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Jurisdictionary ®

- Presents -

Evidence Made Easy

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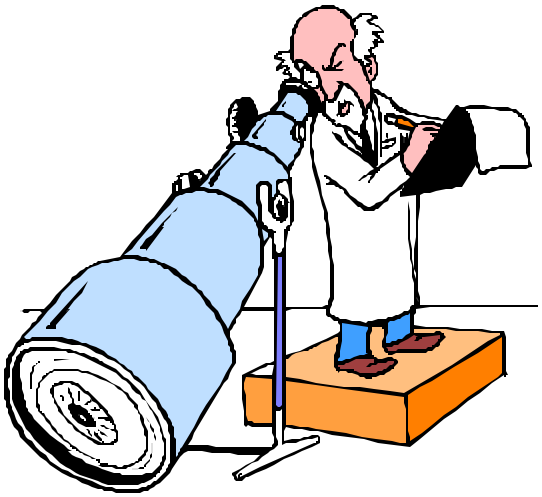
Preface



Evidence is the "stuff" of lawsuits.

Do you have enough? Does the other side have too much? Can you get more? Can you keep out what the other side is trying to get in?

All these questions relate to evidence, stuff without which cases cannot be won!

This tutorial teaches the basics you absolutely *must* know to win a lawsuit! It doesn't pretend to be a complete treatise of the subject. Some lawyers study evidence and its rules for years-on-end without learning all there is to know, however a solid grasp of the fundamentals can give you a decided advantage – and, the fact is that many lawyers study evidence rules for years without seeing the simplicity of them, the simplicity set out here in this tutorial, the nuts-and-bolts simplicity that gives you a common-sense understanding of the rules of evidence and how to use them in court to win your lawsuit!

The rules of evidence controlling federal courts appear in rule books printed on only 15 pages. State rules are not much more complicated. The subject comprises only a very few simple concepts. It may take years for a seasoned lawyer to master using the rules, however it is not difficult to quickly grasp the underlying principles taught here.

So, without more, let's begin!

Introduction

Everyone with even a tiny smattering of exposure to the world of law and its courts knows that "proof" is the test by which lawsuits are determined … proof of facts based on admissible evidence.

Proving your case is synonymous with winning your case.

Proof, however, is based *solely on evidence presented and admitted*. One cannot "prove" a case by clever argument alone. No one can "prove" a case by convincing a jury he's a nice guy who deserves to win! The test of every case is proof that rests on evidence presented to the court in a manner the rules allow to be admitted.

Not all evidence is "allowed".

You may remember the old Perry Mason trials in which Perry objected to testimony with oft-repeated words, "Objection, your Honor. Immaterial. Irrelevant. Hearsay."

The judge responded (for Perry of course) "Sustained!" The objection was sustained. The evidence was excluded as inadmissible.

Of course the jury heard the testimony anyway! But, then, Perry was sure to pull a surprise at the close of the trial so it didn't much matter whether testimony was allowed or not.

In real life it matters a great deal.

In fact, it is perhaps the most important matter of all.

Perry Mason was a fictitious character, always able to pull a surprise at the last minute to win his case. When it's *your* case on the line, you cannot count on surprises.

You must be able to get your evidence in and, as much as possible, keep the other side's evidence out.

What follows will explain how to do this by understanding the rules of evidence.

Understanding Evidence

The key to understanding the rules of evidence is to see them classified into groups according to application. There are rules pertaining to hearsay, for example, and rules pertaining to relevance, privilege, and witness credibility.

Our classification of evidence rules follows:

- Admissibility
- Judicial Notice
- Presumptions
- Relevance
- Privileges
- Witnesses
- Opinions and Expert Testimony
- Hearsay
- Authentication
- Tangible Evidence
- Applicability

This tutorial takes each group in turn, explaining the nuts-and-bolts simplicity of each group in terms you can understand and use.

We are going to examine evidence rules in a general way. This tutorial is not intended to be a substitute for official rules that control local courts. We will examine rules of evidence only as they apply generally. The rules examined here may not be the same as the rules that control your local court. This tutorial is only a general discussion of rules of evidence as generally applied. Variations may exist in your local jurisdiction. For more information on evidence and specific rules that control local courts, consult your local law library. What follows is intended only to explain in a general way how evidence rules are interpreted and applied.

Careful study of this tutorial will help you interpret and apply the rules in your own case … with reference to official rules that control your local court.

Following an initial examination of the classification of evidence rules, the tutorial will provide tips on keeping your opponent's evidence "out", getting *your* evidence "in", and moving the court to consider all evidence in the best possible light for *your* case.

Admissibility

The most interesting and critical thing about evidence rules is how they apply to "admit" certain matters to be considered by the court and limit or exclude other matters.

This first classification of evidence rules, therefore, deals with admissibility.

A witness statement, for example, might tend to prove or disprove some of the issues in controversy (i.e., it might be "relevant" to the outcome of your case) and yet be inadmissible for one or more reasons. Being relevant alone, is not enough. Other factors must be considered before the court can determine if evidence is admissible. Each of these will be covered in detail during this tutorial. Some those factors follow.

- Relevance – ability to prove or disprove an issue material to outcome of the case
- Credibility – reliability of witness or tangible evidence
- Privilege – protection afforded certain kinds of evidence (e.g., attorney-client)
- Prejudice – tendency to confuse, mislead, or waste time

If a party offers evidence that is not likely to prove or disprove any issue material to the outcome of the case, not worthy of being relied upon as true, protected by a privilege, or likely to cause prejudice that may outweigh its ability to prove or disprove any issue, it should be excluded as inadmissible, and an appropriate objection should be made as soon as possible – preferably before the court hears the evidence.

Unless a matter is admissible, it should *never* be heard by the court. If it gets in by accident (the too-frequent result of *unlawful* efforts of parties trying to get away with whatever the judge will allow) the matter should not be considered by the court. It should have no bearing on the outcome of the case. Of course, once it's in, it's in!

(More on handling improperly introduced evidence further on.)

Only admissible evidence should be considered by the court.

Courts are called upon again and again to rule on admissibility of evidence offered by the parties trying to win their cases. The admissibility of evidence is ruled on at trial and all pre-trial phases of litigation as well, particularly including the discovery phase.

It is (unfortunately) not at all uncommon for unscrupulous lawyers to try to shift the court's attention away from relevant facts by introducing "smoke and mirrors" evidence that has no bearing at all on the outcome of the case but tends to confuse both judge and jury. The savvy litigator is always aware his opponent will try to "get in" everything he can to muddy the waters and confuse the court.

It is extremely important, therefore, to understand admissibility and how courts rule on admissibility, because keeping the other side's evidence "out" is just as important (and sometimes *more* important) than getting your own evidence "in".

Federal Rule 1.02[1] suggests the purpose of evidence rules: To secure fairness, the elimination of unnecessary expense and delay, and a means to ascertain truth and justly determine the outcome of judicial proceedings.

The first step, therefore, is to determine admissibility of evidence, whether it should come in or stay out.

[1] You are urged to obtain a copy of the official rules for your courts. Federal rules differ from the rules governing state and county courts in most jurisdictions. Differences can be critical. Always refer to a recent copy of the official rules for your jurisdiction.

Rulings on Evidence

Objections

You *must* object when inadmissible evidence is offered. You cannot allow it to come in then, after you've lost your case, complain to the appellate courts that the trial judge should have excluded it. The rules simply don't work that way.

You *must* object!

You must object in a timely manner. You cannot allow a witness to keep on talking and object when it comes your turn to question the witness. You must object right then and there! On the spot! Without unnecessary delay!

Merely saying, "Objection!" isn't enough, either (unless the basis or ground for your objection is clearly apparent from the context, and you should never assume that it is). When you object to evidence being admitted, state your reasons. Cite the rule, if you know it. Otherwise, explain the ground for your objection clearly.

For example, if the lawyer on the other side is examining his own witness, he is not permitted to "lead" his own witness but is required to elicit the witness' testimony by direct questions only. So, if he asks, "Isn't it a fact you were walking your dog when the defendant attacked you with an umbrella?" that's a leading question. It's improper.

You should jump to your feet and quickly say, "Objection, your Honor. Leading."

That's enough to preserve your objection on the record for appeal if the judge's allowing the evidence to come in is the cause of your losing.

You should always object as quickly as you can so the witness hasn't time to answer before you make your objection!

If the judge is awake, your objection will be sustained, and the other side will be ordered to continue with direct questions only, as the rules require. (Cross-examination, i.e., using leading questions to interrogate a witness, is allowed only when you are examining the other side's witness or, in rare cases, where your own witness has turned hostile to your case. More on this later.)

Even though the rules allow objections to be made without stating the grounds *if* the grounds are apparent from the context, you are urged to state the grounds for every objection, so there'll be no argument later on as to whether the ground of your objection was apparent from the context or not.

Remember, you cannot appeal a trial court's decision based on the judge's exclusion or admission of evidence if you don't timely object *and state proper grounds for your objection.* That's why understanding the rules of evidence is so critically important.

Once a court rules on excluding or admitting evidence and you make your objection and state proper grounds for your objection, you need not renew your objection … unless additional or different evidence is offered (in which case you must object again and state your grounds … or be deemed by the courts to have waived your objection).

Offer of Proof

If you begin to offer evidence and, before you can get it before the court, the other side objects and the court sustains the objection, you *must* move the court to allow you to make clear on the record what the evidence was. This is called an offer of proof. If you don't get your evidence in and don't offer the proof, you'll have nothing to appeal if the court rules against you, because the record will not show what the evidence would have

been! Therefore, when your attempt to get evidence in is prevented by the court's sustaining the other side's objection, be sure to make an offer of proof stating what the evidence would have been and what you intended to prove by it. Then, if an appeal must be taken to the higher court on the basis that you were not allowed to get the evidence in, you'll have a record to show what the evidence was (or would have been).

In jury trials, offers of proof should be made outside the hearing of the jury. In some cases this may be made at the bench (with the court reporter taking down every word spoken by the parties and the judge) or the jury may be excused. It is common for the jury to be excused and for a party to be allowed to continue questioning a witness outside the hearing of the jury until the judge can determine if the evidence sought is relevant and not otherwise excludable. You can see how much prejudice would result if this offer of proof were permitted to take place within the hearing of the jury!

Hearing of the Court

It is entirely *improper* for a lawyer to ask questions he knows will elicit inadmissible testimony. It is against the rules in every jurisdiction! Federal rule 102(c) is clear on the subject, stating that proceedings before the court should be conducted, to the extent practicable, to prevent inadmissible evidence from being suggested to the court "by any means", such as by offers of proof, making statements, or asking questions. It is wrong! If it happens in your case, object loudly!

Make your record!

Making a Record

Remember that objections are only proper where the effect of failure to object would result in prejudice to a party's substantial rights.

Objections are made to preserve those rights for appeal as well as to prevent the court from hearing what it should not hear, evidence that might tend to confuse the issues in controversy, mislead the court, or result in undue delay, waste of time, or needless repetition. Objections are made to keep out what should stay out, to let in what should come in, and to establish a record in case an appeal must be taken on the basis that evidence was improperly admitted or excluded by the trial court judge. There is no other reason for objecting.

Merely objecting for the sake of objecting or to disrupt the other side's train of thought (though too-frequently practiced by unscrupulous lawyers) is contrary to both the letter and the spirit of the rules, and will result in getting you on the judge's bad side. Not good!

It is perfectly permissible to object when substantial rights are being threatened with real prejudice (i.e., a consequence that may affect the outcome of the case). Make your record! Object timely and state your grounds for objection.

However, to object for any other reason is improper and will work against you in the long run. What goes around comes around.

Preliminary Questions

In determining admissibility of evidence, the court may rule on the qualification of a person to be a witness or the existence of a privilege. To reach this determination, it may

be necessary for the court to consider facts that might not be otherwise relevant, i.e., facts that relate only to the qualification of a witness or a relationship (e.g., attorney-client or priest-penitent) that gives rise to a privilege. In such cases, the otherwise irrelevant facts are permitted to be heard and, generally, will be heard by the judge with the jury removed from the courtroom.

Remainder of Writings or Recorded Statements

If one party introduces any part of a writing or recorded statement (e.g., a deposition transcript, audio or videotape recording, or affidavit) the other party may introduce any other part or all of same that ought, in fairness, to be considered at the same time. One cannot introduce part of such a writing or recorded statement and withhold the rest.

The warning to consider is that, if you have a deposition transcript with testimony in your favor mixed with some testimony that is *not* in your favor, take care when you offer the part you want to come in, because by offering any part you open the door to the other side to offer it all!

Judicial Notice

This is one of the least-used yet potentially most-powerful tools in any litigant's box of lawsuit-winning tools. Every jurisdiction we know of allows it, however very few lawyers use it … because, perhaps in part, it makes the judges work harder, and lawyers often don't want to upset judges they'll be required to appear before again next week!

That being said, this tutorial wasn't written for lawyers who have to appear before the same judge week-after-week, year-after-year. We're only concerned about winning *your* case, not maintaining a career relationship with a judge. Therefore, if we have to make the judge work just a bit harder to win our case, we'll have no hesitation to move the court to take judicial notice.

But, what does it mean?

Take judicial notice of what?

To explain, allow me to digress by telling a story of one of my first encounters with a real, live judge. My client had moved out of her apartment, cleaned the floors, the walls, the inside of the oven. Everything was spic 'n span, tidy, and clean as a pin. The landlord wouldn't return her security deposit, though, so as a young attorney ready to champion any cause I could find, it seemed reasonable to sue the landlord in small claims court, demanding return of my client's deposit.

The landlord had no leg to stand on. We had photographs. We had witnesses who helped clean the apartment. Everything was better than the day my client moved in.

The landlord, not to give up, however, complained, "But they cut down my Brazilian Pepper tree, judge!"

Ah! There at last was the root premise of the defense. My client had, indeed, cut down the plant … a known nuisance in Florida where this particular case was filed.

Clearing my throat cautiously, I calmly said to the good judge, "Your honor, I move the Court to take judicial notice that the Brazilian Pepper plant is a nuisance in Florida, and that the defendant landlord has no pecuniary interest in retaining it as an ornamental plant or for any other purpose, so that my client was justified and altogether sensible in her decision to destroy the plant during her tenancy."

I'd never moved a court to take judicial notice before, so I didn't know exactly what to expect. To my delight, however, the judge leaned back in his stuffed leather chair and talked for what seemed like a good half-hour explaining his own experience with that pesky nuisance and, at last, how the landlord would not be heard to complain about its destruction by my client nor be permitted to retain her security deposit upon the pretext that the plant had any monetary value whatsoever.

Judicial notice is the obligation of a court to adjudge certain known facts upon the record of the case, provided that those facts are so generally known within the court's jurisdiction and capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned that the fact need not be otherwise "proved".

A famous case reported to have been won by Abraham Lincoln before he became President of the United States involved the testimony of one who claimed to have witnessed a murder. The witness was so sure of his recollection that Old Abe put him to a difficult test, asking him precisely how far away he stood at the time of the crime and how clearly he could identify the accused. The witness testified that although he was several dozen yards away he could see clearly by the light of the full moon. Abe asked

for a brief recess during which time he consulted the Farmer's Almanac before returning to the court where he prevailed upon the judge to take notice that upon the night of the murder there was a new moon, i.e., no moonlight whatsoever. The accused was set free!

The court's notice was not based on opinion.

The court's notice was not based on persuasive argument by counsel.

The court's notice was based on the Farmer's Almanac, a source whose accuracy could not reasonably be questioned on the point.

If there was no moon that night, the witness could not have identified the murderer with the precision he claimed.

A court may take judicial notice whether or not a party moves it to do so.

The court has discretion whether or not to take judicial notice of some matters once it is moved to do so, however in other matters it has no discretion and *must* take notice once a party makes the motion. This distinction is important and will be examined closely.

When the Court has Discretion to Take Notice – "May"

As stated above, a court may at any time on its own motion (i.e., *sua sponte*) take judicial notice of any undisputed fact or law that applies to the case. This happens rarely, however it does happen … though the court may not formally announce it is taking judicial notice and may merely make a statement, such as, "The court is aware that the highway in question runs generally north and south through this county," or such like statements to move the parties along. In other cases, the court may go on record formally taking judicial notice, e.g., judicial notice of the essential elements of a cause of action or that a certain date fell on a weekend.

The court may also be moved by a party to take judicial notice, however unless the matter sought to be judicially noticed falls into one of the categories where the court has no discretion to deny the motion, the court may refuse to take judicial notice. Examples where the court has discretion include weather conditions on past dates, proper medical procedures to be followed in certain cases, or any such similar matters where reasonable persons might disagree as to particulars.

When the Court Lacks Discretion to Take Notice – "Shall"

If moved to do so, a court does *not* have discretion to refuse to take judicial notice of facts that admit of no controversy, such as the phase of the moon mentioned above or the controlling effect of a law within the court's jurisdiction.

If the fact sought to be judicially noticed can have no bearing on the outcome of the case, of course, the court is not required to take notice. The fact must be relevant.

If moved to do so (and notice is given to the other side along with sufficient information to enable the adverse party to prepare to meet the request) a court *must* take judicial notice of such things as acts and resolutions of Congress or the State Legislature, the law of any state, contents of the Federal Register, laws of foreign nations or organizations of nations, official acts of any branch of government, rules of court, duly enacted ordinances, and general facts that are not subject to dispute because they are generally known (e.g., the Brazilian Pepper tree nuisance) or because they are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Keep in mind that the court is only *required* to take judicial notice of facts that are relevant to the case before it, and the party moving for judicial notice must provide the opposing party with sufficient information to prepare to meet the request, filing all such matters also with the court.

Effect on the Jury

All matters judicially noticed should be communicated to the jury with instructions that the jury is to consider same as undisputed facts with regard to each and every matter the jury is called upon to decide. The jury thereupon has no discretion to disagree with a matter that has been judicially noticed as fact.

Use and Practice

Like everything else in life, judicial notice can be overused and abused to the point of jeopardizing your case. There is no point in unnecessarily putting a judge to the necessity of taking judicial notice of matters only remotely related to your cause.

On the other hand, if it is relevant to the outcome of your case to take notice that a corporation was administratively dissolved by the Secretary of State prior to its suing you, move the court to take judicial notice of the fact … providing opposing parties sufficient documentation to allow them to consider the facts in support of your motion and filing all such documents with the court.

Many times cases can be speeded along and remaining facts dealt with much more expeditiously by moving the court to take judicial notice, rather than spending added time and costs calling witnesses to "prove" what cannot be reasonably disputed.

Presumptions

This is an interesting area of evidence law that arises where a fact may be presumed once one or more other facts are established on the record.

Of course, the weight of a presumption depends on the credibility of underlying facts on which it is based, and some presumptions are rebuttable while others are not (i.e., they may be refuted and ignored if additional facts tend to undermine their reliability).

Some presumptions arise as a matter of law while others arise merely by inference. (A clear distinction between presumptions and inferences will be made in this tutorial.) The effect of presumptions often decides the outcome of lawsuits, however too many cases are wrongly decided because inferences were permitted to be treated as presumptions.

It is critically important, therefore, to understand the difference between inferences and legal presumptions.

Inference

An inference, like a presumption, is an assumed fact.

However, unlike a presumption, an inference arises not from the application of law but from common-sense reasoning (or, as too often happens, not-so-common-sense guessing or wild conjecturing).

For example, suppose you forget to walk the dog, and the dog leaves a mess for your wife to discover on the kitchen floor, and she exclaims in tones of hurt and disapproval, "How *could* you? You refuse to walk the dog on purpose! You don't love me anymore!"

In fact, you may love your wife *very* much. You simply have other things on your mind and occasionally forget to walk the dog. It doesn't mean you don't love your wife or that you refuse to walk the dog on purpose.

However, you did not walk the dog!

And, the mess on the kitchen floor is an unavoidable fact.

Inferences *will* be made! Judges and juries are human, too. We all make inferences from facts. We do it unconsciously.

Sometimes, we even infer new "facts" from known facts then make inferences from our newly "inferred facts" … and the results are often catastrophically far from the truth!

In court, the making of inferences often results in disaster, because inferences can be (and frequently are) *extremely* far from the truth.

Presumption

A presumption, on the other hand, is a fact that is established by operation of law, unlike the inference that results from the unrestrained human imagination. Presumptions are the product of courts and legislatures that decide certain facts can be determined from other facts *as a matter of law*.

For example, in Florida we have what's called the Carpenter Presumption, a legal presumption that kicks in where a person of some degree of mental infirmity dies leaving the bulk of his estate to someone who (1) enjoyed a confidential relationship with the decedent and who (2) actively participated in procuring the will.

If these two facts are proven[2], the Carpenter Presumption kicks in to require the party favored by the will to prove the decedent was not unduly influenced, i.e., that the written will was a genuine expression of the decedent's "will", stating what the decedent would have written if he had not been the victim of undue influence.

The effect of presumptions is to shift the burden to prove.

In Florida, once the party presenting the will to probate demonstrates that the will is valid, properly executed and witnessed, the burden shifts to the party challenging the will to show that the two elements of the Carpenter Presumption exist. Once the elements are shown to exist, the burden shifts to the person seeking to establish the will to prove there was no undue influence. If the person seeking to establish the will can show there was no undue influence, the burden shifts back, and the presumption disappears.

Burden shifting may not require a party to "prove" his case. It may suffice for him to merely present some degree of evidence to "meet" the presumption without overcoming it. This burden is sometimes called the burden of producing evidence. (Consult local rules for details.) Whether a particular legal presumption shifts the burden to prove or merely the burden of producing evidence, the effect is the same – presumptions shift burdens.

In some cases, if particular facts are established on the record, a legal presumption may be conclusive, i.e., un-rebuttable. The law will presume the outcome then-and-there. If facts supporting a conclusive presumption are shown to exist, there is nothing more for the court to decide. The presumption carries.

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2 It is the burden of the party challenging the will to first prove all the elements of essential fact exist before the presumption kicks in to shift the burden to the party who procured the will.

Most presumptions, however, are rebuttable … and all arise from enacted law. The number and nature of various presumptions are too numerous to list here. Consult your local law library to learn more about presumptions.

Relevance

Relevance is probably one of the most widely understood concepts of evidence law and yet the most argued. Lawyers fighting to get evidence in or keep it out are ultimately called upon to argue relevance of the evidence in question.

What is relevance?

To paraphrase a definition given by the Federal Rules of Evidence, relevant evidence is evidence that tends to prove or disprove a material fact.

So, what is a "material fact"?

Suppose you were involved in a traffic accident wherein you rear-ended another car while wearing flip-flops on your bare feet and carrying your girlfriend's picture in your wallet. The flip-flops might have caused your feet to slip off the brake pedal. The picture in your wallet, though you may have been daydreaming about your girlfriend at the time of the accident, cannot *reasonably* be considered to have any bearing on the matter. The fact you were wearing flip-flops at the time may be material to the outcome of the case. The fact that you had your girlfriend's picture in your wallet probably isn't.

If a fact is not "material", then evidence likely to prove or disprove such a fact, is not relevant and, therefore, is not admissible.

It really isn't (and clearly shouldn't be) any more difficult than that!

Relevant evidence (i.e., evidence likely to prove or disprove a material fact) is generally admissible.

Irrelevant evidence isn't.

Evidence is *only* properly admissible when its introduction is reasonably likely to prove or disprove a material fact. If the fact that may be proved by offered evidence is not material, i.e., if it will not tend to decide the case one way or the other, then the evidence is irrelevant and should not come in.

The sad fact, however, is that many unscrupulous lawyers (in their mad haste to make as much money as possible in the shortest length of time, regardless what may or may not be true or just) introduce irrelevant evidence in an effort to prejudice the court. Such irrelevant evidence may "seem" to address itself to some material fact, however on closer examination it is found to be nothing more than smokescreen to hide the truth. An example from a real case follows.

A very successful multi-million dollar business operated almost exclusively upon its creative use of certain trade secrets, without which it could not have made a dime. The CEO of this company met with the owner of a competitor company and agreed the two of them would create yet a third company that the competitor would eventually purchase for a substantial sum by paying the CEO millions, of course. The CEO in turn stole the trade secrets, left his once-successful employer, and started the new business (with a great deal of financial support from the competitor who looked forward one day to owning the trade secrets and the new business while the CEO enjoyed the millions he was promised).

After the victim business owners filed the lawsuit to recover damages from the CEO and the competitor, the defendants claimed the victim business owners had prior dealings with a man who had gone to prison six years prior and alleged that because the victim business owners had once dealt with a man who is now a convict that they should not be

permitted to sue the CEO or the fund-providing competitor … insisting on introducing evidence of the prior dealings with this "bad man" as probative of their defense.

Their defense revolved around the ridiculous theory that anyone who ever makes a mistake by dealing with someone who later goes to prison should not be permitted to sue for damages they suffer at the hands of thieves. In other words, it's alright to steal from someone who once knew someone who was a thief. They had no other defense. The court finally ruled that such evidence was irrelevant and would not be admitted, since it would not tend to prove or disprove any material fact, i.e., it would not tend to prove or disprove whether the CEO and his competitor conspirator stole the victim company's trade secrets.

It's always a good idea to be on your guard for such tactics, prepared to argue against the introduction of irrelevant evidence, i.e., evidence that cannot reasonably be expected to prove or disprove any *material* fact.

Prejudice May Exclude Relevant Evidence

Where the probative value of evidence (i.e., its ability to prove or disprove a material fact) is substantially outweighed by the likelihood of confusing the issues, misleading the jury, wasting time, or unnecessarily introducing cumulative evidence, courts may exclude otherwise admissible relevant evidence. This is, of course, a judgment call on the part of the court and, typically, will only result when a party objects to the prejudicial evidence.

For example, in the stolen trade secrets case mentioned above, one of the defendants died from a gunshot wound and was found dead in a pool of blood by the side of his car in the parking lot of the court reporter's office where he was scheduled to give his deposition. The police said it was suicide. A jury could imagine otherwise. Clearly, the

fact that one of the defendants died from a gunshot wound in such an improbable place as a parking lot (whether the wound was self-inflicted or not) might be probative of material issues related to his participation in the alleged theft of trade secrets, however it might also shock and mislead the jury. Whether such evidence should come in over objections by the other side is a question for the judge … if the motion to exclude is made.

Relevant evidence is often excluded when a party has presented multiple, duplicative papers or multiple witnesses testifying to substantially the same thing so that the material fact to be proven has so sufficiently been proven that further introduction of evidence on that point can serve no purpose other than to make that party's case seem sounder than it is. A dozen witnesses saying a driver was drunk may be more than enough, where a half-dozen witnesses have already agreed. The point to be proved is that the driver was drunk. If a party is permitted to put on dozens of witnesses to prove only this single point, it may tend to mislead the jury by masking the fact that the other driver ran a stop sign! Putting on multiple, duplicative papers or witnesses should be opposed by motion to limit. (See motion *in limine* later in the tutorial.)

Character Evidence

This is an area of evidence law that varies from jurisdiction to jurisdiction and gives rise to many errors. Be sure to consult local law for details.

In evidence law, "character" refers to an individual's reputation, i.e., what others in the community think of the individual, e.g., his reputation for honesty or its opposite. What the individual may have *done* in the past, i.e., his prior bad acts, is not the same as his "character".

Character of Party

In general, evidence of the character of a party (or an accused in a criminal case) is inadmissible to prove the party acted in conformity with his character (i.e., in conformity with his reputation in the community). Exceptions apply where the party himself raises his character as a defense, because to do so permits the other side to put on contrary evidence to rebut his claims.

Character of a Victim

The character of victims, generally, is admissible only if offered by the accused, i.e., once offered, the other side may rebut.

Character of a Witness

The character of a witness, generally, is only admissible to prove the reputation of a witness for truthfulness or untruthfulness. Evidence that a witness has been convicted (not merely arrested) for a crime is admissible if the crime was punishable by death or more than one year imprisonment and, if the crime involved dishonesty or making false statements, then regardless of the duration of punishment.

More on witness testimony later in this tutorial.

Prior Bad Acts

In general, evidence of past crimes, wrongs, or bad acts is not admissible to prove the character of a person in order to show that, relative to the case before the court, that the person acted in conformity with the character established by proof of prior acts. It may be admissible to prove other things (and thereby may come in so the judge and jury

hear all), however in general it may not be admitted to prove the witness acted in the same way with regard to the issues now on trial.

Proving Character

Proof of character, for good or bad, may generally be made by testimony of credible witnesses as to the person's reputation in the community or the mere offer of opinion. It is permissible to inquire into specific instances of past conduct to prove character (within the scope of the rest of the rules relating to character).

Habit and Routine

Evidence of a person's habit or the routine practices of an organization may be admitted to prove that conduct of the person or organization now under trial was in conformity with the habit or routine practices of that person or organization. Note that habit and routine are not "character" based on reputation. Habit and routine are *facts* that can be established by competent evidence properly presented and admitted before the court.

For example, if it was the habit of a particular party to take a cab home from his local tavern when the bartender refused to serve him past closing, then that habit is admissible to prove the party took a cab home from the tavern on a particular night. Similarly, if the routine practice of a business organization was to deposit its payroll taxes at a particular bank on a particular day of the week, then evidence of this practice is admissible to prove the business organization followed this routine practice on a particular occasion.

The proof here has nothing to do with speculative "reputation" or "character". The proof of habit or routine practice is established in court based on fact, not speculation or

opinion of witnesses, and therefore carries somewhat greater weight and is admissible to prove (or tend to prove) conformity with habit or routine practice, while reputation or "character" is generally not allowed to prove behavior in conformity therewith.

Subsequent Remedial Measures

Evidence rules prohibit offering evidence of subsequent remedial measures to prove negligence or culpable conduct.

For example, suppose the owner of an apartment complex replaces the stair treads on a stairway where a tenant fell to his death … *after* the tenant died. Common-sense might urge us to consider this an admission of guilt or responsibility for the unfortunate death. We might think to ourselves, "If only he'd replaced the treads *before* the accident," and assume he was under some legal duty to do so.

This the evidence rules generally disallow … for several reasons.

First, perhaps the landlord had no duty to replace those treads. Perhaps he replaced them only to prevent further injury to others. The fact he replaced them does not mean his failure to do so sooner was the proximate *cause* of the death. To admit evidence of his efforts to replace them *after* death might be misconstrued by a jury, so the rules generally exclude such evidence of subsequent remedial measures.

Second, the law does not wish to discourage individuals from taking such remedial measures when safety to others is in jeopardy. To allow evidence of remedial measures to come in as proof of liability for an injury that resulted prior to the remedial measures might encourage people to leave things in a dangerous condition, lest their attempted repairs be used as evidence against them to prove they were negligent in not having acted

sooner. Therefore, it is contrary to public policy to allow such evidence to come in for the purpose of proving negligence or culpability.

Evidence of subsequent remedial measures may, however, be admitted to prove other facts, such as ownership of the apartment building or that prior remedial measures were technically feasible and *could* have been employed. As you can see, a clever lawyer may be able to get around the rule and let the jury decide what the otherwise inadmissible evidence may tend to proves.

Similarly, offers to pay medical expenses or actual payment of expenses resulting from an injury is not admissible to prove liability for the injury. Public policy outweighs the probative value of such evidence.

Also, generally, evidence that a party was or was not insured against liability is not admissible to prove whether a person acted negligently or otherwise wrongfully, though it may come in for another purpose, e.g., proof of ownership or compliance with law.

Offers of Settlement or Compromise

For similar public policy reasons, evidence that one party offered to settle a case is not admissible to prove that party's liability for the damages. This is an important rule to keep in mind, because allowing evidence of settlement offers or discussions at mediation conferences to come before the court can result in mistrial … and judgment for the other side's costs and fees.

It is forbidden.

Anything and everything that happens during a mediation conference is not to be heard by the court. It is strictly confidential and not to be heard. The only exception is the

case where one side makes an offer, the other side accepts the offer, and the one making the offer backs down. In such situations, either side may tell the court an offer was made and accepted but that the other side failed to comply with the agreement. At that point, of course, the case is closed … having been converted to an action to enforce the settlement agreement.

Privileges

Privilege is the right not to testify or the right to prevent another from testifying or introducing evidence protected by the privilege. Privilege is a powerful right and, in general, belongs to the person claiming it … not to the person resisting it.

A wife, for example, may have a privilege to prevent her husband from testifying against her, and her husband may also have a privilege not to be required to testify against her. In such cases, both husband and wife have the privilege, and both can assert the privilege to prevent the other's testimony from coming in.

An attorney, however, generally does not have a privilege not to testify against his clients. That privilege belongs to the clients alone, who may prevent their attorney from testifying or waive the privilege and require the attorney to testify … even if it gets the attorney in trouble!

Privileges arise from local law, i.e., state law. In federal court, state law pertaining to privilege applies.

Fifth Amendment

Perhaps the most powerful privilege of all is the privilege against self-incrimination provided by Amendment V of the Constitution of The United States, however this is an area of great misunderstanding, and many have fallen victim to this rule's peculiarities.

To begin, the privilege against self-incrimination is not a privilege not to testify at all but only to refuse to testify as to facts that "might tend to incriminate" you, i.e., facts that might tend to result in criminal charges being brought against you.

If the information sought relates only to your breaching a contract, for example, an act that has no criminal consequences, you cannot refuse to answer by pleading the Fifth.

Moreover, if you are offered immunity from prosecution, the privilege not to testify disappears, because the threat of criminal prosecution has been removed.

Unless there is a clear right not to testify, failure to testify may be used as evidence of guilt.

Many situations exist where the privilege is waived automatically. For example, in some states, a probationer may not refuse to testify on the grounds it would tend to prove he violated his probation.

Don't assume you can claim the Fifth and refuse to answer any and all questions that are put to you. It doesn't work like that. To be on the safe side, consult local case law in your jurisdiction for details on when and how the privilege may be invoked.

Other Privileges

In general, unless provided by the U.S. Constitution or specific state or federal law, none of us has a privilege to:

- Refuse to be a witness
- Refuse to disclose any matter personally known
- Refuse to produce any object or document controlled or possessed
- Prevent another from being a witness, disclosing, or producing

The following is a general description of a few privileges recognized in Florida. This is not intended to substitute for more careful study of privileges. Other privileges exist in Florida and other states. The general descriptions that follow are only for the purpose of demonstrating how privileges apply in general, not as controlling law. Not all states

recognize these privileges. Of those states that recognize the same or similar privileges, not all recognize the same conditions for the privileges to apply. Refer to local law for details.

Lawyer-Client

As with all privileges discussed in this section, the right to refuse to testify or prevent another from testifying arises *only* where facts sought to be revealed were communicated under circumstances giving rise to reasonable expectation of confidence, i.e., confidential communications.

Clients have a privilege to prevent attorneys from testifying as to any fact discussed with the attorney in confidence. By "confidential" the rules include any communication not intended to be heard by persons other than the attorney or his staff (where the staff's knowledge was gained in furtherance of the attorney's legal services).

The privilege belongs to the client, to the lawyer on behalf of the client who is (in the absence of any contrary expression) presumed to invoke the privilege, to the client's guardian if the client is mentally incapacitated, to the personal representative (executor) of the client if the client is deceased and, in the case of successor organizations or trusts, to successors in interest.

The privilege does not exist if the client sought legal advice of the attorney in order to carry out a crime, fraud, or other illegal scheme.

The privilege does not exist if the client is suing the lawyer, e.g., for malpractice or fraud.

The privilege does not exist if the communication was made in a setting where third persons were likely to overhear.

The privilege exists between "client" and non-attorney if (and only if) circumstances are such that the client had a reasonable belief the non-attorney was, in fact, the client's attorney lawfully licensed to practice law.

Psychotherapist-Patient Privilege

A privilege arises when any person consults or is interviewed by a psychotherapist under conditions creating a reasonable expectation of confidentiality. The psychotherapist must be (1) licensed to practice medicine, (2) licensed psychologist, (3) licensed clinical social worker, licensed family therapist, or licensed mental health counselor, or (4) treatment personnel of a licensed treatment facility. Note that licensing gives rise to the reasonable expectation of privilege.

There are, however, specific exceptions where (1) the communications are made in proceedings to compel hospitalization of the patient, (2) the communications are made in the course of a court-ordered examination, or (3) the communications were made as a result of the patient's raising his mental condition as an element of his claim or defense.

Finally, a psychotherapist is under a legal duty to report communications made by a patient when the patient states or suggests he is about to commit a violent crime. This exception does not apply to communications about a past crime but only with regard to crimes he states or suggests he is about to commit. The exception is to protect the public from foreseeable harm. (This same exception applies to attorneys who learn from a client that he intends to commit a violent crime.)

Husband-Wife Privilege

Spouses generally have a privilege (both during marriage and after divorce) to refuse to disclose and to prevent the other spouse from disclosing communications made during marriage under circumstances giving rise to a reasonable expectation of confidentiality.

The privilege may be claimed by either spouse (or any third person having a right to exercise the privilege on the spouse's behalf, e.g., a guardian or attorney).

There is no privilege in a civil proceeding brought by one spouse against the other or in a criminal proceeding where one spouse is charged with a crime against the person or property of the other spouse.

Priest-Penitent Privilege

Any person has a privilege to refuse to disclose and prevent another from disclosing communications made by him to a "member of the clergy", which term is broadly applied to priests, rabbis, and ministers of any religious organization or denomination commonly referred to as a church. As with other privileged communications, matters must have been communicated in confidence, i.e., with a reasonable expectation that the matters would not be communicated to third persons, and the communications must have been made for the purpose of seeking spiritual counsel and advice.

If you're playing golf some Sunday afternoon when you divulge to your local parish priest that you murdered your Uncle Mort, there will be no privilege, since the matter was not communicated for the purpose of seeking spiritual counsel and advice.

Accountant-Client Privilege

In Florida (check local rules for all these privileges) in order for a privilege to arise, the accountant must be a certified public accountant or a public accountant. The company bookkeeper or your private secretary who balances your checkbook does not qualify.

As with other privileges, this one belongs to the client and arises *only* where matters were communicated in confidence, i.e., in such a way that they were not intended to be communicated to third persons.

As with the attorney-client situation, this privilege does not arise where the matter to be protected was communicated in contemplation of a crime or fraud.

Waiver of Privilege

Special care must be made to avoid waiving these privileges. In some cases, if one is foolish enough to communicate to others any part of an otherwise privileged matter, he may be deemed by the court to have waived his privilege with regard to facts that would otherwise have been protected.

Also, as stated above, unless the matter was communicated "in confidence" under conditions reasonably giving rise to an expectation of confidentiality and privacy, there is no privilege in the first place. The privilege is deemed waived by voluntary disclosure.

On the other hand, one is not deemed to have waived the privilege if he is compelled to disclose the matter or does so without having been given an opportunity to claim the privilege. Sometimes courts erroneously compel witnesses to testify, even when there is a *bona fide* privilege that should be protected. Similarly, a spouse may be questioned at a preliminary hearing without being told she has the right to refuse to testify. In either case,

the evidence contained in such statements becomes inadmissible as against the holder of the privilege (though, of course, the injury of its being heard may never be measured).

Witnesses and Competency

Dead persons cannot testify.

In most situations, living persons are not permitted to testify what a dead person may have said while still alive. (See exceptions later in this tutorial.)

Persons lacking first-hand knowledge about a matter cannot testify about the matter.

Persons refusing to promise by oath or affirmation to tell the truth are excluded from testifying.

Persons incapable of understanding the duty of witnesses to tell the truth, e.g., young children, are excluded from testifying.

Persons who by reason of mental infirmity or other cause are incapable of expressing themselves in a manner that can be understood, either directly or through an interpreter, are disqualified from testifying.

The presiding judge cannot testify.

Jurors cannot testify.

Lawyers representing parties in the suit cannot testify – a fact you should keep in mind at all times when before the court, because "lawyer testimony" is a common breach of the lawyer's professional responsibility and code of ethics. If opposing counsel insists on providing the court with facts (other than in opening and closing statements when he may instruct the court, "The evidence will show …" or "The evidence has shown …") get to your feet, object, and insist that the attorney be sworn and testify *only* to those matters within the limited sphere of his own personal knowledge. If the lawyer insists on being a witness for his client (as many do when they think they can get away with it), he should

be disqualified as counsel for his client and reported to the Bar. A lawyer cannot serve as both counsel and witness in the same case. Although clearly against the rules, it happens all the time. Object and state the grounds. Don't let it happen in your case!

The underlying consideration to determine if a witness is "competent" to testify is the witness' reliability, which is to say the probability that his testimony can be relied upon as true. For example, an insane person suffering from psychotic delusions clearly is not competent to testify (though the testimony he might offer could be probative of facts material to the outcome and therefore relevant and in all other aspects admissible). If the witness lacks competence to testify, his testimony should not be admitted. (Remember to timely object and state the grounds of your objection to keep incompetent evidence out.)

In general, every person is competent to testify, unless excluded by the rules. State law controls, even in federal courts. Consult local rules for details.

Impeachment

When one party seeks to elicit testimony from a witness who is not likely to tell the truth, the other party may impeach the witness (attack the witness' credibility) by several methods.

You should impeach every opposing witness you can impeach.

Fight to exclude the testimony of liars!

Inconsistent Prior Statements

This is the hardest-hitting method for attacking a witness' credibility.

Suppose a witness testifies he clearly saw you stealing chickens from his henhouse, but by the time he went to get his shotgun and return you were gone. Suppose he tells the court he has absolutely no doubt it was you, that he saw you *very clearly*.

Now, suppose this same witness, when his deposition was taken a few months earlier (when the case was still in its infancy and his memory of the event quite fresh) testified, "I'm almost 100% certain. It was dark that night. There was a light fog hanging over the cornfield. I'd almost swear it was you."

See where this is going?

If the old farmer had stuck to his earlier story, there'd be nothing to impeach, but in his enthusiasm for getting you in deep trouble, he is (several months after being deposed) *very clearly* certain it was you he saw that night.

Easily fixed.

"Mr. Farmer, do you remember my taking your deposition early autumn last year?"

Get an answer. Get an audible answer the court stenographer can record. Don't let the witness hedge, fudge, talk around your question, or simply shrug his shoulders.

Get an *audible* yes or no the court stenographer can record!

"Mr. Farmer, I show you the transcript of that deposition. Is this your signature at the end? Yes or no?"

"And here on page 37, do you see where I asked if you could clearly identify the person you say was stealing your chickens. Yes or no?"

Note that even here we question the old farmer's reliability by calling attention to the fact we only know chickens were stolen because he says so!

"Would you read your answer for the court, please?"

This always gets ‘em!

“Has your recollection of that night improved these past three months since I took your deposition last autumn?”

Get an answer. Either way his credibility is blown!

Yes or no?

Then ask, “Tell me, Mr. Farmer, were you lying then, or are you lying today?”

This will get an objection from the other side, but you’ve made your point … legally.

You have a right to impeach witnesses against you.

Exercise your rights.

Fight falsehood.

Get the truth about your case into the record, and prevent everything else!

You aren’t limited to impeaching by inconsistent prior statements in depositions alone. You can use other inconsistent prior statements. (It’s just easier with depositions, since they’re under oath.) If you have a letter or invoice or purchase order or hand-written memorandum authored by the witness that contains facts inconsistent with testimony the witness has just given, use the inconsistent prior statement to attack credibility.

Show the witness his prior recorded statement and ask, “Is this your signature?” Get an answer. “Yes or no?”

“Did you write this?” Yes or no.

Then proceed as outlined above to impeach using the inconsistent prior statement.

“Were you lying then, or are you lying now?”

Character

Impeaching by character is more difficult. You must carefully follow local evidence rules to make certain you're doing it lawfully. In most jurisdictions, the reputation of a witness is only admissible as evidence of the witness' credibility. If the witness killed his mother-in-law with a chainsaw, you cannot offer the fact to impeach his testimony, since the fact does not relate to the witness' reputation for telling the truth or lying. If he has a community-wide reputation for writing bad checks, however, the character trait relates to dishonesty and can be used to impeach by attacking his reputation for truthfulness.

Note this only works in the negative, i.e., to impeach. You cannot present reputation evidence to show a witness is reliable, i.e., that the community considers him an honest fellow and therefore the judge and jury should give greater weight to what he says. This is only permitted if the other side first attacks the witness' honesty by putting on evidence of his negative reputation in the community. You are not permitted to offer his character for truthfulness unless the other side has first attacked it.

Reputation aside, if a witness has been *recently convicted* of a crime, especially one involving dishonesty (consult local rules) you may impeach by presenting evidence of the conviction. Jaywalking, even if followed by a conviction, probably doesn't apply. Theft, on the other hand, is a crime of dishonesty and probably applies in all jurisdictions, since it is the witness' dishonesty that gives us the opportunity to impeach his credibility. Theft is, if a conviction resulted (arrest alone is not enough), a crime of dishonesty and tends by itself to demonstrate the witness cannot be trusted.

Remember, what we're trying to show is credibility of the witness, or lack of it.

Religion

In general, a witness' religious beliefs or opinions in matters of faith are inadmissible to show credibility or lack thereof.

In short, *don't go there!*

In American courts, even the Pope is susceptible of being impeached on the witness stand if admitted facts contradict his testimony.

There are no exceptions.

A witness' spiritual convictions or religious affiliations are not admissible to show honesty or dishonesty. Whether he faithfully attends the First Church of Holiest Truth or hangs out in taverns with disreputable unbelievers, his religion or lack thereof cannot be brought to bear on the credibility of his testimony.

Defect of Capacity

The most striking defect of capacity is failure to have first-hand knowledge.

If a witness knows only what he's learned from others, he cannot testify to the truth. Defect of capacity is inability to testify to facts *of the witness' own personal knowledge.*

(This defect is discussed in detail later in the chapter on hearsay.)

If a witness cannot remember what he had for breakfast, he may lack the capacity to testify about past events. If he is allowed to testify, the probative value of his testimony is impaired. If you doubt a witness' ability to remember clearly, probe events carefully. Use new questions to revisit answers the witness has already given. If you get answers that are inconsistent with the previous answers, make your record. Impeach on the ground that the witness has a defect of capacity to accurately and reliably recall events.

The same applies to witnesses who lack capacity to communicate what they know in an effective manner. I once had a client who could not answer a simple question. She had a peculiar penchant for talking about her childhood or other irrelevant past events when asked about matters bearing on her present circumstance. My firm was anxious to help, but her lack of capacity to answer questions made it impossible.

Witnesses must have the mental capacity to explain themselves intelligibly.

Most courts will not hesitate to prevent very young children from testifying. There are a few exceptions in local rules, however the general rule is that very young children lack capacity to testify. *They talk to their toys*.

Habitual drunks and drug addicts may suffer defects of capacity so severe that they cannot testify, even during periods of seeming sobriety. Prolonged substance abuse can destroy the capacity to discern between truth and falsehood. If the court is convinced a witness is so severely impaired that he has lost touch with reality (an inquiry should be made with the jury removed from the courtroom) the witness may be prevented from testifying altogether because of his defect of capacity.

Substantial Contrary Evidence

If substantial evidence has been admitted that contradicts a witness, this fact may be used to impeach, destroying the value of testimony. There must be substantial contrary evidence, however.

"Isn't it a fact, sir, you were inside your house watching television when the accident occurred?"

Get your answer, "Yes or no?"

"And, isn't it a fact six witnesses whose testimony conflicts with yours were walking along the sidewalk in front of your house where they could observe the accident from a position just a few feet from where the body was found? Yes or no?"

"And, isn't it a fact that you wear corrective lenses for seeing distances but were not wearing those lenses at the time of the accident? Yes or no?"

You see how easy it is to do?

Just remember that it *should* be done, no matter how it may infuriate the witness or exasperate the judge who wants to hurry along and hear the next case on his docket.

You have a right to win.

Many lawsuits are won simply because one side showed determination and courage, fighting to exclude incompetent evidence or, at least, attacking its credibility.

Impeach whenever you can … and *never* permit counsel for the other side testify!

Opinions and Expert Testimony

There are two types of opinions permitted in court: lay and expert.

Understanding the distinction can mean the difference between winning and losing your case.

What follows is a general examination of this critical topic. You should thoroughly familiarize yourself with local law controlling opinion testimony of lay witnesses and experts.

Lay Opinions and Inferences

A major distinction between lay and expert testimony is that lay testimony is *always* derived from the witness' personal observation and experience with the underlying facts, while expert testimony may arise from hypothetical facts presented to experts who have no first-hand knowledge of the underlying facts but possess special skills, education, or training that equips them to form admissible opinions with regard to such facts.

Unless a lay witness has personally perceived the underlying facts, the witness is not permitted to offer an opinion.

For example, a lay witness may have seen the plaintiff's crops wilting in the field. He may even have first-hand knowledge a certain chemical was sprayed on those crops a week prior to their wilting in the field. His testimony as to these facts is admissible (if he is not otherwise incompetent to testify) because he has first-hand knowledge of the facts.

Such a lay witness may not, however, offer his opinion that the chemical caused the crops to wilt. He is a lay witness, not an expert. If he attempts to offer such an opinion, object at once.

Lay opinion is *only* admissible when it is based on first-hand perception of the facts and is *never* admissible if it depends on the witness' special knowledge, skill, experience, or training. Indeed, if a witness having first-hand knowledge of the facts offers an opinion based on special knowledge, skill, experience, or training, then his testimony is offered as an expert. The rules deal differently with expert testimony as discussed below.

A family member may testify as to the peculiar behavior of an elderly relative who of late has been given to abandoning her former habits of personal hygiene, can no longer balance her checkbook, gets lost when she attempts to drive to the grocery two blocks from her home, and cannot call her own children by name. These are facts within the lay witness' own perception and (if the witness is otherwise credible) are clearly admissible.

Moreover, as lay witness (and not as an expert) such a family member with personal knowledge of such facts may offer an opinion as to the elderly person's mental condition. However, the family member may not be permitted to say, "Grandmother suffers from an advanced stage of senile dementia," or otherwise offer a technically precise identification of the underlying pathology.

Nor can a lay witness testify, "I work in an Alzheimer's center as a volunteer and can say for a fact that Grandmother has Alzheimer's disease," because such testimony would depend on the lay witness' special knowledge, skill, experience, or training … testimony reserved to experts only.

On the other hand, if the family member has *personal* knowledge and perception of the underlying facts of Grandmother's questionable behavior, the family member as lay witness may offer the opinion that Grandmother should no longer be left unsupervised. That is an opinion. It is a lay opinion. It is not based on the witness' special skill or knowledge. It *is* based on the witness' first-hand knowledge and perception. And, it is in the nature of an opinion lay persons are permitted to testify without being challenged for admissibility.

Expert Opinions and Inferences

Expert witnesses are witnesses who have no first-hand knowledge of the facts. They know only what they've been told prior to trial or what they are told at trial in the form of hypothetical facts, from which they form their opinion testimony.

They don't have first-hand knowledge of the facts.

They are permitted to offer opinions of fact only.

They are not permitted to offer an opinion as to which party should win the case.

They are given certain facts to consider and asked to provide other opinions of fact.

The value of expert testimony is entirely in the expert's knowledge, skill, experience, training, or education. Experts don't know the facts first-hand as lay witnesses do. They can only offer opinions based on the facts they are told.

In order to testify as an expert, the witness must be qualified as an expert by being examined and cross-examined under oath. If the judge believes the witness is an expert in the field required to form an opinion on some material fact, the court will declare him an expert by reason of his knowledge, skill, experience, training, or education.

Having qualified as expert, the witness may offer opinions or infer conclusions from facts presented to him, even though he has no first-hand knowledge of the facts. Of course facts presented to an expert must be substantially identical to the facts in evidence, or the expert's opinion is meaningless, irrelevant, and therefore inadmissible.

Commonly, after presenting all facts material to a case by putting on witnesses and authenticating documents and things, counsel will call experts who are asked for opinion testimony based on the hypothetical facts presented to them.

"Doctor Wisdom, if an employee were exposed to airborne fibrous asbestos having a median particulate size of 7 microns in concentration of 4 micrograms/liter for an average 40-hour work week over 18 months, is it more likely than not that such an employee would develop symptoms of asbestosis?"

The expert is not testifying the plaintiff came down with asbestosis from working at the defendant's manufacturing plant. That would be offering an opinion on the ultimate issue before the court, and no witness (expert or lay) is permitted to offer such opinions. Instead, he is testifying as to the probable outcome of a hypothetical fact circumstance.

If the expert testifies that asbestosis is likely, counsel may ask the witness, "What are some of the symptoms of asbestosis, Doctor?"

If the expert's description of asbestosis symptoms is the same as the symptoms of the plaintiff already presented to the jury, and the conditions of the workplace are the same as technically described to the expert, the jury will have a sound basis for finding in favor of the plaintiff … at least as far as causation of the plaintiff's injury.

Expert testimony can be very costly. If you can make your case without an expert witness, you should consider doing so.

If there is any doubt as to the value of a particular expert, however, hire your expert early on. Confer with him before trial to make certain he is qualified and will give the testimony you need to win. If you are unsure if the expert is scrupulously honest, take his deposition *before* trial so you will not be surprised by answers you didn't expect when it counts most. Some "experts" testify to the highest bidder. Sad, but it does happen.

Balancing Lay and Expert Opinions

Neither lay nor expert witnesses may offer an opinion of the ultimate issue on trial, i.e., neither may offer an opinion as to who should win. That's for the trier of fact (jury in jury trials, judge in bench trials). Witness opinions, lay or expert, are considered by the trier of fact along with all other admissible evidence presented at trial.

A jury may sometimes ascribe greater weight to lay opinions than to expert opinions. Juries are free to decide which opinions are more reliable based on their perception of the witness' demeanor, candor, mode of expression, and any number of other factors. That's the nature of jury trials. Once the evidence is "in" and the jury retires to deliberate, it is entirely up to the jurors to decide what evidence they choose to believe, what opinions to ignore, and what opinions to consider most likely.

If lay testimony substantially rebuts the "facts" presented to an expert, ie., "facts" on which the expert formed his opinion, the jury may ignore the expert opinion altogether.

Again, as stated above, admissibility of opinion testimony varies from court to court. This tutorial only deals with opinion testimony in a general way. Consult local rules.

Hearsay

Hearsay is almost universally misunderstood yet fairly easy to explain. The problem is not so much in understanding what hearsay *is* but in knowing when it is admissible and when it is not.

In general, hearsay testimony is not admissible.

There are many exceptions, however, and the exceptions vary by jurisdiction.

Hearsay is nothing more complicated than a statement made out of court by a person who is not now in court, offered to prove the truth of the matter asserted. In other words, it is a statement made by someone who cannot be cross-examined yet offered to prove the truth of what that person said.

In brief, if the person making the statement cannot be examined in court to determine if what he said was true or not, then the statement is not admissible.

It is in the exceptions to this rule that the concept becomes less clear.

Some may remember the children's story of Henny Penny who, being hit on the head by an acorn dropping from a tree, exclaimed, "The sky is falling, and we must tell the king!"

As the story goes, Turkey Lurkey heard Henny Penny and told Piggly Wiggly who, in turn, told Goosey Lucy … and so the animals set off to tell the king.

Foxy Loxy spied them marching on their journey and asked where they were going.

Goosey Lucy replied, "Piggly Wiggly said Turkey Lurky said Henny Penny said, 'The sky is falling, and we must tell the king.'"

Goosey Lucy's testimony is inadmissible hearsay, because Goosey Lucy is testifying to something said by another who is not being questioned, i.e., not in court to testify.

Yet, Goosey Lucy's testimony is hearsay for another important reason, also. Whether or not the sky is falling depends on the credibility of Henny Penny and no one else! Since Henny Penny is not testifying that the sky is falling, the fact of whether the sky is in fact falling cannot be determined from Goosey Lucy's hearsay statement.

Hearsay is only hearsay if it is offered *to prove the truth of the matter asserted*.

Goosey Lucy may testify that Piggly Wiggly said Turkey Lurky said Henny Penny said, "The sky is falling, and we must tell the king," however Goosey Lucy's testimony cannot be used to prove the sky is falling. It's not even admissible to prove what Turkey Lurky said. It may be admitted only to prove what Piggly Wiggly said (if what the pig said is, of itself, admissible). It is not admissible to prove what anyone else said and, of course, it is *not* admissible to prove the sky is falling.

You cannot understand hearsay until you fully understand this important distinction.

The word "hearsay" is bandied about by persons wishing to appear as if they know what they're talking about, yet the term is almost universally misunderstood and misused by lay persons and lawyers alike. You *must* understand the distinction and exceptions.

Even Turkey Lurky, who heard Henny Penny first-hand, cannot testify that the sky is falling. Turkey Lurky can testify only that Henny Penny *said* the sky is falling, and only then *if* the "fact" Henny Penny made the statement is *of itself* relevant and admissible. The "fact" of the sky falling cannot be proved by saying what Henny Penny said.

Henny Penny is the only one who can testify the sky is falling. He personally felt it hit him on the head. He alone has first-hand knowledge. Of course, it's only his being hit

on the head by an acorn that makes him believe the sky is falling, yet he may testify the sky is falling if, in fact, it's his own personal first-hand experience.

If the condition of the sky is relevant to the outcome of the case, i.e., if it is an issue of material fact, any credible witness can testify of his own personal knowledge what he knows about the sky's condition … falling or not … whether or not the facts comply with the witness' perception.

What one cannot testify to is the experience or knowledge of others. That's hearsay.

Henny Penny may tell the court in person, "The sky is falling," because he honestly believes the sky is falling. He felt it hit his very own head!

Henny Penny would then be subject to cross-examination by the party opposing his testimony, and that party might ask, "Isn't it a fact that at the time you felt the sky falling you were standing under an oak tree? Yes or no, Mr. Penny?"

And, by this process of cross-examination, the value of Henny Penny's opinion may be tested and tried before the court. (By the way, that's why they call it a trial, i.e., a time for testing and trying facts offered in evidence to see which are true and which are not.)

"Did the sky feel very heavy when it hit your head, Mr. Penny?"

"Do you still feel the weight of the fallen sky pressing down upon your head, sir?"

In this manner courts get to the truth.

By excluding hearsay, courts prevent parties from alleging facts on the record when those facts were not experienced by anyone who is in court subject to being examined to test and try the truth of what's alleged.

Hearsay, therefore, is generally excluded. Hearsay is not admissible.

There are, however, many exceptions … exceptions that vary from jurisdiction to jurisdiction. The exceptions are too many to list here. A few common exceptions follow for illustration. Consult local rules to learn what exceptions apply in your courts.

Statement Against Interest

If an out-of-court statement made by a person who is not available to testify at trial is so contrary to the interests of the person making the statement that a reasonable person under the same or similar circumstances would not have made the statement unless it was true, then the out-of-court statement may come in as an exception to the hearsay rule. The reasoning is that the person making the statement would not have said what he said if the statement wasn't true. In other words, people may lie to feather their own nests, but only a deranged person would lie about something certain to cause himself injury. Therefore, the hearsay rule (designed to prevent improbable facts from coming in) admits testimony by in-court witnesses saying what out-of-court persons said, *if* what was said by the out-of-court person is substantially contrary to the best interest of the person saying it. The law assumes such statements are more likely to be true than not true.

Dying Declaration

As with statements against interest, any statement made by a person who believes his death is imminent is deemed to be sufficiently reliable that others are permitted to testify as to what such a person may have said *about the perceived cause of his impending death or the circumstances surrounding it.* The law considers that such persons, in view of the finality of the experience they believe they are about to undergo, are unlikely to lie.

It should be noted that the person need not die for the exception to apply. If a person makes a statement about the perceived cause of his impending death or circumstances surrounding it *at a time when he genuinely believes he is at death's door*, the exception will apply, and if that person is unavailable to testify at trial, others may testify as to what he said about the perceived cause of his impending death or surrounding circumstances.

The exception does not apply to other matters. For example, if the dying person says, "Joe embezzled money from my company," just before he breathes his last, this statement is excludable hearsay (to the extent it is being offered to prove the truth of the matter asserted). It does not fall under any exception. The dying declaration exception applies to admit statements about the dying person's perception of the cause of his impending death and the circumstances surrounding it … not unrelated matters.

Excited Utterance

A witness may testify what someone else said under stress of excitement, provided the statement relates to the cause of the excitement, and the cause is an issue of material fact relevant and otherwise admissible. It doesn't matter if the person is out-of-court or available at trial. The statement falls under an exception to the hearsay rule and comes in.

For example, suppose Smith runs out of his shop at the sound of screeching tires and a sickening "thump" to see the crushed body of a young boy lying in the street and also to see a passer-by, Jones, in a state of extreme agitation, trying to help the injured boy.

As Smith approaches, Jones looks up, wild-eyed and exclaims, "That man in the red Corvette saw the boy and didn't even try to stop! Oh, my! This is so terrible! Oh, my!"

Now, suppose a woman is sued for the boy's injury because she owns the only red Corvette in town. Jones, who was only a passer-by, has disappeared. The only evidence that the driver was a man, and not the woman defendant, is the statement made by an out of court declarant … i.e., hearsay.

Smith is called to the stand and asked what he knows. In response, Smith answers, of course, that he didn't see the accident first-hand and can only add, "When I got to the scene, a man trying to help the victim was in great emotional distress and said, 'That man in the red Corvette saw the boy and didn't even try to stop!"

The victim's lawyer jumps up to object, "Hearsay."

The woman's attorney responds, "Excited utterance exception to the hearsay rule."

The judge says, "Objection overruled. You may continue."

So the woman's attorney gets Jones' statement in, even though it is clearly hearsay, because the statement was made under stress of excitement related to the event at issue.

The court gets to hear evidence that the hit-and-run driver may have been a man.

Whether the excited utterance exception applies depends on the degree of excitement and the length of time between the excitement-causing event and the excited utterance. If a long period of time (a matter for the court to decide) intervenes, the exception may not be effective, since the excitement may have worn off. The closer the statement is made to the time of the excitement-causing event and the more exciting the event, the more likely the exception will apply.

Remember: for the excited utterance exception to apply, the statement must relate to the cause of the excitement and be probative of (i.e., relevant to) material issues on trial.

Conclusion

There are many other exceptions in both federal and state rules of evidence. Before taking your case to trial, know them all and be prepared to object. Each court jurisdiction has different rules. Know the rules in your local jurisdiction.

Authentication

A critical part of evidence is, of course, documents and other things that cannot take the stand to testify. Authenticity of such documents and things must be determined by the court before they can be admitted into evidence, just as identity of witnesses must be determined before they can give testimony.

Authentication is the process of determining the credibility of documents and things.

Authentication is a condition precedent to admission of tangible evidence.

All tangible evidence should be authenticated *before* it is presented to the court.

If a party wishes to offer tangible evidence that might prejudice or mislead the jury, and authentication of that evidence has been challenged by the other side, the evidence should be presented with the jury removed from the courtroom so the court can rule as a matter of law whether the documents and things are authentic, reliable, and relevant to at least one issue of material fact.

Authentication of Documents

Authentication of documents is necessary in almost all lawsuits.

Letters, checks or other negotiable instruments, contracts, deeds, official documents, and other papers cannot come in simply by being offered by a party wishing them to be considered by the court. First, the document must be authenticated.

Video and audio tapes, photos, computer diskettes, and similar recordings of data or other information are treated as "documents" for authentication. It is the authenticity of information contained in a document that concerns courts, rather than the document itself.

Self-Authenticating Documents

Copies of court papers certified by the clerk of court, ie., bearing the clerk's seal and signature are self-authenticating. They come in over the other side's objection, unless the other side alleges the seal and signature are forged or that the document is a counterfeit. This almost never happens, of course. Court papers under seal are admitted in all cases, if the information contained therein is relevant to material issues of fact.

Similarly, a document purporting to be that of the United States or any state, district, commonwealth, territory, or insular possession thereof comes in if under seal.

In general, any official government document under seal or bearing the signature of an officer authorized to attest to its authenticity will be admitted in spite of objections. The only exceptions are objections for fraud or counterfeit, as mentioned above.

Where many people get into trouble is showing up for trial with *copies* of official court or other government papers that do not bear an *original* seal or *original* signature of an authorized officer attesting to the document's authenticity. Unless the seal or signature is *original*, a copy is not self-authenticating. A witness must authenticate it, i.e., someone who has authority to attest to its authenticity.

Self-authenticating documents that do not need a seal or other certification include:

- Books, pamphlets, or other publications purporting to be issued by a government
- Printed materials purporting to be newspapers, magazines, or other periodicals
- Tags, labels, and signs affixed in business to show ownership, origin, or control

Non-Self-Authenticating Documents

Other documents are generally not self-authenticating and require the testimony of a credible witness as to chain of custody, proof of signature, and similar matters. Though a

document may not be self-authenticating, it may still be admitted if authenticated by the testimony of a credible witness, i.e., one who has first-hand knowledge as to the nature of the document and its authenticity.

Remember, *any* document can be challenged for fraud, seal or no seal, and witnesses called to authenticate documents can be impeached if you have evidence to prove their testimony is not credible.

Local rules may differ in significant ways. Consult your local law library for details.

Authentication of Things

The authentication of things almost always requires live testimony by witnesses who have first-hand knowledge of the item's authenticity and authority to authenticate.

If there is some peculiarity about a thing offered in evidence, like a dent or a scratch relevant to some material issue in the case, the person testifying to its authenticity may be required to prove knowledge of the item's chain of custody, i.e., that the witness has been in constant possession or exclusive control of the object since the date when the dent or scratch was alleged to be made.

Obviously, if a witness testifies, "Yes, that's my motorcycle," and the opposing party is attempting to prove the scratch on its front fender has something to do with his injuries, the witness must testify that nobody but himself has had access to the bike since the injury-causing accident and that he himself did not scratch the fender.

Authentication of things, of course, is entirely dependent on credibility of the witness testifying to its authenticity.

Requirement for Originals

In general, originals are required.

Certainly this is true of things. It is also true of writings, photographs, or recordings offered to prove the authenticity of their contents.

Copies are never admitted unless they can be authenticated.

Many lose a valuable litigation advantage by accepting copies in response to requests for production, subpoenas, and depositions *duces tecum*. (See our other **Jurisdictionary**® tutorials to learn more about pre-trial discovery of evidence.) By accepting copies, you are without originals at trial, and the other side may argue about authenticity. You have a right to demand production of originals during pre-trial discovery and, if you must make a copy of originals presented by the other side, you can have the other side admit the authenticity of those copies using requests for admissions. (Also covered by our other **Jurisdictionary**® tutorials.)

Applicability

To fully and effectively apply the rules of evidence, you should be familiar with the process of pre-trial discovery of evidence and other lawsuit tactics and procedures taught by our **Jurisdictionary®** tutorials. The following is offered only as a general help. If you are serious about winning lawsuits, visit our website www.**Jurisdictionary®**.com to order our other lawsuit-winning tutorials.

Motion in Limine

At any time prior to trial and in some cases during trial, any party may file a motion *in limine* (pronounced lim´-i-nee) to exclude evidence the other party is trying to offer. The term means "at the threshold", at the very beginning, preliminarily, and applies to the motion's being brought before trial to preliminarily prevent introduction of evidence that is irrelevant or otherwise inadmissible.

Motions *in limine* to prevent offers of adverse evidence is a very smart thing to do.

For example, in an actual case we handled here in Florida, the defendants stole trade secrets from our client then, using those trade secrets, stole our client's customer base. In their affirmative defenses they alleged that the customers "would have left anyway".

We successfully prevailed on the court to grant our motion *in limine* to prevent the other side from introducing certain evidence in support of their "would have left anyway" defense on the basis that the offered evidence was not relevant to our cause of action for theft of trade secrets. If the defendants had not stolen our clients' trade secrets, we'd have

no case against them for stealing customers. The "would have left anyway" defense was not relevant to our action for theft of trade secrets.

In a similar matter, the defendants sought to introduce a newspaper article to prove our client had participated in some activity that, if shown to the jury, would mislead or prejudice the court. Though a newspaper itself may be self-authenticating (i.e., it is what it purports to be) the content of an article in a newspaper is hearsay that does not fall under any exception to the hearsay rule. The article was an out-of-court statement offered to prove the truth of the matter asserted in the article. So we filed a motion *in limine* to keep it out.

Some judges don't like motions *in limine*. They don't want to be bothered by ruling on evidence before trial begins. Don't fall into the trap of being afraid of judges. Motions *in limine* are authorized by the rules of evidence and are used by winning lawyers.

If you can keep evidence out *before* trial, do so!

Testimony by Attorneys

As a rule, attorneys representing their clients in court are *not permitted to testify as to facts about which they have no personal, first-hand knowledge* … and, if they do so, they should be disqualified as counsel for their client and placed under oath!

The only exceptions are (1) in opening statements at the beginning of trial when the lawyer may say to the jury, "Ladies and gentlemen, the evidence you are about to hear will show …" or (2) in closing statements at the end of trial when the lawyer may say to the jury, "Ladies and gentlemen, you have heard evidence that showed …"

It is improper for lawyers to testify, yet it happens all the time.

Just as in opening and closing arguments, a lawyer arguing a motion hearing may tell the judge, "We will present Mrs. So-and-so, who will testify that …," however the lawyer should never say, "Defendant was wearing red shoes the day of the accident," unless the lawyer was present, has first-hand knowledge of the fact, and is testifying as a witness (in which case he is disqualified from acting as counsel to a party in the case).

Don't let lawyers testify in *your* case!

If a lawyer begins to tell the court material facts (instead of saying what the evidence will show or has shown already) jump to your feet and object.

Move the court to put the lawyer under oath and to disqualify the lawyer as counsel.

No one is competent to testify to facts about which he has no first-hand knowledge.

That includes lawyers, who all-too-frequently mislead judges and prejudice juries by proclaiming the truth of matters about which there has been absolutely no admissible evidence presented!

Don't let it happen to you!

Dealing with Perjury

Perjury is a crime.

In some states it is still a felony punishable by imprisonment.

Remarkably, however, it is common-place practice by witnesses and even by lawyers who not only improperly testify about facts they do not know first-hand but testify about facts *that are not true!* (Anything to win a lawsuit and make more money in fees.)

The first rule is to require *all* testimony to be under oath and on the court record.

If a witness (or lawyer) has not been sworn, he or she can lie with impunity. It is not perjury to lie in court.

It is only perjury to lie under oath.

Moreover, it is only perjury if the person testifying is aware his testimony is false.

Finally, the perjury must be relevant to some *material* issue of fact. The perjury must threaten some prejudice to the other side or to the administration of justice generally.

If a witness (or lawyer) lies under oath, move the court for an order to show cause why that witness (or lawyer) should not be held in contempt … and press for contempt!

It's hard enough to win a lawsuit when everyone tells the truth.

Direct and Cross-Examination

Cross-examination is an extremely powerful tool for getting at the truth.

Being able to tell a witness a fact and make him admit it (as may be done during the discovery phase with requests for admissions, as explained in our other Jurisdictionary® tutorials) can be devastating to a liar on the stand … or someone who wants to hedge the facts and dance around the truth with innuendo and half-answers.

For example, the following is a leading question permitted during cross-examination but not during direct examination.

"Isn't it a fact you've read part or all of the Jurisdictionary® tutorial on evidence?"

Yes … or … No?

Now, what if you couldn't ask the question this way but were required to "develop" your line of questioning, one element upon another, until you'd created a "predicate" for

your questions, i.e., until you drew the witness out until he stated in answer to a "direct" question, "I've read part of the Jurisdictionary® tutorial on evidence."

Harder?

The point of this is to make certain you understand before we end this tutorial that you cannot ask leading questions except in certain situations, and you must learn how to get the testimony you want with *direct* questions when cross-examination is not allowed.

When Direct and When Cross?

In general (though there are exceptions in local rules that vary from state-to-state) you may not cross-examine (i.e., ask leading questions of) your own witnesses, i.e., the witnesses you call. You may cross-examine the opposing party and witnesses he calls, but you may not cross-examine your own. When examining your own witnesses, you must use direct questioning to elicit testimony you want the court to hear.

Witnesses called to the stand by the other side can be cross-examined by you once the other side completes his direct examination.

Don't let the other side cross-examine his own witnesses! Object at once, stating the grounds for your objection. Make your record! Do not allow it!

One exception is where a witness *you* call turns "hostile" or begins to lie. If you can convince the judge to declare your witness hostile, he will be treated as if called by the other side or even as if he were an opposing party, in which case you may impeach your own witness and cross-examine him to get at the truth.

You can always cross-examine opposing parties.

The reason you aren't permitted to cross-examine your own witness is because the process of cross-examination gives the examiner an opportunity to state facts and ask the witness to corroborate "the examiner's own testimony". What we want from witnesses on direct examination (i.e., when being examined by the party who called the witness) is not mere "yes" or "no" as the examiner tells the story he wants the court to hear but what the witness can say *from his own personal knowledge*. By requiring examiners to ask direct questions instead of leading the witnesses they call, the testimony is limited to what the witnesses know first-hand, not what the examiner wants the witnesses to know and tells the witnesses to say by using leading questions.

When you call your own witness, you cannot lead. You must use direct questions to get the testimony you want the court to hear.

When the other side finishes direct examination of his own witness, however, you can attack the other side's testimony with cross-examination.

In general, however, cross-examination of the other side's witness is not permitted to inquire into matters not raised by the other side's direct examination. If the other side didn't ask questions about company billing procedures, for example, you cannot inquire into those procedures for the first time on cross-examination. Unless direct examination "opens the door" to a particular matter, you cannot inquire into that matter when it comes time for your cross.

An obvious exception to this rule is when examining an opposing party whom you may *always* ask leading questions.

Another obvious exception is when impeaching a hostile witness, which may be done with leading questions.

How to Examine a Witness on Direct

Direct examination is probably one of the most difficult tasks of trial lawyers.

It is beautiful to hear when properly done … a nightmare when done poorly.

Keeping in mind that the examiner may not lead his witness or in any way suggest to his witness what the answer might be to the question asked, you can see how difficult it is to get a witness to say what you wish the witness to say.

For example, you may wish your witness to tell the court he's known the opposing party nearly 40 years, done business with the opposing party for 10 of those years, and of his own personal knowledge can testify the opposing party issued bad checks to him not fewer than 20 times during those 10 years and 5 times in the last year alone. If you begin, "Mr. Witness, isn't it a fact Mr. Party gave you 20 bad checks in the last 10 years and that 5 of those bad checks were in the last year alone?" you won't get past the words "isn't it a fact" before being interrupted.

The other side will jump up to object, "Leading!"

And, the court will surely wither you with an immediate, "Sustained!"

The other side won't say, "Objection, your Honor. That question was leading and is not permitted." It won't be necessary.

He will say simply, "Leading!"

His objection will be sustained … while you will be required to start over.

Get the picture?

Try getting a family member or friend to "testify" to some fact you know the friend or family member knows by using direct questions alone, i.e., without "leading". You'll find it very difficult, and the practice will serve you well when it comes time for trial.

Have another friend or family member sit as judge and another as opposing counsel to object when you ask leading questions. Pick some event like last year's county fair or a visit to the amusement park, something your "witness" is sure to remember. Write on a piece of paper the fact you want your witness to testify to and put the paper in your pocket. Then, start asking *direct* questions until you get the answer you want.

Go ahead.

Give it a try.

You'll find it's none too easy, yet the practice will be extremely valuable later on, when you must examine your witnesses with direct questions only, i.e., without leading.

Now, let's complicate the process by requiring that your questioning be constrained to matters you can convince your "judge" are relevant to some underlying issue, such as the witness' fear of heights. Let the judge limit your questioning when the questions seem to wander from the point you're trying to prove. (Remember, you alone know that your goal is to get the witness to talk about a particular experience that happened at the fair or amusement park, the facts you wrote on the paper in your pocket.) You cannot tell the judge, "Your honor, I wish my witness to tell how he refused to ride the Double Ferris Wheel last year at the fair."

That's you testifying, instead of getting the witness' testimony.

You cannot lead your own witnesses!

A good way to learn direct examination is to practice with friends or family judging and objecting when you lead of wander from relevance. Then it will be easier in court, during real cases involving real issues … with real stakes on the line.

How to Examine a Witness on Cross

This is probably the most fun a human being can have in court.

Cross-examination is a delight when properly managed, focused on getting *relevant* evidence, and directed toward a witness who's trying to evade the truth.

Well-done it will get the truth every time and uncover lies with very little difficulty.

Done poorly, however, it can backfire, so learn the simple principles taught here and practice them on friends and family members *before* you go to court.

Be ready for the real thing when the time for court arrives.

The most important thing when cross-examining a witness is to remain calm, cool, and collected. The goal is to get the truth, not to rattle the witness and certainly not to imitate TV lawyers like Matlock or Perry Mason.

Keep cool.

Let the witness believe you're his friend.

Or, if it serves your purpose, let the witness think you don't know what you're doing.

It doesn't matter what the witness or judge and jury think about you. All that matters are the questions you ask and the answers you get … on the court's written record where postures and facial expressions will not appear.

The goal is not to "look" like or "act like" anyone but yourself. Just get the truth!

Successful cross-examination deals with words, not attitudes, postures, tone of voice, or other theatrical tricks to make you seem clever and competent.

The goal is to make an effective *winning* record of the truth.

If you want to be seen as clever and competent, ask questions in an orderly manner. As taught in all Jurisdictionary® tutorials, "Have a plan and work your plan!" Know what

your witness knows (this comes from pretrial discovery procedures taught in our other tutorials whereby you learn through interrogatories, requests for admissions, requests for production, subpoenas, and depositions just what your case is all about – i.e., who knows what and where to find tangible evidence that supports your position in the case).

The most effective cross-examiners "lead" witnesses subtly, not revealing the goal of their questioning until they've laid a predicate building up to the BIG QUESTION that will reveal the truth about some ultimate fact issue material to the outcome of their case.

Take your time. Woo the witness. You'll get more flies with honey.

Just remember, this is not a thespian exercise. You're not on stage. You're seeking answers to questions that will win your case … nothing more.

Focus on this goal.

Get answers you need to win … make a winning record … then move on!

Circumstantial Evidence

Circumstantial evidence is an invention. Circumstantial evidence reaches beyond the boundaries of known truth into the realm of conjecture, imagination, and hunches.

To be admissible in court, circumstantial evidence must be derived from direct evidence. It must be directly derived from direct evidence. It cannot be derived from other circumstantial evidence, inferences on inferences, or opinions founded on intuition.

Inferences that circumstantial evidence makes must be reasonable, or the evidence is excluded for lack of credibility.

Circumstantial evidence derived from inferences built on other inferences is always excluded by reasonable courts by the rule against pyramiding inferences.

Direct facts are not disputed by reasonable persons. Direct facts may be explained by saying what *indirect* facts are – facts inferred or surmised from other facts.

A direct fact requires no inference.

A direct fact is not surmised nor does it arise from intuition or spiritual powers.

A direct fact is not a guess or hunch!

A direct fact is a fact reasonable persons would believe without relying on a hunch.

Pure speculation founded solely on conjecture or inference should not be given the same weight as facts that are clearly evident. Direct facts are clearly evident. Direct facts are, therefore, good evidence if they are relevant to the issues in your case.

Circumstantial evidence is evidence that does not in itself exist. It is only a fiction of conjecture offered to prove a disputed issue by drawing an inference from direct facts.

The quality of the inference relied upon to create circumstantial evidence determines the probative value of the circumstantial evidence.

For example, if a locked house is robbed without any visible signs of forced entry, a jury may be persuaded to believe the robber had a key. At the same time, one could infer the robber knew how to pick locks or, even, that the house was unlocked when the robber arrived and that he locked the door behind him! The evidence here is susceptible of three separate inferences (at least) and is, therefore, not as reliable as direct fact evidence.

Some jurisdictions have ruled that unless an inference drawn from circumstantial evidence is incontrovertible, i.e., not susceptible of any contrary reasonable inference, it should not even be presented. Most jurisdictions rule that one inference cannot be piled upon another, e.g., inferring from the preceding circumstances that the homeowner must have robbed his own house because he was the only one who had a key. In this example,

direct fact evidence is absence of any sign of forced entry. The first inference is that the robber had a key. The second inference built on the first is that the owner must be the robber because he is *presumably* the only one with a key. Such pyramiding of inferences is forbidden in most jurisdictions to prevent obvious errors. Such evidence should never be relied upon to reach a verdict.

An example of direct evidence in the preceding example is that there were no visible signs of forced entry, a matter that needs no inference but stands on its own as evident.

The inferred conclusion that the home-owner robbed his own house is unsupported.

Circumstantial evidence should never outweigh contrary direct evidence.

Many troubles arise today from refusal to acknowledge the difference between direct and circumstantial evidence. A judge may properly refuse to be influenced by evidence presented only as circumstances infer.

It is by this fundamental principle that multitudes today enjoy freedom.

It is in the lack of this knowledge that needless sufferings occur.

Truth alone is true. Nothing else is!

Be prepared to defend the difference.

Conclusion

Don't rely on the judge to help you get evidence in or keep it out.

You must move the court to get what you want.

You must object and give grounds for your objections.

It is up to you to control your case *by keeping the other side from controlling it*.

As stated before, federal rules of evidence require just 15 pages of official rulebooks.

State rules are not much more complex.

Not a lot to study and understand.

You owe it to yourself to study the official rules of evidence that control your court, with the help of this tutorial to understand the general principles of evidence law.

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