewal at the time the evidence is to be offered at trial is always required. *See, Collins v. Wayne Corp*., 621 F.2d 777 (5th Cir. 1980). In contrast, other courts have held that renewal of the offer of proof or of the objection is not required if (1) the issue decided is of a type which may be decided as a final matter before the evidence is actually offered, and (2) the trial judge stated her ruling was final and presentation of the evidence or objection to it does not have to be presented at the trial for a final ruling. *See, Rosenfeld v. Basquiat,*78 F.3d 84 (2d Cir. 1996). The problem with that latter formulation for the trial lawyer, of course, is guessing what the appeals court will decide is "a type which may be decided…," and what the trial court "intended to rule…." What is a trial lawyer to do to act in a "fail-safe" mode during trial?

Our answer is simplify your life and follow three rules of thumb in all cases, in all courts.

1. If you lost on your pre-trial attempt to have the evidence admitted – at trial always offer the evidence again. At the Notes of the Federal Advisory Committee to Fed. Rules Evid., Rule 103, there is an extended discussion on whether you must offer the evidence again. You may not have to offer it again. But the safe way to be sure you have preserved the point on appeal is to offer it again at the trial.

WARNING. If there is a court order of the sort discussed below (following the TIP), act in compliance with the order — obey — follow the order and approach the bench first, at that point in the trial.

2. If you won on your pre-trial attempt to have the evidence excluded and there was *not* a court order of the sort discussed below (following the TIP), you again must object on all the grounds you used in winning at pre- trial (*See*, e.g., lack of foundation, Rule 403

balancing, et cetera). Ask to approach the bench to revisit the matter if the court does not want to immediately grant your objection.

3. If you won on your pre-trial attempt to have the evidence excluded and there *was* a court order of the sort discussed below (following the TIP), object on the ground that the Court's pre-trial rulings have stated that this line of testimony or exhibit is improper. Ask to approach the bench. Make the same objections that you made in pre-trial to the evidence. Then object to adverse counsel violating the court's order. Then sit back and enjoy the court's attack on adverse counsel for ignoring the court's pre- trial order.

TIP: In pre-trial rulings, if you win, get the provision below inserted in the court's order.

The best pre-trial rulings by a trial judge add a provision that the question should not be asked, or exhibit offered, without first approaching the bench for the court's order at that point. This preserves the virginity of the jury from exposure to the potentially inadmissable evidence, but still allows the required offer of evidence at that point in the trial. At the sidebar, or in chambers, you must renew all of your arguments or objections that you made pre-trial; the judge will make a final, in-trial, ruling on the record, outside the hearing of the jury. Then you go back to the jury and continue. At that point, back before the jury, if the judge reverses himself and allows the evidence, you do not have to object again (assuming that during sidebar or chambers conference before you returned to the jury, you renewed your objection and were definitely overruled).

Section 17.2 contains a form of order, for plaintiffs, for you to request the court to sign (§17.3 for defendants is similar). It says:

ORDER. The foregoing Motion in Limine by Plaintiff has been presented to me. Upon all files and proceedings herein, the separate paragraphs of the Motion are hereby granted, or denied as I have indicated immediately below each of the paragraphs in the Motion. The attorney(s) for the Defendant(s) is instructed:

a. Not to interrogate witnesses concerning the prohibited items, or to mention to the jury in any manner those items, without Defendant's attorney first obtaining permission outside the presence and hearing of the jury; and

b. To personally admonish the Defendant and Defendant's witnesses to refrain from mentioning to the jury in any manner the prohibited items, without Defendant's attorney first obtaining permission outside the presence and hearing of the jury.

Some judges add that type of paragraph to their orders automatically, but most do not. For your maximum benefit, as the prevailing party in a pre-trial motion keeping evidence out, hand the judge a form paragraph to include in the court's pre-trial order.

If the trial court *has* ordered in its pre-trial rulings that the matter should not be inquired about in front of the jury without again coming to the court at that point in the trial, the court may take very stringent measures indeed. Given such an order, the other side may be in contempt of the court's order and suffer punishment for misbehavior. Even if there was no contempt, and the mentioning was inadvertent, the court can order various punishments to correct the prejudice

caused by the order-violation, up to and including ordering a mistrial, or waiting until the case has ended and then granting a new trial. *See, Orvis v. Calkins Indiantown Citrus Co.*, (4th Dist Appeals, FL, 2003) (inadvertent mention sufficient for new trial order).

If you are in court with this quick-reference checklist in your trial notebook, and you quickly need to argue for or against the court granting (a) a curative jury instruction, (b) a directed judgement on some issue involved, (C) an immediate mistrial, or (d) a mistrial or new trial to be granted if the offending party wins a verdict — follow the four point format for argument suggested by the following case.

[1] …consider whether the evidence excluded by the court's order was deliberately introduced or solicited by the party, or whether the violation of the court's order was inadvertent…. [2] also consider the inflammatory nature of the violation such that a substantial right of the party seeking to set aside the jury's verdict was prejudiced…. [3] [also consider] the likelihood that the violation created jury confusion, wasted the jury's time on collateral issues, or otherwise wasted scarce judicial resources…. [4] also consider whether the violation could have been cured by a jury instruction to disregard the challenged evidence.

Honaker v. Mahon, 210 W. Va.53, 552 S.E.2d 788 (2001).

RESPONSE: [Assuming court's order *did prohibit*you asking the offending question during the trial without counsel first approaching the bench for permission]: "Your Honor, I do not believe this falls within the matters already ruled upon. May we approach the bench to discuss that?"

U. Privilege.

"OBJECTION: Your Honor, the question calls for privileged matters (stating the nature of the privilege)."

DISCUSSION: A privilege is a right of an individual not to testify. In federal court, in civil actions, a privilege is determined in accordance with state law. (There are three main exceptions to that statement regarding priority of state law: (1) the Federal Constitutional Fifth Amendment privilege against self-incrimination, (2) the privilege for federal grand jury proceedings and (3) the work product rule protecting attorneys' mental impressions.)

There are a variety of privileges in the state laws across the country, and they are handled in a variety of ways. For example, in California, the law protecting newspersons provides only an immunity from being adjudged in contempt; it does not prevent the use of other sanctions for refusal of a newsman to respond to discovery when he is a party to a civil proceeding. *KSDO v. Superior Courtof RiversideCounty*, 136 Cal.App.3d 375 (4th Dist. 1982). Recognizing the impossibility of discussing such varied privileges in a quick reference to objections, we will simply give you a laundry list of the common privileges:

- The Fifth Amendment to theUnited States Constitution. *Pillsbury Co. v. Conboy,* 459 U.S. 248 (1983) (the privilege is available in civil proceedings); *Baxter v. Palmigiano,* 425 US 308 (1976) ("the Fifth Amendment does not forbid adverse inferences against

parties to civil actions when they refuse to testify in response to probative evidence offered against them"). The privilege does not extend to records required by statute to be kept. *United States v. Doe,* 465 US 605 (1984).

- Accountant — Client.
- Attorney — Client.
- Attorney Work Product. Federal law distinguishes between opinion (core) and ordinary work product of attorneys. Core work product consists of mental impressions and conclusions and is given absolute protection. Ordinary work product consists of primary information, such as a witness's recorded statement or objective data collected by the attorney; it is given only limited protection and may be obtained upon a showing of substantial need and undue hardship. Fed. Rules Civ. P., Rule 26 (b)(3); *Robinson v.Texas Auto Dealers Assn.*, 214 FRD 432, at 444 (E.D. Tex, 2003).
- Clergy.
- Husband — Wife.
- Joint Defense or Common Legal Interest.
- Jury (Grand and Petit) Proceedings.
- Mediation Discussions and Offers of Settlement. The protection granted by Fed. Rules Evid., Rule 408 is not a privilege grant. It is a public policy protection. But some states have special statutes granting a privilege not to testify.
- Mental Health Records.
- Physician — Patient.
- Psychotherapist — Patient.
- Trade Secret.

RESPONSE: "Your Honor, the matter is not privileged because…."

V. Public policy.

"OBJECTION: Your Honor, the [specify the statute, rule or common law doctrine] says it cannot be admitted into evidence. It is incompetent evidence."

DISCUSSION: The objection regarding public policy does not consist of a optional right of an individual not to testify. The objection based on public policy refers to a non- optional class of evidence that cannot be introduced, no matter that the person who holds the evidence wants to testify. The term "incompetent" is use as a generalized reference to evidence which cannot be introduced because it violates various rules against being allowed. If you are in front of judge only, using the term "incompetent" does not add anything to your specific objection (and by itself an objection of "incompetent" is so general as to be regarded by the courts as meaningless and not a valid objection). But if you are in the hearing of a jury, adding the term "incompetent" may soften somewhat their idea that you and a lawyer's law are blocking good evidence they want to hear or see.

The variety of subjects forbidden by state and federal law is wide. The only unity of concept is "public policy forbids." To give you some idea of the variety of statutory subjects you should consider, here is a small listing of subjects of frequent prohibition, based on public policy:

- Dead Man's Statute. The dead man's statutes are state laws with so many exceptions, twists and turns they are a minor favorite of bar examiners. The public policy is to protect estates from false claims. Most dead man statutes provide that a party to the litigation who has an interest adverse to the estate is not a competent witness as to matters against the estate. The claim must be supported instead by written documents or disinterested testimony.
- Medical Expense Payments. Evidence of the payment of medical expenses to show liability for negligence leading to the medical expenses are inadmissable. Fed. Rules Evid., Rule 409.
- Medical Review Records. Most states forbid discoverability or admissibility of the records of a medical review committee of a hospital. It is a legislative policy decision to promote the ability of a hospital to discover medical malpractice above that of the injured person to discover the malpractice.
- Motor Vehicle Accident Records. Most states have statutes regarding some aspect of motor vehicle accident evidence, about which some energetic legislators felt strongly. E.g., that police accident reports are or are not admissible in evidence; that lack of seat belt use cannot be introduced into evidence; that police blood alcohol tests are not admissible unless strict conditions are met.
- Parole Evidence Rule. The "parole evidence rule" has long been a rule of law in the English speaking world. In the absence of fraud or mutual mistake, oral statements are not admissible to modify, vary, or contradict the plain terms of a valid written contract between two parties. It has been enacted in statutory form in some states, but is available in all states under common law. The public policy is to promote commercial certainty if the contract is clear. If terms of the contract are ambiguous or clearly susceptible to more than one meaning, then parole evidence is admissible to show what the parties meant at the time of making the contract and how they intended it to apply. ("Parole" means oral evidence.)
- Settlement Discussions. Evidence of mediation or settlement discussions is not admissible to prove liability for the claims that were being discussed. Fed. Rules Evid., Rule 408.
- Subsequent Remedial Measures. Evidence of subsequent remedial measures is not admissible to show previous negligence or culpable conduct. Fed. Rules Evid., Rule 407.
- Withdrawn Guilty Plea. Evidence of a guilty plea that is later withdrawn, or any statements made in connection with it. Fed. Rules Evid., Rule 410.
- Witness is Attorney. Ethical rules prohibit a lawyer from serving simultaneously as a witness and an advocate. Generally, a party's lawyer who attempts to testify is subject to having to choose between being a witness or continuing as a lawyer in a case. The "witness/advocate rule" is subject to misuse, especially if an adverse party can subpoena the other side's lawyer to be a witness and then file a motion to disqualify her from representing her opponent because of the witness/advocate rule. This would deprive a person of their chosen attorney. Accordingly, most state ethics codes and courts are more strict on applying the rule when a lawyer herself decides on being a witness rather than it being the adverse party who seeks the testimony.

RESPONSE: [Depends on the statute or rule involved.]

W. Rule 403.

"OBJECTION: Your Honor, this calls for evidence that is excluded under Rule 403. May we approach the bench to discuss this further?"

DISCUSSION: Any time you want to rely on Rule 403 in front of a jury, do it by rule number. Consider the alternative of saying this in front of the jury: "Objection, Your Honor, this evidence is so powerful and prejudicial that if the jury hears it they will decide against my client." That alternative way is a guarantee that: (a) if the judge overrules your objection, the jury will agree with your own assessment of how important it is; (b) if the judge sustains your objection, the jury will know there is really bad evidence out there against your client justifying any punishment they can give your client! So, object using the Rule 403 number, and ask to talk to the judge out of the hearing of the jury.

Rule 402 states the fundamental principle of American evidence law, to wit:

All relevant evidence is admissible, except as otherwise provided by [the Constitution, statutes, and other court rules]. Evidence which is not relevant is not admissible.

That principle, dividing evidence into the two classes (relevant is admissible and not- relevant is not-admissible) is "a presupposition involved in the very conception of a rational system of evidence." Thayer, *Preliminary Treatise on Evidence* 264 (1898). It constitutes the foundation upon which the structure of admission and exclusion rests.

Generally, skillful attorneys can make almost anything relevant. "Relevant" simply means an item *tends* to prove or disprove some fact or issue. *Williams Elec. Co-op v. Montana-Dakota Utility Co.,* 79 NW2d 508 (ND 1956); Fed. Rules Evid., Rule 401.

The question under Rule 403 is whether evidence in the class of "relevant evidence" is material enough (makes enough difference) to be admitted when balanced against (a) unfair prejudice to a party or (b) time waste. The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances range all the way from inducing decision on a purely emotional basis, to nothing more harmful than wasting time. Rule 403 calls for balancing the probative value of and need for the evidence against the harm likely to result from its admission. *Fed. Rules Evid, Rule,* Rule 403, provides (as do state rules and the common law) that:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Determining "probative value" is at the discretion of the judge. Generally, the discretion of the trial judge as to probative value of the evidence will be upheld. Thus it has been held that it is within the discretion of the trial judge to allow or disallow testimony as to the speed of a car some distance from the scene of the accident. *See, Thompson v. Nettum,* 163 NW2d 91 (ND 1968). In general, the judge determines probative value of evidence by:

- How directly related is the evidence to the disputes?
- How important is the evidence to the jury's decision?
- How much other evidence on the point has already been introduced or is available to be introduced?
- How far removed is the evidence in space or time from the people, places, and events being litigated?
- Will the evidence introduce inadmissable issues on which jurors may have strong feelings or prejudices, such as drugs, sex, and illegal immigration.
- Will the evidence carry strong emotions likely to overwhelm any reason or logic of the weight of the evidence?

The amount of "unfair prejudicial effect" also is determined by the judge. The word "*unfair*" is the key.

The rule is directed to unfairly prejudicial evidence, not simply prejudicial evidence. Indeed, no verdict could be obtained without prejudicial evidence. *United States v. Noland,* 960 F.2d 1384, 1387 (8th Cir. 1992). After all, "the admission of evidence is generally calculated to benefit one side to the prejudice of the other." *Bell v. City of Milwaukee*, 746 F.2d 1205, 1277 (7th Cir. 1984). "'Unfair prejudice'… means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Advisory Committee Note, Rule 403, *Fed. Rules Evid.* Prejudice is unfair if it is the result of something other than the relevance of the evidence. *See, State v. Kringstad*, 353 N.W.2d 302, 310 (N.D. 1984). Stated otherwise, "any prejudice due to the probative force of evidence is not unfair prejudice."

State v. Zimmerman, 524 N.W.2d 111, 116 (N.D. 1994).

The Evidence Rule 403, like the common law, keeps out admissible evidence only if its probative value is *substantially outweighed* by the danger of unfair prejudice. It is not a test of mere preponderance of unfairness. Unfair prejudice must "substantially outweigh" the probative force of the evidence. If you are the proponent of the evidence, draw to the trial court's attention that if the balancing test of Rule 403 is being used, the court must resolve all doubt in favor of admission. If the court says it is "a close question," the evidence should go in. Any doubts about admissibility of evidence under Rule 403, such as doubts about the existence of unfair prejudice, confusion of issues, misleading, undue delay, or waste of time, should be resolved in favor of admitting the evidence, if necessary giving a contemporaneous warning instruction to the jury or an admonition in the charge. 1 *Weinstein's Evidence*, ¶ 403[01], at 403-11, 403-12 (1994).

In determining whether to exclude evidence under Rule 403, courts should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.

State v. Randall, 2002 ND 16, ¶ 15, 639 N.W.2d 439.

[T]he exclusion of relevant evidence under Rule 403 is an extraordinary remedy to be used sparingly.

K-B Trucking Co. v. Riss Int'l Corp., 763 F.2d 1148, 1155 (10th Cir. 1985).

Rule 403 also mentions "confusion of issues" and "waste of time" as grounds for exclusion. "Confusion of issues" means that too many issues will be injected into the jury room, causing confusion in reasoning. "Waste of time" addresses whether the offered evidence is simply so weak and removed from the issues being litigated, or so cumulative of other similar evidence, that is not worth the time involved to consider it. That is where the objections of "repetitive" or "asked and answered" are resolved. No rule of evidence or procedure prohibits an attorney from asking the same question over and over again to secure a different answer or to clarify a point. This objection is usually invalid because the question usually is a question by the interrogating counsel to pin down an ambiguous or evasive answer. However when it has merit, it is Rule 43 that is the authority for the objection.

McCormick's view was that unfair surprise would be, by itself, a ground for exclusion. The federal committee instead adopted the view of most courts and of Wigmore that surprise, by itself, was not a ground for exclusion, so surprise is not listed in Rule 403. The official comments of the Federal Advisory Committee in a mild manner suggest that in lieu of exclusion of evidence: "it has been stated that granting a continuance is the proper remedy for unfair surprise." *See, Gerhardt v. K.*, 327 N.W.2d 113 (N.D. 1982) at note 7 ("the proper remedy for unfair surprise is a continuance").

Two qualifications should be noted to the view that continuance, not exclusion, should be used if the offered evidence is a surprise:

- Exclusion may be the only available remedy if a party deliberately withholds information in response to discovery interrogatories or depositions. Exclusion as an enforcement device may be necessary to preserve the system of discovery.
- Sometimes a piece of evidence may be prejudicial and that prejudice may be compounded by the element of surprise. That combination may make the piece of merely prejudicial evidence excludable on the ground of "unfair prejudice."

The court's choices regarding a Rule 403 ruling on admitting evidence surprising the adverse party may be categorized as being among:

- No exclusion of the evidence (for inadvertent surprise and no prejudice);
- Continuance (for inadvertent surprise and prejudice); and
- Exclusion (for inexcusable surprise and prejudice).

This manner of analysis is illustrated in *Krech v. Erdman*, 233 N.W.2d 555 at 557 (MN 1975). The court upheld the trial court's admission of a neurologist's testimony, although disclosure of the expert witness was not made until the day before trial.

Trial courts have a duty to suppress such evidence where counsel's dereliction is inexcusable and results in disadvantage to his opponent. In situations where the failure to disclose is inadvertent but harmful, the court should be quick to grant a continuance and assess costs against the party who has been at fault. Here, however, defendant did not seek a continuance upon learning that the doctor would testify. The trial court was justified in finding that defendant did not sustain prejudice which was attributable to his having had only brief notice of the doctor's appearance.

RESPONSE: “Your Honor, the exclusion of relevant evidence for unfairness under Rule 403 is an extraordinary remedy. There is nothing unfair about this evidence.”

X. Speculative.

“OBJECTION: Your Honor, it calls for the witness to guess and speculate.”

DISCUSSION: Anything that invites a witness to guess is objectionable. A guess is not a fact; a guess is not an opinion based on the appropriate standards for an opinion. Speculation as to what possibly could have happened, or what possibly could happen, is of little probative value. Greater freedom is allowed with expert witnesses, but still the expert is limited by Rule 702 strictures.

RESPONSE: “Your Honor, this is an expert giving an expert opinion within the scope of her expertise.”