THEODORE ROOSEVELT INN OF COURT
PRESENTS

The Civil Action Series: Trial Techniques

Part III Direct & Cross-Examination

PROGRAM MATERIALS

Nassau County Bar Association
Monday, February 11, 2013
6:00 p.m.
(2 CLE credits in Skills)

Presented by:

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CONTENTS

II. Presenting Witnesses and Evidence

Extract "Presenting Witnesses During the Case in Chief" .....

Pointers in the extract:

- Use open-ended questions effectively to draw the attention to your witness and enhance credibility
- Consider closed questions that you can ask without being leading, such as follow up questions, transitional questions (what happened next?) and "looping questions" that repeat a part of a previous answer to emphasize a detail.
- Leading questions are usually not objectionable to elicit questions regarding background
- Be prepared to refresh your witnesses' recollection after you lay a proper foundation
- Introduce documentary evidence by laying a foundation for your witness's knowledge of the document, its relevance and, where applicable, requirements of a hearsay exception and best evidence rules.
- You can question adverse parties on your direct case, but you must first establish a ruling that they are hostile; a court can normally assume that an adverse party is hostile.
- Consider objections, including: compound, leading, argumentative, asked and answered, cumulative, call for narrative (which invites hearsay), vague, ambiguous, mischaracterization of evidence, lack of foundation, lack of authentication, competence, speculative, among objections for admissibility;
- Preserve an offer of proof for evidence that is objected on a ground of admissibility.

Extract "Refreshing Recollection Doctrine Revisited" .....

Pointers in the extract:

- The refreshing recollection doctrine is extremely broad
- Almost anything can be used to refresh recollection: "a song, a scent," "a line from Kipling or the dolorous strain of the 'Tennessee Waltz'; a sniff of hickory smoke; the running of the fingers over a swatch of corduroy; the sweet carbonation of a chocolate soda; [or] the sight of a faded snapshot in a long-neglected album"
- Anything that is used to refresh recollection is discoverable, subject only to an absolute privilege from disclosure;
- If materials prepared in anticipation of litigation (protected under CPLR 3211(d)(2)) were reviewed prior to testimony to refresh the witness's recollection, the material is discoverable.

III. Objections

Extract "Control by the Trial Court Generally" .....

Some pointers in the extract

- Under the Federal Rules, Rules 102, 403, and 611 provide the trial court discretion and control during the course of a trial to further the truth, avoid needless consumption of time, and protect witnesses from harassment or undue embarrassment;
- Trial court will exercise discretion in controlling scope of the cross-examination, including matters that were not reached on direct;
- Rule 611 codifies the traditional categories of witnesses for whom leading questions are permitted, including witnesses with diminished capacity and adverse parties.
- Rule 103 governs rulings on evidence; make timely objection or motion to strike, including in a pre-trial in limine hearing when you anticipate a complex evidentiary issue;
- Rule 103(a) requires that the ground for an objection be specified in federal practice, unless the objection is for relevance; objecting without specificity does not preserve an error for appeal.
- Rule 103(a)(2) requires a proffer of proof to preserve error in an evidentiary ruling; the proffer must communicate the substance of the evidence, unless the record discloses sufficient information to make the substance of the evidence evident.

IV. Cross-Examination

Extract "Cross-Examining the Expert Witness" .....

Some pointers in the extract:

- Create a binder for the expert witness with his name large enough for him to see;
- Research and understand the science and the limits of the test involved;
- Research the expert, including other CV's, websites, and any past articles that may support your position;
- Cross-reference all jury verdicts in the expert's list with Lexis or Westlaw jury verdicts; either the expert may have embarrassing cases or omitted cases with unfavorable result, thus revealing fraud in expert's list;
- Investigate whether the boards certifying the expert mean anything and their requirements; was there any exam?; a score?; documentation of a score?
- Ask how much he makes testifying; if he refuses to answer, ask him if he denies making at least $10,000 and keep raising it; if he doesn't keep track of it or claims lack of knowledge, he loses credibility
- Ask if he belongs to any organization with a published code of ethics; who keeps him honest?

- Understand the scientific method; what was the sampling population?; how is was the sample representative of the population he's extrapolating to?; what precautions did the expert take to reduce likelihood of biased sample?; can the expert's method and results be replicated?; what is the negative control? does the expert have proof of blind independent verification?
- Understand the science

Chapter 39

Presentation of the Case in Chief

by Edwin M. Baum[*]

I. INTRODUCTION

II. ORGANIZING THE PRESENTATION OF WITNESSES AND EVIDENCE

III. PREPARING WITNESSES TO TESTIFY AT TRIAL ON DIRECT AND CROSS EXAMINATION

IV. PRESENTING WITNESSES DURING THE CASE IN CHIEF

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[*]Stephen Rackow Kaye, the author of the versions of Chapter 39 which appeared in the First and Second Editions of this work, died on October 30, 2006. To honor his memory, and to pay homage to Steve's lifetime of selfless devotion to teaching in the law, Steve's law firm, Proskauer Rose LLP, thereafter undertook to prepare the annual supplements for this Chapter. In furtherance of this tradition, and in recognition of Steve's enduring legacy, Proskauer lawyers Edwin Baum and Anthony Wladyka co-authored Chapter 39 for the Third Edition of this work, which retains in very substantial part Steve's prior work.

rendered by applying those factual determinations within the framework of the court's instructions of law.[4]

Constituent parts of the case in chief given separate treatment and not discussed in this chapter are cross examination,[5] expert witnesses,[6] and the use of graphics and other demonstrative evidence.[7] In addition, and very importantly, the content and strategy of the case in chief are discussed elsewhere.[8] That discussion covers a spectrum of subjects: defining the claim or defense; determining the facts needed to prove or disprove the claim or defense; the articulation of themes; inventorying and evaluating the available evidence; deciding which documents and other nontestimonial evidence should be introduced; deciding which deposition testimony should be used affirmatively; determining through which witnesses documents should be introduced; determining which witnesses should be called to testify concerning certain subjects; determining whether and, if so, to what extent adverse party or hostile witnesses should be called and as to which subjects; determining the sequence in which oral, documentary, deposition and other evidence should be introduced; determining to what extent and how video and other technology should be used to present documentary and demonstrative evidence, and deposition testimony; and making these decisions as part of the global strategy and tactics of the trial.

II. ORGANIZING THE PRESENTATION OF WITNESSES AND EVIDENCE

§ 39:3 Determining the order of proof

One of the most difficult aspects of preparing the case in chief is determining the precise order in which the witnesses and other evidence will be presented. The goal is to get the factfinder's attention, hold it, introduce evidence in a sequence that tells a coherent and compelling story, and try to build to a climax. Although the literature is replete with guiding principles, there are no hard and fast rules for determining the order of proof. As is

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[4]As to verdicts, see Chapter 45, "Jury Conduct, Instructions, and Verdict" (§§ 45:1 et seq.).

[5]As to cross examination, see Chapter 40, "Cross Examination" (§§ 40:1 et seq.).

[6]As to expert witnesses, see Chapter 41, "Expert Witnesses" (§§ 41:1 et seq.).

[7]As to graphics and other demonstrative evidence, see Chapter 42, "Graphics and Other Demonstrative Evidence" (§§ 42:1 et seq.). In addition, see Chapter 63, "Litigation Technology" (§§ 63:1 et seq.) for discussion of use of technology in connection with the presentation.

[8]See Chapter 37, "Trials" (§§ 37:1 et seq.) concerning the elements and formulation of the Trial Game Plan.

evident from the ensuing discussion, the decision is fundamentally a judgment call by trial counsel as to the sequence of proof that will most effectively and persuasively present the case to the factfinder. This is true whether that factfinder is a judge or jury.

Although a preliminary determination concerning the order of proof should be part of the Trial Game Plan, finalizing that order of proof is usually one of the steps taken before the trial, after witnesses have been prepared, trial counsel has made a final evaluation of the strengths and weaknesses of each witness, and witness availability has been confirmed. Moreover, particularly in commercial cases, being able to present the witnesses and other evidence in accordance with the desired plan may encounter practical difficulties, such as the schedules of busy executives or out of town witnesses and the uncertainties of protracted examinations of prior witnesses. These types of challenges are often of particular significance in commercial cases, where the subject matter or chronology of events is complicated, and where the sequence of testimony is an important factor in making a clear and understandable evidentiary presentation. Trial counsel must try to anticipate and prepare for these issues. And when such problems arise, counsel may need to expend extra effort to avoid interruption or rearrangement and to keep the desired order of proof intact to the maximum extent possible.

Planning the order of proof in commercial cases is generally more complicated for the defendant than for the plaintiff. The defendant often faces greater practical difficulties. No matter how well defense counsel plans in advance, as it must, they can never fully and definitively assess the impact of the plaintiff's trial presentation until it actually happens. As a result, defense counsel must constantly adjust their plan during the plaintiff's case, and cannot make final decisions until after the plaintiff has rested and immediately before beginning the defendant's case in chief. Witness scheduling difficulties are complicated by the uncertainties concerning the amount of time it will take for completion of the plaintiff's case in chief. In addition, defendants much more than plaintiffs are squeezed by the "hydraulics" of the trial proceedings, a mounting pressure from the court to hasten completion of the evidentiary submission.

In planning and deciding on the order of proof, trial counsel should play out the trial hypothetically, weighing the pros and cons of different sequences and presentations. The major consideration is the order of proof that best holds the factfinder's attention. There are many other important considerations. Live testimony is generally more interesting than the introduction of deposition testimony, stipulated facts, interrogatory answers and

the like.[1] Certain witnesses, because of personality or the subject matter of their testimony, will tend to be more interesting than others. Interspersing the reading of documents with live or deposition testimony, and in relation to facts brought out in that testimony, will be far more interesting and understandable than separately reading documents that are independently admissible.[2]

The case should always be presented logically, in a way that will make it most understandable to the factfinder. In a jury trial, the jury should have acquired an understanding of the issues, substance and chronology of the case from the opening statements[3] and the voir dire.[4] The jury should also be aware that, in trial proceedings, the evidence is presented witness by witness, rather than chronologically. This may be conveyed by trial counsel in their opening statements or from the court in preliminary instructions. In a bench trial, the judge should have similar awareness of issues, substance, and chronology from the parties' prior submissions.

The best and most persuasive approach need not, and often cannot, be a chronological presentation of the facts. Structuring the order of proof along subject matter lines is often the better tack, certainly if the opening statements, visual aids, or pretrial memoranda have provided a good road map of the case.

The case in chief usually revolves around the testimonial content, availability, and presence of the live witnesses. The sequence in which live witnesses are presented should also conform to the Trial Game Plan and need not be, and most often cannot be, presenting the facts in chronological order. The live witnesses, as with other evidence, should be introduced in an order that presents overall the most coherent portrayal of the case in chief, recognizing the importance of logic, structure, repetition and reinforcement.

Starting the case with a strong, important witness, particularly in a jury trial, develops a rapport with the factfinder. This creates a favorable initial impression. Likewise, finishing with a

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[Section 39:3]

[1]As to the introduction and trial presentation of evidence without witness testimony, see §§ 39:27 to 39:32.

[2]As to an example of interspersing the reading of documents with deposition testimony, see the deposition script at § 39:35. The marginal notes "SHOW BY PROJECTION OR VIA MONITOR" indicate that the documentary exhibit would be read to the jury at that point. See § 39:18 and the discussion in Chapter 42, "Graphics and Other Demonstrative Evidence" (§§ 42:1 et seq.) concerning the effective use of demonstrative evidence.

[3]As to opening statements, see Chapter 38, "Trial Preliminaries and the Opening Statement" (§§ 38:1 et seq.).

[4]As to voir dire, see Chapter 35, "Jury Selection" (§§ 35:1 et seq.).

strong witness creates a strong, lasting impression. Nevertheless, determining which witnesses satisfy these needs is not always easy. Making the decision involves weighing not only the extent to which witnesses can help the case but also the degree to which the witnesses may hurt the case on cross examination. Obviously, starting out or finishing the case in chief with a witness who is particularly vulnerable to cross examination, even though the witness may have much to contribute on direct, is risky and unwise. If such a witness were to perform badly on cross examination, and is the first witness presented, the jury or judge will get a negative impression of the case which may never be overcome. If that witness is the last witness and an important one, and the cross turns out harmful, the case may be lost because that testimony provided a lasting negative impression. In the end, an assessment of the "net" anticipated impression that each witness will likely create, after both direct and cross, determines the potential value of that witness and the order in which that witness should be presented.

The sequence in which witnesses and other evidence is presented may shelter certain witnesses from effective cross examination. When one witness, for example, is subject to effective cross examination on credibility grounds, but the testimony may be corroborated by other witnesses or other evidence, a decision must be made whether to put that witness on before or after the corroborating testimony or other evidence. The expectation is that corroboration will both confirm and rehabilitate the witness's testimony. Putting the witness on before corroboration allows the factfinder to hear the damaging cross examination before learning of the corroborating evidence. Putting the witness on after the corroboration mitigates the sting of the cross examination because it persuades the factfinder as to the facts before the damaging cross is heard. In the end, as in many other circumstances, this decision requires a judgment call from lead trial counsel.

The order of witnesses can play a similarly important role in maintaining the factfinder's attention. When feasible, counsel should intersperse less interesting witnesses and evidence among more interesting ones in order to retain the attention of the factfinder. When the testimony of several witnesses is necessary on the same issue or related aspects of the same transaction, as is common in a commercial case, the testimony should be spread out during the trial to the extent possible, rather than being consolidated at one time. This promotes reinforcement of particular factual matters while obscuring the repetition involved, reducing tedious testimony, and minimizing the sense that the same things are being said by different witnesses for no apparent purpose.

Often in commercial trials, a building block approach is needed in presenting complicated economic or technological matters. For the factfinder, a trial may resemble a college course. And just like a student learning a new subject, the factfinder may need some grounds in "the basics" before he or she can understand the evidence relating to complex matters. Much of the sequence of presentation of proof is thus determined by the need to present particular documents or testimony early in the case as the factual foundation for later testimony and evidence.

Many, if not most commercial trials include expert witnesses. Experts pose additional considerations as to the presentation and sequence of testimony. Frequently an expert must be one of the last witnesses to testify because the expert's testimony necessarily rests on earlier evidence, or because the subject of the expert's testimony relates to injury or damages. From a tactical standpoint, having the expert testify last may be advantageous if the expert is a strong and effective witness and important parts of the case may be summarized by the expert as the predicate for that expert's opinions.

§ 39:4 Client and friendly witnesses

One of the first tasks in organizing the presentation of witnesses and evidence is determining, on the basis of the available information (including the facts and evidence developed during discovery), which client witnesses and which friendly witnesses will be called to testify, and what documentary and other evidence will be presented. Considerations pertaining to selecting trial witnesses from among individuals within the party's control and who are friendly or neutral, include:

- which witnesses can and should testify as to which facts;
- the need for and timing of certain witness testimony to introduce documents, exhibits, or other evidence in the case;
- to what extent should more than one witness testify as to the same facts for purposes of reinforcement or emphasis;
- the manner in which the testimony of each witness should be structured internally, and in relation to the testimony of the other witnesses; and
- in what order should these witnesses be called so as to present the case clearly and concisely, and in the most interesting, dramatic, and persuasive manner possible.

These subjects, which have been covered in the context of the Trial Game Plan,[1] do not involve or raise any specific legal issues.[2]

[Section 39:4]

[1]See Chapter 37, "Trials" (§§ 37:1 et seq.).

§ 39:5 Subpoenaing witnesses and documentary evidence

In planning for a commercial trial, counsel for each party must determine which witnesses and other evidence they should subpoena to assure the presence of the witnesses and documents at the trial. Will it be necessary to subpoena third-party witnesses or documentary and other evidence from nonparties? Similarly, will it be necessary to subpoena adverse party witnesses or documentary or other evidence in an adverse party's possession?

CPLR 2301 to 2308[1] govern the use of subpoenas to compel the attendance of witnesses and the production of documentary and other evidence at trial.[2] CPLR 2301 and 2305(a) authorize the issuance of a subpoena to compel a person to appear to testify at trial on the date specified in the subpoena. CPLR 2305(a) also provides that if the subpoenaed witness is given reasonable notice of any recesses or adjournments, no further process is required to compel the attendance of that witness on the adjourned date.[3] In the commercial trial setting, compliance with the provisions of CPLR 2305(a) concerning the contents of the subpoena and the requirements of reasonable notice of adjournments is often important because of delays that may occur before or during the course of the trial proceedings.[4]

Counsel will commonly find it necessary to compel the attendance of nonparty witnesses at trial (even those who gave deposi-

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[2]As to the order of proof, see § 39:3; as to preparation of witnesses, see §§ 39:6 to 39:10; as to the presentation of witnesses, see §§ 39:12 to 39:22.

[Section 39:5]

[1]CPLR 2301 to 2308.

[2]Subpoenas may be issued, without court order, by an attorney of record for a party in an action with certain limited exceptions not usually applicable to commercial trials. See CPLR 2302.

[3]See YSL v. Shal, 10 Misc. 3d 554, 809 N.Y.S.2d 387 (Sup 2005) (wherein the judgment creditor's attorney failed to provide the debtor's employer, a nonparty in the creditor's action to enforce a judgment against the debtor, with reasonable notice of the adjourned inquest, as required by a statute [CPLR 2305] providing that reasonable notice be provided of any adjourned date, where the creditor's attorney never served a copy of the order which sustained the trial subpoena on the debtor's employer, and he did not timely notify the debtor's employer of the inquest date).

[4]In addition, CPLR 2303 requires that the person subpoenaed be paid in advance the authorized traveling expenses and a one-day witness fee. CPLR 2305(a) also mandates payment of witness per diem attendance fees and any additional travel fees at the end of each day's attendance for the next day on which the witness is required to attend, whether or not the witness has testified. Failure to tender payment of the fees upon demand discharges the witness and attendance must be resecured by issuance of a new subpoena. 2A Weinstein, Korn & Miller, New York Civil Practice ¶ 2305.03. The amount of fees is provided for in CPLR 8001.

tion testimony if they reside in-state and within 100 miles of the courthouse).[5] These include adverse and neutral nonparty witnesses who are not willing to attend and testify at trial voluntarily. It also is often wise to subpoena a friendly third-party witness, who would otherwise be willing to testify voluntarily, so as to preserve the appearance of neutrality to the extent possible.

A subpoena is also necessary when counsel decides to call any adverse party witnesses during the case in chief, or if only a possibility exists that counsel may want to call such witness to testify as to certain facts.[6] New York does not have a procedure involving a notice to compel the attendance of adverse party witnesses, as do a number of other jurisdictions. Thus, the subpoena procedure must be complied with in all respects. It is common practice among attorneys to agree to accept service of the other side's subpoenas. If, however, such an agreement is not reached, subpoenas for adverse party witnesses must be served on the witnesses personally in one of the manners authorized by law.[7]

If a subpoena to testify is served on and is addressed to an entity, that entity may choose the person who will respond to the subpoena.[8] In order to compel the entity to produce a specific individual to testify, the subpoena should identify the individual to be produced and, if possible, a separate subpoena should be served on that individual as well.[9]

CPLR 2301 and 2305(b) authorize the issuance of a subpoena

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[5]Under CPLR 3117(a)(3), the deposition of a nonparty witness who resides or regularly works in-state within one hundred miles of the place of the trial cannot be used at the trial. Instead, subject to certain exceptions specified in CPLR 3117(a)(3), or agreement by the parties otherwise, that witness must testify in person. As to the use and trial presentation of deposition testimony in lieu of live testimony, see § 39:30.

[6]As to questioning hostile and adverse witnesses on the direct case, see Chapter 38, "Trial Preliminaries and the Opening Statement" (§§ 38:1 et seq.).

[7]See, e.g., CPLR 2303.

[8]2A Weinstein, Korn & Miller, New York Civil Practice ¶ 2305.04. CPLR permits any person served with a subpoena duces tecum to comply with the subpoena by having the requisite documents, books, or things produced by a person able to identify them and testify regarding their origin, purpose, and custody; see also Standard Fruit & S. S. Co. v. Waterfront Commission of New York Harbor, 43 N.Y.2d 11, 15–16, 400 N.Y.S.2d 732, 734, 371 N.E.2d 453, 455 (1977); Castro v. Alden Leeds, Inc., 144 A.D.2d 613, 615, 535 N.Y.S.2d 73, 75 (2d Dep't 1988).

[9]2A Weinstein, Korn & Miller, New York Civil Practice ¶ 2305.05. Because the person served with a subpoena duces tecum can comply with the subpoena by sending a substitute qualified to identify the documents, books, or records at issue, that person should be served simultaneously with a subpoena ad testificandum. A single subpoena with both an ad testificandum and a duces tecum clause may also be served.

duces tecum to compel the production at trial of documentary and other evidence, and a witness able to identify such evidence and testify as to its origin, purpose, and custody. To be enforceable, a subpoena to testify or a subpoena to produce documents must be served within the state[10] on the witness or the witness' authorized agent for service.[11] Where a corporation present in New York is subpoenaed, it must produce knowledgeable officers and employees, even if they are located outside the state.[12] A corporation subpoenaed in New York State can likewise be required to produce documents located outside New York.[13] Accordingly, provided a subpoena can be served in New York State on a corporation over which the court has jurisdiction, the court can compel the production of documents and the attendance and testimony of witnesses located out of the state.

To require the attendance of a specific individual to identify documents, counsel should serve both a subpoena to testify and a separate subpoena duces tecum.[14] A court can compel the attendance of adverse parties and any other person to supply evidence,

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[10]See 2A Weinstein, Korn & Miller, New York Civil Practice ¶ 2303.06. While CPLR 2303 provides that "a subpoena shall be served in the same manner as a summons," Jud. Law § 2-b restricts service of subpoenas to persons found within the state. Jud. Law § 2-b. CPLR 307 to 311 govern personal service within the state of a summons and therefore of a subpoena. CPLR 2303(a) was amended, effective January 1, 1998, to read, "A subpoena requiring attendance or a subpoena duces tecum shall be served in the same manner as a summons . . .," thus clarifying that the rule applies to both types of subpoenae.

[11]CPLR 308(3).

[12]Standard Fruit & S. S. Co. v. Waterfront Commission of New York Harbor, 43 N.Y.2d 11, 15, 400 N.Y.S.2d 732, 734, 371 N.E.2d 453, 455 (1977); 23/23 Communications Corp., d/b/a Communications Diversified v. General Motors Corporation, 172 Misc. 2d 821, 822, 660 N.Y.S.2d 296, 297 (Sup 1997) (Friedman, J.) (following *Standard Fruit & S.S Co. v. Waterfront Comm.*, and denying a motion to quash a subpoena served within the state on a corporate defendant to compel the appearance of an out-of-state secretarial employee for purposes of authenticating a transactional document).

[13]Matter of Grand Jury Subpoenas Dated June 26, 1986, 70 N.Y.2d 700, 702, 519 N.Y.S.2d 353, 354, 513 N.E.2d 239, 240 (1987) (holding that the lower court correctly required the recipients of subpoenas to produce all documents within their control, regardless of location), citing Standard Fruit & S. S. Co. v. Waterfront Commission of New York Harbor, 43 N.Y.2d 11, 15–16, 400 N.Y.S.2d 732, 734, 371 N.E.2d 453, 455 (1977). Such documents are similarly obtainable under Federal Rule of Civil Procedure 45(b): a foreign corporation doing business in a district is subject to all process, including subpoena, in the district, and if documents are required in response to a subpoena, the court has the power to order their production even though they are physically located outside of the jurisdiction. Elder-Beerman Stores Corp. v. Federated Dept. Stores, Inc., 45 F.R.D. 515 (S.D. N.Y. 1968).

[14]A subpoena duces tecum may be joined with a subpoena to testify at a trial, hearing or examination, or may be issued separately. CPLR 2305(b), as amended in 2002.

whether verbal or documentary, when the court deems such evidence relevant to the questions in issue.[15] However, absent an application by a party, the court is not permitted to act on its own in compelling the introduction of evidence because such action would place the court in an advocate's role and impair its impartiality.[16]

In a commercial case, the need at the time of trial to subpoena

[15]Lanzello v. Lakritz, 287 A.D.2d 601, 731 N.Y.S.2d 763 (2d Dep't 2001) (holding that the party seeking discovery from a nonparty witness must show special circumstances, the existence of which is not established merely upon showing that the information sought is relevant, but rather by establishing that the information cannot be obtained from other sources; the defendants did not show special circumstances and therefore the trial court properly granted the plaintiff's motion for a protective order quashing a subpoena served on the treating physician of the plaintiff's decedent); Fazio v. Federal Exp. Corp., 272 A.D.2d 259, 708 N.Y.S.2d 71 (1st Dep't 2000) (stating that the use of a judicial subpoena for the sole purpose of showing that an examining physician's history of financial compensation indicates a defense-oriented predisposition—in other words, for the purpose of impeaching the witness's general credibility—is improper; such information is irrelevant and immaterial to the underlying facts at issue in the case, and the subpoena should have been quashed); Luscher ex rel. Luscher v. One Beacon Ins. Group, 23 Misc. 3d 637, 874 N.Y.S.2d 783, 785 (Sup 2009) (finding no special circumstances present where the sole purpose of the testimony sought by defendants was to launch an impermissible collateral attack on the judgment in the action underlying the malpractice suit at bar); 23/23 Communications Corp., d/b/a Communications Diversified v. General Motors Corporation, 172 Misc. 2d 821, 823, 660 N.Y.S.2d 296, 297 (Sup 1997) (stating that "common sense indicates that the court's power to require the presence of a witness cannot be affected by that witness's centrality to the case. The power of the court would be the same no matter how peripheral or central the witness's testimony . . ."); In re Ebbets' Will, 155 Misc. 870, 873, 280 N.Y.S. 710, 714 (Sur. Ct. 1935) (stating that " 'compulsory measures for the production of evidence are essential to the very existence of a court of justice in any civilized community' . . . [a witness so compelled can take] consolation . . . in the knowledge that . . . the court will enforce his own identical rights against others whose inclinations would similarly induce them to withhold their aid, were it permissible." [internal citation omitted]). See also 2A Weinstein, Korn & Miller, New York Civil Practice ¶ 2305.05. Velez v. Hunts Point Multi-Service Center, Inc., 29 A.D.3d 104, 811 N.Y.S.2d 5 (1st Dep't 2006) (the records of payments made to family members of the former president of a not-for-profit corporation and its comptroller, sought by a nonparty subpoena duces tecum, were relevant to the corporation's breach of fiduciary duty claims against the CEO; also finding that even though a nonparty subpoenas duces tecum served by the defendant failed to give the required notice stating the circumstances or reasons such disclosure was sought or required, the plaintiff was not prejudiced where the defendant's papers articulated the need for, and relevance of, the information being sought); Rackowicz v. Feldman, 22 A.D.3d 553, 802 N.Y.S.2d 248 (2d Dep't 2005) (declining to permit the subpoena of a witness who had no knowledge of any material facts regarding the personal injury claim).

[16]Stampfler v. Snow, 290 A.D.2d 595, 735 N.Y.S.2d 255 (3d Dep't 2002) (holding that where the Family Court initiated the underlying contempt proceeding, issued subpoenas duces tecum, ruled upon the petitioner's motions to quash and to dismiss, questioned the only witness to testify at the hearing,

documents from an adverse party should arise rarely, and from a nonparty only infrequently, because relevant documentation should have been produced during pretrial document discovery.[17] There are occasions, however, when new developments or newly acquired information arise after discovery has been completed and during trial preparation that suggest or confirm that there are relevant documents in the hands of an adverse party or nonparty witness. In such circumstances, the New York subpoena procedure for compelling the production of such documents at trial is a very useful device. It was used, for example, in a complex commercial dispute where pretrial discovery had already produced hundreds of thousands of pages of documents and scores of depositions. Nevertheless, it did not become evident until trial preparation that a nonparty, the accounting firm for the adverse party, might possess relevant documents. Because the accounting firm's documents were generated internally and had not been furnished to that adverse party, the party seeking this belated disclosure reasoned that such documentation, if it existed and was relevant, would have escaped the net of pretrial discovery. A trial subpoena (with notice to the adversary) was issued to the accounting firm. The documents did exist and were produced for trial.[18]

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ruled upon counsel's objections thereto, acted as the trier of fact at the contempt hearing, and sentenced the petitioner to serve 72 hours in jail, the Family Court's decision to serve as complainant, prosecutor, trial judge, and sentencing court brought about a clear clash in judicial roles and, as such, recusal was warranted); Carroll v. Gammerman, 193 A.D.2d 202, 602 N.Y.S.2d 841 (1st Dep't 1993). See the discussion of the limitations on the role of the judge in the trial proceedings in Chapter 37, "Trials" (§§ 37:1 et seq.).

[17]Murray v. Hudson, 43 A.D.3d 936, 841 N.Y.S.2d 645 (2d Dep't 2007); Porter v. SPD Trucking, 284 A.D.2d 181, 727 N.Y.S.2d 70 (1st Dep't 2001) (overruled on other grounds by, Reid v. Brown, 308 A.D.2d 331, 764 N.Y.S.2d 260 (1st Dep't 2003)) (holding that a subpoena may not be used for the purpose of discovery or to ascertain the existence of evidence; in preparation for an inquest, the defendants, the defaulting parties, were not entitled to disclosure from the plaintiffs on the issue of damages; the defendants unlawfully used an ex parte subpoena in pursuit of pretrial discovery that was unavailable to them in the absence of a court order; therefore, the defendants should not be permitted to benefit from evidence they discovered by virtue of such subpoena); Barrett v. Barrett, 281 A.D.2d 799, 722 N.Y.S.2d 270 (3d Dep't 2001) (holding that the purpose of a subpoena duces tecum is to compel the production of specific documents that are relevant and material to the facts at issue in a pending judicial proceeding, and it is not to be used to expand the scope of discovery); Reckson Operating Partnership, LP v. Collision Consultants, Inc., 14 Misc. 3d 1225(A), 836 N.Y.S.2d 495 (Sup 2007) (quashing ex parte subpoenas for bank and financial records of defendants issued by plaintiff who failed for three years to move to compel production of documents sought).

[18]In this respect, New York practice historically has been more flexible than federal practice. Ordinarily in federal practice, after the cutoff of discovery

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A **Direct** Path To **Winning**

Tips for conducting an effective direct examination.

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AND JOHN GLEESON

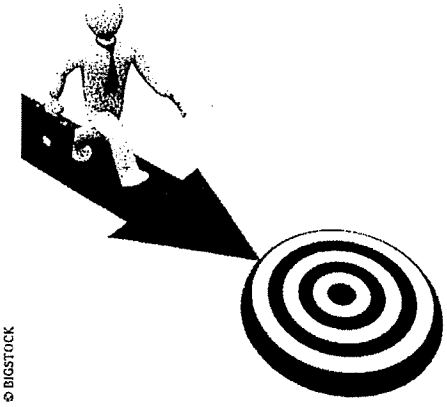
SOME LAWYERS DREAM of conducting a blistering cross examination. Others of delivering a compelling, emotionally charged closing argument. But few lawyers dream of planning, preparing and conducting a direct examination. In fact, direct examination may be the most underestimated part of trial.

It may also be the most important, because the truth is many, if not most, cases are won or lost on direct examination. It is during direct examination that the parties present their affirmative cases, that the witnesses provide their versions of the events and that the judge and jury first hear from the witnesses. While other parts of the trial may be more dramatic, none matters more than direct examination. This article offers 11 tips for conducting it effectively.

Choose Witnesses Carefully

More than one lawyer has told of how well his case was going until his witnesses opened their mouths. It is only a slight exaggeration to say there are no bad cases, just bad witnesses. Indeed, very few cases are better than the witnesses who make them, no matter how compelling the story, no matter how persuasive the documentary evidence and no matter how extensive counsel's preparation.

There are of course cases in which counsel will have no choice but to call a particular witness, no matter his or her baggage. It is difficult to try a product liability case without presenting testimony from the plaintiff, no matter how nervous; it is just as difficult to defend a securities fraud litigation without presenting testimony from the individuals accused of fraud, no matter how arrogant; and it is almost impossible to try a patent case without presenting testimony from the inventor, no matter how quirky. In other cases, however, one of counsel's principal tasks in preparing for trial is to identify the witnesses who can present the case most effectively.



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Choosing whom to call and for what purposes is often a difficult task. Although most witnesses can be prepared to testify effectively, the risks of calling a witness can nevertheless outweigh the benefits. None is perfect, and many have the vulnerabilities mentioned above and others as well. There is no substitute for engaging in a mock examination of each potential witness. How effectively does each communicate the client's side of the case? How well does he or she handle the likely cross? The decision whether to call a particular witness must be based on an evaluation of the individual's relationship to the case, i.e., the centrality of the witness' role in the story being told, and on an objective assessment of the strengths and weaknesses revealed by a mock examination.

Prepare Them for Success

Juries tend to side with the parties they like and have a hard time believing the testimony of witnesses they dislike or to whom they cannot relate. In a trial setting, however, even likeable people can be paralyzed by fear, honest people can appear to be lying when they state their name, and knowledgeable people can come across as arrogant. A direct examination that maximizes a witness' strengths and minimizes his or her weaknesses rarely, if ever, occurs spontaneously. Setting the stage for success in the courtroom requires preparation.

There is no single method for preparing a witness to testify. Provided it can be done without imparting to the individual information she does not already possess, it is usually advisable to ensure that the witness understands the big picture, and how she fits into it. That usually entails multiple meetings with the witness, discussion of the topics the examination will address, a review of her prior testimony and consideration of documents relevant to her testimony. Developing an effective direct examination is a collaborative, iterative process, and the objective is to find the best way for the witness truthfully to communicate what she knows as simply and persuasively as possible.

Trial lawyers differ on whether a detailed "script" of the examination that includes both questions and expected answers is desirable. Inexperienced trial counsel can get so preoccupied with their outlines that they do not listen carefully enough to the witness' answers, missing opportunities to clarify or

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correct. Experienced ones will often reduce to bullet points the testimony that must be elicited from the witness and make sure each point is checked off. Suffice it to say that, by the time she is expected to take the stand, the witness should be familiar with the questions that may be asked, whether or not they have been "scripted" in detail, and with the exhibits that may be used. Nothing that occurs during a direct examination (or cross examination, for that matter) should come as a surprise to the witness or the examining attorney.

All witnesses have strengths and weaknesses. The most effective direct examinations play to the witness' strengths and minimize (or at least accommodate) weaknesses. If the witness is a chemistry professor who has spent decades teaching in a classroom, it may make sense to structure the examination so that it resembles a classroom discussion by asking for permission to have the witness come off the stand and present testimony using flip charts or other demonstratives. By contrast, if the witness is a reserved bookkeeper who rarely interacts with people, it may make sense to orient the examination around the documents with which the witness is most comfortable.

Introduction and Accreditation

More than 2,300 years ago, Aristotle referred to one of the primary means of persuasion as "ethos," appeal based on the character of the speaker. Not only is ethos important in any jury trial, it is critical that it be established early. Jurors form strong opinions early, and those opinions can be difficult to shake. Thus, an effective direct examination begins by introducing and accrediting the witness.

From the start of direct, the witness' relationship to the case should become apparent, and the trier of fact should have a general sense of what she will testify to and why her testimony should be credited. One way to do that is by asking, immediately after the witness identifies himself or herself to the jury, "Why are you here today?" The answer to that question, e.g., "I witnessed the accident that I understand is at issue," "I signed the contract" or "I am the inventor of the patented technology," will make clear why the witness' testimony matters and should be listened to.

Questions about the witness' background and personal history permit the trier of fact to connect with the witness and add to her credibility. But witness accreditation is about more than merely humanizing the witness. It is about giving the trier of fact a reason to credit her. With an expert witness, that can be done by eliciting testimony concerning areas of expertise or accomplishments, such as professional awards or distinctions. With lay witnesses, it can be done by emphasizing what makes the witness' testimony special, e.g., her presence at the site of the accident, her role in the negotiations that led to the contract being signed and so on.

Organize to Facilitate Learning

To persuade, direct testimony must be understood. As the German poet Goethe put it, "everyone hears only what he understands." Thus, the most effective direct testimony is organized to promote learning. Jurors are generally most alert at the beginning of an examination. And what comes at the end can be enduring because it is the last thing jurors hear. Beginning strong increases the probability that an examination will be understood and remembered.

Few lawyers dream of planning, preparing and conducting a direct examination. It may be the most underestimated part of trial. It may also be the most important, because the truth is many, if not most, cases are won or lost on direct examination.

Direct examinations are most effective where they employ the principles of good storytelling. For instance, most stories are best understood when presented chronologically. Action testimony is most effective when presented without interruption. And specifics are more interesting than generalities.

Control Without Leading

Leading questions are generally not allowed on direct examination. But even if they were, leading questions are rarely the most effective means of conducting an effective direct examination.

Leading questions put the examiner front and center. The aim on direct examination, however, is to spotlight the witness. Juries tend to identify with and believe (or disbelieve) witnesses, rather than counsel. For that reason, the most effective examinations are those in which the jury hears the story directly from the witness.

Besides, leading questions are not the only means of control on direct. Counsel can control the examination by guiding the witness from one topic to another, asking open-ended questions that require a narrative answer and following up with more focused questions, if necessary, to elicit omitted detail. If and when the witness' account omits useful detail, counsel can follow up to elicit that information.

Anticipate the Witness' Need for Help

No matter how well trial counsel selects and prepares her witnesses, there will be glitches, and some will be significant.

In all of the prep sessions, the project manager, her key witness, will remember clearly that he began construction on the job in the fall of 2009. But when counsel asks him about that at the beginning of his direct, he is flustered in front of the jury and cannot remember.

An unprepared lawyer will ask, "Was it in the fall of 2009?" That will likely establish the necessary fact, but at the cost of creating the impression that the witness is there to say what counsel wants him to say. Prepared counsel will have annotated her witness outline and have ready access to the exhibits in the case. She will seamlessly place before the witness the document that refreshes his recollection. The jury gets the testimony about when construction began from the witness, and counsel has shown both the jury and her nervous witness that she is completely in control of things, even when they do not go according to plan.

In many cases, virtually everything to which a witness will testify is rooted in documents or other exhibits. Prepared counsel will have annotated witness outlines with references to those exhibits. When the inevitable failure of recollection (or, worse yet, incorrect recollection) occurs, counsel will then be prepared to immediately produce before the witness the exhibit that will set him straight, rather than being one of those lawyers who ends up fumbling awkwardly for an exhibit in front of the jury, only to end up uttering the least-kept promise of unprepared trial lawyers: "I'll come back to that later."

Anticipate Objections

Annotations to a witness outline should include more than just references to exhibits. With respect to any part of that witness' testimony that could draw a reasonable objection, the outline should equip counsel to respond to the objection.

If there will be testimony about a third party's statement that is admissible through the witness as a present sense impression or excited utterance, the outline will prepare trial counsel to identify the specific hearsay exception relied on, to list its prerequisites, and to cite the best case supporting admissibility. Prepared lawyers will bring the outline to the sidebar and soundly defeat the objection in a way that instills confidence in the judge that counsel knows what he is doing.

Preparing for objections in this way will reveal that some responses to anticipated objections are more involved or nuanced, and a complete understanding of why trial counsel is right requires a more considered analysis than a sidebar permits. Those issues become candidates for a motion in limine, so the trial judge can devote to them the attention they deserve before trial. A middle ground between an in limine motion and springing the issue on the judge for the first time at sidebar is alerting the judge to the looming issue the day before eliciting the testimony.

Anticipate the Cross

Every case has two sides. One way or the other, at some point during trial, both sides will come out. An effective direct examination, like a good theory of the case, takes account of all of the expected evidence, not just the evidence favorable to counsel's case. In fact, the surest way to undermine an effective direct examination is to ignore an adversary's theory and evidence.

In one high-profile case, for example, an expert isolated seven allegedly misleading statements from a lengthy patent prosecution. The expert's testimony sounded pretty good until it became clear on cross examination that the expert's account omitted important context, which could have been included in a more careful direct examination.

By contrast, anticipating the cross (and structuring the direct in view of it) can not only blunt its force, but can also enhance credibility and thus strengthen counsel's case. This time-tested principle was highlighted by Aristotle in his treatise "On Rhetoric." Revealing that a witness has a criminal record, for example, draws the sting of the point when mentioned on cross, as does disclosing that a witness had a limited view of an accident or participated in some but not all of the contract negotiations. Overstatement can lose cases.

Use Visual Aids and Physical Exhibits

The most effective direct examinations involve more than the spoken word. They involve photographs of the scene of the case, computer re-creations of an accident, drawing on a chalkboard, visual aids, summary charts and physical exhibits and other such demonstrative evidence.

This is an age of visual learning. It has been estimated that retention of information is six times greater when that information is conveyed by visual and oral means than when the information is conveyed by the spoken word alone.[1] Pictures, flow charts, diagrams and other visual aids can not only enhance the trier of fact's interest in the testimony, but also effectively explain, emphasize and summarize what words alone cannot.

A common example to illustrate this principle is a patent case in which a patent-holder plaintiff seeks to defeat a claim of obviousness by showing, among other things, that it took the inventor a long time to solve the problem disclosed in the patent. Counsel can underscore the plaintiff's point by having the witness walk the jury through enlargements of selected pages from the notebook used by the inventor during her research. Physical exhibits might also be employed to recreate in real-world detail the experimentation ultimately culminating in the invention.

Finally, the lengthy road to innovation can be depicted in a demonstrative exhibit listing chronologically all the events, including failed experiments, that predated the disputed invention. That same demonstrative will come in handy when it comes time to sum up.

Notably, however, visual aids are not effective when they upstage the witness, or when they become a distraction. In an effective examination, visual aids are used to complement and enhance, rather than supplant, the substance of the witness' testimony. Demonstrative exhibits are often most effective when introduced after the witness has completed his description of events. That preserves the flow and impact of the story, while at the same time reinforcing visually what the trier of fact heard previously.

And whenever they are introduced, the jury needs time to examine and absorb them. It is best not to elicit critical testimony moments after distracting the jury's attention with a complex visual aid.

Use Redirect Sparingly

Redirect examination is not an opportunity to repeat the direct examination. Nor is it about underscoring what may have gone poorly on cross. The purpose of redirect is to put the cross in context, clarify testimony that might not have been clear on cross examination and/or explain or further develop a point brought up by opposing counsel. The most effective redirect examinations are brief and to the point, usually touching on just a few propositions.

The most effective redirects are those that exploit over-reaching and unfairness in the cross, such as the following example:

Q: Counsel showed an e-mail you wrote on March 15, 2001. Do you recall that?

A: Yes.

Q: Specifically, counsel pointed you to the first line in the document where you said "clinical studies conducted to date indicate no statistically significant improvement in efficacy." How do you reconcile that statement with the testimony you provided on direct examination, when you noted that clinical studies did establish efficacy?

A: Well, several studies establishing efficacy were conducted after I wrote the e-mail.

This redirect not only clarified a point made during cross, but did so in a way that undermined the credibility of the cross examination.

Use Depositions Selectively

Despite all of the time, money or effort put into depositions, they are best used sparingly at trial. They are, in a word, deadly.

The trier of fact usually has little patience for long clips of deposition testimony, most of which is unfocused and less interesting than live testimony. Yet it is sometimes necessary to use deposition designations affirmatively at trial, such as where important witnesses are unavailable to testify or are outside the parties' control and the court's subpoena power. There can also be good strategic reasons to use deposition testimony in lieu of live testimony, such as avoiding or limiting cross examination.

The key is to carefully select the excerpts used at trial. They should generally be brief and to the point, but they cannot be presented without context. Some introductory testimony is usually a good idea.

Jury research shows that, if counsel chooses to use deposition testimony, it should "consider using videotapes of adverse witnesses, especially those who appear nervous, hesitant, or argumentative, since the videotape tends to show these negative characteristics effectively. Depositions of favorable witnesses are usually more effectively presented in court by reading the deposition."[2]

1. U.S. Dept. of Labor, Presenting Effective Presentations with Visual Aids, available at http://www.osha.gov/doc/outreachtraining/htmlfiles/traintec.html.

2. Thomas A. Mauet, "Trial Techniques" 163 (Aspen, 2007) (7th ed.).

that will be used during the direct examination, and extracts of deposition testimony that may be needed to help refresh the witness's recollection if the witness falters. If counsel is using a computer graphics system to present exhibits or deposition testimony, the book may also incorporate cues or devices that counsel can use to display selected documents or testimony on computer screens set up in the courtroom.

Another section of the trial book should concern anticipated cross examination for that witness, including recognized weaknesses in substantive testimony or credibility, possible cross examination questions, and any additional documents or deposition testimony that may be relevant.

IV. PRESENTING WITNESSES DURING THE CASE IN CHIEF

§ 39:12 Generally

The direct testimony of each witness is aimed at presenting particular information and themes to the jury or judge as part of painting the overall picture, or as part of accomplishing trial counsel's Trial Game Plan. Additionally, the direct testimony of the client is of great importance because it creates the first impressions concerning the relative deservedness or blameworthiness of the plaintiff and the defendant.[1]

To make direct testimony effective, it should

- be clear and easy to understand;
- support and advance the theories and themes of the case;
- make a lasting impression on the factfinder and hold the factfinder's attention;
- be presented in such a way that the factfinder will appreciate its significance; and
- leave the impression that the witness is credible.

To achieve these objectives, the testimony should be simplified and the amount of detail or complexity reduced to the extent possible. Trial is the time when counsel must decide which facts are truly germane and compelling, and then strip away the many nonessential details that may have been developed during the often years of discovery, that preceded trial. Some of those nonessential details need not be raised at all on direct examination while others can be communicated in broad or otherwise simplified terms.

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and is a waste of time and effort. As to questions on cross examination related to witness preparation, see Chapter 40, "Cross Examination" (§§ 40:1 et seq.).

[Section 39:12]

[1]As to the ultimate goal of trial success and the ways and means to achieve it, see Chapter 37, "Trials" (§§ 37:1 et seq.).

Important facts may merit detailed treatment, and key information is often presented more than once in the course of the examination to capitalize on repetition and emphasize critical points. Different themes, thematic words, and metaphors brought out in the course of the examination should also be carefully planned along with the pace of that direct examination.

Limiting the scope and effectiveness of cross examination is also an essential consideration when planning and organizing the direct. Virtually every subject raised in client examination is fair grounds for cross examination. So, trial counsel should exercise restraint in questioning a witness about nonessential topics, especially if the witness is likely to appear weak when cross examined on those subjects.

The examiner determines the most logical and persuasive order for witness testimony. The goal is to elicit and present information in the order that will best create the overall image. Presenting the testimony in chronological order may seem easiest, but often topical or subject matter organization is more effective, particularly if the chronology has been well-established in the opening statements[2] or through the testimony of prior witnesses. Counsel should carefully plan and integrate the introduction, timing, and use of documents, exhibits, demonstrative evidence, visual aids, and other evidence within the overall direct examination. He or she must make tactical decisions about whether or not to anticipate cross examination by asking preemptive questions during direct examination, and whether or not to set traps for the cross examiner.

§ 39:13 The substance and conduct of the direct examination

The testimony elicited on direct examination must be relevant and material to the issues in the case.[1] Furthermore, the evidence must be competent and admissible, and the witness must be competent to testify about the subject matter of the testimony (i.e., the witness usually must have first hand knowledge of the facts to be elicited).[2] The nature and style of the questioning will vary, however, depending on the status of the witness. There are meaningful differences between the nature and style of direct examination of party witnesses and friendly or neutral third party

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[2]As to opening statements, see Chapter 38, "Trial Preliminaries and the Opening Statement" (§§ 38:1 et seq.).

[Section 39:13]

[1]Prince, Richardson on Evidence §§ 4, 128, 146 (10th ed. 1973).

[2]Prince, §§ 4, 385-408. As to the admissibility of evidence, see Chapter 43, "Admissibility Issues in Commercial Cases" (§§ 43:1 et seq.).

witnesses, and the nature and style of questioning permitted of adverse or hostile witnesses called on the direct case.[3]

Although direct examination is conducted almost exclusively by the examining attorney, in rare instances, jurors may pose questions to a witness.[4] The judge in both bench and jury trials has a much broader discretionary right to question witnesses, although there are limits on how far a judge may do so. Questioning that is too extensive, intrusive, or that places the court in an advocate's role and impairs its impartiality may constitute reversible error.[5]

§ 39:14 Direct examination of party witnesses and friendly or neutral third party witnesses—The role of the lawyer and witness on direct examination

The examining attorney must maintain control of the subject matter, direction, and pace of the direct examination through the questioning process, but without ever appearing to do so. The witness, not the lawyer, should tell the story and relate the facts.

Prompting the witness or attempting to put words into the witness's mouth undermines the credibility and persuasiveness of the witness, and should be resorted to only in the most exceptional or desperate circumstances. Even then, it may be a mistake to do so, particularly where the facts involved are crucial. In a case involving the value of certain property, for example, one of the important witnesses literally went blank as to a very important element of the testimony. The lawyer conducting the direct examination nevertheless decided to go on with the questioning and made no attempt to use a suggestive question or

[3]As to direct examination of party witnesses and friendly or neutral third party witnesses, see §§ 39:14 to 39:16; as to cross examination, see Chapter 40, "Cross Examination" (§§ 40:1 et seq.). As to questioning hostile witnesses on direct, see § 39:20.

[4]See Chapter 45, "Jury Conduct, Instructions, and Verdict" (§§ 45:1 et seq.).

[5]See Chapter 37, "Trials" (§§ 37:1 et seq.) and § 39:4; Carroll v. Gammerman, 193 A.D.2d 202, 205, 602 N.Y.S.2d 841, 843 (1st Dep't 1993); see also People v. Yut Wai Tom, 53 N.Y.2d 44, 57, 439 N.Y.S.2d 896, 422 N.E.2d 556, 563–64 (1981) (holding that excessive witness questioning by the trial judge resulted in the denial of a fair trial); People v. Melendez, 227 A.D.2d 646, 647, 643 N.Y.S.2d 607, 609 (2d Dep't 1996) (following People v. Yut Wai Tom, 53 N.Y.2d 44, 57, 439 N.Y.S.2d 896, 904, 422 N.E.2d 556, 564 (1981) (holding that a fair trial was denied where the trial judge "assumed control" of both the prosecutor's and defense counsel's examinations). Cf. People v. Pines, 298 A.D.2d 179, 748 N.Y.S.2d 716 (1st Dep't 2002) (holding that the trial court's questioning of two witnesses was proper, where the court intervened to clarify technical testimony).

any other method to prompt the witness. Any attempt to suggest the testimony at that point might have foreclosed any possibility of later repairing the damage. Some of the damage was, in fact, repaired later on cross examination when the witness recaptured both his composure and recollection and was (mistakenly) afforded an opportunity by the cross examiner to testify credibly about the facts involved.

§ 39:15 Direct examination of party witnesses and friendly or neutral third-party witnesses—Types of witness questioning

There are two broad categories of permissible questions: "open ended" and "closed" questions. Open ended questions (also called "narrative questions") invite the witness to tell the story. A typical open ended question such as "What happened next?" does not call for a specific answer, but allows the witness to tell the story in the witness's own words and form.

An open ended question, however, limits the lawyer's control of the examination and cedes it to the witness, sometimes producing long, unwanted narrative answers. In deciding whether to use an open ended question counsel must gauge how in tune the witness is with the examiner's goals. The witness, for example, might be asked "what happened next" and then proceed to testify, not only to the date of a meeting, but also to all of the details of that meeting. In some instances, that may be exactly how the lawyer wants the testimony to proceed. In other instances, the lawyer may be interested in eliciting what was said at the meeting only as to one or two specific subjects. In the case of the latter, open ended questions may be a poor choice. The witness may bury the important facts beneath a blizzard of nonessential details. This problem usually results from either the lawyers' lack of experience in the use of different questioning techniques or their overestimation of the witness's preparation and insight as to the pertinent facts or issues in the case.

Sometimes open ended or narrative questions may elicit a proper objection on the grounds that, in the absence of a more specific question, the witness may testify to hearsay or other inadmissible matters.

Closed questions are more narrowly focused and seek only a limited amount of information before the next question is asked. The lawyer retains control of the examination and sometimes the answer becomes simpler and more understandable. For example,

a series of closed questions (some of which may border on leading[1] may be asked:

- "Was a meeting held?"
- "What general subjects were discussed at the meeting?"
- "What then was said at the meeting with respect to X or Y subjects?"

Repetition is often prescribed to ensure that the factfinders do not miss an important point and/or to reinforce the point's importance in their minds. Some creativity is often needed to get repetitive testimony "in" because simply asking the witness the same question a second time may elicit an "Asked and Answered" objection from the adversary or, even worse, a "move along" direction from an exasperated-sounding judge. A better technique is to use more open ended questions first, followed by narrowly drawn questions, taking the witness back through the details, with emphasis on the important facts.[2] For example, the witness can be asked initially to give the witness's best recollection of what was said in a meeting or conversation. After the answer is completed, the examiner can then follow up or back track on the key subjects with specific questions, ostensibly aimed at bringing out further details of the meeting or conversation related to those subjects.

A "looping" question is one that repeats part of a previous answer to emphasize a key point.[3] It is a form of repetition. Care must be taken, however, to use "looping" questions on direct examination in a selective manner because overuse may fall into a pattern that creates the sense that the lawyer, rather than the witness, is really testifying. This technique is usually better used in cross examination.

Transitional questions are used to guide the witness (and also the judge or jury) from one topic to another, to change the time frame of the examination, or to cause some other shift in the focus of the questioning. Transitional questions often are not questions at all, but take the form of an introductory statement by the examiner. The examiner, for example, may say to the witness:

- "Please turn your attention to the meeting of March 12th,"

or

[Section 39:15]

[1]As to leading questions, generally, see Chapter 40, "Cross Examination" (§§ 40:1 et seq.).

[2]The use of demonstrative evidence is another valuable method of emphasizing important information to the factfinder. As to demonstrative evidence, see Chapter 42, "Graphics and Other Demonstrative Evidence" (§§ 42:1 et seq.).

[3]As to an illustration of looping, see Chapter 40, "Cross Examination" (§§ 40:1 et seq.).

- "Now, let's talk about what happened on the afternoon of September 15th," or
- "Let's discuss the subject of your efforts to find a replacement for defendant's product."

Transitional questions also may bring the witness back to a subject testified to earlier. For example, if the witness previously testified that he signed a disputed contract at a meeting with Mr. Smith on January 15, the examiner may say, "I'd like to take you back to the meeting with Mr. Smith on January 15 at which you signed the contract." The transitional question not only helps the judge, jury, or witness follow the topic of the examination, but also can be used to repeat, emphasize, and underscore important events such as, in this example, the January 15 meeting with Mr. Smith.

Although it is generally not proper to ask leading questions during the direct examination of friendly or neutral witnesses,[4] judges usually permit the use of leading questions to develop the background of fact witnesses, or to bring out preliminary or other introductory matters.[5] One virtue of leading questions, and the primary reason the judge may allow them, for background facts, is that leading questions enable the examination to move quickly through those typically undisputed subjects. As to matters of substance, lawyers sometimes ask leading questions in an attempt to assist the witness (even though an objection is anticipated), but this is usually unwise because the lawyer appears to be putting words into the mouth of the witness. In some circumstances, posing alternatives in the question may enable the examiner to ask a question that does not have the appearance of leading and may have a better chance of withstanding an objection.

§ 39:16 Direct examination of party witnesses and friendly or neutral third-party witnesses—Witness background questioning

The critical process of establishing a witness' credibility typically begins with questioning the witness's background. Everyone is interested in finding out, usually briefly, who the witness is and what the witness has done. Sometimes the background is important in establishing the authoritativeness of the testimony, particularly when it may relate to economic, technological, or other general unfamiliar subjects. Background questions also give the witness, especially a nervous one, an opportunity to settle down and allow the witness to become more comfortable before embarking on the more substantive areas of testimony.

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[4]See Prince, Richardson on Evidence § 478 (10th ed. 1973).

[5]Prince, at § 482.

Because of these purposes, questioning the witness about background almost invariably takes place at the outset of the testimony. Leading questions are generally permitted in taking a witness through background information. They sometimes result in shorter answers (often just "Yes" or "No"), an undesirable result that should be avoided because it will not give the witness an opportunity to speak and develop more self-confidence. Allowing the witness to "do the talking" additionally helps establish a bond with the jury or judge and allows them to become more familiar with the witness and form an initial, hopefully favorable, impression.

§ 39:17 Refreshing recollection

Regardless of the thoroughness of the pretrial preparation, witnesses often suffer memory lapses or inaccurately recall certain information when testifying at trial. Witnesses may also fail to recognize the examiner's goals when questioned (particularly when not as well prepared as they might be) and thus do not provide the expected responses. At the extreme, some individuals will virtually freeze up from anxiety upon taking the witness stand or making a mistake in their testimony, and find it difficult to remember anything or respond to questions with much more than single word, monosyllable answers (e.g., yes, no, or "un hum").

If the witness simply has not provided as complete a response as the lawyer expected, or inadvertently omitted a fact, the examiner usually can follow up with a slightly rephrased and possibly more pointed question. If that does not help, or if a witness suffers a memory loss, trying to refresh the witness's recollection is necessary so that missing information can be provided or a mistake may be corrected.

Before a witness's recollection can be refreshed, it must be shown that the witness's memory is deficient to some extent or is impaired.[1] Sometimes the witness's own answer acknowledges a lack of recollection or uncertainty as to what is remembered. If

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[Section 39:17]

[1]See People v. Jacksony, 61 A.D.3d 620, 877 N.Y.S.2d 327 (1st Dep't 2009), leave to appeal denied, 13 N.Y.3d 745, 886 N.Y.S.2d 99, 914 N.E.2d 1017 (2009) (affirming conviction and holding that trial court properly precluded defendant from using a complaint report to refresh a testifying officer's memory because officer's recollection was clear and did not need to be refreshed); People v. Henry, 297 A.D.2d 585, 748 N.Y.S.2d 2 (1st Dep't 2002) (holding that a criminal defendant was properly precluded from attempting to refresh the recollection of an officer as to his route of pursuit with a data sheet prepared by an assistant state's attorney in interviewing another officer, because the arresting officer never indicated that he needed his recollection refreshed on the subject).

the witness does not so testify, however, the lawyer must bring out the lack of memory. This is often done with a "Do you remember" question. If, for example, the lawyer expects the witness to identify three people present at a meeting, but the witness identifies only two of them, the following simple question and answer will lay the foundation for refreshing recollection:

Q. Do you remember whether anyone else was present at the meeting?

A. No, I do not.

Once the proper foundation has been laid,[2] the examiner may proceed to refresh recollection through the use of documents, prior testimony, or with further questioning. The examiner can show the witness virtually any document to refresh recollection, and the document shown to the witness need not be admissible.[3] Materials that can be shown to refresh recollection include the witness's own writings,[4] memoranda,[5] prior testimony,[6] and transcripts of prior conversations.[7]

When counsel uses a document to refresh recollection, after

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[2]It is critical that the foundation question incorporate a word or phrase evoking the recollection (or the lack thereof), such "do you remember" or "do you recall," as well as an open-ended component ("whether"). A close-ended question such as "was anyone else present" could evoke a definitive sounding answer, such as "no", which would not demonstrate a lack of recollection. (If the witness answered that question "I don't recall," a proper foundation to refresh recollection would be laid. It is risky, however, to rely on an (often nervous) witness to remember the lesson, taught in preparation, of distinguishing, in their testimony, between facts that they actually recall and can definitively testify about (with a "yes" or "no," if appropriate) and circumstances where they just cannot remember what happened.

[3]As to refreshing recollection, generally, see Prince, Richardson on Evidence §§ 465-467 (10th ed. 1973).

[4]People v. Boyd, 58 N.Y.2d 1016, 1018, 462 N.Y.S.2d 435, 436, 448 N.E.2d 1346, 1347 (1983).

[5]People v. Castro, 113 Misc. 2d 255, 256, 448 N.Y.S.2d 991, 992 (Sup 1982).

[6]People v. Estrada, 142 A.D.2d 512, 513–514, 530 N.Y.S.2d 148, 149 (1st Dep't 1988); Melendez v. City of New York, 109 A.D.2d 13, 19, 489 N.Y.S.2d 741, 746 (1st Dep't 1985); Ruggiero v. Fahey, 103 A.D.2d 65, 70, 478 N.Y.S.2d 337, 341 (2d Dep't 1984).

[7]Adamy v. South Buffalo Ry. Co., 294 A.D.2d 801, 742 N.Y.S.2d 459 (4th Dep't 2002), opinion amended on other grounds on reargument, 298 A.D.2d 999, 751 N.Y.S.2d 798 (4th Dep't 2002) (holding that a transcribed statement of a conductor taken by a railroad's supervisor of personnel at the time of an employee's accident was properly used on cross examination of the supervisor to refresh his recollection and impeach his credibility; the supervisor, who had "forgotten" that he had taken the statement, testified at trial that the railroad had no reason to believe that the accident occurred in the manner described by the employee); People v. Di Loretto, 150 A.D.2d 920, 921–22, 541 N.Y.S.2d 260 (3d Dep't 1989).

showing it to adversary counsel, examining counsel should ask the witness to look at the document and state whether it refreshes his or her recollection about a particular subject. It is improper for the lawyer or witness to read the contents of the document aloud if the document has not been received in evidence.[8] Once the witness indicates that the document has refreshed recollection, the examiner can then ask the witness questions designed to elicit the missing information or correct inaccurate testimony.[9]

In answering the question, unless the document has been offered and received in evidence beforehand, the witness must not read from the document, but must testify from independent, now refreshed, recollection. The witness's testimony, not the document used to refresh recollection, is the evidence.[10] Adversary counsel, in addition to having a right to examine the document first,[11] may use it on cross examination to test the credibility of the witness.[12]

Counsel can also attempt to refresh recollection merely with questions, and without a supporting document. Leading questions, for example, are permitted as to certain matters (such as suggesting a name, a date, or other independently provable fact), and often are used to refresh recollection.[13] Similarly, questioning a witness about background details or circumstances, which put the event in context, may stimulate recollection.[14]

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[8]See Prince, Richardson on Evidence § 467 (10th ed. 1973).

[9]E.g., Q: Does looking at Exhibit__ (a memorandum) refresh your recollection as to what was said at the meeting. A: Yes. Q: What, to the best of your recollection, was said. A: Mr. Jones said . . . . For an illustration of the use on cross examination of an inadmissible document to refresh recollection so as to impair the credibility of the witness, see § 40:10.

[10]Brown v. W. U. Tel. Co., 26 A.D.2d 316, 318, 274 N.Y.S.2d 52, 54 (4th Dep't 1966).

[11]Herrmann v. General Tire and Rubber Co., Inc., 79 A.D.2d 955, 956, 435 N.Y.S.2d 14, 16 (1st Dep't 1981); Slotnik v. State, 129 Misc. 2d 553, 554, 493 N.Y.S.2d 731 (Ct. Cl. 1985); E. R. Carpenter Co. v. ABC Carpet Co., Inc., 98 Misc. 2d 1091, 1092, 415 N.Y.S.2d 351, 353 (N.Y. City Civ. Ct. 1979).

[12]Patchogue Oil Terminal Corp. v. Sambach, 15 Misc. 2d 266, 268, 178 N.Y.S.2d 659, 661 (Sup 1958); see also Prince, Richardson on Evidence § 467 (10th ed. 1973).

[13]See Prince, Richardson on Evidence § 484 (10th ed. 1973).

[14]E.g.: Q: On what day did the meeting take place? A: I don't recall. Q: Do you recall whether you had any particular problems getting to the meeting that day? A: Oh, yes, I had a very hard time crossing Fifth Avenue to get to that meeting because the St. Patrick's Day parade was going on. Q: Does that memory refresh your recollection as to when the meeting took place? A: Oh yes, it was St. Patrick's Day, March 17.

§ 39:18 Introduction of documentary evidence through witnesses

In order to introduce a document into evidence, a proper foundation must be laid, unless the parties have stipulated to its admissibility. In commercial cases, it is common—and certainly desirable—for the parties in advance of the trial to stipulate to the authenticity and admissibility of many if not most of the documents in the case.[1] However, whenever there is a contest concerning the admissibility of a document, the document must meet the relevancy requirement and, where applicable, other evidentiary requirements, such as the hearsay and/or best evidence rules. Laying a proper foundation usually, but not always, requires having authentication of the document established by a witness who is competent to do so (i.e., a witness who has personal knowledge of the document).[2]

Before the document is shown to the witness, it should be marked for identification, with copies provided to adversary counsel and the court.[3] Counsel should then show the document to the witness and ask whether the witness can identify it. Because the document is not yet in evidence, the examiner and the witness may not disclose its contents. Normally, the question for the witness is along the following lines:

> I show you what has been marked (plaintiff's/defendant's) Exhibit 1 for identification and ask if you can identify it.

The properly prepared witness will simply answer "Yes." Unless the witness's personal knowledge of the document need first be established (which often is not the case with documents on their face authored or received by the witness), the examiner then may ask an open ended question such as, "What is it?" This allows the witness to further identify the document, establishing the basis for reading all or portions of it to the jury, and permitting further questions concerning its content or surrounding circumstances.

[Section 39:18]

[1]As to the presentation of documents stipulated in evidence, see § 39:28; as to pretrial matters, generally, see Chapter 38, "Trial Preliminaries and the Opening Statement" (§§ 38:1 et seq.).

[2]See, e.g., Brown v. Reece, 194 Misc. 2d 269, 753 N.Y.S.2d 825 (N.Y. City Civ. Ct. 2003) (holding that prior to the introduction of any documentary evidence, it is necessary to lay a foundation for its accuracy; to do so, the preparer of the document must testify as to the timeliness of its preparation and the basis for the statements appearing therein). See also the discussion concerning business records in Chapter 43, "Admissibility Issues in Commercial Cases" (§§ 43:1 et seq.).

[3]Counsel should have copies of documents available for the witness, for the judge, and the jury if it is planned to distribute them. As to the use of legal assistants to copy documents for distribution, see Chapter 37, "Trials" (§§ 37:1 et seq.).

For contracts, checks, invoices, and similar documents, which do not constitute hearsay, or in the case of letters, memoranda, or other documents from the adverse party that are admissible under the party admission exception to the hearsay rule, authentication (if needed because of the absence of stipulation) will lay the proper foundation for the admission of the document. This also may occur with respect to certain letters, memoranda, or other documents whose contents may be admissible as evidence of "state of mind"—an often important type of evidence in contract and other types of commercial cases. However, with respect to business records or other types of hearsay exceptions, the witness must also establish that the documents fall within such exceptions.[4]

Once the proper foundation has been laid, examining counsel can introduce (or move) the document into evidence. Laying the proper foundation does not automatically place the document into evidence. Rather, the lawyer must formally introduce the document into evidence by asking the judge to admit the document into evidence (and the other side will then have an opportunity to conduct a voir dire). The contents of the document cannot be disclosed to the factfinder unless, and not until, the document has been admitted into evidence.

The examining lawyer usually moves the document into evidence immediately after the foundation has been laid, but there may be tactical reasons to wait. For example, if the lawyer expects that the other side may conduct a voir dire that will interrupt the flow of the direct testimony, counsel may choose to defer requesting its introduction until a later point in the examination. Similarly, if the examining lawyer expects an objection to the document's admissibility at the time it is offered, and believes that additional evidence to be introduced later that could bolster the document's admissibility, it may be tactically prudent to defer offering the document until the later evidence has been introduced.

Once the document has been received into evidence, there are a number of ways its contents may be published (or disclosed) to the factfinder. One method is simply to have the judge or jury examine the document. In a bench trial, the judge will have already read or at least perused the document even though it has not yet been formally received in evidence. In a jury trial, separate copies of the document may, with the court's permission, be provided to each juror or projected on a computer screen. A principal drawback, however, is that the direct examination will be interrupted, the trial will be delayed, and the jurors may become

[4]As to hearsay and its exceptions in the context of commercial cases, see Chapter 43, "Admissibility Issues in Commercial Cases" (§§ 43:1 et seq.).

distracted. Jurors may also focus on the wrong language. However, if the document or a portion of the document is a "smoking gun" or is crucial to the case, such as a contract that is at the heart of the controversy, it is essential that the jury hear and see the important portions of it by one means or another.

The contents of the document or the key portions of the document may be conveyed to the jury and judge by having the witness or lawyer read pertinent portions aloud. This method, without simultaneous visual display, sometimes is tedious and difficult to understand, especially if the material is complicated or of any significant length. Furthermore, reading material aloud does not have the same impact as showing exhibits visually to the factfinder.

In modern commercial trial practice, display on large computer (television) screens has become the most common and generally is the most effective method to display the contents of documents, because jurors actually eyeball the document while counsel reads the important material and guides the jury through it.

Today's presentation software gives the lawyer great flexibility in displaying and highlighting key portions of documents, in moving between documents, and even in displaying multiple documents side-by-side for comparison.[5] Moreover, most people likely to serve as jurors in the early 21st century are accustomed to using television and computer screens as their major, if not their primary, source of information. At least two factors, however, not infrequently limit the use of such courtroom technology: (1) it can be quite expensive, so the stakes in the case must warrant it and the client's budget must allow it; and (2) counsel must be able to ensure that the technology works properly—and is suited to the particular courtroom where the trial will take place—and that the examining lawyer (and his or her support team) know how to use the technology seamlessly. In most courts, moreover, counsel must obtain permission from the trial judge, before the trial, to use the equipment, although in the modern era such permission is routinely granted by most courts.

Related and older forms of graphic presentation, still very effective in cases where there are only a few documents or where only one or two documents hold center stage in the case, include blow-ups on poster boards and simple overhead projectors. These older forms of presentation materials have the virtue of often being much less costly thean computer technology, and are also much easier for counsel to learn to use and less prone to failure. Counsel also needs to consider the potential negatives of any

[5]See Chapter 63, "Litigation Technology" (§§ 63:1 et seq.) for additional discussion of trial preparation software.

choice of presentation materials—e.g., whether, given the relative positions of counsel's client and adversary and the demographics of the jury, use of computer technology may look "too slick" and/or use of simpler materials gives an impression that counsel (or the client) is "old fashioned" or obsolete.

These presentation devices all enable the witness and counsel to read the important portions of the document while the fact-finder follows along, and then continue questioning to elicit further testimony concerning the document's contents.[6]

§ 39:19 Use of demonstrative evidence and visual aids

The use of other types of visual aids, such as graphs and charts, and computer screen blow-up images of critical portions of documents (enhanced with computer-generated pointers or highlighting) can often enhance effective presentation of direct examination. Everyone, judge or jury, has a limited attention span, and may tune out when only listening to questions and answers. (The mid-afternoon hours bring added dangers of this kind.) Visual aids should be integrated into the direct examination, both to help hold interest and to emphasize particularly important aspects of the testimony and documentary evidence that is introduced through the witness. Graphics and demonstrative aids and evidence must be carefully integrated into the Trial Game Plan.[1]

§ 39:20 Questioning adverse and hostile witnesses on the direct case

Conventional wisdom cautions against calling an adverse or hostile witness as part of the direct case because of the witness's desire to provide harmful testimony. On occasion, however, testimony from an adverse party or hostile witness may be needed to establish an element of the claim or defense or because of some overriding tactical consideration, such as perceived weaknesses in friendly or neutral witnesses. A party, usually the plaintiff, may conclude that adverse or hostile witnesses will strengthen the overall presentation of the case in chief because they offer helpful information despite the potential risks. The

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[6]See the discussion in Chapter 42, "Graphics and Other Demonstrative Evidence" (§§ 42:1 et seq.), concerning techniques for displaying the contents of documents.

[Section 39:19]

[1]As to graphics and other demonstrative evidence, generally, see Chapter 42, "Graphics and Other Demonstrative Evidence" (§§ 42:1 et seq.). In addition, see Chapter 63, "Litigation Technology" (§§ 63:1 et seq.) for further discussion of use of technology in trial preparation.

drama generated with meaningful and effective examination of adverse or hostile witnesses in the direct case sometimes has particularly effective impact on the factfinders.[1] In other circumstances, eliciting testimony from a hostile witness is unintended, but unavoidable, as when a witness expected to be friendly or neutral unexpectedly turn out to be hostile.

The examining attorney is permitted to ask leading questions of an adverse party or hostile witness testifying on direct.[2] This enables the examiner to exercise much greater control over the witness by limiting the scope and content of that witness's answers. For all intents and purposes, the examination of an adverse party or hostile witness as part of a party's case in chief is cross examination, except that the scope of the examiner's questioning is not limited by the other parties' direct examination of the witness.[3]

§ 39:21 Impeaching or correcting the testimony of a party's own witness

Impeachment of a witness consists of questioning designed to impair the witness's credibility or to correct mistaken testimony.

[Section 39:20]

[1]See Chapter 37, "Trials" (§§ 37:1 et seq.) and Chapter 40, "Cross Examination" (§§ 40:1 et seq.).

[2]Where an adverse party is called as a witness, it may be assumed that such adverse party is a hostile witness, and, in the discretion of the court, direct examination may assume the nature of cross examination by the use of leading questions Fox v. Tedesco, 15 A.D.3d 538, 789 N.Y.S.2d 742 (2d Dep't 2005) (the defendant driver was called as a witness by the plaintiffs in a personal injury action; as such, the defendant was a hostile witness, and the plaintiffs could proceed with direct examination by cross examining the defendant driver and impeaching her). A hostile witness may be known to be hostile before being called or may be a witness who unexpectedly turns hostile or recalcitrant while being questioned. Before being able to question a witness as a hostile witness, it is necessary to obtain a ruling from the court that the witness can be treated as a hostile witness. Ostrander v. Ostrander, 280 A.D.2d 793, 720 N.Y.S.2d 635 (3d Dep't 2001) (holding that while an adverse party who is called as a witness may be viewed as a hostile witness and direct examination may assume the nature of cross examination by the use of leading questions, whether to permit such questions over objection is a matter which rests in the discretion of the trial court). As to hostile witnesses, generally, see Prince, Richardson on Evidence §§ 503-505 (10th ed. 1973).

[3]As to cross examination, see Chapter 40, "Cross Examination" (§§ 40:1 et seq.).

A party ordinarily may not impeach its own witness.[1] However, there are exceptions.[2]

A party may "impeach" its own witness who is not adverse or hostile through the use of certain prior inconsistent statements. This most commonly occurs when the witness has made a mistake in testifying and counsel endeavors to correct the mistake through the use of a prior inconsistent statement. Under CPLR 4514,[3] "any party may introduce proof that any witness has made a prior statement inconsistent with his testimony if the statement was made in a writing subscribed by him or was made under oath." CPLR 3117(a)(1)[4] likewise provides that "any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness."

A party may therefore use prior inconsistent statements in documents subscribed by the witness or in prior sworn deposition or trial testimony to impeach or correct the testimony of its own friendly or neutral witness, even the party-client.[5] Moreover, by the use of such prior inconsistent statements, or through the technique of "refreshing recollection,"[6] the examiner has another tactical path for attempting to correct what appears to be mistaken testimony of the party's own witness or providing the witness with an opportunity to explain an apparent inconsistency.

[Section 39:21]

[1]This is commonly referred to as the "voucher rule." See Prince, Richardson on Evidence § 508 (10th ed. 1973). See Chapter 40, "Cross Examination" (§§ 40:1 et seq.).

[2]The general rule prohibiting a party from impeaching his or her own witness does not preclude a hostile witness from being impeached by prior statements made either under oath or in writing. Fox v. Tedesco, 15 A.D.3d 538, 789 N.Y.S.2d 742 (2d Dep't 2005) (holding that a defendant called as a witness by the plaintiffs in a personal injury action was a hostile witness, and the plaintiffs were entitled to proceed with direct examination by cross examining the defendant and impeaching her with alleged inconsistencies in her accident report and deposition testimony). As to impeachment, generally, see Chapter 40, "Cross Examination" (§§ 40:1 et seq.).

[3]CPLR 4514. See, e.g., Gale P. Elston, P.C. v. Dubois, 18 A.D.3d 301, 795 N.Y.S.2d 33 (1st Dep't 2005) (in action by prime tenant against subtenant to recover use and occupancy payments while tenant's serial holdover proceedings against subtenant were ongoing, sworn documentary statements submitted by subtenant in civil court proceedings that were materially inconsistent with subtenant's testimony in use and occupancy action were admissible) (citing CPLR 4514).

[4]CPLR 3117(a)(1).

[5]See also Prince, Richardson on Evidence § 508 (10th ed. 1973).

[6]As to refreshing recollection, see § 39:17.

§ 39:22 Redirect examination

Redirect examination is used to rebut, explain, or further develop matters raised during cross examination. Redirect examination can also be used to rehabilitate witnesses by giving the witness an opportunity to explain inconsistent, contradictory, or discrediting facts disclosed on cross examination.[1] The principal purposes of redirect are rehabilitating a witness's credibility or clarifying and explaining substantive matters that were attacked on the cross.

Repeating direct testimony that has not been the subject of cross examination is improper, as is introducing brand new subject matter not covered during the cross examination. Although redirect examination is supposed to be limited to matters brought out during cross examination, the court, in its discretion, may permit presentation of new matter that could have been (but was not) introduced on direct, or to allow the repetition of matter previously elicited on direct.[2] However, expecting to sandbag the adversary (by saving for redirect facts that could have been elicited on direct) ordinarily is improper, and in any event tactically dangerous because of the likelihood that counsel will be barred from raising facts and issues not within the scope of the cross.[3]

Redirect examination offers the examiner the chance to bring out new or additional testimony on points addressed by the adversary on cross examination. Thus, for example, if a portion of a conversation or transaction is brought out on cross examination, the remainder may be brought out on redirect.[4] Similarly, if

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[Section 39:22]

[1]Kings County Trust Co. v. Hyams, 242 N.Y. 405, 411–412, 152 N.E. 129 (1926); People v. Noblett, 96 A.D. 293, 89 N.Y.S. 181, 183 (1st Dep't 1904), aff'd, 184 N.Y. 612, 77 N.E. 1193 (1906).

[2]Roth v. S & H Grossinger Inc., 284 A.D.2d 746, 726 N.Y.S.2d 774, 155 Ed. Law Rep. 752 (3d Dep't 2001) (holding that the decision to permit rebuttal testimony is committed to the trial court's discretion and will not be disturbed absent a clear abuse thereof). As to these and other matters relating to redirect examination, see Prince, Richardson on Evidence § 523 (10th ed. 1973).

[3]The trial court does, however, have the discretion to allow questioning on redirect even with respect to topics that could have been addressed during direct testimony, but were inadvertently omitted. See People v. Dennis, 55 A.D.3d 385, 866 N.Y.S.2d 28 (1st Dep't 2008), leave to appeal denied, 12 N.Y.3d 783, 879 N.Y.S.2d 59, 906 N.E.2d 1093 (2009) (holding that trial court did not err in allowing the prosecutor to ask questions on redirect that the prosecutor had forgotten to ask on direct).

[4]Feblot v. New York Times Co., 32 N.Y.2d 486, 496–498, 346 N.Y.S.2d 256, 265–266, 299 N.E.2d 672, 678–79, 63 A.L.R.3d 881 (1973). See also People v. Johnson, 296 A.D.2d 422, 745 N.Y.S.2d 51 (2d Dep't 2002) (holding that in

conduct was brought out on cross examination, its meaning and motive may be shown on redirect.[5]

Because of its limited scope, redirect examination usually is and should be short and quite pointed. The conduct of redirect examination follows the same rules that govern the form and nature of questions on direct. Leading questions generally cannot be used, except to focus the witness's attention on the portion of the cross examination to which the witness is asked to respond or clarify. It is often helpful for counsel to summarize accurately the earlier testimony to help lead the witness toward achieving the goal of the redirect examination.

V. OBJECTIONS AND MOTIONS TO STRIKE DURING DIRECT AND CROSS EXAMINATION

§ 39:23 Generally

The principal function of objections is to bar the admission of improper evidence.[1] Objections are also used as a tactical weapon to interrupt the flow of the other side's presentation. When adversary counsel is inexperienced, objections may fluster and unnerve. In a jury trial, although requesting a sidebar or bench conference to discuss evidentiary objections may heighten the interruptive effect, it also can backfire; it may leave the jurors with a sense that they are purposely excluded from pertinent information. This may occur even if the jury has been properly instructed by the court at the outset of the trial concerning the nature of objections as part of the normal trial process, and the need to avoid drawing any inferences from the exclusion of

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situations where only a part of a statement has been brought out on cross examination of a witness, under the "opening the door" rule, the other parts may be introduced on redirect examination for the purpose of explaining or clarifying the statement); Fisch On New York Evidence § 344 (2d ed. 1977).

[5]Honsberger v. Wilmot, 276 A.D. 884, 93 N.Y.S.2d 762, 763 (3d Dep't 1949) (holding that where revocation of a driver's license was disclosed on cross examination, testimony on redirect was allowed to explain the reason for its revocation).

[Section 39:23]

[1]CPLR 4017 provides generally for the making of objections during trial: "Formal exceptions to rulings of the Court are unnecessary. At the time a ruling or order of the court is requested or made a party shall make known the action which he requests the Court to take or, if he has not already indicated it, his objection to the action of the court. Failure to so make known objections, as prescribed in this section or in section 4110-b, may restrict review upon appeal in accordance with paragraphs three and four of subdivision (a) of section 5501."

evidence.[2] Sidebar conferences nevertheless may be necessary to argue the merits of the evidentiary objection out of the hearing of the jury.

Objections to questions during direct examination basically fall into two categories: objections to the form of the question and objections to the admissibility of the testimony being sought or the document being offered. If an objection to the form of a question is sustained, examining counsel can overcome the objection by rephrasing the question in a proper form. If the objection is aimed at the admissibility of the evidence and the objection is sustained, the problem cannot be cured by merely modifying the form of the question.

Common objections to the form of the question include compound questions, leading questions, argumentative, asked and answered, cumulative,[3] calls for a narrative (when the question invites the possibility that the witness will testify to inadmissible matter), vague, ambiguous, and mischaracterization or misquotation of evidence. Common objections to the admissibility of evidence include relevance, hearsay, improper opinion or conclusion, lack of foundation, lack of authentication, best evidence, competence, speculative, privileged communication, and assumes facts not in evidence.

Counsel must timely assert objections.[4] Objections to questions should be raised as soon as the question is asked and before the witness has answered. If the witness answers before objecting counsel has had a chance to object,[5] counsel can make a motion to strike but should do so immediately after the witness has finished

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[2]As to preliminary jury instruction, see Chapter 45, "Jury Conduct, Instructions, and Verdict" (§§ 45:1 et seq.).

[3]Improper bolstering of testimony occurs where prior consistent statements are offered into evidence even though the original statement was not attacked on cross examination. See Connor v. New York City Police Dept., 22 A.D.3d 425, 802 N.Y.S.2d 683 (1st Dep't 2005) (officer was not entitled to admission of tape as a prior consistent statement during hearing regarding his termination, where police department did not argue that officer's testimony at hearing was recent fabrication); Carr v. Burnwell Gas of Newark, Inc., 23 A.D.3d 998, 803 N.Y.S.2d 834 (4th Dep't 2005) (improper bolstering occurred in an automobile accident case by admitting, and permitting a police officer to testify over objection about, the truck driver's prior consistent statement regarding the cause of the accident, where that testimony had not been attacked).

[4]Evers v. Carroll, 17 A.D.3d 629, 794 N.Y.S.2d 398 (2d Dep't 2005) (where the defendant's attorney consents to the admission of evidence, any right to object is waived). As to objections, generally, see Prince, Richardson on Evidence §§ 537–538 (10th ed. 1973).

[5]Meyers v. Fifth Ave. Bldg. Associates, 90 A.D.2d 824, 825, 456 N.Y.S.2d 17, 18 (2d Dep't 1982); Mollineaux v. Clapp, 99 A.D. 543, 90 N.Y.S. 880, 881 (2d Dep't 1904).

the answer.[6] Objections to the admissibility of documentary or other nontestimonial evidence must be made when introduced into evidence.

Although the facts necessary for the court to rule on the objection will generally be evident when the question is asked or the nontestimonial evidence is offered, sometimes a voir dire of the witness may be employed to elicit additional facts necessary to determine the basis for an objection or for the judge to decide the objection. For example, voir dire may be necessary to show that the witness is not competent to testify about a given subject or that a proper foundation does not exist for such testimony. Voir dire may also be used to challenge the use of demonstrative evidence or other visual aids or the credentials of an expert.[7]

When the question itself is proper, but the answer is unresponsive or contains other improper or inadmissible material, the objection will take the form of a motion to strike. The motion to strike, when granted, is often accompanied in a jury trial by curative instructions (i.e., the witness's answer should be disregarded). If the judge does not voluntarily give such an instruction, counsel may request one after considering its potential effects on the jury. In some instances, such an instruction may have precisely the opposite effect of "curing" the impact of the improper testimony, by giving further emphasis to the objectionable subject.

The form of objection may be general or specific. General objections do not identify the ground upon which they are being made,[8] and are usually made by the examining lawyer simply saying, "Objection." General objections will be sustained by the trial court if there is any ground for excluding the evidence.[9] Specific objections identify the ground on which the objection is being made[10] and will be sustained by the trial court only if the ground advanced is correct.

Some judges prefer general objections particularly in jury trials, because they are simpler and easier to rule on, may lessen or

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[6]Le Coulteux de Caumont v. Morgan, 104 N.Y. 74, 85–86, 9 N.E. 861, 865–866 (1887).

[7]See Chapter 41, "Expert Witnesses" (§§ 41:1 et seq.).

[8]See 4 Weinstein, Korn & Miller, New York Civil Practice ¶ 4017.04; People v. Ross, 21 N.Y.2d 258, 262, 287 N.Y.S.2d 376, 379, 234 N.E.2d 427, 429 (1967); People v. Murphy, 135 N.Y. 450, 454, 32 N.E. 138 (1892) (overruled in part on other grounds by, Hoag v. Wright, 174 N.Y. 36, 66 N.E. 579 (1903)).

[9]Bloodgood v. Lynch, 293 N.Y. 308, 312, 56 N.E.2d 718, 719–720 (1944).

[10]4 Weinstein, Korn & Miller, New York Civil Practice, ¶ 4017.04; see, e.g., Williams v. Alexander, 309 N.Y. 283, 286, 287, 129 N.E.2d 417, 419–420 (1955) (hearsay); Steen v. Burleson, 268 A.D. 815, 49 N.Y.S.2d 210, 211 (4th Dep't 1944) (improper impeachment).

eliminate the possibility of argument in the presence of the jury and are more susceptible of being sustained on appeal. Often, however, judges will ask counsel to specify the basis for the objection if it is not readily evident. Similarly, specific objections are better if counsel feels the court may need direction in understanding the nature of the objection, although some trial lawyers prefer in the first instance making general objections in the belief they provide the widest latitude and best chance of being sustained.

CPLR 4017 provides that formal exceptions to the judge's ruling on objections are not required. Some counsel note "exceptions" on the record, often out of habit developed in other jurisdictions or when frustrated by the judge's ruling on an objection. It generally is advisable to avoid doing so as it can antagonize the judge.

§ 39:24 Appellate review

Although the appellate court has the discretion to disregard a party's failure to make a timely objection where there is a reasonable basis for believing that injustice has resulted,[1] in all but the most exceptional cases the objection will be deemed not preserved for appeal. A holding that counsel failed to preserve an (untimely) objection is particularly likely in commercial cases because such cases typically involve sophisticated parties with experienced counsel.[2]

Rulings on general and specific objections are treated differently on appeal. If a general objection is sustained by the trial court, the ruling will be upheld if any ground in fact exists to support the objection.[3] If a general objection is overruled, the ruling will be upheld unless the evidence is not admissible for any purpose or there was some defect that was impossible to obviate even if it had been specified.[4] Specific objections are limited to the stated objection. If a specific objection is overruled by the trial court, only the ground asserted will be considered on appeal, un-

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[Section 39:24]

[1]Merrill by Merrill v. Albany Medical Center Hosp., 71 N.Y.2d 990, 991, 529 N.Y.S.2d 272, 273, 524 N.E.2d 873, 874 (1988); Graham by Graham v. Murphy, 135 A.D.2d 326, 329, 525 N.Y.S.2d 414, 417 (3d Dep't 1988).

[2]Horton v. Smith, 51 N.Y.2d 798, 799, 433 N.Y.S.2d 92, 93, 412 N.E.2d 1318, 1319 (1980); Mashley v. Kerr, 47 N.Y.2d 892, 893, 419 N.Y.S.2d 476, 477, 393 N.E.2d 471 (1979).

[3]Matter of Fiumara's Estate, 47 N.Y.2d 845, 847, 418 N.Y.S.2d 579, 580, 392 N.E.2d 565, 566 (1979); Prince, Richardson on Evidence § 538 (10th ed. 1973).

[4]Prince, Richardson on Evidence § 538 (10th ed. 1973); see also Hoag v. Wright, 174 N.Y. 36, 39–41, 66 N.E. 579 (1903); Levin v. Russell, 42 N.Y. 251, 255–256, 1870 WL 7709 (1870).

less there is no purpose for which the evidence was admissible.[5] When a specific objection is sustained by the trial court, the ruling will be overturned if the evidence is not objectionable on the ground asserted even if it could have been objected to upon some other ground (unless the evidence is not admissible for any reason).[6] However, even if the trial court committed error in making evidentiary rulings, most errors in commercial cases are deemed "harmless," and with notable exceptions (such as the parol evidence rule which is a principle of substantive law not a rule of evidence), it is rare when an appellate court will reverse an order or judgment based on such errors.[7]

§ 39:25 Offers of proof

During the course of jury trial proceedings, when the evidentiary process is of greatest importance, offers of proof to the court may sometimes be needed to argue best against an objection posed. Offers of proof may be a simple explanation from counsel at sidebar of anticipated evidence, but sometimes written submissions may be desirable or required. Offers of proof are necessary when the trial court sustains an objection and the nature of the evidence or testimony sought is not obvious. An offer of proof may succeed in changing the judge's ruling and, as to really important matters, best preserves the argument for appeal. In jury trials, offers of proof should always be made out of the jury's hearing so as not to prejudice their view of the evidence.

§ 39:26 Practice tips

Counsel should refrain from objecting to every improper question. Trials are not law school classes in evidence. Counsel should have good substantive or tactical reasons for making the objection in addition to an arguable threshold basis for the objection. Frequent objections may alienate or offend the fact-finder, particularly if it is a jury. Certainly, objections should be made when the putative answer or other evidence can be expected to damage the case. Even if no direct damage may be done, well-placed and well-supported objections may lead the examining lawyer to abort a line of questioning, successfully interrupt the pace of the examiner, or help undermine the confidence of the witness or the witness's lawyer.

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[5]Prince, Richardson on Evidence § 538 (10th ed. 1973).

[6]Gurski v. Doscher, 112 A.D. 345, 346–347, 98 N.Y.S. 588, 589 (2d Dep't 1906), aff'd, 190 N.Y. 536, 83 N.E. 1125 (1907); Prince, Richardson on Evidence § 20 (10th ed. 1973).

[7]As to hearsay and its exceptions: the prerequisite of relevance and materiality, see Chapter 43, "Admissibility Issues in Commercial Cases" (§§ 43:1 et seq.).

Often the judge will rule on an objection before the other party has an opportunity to respond. When this occurs, a response should be made when it is desirable to force the adversary counsel to specify the ground for the objection, or if it may help in getting the judge to reverse the quickly made ruling.

Before proceeding to trial, counsel should familiarize themselves to the extent possible with the trial judge's preferences regarding objections. Some judges discourage speaking objections. Others, including several of the Commercial Division judges in Manhattan, forbid speaking objections entirely because of their prejudicial or interruptive effect. Other judges may permit briefly stated specific objections such as "Form," "Hearsay," "Lack of Foundation," etc.

Judges who allow argument on objections in front of the jury make a serious mistake, although not necessarily a reversible one. In bench trials, repeated or prolonged arguments on evidentiary issues interrupt and prolong the flow of evidence, and the arguments may improperly influence the jurors' views of the resulting evidence.

A valuable technique for dealing with important evidentiary issues, whether in a jury or nonjury trial, is for counsel to submit a one or two page "bench memorandum" on the issue together with copies of a few of the most pertinent authorities.[1] The judge can read the memorandum, get the point, and rule swiftly. In appropriate circumstances, counsel may wish to provide such a bench memo in advance of trial so the court has the opportunity to consider the arguments and authority more reflectively before rendering a ruling. Bench memoranda concerning important evidentiary issues should be anticipated and prepared before the trial ever begins, providing counsel with the widest latitude in using them during the trial.

VI. THE INTRODUCTION AND TRIAL PRESENTATION OF EVIDENCE WITHOUT WITNESS TESTIMONY

§ 39:27 Generally

Certain evidence can be admitted without the need for witness testimony, including (i) documents stipulated in evidence, (ii) judicial admissions, which are admissions found in the pleadings, stipulations, admissions in response to requests to admit, bills of particular, and pleadings in other cases, (iii) deposition testimony, and (iv) answers to interrogatories, can be admitted without the need for witness testimony.

[Section 39:26]

[1]For a sample bench memorandum, see § 39:37.

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Refreshing Recollection Doctrine Revisited

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The refreshing recollection doctrine, a common law rule of evidence in New York, permits a witness to use while testifying at trial a writing when the witness has difficulty in recalling facts to attempt to stimulate the witness' recollection, and thereafter testify to the fact(s) thereby recollected.[1] If reference to the writing actually does refresh the witness' memory, the examination may proceed with the witness testifying from present recollection.[2] Opposing counsel then has the right to inspect the writing, and use it in examining the witness for the purpose of protecting against the introduction of "false, forged or manufactured evidence."[3] All of this is well established in New York evidence law.

Three recent Appellate Division decisions—*Beach v. Touradji Capital Mgt.*, 99 A.D.3d 167 (1st Dept. 2012); *Seaberg v. North Shore Lincoln-Mercury*, 85 A.D.3d 1148 (2d Dept. 2011); and *Fernekes v. Catskill Regional Med. Ctr.*, 75 A.D.3d 959 (3d Dept. 2010)—discussed this doctrine in the context of deciding whether the doctrine applies to sound recordings sought to be used at trial, and, if so, what adjustments to its basic foundation elements are necessary; whether the doctrine applies when a witness uses a writing in preparation for deposition; and whether the use of a privileged document, e.g., a document protected by a statutory privilege such as the attorney-client privilege, attorney work product privilege pursuant to CPLR 3101(c), or material prepared for litigation privilege pursuant to CPLR 3101(d), used by a witness to refresh recollection prior to a deposition effects a waiver of the privilege. This column will address these and other related issues raised by the decisions.

'Seaberg' Decision

In this personal injury action, plaintiff alleged that she slipped and fell on ice in the defendant's parking lot. On her direct case, plaintiff testified that, as she fell, she saw and felt ice on the ground. In addition, she called as a witness a mechanic employed by defendant, who had called 911 approximately two minutes after the accident stating, inter alia, that he had seen "ice on the ground that caused [plaintiff] to slip and fall." *Seaberg*, 85 A.D.3d at 1149. However, after the trial court ruled the 911 tape was inadmissible under the present sense impression or excited utterance exceptions to the hearsay rule, the witness repeatedly testified that he had very little, if any, recollection of the slip and fall, plaintiff or the 911 call.

Plaintiff then requested the use of the 911 tape to refresh the witness' recollection as to what he had told the 911 operator about how the accident occurred, i.e., that plaintiff slipped and fell on ice. The trial court sustained defendant's objection, explaining that since it had already ruled that the 911 tape was inadmissible, allowing the plaintiff to refresh the witness' recollection with the inadmissible 911 tape would render its prior evidentiary ruling "nonsense." Id. at 1150. The jury subsequently returned a verdict in favor of the defendant.

The Second Department reversed and remanded the case for a new trial. While concluding that the trial court's ruling barring the admission of the 911 tape under the proffered hearsay exceptions was correct, the court found error in the

trial court's ruling precluding the use of the tape to refresh the witness' recollection. Id. at 1150-1151. In so ruling, the court made several points regarding the use of the refreshing recollection doctrine.

Initially, the court found nothing improper with the use of a sound recording as the refreshing recollection device. Id. at 1150. This ruling is unquestionably correct as it is consistent with the common law recognition that almost anything can be used to refresh one's memory, including "a song, a scent,"[4] or "a line from Kipling or the dolorous strain of the 'Tennessee Waltz'; a sniff of hickory smoke; the running of the fingers over a swatch of corduroy; the sweet carbonation of a chocolate soda; [or] the sight of a faded snapshot in a long-neglected album."[5] The ruling is also consistent with New York's recognition that virtually any type of writing may be used to refresh recollection.[6] What matters, in other words, is whether the device or object used to refresh recollection actually serves that purpose, and not the matter or device used to refresh the recollection.[7]

Second, the court recognized that the fact the tape constituted inadmissible evidence cannot preclude its use as a refreshing recollection device, as the trial court had held. Id. at 1151. This conclusion is consistent with the view that when a writing is used, it need not be admissible itself.[8] The reason is that the writing, or sound recording, is not being offered into evidence but used only to refresh the recollection of the witness.

Third, the court, in order to comply with the doctrine's rule that the contents of a document not be disclosed to the jury when it is being used to refresh a witness' recollection as the writing is not evidence,[9] directed that the tape first be played to the witness outside the presence of the jury with counsel present to allow the witness the opportunity of refreshing his recollection about what he told the 911 operator. Id. at 1151. Such procedure is eminently sensible, ensures that the jury is not made aware of the tape's contents, and should not be disruptive of the orderly presentation of proof at the trial.

'Fernekes' Decision

In this action to recover for injuries suffered when plaintiff was assaulted by a patient at defendant hospital where he was also being treated, plaintiff sought discovery of an incident report written by the nurse who discovered plaintiff after the incident. This incident report was purportedly created pursuant to Public Health Law §2805-1, which statute requires an investigation of reportable incidents, such as an assault upon a patient, and that an incident report then be filed with the Department of Health. Pursuant to Education Law §6527(3), these reports are exempt from disclosure pursuant to CPLR article 31.

Plaintiff nonetheless sought disclosure on the basis that the nurse reviewed it prior to her deposition, thereby effecting a waiver of its privileged status. Supreme Court agreed and ordered disclosure of the incident report in its entirety, regardless of whether or not it was privileged. *Fernekes*, 75 A.D.3d at 960.

The primary issue before the Third Department was whether the nurse's report qualified as an incident report under Public Health Law §2805-1, and if so whether the nurse's review of it in the course of preparing for a deposition effected a waiver of the statutory privilege that otherwise attaches to an incident report. In a thoughtful and comprehensive opinion written by Justice William McCarthy, the court in the course of addressing the waiver issue, which will be discussed infra together with the *Beach* court's discussion of a similar waiver issue, made three significant points regarding the refreshing recollection doctrine.

Initially, the court reaffirmed the doctrine's application, including its inspection right, where a witness reviews a document prior to testifying at a deposition for refreshing recollection purposes. Id. at 961. In that regard, New York decisional law has consistently held that the doctrine should apply whether the witness refreshes his recollection using a writing before trial or by consulting it while on the witness stand during trial;[10] or whether the refreshing occurs during the discovery stage of the action.[11]

However, the court made clear that any disclosure regarding a document reviewed by a witness prior to the witness' deposition must rest upon a determination by the trial court that the document was reviewed by the witness to refresh the witness' recollection and the testimony is based, at least in part, on that document. Id. at 962. Thus, merely looking at a document prior to a deposition would not necessarily trigger disclosure.[12]

Lastly, the court suggests in its decision that if a document is in fact used to refresh a witness' recollection before a deposition and no privilege attaches to it, that document must be disclosed to the adversary party. This suggestion arises from the court's remand to Supreme Court to determine if the incident report qualified as a privileged report and thus is protected from disclosure, i.e., if not privileged, it must then be disclosed. Id. at 961-963. In other words, a court has no discretion to withhold from disclosure any non-privileged document used to refresh the witness' recollection prior to a deposition. Recognition of such an absolute right of discovery seems preferable at the pretrial stage.[13]

'Fernekes' and 'Beach'

The primary issue in *Fernekes* was whether the incident report was immune from disclosure even though the nurse had reviewed it prior to her deposition to refresh her recollection because it was subject to the Public Health Law §2805-1 privilege for such a report. The Third Department held that if the incident report at issue qualified as an incident report under Public Health Law §2805-1, it would be protected from disclosure. *Fernekes*, 75 A.D.3d at 961-962.

In support, the court noted the privilege was unqualified, thereby suggesting a legislative intent that it could not be waived by mere use of it to refresh recollection prior to a deposition.[14] By comparison, the privilege that attaches to material prepared for litigation would be waived if that material were used for recollection purposes as it is a conditional one. Id. at 961.

Beach also involved an issue as to whether a witness' review of a written report prior to his deposition required its disclosure but where the objection thereto was that the report was either privileged as attorney work product or material prepared for litigation. In this action, defendant filed a counterclaim against plaintiffs, alleging that while employed by them they had stolen its proprietary information in order to form their new business.

To comply with discovery requests plaintiffs retained a third-party forensic examiner to examine their computers. During the examiner's deposition, he testified that he had prepared a written report for plaintiffs and that he had reviewed the report to refresh his recollection prior to the deposition. Defendant sought disclosure of the report, but the special referee denied the request, concluding that the reports were either privileged or material prepared for litigation; and the Supreme Court denied defendant's motion to review the special referee's ruling. *Beach*, 99 A.D.3d at 170.

The First Department in an opinion written by Justice Sheila Abdus-Salaam held that if the report constituted attorney work-product, it was privileged from disclosure notwithstanding that the analyst reviewed the report to refresh his recollection before his deposition; but if it were material prepared for litigation, the privilege which would otherwise attach to it would be waived. Id. at 171. The court then remanded the matter to Supreme Court to determine which portion, if any, of the report would be immune from disclosure as attorney work product. The court's carefully crafted opinion reflects a thoughtful review of the First Department's own precedent, including a rejection of a prior decision, *Hermann v. General Tire & Rubber*, 79 A.D.2d 955 (1st Dept. 1981), and in doing so embraces the approach followed by the Third Department in *Fernekes* regarding waiver.

Under *Fernekes* and *Beach*, whether writings otherwise protected from disclosure by a privilege must be disclosed when used to refresh a witness' recollection prior to deposition will turn upon the nature of the claimed privilege. Thus, when the writing used to refresh recollection is subject to a qualified privilege, such as the privilege for material prepared for litigation under CPLR 3101(d)(2), disclosure is appropriate as the privilege is deemed waived. However, when the writing used constitutes attorney work product under CPLR 3101(c), disclosure will not be ordered as that privilege is not deemed waived in the circumstances.

Likewise, when the writing utilized is deemed privileged under an unqualified statutory privilege, disclosure will not be ordered. As to the referenced unqualified statutory privileges, all of the privileges set forth in CPLR article 45, including the attorney-client privilege, should be included within that category. Although there are statutory and judicially created exceptions to these privileges, they are nonetheless "unqualified," as that term is used in both *Fernekes* and *Beach*.

Of note, older decisions can be read to hold that use of any privileged document to refresh recollection constitutes a waiver, a reading that comports with the doctrine's broad right of inspection and disclosure to protect against fraud.[15] However, as the *Beach* court carefully pointed out, these prior decisions ordering disclosure, as in *Hermann*, involved material prepared for litigation. *Beach*, 99 A.D.3d at 171.

The approach to waiver at the pretrial stage adopted by *Fernekes* and *Beach* has much to commend. Not only does the approach bar the invasion of client confidences and attorney files, but also the approach allows witness preparation to go forward smoothly.[16] It does raise, however, a significant issue for future resolution, namely whether using a writing to refresh recollection while testifying at a trial defeats any claim of privilege that otherwise attaches to the writing.[17]

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Endnotes:

1. See generally, Barker and Alexander, *Evidence in New York State and Federal Courts* (2d ed) §6:80; Martin, Capra & Rossi, *New York Evidence Handbook* (2d ed) §6.13; *Prince, Richardson on Evidence* (Farrell 11th ed) §6-214.

2. See, *People v. Reger*, 13 A.D.2d 63, 70 (1st Dept. 1961) (Stevens, J.).

3. See, *People v. Gezzo*, 307 N.Y. 385, 393-394 (1954).

4. *United States v. Rappy*, 157 F.2d 964, 967 (2d Cir. 1946); *Jewett v. United States*, 15 F.2d 955, 956 (9th Cir. 1926).

5. *Baker v. State*, 371 A.2d 699, 705 (Md. App. 1977).

6. Prince, supra, §6-214, at 362.

7. *Reger*, 13 A.D.2d at 70 (tape recording).

8. Martin, supra, §6:13, at 546.

9. Barker, supra §6:80, p. 640.

10. *Doxator v. Swarthout*, 38 A.D.2d 782, 782 (4th Dept. 1972), citing Richardson, Evidence (9th ed) §480.

11. Ibid.

12. See, *Chabica v. Schneider*, 213 A.D.2d 579, 580-581 (2d Dept. 1995); *Rouse v. County of Greene*, 115 A.D.2d 162 (3d Dept. 1985).

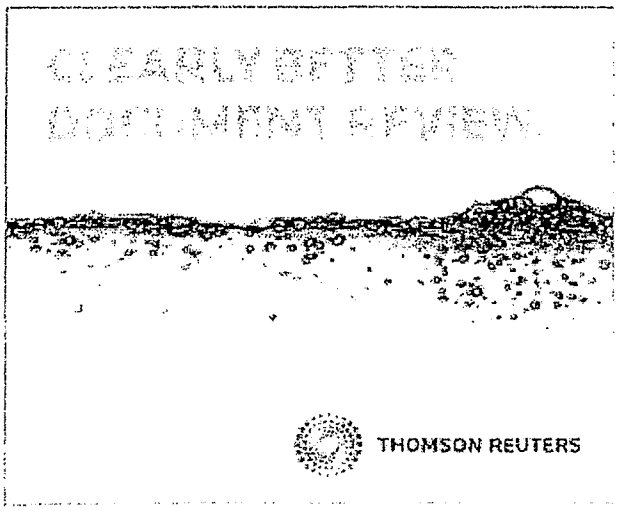
13. See, *Alfredson v. Loomis*, 148 N.Y.S.2d 468, 469-470 (Sup. Ct. Kings Co. 1956); Fisch, *New York Evidence* (2d ed) §333, 218; compare, Federal Rule of Evidence 612 (court has discretion to withhold a from disclosure a writing used for refreshing recollection prior to trial).

14. The court also noted the attorney work product privilege and the statutory social worker privilege were unqualified privileges, and thus they were immune from waiver. *Fernekes*, 75 A.D.3d at 961.

15. See, Alexander, Practice Commentaries to CPLR 4503, Book 7B, McKinney's Cons. Laws of N.Y., C4503:6(e); see also *Doxator*, 38 A.D.2d at 782.

16. See, Mueller and Kirkpatrick, *Federal Evidence* (3d ed) §6:97, 642.

17. Pursuant to Federal Rule of Evidence Rule 612, waiver will be present in such a situation. See, Mueller, supra, at §6:97, 639-640.



CHAPTER 2

Control by Trial Court Generally*

SYNOPSIS

* Chapter revised in 1993 by ROBERT L. ROSSI, member of the Massachusetts bar.

§ 2.01 Overview of Trial Judge's Control

The trial judge is granted great discretion under the Federal Rules.[1] In this chapter specific reference is made to the judicial power to control the mode and order of interrogating witnesses (Rule 611), limited review of error in rulings on evidence (Rule 103), the authority to instruct on limited admissibility (Rule 105), application of the fairness concept in related writings (Rule 106), the right of the judge to call and interrogate witnesses (Rule 614), and the judge's power to sum up and comment (Standard 107). Other indicia of judicial discretion are found in Rule 102, on construction of the Rules (Chapter 1), Rule 104, on the authority to answer preliminary questions as a predicate for admissibility (Chapter 3), Rule 201, on discretionary power to take judicial notice under some circumstances (Chapter 4), Rule 403, on the power to weigh probative force against prejudice and other negative factors (Chapter 6), Rule 404, on the admissibility of character evidence (Chapter 7), Rules 608 and 609, on discretionary limits on the use of character and conviction evidence to impeach (Chapter 12), Rules 702–706, on

[1] *See* WEINSTEIN'S FEDERAL EVIDENCE at Preface and Ch. 102, *Purpose and Construction.*

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

[*Adopted Jan. 2, 1975, effective July 1, 1975; amended Mar. 2, 1987, effective Oct. 1, 1987.*]

[2] Control by Court[1]

Rule 611(a) states a number of principles echoed elsewhere in the rules, particularly in Rules 102 and 403. The rule affirms the trial court's power to control the course of a trial so as to ascertain the truth, avoid needless consumption of time, and protect witnesses from harassment or undue embarrassment.

In the usual case, the order and mode of the presentation of evidence and interrogation of witnesses are determined by legal conventions and the parties' choice of trial tactics. The court steps in only when: (1) the parties ask for a ruling, (2) when it wishes to clarify matters,[2] or (3) when something out of the ordinary occurs that warrants intervention.[3] The court should defer to the parties' preferences respecting the mode of questioning and order of proof, so long as they promote the efficient ascertainment of the truth. Even if the court is trying to save time, which is one of the objectives of Rule 611(a), it must bear in mind that counsel are far more familiar with the case, so that a seemingly trivial ruling may impede rather than expedite the search for truth.[4]

Once the trial court exercises its power, its decision is virtually immune to attack, and will be overturned only in the rare case when the appellate court finds

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[1] *See* discussion in WEINSTEIN'S FEDERAL EVIDENCE at § 611.02.

[2] *See, e.g.*, United States v. Simpson, 337 F.3d 905, 907 (7th Cir. 2003) (trial court did not abuse its discretion by interrupting trial proceedings to clarify ambiguous testimony).

[3] *See, e.g.*, M.T. Bonk Co. v. Milton Bradley Co., 945 F.2d 1404, 1409 (7th Cir. 1991) (no abuse of discretion in terminating witness examination at end of period estimated by counsel, after prior examination had greatly exceeded counsel's time estimate; remark by judge that counsel's extended examination was adversely affecting her client's case was also not improper, and indicated "a legitimate concern for the manner and mode of the presentation of evidence").

[4] *See* Civil Trial Practice Standard 12(a) (A.B.A. 1998) (limits on trial presentation should be imposed only after court has analyzed case, asked parties about adopting voluntary self-imposed limits, and given parties opportunity to be heard about amount of time, number of witnesses, and exhibits).

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a clear abuse of discretion that seriously damaged a party's right to a fair trial.[5]

Subdivision (a) authorizes departures from the usual order of proof and innovations in the presentation of evidence. A trial court's decision to permit or deny a requested departure or innovation is entitled to great deference.[6] Some of the more frequently occurring examples of a court's power to depart from the normal order of proof are the following:

- Allowing the reopening of a case after a party has rested.[7]
- Allowing a witness to be recalled.[8]
- Allowing witnesses to testify out of order.[9]
- Admitting or excluding rebuttal or surrebuttal testimony.[10]
- Permitting witnesses to testify in installments.[11]

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[5] *See, e.g.*, SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC, 467 F.3d 107 (2d Cir. 2006) (in reviewing district court's evidentiary rulings, "we are mindful of the 'wide latitude' that traditionally has been afforded to district courts both in determining whether evidence is admissible, and in controlling 'the mode and order' of its presentation to promote the effective ascertainment of the truth, Fed. R. Evid. 611(a)").

[6] *See* Fed. R. Evid. 611(a); *see also* Civil Trial Practice Standard 14 (A.B.A. 1998) (in "cases of appropriate complexity, the court should exercise its discretion to alter the traditional order of trial where that will enhance jury comprehension and recollection or facilitate the effective presentation of evidence and argument, without unfair advantage to either side"); United States v. Holly, 167 F.3d 393, 395 (7th Cir. 1999) (since defense had announced its intent to present prior inconsistent statements of government witnesses, government was properly allowed to present in its case-in-chief evidence that defendant had intimidated witnesses into making those statements).

[7] *See, e.g.*, Perry v. Dearing (In re Perry), 345 F.3d 303, 309–310 (5th Cir. 2003) (trial court has wide discretion to allow party to reopen, or to do so on its own motion).

[8] *See, e.g.*, United States v. Brown, 954 F.2d 1563, 1572 (11th Cir. 1992) (no abuse of discretion in allowing government to recall witness; district court made reasoned determination that witness's further testimony was material to jury's ascertainment of truth, and gave defendant adequate opportunity to cross-examine after recall).

[9] *See, e.g.*, Lis v. Robert Packer Hosp., 579 F.2d 819, 823 (3d Cir. 1978) (not error for court to allow defense to qualify plaintiff's witness, a physician, as its witness at conclusion of cross-examination; court has discretion to accommodate expert witnesses' schedules even though calling defense witness during plaintiff's case-in-chief may disrupt planned presentation).

[10] *See, e.g.*, United States v. O'Brien, 119 F.3d 523, 531 (7th Cir. 1997) (no abuse of discretion in barring further testimony by defendant on same issue, because her surrebuttal testimony would be cumulative).

[11] *See, e.g.*, United States v. DeLuna, 763 F.2d 897, 911–912 (8th Cir. 1985) (no abuse of discretion when defendants had ample opportunity to cross-examine witnesses after each installment).

- Allowing witnesses to testify in a narrative.[12]
- Allowing jurors to question witnesses.[13]
- Permitting the parties to read the contents of documents admitted into evidence to the jury or preventing them from doing so.[14]
- Allowing witnesses to use charts as pedagogical devices.[15]
- Requiring party to delay "cross-examination" of its own employee, who had been called as a witness by its opponent, until the party's own case in chief.[15.1]
- Allowing parties to use non-expert witnesses to summarize complex documentary and testimonial evidence.[15.2]
- Allowing plaintiffs in mass tort cases to use sampling and statistical techniques to prove causation and damages rather than requiring proof that each victim suffered injury as the result of the defendant's actions.[15.3]
- Allowing parties to call the adverse party's expert witness during their

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[12] *See, e.g.*, United States v. Young, 745 F.2d 733, 761 (2d Cir. 1984) (qualified expert properly permitted to give narrative testimony and opinions while videotape played for jury).

[13] *See, e.g.*, United States v. Hernandez, 176 F.3d 719, 723 (3d Cir. 1999) (juror questioning of witness in criminal trial is permissible "so long as it is done in a manner that insures the fairness of the proceedings, the primacy of the court's stewardship, and the rights of the accused").

[14] *See, e.g.*, United States v. Moskowitz, 215 F.3d 265, 270 (2d Cir. 2000), *overruled on other grounds*, Crawford v. Washington, 541 U.S. 36, 64, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (district courts have discretion under Rule 611(a) to limit manner in which evidence is presented to jury, including preventing parties from reading contents of documents already in evidence to jury).

[15] *See, e.g.*, United States v. Taylor, 210 F.3d 311, 314 (5th Cir. 2000) (in conspiracy case, government's intermittent use throughout trial of chart that was not in evidence as device to assist jurors to distinguish between alleged conspirators, many of whom had same name, was within trial court's discretion under Rule 611(a), especially when jury was instructed at outset that chart indicated only what government believed facts to be, and it was jury's function to determine whether it was accurate); *see also* Ch. 9 concerning charts that are admitted into evidence in lieu of voluminous underlying data.

[15.1] Argentine v. USW, 287 F.3d 476, 486 (6th Cir. 2002) (Rule 611(a) gives trial judge discretion concerning order in which witnesses are called).

[15.2] *See, e.g.*, United States v. Sabino, 274 F.3d 1053, 1066–1068 (6th Cir. 2001) (IRS employee was properly allowed to summarize and analyze facts in evidence from documents and other witnesses indicating willful tax evasion, since accompanied by limiting instruction informing jury that summary itself did not constitute evidence).

[15.3] *See, e.g.*, Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., 178 F. Supp. 2d 198, 247–262 (E.D.N.Y. 2001) (Weinstein, J.) (Rule 611 permits use of statistical techniques in mass tort cases to avoid otherwise crippling discovery and evidentiary costs).

case in chief and to examine him or her as a hostile witness when his or her adversity becomes apparent.[15.4]

This list is in no way exhaustive. The court has the power under Rule 611(a) to experiment with more radical variations on traditional practice.[16]

Rule 611(a)'s authorization of the court's intervention in the presentation of evidence for the purpose of enhancing its effectiveness in the ascertainment of the truth sometimes provides the trial court with discretion to admit into the record evidence that would otherwise be inadmissible.[16.1] It also sometimes serves as the source of the trial court's discretion in excluding what would otherwise be admissible evidence.[16.2]

Problems relating to the harassment or embarrassment of witnesses usually arise in the context of the permissible scope of cross-examination. The exact point at which the court must step in to prevent abuse is impossible to formulate since it depends on the specific circumstances of the case, the personalities of the parties, witnesses, and counsel, and the situation at the time the court is asked to intervene. A witness may be intimidated by the manner as well as the questions of the cross-examiner. Indeed, if the witness is easily intimidated, the process of cross-examination itself mat be quite uncomfortable. On the other hand, even fighting words may be unobjectionable if they are said with a smile. Appellate courts are reluctant to disturb a trial judge's decision restricting cross-examination since the cold record will not adequately reflect the actual situation in the courtroom. An appellate court will, however, review a judgment carefully if the trial court's efforts to protect a witness from embarrassment by imposing limitations on cross-examination may have affected the outcome of the trial.[17]

[15.4] *See, e.g.*, National RR Passenger Corp. v. Certain Temporary Easements Above the RR Right of Way in Providence, RI, 357 F.3d 36, 42 (1st Cir. 2004).

[16] *See, e.g.*, Wilson v. Daimler Chrysler Corp., 236 F.3d 827, 828–829 (7th Cir. 2001) (trial court did not abuse its discretion under Rule 611(a) by granting defendant summary judgment after holding bench trial on causation and finding that plaintiff did not prove that her schizophrenia was caused by sexual harassment, assuming arguendo that harassment had occurred).

[16.1] *See, e.g.*, United States v. Marshall, 307 F.3d 1267, 1269 (10th Cir. 2002) (when defendant belabored arresting officer with absence of particular action from officer's incident report and prosecution offered officer's arrest affidavit as prior consistent statement, court did not abuse its discretion under Rule 611(a) in admitting both affidavit and incident report, which was not otherwise admissible, to clarify officer's testimony about entries in both documents).

[16.2] *See, e.g.*, Toth v. Grand Trunk R.R., 306 F.3d 335, 350 (6th Cir. 2002) (trial court did not abuse its discretion under Rule 611(a) in refusing to take judicial notice of federal regulations, although proper subject for judicial notice, based on grounds of improper foundation and being beyond scope of rebuttal).

[17] *See, e.g.*, United States v. Santos, 201 F.3d 953, 964 (7th Cir. 2000) (trial court abused its discretion under Rule 611(a)(3) by barring cross-examination designed to elicit witness's grudge

[3] Cross-Examination

[a] Scope[1]

Rule 611(b) accords with the majority position in the United States by restricting cross-examination to the subject matter of the direct examination and matters affecting the witness's credibility.[2] The rule permits trial courts, in the exercise of their discretion, to permit a cross-examiner to inquire into matters that were not raised in the direct examination, but the cross-examiner must proceed as if asking questions on direct examination.[3]

Trial courts have considerable discretion respecting the determination of the appropriate scope of cross-examination.[4] Their exercise of discretion must, however, be consonant with the rule's objective of promoting the orderly presentation of evidence without restricting relevant inquiry.[5] Moreover, when the trial court exercises its discretion to control the scope of cross-examination to protect witnesses from harassment or undue embarrassment, it must do so within the confines of Rule 403.[5.1] Similarly, when the court exercises its discretion to

against defendant for firing witness's lesbian lover, causing break-up of their relationship; although homosexuality is stigmatized by many Americans, this limitation was unnecessary, since witness was openly lesbian and a lesbian activist).

[1] *See* discussion in WEINSTEIN'S FEDERAL EVIDENCE § 611.03. Weinstein's Federal Evidence discusses in some detail the minority, English rule, which permits wide-open cross-examination. Rule 611(b) had been drafted as a rule of wide-open cross-examination, but Congress rejected this change. *See* discussion of Congressional Action on Rule 611 in WEINSTEIN'S FEDERAL EVIDENCE at § 611App.01[2].

[2] United States v. Harris, 185 F.3d 999, 1008 (9th Cir. 1999) (even if government's cross-examination exceeded scope of direct examination, cross-examination on credibility "is often on topics outside the scope of the direct examination, but that is not a reason to exclude inquiry into the [matter].").

[3] Fed. R. Evid. 611(b).

[4] *See, e.g.,* United States v. McLaughlin, 957 F.2d 12, 17–18 (1st Cir. 1992) (no abuse of discretion in prohibiting cross-examination of government agents as to certain matters beyond scope of direct examination that were not related to credibility, since defendant could have called agents as defense witnesses); *see also* Taskett v. Dentlinger, 344 F.3d 1337, 1342 (Fed. Cir. 2003) (under Fed. R. Evid. 611(b), party was properly permitted to ask questions on redirect examination that arguably exceeded scope of cross-examination, because questions were necessary to clarify facts "that were not made sufficiently clear by either cross examination or direct examination").

[5] *See, e.g.,* United States v. McLee, 436 F.3d 751, 761–762 (7th Cir. 2006) (trial court did not err in limiting cross-examination of two cooperating witnesses in drug trafficking prosecution, when defense had been permitted "great leeway" in exploring witnesses' possible biases, and cross-examination had already exposed their motive to lie).

[5.1] Fed. R. Evid 403; *see, e.g.,* Fraser v. Major League Soccer, L.L.C., 284 F.3d 47, 66 (1st Cir. 2002) (trial court has authority to block impeachment questions that would damage witness's reputations, invade their privacy, or assault their personalities only when evidence's probative value

permit the cross-examiner to inquire about matters that were not the subject of the direct examination, it must do so in a fashion that excludes unfairly prejudicial evidence.[5.2]

The trial court also has the power, pursuant to Rule 403, to limit cross-examination that would create prejudice or confusion, or that would be cumulative, even though it satisfies the test of Rule 611(b).[6]

In criminal cases, the court's right to curtail cross-examination is circumscribed by the defendant's Sixth Amendment right of confrontation.[7] The constitutional right to confront adverse witnesses, however, does not negate a district court's discretion to determine the relevance of a particular area of inquiry and the extent of cross-examination to be permitted on the topic.[8] Nevertheless, the court's discretion may be somewhat narrower when the right to confront adverse witnesses is at issue. Defendants must be permitted sufficient cross-examination to develop enough information so the jury can make an adequate assessment of the witness's credibility.[9] Any constitutional error in restricting cross-examination, however, is subject to harmless error analysis.[10]

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is substantially outweighed by danger of undue prejudice).

[5.2] *See, e.g.*, United States v. Crenshaw, 359 F.3d 977, 1002 (8th Cir. 2004) (trial court abused its discretion in permitting government, under Rule 611, to cross-examine alibi witness concerning defendant's prior criminal convictions when witness did not act as character witness for defendant).

[6] *See, e.g.*, United States v. Smith, 452 F.3d 323, 333 (4th Cir. 2006) (trial judge's sua sponte objections to defense counsel's confusing, repetitive, or irrelevant questions and his comments to defense counsel during cross-examination to "move things along" represented judge's "permissible attempt to cabin and control" lengthy and complex trial).

[7] *See, e.g.*, United States v. Callahan, 551 F.2d 733, 737 (6th Cir. 1977) (when "court's restriction prevented defense counsel from cross-examining government's chief witness as to his reliability and veracity of his testimony on a required element of the charged offense, the defendant has been denied his Sixth Amendment right of confrontation").

[8] *See, e.g.*, United States v. Smith, 454 F.3d 707, 715 (7th Cir. 2006) (court did not violate defendant's right to confrontation by limiting his ability, on cross-examination, to add "extra detail," after defendant had established that cooperating witness had motive to lie).

[9] *See, e.g.*, United States v. Larson, 460 F.3d 1200, 1210 (9th Cir. 2006) (trial court's exclusion of evidence about sentence faced by cooperating co-conspirator absent his agreement to testify against defendant did not unconstitutionally restrict defendant's right to cross-examine for bias, since jury received adequate information with which to appraise witness's possible biases and motivations). United States v. Lankford, 955 F.2d 1545, 1549 (11th Cir. 1992) (reversible error to have prevented defendant from cross-examining witness concerning his sons' drug arrests when such exclusion improperly limited defendant's sixth amendment right to cross-examine for possible bias or motive for testifying).

[10] *See, e.g.*, United States v. Turner, 198 F.3d 425, 430 (4th Cir. 1999) (although trial court erred in limiting cross-examination of witness regarding motive, error was harmless in light of other, overwhelming, evidence against defendant).

[b] Impact of Privilege Against Self-Incrimination[11]

Rule 611(b) is silent about the extent to which the privilege against self-incrimination limits the permissible scope of cross-examination. The question should be resolved by constitutional principles rather than evidentiary concerns about order of proof. The problem arises in civil as well as in criminal cases, and in the case of ordinary witnesses as well as party witnesses, but it is most difficult to solve when the accused takes the stand in a criminal case.

Courts generally assume that the scope of the privilege against self incrimination is determined by the scope of cross-examination permitted by the restrictive approach of Rule 611(b).[12] Consequently, they hold that a defendant taking the stand on his or her own behalf must answer all questions on cross-examination that are "reasonably related" to the subject of the direct examination and to credibility.[13]

Other restrictions may apply to a criminal defendant who chooses not to testify. For example, a criminal defendant who elects not to take the stand cannot claim on appeal that the district court erred in denying the defendant's motion in limine to restrict cross-examination.[14]

A party in a civil action who testifies voluntarily is in a position analogous to that of an accused who voluntarily takes the stand in a criminal case.[15] The civil party waives the privilege, at least as to matters relevant to direct examination, and risks sanctions for a refusal to testify. Moreover, unlike the situation in a criminal case, even the proper exercise of the privilege by a civil party may warrant the jury's drawing an adverse inference against that party.[16]

The position of the non-party witness is somewhat different. If subpoenaed, a

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[11] *See* discussion in WEINSTEIN'S FEDERAL EVIDENCE § 611.04[1].

[12] *See, e.g.*, United States v. Ellis, 951 F.2d 580, 584 (4th Cir. 1991) ("A defendant who testifies waives his Fifth Amendment privilege in all areas subject to proper cross-examination").

[13] United States v. Raper, 676 F.2d 841, 846 (D.C. Cir. 1982) ("any question which would have elicited testimony that was reasonably related to the inferences that might reasonably be drawn from his direct testimony would have been permissible"); *see, e.g.*, United States v. Crockett, 435 F.3d 1305, 1313 (10th Cir. 2006) (when "an accused testifies in his own case-in-chief, he waives his privilege against self-incrimination, a waiver that subjects him to cross-examination on all 'relevant facts'. . . . even if the evidence elicited by the prosecution ordinarily might be collateral or otherwise inadmissible").

[14] Luce v. United States, 469 U.S. 38, 40, 105 S. Ct. 460, 462, 83 L. Ed. 2d 443 (1984).

[15] *See, e.g.*, Brown v. United States, 356 U.S. 148, 154–155 78 S. Ct. 622, 626, 2 L. Ed. 2d 589 (1958).

[16] *See, e.g.*, Baxter v. Palmigiano, 425 U.S. 308, 316, 96 S. Ct. 1551, 1557, 47 L. Ed. 2d 810 (1976).

non-party has no right to refuse to testify without being subject to contempt. Consequently, a non-party witness generally does not waive the privilege against self-incrimination by merely taking the stand. Such a witness has the right to claim the privilege if the answers sought may tend to be incriminating.

If on cross-examination a witness successfully claims the privilege against self-incrimination and does not answer proper questions fully, the court must strike the direct testimony if the witness's exercise of the privilege has deprived the cross-examiner of the ability to test the truth of the witness's direct testimony.[17] In certain cases of extreme prejudice, however, merely striking the direct testimony is an insufficient remedy and a mistrial may be necessary.[18] Courts may deny a motion to strike if they properly find that the direct testimony involved "collateral" matters.[19] They may also do so if the unanswered questions constitute an insignificant portion of the cross-examination.[20]

In criminal cases the government may grant a witness use immunity to obtain testimony. The courts have not recognized a defendant's right to demand that defense witnesses receive use immunity, at least so long as the government is not using its grant such immunity selectively and unfairly.[21]

[4] Leading Questions[1]

Rule 611(c) codifies the traditional practice concerning leading questions. It acknowledges that: (1) they are generally undesirable on direct examination,[1.1] (2) they are usually permissible on cross-examination, and (3) there are exceptions to both of those rules.[1.2]

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[17] *See, e.g.*, Fountain v. United States, 384 F.2d 624, 628 (5th Cir. 1967).

[18] *See, e.g.*, Toolate v. Borg, 828 F.2d 571, 572 (9th Cir. 1987) (trial court struck testifying co-defendant's testimony when defendant was prevented from cross-examining him, but should have granted mistrial; error was harmless).

[19] *See, e.g.*, United States v. Yip, 930 F.2d 142, 147 (2d Cir. 1991) (subject of unanswered questions concerned a matter not raised on direct and was thus a collateral matter bearing solely on witness's credibility).

[20] *See, e.g.*, United States v. Seifert, 648 F.2d 557, 561 (9th Cir. 1980) (only one question was unanswered over course of lengthy cross-examination).

[21] *See, e.g.*, United States v. Mohney, 949 F.2d 1397, 1401 (6th Cir. 1991) (majority of circuits have rejected theory that trial court may grant immunity for defense witnesses, but government's selective grants of immunity could violate due process).

[1] *See* discussion in WEINSTEIN'S FEDERAL EVIDENCE § 611.06.

[1.1] *See, e.g.*, United States v. Grassrope, 342 F.3d 866, 869 (8th Cir. 2003) (whether counsel may use leading questions is within trial court's discretion; leading questions are frequently necessary to develop direct testimony of sexual assault victims, particularly children).

[1.2] *See, e.g.*, United States v. Smith, 378 F.3d 754, 756 (8th Cir. 2004), *vacated on other*

Although it is not explicit on this point, the rule implies what has in fact long been the case, that the matter falls within the trial court's discretion.[2] Reversals on the basis of the trial court's refusal to require counsel to comply with Rule 611(c) are exceedingly rare.[3] Such error probably occurs most frequently in criminal cases, when a prosecutor, in the guise of asking leading questions, brings prohibited material to the attention of the jury.[4]

Rule 611(c) does not specify what makes a question "leading." The term is, however, well recognized in case law as a question that "so suggests to the witness the specific tenor of the reply desired by counsel that such a reply is likely to be given irrespective of an actual memory."[5] The tenor of the desired reply can be suggested in a number of ways, as, for example, by the form of the question, by emphasis on certain words, by the tone or nonverbal conduct of the examiner, or by the inclusion of facts still in controversy or as to which no evidence has been produced. Because of these myriad ways in which a suggestion can be conveyed, only the judge actually presiding at the trial is in a position to assess fully the impact of the question on the witness and the effect of any impropriety on the conduct of the litigation. The trial judge also has full discretion to decide whether the questioner may rephrase a question after an objection has been sustained on the ground that it was leading.[6]

Rule 611(c) acknowledges that leading questions may be necessary to develop the testimony of a particular witness. Among the situations in which the court is most likely to permit leading questions are the following:

- A witness with less than a normal adult's mental capacity.[7]

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grounds, 543 U.S. 1136, 125 S. Ct. 1330, 161 L. Ed. 2d 94 (2005) ("Generally, leading questions are best reserved for cross examination. However, leading questions may properly be used on direct examination with certain witnesses—such as an adverse party or a potentially hostile witness.").

[2] *See, e.g.*, United States v. Nambo-Barajas, 338 F.3d 956, 959–960 (8th Cir. 2003) (trial court did not abuse its discretion in permitting prosecution to develop testimony of witnesses with mental disabilities through leading questions).

[3] *See, e.g.*, Sanders v. New York City Human Resources Admin., 361 F.3d 749, 757 (2d Cir. 2004) (Rule 611's preference for non-leading questions on direct examination is purely precatory; trial court has very large amount of discretion in overseeing examination of witnesses).

[4] *See, e.g.*, United States v. Meeker, 558 F.2d 387, 389 (7th Cir. 1977) (permitting leading questions was improper when they implied prior misconduct and suggested that defendant had engaged in conduct for which he was not on trial, and thereby violated Rule 404(b)).

[5] United States v. Durham, 319 F.2d 590, 592 (4th Cir. 1963).

[6] *See, e.g.*, United States v. Noone, 913 F.2d 20, 37 (1st Cir. 1990) (no abuse of discretion in allowing prosecutor to rephrase leading question and continue with examination).

[7] *See, e.g.*, United States v. Archdale, 229 F.3d 861, 865–866 (9th Cir. 2000) (direct examination of child witness is recognized exception to rule against leading questions).

- A witness who has difficulty testifying.[8]
- A witness who becomes evasive and unresponsive at a critical point in the testimony.[8.1]
- A witness whose memory is exhausted.[9]
- Testimony related to undisputed matters.[10]

If the witness is hostile to the examiner, there is no reason to prohibit leading questions since there is no danger of false suggestion. Accordingly, Rule 611(c) provides that interrogation may be by leading questions when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.[11] To show that the witness is hostile, the examiner will have to demonstrate the requisite degree of hostility, bias, or reluctance to the court's satisfaction.[12] As to an adverse party or a witness identified with an adverse party, leading questions are permitted once the examiner has made a sufficient showing of the witness's status.[13]

The second sentence of subdivision (c) states the traditional view that leading questions may usually be asked on cross-examination as a matter of right, but that the right is not absolute. When the witness is biased in favor of the cross-examiner, the same danger of leading questions arises as on direct and the court may, in its discretion, prohibit their use.[14] The Advisory Committee noted two

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[8] *See, e.g.*, United States v. Grassrope, 342 F.3d 866, 869 (8th Cir. 2003) (information concerning details of sexual assaults must often be elicited from victims of those crimes through leading questions).

[8.1] *See, e.g.*, United States v. Mora-Higuera, 269 F.3d 905, 912 (8th Cir. 2001) (no plain error in allowing leading questions when prosecution witness "became evasive and unclear" about types of drugs involved in conspiracy for which defendant was on trial).

[9] *See, e.g.*, Beckel v. Wal-Mart Assocs, Inc., 301 F.3d 621, 624 (7th Cir. 2002) (leading questions are appropriate on direct examination if witness has exhausted his or her memory).

[10] *See, e.g.*, United States v. Schepp, 746 F.2d 406, 410 (8th Cir. 1984) (leading questions were proper respecting preliminary and collateral matters to expedite the trial).

[11] Fed. R. Evid. 611(c).

[12] *See, e.g.*, United States v. Carboni, 204 F.3d 39, 44–45 (2d Cir. 2000) (trial court had discretion under to allow prosecution to use leading questions on direct examination of witness who continually evaded non-leading questions).

[13] *See, e.g.*, United States v. Hicks, 748 F.2d 854, 859 (4th Cir. 1984) (not abuse of discretion to allow prosecution to ask leading questions of defendant's girlfriend who was called as a government witness, since she was identified with adverse party).

[14] *See, e.g.*, Ardoin v. J. Ray McDermott & Co., 684 F.2d 335, 336 (5th Cir. 1982) (trial court has power to require party cross-examining friendly witness to employ non-leading questions; per se rule that employer cross-examining its own employees must use non-leading questions is inappropriate).

circumstances in which the prohibition may be applied: (1) when a party is "cross-examined by his counsel after having been called by his opponent," and (2) when an "insured defendant proves to be friendly to the plaintiff."[15]

§ 2.03 Rulings on Evidence—Rule 103

[1] Preservation of Error in Admissibility Rulings[1]

Rule 103 establishes two major ground rules in connection with appellate review of trial court rulings on the admissibility of evidence: (1) the initiative for raising and preserving error in the admission or exclusion of evidence lies with the litigants at the trial court level, and (2) the appellate court reviewing the trial court's evidentiary rulings is not to reverse the lower court's decision on purely technical grounds, but to rectify only errors that affect substantial rights of the parties.

Appellate courts generally review a trial court's determination concerning evidence admissibility questions for abuse of discretion when the claim of error is properly preserved.[1.1] The Eighth Circuit, however, has noted that, while it is appropriate for an appellate court to accord deference to a trial court's evidentiary determinations when they involve a balancing of factors, in other circumstances the trial court's interpretation and application of the Rules of Evidence are matters of law, and should be reviewed de novo.[1.2]

To preserve error properly when the trial court's ruling admits evidence, the complaining party must be able to show the appellate court that its timely objection to the evidence or motion to strike it appears of record and that the objection or motion to strike states the specific ground of objection if the specific ground for objection is not otherwise apparent.[1.3] If the trial court's ruling excludes evidence, the complaining party must be able to show the appellate court that it made the substance of the evidence known to the trial court through an offer of proof on the record or that it was otherwise apparent from the context in which the evidence was offered.

Rule 103 governs civil and criminal cases, and jury as well as non-jury trials.

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[15] Fed. R. Evid. 611(c) Advisory Committee's Note (1972) (reproduced verbatim in Weinstein's Federal Evidence at § 611.App.01[2]).

[1] *See* discussion in WEINSTEIN'S FEDERAL EVIDENCE § 103.02–103.22.

[1.1] *See, e.g.*, United States v. Trujillo, 376 F.3d 593, 605 (6th Cir. 2004) (determinations under Fed. R. Evid. 404(b); United States v. Tse, 375 F.3d 148, 155 (1st Cir. 2004).

[1.2] United States v. Blue Bird, 372 F.3d 989, 991 (8th Cir. 2004).

[1.3] *See, e.g.*, United States v. Mitchell, 365 F.3d 215, 257 (3d Cir. 2004) (defendant's failure to include hearsay as ground for objection resulted in his failure to preserve that ground for appeal).

In criminal cases, because of constitutional guarantees, certain errors in the admission or exclusion of evidence may at times, though rarely, be raised by collateral attack when similar errors would not be subject to collateral attack in civil cases.[2] Rule 103 is applicable both when an appellate court reviews a decision of an inferior court and when a trial court rules on a motion for a new trial.[3]

The rule provides:

Rule 103. Rulings on Evidence.

(a) Effect of erroneous ruling.—Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection.—In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof.—In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a clam of error for appeal.

(b) Record of offer and ruling.—The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury.—In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error.—Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

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[2] *See, e.g.*, Kimmelman v. Morrison, 477 U.S. 365, 371–380 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

[3] *See, e.g.*, Badami v. Flood, 214 F.3d 994, 998 (8th Cir. 2000) (when proffering party does not make offer of proof, trial court's error in excluding evidence is not proper ground for granting new trial).

[*Adopted Jan. 2, 1975, effective July 1, 1975; amended Apr. 17, 2000, effective Dec. 1, 2000.*]

Subdivisions (a)(1) and (a)(2) of Rule 103 specify in some detail the information that the parties must include in their objections to a trial court's evidentiary rulings. However, the rule is silent as to the factors a court must consider in determining whether substantial rights have been affected. This silence suggests that the determination is to be made in light of the record in the case as a whole, and indicates that the court must proceed on a case-by-case basis rather than apply a mechanical rule.

Prior to the 2000 amendment to Rule 103, in some circuits it was necessary for parties to make their objections or offers of proof at the trial; pretrial rulings, no matter how definitive, were not sufficient to preserve error. The 2000 amendments eliminated the necessity for renewed objections or offers of proof when the trial court rules definitively on the record, either before or at trial, that proffered evidence is admissible or inadmissible.[4]

Although plain error is the only class of error explicitly mentioned in Rule 103, the rule deals with three categories of error well recognized in statutory law and judicial opinion. "Harmless error" is error raised in the trial court that does not affect substantial rights. "Prejudicial" or "reversible" error is error raised in the trial court that does affect substantial rights. "Plain error" is error not raised in the trial court, but nevertheless considered by a reviewing court, that affects substantial rights. The distinction between harmless and reversible error thus turns on whether the error affected substantial rights, and the distinction between harmless and plain error turns on whether the circumstances under which the particular error in the case at hand was committed excuse the party's failure to bring it properly to the trial court's attention.

[2] Objections to Admission of Evidence[1]

[a] Timely Objection or Motion to Strike Must Appear on Record With Ground for Objection

Rule 103(a)(1) provides that error in the admission of evidence cannot be predicated on a ruling admitting evidence unless "a timely objection or motion to strike appears of record stating the specific ground of objection." As a result, if the appellant did not make a timely and specific objection or motion to strike at trial, there can generally be no claim of error in the court's ruling admitting the

[4] *See* [4], *below.*

[1] *See* discussion in WEINSTEIN'S FEDERAL EVIDENCE §§ 103.10–103.14.

evidence.[2] Alternatively, if the trial court ruled definitively on the record during pretrial proceedings that proffered evidence was admissible over a properly tendered objection, the objecting party's claim of error is preserved for appeal, even in the absence of an objection when the evidence is tendered at trial.[3]

Calling the trial court's attention to its error provides the court an opportunity to correct the error, which might obviate the need for further proceedings.[4] In addition, a properly phrased objection may provide both the court and the opposing party with the opportunity to correct deficiencies in foundational evidence.[5]

[b] Failure to Make Timely Objection or Motion to Strike Constitutes Waiver

By failing to object to evidence at trial, a party waives the right to raise admissibility issues on appeal.[6] Preservation of error in the admission of evidence requires only a timely objection or a timely motion to strike, not both and objection and a motion to strike.[6.1] Rule 103 eliminates the necessity for the opponent to object when the evidence is offered at trial if the trial court has made a definitive pretrial ruling on the record that the evidence is admissible.[6.2]

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[2] *See, e.g.*, United States v. Duffaut, 314 F.3d 203, 209 (5th Cir. 2002) (complaining party waives right to abuse of discretion review of trial court's decision admitting testimony by not renewing objection at trial when trial court did not rule on pretrial objections; appellate court reviews admission of evidence under such circumstances for plain error only).

[3] Fed. R. Evid. 103.

[4] *See, e.g.*, United States v. Del Rosario, 388 F.3d 1, 10 (1st Cir. 2004), *vacated on other grounds*, 544 U.S. 970, 125 S. Ct. 1866, 161 L. Ed. 2d 716 (2005).

[5] *See, e.g.*, Brookover v. Mary Hitchcock Memorial Hosp., 893 F.2d 411, 413–415 (1st Cir. 1990) (if defendant had made timely and explicit objection, stating that out-of-court statement was not admissible as admission by party-opponent because of lack of foundation under Rule 801(d)(2)(D), proponent might have presented personnel records to establish employment); United States v. Kragness, 830 F.2d 842, 868 (8th Cir. 1987) (objection that government was asking "loaded question" was insufficient to raise issue that testimony was without foundation; had opponent made such an objection, voir dire examination of witness might have established proper foundation).

[6] Bowman v. Corrections Corp. of Am., 350 F.3d 537, 548 (6th Cir. 2003) (plaintiff's failure to object to witness's habit testimony waived plaintiff's right to complain about its admission on appeal); *see also* Densberger v. United Techs. Corp., 283 F.3d 110, 119 n.10 (2d Cir. 2002) (when plaintiff's expert testified without objection that prudent manufacturer would know what tests to run on its products, defendant forfeited objection).

[6.1] *See, e.g.*, United States v. Meserve, 271 F.3d 314, 325 (1st Cir. 2001) ("Because Rule 103 is written in the disjunctive, the right to review may be preserved either by objecting or by moving to strike and offering specific grounds in support of that motion").

[6.2] Fed. R. Evid. 103(a); *see, e.g.*, Zachar v. Lee, 363 F.3d 70, 75 (1st Cir. 2004) (plaintiff's

However, an opponent's complete failure to assert an objection in the lower court waives that party's right to assert that the admission of the evidence was erroneous unless the error was plain and adversely affected the opponent's substantial rights.[7]

Thus, the decision whether to object should not be taken lightly. Although Rule 103(d) permits appellate courts to relieve a party of the consequences of a failure to object in the case of "plain error" that affects substantial rights, appellate courts often discern strategic patterns that underlie a decision not to object to evidence that might have appeared to have had a beneficial potential when it was offered but that, in retrospect, appears to have been harmful. They are extremely reluctant to consider errors in the admission of evidence when they suspect that the failure to object was attributable to legitimate trial tactics that failed to achieve the desired result.[8]

Counsel can also waive the right to assert on appeal an error in the admission of evidence by deliberately eliciting[9] or relying on it,[10] or by inadvertently eliciting it and failing immediately to move to strike it.[11] A party does not,

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inartful objection at trial to admission of appraisal report did not waive error by failing to point to specific portions of report that were not admissible, because trial court's pretrial ruling denying plaintiff's motion in limine explored all grounds for excluding report).

[7] *See, e.g.,* United States v. Diaz, 300 F.3d 66, 74–76 (1st Cir. 2002) (party's failure to object to expert testimony on reliability grounds waives right to complain about admission of testimony, absent plain error affecting party's substantial rights); Rule 103(d).

[8] *See, e.g.,* Polack v. Commissioner, 366 F.3d 608, 612 (8th Cir. 2004) (in offer of proof, proponent must "express precisely the substance of the excluded evidence" to inform both trial and appellate courts why exclusion of evidence was prejudicial error); United States v. Coonan, 938 F.2d 1553, 1561 (2d Cir. 1991) (in racketeering prosecution, defendant's failure to object to evidence of criminal activity by other enterprise members that occurred before defendant joined enterprise waived any error in admission of that evidence; defendant appeared to welcome that evidence at trial and was now "attempting to evade the consequences of an unsuccessful tactical decision").

[9] *See, e.g.,* Ohler v. United States, 529 U.S. 753, 755, 120 S. Ct. 1851, 1855, 146 L. Ed. 2d 826 (2000) (defendant who preemptively introduced prior conviction, after court granted prosecution's motion in limine to admit it, was barred from challenging its admission on appeal); Price v. Kramer, 200 F.3d 1237, 1250 (9th Cir. 2000) (parties "may not seek reversal on the basis of their own evidentiary errors").

[10] *See, e.g.,* United States v. Huerta-Orosco, 340 F.3d 601, 604 (8th Cir. 2003) (defendant waived his objection to evidence of his immigration status when he relied on it during direct examination).

[11] *See, e.g.,* United States v. Cabrera, 201 F.3d 1243, 1248–1249 (9th Cir. 2000) (when witness on cross-examination gives answer that contains objectionable material that might be characterized as unresponsive, counsel must move to strike objectionable matter immediately to preserve error; "error that is caused by the actions of the complaining party will cause reversal only in the most exceptional situation [when] reversal is necessary to preserve the integrity of the judicial process or to prevent a miscarriage of justice.").

however, invite error by merely cross-examining a witness who has already testified to objectionable evidence in an attempt to lessen its impact.[11.1] Waiver resulting from a failure to object or to move to strike evidence in a timely fashion has been found even when the alleged error involved a defendant's constitutional rights.[12]

[c] Timing of Objection or Motion to Strike

An objection or motion to strike must be timely.[13] An objection or motion to strike is "timely" if it is made as soon as the opponent knows, or should know, that the objection is applicable.[14]

Some objections may have to be raised even before trial, such as motions for the suppression of evidence obtained through an illegal search or seizure[15] or as the result of a tainted out-of-court identification,[16] and objections relating to depositions,[17] In criminal cases, there should be a pretrial hearing at which the trial court can hear and determine any motions to suppress.

Some evidentiary issues are factually complex and their resolution will necessarily be quite time consuming. These issues should usually be determined in pretrial in limine hearings, to comply with Rule 103(c)'s provision that inadmissible evidence should not be suggested to the jury and to avoid wasting the jury's time with a lengthy recess. Many courts have held that, for example, reliability issues concerning proffered expert testimony should ordinarily be the subject of pretrial in limine hearings.[18]

[11.1] Mukhtar v. California State Univ., Hayward, 299 F.3d 1053, 1063 n.6 (9th Cir. 2002).

[12] *See, e.g.*, Shaw v. United States, 403 F.2d 528, 530 (8th Cir. 1968) ("[B]arring plain error, we will not notice errors raised for the first time in the appellate court, including errors involving a defendant's constitutional right").

[13] *See, e.g.*, United States v. Meserve, 271 F.3d 314, 325 (1st Cir. 2001) (to preserve evidentiary issue for review, objection of party opposing admission must be timely); Christopher v. Cutter Lab., 53 F.3d 1184, 1192 (11th Cir. 1995) (timely objection necessary to preserve issue for appeal).

[14] *See* United States v. Carson, 52 F.3d 1173, 1187 (2d Cir. 1995) (objection is timely if it is brought to attention of court and opposing party at earliest possible time to alert court concerning proper course of action and to enable counsel to take proper corrective measures); United States v. Moore, 923 F.2d 910, 915 (1st Cir. 1991) (general motion to strike evidence at close of case not sufficient when no objection or motion to strike made at time evidence was offered).

[15] Fed. R. Crim. P. 12(b), Fed. R. Crim. P. 12(f); *See* 24 MOORE'S FEDERAL PRACTICE, Ch. 612, *Pleadings and Motions Before Trial; Defenses and Objections* (Matthew Bender 3d ed.).

[16] *See* United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

[17] *See* Fed. R. Civ. P. 32(b); 7 MOORE'S FEDERAL PRACTICE, Ch. 32, *Use of Depositions in Court Procedures* (Matthew Bender 3d ed.).

[18] *See, e.g.*, Pride v. BIC Corp., 218 F.3d 566, 578 (6th Cir. 2000) (trial court properly excluded expert testimony after pretrial evidentiary hearing); Goebel v. Denver & Rio Grande Western R.R.,

The 2000 amendment to Rule 103 makes it clear that an objecting party can rely on a trial court's definitive ruling on the record at a pretrial in limine hearing to preserve error.[19]

An objection to the admission of evidence on foundational grounds must give the basis for the objection in a timely way, in order to permit the possibility of cure.[19.1] For example, district court's late exclusion of plaintiff's expert testimony was an abuse of discretion, because defense counsel's untimely objection, and district court's untimely decision, unfairly prevented plaintiffs from providing a curative response.[19.2]

The requirement of a timely objection also means that counsel cannot gamble on letting inadmissible evidence in as long as it is favorable, and beginning to object only when the evidence becomes unfavorable. For instance, if a witness gives testimony that is inadmissible under the hearsay rule, opposing counsel cannot remain silent while the witness gives helpful testimony, and then object on the basis of hearsay once the witness gives damaging testimony.[20] Such silence is apt to be interpreted as a waiver of any objection.[21]

Speed and alertness of counsel are essential. Once the answer to an improper question has been given, the court is likely to rule that the objection came too late.[22] In appropriate circumstances, however, a later objection may be considered sufficiently timely to preserve the issue for appeal. Thus, a later objection adequately preserves the admissibility question for appeal when:

- The objecting party had previously made the same objection to numerous

215 F.3d 1083, 1087 (10th Cir. 2000) ("[t]he most common method for fulfilling this function [of gatekeeper for expert testimony] is a *Daubert* hearing"); Padillas v. Stork-Gamco, Inc., 186 F.3d 412, 417–418 (3d Cir. 1999) (Third Circuit has strong preference for pretrial hearings respecting reliability of expert testimony, even if neither party requests one, whenever bases for proposed expert witness's opinion "are insufficiently explained and the reasons and foundations for them inadequately and perhaps confusingly explicated."); United States v. Sinskey, 119 F.3d 712, 717 (8th Cir. 1997) (trial court properly admitted expert testimony it found reliable during pretrial evidentiary hearing).

[19] *See* [4], *below.*

[19.1] Jerden v. Amstutz, 430 F.3d 1231, 1236–1237 (9th Cir. 2005).

[19.2] Jerden v. Amstutz, 430 F.3d 1231, 1237–1238 (9th Cir. 2005) (citing WEINSTEIN'S FEDERAL EVIDENCE).

[20] *See, e.g.,* United States Aviation Underwriters, Inc. v. Olympia Wings, Inc., 896 F.2d 949, 956 (5th Cir. 1990); Willco Kuwait (Trading) S.A.K. v. De Savary, 843 F.2d 618, 624 (1st Cir. 1988).

[21] *See* [b], *above.*

[22] *See, e.g.,* Hutchinson v. Groskin, 927 F.2d 722, 725 (2d Cir. 1991) (general principle is that objection should be made after question has been asked but before answer has been given).

similar questions.[23]

- The questioning party was attempting to elicit inadmissible evidence through a non-responsive answer to a facially unobjectionable question.[24]
- The objecting party could not have been aware of the ground for the objection until after the witness gave the inadmissible evidence.[25]

[d] Form of Objection or Motion to Strike

Rule 103(a)(1) requires that an objection or motion to strike state "the specific ground of objection." The timeliness requirement, however, frequently requires counsel to state the objection before the jury hears the objectionable evidence.[26] Counsel are afforded some leeway because trial courts recognize that the short period of time between when a question is asked and when it is answered may not be sufficient time for a thorough analysis of the errors that admission of the answer might entail.

General objections, such as "I object" or "incompetent, irrelevant and immaterial" will not usually satisfy the specificity requirement unless the ground for exclusion is obvious to the court and to opposing counsel,[27] or unless the basis for the objection is that the evidence is not relevant under Rule 401.

Under Rule 103(a), the objecting party must state all grounds for objection other than lack of relevance with specificity. If the trial court overrules a general

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[23] *See, e.g.*, Hutchinson v. Groskin, 927 F.2d 722, 725 (2d Cir. 1991) (objection to hearsay testimony of expert was timely although made after witness answered; same objection had previously been made and overruled and trial court was familiar with its basis).

[24] *See, e.g.*, United States v. Pallais, 921 F.2d 684, 688–689 (7th Cir. 1990) (objection to government witness's hearsay testimony was sufficient to preserve issue for appeal when it was made before witness completed his answer or gave part of answer that was damaging to defendant; question literally called only for yes or no answer, neither of which would have been hearsay, and prosecutor obviously wanted witness to give hearsay evidence in response to question).

[25] *See, e.g.*, United States v. Meserve, 271 F.3d 314, 324–325 (1st Cir. 2001) (defendant's objection on ground that impeachment by evidence of 20-year-old conviction for disorderly conduct was improper under Rule 609, made as soon as defendant learned of nature of conviction, was not untimely).

[26] *See* [c], *above*.

[27] *See, e.g.*, United States v. Diaz, 300 F.3d 66, 75–76 (1st Cir. 2002) (defendant's objection to expert testimony, referring only to *Daubert* re competency to render the opinion in question failed to specify flaws with witness's methodology and application of that methodology to facts of case, especially since defendant's pretrial objection was limited to witness's qualifications); United States v. Haywood, 280 F.3d 715, 725 (6th Cir. 2002) (when defendant objected to other acts evidence on grounds of relevance and prejudice and government argued evidence was admissible under Rule 404(b), basis for defendant's objection was evident from context and Rule 404(b) objection was preserved for appeal).

objection and the objecting party should have made a specific objection, the objecting party is precluded from asserting the proper objection on appeal.[28] A specific objection made on the wrong grounds and overruled similarly precludes a party from raising a specific objection on other, tenable grounds on appeal.[29] An improper specific objection made when the objectionable question was asked should not, however, preclude preservation of error by a subsequent motion to strike the answer on a different ground made while the witness is still on the stand, since the policy of encouraging the elimination of error in the trial court is forwarded by permitting a motion to strike while the witness is still testifying.

If the trial court errs in overruling a specific objection and admits the proffered evidence, the appellate court may permit the proponent of the evidence to advance a theory of admissibility that was never argued at trial, and on which the trial court never ruled.[30]

In all cases, objecting counsel should be prepared to explain to the court—if the court requests an explanation or obviously does not see the point—precisely how the admission of the evidence in question would transgress a rule of evidence. The explanation should be brief and to the point. Often it is sufficient to cite a Rule of Evid ence by number.

[3] Objections to Exclusion of Evidence[1]

[a] Offer of Proof is Generally Necessary

Rule 103(a)(2) provides that error may not be predicated on a ruling excluding evidence unless the judge was informed of the substance of the evidence by an

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[28] *See, e.g.*, Bandera v. City of Quincy, 344 F.3d 47, 54 (1st Cir. 2003) (defendant's general objections without grounds, intermingled with objections on grounds of relevance and "time frame," did not preserve error in admission of lay opinion testimony).

[29] *See, e.g.*, Diefenbach v. Sheridan Transp., Inc., 229 F.3d 27, 29 (1st Cir. 2000) (objection to expert witness's qualifications does not preserve objection that witness's opinion lacks reliability under *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579, 591, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)); Shaw v. AAA Eng'g & Drafting, Inc., 213 F.3d 519, 537 (10th Cir. 2000).

[30] *See, e.g.*, United States v. Paradies, 98 F.3d 1266, 1290 (11th Cir. 1996) (no error in admitting evidence, even if reason for admission given by trial court is invalid, if evidence was properly admissible on other grounds); United States v. Williams, 837 F.2d 1009, 1012–1013 (11th Cir. 1988) (citing WEINSTEIN'S FEDERAL EVIDENCE when evidence was erroneously admitted pursuant to business records exception, proponent could rely on another hearsay exception admission theory on appeal; grounds for admissibility relied on at trial and on appeal serve same purpose, to permit introduction of evidence of out-of-court statements to prove the truth of the matter asserted; court distinguished such situations and those based "on a theory wholly unrelated to the ground advanced at trial").

[1] *See* discussion in WEINSTEIN'S FEDERAL EVIDENCE at §§ 103.20–103.22.

offer of proof, or could ascertain the substance from the context of the questions asked. As the Fifth Circuit has bluntly put it, "this circuit will not even consider the propriety of the decision to exclude the evidence at issue, if no offer of proof was made at trial."[2]

Rule 103 makes a pretrial offer of proof effective to preserve error in the exclusion of evidence without a renewal during the trial, so long as the trial court's ruling was definitive and on the record.[3] No offer of proof is necessary, either before the trial or when the evidence is offered, if the court has been apprised of the substance of the evidence and the basis on which it is admissible.[4]

The failure to make an offer of proof may be excused when it would be futile and would only result in an unseemly argument with the court, e.g., when the trial judge prevents a formal offer.[5] Prompt filing of a written proffer may be helpful if the trial judge is uncooperative.

[b] Offer Must Reveal Substance of Evidence and Ground for Admission

There are four traditional ways to make an offer of proof: (1) examining the witness on the record in the absence of the jury; (2) counsel's oral statement about the proposed testimony (which is the least favored approach); (3) counsel's written statement describing the proposed testimony in detail; and (4) the witness's signed, written statement describing the proposed testimony.[6]

However, a "formal proffer" need not always be made.[7] The proponent of the excluded evidence only has to have made known the substance of the proffered evidence and the grounds for its admissibility in sufficient detail to permit the trial

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[2] United States v. Winkle, 587 F.2d 705, 710 (5th Cir. 1979); *see also* Badami v. Flood, 214 F.3d 994, 998 (8th Cir. 2000) (party offering evidence must make offer of proof on record to preserve error in trial court's exclusion of evidence).

[3] Fed. R. Evid. 103(a); *see, e.g.*, United States v. McDermott, 245 F.3d 133, 140 n.3 (2d Cir. 2001).

[4] *See, e.g.*, Searles v. Van Bebber, 251 F.3d 869, 877 n.4 (10th Cir. 2001) (when record of parties' arguments shows substance of proffered evidence was conveyed to court, no further offer of proof is necessary).

[5] *See, e.g.*, Moss v. Ole South Real Estate, Inc., 933 F.2d 1300, 1310–1311, n.10 (5th Cir. 1991) (plaintiffs' failure to make offer of proof concerning witness's testimony would not preclude review of trial court's exclusion of testimony when trial judge refused to hear proffer).

[6] United States v. Adams, 271 F.3d 1236, 1241–1242 (10th Cir. 2001).

[7] *See, e.g.*, Okai v. Verfuth, 275 F.3d 606, 611–612 (7th Cir. 2001) ("Although a party need not make a formal offer of proof, he must at a minimum make known to the trial judge the substance of the evidence he hopes to present."); Tiller v. Baghdady, 244 F.3d 9, 13 n.3 (1st Cir. 2001) (proponent's offer of proof need not be in writing to preserve error in exclusion of evidence).

court to determine whether the evidence would be admissible, and to permit the appellate court to assess the impact of the ruling in the process of determining whether the exclusion of the evidence constituted reversible error.[8]

When the record discloses sufficient information to permit both the trial and appellate courts to fulfill each of those respective functions, no further offer of proof is necessary.[9] Moreover, the party complaining about the exclusion of the evidence need not be the party who made the offer of proof. One party can take advantage on appeal of another party's effective offer of proof.[10]

In making an offer of proof, counsel must specify the evidence in question.[11] The proffering party must also articulate in his or her offer of proof every discrete ground on which the evidence is admissible.[12] On the other hand, when the trial court rules that specific evidence a party has offered as relevant to issues of liability is not admissible for any purpose, it is not necessary for that party to reoffer the same evidence respecting a subsidiary issue, such as whether there should be an award of punitive damages and, if so, how much they should be, to preserve the issue of admissibility for those purposes.[13]

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[8] *See, e.g.*, Polack v. Commissioner, 366 F.3d 608, 612 (8th Cir. 2004) (in offer of proof, proponent must "express precisely the substance of the excluded evidence" to inform both trial and appellate courts why exclusion of evidence was prejudicial error); United States v. Thompson, 279 F.3d 1043, 1047 (D.C. Cir. 2002) (when defendant offered evidence of out-of-court statements and court sustained hearsay objection, defendant's failure to inform court that statements were offered for non-hearsay purpose of showing declarant's state of mind resulted in appellate court's review of exclusion of evidence only for plain error).

[9] *See, e.g.*, Okai v. Verfuth, 275 F.3d 606, 611–612 (7th Cir. 2001) ("Although a party need not make a formal offer of proof, he must at a minimum make known to the trial judge the substance of the evidence he hopes to present"); Searles v. Van Bebber, 251 F.3d 869, 977 n.4 (10th Cir. 2001) (when record of parties' arguments shows substance of proffered evidence was conveyed to court, no further offer of proof is necessary).

[10] *See, e.g.*, United States v. Davis, 261 F.3d 1, 40–41 (1st Cir. 2001) (defendant who did not offer excluded evidence may take advantage of co-defendant's effective offer of proof on appeal; Rule 103(a)(2) only requires that trial court be aware of nature of evidence and purpose of offer, not that appellant be party that made trial court aware of those matters).

[11] *See, e.g.*, United States v. Rettenberger, 344 F.3d 702, 706 (7th Cir. 2003) (trial court properly precluded defendant from presenting expert testimony not disclosed in discovery when, among other things, lack of disclosure kept trial court from knowing substance of expert's proposed testimony).

[12] *See, e.g.*, Reese v. Mercury Marine Div. of Brunswick Corp., 793 F.2d 1416, 1420–1421 (5th Cir. 1986) (it is proponent's duty to articulate clearly every ground for which proffered evidence is admissible; in wrongful death action, offer of proof arguing evidence was relevant to issue of causation was insufficient to preserve error in excluding evidence on ground it was relevant to theory of liability for failure to warn).

[13] *See, e.g.*, EEOC v. Ind. Bell Tel. Co., 256 F.3d 516, 526–527 (7th Cir. 2001) (en banc).

[c] Offer Must Be on Record

For error to be preserved, the proffering party's disclosure of the necessary information to the trial court and the trial court's ruling excluding the evidence must appear of record.[14] Moreover, the absence of an adequate record will make reversal for plain error extremely unlikely.[15]

Many problems are avoided if the trial court informs the parties of the ground on which it is sustaining a general objection, or on which of several urged specific grounds it is sustaining a specific objection. If the trial judge does not do so, the burden is on the proponent to request such a ruling. In addition, if the trial court has been unclear in explaining the ground for its decision to admit or exclude evidence, the appellate court can sometimes avoid a reversal and the resulting new trial by remanding to the district court for a hearing on the admissibility of the evidence.[16]

[4] Pretrial Rulings Admitting and Excluding Evidence[1]

Before Rule 103 was amended in 2000, many appellate courts held that objections presented and overruled in an in limine pretrial hearing must be renewed at trial to preserve error.[2] Other courts held that a ruling on a pretrial motion in limine that overruled an objection to evidence was sufficient to preserve error if:

- The trial court's unfavorable ruling was neither "conditional" nor "quali-

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[14] *See, e.g.*, Macsenti v. Becker, 237 F.3d 1223, 1241 (10th Cir. 2001) (when record does not contain proffer or reveal what arguments were made to trial court, appellate court cannot say trial court's rulings were not within its discretion and, therefore, cannot hold evidentiary ruling not harmless).

[15] *See, e.g.*, Tompkin v. Philip Morris USA, Inc., 362 F.3d 882, 900 n.16 (6th Cir. 2004) (when plaintiff failed to offer portions of deposition transcripts, she waived her right to appeal trial court's alleged exclusion of those transcript portions).

[16] *See, e.g.*, United States v. Downing, 753 F.2d 1224, 1226 (3d Cir. 1985) (remanded to trial court for determination of admissibility of expert testimony concerning reliability of eye witness testimony).

[1] *See* discussion in WEINSTEIN'S FEDERAL EVIDENCE at §§ 103.30, 103.31.

[2] *See, e.g.*, United States v. McNeil, 184 F.3d 770 776–777 (8th Cir. 1999) (after trial court overrules motion in limine to exclude evidence, party's failure to object at trial when evidence is offered waives any error in its admission); McEwen v. City of Norman, 926 F.2d 1539, 1543–1545 (10th Cir. 1991) (objection to expert's testimony not preserved for appeal when raised in pretrial motion in limine but not at trial when expert's testimony was offered); Wilson v. Waggener, 837 F.2d 220, 222 (5th Cir. 1988) ("[a] party whose motion in limine is overruled must renew his objection when the evidence is about to be introduced at trial").

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Cross-Examining The Expert Witness: Do's and Don'ts and An Occasional Maybe

What factors make people believe one expert witness over another? People ask several questions when deciding if they are going to trust an expert.[1]

Does the expert witness *look* and *sound* smart?

Does the expert not lose her cool when cross-examined?

Does the expert witness talk too much about irrelevant material?

Does the witness answer questions directly?

Does the expert admit when he is wrong?

Rarely does the question relate to whether the expert's opinion or science is sound. Instead, people are inclined to focus on how the expert comes across. Is she smooth? Is she polished? If so, then she *must* be good — or perhaps she is a sociopath. A sociopath, among other things, tends to (1) have a disregard for the truth; (2) lack concern for society's rules (i.e., do not over-bill, do not commit perjury); (3) be manipulative; and (4) be personable, charming, and have an above average IQ. The frightening thing is that the more sociopathic an expert is (glib speech, unflappable, charming), the more successful she may be at convincing a jury.

When defense attorneys question an expert, it is helpful to let the expert know they have done their homework. Bring a notebook filled with research and label it with the expert's name written in 72 point bold font. This keeps bad experts more honest because they have no idea what information the notebook contains. An honest expert will not be as concerned because he is giving his true opinion and does not need to remember when he gave contradictory statements.

The more sociopathic the expert, the less he has familiarized himself with the facts. He does not spend the time or effort to learn the science or the facts in the case because he does not care. He just wants to be paid. When an attorney suspects she is dealing with an expert who is a sociopath, she can expose his callousness to the jury by asking him fact-specific questions he cannot answer.

When the expert is evasive, keep going. Sometimes an attorney becomes frustrated and sits down when a verbose expert avoids answering a question and starts blathering. Counsel should stand her ground. It may not even matter if the expert never answers the question. What is often more important is the fact that the expert failed to answer. The job of the attorney is to make that clear. If an expert fails to answer an attorney's question and the attorney becomes frustrated and sits down, the jury may believe the expert *did*

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answer the question and the attorney did not like the answer. Therefore, counsel should keep pointing out that the expert failed to answer — until the judge orders the expert to answer or it is clear the jury understands that the expert witness is being evasive.

Weaknesses in Science And the Experts

In a majority of cases in which defendants were ultimately exonerated by post-conviction DNA, experts for the prosecution overstepped their bounds with regard to training and testifying or with regard to misstating empirical data.[2] Research conducted involving 137 cases in which defendants were wrongfully convicted revealed that in 60 percent of the cases, "Forensic analysts called by the prosecution provided invalid testimony at trial. That is testimony with conclusions misstating empirical data or wholly unsupported by empirical data."[3] The invalid testimony came from 72 forensic analysts called by the prosecution and employed by 52 laboratories, practices, or hospitals from 25 states.[4] Misrepresentation, however, is not always intentional. "Invalid testimony could be explained not by intentional or reckless acts, but rather by inexperience, poor training, or inadequate supervision."[5]

In 2005 Congress authorized the National Academy of Sciences (NAS), in existence since 1863,[6] to study forensic science.[7] Four years later, in August 2009, the National Research Council of the National Academies published *Strengthening Forensic Science in the United States: A Path Forward* (NAS Report). The report found that the entire forensic science system had serious problems: "New doubts about the accuracy of some forensic science practices have intensified with the growing number of exonerations resulting from DNA analysis. ...."[8]

For years criminal defense attorneys lamented the state of forensic science, concerned that some of it was junk science. Proving it, however, was another matter. In order to best represent clients, attorneys should research the expert, research the science and the test employed, and research the expert's conclusion.

Research the Expert

Does the expert operate out of his garage? Some experts have no office and work from home. Use Google Earth to find out if the address on the expert's letterhead is his home.[9]

Verify the degree. If an expert witness outs a degree from a university that the defense team members have never heard of, they should check it out, especially if it is from another country. If one inserts "fake degrees" in the Google search engine, over 1.6 million hits will be returned. Anyone can buy a degree from a diploma mill. In one case, a simple telephone call to a university in Spain revealed that the expert obtained his medical degree in two weeks, with no anatomy courses.[10] Moreover, the defense must verify everything on the expert's curriculum vitae (CV). If the expert claims he has a patent, verify it.[11] If he claims he belongs to an organization, find out if it even exists.

Cross-reference all jury verdicts and case citations in state and federal cases with the expert's case list. Some experts do not list cases in which embarrassing rulings occurred. Cross-referencing the expert's case list with Lexis or Westlaw jury verdicts might uncover instances of fraud.

Verify the expert's memberships in organizations. Most organizations include their membership lists in online databases.

If the doctor claims a fellowship, obtain proof that the fellowship exists. Ask the expert to sign a release to permit the defense to obtain documentation of the alleged fellowship. Most bad experts will not agree to do this because they are not telling the truth.

Investigate an expert's former websites.[12] It might be helpful to find out if there are older articles supporting the defense position.

Was the expert trained and tested in the area in which she claims expertise? If the expert is a scientist, for example, and is testifying about hair comparison, was she given proficiency testing on this subject? Did she pass the first time? How long was the expert actually trained in the particular area in which she is testifying? If she took a class in hair forensics and it lasted a year, what portion of the class only dealt with hair comparison? It may have been as little as a couple of months.

What's *not* in the CV? A forensic expert may leave off important information reflecting bias, such as multiple free speeches to prosecutors or other organizations. Does the expert speak at defense attorney seminars? Is she a member of the Innocence Project?

The expert says she wrote an article. Did the expert really write it? It is not uncommon for a CV to reflect articles when (1) someone else was the lead author; (2) the expert did not write the article; (3) the article was never written; (4) the article was a one-paragraph letter to the editor; and (5) the article helps the defense position. Moreover, in some instances the defense attorney will discover that the article did not appear in a peer-reviewed journal. Instead, it appeared in a "pay" journal. The writer pays the journal, the journal prints the article, and there is no review process to ensure validity.

Buy a used copy of the expert's book from Amazon.com and read it. There is often a wealth of information in such publications that supports the defense position. Nothing is more deadly to an expert than to have a defense attorney reading the expert's own publication to support the defense. It is also helpful to search the Web for free article abstracts[13] or, for a fee, to read entire articles on other websites. For example, use a pay website such as www.mdconsult.com when looking for an entire article. To browse a book authored by the expert, consider conducting a free word search on the expert's book.[14]

Board Certifications

Is the expert really board certified? Some organizations will permit anyone to become board certified — even a child. An individual can simply visit the organization's website, pay the fee, proceed to "checkout," and *voila*! The defense attorney can also join the organization and pay to become board certified. At trial, defense counsel can ask the expert if the organization by which he is board certified is an example of his expertise or separates him from the pack. Make him *special*. Some experts will go on and on about their exclusive club. Then, the defense attorney can point out that she joined, along with her eight-year-old. Show the expert a photo of little Sally. Does this make Sally a forensics superstar?

Does the organization require vetting and real tests? Some organizations claim to test members, but the defense team needs to find out if the test involves more than an oral examination — which may translate into nothing more than a brief conversation. Was there a written test? A score? Documentation of a score? Who has the documentation? How can the defense verify it? Typically, in the medical field, the American Board of Medical Specialties is legitimate and requires proof of competence if dealing with a medical doctor.

Show Me the Money

The expert for the prosecution may claim he does not know how much money he makes in his forensic practice. Ask him if he *denies* making $10,000 per year. Start increasing the amount from that base figure. Many experts will claim they "do not keep track" and will stick to that response even when the defense

lawyer asks if he denies making hundreds of thousands of dollars, or even millions, from his forensic practice. What is important is not that he makes a lot of money from testifying, but that he is not being straightforward. Some jurors simply do not care how much an expert makes. In fact, some jurors think the more an expert makes from testifying, the better his credentials must be. Thus, the defense attorney should place the testimony in context: "You don't know if you make half a million dollars per year? Isn't that the kind of thing a person would remember?"

Code of Ethics

Does the expert belong to an organization with a published code of ethics? If not, then who is monitoring ethical behavior?

Did the expert *withdraw* from an organization that has a code of ethics? There have been instances in which doctors encountered problems involving ethical issues and withdrew from organizations before someone could complain. The complaint could have resulted in the expert being kicked out or sanctioned by the organization. It merits further inquiry.

University Experts

The defense team might be able to find publications on a university's website to support the defense team's position. Keep in mind that experts who claim to teach at a university may only have courtesy privileges, which means they do not get paid, do not teach classes and, perhaps occasionally, allow graduate students to follow them around in exchange for being able to say they are associated with the university. In addition, many publicly funded universities require employees to obtain permission before they do forensic work and some, such as the University of Florida, keep track. Send a Freedom of Information letter to the legal department of the university demanding the expert's entire file and all cases in which he sought permission to become an expert.

Casey Anthony Photographer: ©Orange County Sheriff\ ZUMApress.com

While researching gas chromatographs in the Casey Anthony case — even before she could speak intelligently with the expert — Dorothy Clay Sims needed to research the equipment by viewing photos using Google Images to actually see the instrument. Next, she saw the working apparatus by watching Google videos. She found this to be extremely helpful. "It gave me a frame of reference that put the science into perspective," Sims said. "You don't know what you don't know. Consider taking the jury through this process as well to ensure the decision-makers have a deep understanding of the science. Too often, I've seen lawyers lose an entire jury during the first five minutes of cross-examination."

Experts From Other States

Is the prosecution expert from another state? Many boards of medicine in various states require out-of-state doctors to obtain permission before they can testify. In fact, at least 30 states have adopted some type of regulation or requirement.[15] In an apparent attempt to limit doctors who testify for plaintiffs in medical malpractice cases, it is becoming more difficult to come in from another state and testify for plaintiffs.

It is also a good idea to make sure the *defense* team's out-of-state experts know the applicable rules. Failure to do so might result in the court striking defense experts. Even if an expert is not stricken, he will probably withdraw if made aware he is in violation of local board rules.

Research the Science

Look at the science. If a case involves research equipment, the defense can use Google Images[16] to find pictures of the equipment. See the equipment in action by watching Google videos.[17] Jury members might benefit from this exposure too.

Practice on a Seventh Grader

More than one juror may have the intellect of a seventh grader or less. This is an unfortunate reality. Do not forget that when a witness is testifying, members of the jury might be bored, tired, in pain, or thinking about something else. Defense counsel needs the attention of all the jurors when the defense expert is on the witness stand. If the science is not given in small digestible bites, defense counsel will lose the jury and the case. The defense risks a guilty verdict should that seventh grader not understand the science in the case and defense counsel's questions on cross-examination.

Research, Save, and Share

Start with Wikipedia? Yes. While it may not be considered an official scientific reference, Wikipedia offers a framework upon which to build a database. Consult Wikipedia to understand why a test was created, its weaknesses, and the funding behind it. Save the research. If defense counsel puts in 20 hours researching a topic, he should save the notes so that he can access them later. The issue might come up in a year, and the lawyer will have saved tremendous time. If an attorney starts doing this now, in a few years he might build up a databank of thousands of pages on experts and topics. Save the questions and the research; cut and paste in future cases. Share the research if the issue arises on a listserv. An attorney will receive help in the future on newer topics if he is not seen as someone who hoards data.

The Casey Anthony Case

Research Methodology

Casey Anthony was accused of the death of her two-year-old daughter. Prosecutors said forensic evidence — including the smell and chemical signature of decomposition in her car — linked Anthony to her daughter's death. A jury found Anthony not guilty of first-degree murder.

In Casey Anthony's case, the state introduced air obtained from a trunk that had been opened. The state's expert testified that moving air obtained from a trunk at a later point in time after a child went missing had revealed evidence of decomposition. This claim presented several problems. First, this type of testimony had never been accepted in any criminal case. Second, the methodology for *when* and *how* the air was obtained, stored, and analyzed did not come from a published instruction manual. Third, in the articles on decompositional chemicals, there was no consensus as to which chemicals constituted decomposition. Which one was the right one? Publications differed as to which chemicals exist in decomposition, and the chemicals present could depend on the location of the body and the conditions involved (below ground, above ground, temperature, and time of decomposition process).

One expert testified the amount of chloroform found in the car trunk was very high, and another expert testified the amount in the trunk was "very, very low." Furthermore, investigators found chloroform in an abandoned car in a junkyard. This posed a problem because this was an abandoned car with no evidence of a decomposing body in it. Perhaps car trunks simply have chloroform in them for reasons other than decomposition. Finally, a publication by one of the experts

listed chemicals that are allegedly present when human decomposition occurs. However, most of the chemicals listed were not found in the Anthony trunk.

If there is a break in the link that connects the science to the conclusion, then the conclusion may be invalid. How does a lawyer deal with science and experts when the experts are far more able to understand and even potentially misrepresent the science? The answer is quite simple. Defense counsel must believe what he tells the jury. The government has the burden of proof, not the defense. Approach cross-examination the same way. If the state in which defense counsel practices permits depositions, subpoena the relevant items. If the state does not permit depositions, subpoena the expert to bring published administration and interpretation manuals to trial outlining her methodology. They may not exist. In 2000, the Federal Judicial Center published the *Reference Manual on Scientific Evidence* and discussed how judges must explore the opinions of underlying experts:

1. Was an appropriate universe or population identified?

2. Did the sampling frame approximate the population?

3. How was the sample selected to approximate the relevant characteristics of the population?

4. Was the level of nonresponse sufficient to raise questions about the representativeness of the sample?

5. What procedures did researchers use to reduce the likelihood of a biased sample?

6. What precautions did researchers take to ensure that only qualified respondents were included in the survey?[18]

Lawyers should also consider asking for proof of blind independent verification. If the second scientist knew the opinions of the first scientist, then the verification was not blind. Blind means "fresh eyes" not tainted by a supervisor's opinion. Was the opinion of the first expert verified by a second expert? This type of verification has been recommended for DNA testing by the American Academy of Sciences.[19] Therefore, in any case involving a scientific test, logic would dictate a blind review would be appropriate. If the validation study exists, did the expert turn over the results? One of the best examples of this arose in the Gregory Taylor case in North Carolina.[20] The expert in that case failed to disclose he had performed confirmatory tests that revealed negative results for blood versus the positive result he received from a phenolphthalein test. This is a lesson for every member of the defense bar. Ask under oath whether someone conducted confirmatory tests and ask for the results. Selective reporting has been a tool of the trade for certain experts. This is cause for concern, especially if the expert is on the defense team. Make sure defense experts have not omitted any information.

Botanical Evidence

The state produced an expert in the Casey Anthony case who testified in deposition about how long he believed the child's remains existed at the scene where they were found. However, he candidly admitted his methods of measuring a few root diameters from digital photographs of unknown plants and then determining their age had not been published in any journal. The expert also admitted that he had no empirical evidence to support his methodology and that neither he nor anyone else he knew taught this methodology. In fact, a book this expert wrote suggested how to evaluate botanical evidence. Through no fault of his own, the author's method was not utilized in the Anthony case (the evidence was destroyed before he could see it firsthand). The state elected not to call him as an expert at trial.

Lawyers may wish to expose documentation of false positive rates. Note the question: Where is the *documentation*? An expert may claim she knows a false positive rate, but the defense attorney should demand proof. If the attorney asks for documentation in his question, it precludes the expert from postulating without backup.

As mentioned earlier, defense counsel should ask whether validation studies were performed. The National Academy of Sciences suggests this when dealing with DNA. The same requirements should apply to other areas of science.[21] The NAS Report stated that "human judgment is subject to many different types of bias, because we unconsciously pick up cues from our environment. ..."[22] In fact, the report mentioned an experiment wherein contextual bias was introduced. As part of the experiment, researchers asked fingerprint examiners to analyze fingerprints that, unknown to the examiners, they had analyzed previously. Researchers told the examiners that a suspect had confessed to a crime, and in six out of the 24 examinations, the results were different from the prior time when the same examiner ana-

Codes of Ethics on the Web

American College of Epidemiology
http://www.acepidemiology.org/policystmts/EthicsGuide.pdf

American Board of Electrodiagnostic Medicine
http://www.aanem.org/getmedia/470fb367-ee3b-473b-8575-2af659695691/ed_gl_for_edx_tp.PDF.aspx

American Medical Association
http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics.shtml

American Academy of Neurology
http://www.aan.com/go/about/ethics

American Academy of Family Physicians
http://www.aafp.org/online/etc/medialib/aafp_org/documents/about/rap/curriculum/medical_ethics.Par.0001.File.dat/Reprint279.pdf

American Board of Independent Medical Examiners
http://www.abime.org/node/21

Congress of Neurological Surgeons
http://www.cns.org/about/pdf/cnsbylaws.pdf

American College of Emergency Physicians
http://www.acep.org/content.aspx?id=29144

American Neurological Association
http://www.aneuroa.org/i4a/pages/index.cfm?pageid=3301

American College of Surgeons
http://www.facs.org/fellows_info/statements/stonprin.html#anchor116209

American Association of Neurological Surgeons
http://www.aans.org/Media/Article.aspx?ArticleId=9842

American Psychiatric Association
http://www.psych.org/MainMenu/PsychiatricPractice/Ethics/ResourcesStandards.aspx

American Board of Vocational Experts
http://www.abve.net/certethics.htm

American College of Cardiology
http://www.cardiosource.org/acc/~/media/files/acc/leadership/acc%20code%20of%20ethics.ashx

American Optometric Association
http://www.aoa.org/x4878.xml

American Osteopathic Board of Surgery
http://www.aobs.org/pdf/AOA%20Code%20of%20Ethics2.pdf

American Psychological Association
http://www.apa.org/ethics/code/index.aspx

American Sociological Association
http://www2.asanet.org/members/coe.pdf

American Registry of Radiological Technologists
https://www.arrt.org/ethics/standardethic.pdf

Commission on Rehabilitation Counselor Certification
http://www.crccertification.com/pages/crc_ccrc_code_of_ethics/10.php

American Board of Forensic Psychology
http://www.abfp.com/bylaws.asp

American College of Forensic Examiners
http://ethics.iit.edu/indexOfCodes-2.php?key=23_39_1106

American Board of Forensic Toxicology
http://www.abft.org/index.php?option=com_content&view=article&id=56&Itemid=65

American Academy of Forensic Sciences
http://www.aafs.org/aafs-bylaws

National Academy of Neuropsychology
http://www.nanonline.org/NAN/AboutNAN/Bylaws.aspx

The Society of Thoracic Surgeons
http://www.sts.org/about-sts/policies/code-ethics

Ethics in Epidemiology: International Guidelines by WHO
http://whqlibdoc.who.int/publications/1991/9290360488_(part1).pdf

Society of Interventional Radiologists
http://www.sirweb.org/about-us/CodeOfEthics.shtml

American Academy of Physical Medicine & Rehabilitation
http://www.aapmr.org/academy/codec.htm

The Endocrine Society
http://www.endo-society.org/about/ethics/upload/ee20018398.pdf

lyzed the same print without the bias introduced. Therefore, the need for blind verification was clear. "Independent (blind) verification"[23] is necessary to reduce the impact of bias.

The goal is to make scientific investigations as objective as possible so that results do not depend on the investigator.[24] What happens if investigation into bias, or rigorous and deep investigation into the science, does not occur? Erroneous convictions or expensive second trials will be the result. A report on CNN revealed that "the FBI believed that lead in bullets had unique chemical signatures"[25] and at least 200 people were wrongfully convicted. In 2002 the FBI asked NAS to conduct an independent review. Two years later, the National Research Council issued a report finding that the process of bullet lead analysis was overstated, misleading, and deeply flawed.[26] Bullet lead analysis had been used to support convictions across the country — for decades.

An expert may not be aware of the documented error rate. This is extremely important. No science is perfect. If the expert cannot show how often the technique is wrong, then she has a problem. What if the testing technique is wrong 90 percent of the time? If new science is provided and the forensic expert cannot tell the defense attorney how often the technique or machine is inaccurate, then it is, by definition, unreliable. NAS also discussed determining the error rate when engaging in hair comparison.[27] Again, if it applies to the science of hair, the same logic dictates it applies to all other disciplines.

Negative Control

Lawyers need to know how experts obtain a *negative control*. Consider this example. The prosecution says the defendant committed murder. The police find his wife dead in the bedroom, and an autopsy reveals exposure to high levels of lead in the room. What is the expected level, if any, of lead in a bedroom where *no one died* (the negative control) such that a comparison can be drawn? The expert for the prosecution tests the air in the client's bedroom and concludes the levels are so high that they are toxic. If the expert sampled three random bedrooms where no one died (the negative controls) and found the *same* level of lead (which exists in drinking water and even air), then what is the *real* significance of the lead level?

- Where is the documentation showing that the machines involved are current, accurate, and reliable?
- Where is the documentation that the expert was appropriately trained on the use of the machine?
- Did the expert document problems that may have existed in running a sample? Did the machine fail to find a substance that should have been identified? Did the machine break down during testing? Did the expert document all potential failures?
- Where is the documentation that the lab is a forensic lab versus a research lab? Did anyone provide the defense with accreditation requirements for the lab and proof they were met?
- Did the expert adhere to the manuals supplied by the machine manufacturer?
- Do published lab standards exist? Were they followed?
- What are the quality control measures? Where is the proof they were followed?
- Was the chain of custody for the sample documented?

Research the Conclusion

Is there a conclusion? Some reports are so vague they never reach a conclusion. What exactly is the expert saying? If the state permits a deposition, use it to pin down the expert regarding the conclusion.

What is the expert leaving out? Sometimes a report may omit important conclusions, which may mean the expert does not have an opinion or the opinion is hurtful to the prosecution. Look very carefully for what is *not* in the report.

Does the expert have the training to make the conclusion? How, when, by whom, and where is the documentation? Did she merely attend a course? If the defense attorney attended the same

course, would that make him an expert?

Does the conclusion consider all pertinent facts, or did the expert reach her conclusion by relying only on the other prosecution experts? If she relied only on prosecution experts, does she have personal knowledge about the training and education of the defense witnesses? If not, where in her code of ethics does it suggest she reach a conclusion by ignoring other data and opinions from experts? This puts her on the defensive — which is exactly where she should stay. After all, the defense does not have the burden of proof, the government does (at least in theory).

If another fact is injected, or removed, does it change the conclusion? Does the conclusion make sense? Does defense counsel understand how the expert reached her conclusion? Will the jury understand how the expert reached the conclusion?

Is the conclusion legitimate, but essentially *irrelevant*? Consider a situation in which the police charge the client with assault. The prosecution produces a witness who conducted a psychological evaluation of the client. The doctor states in her report the fact that the client had an abortion. Some expert witnesses try very hard to get negative facts into a report and say something absurd to try and claim its relevancy. Convince the judge to limit this type of testimony, and then share the order limiting the expert. If possible, make sure the judge includes language in the order about the expert receiving a copy of the order. Then suggest that the next lawyer who examines the expert ask if his opinion has ever been stricken. Invariably, certain experts will lie.

Dealing With the Psychiatric/ Psychological Expert

Psychological and psychiatric witnesses are different from other witnesses. People in the mental health field are more likely to say, for example, symptoms "are consistent with" something. This is virtually meaningless. Alternative causes are equally or *more* consistent. How did the expert determine this? The use of this term is not only extremely prejudicial, but potentially misleading. "To say that two items are 'consistent,' without being able to tell the jury that consistency is rare or common, renders the evidence potentially misleading, and hence raises questions whether it is inadmissible as both irrelevant and unduly prejudicial."[28]

Consider reframing the conclusion when a doctor says the defendant is malingering. If the psychiatrist writes a report accusing the client of malingering (intentional misrepresentation), then prepare a document and ask the psychiatrist to sign it. "I, Dr. John Doe, MD, am stating under oath that the defendant, James Smith, is a *liar.* Date _____ Name _____" Malingering is *lying.* If the expert will not sign the document, her opinion must not be solid.

Research the Test

Defense counsel must remember to research the test. For example, the Fake Bad Scale in the MMPI-2 has been the recipient of criticism and multiple court orders throwing it out.[29] The test contains items that give points towards a conclusion of malingering if the client endorses symptoms of confusion, health issues, or mental illness. In essence the client is sick, mentally ill, and answers "true" to items that make up some of those symptoms — and he gets points for being a malingerer.

Verify the actual score. There have been cases in which a doctor's report indicated the defendant was faking. The report, however, was based on a test score which, in fact, was a passing score.

Consider ethno-cultural issues. People from different cultures respond differently to some scales. This must be taken into consideration when interpreting a scale.

Find out if the client has a low IQ. Some tests are biased and should not be given in the first place. Moreover, a client may perform poorly on some tests if he has visual or motor problems. In addition, a client with brain damage may perform poorly on tests experts claim support malingering.

A psychiatrist, and even a psychologist, may have no clue how to score a test she administered. For example, the MMPI-2 permits the doctor to have the answers the client gave scored by a computer. However, when the defense attorney asks questions about how to score the test manually or how many items in a scale must be endorsed before it is considered elevated, the expert has no clue. In fact, sometimes the expert does not even have the interpretation manual. A psychiatrist may ignore the defense expert's psychological testing, claiming it is irrelevant. How can the test be irrelevant if the psychiatrist does not *understand* it? Where in an expert's code of ethics does it suggest that the expert *ignore* evidence?

A psychologist may ignore effects of medication on testing and call it malingering. A good (free) website where one can review possible synergistic side effects is www.epocrates.com. List all of the defendant's medications; the website advises if the combination of medications causes additional impairment. In a DUI case, the defendant was taking a combination of medications that caused narcotics to stop breaking down in her system. She ran into a tree when her narcotic levels continued to increase. The prosecution dismissed the case after being given this information. One medication (Concerta) stopped the narcotics from breaking down in her system, and thus, while she had a toxic level of narcotics, it was not her fault.

If the psychologist tested the client, subpoena her to bring the instruction and interpretation manual to the deposition or trial. Why? Because a bad expert may misrepresent what the findings mean. Defense counsel needs to see the client's answers and verify the manual's interpretation. Defense counsel can ask the witness to do it in a single request. "Show me in the manual where it suggests one give the interpretation you gave in this case." If the expert cannot find it, it means it is not there. It is not unusual to read a psychological report, compare it to the raw data, and find key test results that were left out or misstated. Why do experts do this? Because they can. Most lawyers do not have hours and hours to spend

understanding a single psychological measure, so the expert gets away with it.

In the alternative, ask a psychologist to have his psychometrician (the person who does the testing and is paid at a much cheaper rate) to verify the scoring. Choose the key tests that are the most harmful and ask the psychologist to address the interpretation of those scales or tests. Ask her to verify it independently. Many psychologists simply trust the other side's interpretation of a certain scale instead of going back and reviewing the manual. There is a certain naiveté to treating psychologists that can be deadly in a courtroom. Misrepresenting the test is one of the most typical abuses. "Your client did well on the TOMMS. It's a memory test and your client has no brain damage and is competent." Translation: The TOMMS is the Test of Memory *Malingering*. Your client is not a faker.

Another ploy to watch out for is the use of old tests. Based upon what is known as the "Flynn Effect,"[30] the population is getting smarter from generation to generation. Therefore, if a doctor administers an older version of a test — which means comparing the client to a population that was normed 30 years ago — the client could test out with an artificially higher IQ. Furthermore, some experts do not administer tests in their entirety. Many manuals strongly suggest following the test instructions, including the instruction to give the entire test, not just give a portion and stop when the defendant does poorly.

Some experts will not admit when the defendant passes malingering scales. When dealing with IQ tests, watch out for experts who help with the answers. If possible, a lawyer should record the examination and psychological testing to make sure the defendant was not coached. If the opposition objects and claims raw data is not discoverable,[31] file a Motion to Compel.

Defense attorneys should take the tests. This is the best way to learn. The most common psychological battery is the MMPI-2. An attorney will understand how to conduct a better cross-examination of a doctor after taking the MMPI-2.

Meet with doctors and ask them how the results of a test can be manipulated. For example, in one case involving an IQ test, the administrator told the client to turn blocks over to create a pattern. The task was similar to putting a puzzle together. It was a timed test. The instructions indicated only two pieces should be in the correct position. The test administrator practically put the whole thing together, which put the client's score in the top 90 percent. In addition, an attorney should look for erasure marks when he examines the doctor's file. Finally, counsel should make sure the handwriting on the test matches the client's handwriting.

Conclusion

If attorneys train members of the defense team to conduct deep research on an expert, and if attorneys put effort into understanding the science, they will be able to stand their ground and expose bad experts and false science. This is a professional and ethical obligation. A client's life may depend on it.

Notes

1. The author conducted an informal poll in 2011 to determine the factors people consider when assessing whether an expert is believable.

2. B.L. Garret & P.J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1 (2009).

3. *Id.* at 1.

4. *Id.* at 2.

5. *Id.* at 24.

6. http://www.nationalacademies.org/about/history.html (last viewed April 3, 2011).

7. NATIONAL ACADEMY OF SCIENCES, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (hereinafter NAS Report) (2009). Download the report at http://www.nap.edu/catalog.php?record_id=12589.

8. NAS Report at 37.

9. http://maps.google.com/maps?hl=en&tab=wl (use satellite view).

10. The author served as a consultant on the case.

11. http://www.google.com/patents.

12. www.archive.org/web/web.php.

13. Visit this excellent site (http://scholar.google.com/schhp?hl=en&tab=ws) to look for abstracts of articles, which also provide other articles that cite the article in question.

14. Go to http://books.google.com/bkshp?hl=en&tab=wp.

15. http://www.ama-assn.org/amednews/2011/08/01/prsa0801.htm.

16. http://www.google.com/imghp?hl=en&tab=wi.

17. http://video.google.com/?hl=en&tab=iv.

18. REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 46 (2d ed. 2000).

19. NAS REPORT at 37.

20. Mike Klinkosum, *State v. Taylor and the North Carolina State Bureau of Investigation Lab Scandal*, THE CHAMPION, May 2011 at 10.

21. "Methods to reduce errors are part of the study design so that, for example, the size of the study is chosen to provide sufficient statistical power to draw conclusions with a high level of confidence or to understand factors that might confound results." NAS Report at 112. "To confirm the validity of a method or process for a particular purpose ... validation studies must be performed." NAS Report at 113. Regarding the specifications required by the FBI's Quality Assurance Standards for DNA testing laboratories, a laboratory "shall have and follow written general guidelines for the interpretation of data." NAS Report at 114-115. Finally, a laboratory "shall verify that all control results are within the established tolerance limits." NAS Report at 115.

22. *Id.* at 122.

23. *Id.* at 124.

24. *Id.*

25. http://www.cbsnews.com/stories/2007/11/16/60minutes/main3512453.shtml (last viewed Aug. 6, 2011).

26. NAS Report at 1, 2.

27. "Error rates are defined as proportions of cases in which the analysis led to a false conclusion." *Id.* at 120. "As in the case of all analyses leading to classification conclusions ... the microscopic hair analysis process must be subjected to performance and validation studies in which appropriate error rates can be defined and estimated." *Id.* at 118.

28. B.L. Garret & P.J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 48 n.46 (2009).

29. Court orders are on file with the author.

30. http://en.wikipedia.org/wiki/Flynn_effect (last viewed Aug. 8, 2011).

31. Motions to compel (and multiple orders granting the same) are on file with the author. ■

About the Author

Dorothy Clay Sims was a member of the Casey Anthony defense team and consults with lawyers in cases involving expert witnesses. Her book, *Exposing the Deceptive Defense Doctor* (referring to insurance defense experts), is available through James Publishing. Sims gives private seminars to lawyers on research, the use of technology and how to cross-examine expert witnesses.

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