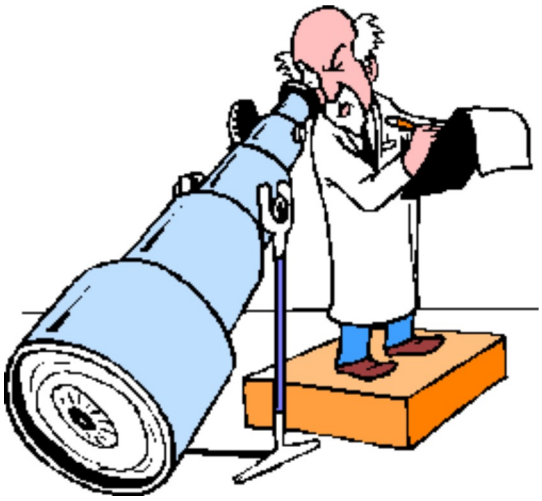
How to Win Without a Lawyer

Evidence



The Stuff that Wins Lawsuits

Evidence is the "stuff" that wins lawsuits.

Do you have enough?

Does the other side have more?

Can you get what you need into the record?

Can you prevent the other side?

Once the pleadings are in and closed, evidence is what the fight is all about ... *proving those ultimate facts you alleged to support the essential elements.*

Yes! Once you see this simple pattern, the rest is easy ... *if you can get the evidence you need to outweigh the evidence your opponent will try to bring in.*

So, getting more evidence is important.

Keeping the other guy's evidence out is equally important.

Because, if all you have to offer are legal arguments, citations to case law and statutes, and maybe a sad tear-jerking story to tell the judge and jury, *you don't have nearly enough to win!*

Lawsuits *stand* on pleadings.

They *run* on evidence!

And that's really all there is to it.

You win the game when you

- Know what evidence you need to prove your alleged ultimate facts.
- Know how to find that evidence.
- Know how to get the evidence *admitted* to the record.
- Know not to drag in unnecessary facts that aren't relevant.
- Know how to keep the other side from using *inadmissible* evidence.

And none of this is difficult to learn.

It's all common sense, really!

What you're about to learn about evidence is what you absolutely *must* know win.

It's really simple when you separate the different parts into categories, and the official rules help you with this, since the rules themselves have these categories - making it very easy to learn.

Some lawyers study the evidence rules for years without learning the simplicity to it. Many never see how the official rules are laid out by categories. Once you see the categories, each separate set of ideas comes naturally. It's all common sense.

The Federal Rules of Evidence (that control all federal courts - civil or criminal) can be found in fewer than 20 pages in official rule books. State rules are generally not much more complex.

However!

Knowing the rules of evidence *without knowing how to use them tactically and strategically against your opponent* is not enough. You need to *apply* the rules, *argue* the rules, *object* when the rules aren't followed, and *demand* that the judge enforce the rules *to-the-letter!*

Remember: To win you must

- Know what evidence you need to prove your alleged ultimate facts.
- Know how to find that evidence.
- Know how to get the evidence *admitted* to the record.
- Know not to drag in unnecessary facts that aren't relevant.
- Know how to keep the other side from using *inadmissible* evidence.

That's what you'll learn in this class.

Everyone knows "proof" is the acid test by which court battles are resolved.

Proving your case is synonymous with winning.

Proof can only come from evidence that's *admitted* - proof based on admissible evidence *and admissible evidence alone*.

One cannot "prove" his case by clever legal arguments.

One cannot "prove" his case by insisting he deserves to win!

One cannot "prove" a case by slandering one's opponent.

Cases are proven by one thing and one thing alone: *admissible evidence!*

But, not all evidence is "admissible".

Whether you're fighting a case in foreclosure, credit card debt, collection, family law, fraud, slander, or something else, you absolutely must know what this class explains.

We've all watched TV lawyers. "Objection! Immaterial! Irrelevant! Hearsay!" These are good things to say *when we know what they mean and know the proper time to say them.* On TV the lawyers seldom explain their objections. In real life, failure to explain the grounds for an objection rarely results in the judge sustaining the objection. These things are easy to learn, but they *must* be learned if you want to win.

Before going forward in this class, watch this short video clip by clicking the movie projector icon below:

Evidence rules are grouped into categories.

This makes them easier to understand and apply.

Each category includes the rules for a particular aspect of evidence. You'll see this grouping in the official rules for both state and federal courts.

Evidence Rules

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

  By learning the rules *by category* you will learn more quickly and better understand how to apply each rule, according to its category, to win your case.

  This class takes each category separately, explaining the nuts-and-bolts simplicity of each in terms you can understand and use.

  Remember. This is *not* difficult. There's a lot to learn, but it most assuredly is not rocket science or differential calculus.

  This class is not a substitute for learning the official rules that control your local court. Rules are constantly being changed. We examine the rules as they apply generally. What we say here may differ somewhat from current rules that control your local court. Check the latest version of official rules that control your local court for possible

differences.

This class explain how to the rules work.

You will learn how to understand them.

You will learn how to apply them.

You will learn how to *win* with them!

Following a brief examination of the categories, we'll take a closer look at each of the rules.

You will learn what "admissible evidence is", how to keep your opponent's facts out, how to get your facts in, and how to get the court to consider all the evidence presented in the best possible light for *your* case.

Evidence rules do one thing *and one thing only!*

Evidence rules "admit" certain facts, things, documents, and testimony to be considered by the court, and they "deny" other facts, things, documents, and testimony so it cannot be (or should not be) considered by the court.

That's *all* they are there for.

They do absolutely nothing else!

Just by grasping this simple point, you have simplified your study of evidence immensely.

This first category of rules, therefore, is "admissibility".

A statement by a sworn witness on the stand at a hearing or trial or at a deposition might tend to prove or disprove one or more issues in controversy (i.e., it might be "relevant" to the outcome of your case) and still be inadmissible for one or more reasons we discuss in this

short section.

Being relevant alone (i.e., tending to prove or disprove a face material to the outcome) is not nearly enough to make the testimony "admissible".

Other factors must be considered.

Factors of Admissibility

- Relevance - tendency to prove/disprove facts material to outcome of case
- Credibility - reliability of witness or tangible evidence
- Privilege - protection for sensitive facts (e.g., attorney-client contact)
- Prejudice - tendency to confuse, mislead, or waste time

If a party offers evidence that's not likely to prove or disprove an issue material to the outcome, the evidence is not relevant and is inadmissible by definition.

If a party offers evidence that's not worthy of being relied upon as true for one reason or another, the evidence is not credible and may not be considered.

If a party offers evidence that's privileged (e.g., communications between a client and her lawyer) the evidence is protected from being divulged to the court.

If a party offers evidence likely to confuse, mislead, anger, shock, or frighten, or if it's being offered merely to waste the court's valuable time, it may be excluded on the grounds of being more prejudicial than probative.

In each case where your opponent makes an effort to offer evidence

falling into one of these categories, object or make a motion to prevent it from getting into the record, preferably *before* the court hears or sees the evidence.

Unless a matter is admissible, it should *never* be heard by the court.

If inadmissible evidence gets heard or seen by "accident" (too often it's no accident at all but, rather, the *unlawful* effort of a lawyer trying to get away with whatever a judge and his opponent will allow) take action at once to stop the pollution. Inadmissible evidence offered "in error" should never be considered by a court or be allowed to have any bearing whatsoever on the outcome of a case.

Of course, once it's in, *it's in!*

You can't *unring* a bell!

(More on handling improperly offered evidence further on.)

Only admissible evidence should be heard, seen, or considered.

Courts are constantly ruling on admissibility of evidence - at trial and at every phase of the proceedings leading up to trial. Evidence battles are the biggest part of the word war.

It's not uncommon for unscrupulous litigators to try to minimize or hide the importance of your excellent, powerful, case-winning relevant facts by introducing facts, painting pictures, and stringing strange scenarios onto the courtroom stages - facts having nothing whatever to do with the facts that will determine the outcome of the case. This is tactical only. It's done solely to confuse judge and jury *and to get you off your game*. Be always on-your-toes, ready to object, ready to move the court, anticipating your opponent's next

devious trick to muddy the evidentiary waters! Don't let the enemy take any ground at all! Object to it as soon as it begins. And, if any of it gets out of the proverbial bag, move the court to take remedial measures to see it does not get into the official written record of the case!

You'll learn much more about this in the class on objections. For now, let's finish this class on evidence before moving on.

Keeping the other side's offers of evidence out is just as important (and many times *more* important) than getting your own evidence in.

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

Your #1 job is staying vigilant to control your opponent's offered facts while persistently painting an evidentiary picture favorable to your own cause.

Rulings on Evidence

Objections

You *must* object.

When inadmissible evidence is offered, you must begin to speak out as you come up out of your seat (if you're sitting at the time). You must speak forcibly so as to stop your opponent's efforts to circumvent the rules.

This *is* an axe fight!

You dare not allow your opponent to introduce inadmissible

evidence.

Even if a motion to cure keeps it out of the official record, the judge and jury will hear and/or see the evidence, and ruling or no ruling the damage to your cause can be fatal and irremediable.

After losing your case unnecessarily, it's a sad day when you must go to great lengths to take the judge up on appeal only to find out that *you* were the one who could have stopped it. The judge may make necessary rulings to keep it out of the official record. The judge may sustain your objections. But, if the jury hears or sees what was offered (perhaps you were worried about whether you put enough quarters in the parking meter outside) the appellate court's hands will be tied. Unless the judge makes an error, there is no ground for appeal. You cannot appeal on the grounds that opposing counsel broke the rules. (All this and more is explained in the class on appeals later on.) The rules simply don't work that way.

You *must* object!

You must object in a *timely* manner.

One might say in an *instantaneous* manner.

If you can read your opponent's mind and know beforehand that he's going to try to get something in that should be kept out, jump to your feet *before* he opens his mouth!

Objection!

The judge will look at you like you've lost a gear or two, but you will have saved the moment by preempting your opponent's intent.

And, once a witness begins to answer an improper question by your opponent, you dare not allow the witness to keep on talking. Jump up and down. Wave your hands in the air. Pick up a book and slam

it on the table in front of you. *Do whatever it takes to keep inadmissible evidence OUT!*

Object on the spot!

Object preemptively, if you can.

But!

Merely saying "Objection!" like you hear lawyers on TV isn't enough. The judge (and your opponent) will demand to know the grounds for your objections, and here is where it pays to learn the evidence rules.

Unless the legal grounds for your objection is clearly apparent from the context, you will be required to explain. When objecting, state the grounds with mention of the official rule, if you remember. If you don't remember the rule word-for-word, do the best you can to explain what you think the rule says and why the rule should be applied to keep the offered evidence out.

Say "Objection!" quickly. Then slow down, take a deep breath, and prepare to explain the grounds carefully and clearly if called upon to do so.

For example, if the lawyer on the other side begins to ask his witness leading questions, object at once. Don't let the witness answer! One may not "lead" his own witness. It's against the rules. Your opponent cannot help his witness answer questions by giving hints what the answers are. If you don't object, you are giving your opponent powerful points that should never be surrendered without an evidentiary fight!

As soon as you hear your opponent say, "Isn't it a fact ... " jump to your feet, drop a book on the table, wave your arms in the air, do all

in your power to prevent the question from being asked completely and, if it's asked, to prevent the witness from answering.

If you allow, "Isn't it a fact you were walking your dog on the street where you live, minding your own business as you always do, when the ugly and disreputable defendant attacked you brutally with an umbrella, knocking you to the ground, and causing you to suffer multiple abrasions and contusions that resulted in $755,386 in medical bills?" *then you might as well give up!*

That's not only one humdinger of a leading question. It's improper, because it is leading, and one cannot lead his own witness ... i.e., he cannot ask a witness questions that suggest the answer.

Prompt objections keep improper questions *and* witness' answers from being heard.

You must remain wide awake at all times, listening with all ears!

"Objection! Leading!"

If the judge is also awake, your objection will be sustained. The other side will be ordered to use direct questions only to interview his own witness, as the rules require.

Cross-examination, i.e., using leading questions to interrogate a witness, is allowed only when you're examining the opponent or his witnesses or, in rare cases, where your own witness has turned hostile.

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

Remember, you cannot appeal a trial court's decision based on a judge's exclusion or admission of evidence if you don't timely object *and state proper grounds for your objection.*

That's why understanding evidence rules is critically important.

If you state an objection and proper grounds, and if the judge overrules your objection, *renew* your objection then and there *without delay*! This preserves the judicial error on the record and puts the judge on notice you are setting the stage for taking him up on appeal if he enters judgment against you at the end of the fight!

Offers of Proof

If you begin to offer evidence and, before you get it before the court, the other side objects and the court sustains the objection, you *must* move the court to allow you to make clear on the record what the evidence was, i.e., what it was *going to be*.

This is called an offer of proof.

If you don't get your evidence in and don't offer proof, you have nothing to appeal if the court rules against you. The record will not show what the evidence would have been, because you didn't make an offer!

Whenever your attempt to get evidence in is prevented by the court's sustaining your opponent's objection, be certain to make an offer of proof. The offer states what the evidence would have been and what you intended to prove by it. Then, if appeal must be taken to a higher court on the basis you were denied your right to get admissible evidence in, you have a record to show what the evidence was (or would have been).

In jury trials, offers of proof should be made outside the hearing of the jury. This is often at a bench "sidebar conference" (with the court reporter bringing her steno machine close to take down every word whispered by the parties and the judge).

In some cases, where an offer promises to be extensive and fraught with heated arguments from both sides, the jury may be excused. It's common for the jury to leave the room while the party offering proof is allowed to question one or more witnesses outside the jury's hearing until the judge can determine if the offered proof is relevant and admissible.

Hearing of the Court

It is entirely *improper* for a lawyer to ask questions he knows will elicit inadmissible testimony.

It is against the rules in every jurisdiction!

Federal rule 102(c) is clear on the subject, stating proceedings before the court should be conducted, to extent practicable, to prevent inadmissible evidence from being suggested to the court "by any means", such as by offers of proof, making statements, or asking questions.

It is wrong!

If it happens in your case, object loudly!

Make your record for appeal!

Making Your Record

Objections are proper *only* when failure to object would prejudice a party's substantial rights.

Objections are made to preserve judicial errors for appeal as well as to prevent the court from hearing what it should not hear, evidence that might confuse issues in controversy, mislead the court, or result in undue delay, waste of time, or needless repetition.

Objections keep out what should stay out.

Objections may also let in what should come in.

Objections establish a record for appeal in case judicial errors result in manifest harm.

There is no other reason for objecting.

Objecting for the sake of objecting or to disrupt an opponent's train of thought (too-frequently practiced by unscrupulous litigators) is contrary to the letter and spirit of the rules. It will get you in hot water. Not good!

It's perfectly permissible and highly recommended to object whenever a substantial right is threatened with real prejudice (i.e., a consequence that may affect the outcome of the case).

Make your record!

Object timely and state your grounds for objection.

However, objecting for any other reason is improper and will work against you in the long run.

What goes around comes around.

Preliminary Questions

In determining admissibility of evidence, courts rule on qualifications of persons to be witnesses and existence of privilege.

These are preliminary questions.

To reach such a determination, it may be necessary to consider facts not otherwise relevant, i.e., facts relating only to the qualification of a witness or a relationship (e.g., attorney-client or priest-penitent).

In such cases, otherwise irrelevant facts are permitted to be heard but, generally, are heard *only* by the judge. The jury will be removed from the courtroom during such questioning.

Remainder of Writings or Recorded Statements

If one party introduces any part of a writing or recorded statement (e.g., a deposition transcript, audio or videotape recording, affidavit, or document of any kind) the opposing party may introduce any other part or all of same that ought, in fairness, to be considered at the same time.

One cannot introduce part of such a writing or recorded statement and withhold the rest.

If you have a deposition transcript, for example, with some testimony in your favor and some testimony decidedly *not* in your favor, take care when you offer the part you want to come in.

By offering any part of a writing or recorded statement you open the door for the other side to offer any part of it or every last bit!

This is not about getting noticed or receiving a notice.

This is about getting a judge to enter an order taking notice of the reliability of some fact you might otherwise be unable to get into evidence or, at least, have to work very hard and spend a lot of money to get in.

With judicial notice the fact is established for all purposes, and that's the end of it!

This is one of the most powerful yet seldom-used and least-understood gadget in any litigant's box of case-winning tools.

Every jurisdiction allows it, however few lawyers use it. This is because, perhaps, it makes the judges work harder. Lawyers have a vested interest in not upsetting judges they'll be required to appear before next week!

That said, this class isn't written for lawyers afraid of upsetting judges!

You don't have have to appear before the same judge week-after-week. Your livelihood doesn't depend on keeping on the good side of a judge.

Learn judicial notice and *use* it to advance your cause in court!

If we have to make a judge work a bit harder to win our case, we should not hesitate to move the court to take judicial notice.

But, what does it mean?

Take judicial notice of what?

Allow me to digress by telling a story. It was one of my first encounters with a real, live judge. My client moved out of her apartment, cleaned the floors, walls, inside of the oven, everything. I saw the photographs. That place was spic 'n span, tidy as a tick, and clean as a pin.

The landlord, however, wouldn't return her security deposit.

Hmmm.

I checked out the facts as best as I could and decided to sue the landlord for return of the security deposit.

As I saw it, the landlord had no leg to stand on. I had photographs. I

had witnesses who helped clean the apartment. The place looked good, probably better than the day my client moved in.

When we got to court, the judge was impressed with how clean the place was, but landlord complained, "She cut down my beautiful Brazilian Pepper tree, judge!"

Ah! There at last was the root of the defense. The legal lynch pin!

My client had, indeed, cut down the plant - *a known botanical nuisance in Florida where this case was filed*.

Clearing my throat professionally (of course) I said, "Your honor, I move the Court to enter an order taking judicial notice of the well-known fact that the Brazilian Pepper is a botanical nuisance in Florida, having no commercial value sufficient to justify retaining my client's security deposit. The plant is, as a matter of law, worthless."

I'd never moved a court to take judicial notice before. I had no idea what to expect. To my delight, the judge leaned back in his stuffed leather chair and talked for what seemed a good half-hour explaining his own experience with that pesky nuisance plant and, at last, granted my motion, explaining to the landlord how he could not be heard to complain about its destruction nor be permitted to retain her security deposit upon the pretext that plant had any monetary value whatsoever.

Judicial notice is an order of the court adjudging certain kinds of known facts on the record of the case, provided the facts are so generally known within the court's jurisdiction and capable of accurate determination by resort to sources whose accuracy cannot reasonably be questioned that the fact need not be otherwise "proved".

Such facts can be judicially noticed - and that's the end of the issue!

A famous murder case reportedly won by Abraham Lincoln, when he was a lowly backwoods lawyer in the farming country of Illinois, turned on the testimony of a man who claimed to witness the killing. The witness sure of his recollection, so Old Abe put him to a difficult test. The Rail Splitter asked the man precisely how far away he stood at the time of the crime and how clearly he could identify the accused.

The witness testified although he was several dozen yards away he could see clearly by the light of the full moon.

Abe asked for a brief recess and consulted the Farmer's Almanac before returning to the courtroom. He then moved the court to enter an order taking judicial notice that, based on the Farmer's Almanac (a reliable source), on the night of the murder the moon was new (i.e., no moonlight at all).

The accused went free!

The court's order taking judicial notice was not based on opinion.

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

The court's order taking judicial notice was based on a source whose accuracy could not be reasonably challenged on the point.

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

A court may take judicial notice whether a party moves it to do so or not. Courts have discretion whether to take judicial notice of some matters once moved to do so, however in other matters it has no discretion and *must* take judicial notice once a party makes the

motion.

This distinction is important and will now be examined closely.

When a Court "May" Take Judicial Notice

As stated above, a court may on its own motion (i.e., *sua sponte*) enter an order taking judicial notice of any undisputed fact or law that applies to the case.

This happens rarely, however it does happen.

The court need not announce in advance it is taking judicial notice. It may merely make a statement, such as, "The court is aware that the highway in question runs generally north and south through this county," or such like statements to move the parties along.

The court may, *sua sponte*, take judicial notice of the essential elements of a cause of action, for example, or that a certain date fell on a weekend, or anything beyond dispute that can be ascertained from sources whose accuracy cannot reasonably be questioned.

More often, the court will take judicial notice in response to motions filed by parties to lawsuits. However, unless the matter sought to be judicially noticed is one the court has *no discretion* to deny, the court may refuse to take judicial notice.

Courts have discretion and need not take judicial notice of facts about which reasonable persons might disagree, e.g., the value of wearing striped neckties in public, whether The Beatles were great musicians, and what kind of wine pairs best with seafood. These types of matters cannot be settled by the court's taking judicial notice (and it would be an appealable abuse of the court's discretion to do so).

When a Court "Shall" Take Judicial Notice

Courts do *not* have discretion to refuse to take judicial notice of facts that are beyond dispute.

Matters about which reasonable persons cannot disagree include the phase of the moon on a particular date, the speed limit on a particular stretch of highway, the number of letters in the English alphabet, or the controlling effect of a statute or rule of court in a particular case.

If the matter sought to be judicially noticed can have no bearing on the outcome of the case, on the other hand - regardless of how certain it may be - the court is not required to take notice. Only if a fact is relevant to the case at hand *and* beyond dispute must the court take judicial notice.

If moved to do so a court *must* take judicial notice of such things as acts and resolutions of Congress or the State Legislature, the law of any state, contents of the Federal Register, laws of foreign nations or organizations of nations, official acts of any branch of government, rules of court, duly enacted ordinances, and facts generally known and not subject to dispute (e.g., the value of a Brazilian Pepper tree). Such are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

The party moving for judicial notice must, as is required with all motions, give notice by providing a copy to the other side. In addition, with motions to take judicial notice, supplemental information must be provided to enable the adverse party to prepare to argue in opposition.

The court is *required* to take judicial notice of undisputable facts

relevant to the case before it *and nothing that is not undisputable and relevant*.

Effect on the Jury

All matters judicially noticed should be communicated to the jury.

The jury should be instructed to consider judicially noticed facts as true for all purposes and to take such facts into consideration when arriving at a decision.

The jury has no discretion to disagree with a matter that's been judicially noticed as fact.

Use and Practice

Like everything else in life, judicial notice can be overused to the point of jeopardizing your case.

There's no gain to be had by unnecessarily putting a judge to the trouble of taking judicial notice of matters only remotely related to your cause.

On the other hand, if the establishment of an undisputable fact relevant to the outcome of your case will improve your chances for success, you are unwise to let the chance go by.

If it's relevant to your case that a certain corporation was administratively dissolved by the Secretary of State prior to its suing you, move the court to take judicial notice of the fact - providing opposing official documentation from the Secretary of State so they may consider the facts and oppose you, if they have a leg to stand on. An official document from the Secretary of State should be conclusive in such cases, and the court will be without discretion to

refuse.

Cases can be speeded along and the delays and heated arguments over discovery can be avoided by moving the court to take judicial notice of such facts as are undisputable and relevant.

Why spend the time and money to "prove" what cannot be reasonably disputed, when the court *must* take judicial notice if moved to do so?

A presumption of solid ground beyond the edge of a cliff is not a "legal presumption".

A legal presumption is one that arises from facts *based on law*, not mere speculation.

Legal presumptions are not mere guesses.

A particular fact may be "presumed" once one or more other facts are established with a degree of legal certainty.

This is what we mean by a legal presumption.

A presumed fact is "established" for all purposes in a case, unless the presumption can be overcome by other facts.

Of course, the evidentiary value of a presumption rides on the credibility of the underlying facts on which it is based. If the underlying facts are solid, the presumption is secure. If the underlying facts are shaky, however, the presumption may be easily overcome by a rebuttal based on evidence that is more reliable.

Rebuttable inferences may be refuted or ignored if persuasive admissible evidence undermines their reliability.

Some presumptions arise as a matter of law.

Others arise by inference, such as circumstantial evidence so-

called. You will learn that circumstantial evidence really isn't "evidence" at all. It is only a controlled guess, and it is strictly controlled by rules that are too often ignored by judges and juries alike. More on this later.

The effect of presumption often decides the outcome of a case, however too many cases are wrongly decided because inferences were permitted to be treated as presumptions ... and an inference is not a presumption any more than an apple is a pear.

To survive the word-war of litigation and walk away a winner, it's critically important to understand the difference between an inference and a legal presumption. They are often confused, but they are not at all the same.

Inference

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

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

For example, suppose you forget to walk your dog one day. The dog leaves a little present for your wife to discover in the middle of the kitchen floor. "How could you?" she screams as you reach for the TV remote to turn up the volume. "You refuse to walk the dog on purpose! You don't love me anymore!"

In fact, you may love your wife very much.

You simply have other things on your mind and occasionally forget to walk the dog.

It doesn't mean you don't love your wife or that you refuse to walk

the dog on purpose.

However, *you did not walk the dog!*

And, the little present on the kitchen floor is an unavoidable fact.

Inferences *will* be made!

Judges and juries are human, too.

We all make inferences from facts.

We do it unconsciously.

Sometimes, however, we infer new "facts" from known facts then infer additional "facts" from our newly inferred "facts".

The resultant departure from truth is often catastrophic. Divorce or even the death penalty, depending on the facts and the setting.

And inferred "fact" is *not* a fact. It is a guess. A hunch. An inference!

Presumption

A presumption, on the other hand, is another "non-fact fact" that may be established by operation of law.

Unlike an inference that results from unrestrained human imagination, a presumption is the product of court rules and legislative enactments that decree that certain "facts" can be established from other facts *as a matter of law*.

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

If these two facts are established conclusively, the Carpenter Presumption kicks in to require the party favored by the decedent's will to rebut the presumption by proving the decedent was not unduly influenced, i.e., that the testament was a genuine expression of the decedent's "will" and conveyed exactly what the decedent wished.

The effect of such a presumption is to shift the burden to prove.

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

Burden shifting may not require a party to "prove" his case. It may suffice merely to present some reliable evidence to "meet" the presumption without overcoming it. This burden is sometimes called the burden of producing evidence. Whether a particular legal presumption shifts the burden to prove or merely the burden of producing evidence, the effect is the same.

Presumptions shift burdens.

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

Many presumptions, however, are rebuttable.

Relevance is connection.

Every fact offered as evidence must be connected to the outcome in some way.

If it's reasonably likely a fact will affect the outcome of a case, the fact is relevant.

If a fact is not connected to the outcome in some determinative way, it is not relevant (i.e., if it's not likely to affect the final decision).

If a fact is not relevant it is inadmissible.

There are no exceptions to this rule.

Simple as that brief explanation is, the concept of relevance is frequently misunderstood, even by experienced lawyers and judges.

YOU will not misunderstand.

YOU will not allow your opposition to offer irrelevant facts to muddy the evidentiary waters of your case and confuse the court!

The Federal Rules of Evidence explain that relevant evidence is evidence that tends to prove or disprove a material fact.

But, what is a "material fact"?

Well, we already explained that. It is a fact that is reasonably likely to affect the final decision of the court.

Suppose you were involved in a traffic accident. You rear-ended another car. You were wearing flip-flops on your bare feet. You were also carrying your girlfriend's picture in your wallet.

The flip-flops might have caused your feet to slip off the brake pedal.

The picture in your wallet, though you may have been daydreaming

about your girlfriend at the time of the accident, cannot *reasonably* be considered to have any bearing on the matter. The presence or absence of that photo in your wallet at the time of the accident cannot *reasonably* affect the final decision of the court as to your liability for the accident.

The fact you were wearing flip-flops may be material.

The presence of your girlfriend's picture isn't.

See?

I keep telling you this isn't rocket science!

If a fact is not "material", it can't be relevant.

If it's not relevant, it isn't admissible.

Think of the tendency to prove or disprove something that may affect the outcome of the case. If it can prove or disprove, it is relevant. If it can't, it isn't.

Far too much irrelevant "stuff" is offered in legal proceedings - either to confuse the court, embarrass the opponent, or just because the litigant doesn't know any better! It can only make a case harder to win!

Don't do it.

Don't allow it!

"Objection, your Honor! Relevance?"

A multi-million dollar capital management company depended on certain trade secrets. The CEO colluded with the owner of a competitor company. The two agreed to create a third company. The competitor promised to pay the CEO a small fortune if the CEO would bring his company's trade secrets to the new company. So,

the CEO left his once-successful employer and started the new business with a great deal of financial support from the competitor who looked forward to owning the trade secrets, while the CEO looked forward to enjoying the fortune he was promised.

The victim business filed a lawsuit to recover damages from the CEO and the competitor. The defendants tried to introduce facts related to the owner of the victim business having prior dealings with a man who'd gone to prison six years earlier for securities fraud. They tried to argue because the owner of the victim business once dealt with a man who was a convict that the victim business should not be permitted to sue the conspirators!

Their defense stood on the ridiculous theory anyone who ever makes a mistake by dealing with someone who later goes to prison should not be permitted to sue for damages suffered at the hands of thieves. In other words, it's alright to steal from someone who once knew someone who was a thief. They had no other defense.

The court finally ruled that such evidence was irrelevant and would not be admitted. It could not tend to prove or disprove any material fact. It could not prove or disprove whether the CEO and his conspirator stole the victim company's trade secrets.

Be on guard for such sidewinding tactics!

Prejudice

Prejudice may exclude otherwise relevant, admissible evidence!

Where the probative value of evidence offered (i.e., its ability to prove or disprove a material fact) is substantially outweighed by the likelihood of confusing the issues, misleading the jury, wasting time, or unnecessarily introducing cumulative evidence, courts may

exclude otherwise admissible relevant evidence.

For example, in the stolen trade secrets case mentioned above, one of the defendants died from a gunshot wound. He was found dead in a pool of blood by the side of his car in the parking lot of the court reporter's office. He was scheduled to give his deposition that day.

The police said it was suicide.

A jury could imagine otherwise.

Clearly, the fact that one of the defendants died from a gunshot wound in such an improbable place as a parking lot (whether the wound was self-inflicted or not) might be probative of material issues related to his part in the conspiracy to misappropriate trade secrets, however it might also shock and mislead the jury.

Whether prejudicial evidence should be admitted is with the discretion of the judge.

If you see it, and it looks spooky, object on the grounds of prejudice.

"Objection, your Honor! The probative value of the offered evidence is outweighed by the near certainty that it will shock the jury!"

Relevant evidence is often excluded when a party offers multiple papers or multiple witnesses testifying to substantially the same thing. The fact to be proven has been so sufficiently proven already that further introduction of evidence on the same point can serve no purpose other than to make that party's case seem sounder than it is.

A dozen witnesses saying a driver was drunk may be more than enough, where a half-dozen have already agreed. The point to be proved is that the driver was drunk. If a party is permitted to put on dozens of witnesses to prove this single point, it tends to mislead the

jury by masking the fact that the other driver ran a stop sign!

Offering multiple papers or witnesses should be opposed by a motion to limit the evidence. (See motion *in limine* later.)

Character Evidence

Misunderstanding in this area causes many errors.

In evidence law, "character" refers to an individual's reputation.

Reputation means what others in the community think of the individual, his reputation for honesty or its opposite.

What the individual may have *done* in the past (i.e., his prior bad acts) is *not* the same thing as "character" in the eyes of evidence law.

Character of Parties

In general, evidence of the character of a party (or accused in a criminal case) is inadmissible to prove the party acted in conformity with his character (i.e., in conformity with his reputation in the community).

If Sam Sneaky is being sued for theft or conversion, the plaintiff cannot bring witnesses to testify as to Sam's reputation for being "sneaky". One may be sneaky and not be a thief. Sam's character (reputation in the community) cannot be raised by his opponent to prove Sam stole or converted plaintiff's property.

If a party offers his own character (community reputation) in support of his position in a case, the rules permit the other side to put on contrary evidence of the party's reputation (community reputation) to rebut his claims.

So, if Sam Sneaky calls his grandmother to testify, "Sammy was always such a sweet little boy. He used to bring me wildflowers when he came to visit," he opens the door for his opponent to bring witnesses to tell the court how sneaky Sam really is ... something they could not do but for Sam's opening the door by volunteering to put his character (community reputation) into controversy.

Character of Victims

The character of victims, generally, is admissible only if offered by the accused.

As already mentioned, once a party offers his character as evidence, the other side by rebut with contrary evidence.

Character of Witnesses

The character of a witness is generally admissible only to demonstrate the witness' reputation for truthfulness or untruthfulness.

Evidence that a witness has been convicted (not merely arrested) for a crime is admissible if the crime

- Was punishable by death
- Was punishable by more than one year imprisonment (felony)
- Involved dishonesty regardless of duration of imprisonment

More on witness testimony later in this class.

Prior Bad Acts

Evidence of prior bad acts is generally inadmissible to prove a person acted in conformity with alleged prior bad acts.

Alleged prior bad acts may be admissible to prove other things but not, generally, to prove a party acted the same way with regard to issues now on trial.

Proving Character

Proof of character, good or bad, may be offered by testimony of opinion or a person's reputation in the community.

It is permissible to inquire into specific instances of past conduct to prove character (within the scope of the rest of the rules relating to character).

Habit and Routine

Evidence of a person's habit or the routine practices of an organization may be admitted to prove conduct of a person or organization conformed with the habit or routine of that person or organization.

Habit and routine, however, are not "character" based on reputation.

Habit and routine are *facts*.

For example, if it was the habit of a particular party to take a cab home from his local tavern when the bartender refused to serve him past closing, that habit is admissible to prove the party took a cab home from the tavern on a particular night.

Similarly, if the routine practice of a business organization was to deposit payroll taxes at a particular bank on a particular day of the week, evidence of this practice is admissible to prove the business organization followed this routine on a particular occasion.

Proof here has nothing to do with reputation or character.

Evidence of habit or routine is based entirely on fact, not speculation or opinion of witnesses.

Habit and routine evidence is admissible to show conformity with habit or routine, while reputation or character evidence is not allowed to prove that a person or organization acted in conformity with reputation or character.

Subsequent Remedial Measures

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

Suppose the owner of an apartment complex replaces the stair treads on a stairway where a tenant fell to his death.

The treads were replaced soon after the tenant died.

Common-sense might urge us to consider this an admission of guilt. Or, at least, it *appears* to show admission of responsibility for the unfortunate death.

We naturally think, "If he'd replaced the treads before the accident, that poor fellow might still be alive."

Upon this we might assume the owner was under some legal duty to fix those stair treads and that his failure to do so sooner is evidence of his negligence.

Not allowed!

First, the landlord may have had no duty whatever to replace the treads. Building codes or other controlling law may say nothing about stair treads.

Perhaps the landlord replaced them to prevent further injury to

others.

The fact he replaced them does not allow us to conclude his failure to do so sooner was the proximate *cause* of the death.

To admit evidence of his efforts to replace them *after* the accident might be misconstrued by a jury, so the rules exclude evidence of subsequent remedial measures.

Second, our system of law does not wish to discourage individuals from taking remedial measures when safety to others is in jeopardy.

To allow evidence of remedial measures to be used as proof of liability for injury would encourage people to leave things in a dangerous condition. If replacing stair treads is going to be used against the landlord, why would he make an effort?

Public policy dictates that remedial measures are inadmissible to show negligence or culpability.

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

As grandfather used to say, "There's more than one way to skin a cat!"

Similarly, payment or offers to pay medical or other expenses resulting from an injury are not admissible to prove liability for the injury. Public policy outweighs the probative value of such evidence for the same reason stated above. We do not wish to discourage people from doing the right thing!

Also, evidence a party did or did not carry liability insurance is not admissible to prove such person acted negligently or wrongfully. It may come in for another purpose, e.g., proof of ownership or compliance with law, but it cannot be used to show negligence or wrong.

Offers of Settlement or Compromise

For similar public policy reasons, evidence that a party offered to settle is not admissible to prove the party's liability for damages.

This is an important, because allowing evidence of settlement offers or discussions at mediation conferences to come before the court can result in mistrial.

It is forbidden.

Anything that happens during mediation is *not* to be heard by the court.

It is strictly confidential and "off the record".

The only exception is where parties agree to settle and memorialize their agreement in writing, only to have one of the parties back down. Then the disgruntled party may tell the court a binding agreement was reached, and the other side refused to perform.

Otherwise, settlements and offers to settle are off-limits!

Privilege is the right not to testify or prevent another from testifying or offering evidence protected by a legal privilege.

Privilege is a powerful right and belongs to the person claiming it ... *not person challenging it*.

A wife, for example, may have a privilege to prevent her husband

from testifying against her. Her husband may have the same privilege not to be required to testify against her.

In both cases, husband and wife have a privilege. Either can assert their privilege to prevent the other from testifying *as to confidential communications between them.*

Note carefully the foregoing italicized words.

The husband-wife privilege does not apply to communications that were not confidential, such as discussions over the card table with friends at a bridge party!

The client of an attorney owns a privilege to prevent his lawyer from testifying *as to confidential communications between them.* If the client chats with his lawyer while playing a round of golf with two other people who are not part of the lawyer's firm, the privilege does not attach, since the communications was not confidential.

The client, not the lawyer, owns the privilege.

Lawyers are forbidden by bar rules from testifying about communications with their clients, however this is not a privilege issue. *The lawyer has no privilege to prevent his client from testifying.* If the lawyer wishes to cop a bag of cocaine from a client, and the client later tells authorities what his lawyer said, there is no rule to stop it, and the lawyer cannot complain, because the lawyer has no privilege. Only his client possesses the privilege.

Indeed, a client may waive his privilege and compel his lawyer to testify about their confidential communications, if he wishes - even if this gets his attorney in hot water with the bar or law enforcement. Lawyers beware!

Many privileges are traditional:

- Spouse-Spouse
- Attorney-Client
- Priest-Penitent
- Doctor-Patient

However, different jurisdictions have their own unique twist on privilege so, as emphasized again and again in this course, always rely on the most recent version of the *official* rules for details.

The question is, "Who *owns* the privilege?"

Fifth Amendment

The most powerful privilege of all is the privilege against self-incrimination provided by The Fifth Amendment to the United States Constitution.

However, this is not well understood.

Many people make the mistake of believing they can "stand on the fifth" no matter what questions are put to them. Doing so can land you in jail for contempt.

The Fifth Amendment privilege against self-incrimination does not give us an unqualified right to remain silent when questioned in court. The privilege *is* qualified. It applies *only* where testimony related to particular facts might tend to give law enforcement an opportunity to charge you with a crime. Such testimony is said to be "incriminating". The Fifth Amendment allows us to refuse to answer questions about facts that "might tend to incriminate" us - facts having a foreseeable tendency to result in criminal charges.

If the information sought by questioning in court relates only to a

breach of contract, an act that has no criminal consequences, one cannot refuse to answer by pleading the Fifth. Doing so may result in charges of criminal contempt and time in jail until the witness decides to talk.

The privilege disappears completely if a witness is offered immunity from prosecution, because the threat of self-incrimination has been removed.

Finally (though contrary to ancient law) unless one has a clear right not to testify, refusing without cause may be used as evidence of guilt.

Privilege is sometimes waived automatically. In some jurisdictions, a man on probation or parole may not refuse to testify on the grounds it would tend to prove he violated the terms of his release.

Don't assume you can claim the Fifth and refuse to answer any and all questions put to you. It doesn't work like that.

Other Privileges

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

- Refuse to be a witness
- Refuse to disclose any matter personally known to us
- Refuse to produce any object or document in our control
- Prevent another from testifying, disclosing, or producing

The following is a general description of a few common privileges.

General descriptions in this class are offered as a guide to the official rules, not as a substitute for them. Rules change frequently.

Always consult current sources for details

Lawyer-Client

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

Clients have a privilege to prevent attorneys from testifying as to any fact discussed with an attorney in confidence.

By "confidential" the rules include any communication not intended to be heard by persons other than the attorney or his staff (where the staff's knowledge was gained in furtherance of the attorney's legal services).

The privilege belongs to the client.

The privilege belongs indirectly to the client's lawyer, who may invoke the privilege on behalf of his client.

The privilege belongs to the client's guardian (if the client is mentally or otherwise legally incapacitated), to the personal representative (executor) of the client's probate estate if the client is deceased and, in the case of successor organizations or trusts, to successors in interest.

The privilege does *not* exist if a client seeks legal advice from an attorney in preparation for a criminal scheme, fraud, or other illegal enterprise.

The privilege does *not* exist if a client is suing his lawyer.

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

communications are *not* privileged.

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

Psychotherapist-Patient Privilege

A privilege arises when any person consults with or is interviewed by a psychotherapist under conditions creating a reasonable expectation of confidentiality.

The psychotherapist must be one of the following for the rule to apply:

- Licensed to practice medicine
- Licensed psychologist
- Licensed clinical social worker, family therapist, or mental health counselor
- Treatment personnel of a licensed treatment facility

Licensing gives rise to a reasonable expectation of privilege.

There are, however, specific exceptions where

- Communications in proceedings to compel hospitalization
- Communications in the course of a court-ordered examination
- Communications when patient raises his mental condition as element of his claim or defense

In these cases, the privilege may not attach.

Psychotherapists are legally obligated to report communications

made by a patient when the patient states or suggests he intends to commit a violent crime. This exception does not apply to communications about a past crime but only crimes he indicates he intends. This exception protects the public from foreseeable harm.

(The same exception applies to attorneys who learn from a client that the client intends to commit a violent crime.)

Husband-Wife Privilege

Spouses own a privilege (during marriage and after divorce) to refuse to disclose and prevent their spouse from disclosing communications made during marriage with a reasonable expectation of confidentiality.

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

There is *no* privilege in a civil proceeding brought by one spouse against the other!

There is *no* privilege in a criminal proceeding where one spouse is charged with a crime against the person or property of his or her spouse.

Priest-Penitent Privilege

Everyone owns a privilege to refuse to disclose and prevent others from disclosing communications to a "member of the clergy".

Clergy is a term broadly applied to priests, rabbis, and ministers of any religious organization or denomination commonly referred to as a church.

As with other privileged communications, the communication must be in confidence, i.e., with a reasonable expectation that the communication would not be shared with third persons.

Finally, communications must be for spiritual counsel and advice.

If you're playing golf some Sunday afternoon and divulge to your local parish priest that you murdered your Uncle Mort, there'll be no privilege. If facts are not communicated for the purpose of seeking spiritual counsel and advice, they are not protected by this privilege.

Accountant-Client Privilege

In many other states this privilege applies if communications are made in confidence with a certified public accountant or public accountant.

The company bookkeeper or your private secretary who balances your checkbook does not qualify.

Privilege does not attach if the communications were in contemplation of a crime or fraud.

Waiver of Privilege

Special care must be made to avoid waiving these privileges.

If one foolishly communicates to others any part of a privileged matter, the court may deem that he waived his privilege.

As stated above, unless facts are communicated "in confidence" under conditions reasonably giving rise to an expectation of confidentiality and privacy, there is no privilege in the first place.

Privilege is always deemed to be waived by voluntary disclosure.

On the other hand, one is not deemed to have waived a privilege if he is compelled to disclose a matter or does so without having been given an opportunity to claim the privilege.

Courts may wrongly compel a witness to testify, even when there's a *bona fide* privilege.

A spouse may be questioned at a preliminary hearing without being told she has a right to refuse.

Evidence contained in such statements may be be inadmissible as against the holder of the privilege (though, of course, the injury of its being heard may be fatal).

Drunk persons cannot testify.

Sober persons cannot testify about matters witnessed while they were drunk.

The gist of competence is reliability.

Children who talk to their toys cannot testify.

No person (especially including lawyers) lacking first-hand knowledge of the facts of a situation may testify about those facts. If they don't have first-hand knowledge, their testimony is not reliable, and they are said to lack competence to testify.

Persons who refuse to give an oath or affirmation to tell the truth, and thus subject themselves to possible perjury penalties if they lie, are not permitted to testify. Again, the issue is reliability. If a person is unwilling to give an oath or affirmation, it may be because that person *intends* to lie or is afraid he or she will be compelled to tell the truth about something they'd rather hide from the court. So, if a potential witness will not give a oath or affirmation, they lack competence.

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

Similarly, persons unable to discern between truth and imagination (e.g., schizophrenics and young children) are excluded from excluded on the grounds of competence.

The presiding judge cannot testify.

Jurors cannot testify.

Lawyers representing parties in a suit cannot testify. Note carefully!

Lawyer testimony is a leading cause of good people losing in court!

Unless a lawyer has first-hand knowledge, he lacks competence to act as a witness - yet they do it all the time!

It not only violates the rules of evidence, it also violates the bar rules of professional responsibility and code of ethics.

If opposing counsel insists on providing the court with facts (other than in opening and closing statements when he may instruct the court, "The evidence will show ..." or "The evidence has shown ...") jump violently to your feet! Object to high heaven! Insist that the attorney be sworn or shut up!

If lawyer insists on being a witness for his client (as many do when they think they can get away with it) he should be disqualified as counsel for his client and reported to the bar. A lawyer cannot serve as both counsel and witness in the same case.

Though clearly against the rules, it happens all the time.

Don't let it happen in your case!

Impeachment

If a witness fails to tell the truth (or stretches it a bit too much) you may attempt to impeach him (i.e., demonstrate his lack of credibility) by several methods.

Impeach *every* opposing witness you can.

Fight tooth-and-nail to exclude the testimony of liars!

Inconsistent Prior Statements

This is the hardest-hitting attack on a witness' credibility.

Suppose a witness says he saw you stealing chickens from his henhouse, but by the time he got his shotgun you were gone. Suppose he tells the court he saw you *very, very clearly*.

Suppose you took this witness' deposition a few months earlier (before his memory was "refreshed" by others having an interest in the outcome). Suppose at that time he testified, "I'm almost certain. It was dark. There was a bit of fog hanging over the cornfield. I'd almost swear it was you."

See where this is going?

If the old farmer stuck to his earlier story, there'd be nothing to impeach. But, in his fresh clarity of hindsight (possibly prompted by a greedy lawyer or a spouse hoping for a new gingham bonnet) he is now certain he say you *very, very clearly* that night.

Easily fixed.

"Mr. Farmer, do you remember being deposed early autumn last year?"

Get an answer. Get an audible answer. Make certain the court

reported gets it down on her steno machine. Don't let the witness hedge, fudge, or talk around your question. A shrug of the shoulders is not an answer, and it will not appear in the court record later on if you need it for appeal.

Get an *audible* yes-or-no!

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

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

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

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

This always gets 'em!

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

Get an answer, *yes or no!*

Either way his credibility is blown!

"Tell me, Mr. Farmer, were you lying then, or are you lying today?"

This will get an objection from the other side, but you made your point, and the farmer has lost credibility.

Use other inconsistent prior statements also. If you have a letter, invoice, purchase order, hand-written memorandum, or other writing authored by the witness that contains facts inconsistent with testimony the witness now chooses to give, use his inconsistent prior statement to impeach him. Show the prior written statement. "Is this your signature?"

Get an answer. "*Yes or no?*"

"Did you write this? *Yes or no?*"

"Were you lying then ... or are you lying *now*?"

This kind of impeachment won't make a bad president move out of the Whitehouse, but it will undermine the credibility of those whose testimony might otherwise damage your case!

Fight falsehood

Character

Impeaching by character is more difficult.

You must carefully follow the official rules to make certain you're doing it lawfully. In many jurisdictions, reputation of a witness is only admissible as evidence of the witness' credibility.

If a witness killed his mother-in-law with a chain saw, you cannot offer the fact to impeach his testimony, since the fact does not relate to the witness' reputation for telling the truth or lying.

If he has a community-wide reputation for writing bad checks, however, that character trait relates to dishonesty and can be used to impeach by attacking his reputation for truthfulness.

This only works to impeach.

You cannot present reputation evidence to show a witness is reliable. If the community considers the witness an honest fellow, you cannot use this to influence the court ... *unless other side first attacks the witness' honesty by putting on evidence of his negative reputation in the community.*

You cannot offer a witness' character to show his reliability, unless

the other side attacks his character first. Then you can rebut the attack and bring in the good people's opinion of your witness.

If a witness was recently convicted of a crime involving dishonesty or a depraved sense of morality, you may be able to impeach by presenting the court with a certified copy of the conviction records.

Jaywalking, even if followed by conviction, doesn't apply.

Theft does.

Arrest alone is not enough. There must be a conviction for the crime.

Impeachment is all about credibility of a witness, or lack thereof.

Religion

A witness' religious beliefs or opinions in matters of faith are inadmissible to show credibility or lack thereof.

In short, *don't go there!*

In American courts, even the Pope is susceptible of being impeached if known facts contradict his testimony.

There are *no exceptions!*

A witness' spiritual convictions or religious affiliations are not admissible to show honesty *or* dishonesty.

Whether he faithfully attends the First Church of Holiest Truth or hangs out in seedy taverns with disreputable unbelievers, religion or lack thereof cannot be used to buttress or challenge the credibility of a witness.

Defect of Capacity

The most striking defect of capacity is not having first-hand

knowledge, either because the witness *wasn't there* or because the witness *lacks the ability to know and tell* .

A witness cannot testify about things he only learned from others. (This is discussed further in the section on hearsay below.)

If a witness cannot remember what he had for breakfast, he may lack capacity to testify about past events. If allowed to testify, the probative value of his testimony may be undermined by showing mental impairment.

If you doubt a witness' ability to remember, probe events carefully. Use new questions to revisit answers the witness has given. If you get answers inconsistent with previous answers, impeach on the ground the witness has a defect of capacity to accurately and reliably recall past events.

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

Witnesses must have the the requisite degree of mental capacity to be able to explain themselves intelligibly when questioned.

Most courts prevent very young children from testifying. There are few exceptions. The general rule is that very young children lack capacity to testify. *They talk to their toys, after all*.

Habitual drunks and drug addicts may have defects of capacity so severe they cannot testify, even during periods of sobriety.

Prolonged substance abuse destroys the capacity to discern between truth and falsehood. If the court is convinced a witness is so severely impaired he has lost touch with reality (an inquiry with the jury removed from the courtroom) the witness may be prevented from testifying because of his defect of capacity.

Substantial Contrary Evidence

If *substantial* contrary evidence has been admitted that contradicts a witness' testimony, this fact may be used to impeach, i.e., limit the impact of the conflicting testimony.

There must be *substantial* contrary evidence, however.

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

Get your answer, "*Yes or no?*"

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

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

You see how easy it is to do?

Just remember it *should* be done ... no matter how infuriated the witness or exasperated the judge who wants to hurry so he can clear the next case off his docket.

You have a right to win!

And your chances of winning are diminished by evidence against you.

Many lawsuits are won simply by showing determination and courage, fighting to overcome damaging evidence by attacking its credibility.

Impeach when you can.

And *never* permit your opponent's lawyer to testify!

There are two types of opinion permitted in court:

- Lay opinion
- Expert opinion

The evidence rules treat them differently, of course.

Understanding the distinction can mean winning or losing your case.

Lay Opinion and Inferences

A major distinction is that lay testimony is *always* derived from personal observation and direct first-hand experience with underlying facts.

An expert may base opinions on purely hypothetical facts about which he has no first-hand knowledge, because an expert witness has special skill, education, or training that makes him *competent* to offer reliable opinions with regard to facts presented to him as hypotheticals.

Lay witnesses must testify only to *what they actually know to be fact!*

Lay witnesses need no special skill, education, or training to offer

their opinion with regard to facts about which they have first-hand knowledge.

They are, however, *required* to have first-hand knowledge of the facts on which they base their opinion.

No exceptions!

Unless a lay witness personally perceived facts about which he's called upon to offer an opinion, he is not competent to offer an opinion.

Suppose a lay witness saw plaintiff's crops wilting in the field. He saw a certain chemical sprayed on those crops a week prior to their wilting. His testimony as to these facts is admissible, because he personally saw the crops and the certain chemical being sprayed.

He cannot, however, offer his opinion that the chemical *caused* the crops to wilt. He is a lay witness, not an expert. He lacks the special skill, education, and training necessary to reach a conclusory opinion.

If he attempts to offer an opinion, object at once.

Lay opinion *never* admissible if it depends on special skill, education, or training.

A lay witness may testify about a elderly aunt's recent changed habits of personal hygiene, inability to balance her checkbook, getting lost on her way to the grocery two blocks from her home, forgetting the names of her children, and such like. These are facts within the lay witness' perception.

The lay witness may even offer opinion as to the aunt's declining mental condition, and opinion that does not require special skill, education, or training.

However, a lay witness may not testify, "Aunt Suzie suffers from an advanced stage of senile dementia." As a lay witness, he lacks the special knowledge, education, and training necessary to offer a technically precise identification of Aunt Suzie's underlying mental pathology.

Nor can a lay witness testify, "I volunteer in an Alzheimer's center and can tell you for an absolute fact that Aunt Suzie has Alzheimer's disease." Such an opinion requires special skill, education, and training - the purview of expert witnesses only.

On the other hand, if a lay witness has first-hand knowledge of Aunt Suzie's strange behavior, he may offer his opinion that Aunt Suzie should be supervised for her own safety. That opinion, does not require special skill, education, or training. It is not an expert opinion.

Expert Opinions and Inferences

Expert witnesses have no first-hand knowledge of the facts.

They know only what they've been told prior to trial or what they learn at trial in the form of hypothetical facts. From those hypothetical facts, they form their expert opinion testimony *based on special skill, education, or training*.

They are permitted to offer opinions of fact only, *not which party should win the case*.

Experts are given certain facts in the form of hypotheticals.

They then consider those hypothetical facts and provide opinions based on the hypotheticals.

The value of expert testimony is the expert's special skill, education, or training. They never know the facts first-hand as lay witnesses do.

They offer opinions only on facts they are told.

In order to testify as an expert, a witness must first qualify to testify as an expert. This is done by *voir dire*, during which the expert is examined and cross-examined under oath by the opposing parties. If the judge is satisfied the witness is an expert in the field required to form an opinion on some fact material to the case, the court will declare him an expert.

Typically, after lay testimony and presentation of documents in support, experts may be called to present their opinion based on hypothetical facts presented to them.

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

The expert is not testifying that plaintiff in fact suffers from asbestosis. That would be offering a forbidden expert opinion on the ultimate issue before the court. No witness (expert or lay) is permitted to offer such an opinion. Instead, the expert is testifying as to the probable outcome of a hypothetical fact situation ... facts the court has already heard.

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

If the expert's description of asbestosis symptoms matches plaintiff's symptoms (already before the court), and conditions of the workplace are the same as technically described to the expert, the jury will have a sound basis for finding in favor of the plaintiff.

Expert testimony can be very costly. If you can make your case without experts, consider doing so, unless you're richer than Solomon's cat.

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

Balancing Lay and Expert Opinions

Neither lay nor expert witnesses may offer an opinion of the ultimate issue before the court.

Neither may offer an opinion as to who should win.

That's for the court to decide.

Witness opinions, lay or expert, are considered by the court along with all other admissible evidence presented, and from the entire story that's presented the court draws its own conclusion.

A court may ascribe greater weight to lay opinions than to expert, or just the reverse may be true. Courts are free to decide which opinions are more reliable based on their perception of witness demeanor, candor, expression, body language, and any number of other factors.

In a jury trial, once the evidence is "in" the jury retires to deliberate. It's entirely up to the jurors to decide what evidence they choose to

believe, what evidence to ignore, and what opinions are most likely.

Hearsay is almost universally misunderstood.

Yet, when examined piece-by-piece it's remarkably simple.

The exceptions to hearsay tend to complicate it, but we'll examine some of the more common exceptions so you know what they are and how to be on guard for them.

Hearsay is inadmissible!

With exceptions.

So, what *is* hearsay?

Hearsay is a representation made out of court by a person not in court, offered by a witness to prove the truth of what the out-of-court person said.

Got that?

Let's look at the reasoning behind hearsay. That should clear it up.

It's all about reliability and competence.

As said earlier in this class, a witness cannot testify to matters beyond his first-hand knowledge. What someone tells him is beyond his first-hand knowledge. Right?

Therefore it is inadmissible.

What could be simpler?

The out-of-court person can't be cross-examined to see if what he said or represented is true, yet we have a witness *in* court trying to establish the truth of what was said by an out-of-court person we can't put under oath and cross-examine!

It isn't fair.

It isn't admissible (except for a multitude of exceptions discussed later in this class).

Do you remember the children's story about Henny Penny who was hit on the head by a falling acorn and exclaimed, "Awk! The sky is falling! We must tell the king!"

As the story goes, Ducky Lucky heard Henny Penny, so Ducky Lucky told Goosey Loosey who then told Turkey Lurkey.

So the animals set off to tell the king.

Foxy Loxy spied them marching on their journey. The old fox asked where they were going.

Turkey Lurkey replied, "Goosey Loosey said Ducky Lucky said Henny Penny said 'Awk! The sky is falling! We must tell the king!'"

Turkey Lurkey's testimony is inadmissible hearsay.

In fact, the testimony of every one of the animals except Henny Penny is hearsay *if it is offered to prove the sky is falling ... and only if it is offered to prove the sky is falling!*

Do *not* miss this distinction, or you will miss the most important point about hearsay and weaken your ability to win in court when the issue of hearsay is raised. A statement is hearsay *if and only if it is offered to prove the truth of what it says!*

Whether or not the sky is falling depends on the credibility of Henny Penny and no one else!

Since Henny Penny is not testifying that the sky is falling (and, for the sake of our little children's story, not available to be cross-examined directly) whether the sky is falling or not cannot be determined from Turkey Lurkey's statement, because it is hearsay.

Hearsay is only inadmissible if offered *to prove the truth of what was said by the out-of-court declarant.* (We use the term "declarant" to refer to the out-of-court speaker.)

Turkey Lurkey may testify that Goosey Loosey said Ducky Lucky said Henny Penny said, "Awk! The sky is falling! We must tell the king," *if and only if* Turkey Lurkey's testimony is *not* offered to prove the truth of what the other animals said.

Turkey Lurkey's testimony cannot be used to prove the sky is falling.

Turkey Lurkey's testimony may only be admitted to prove what Goosey Loosey said and only then if *not* offered to prove the truth of Goosey Loosey's statement (i.e., what Ducky Lucky said Henny Penny said).

None of it is admissible to prove the sky is falling.

Now you understand hearsay. Right?

The official rules could have been written in these simple terms. But, can we expect high-ranking members of the legal profession to make things simple for us regular folk?

If the sky's condition is relevant to the outcome of the case (i.e., a "material fact") any credible witness can testify *of his own personal knowledge* what he knows about the sky falling.

However nobody may tell the court what was said by someone *not available to be cross-examined* unless the out-of-court statement is *not* offered to prove its truth.

Of course, Henny Penny may tell the court in person, "The sky is falling," because the acorn hit her on her very head, and she really

does think the sky is falling! She has first-hand knowledge of the bump on her head. And, her testimony can be admitted to prove the sky is, in fact, falling!

But, Henny Penny would then be subject to cross-examination by any party opposing her testimony.

"Isn't it a fact, Miss Penny, when you felt the sky falling you were standing under an oak tree?"

She would have to answer, "Yes".

By cross-examination, Henny Penny's opinion is tried. (That's why we call trial trial, trying the truth of alleged facts offered in evidence.)

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

"Not so much, actually! But, then, the sky is only air, after all."

"Is the weight of the falling sky still pressing down on your head?"

"Hmmm. I don't believe it is, but we're inside the courtroom at present. It may be pressing down on the roof, of course."

This is how we get to truth.

By excluding hearsay, courts prevent parties from alleging facts they learned second-hand from others who aren't available to be cross-examined.

Hearsay is generally inadmissible.

There are, however, many exceptions to the general rule.

Exceptions vary from jurisdiction to jurisdiction and are far too numerous to list them all in this class. They are also subject to modification from time-to-time, so what we give you here are a few of the more common exceptions so you can get a feel for how

exceptions are applied and why.

Statement Against Self-Interest

If a witness offers an out-of-court statement substantially contrary to what's best for the witness, the out-of-court statement may be admitted as an exception to the hearsay rule. The question is whether a reasonable person under similar circumstances would offer the statement unless the statement was true. Remember? It's all about reliability.

If the out-of-court statement were false yet likely to cause the witness harm, a reasonable witness would not offer it. People may lie to feather their own nest, but only deranged people lie about something certain to cause them loss.

The hearsay rule (designed to prevent improbable facts from coming in) admits testimony by witnesses saying what out-of-court persons said, *if* what was said out-of-court is substantially contrary to the best interest of the witness. The law assumes such statements are more likely to be true than not.

Dying Declaration

Statements made by a person believing death is imminent are deemed to be sufficiently reliable that witnesses may testify to what the dying person said *about the perceived cause of his impending death or circumstances surrounding it.* The law considers such persons, facing the awesome finality of what they are about to experience, are unlikely to lie. This may or may not be true for all persons, of course, but in general the law presumes it is so for most persons who *believe* death is imminent.

The out-of-court declarant need not die for the exception to apply, so long as the declarant's *genuinely believes he is at death's door*. This is an issue for the court to decide before the exception is allowed.

The exception may not apply to other matters.

If a dying person says, "Joe embezzled money from my company," just as he exhales his last, the statement is excludable hearsay (to the extent it is offered to prove Joe embezzled money).

The dying declaration hearsay exception applies to admit reports of a dying person's perception of the cause of his impending death and the circumstances surrounding it ... not unrelated matters.

Excited Utterance

A witness may testify what an out-of-court declarant said under extreme stress or excitement, provided the out-of-court statement relates to the cause of the declarant's excitement and that cause is an issue of material fact otherwise admissible.

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

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

Suppose a nice lady who works at the town library is sued for the boy's injury. She owns the only red Corvette in town. Jones, the passer-by, has since disappeared. The only evidence that the driver

was a man, and not the nice lady defendant, is the out-of-court statement made by the man we cannot find to cross-examine.

Smith is called to the stand and asked what he knows.

Smith replies did not see the accident first-hand but adds, "When I got to the scene, a funny-looking little man in a green suit was trying to help the victim. He was in great emotional distress. He looked up at me with wild eyes and flaring nostrils and said, 'That man in the red Corvette saw the boy and didn't even try to stop!"

The victim's lawyer jumps to object, "Hearsay!"

The woman's lawyer responds, "Excited utterance, your Honor."

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

So the woman's lawyer gets Jones' statement in, even though it's clearly inadmissible hearsay but for the exception.

Whether the excited utterance exception applies depends on the degree of excitement and length of time between the excitement-causing event and the excited utterance. If a long period of time (a matter for the court to decide) intervenes, the exception may not apply, since excitement wears off reasonable persons after time.

The closer a statement is made to the excitement-causing event and the more exciting the event, the more likely the exception will apply.

Remember: The statement must relate to the cause of excitement and be probative of material issues. Otherwise it's not relevant and is excluded for that reason.

Conclusion to Hearsay

There are many other exceptions in federal and state evidence rules.

This class gave you a flavor of the rule and its exceptions.

Each jurisdiction has different rules, and the rules change often. Refer to the most current *official* rules for details.

A critical part of evidence is, of course, documents.

Documents and things.

Stuff that cannot take the stand to testify.

Authenticity of such documents and things must be determined by the court before they can be admitted into evidence, just as the identity and reliability of witnesses must be determined before they can give testimony.

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

Authentication is a condition precedent to the admission of tangible evidence.

All tangible evidence should, if possible, be authenticated before being presented to the court. Saves time-wasting arguments with the judge and your opponent.

If a party wishes to offer tangible evidence that might prejudice a party or mislead the jury, it should be presented to the court with jury removed, so the court can rule as a matter of law whether the evidence is authentic, reliable, and relevant to at least one issue of material fact.

Authentication of Documents

Authentication of documents is essential to success in court.

The worst possible thing that can happen to a litigant is waiting until

the day of trial to show the court a copy of Aunt Suzie's letter to Uncle Phil, only to have the other side object that it's hearsay and hear the judge proclaim, "Sustained!"

And there you stand empty-handed!

Some people erroneously believe in the "gotcha tactic", trial by ambush, and such like dirty, underhanded, character-revealing methods ... but such people routinely discover their error in the long run.

It's always best have your cards on the table *before* trial, rather than trying to catch your opponent by surprise. If at the last moment your "evidence" isn't admissible, you'll feel the sting of outrageous fortune and wish you'd paid closer attention to what this course teaches.

Letters, checks or other negotiable instruments, contracts, deeds, declarations of trust, old beer cans, rusty scissors, and the rim off an Oldsmobile spare-tire will not be admitted simply because you wish them to be.

They must be authenticated.

Video and audio tapes, photos, computer diskettes, and similar recordings of data or other information are "documents" for authentication purposes.

It is the authenticity of information contained in a document that concerns courts, rather than the document itself.

When it comes to things like shoe boxes or empty .38 calibre shell casings, courts want to how they're identified, where they've been, who controlled the chain of custody, etc.

Self-Authenticating Documents

Some documents are self-authenticating.

Copies of court papers certified by the clerk of court, bearing clerk's seal and signature are self-authenticating. They will be admitted in spite of your opponent's objections. Unless your opponent alleges the seal and signature are forged or the document is a counterfeit, papers under seal are admitted ... *if the information they contain is relevant*.

Always watch for relevance.
Stay prepared to object!

Any document under seal of the United States or any state, district, commonwealth, territory, or insular possession of the United States will be admitted. No questions asked.

In general, any official government document under seal or bearing the signature of an officer authorized to attest to its authenticity will be admitted in spite of objections, unless challenged for fraud, forgery, or counterfeit.

Don't show up in court with copies of official court or other government papers that do not bear an *original* seal or *original* signature of an authorized officer attesting to the document's authenticity. Unless the seal or signature is *original*, a copy is not self-authenticating.

Self-authenticating documents not needing a seal or other certification include:

- Books, pamphlets, or other publications purporting to be issued by a government
- Printed materials purporting to be newspapers, magazines, or other periodicals

- Tags, labels, and signs affixed in business to show ownership, origin, or control

Non-Self-Authenticating Documents

Most documents are *not* self-authenticating.

Most require the testimony of a credible witness as to chain of custody, proof of signature, and similar matters.

Though a document may not be self-authenticating, it may be admitted if authenticated in court by the testimony of a credible witness, one having first-hand knowledge of the nature of the document, its chain of custody, and its authenticity.

Any document can be challenged for fraud, seal or no seal.

Witnesses called to authenticate can be impeached.

Authentication of Things

Authentication of things almost always requires live testimony by witnesses with authority to authenticate and first-hand knowledge of the thing's authenticity and chain of custody.

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

Obviously, if a witness says, "Yes, that's my motorcycle," and the opposing party's lawyer wants to prove the scratch on its front fender has something to do with his client's injuries, the witness must testify

nobody but himself had access to the bike after the accident and he did not scratch the fender himself.

Authentication of things is much harder than documents, as you see.

It is usually dependent entirely on credibility of the witness testifying to its authenticity.

Requirement of Originals

In general, originals are required if offered in evidence.

This is certainly true of things.

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

Copies are never admitted unless they can be authenticated.

Many lose a valuable litigation advantage by accepting copies in response to requests for production, subpoenas, and depositions *duces tecum*. By accepting copies, you are without originals at trial. The other side *will* challenge authenticity.

You have a right to demand production of originals during pre-trial discovery. If you must make a copy of originals produced by the other side, have the other side admit the authenticity of those copies using requests for admissions, or have a certified court reporter make copies from the originals and certify them as "true copies".

To fully and effectively apply the rules of evidence, you should be familiar with the process of pre-trial discovery of evidence and other lawsuit tactics and procedures taught by this course to know

- What evidence needs to come in.

- How to allege material facts effectively in pleadings.
- How to force the other side to turn over the facts they control.
- How to prevent the other side from getting evidence they seek.
- How to get evidence from people who are not parties to the case.

Knowing What's Necessary

Your first consideration is understanding what evidence is *necessary* and what is not.

Too many lawsuits are lost by people that either fail to get the evidence they need, or work hard getting evidence into the record that wasn't necessary, or both!

The evidence that's necessary is nothing more than the elements of the

- Causes of action alleged in plaintiff's complaint
- Affirmative defenses filed by defendant with his answer

Nothing else matters, ultimately!

Yet every day people (who don't yet know what this course teaches) muddy the probative waters of their case with non-essential evidence while failing to make more effort to get the truly essential evidence they need to win!

To know what evidence you need, all that's necessary is to examine the pleadings. Make a list. Keep it close. Memorize it. Then do all you can to get what *you* need while keeping your opponent from getting what *he* needs. The key is in the pleadings, where each party will have alleged the facts they must prove to win - plaintiff and defendant.

Once you know the facts each side seeks to prove, you know what evidence you need to get in and what evidence you need to keep out.

See? It really is simple! There's a lot to it, but none of it is too hard for an average eighth grader to comprehend.

Discovery

You should already know what discover is by having gone through the previous tutorials.

If you missed the earlier tutorials (shame on you).

A brief mention of discovery is offered here, but you really should study the class in this course concentrates on discovery, examining its parts and procedures in detail.

In essence, discovery is a process whereby either litigant may use any or all of the following tools to find and get admissible evidence or to discover facts "reasonably calculated to lead to the discovery of admissible evidence.

Those tools are:

- Requests for Admissions
- Requests for Production
- Interrogatories
- Depositions
- Supoenas and Other Court Orders

Just remember while you're finding and getting admissible evidence and facts "reasonably calculated to lead to admissible evidence" that its just as important use the rules and tactics you're learning with

this course to prevent your opponent from finding and getting admissible evidence and facts he needs to win, also.

More on this in the other tutorials.

Testimony by Attorneys

It's already been mentioned but is so dreadfully important that it bears repeating.

Never allow your opponent's lawyer to testify.

He lacks competence!

As a rule, *lawyers not permitted to testify as to facts about which they have no personal, first-hand knowledge* ... and, if they do so, they should be disqualified as counsel for their client and placed under oath to be cross-examined!

The only exceptions are

1. Opening statements at the beginning of trial when a lawyer may tell the jury, "The evidence you are about to hear and see will show ..."
2. Closing statements at the end of trial when a lawyer may tell the jury, "You have heard and seen evidence that showed ..."

   Even then it is improper for lawyers to testify, yet it happens all the time *and results in losses for the other side*.

   On opening statement, a lawyer should not be permitted to say, "Mr. Needsanother was drunk when he drove his car into my client's rosebushes." That's improper opening. It's inadmissible *testimony* by a witness who competence. He should say, "You will hear and see evidence that Mr. Needsanother was drunk when he drove his car into my client's rosebushes."

On closing statement, a lawyer should not be permitted to say, "Dr. Crackmybones used a Boy Scout knife to remove my client's appendix." That's improper closing. It's inadmissible *testimony* by a witness who lacks competence. He should say, "You've heard and seen evidence that Dr. Crackmybones used a Boy Scout knife to remove my client's appendix."

The first statements are conclusory, stating facts outside the lawyer's personal first-hand knowledge and therefore inadmissible for lack of competence.

The second statements are not. They simply relate to the evidence that *everyone* in the courtroom has now seen and heard, including the lawyer as well as the judge, jury, bailiff, clerk, court reporter, and any visitors observing from the gallery. The lawyer is certainly competent to testify as to what *everyone* has seen and heard.

Do you see this?

It's important.

The problem you face is that courts are often lenient in this area of opening and closing statements. They shouldn't be, but they often are. You can try to stop it, and you should try, but don't be surprised if your objections are overruled. The important thing is that you will have made your record for appeal, in case appeal is necessary.

Just as in opening and closing arguments, a lawyer arguing a motion during a hearing may tell the judge, "We will present Mrs. So-and-so, who will testify that ..."

However a lawyer should never be permitted to say, "The defendant was wearing flip flops when her motor scooter ran off the road and smashed into my client's popsicle stand!" He wasn't there. He didn't

see the accident. He does know if the defendant was wearing flip flops or steel-toed engineer boots!

"Objection! Counsel is testifying!"

Put a stop to it, or you are giving away valuable evidentiary points for no reason.

Don't let lawyers testify!

Be on guard. Keep both ears open. Just as soon as the lawyer for your opponent begins to tell the court a fact (instead of saying what the evidence will show or has shown) jump to your feet, drop a book on the table, lean forward and spit out the magic word: *Objection!*

After all, only *you* can prevent damaging evidence. Don't expect the judge to fight your fight for you. And never, ever forget that the fight is nearly 90% over evidence - what comes in and what stays out!

Dealing with Perjury

Perjury is still a crime.

In many places it is a felony punishable by at least a year's imprisonment.

The ancients thought it so serious a crime that if perjured testimony was used to convict an innocent man, the innocent man was released once the perjury was discovered, and the punishment the innocent man faced was inflicted on the perjurer, instead. Suffice it to say there was very little perjury back then.

Today it is rare that liars under oath are punished, *but you can demand it by motion!*

First of all make certain no testimony is given until each witness

takes the oath or gives the affirmation required by law. In that way their knowing false testimony puts them in jeopardy of being punished for perjury. Without the oath there is no perjury. Unless the testimony is false and known to be false at the time, there is no perjury.

It is only perjury to knowingly lie under oath.

Finally, in today's courts perjury must be relevant to some material fact. It must threaten some right or impose some prejudice to a party or to the administration of justice in general.

If a witness (or lawyer) knowingly lies under oath, move the court *immediately* for an order to show cause why that witness (or lawyer) should not be held in contempt.

Then press for contempt!

It's hard enough to win when everyone tells the truth!

Direct and Cross-Examination

Cross-examination is your most powerful tool for getting at truth.

Telling a witness a fact then making him admit it is devastating to liars and those who wish to hide the truth, even if they aren't prepared to lie about it.

You *dig* with cross-examination until you hit pay-dirt!

If you end up with your opponent's witness on the stand, hedging facts and dancing round the truth with innuendo and half-answers, lay him out flat with cross-examination. Make him squirm. Penetrate his hard-shell exterior and probe the depths of his hidden knowledge.

"Isn't it a fact you've read only part of this class on evidence? *Yes or no?*"

Notice how on cross-examination you tell the witness what a fact is and demand that he admit or deny. You can do this *with your opponent's witnesses.*

You cannot do it with your own.

When questioning your own witness, you cannot ask leading questions. Instead, you are required to "develop" your line of questioning, one element upon another, until you created a "predicate" for your questions, i.e., until you draw the witness into answering your question with the answer you want.

This process is called "direct" examination.

You *must* know the difference.

Getting what you want with cross-examination is easy, if the witness knows what you want him or her to say (and the witness hasn't been coached to lie). You just make statements then demand, "Yes or no?"

Getting what you want with direct examination is a chore and fraught with pitfalls. You must "lead" your witness toward giving the answer you want *without* hinting what the answer is. It will take some practice and, even then, it never gets much easier. But, if you keep the following points in mind you can do it successfully.

When Direct and When Cross?

In general you may not cross-examine (i.e., ask leading questions of) your own witnesses. The witnesses *you* call are *your* witnesses. You cannot cross-examine them. You cannot use leading questions,

i.e., hinting what the answer is or making statements followed by, "Yes or no?" It isn't allowed.

If you do it, your opponent will object.

If your opponent does it, *you* must object!

You may cross-examine the opposing party and the witnesses he calls till your heart's content, but you may not cross-examine your own witnesses.

When your opponent calls witnesses to the stand, he will examine first using direct questions, i.e., without leading. Then, when your opponent finishes each witness, you have a chance to cross-examine using leading questions, e.g., "Isn't it a fact that you played a trombone in high school?" Or, "You haven't eaten spinach in the past three years. True of false?" Or, "Were you wearing a cheese hat when you attended the football game on October 9th, 2011? *Yes or no?"*

If such questions are relevant, you can ask them at trial.

If you are asking them at a deposition you can ask them even if they aren't relevant, so long as they are "reasonably calculated to lead to the discovery of admissible evidence".

Don't let the other side cross-examine his own witnesses! Object at once. "Objection, your Honor! Leading!"

There is an exception when one's own witness turns "hostile" or begins to lie. If you can convince the judge to declare your witness hostile, he will be treated as if called by the other side or even as if he were an opposing party. Then you may impeach your own witness and cross-examine him with leading questions to get at the truth he's now trying to hide.

You can always cross-examine opposing parties.

The reason you can't cross-examine your own witnesses is because cross-examination gives one an opportunity to state facts then ask the witness to corroborate "the examiner's own testimony". That's what it amounts to, don't you see? A leading question is, in effect, the questioning party's own testimony followed by a demand for the witness to agree or not.

What we want from a party's own witnesses is not what the party *wants* the witness to say but what the witness actually knows, *without the answer being hinted at.* Thus the answers cannot be either "yes" or "no". They must be complete answers.

"Where to you live?"

"Boston."

"How long have you lived there?"

"Twelve years."

"Do you live with someone."

"Yes, I live with my friend."

"What is your friend's name?"

"Dorothy."

"Is Dorothy in the courtroom?"

"Yes."

"Would you please point her out for the jury?"

"It's that woman over there with the big green hat."

And so forth.

This is how direct examination proceeds ... without hinting what the

answers are.

By requiring examiners to ask direct questions of their own witnesses, instead of leading them with questions that suggest the answer, testimony is limited to what witnesses know first-hand, not what an examiner wants the witnesses to say.

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

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

When the tables are turned, of course, your opponent has the same opportunity to tear your witness apart on cross-examination.

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

But, you can call that same witness for *your* side. There is no rule against both sides calling the same witnesses. Then, if you wish to inquire into matters your opponent chose not to ask his witness about, you can do so ... but only by direct questions. And that, again, will be followed by your opponent's opportunity to cross-examine *your* witness, because for this his former witness is now your witness.

Also, when examining an opposing party or opposing party's witnesses (whether at trial, hearing, or deposition) you may *always* ask leading questions.

How to Examine a Witness on Direct

Direct examination is possibly the most difficult task for a trial lawyers or *pro se* litigant. It takes practice. Lots of practice!

It's beautiful to hear when well done ... an utter nightmare when done poorly.

Since the examiner may not in any way suggest to his witness what answer is being sought to a given question, you can see how difficult it can be to get a witness to say *what you wish the witness to say*.

You may wish your witness to say he's known the opposing party 6 years, did business with him the first 5 of those years, then stopped doing business with him last year after receiving no fewer than 6 bad checks in a single month.

If you begin, "Mr. Witness, isn't it a fact Mr. Party gave you 6 bad checks last year?" you won't get past "isn't it a fact".

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

The court will surely wither you with an instant, "Sustained!"

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

The judge will look at his watch, turn to you, and insist, "Move on!"

Hopefully you will not stand there staring at your shoes, helplessly at

a loss for words. It will come as no surprise. You *cannot* lead your own witness in this way.

Get the picture?

Here's how to practice.

Try getting a family member or friend to "testify" to some fact you know the friend or family member knows, but restrict yourself to asking only direct questions. Suppose you know where they went on vacation last year. Believe it or not, you may get an objection if you ask, "Where did you spend your vacation last year?" That question hints at its answer.

You might have to ask, "Where do you live?"

"Gnome, Alaska."

"How is the weather there?"

"Mighty cold when the sun goes down."

"How do you cope?"

"We vacation in Florida."

"Have you vacationed in Florida recently?"

"Yes, as a matter of fact. We were there just last year."

Now you have your answer.

It may seem a strange way to do things, but unless your opponent is a bit slow on the uptake or the judge incredibly lenient, you may be put to just such a task when trying to get facts out of your own witnesses.

Have a second friend or family member sit as judge. Get another to act as opposing counsel, instructed to object when you hint at an

answer. Then pick some event like last year's county fair when your friend screamed hysterically from fear at the top of a Ferris wheel, something you know your "witness" knows. Write on a piece of paper the evidence you want your witness to give, (fear of heights) then pass the paper to your "judge" without showing the others.

Now, ask direct questions until you get the answer you want.

Give it a try.

You'll find it's none too easy!

Practice!

Practice now will be *extremely* valuable later on when you must examine your witnesses with direct questions only, i.e., without leading in any way, in front of a *real* judge who may be very anxious to get to the next case while you fumble your evidentiary ball on his playing field.

At trial, questioning must seek relevant evidence. During pre-trial discovery (e.g., depositions, interrogatories, etc.) facts sought need not be relevant if they are "reasonably calculated to lead to the discovery of admissible evidence.
More in the Discovery class.

Imagine you're at trial where you're required to constrain questions to matters you can convince your "judge" are relevant (e.g., the witness' fear of heights). Let the judge limit your questioning when you wander. Your goal is to get the witness to talk about that harrowing experience at the fair.

"Are you afraid of Ferris wheels?"

Objection! That's you testifying. You haven't yet laid a predicate.

You might get away with, "Have you ever been afraid?" but this, too, may be objectionable.

You might have to start with, "Where do you live?"

"On a farm in Idaho."

"Do you have animals on the farm?"

"Yes. Quite a few."

"What kind of animals?"

And so forth until you've "led" your witness to the fair and that frightening Ferris wheel.

Tough?

Yes?

Impossible?

Definitely no.

How to Examine a Witness on Cross

This may be the most fun a human can have in court.

Cross-examination is a delight when properly managed.

Focus on getting relevant evidence (or during pre-trial depositions at getting facts "reasonably calculated to lead to admissible evidence").

If you're questioning your opponent or one of his witnesses who's trying to hide the truth, you will find cross-examination amazingly surgical.

Well-done it will get the truth every time.

It disrobes liars with ease.

Done poorly, however, it can backfire!

So, once again, practice with friends and family members *before* court so you will be ready for the real thing when the time comes go into battle "under fire".

Remain calm, cool, and collected.

The goal is to get truth, not to rattle the witness and certainly not to imitate TV lawyers like Matlock or Perry Mason.

Let the witness believe you're his or her friend.

If it serves your purpose, let the witness think you're a bumbling idiot who hasn't a clue.

Whatever it takes.

It doesn't matter what a witness or judge or jury think about you at this time. You can clear that up later. While that witness is on the stand you have one job to do: *Get the truth!*

What matters are answers you get. Postures and facial expressions will not go into the court's record. Your goal is not to look like or act like anyone but yourself.

Just get the truth!

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

The goal is to make a winning record of the truth.

If you want to be seen as clever and competent, just ask questions in an orderly manner. Have a plan and work your plan! Know what your witness knows (pretrial discovery if done well, or informal interviews). Then get the witness to spill the beans!

Effective cross-examiners "lead" witnesses subtly, not revealing the goal of their questioning until they've got all the pieces in place leading up to the BIG QUESTIONS that may send the witness into a tailspin but will will reveal the truth about some ultimate fact issue material to the outcome of the case.

Take your time.

Woo the witness.

You get more flies with honey.

This is not a thespian exercise. You're not on stage.

You're seeking answers to win your case ... nothing more.

Circumstantial Evidence

Circumstantial evidence is an invention outside reality.

Circumstantial evidence grasps at straws beyond the reach of truth.

Circumstantial evidence dances with conjecture, hunches, and imagination.

Circumstantial evidence is, in short, nothing more than an inference from known facts. It is not a fact. It is not even "evidence". It is a guess and nothing more.

For that reason we will call it circumstantial inference.

It is controlled by strict rules.

You need to put the brakes on those who seek to use it against you.

To be admissible, circumstantial inferences must be derived from direct evidence, and only *one* inference may be derived - a *reasonable* one that is not contradicted by *any other* reasonable

inference.

Got that?

A circumstantial inference must be directly derived from direct evidence, i.e., from something we can verify as truth *and nothing but truth.*

A circumstantial inference cannot be derived from other circumstantial inferences.

The rule against stacking inferences (also called the rule against pyramiding inferences) forbids taking one inference from another inference to reach an evidentiary conclusion!

After all, a circumstantial inference is nothing but a guess. We cannot dispenses justice fairly if we allow people to reach conclusions based on guesses that are based on other guesses!

Yet, sadly, it happens all the time. If it happens to you, do your legal research where you will find numerous cases talking about "stacking inferences" or "pyramiding inferences". Use those cases to put the judge on notice you will not stand for it.

Direct facts, on the other hand, are facts so solidly established that no reasonable person will be heard to doubt them. Direct facts are *not* inferred. Direct facts are conclusively established by admissible evidence. They are, for evidentiary purposes, the truth!

A direct fact is not a guess or hunch!

Circumstantial inferences are not "known to be the truth" and never can be, by definition. They are and always must be nothing more than guesses, hunches, shots in the dark - even if they are based on direct facts that are known to be true.

If a locked house is robbed without any visible sign of forced entry, a jury may be persuaded by a tricky litigant to infer from the known direct facts that the robber must have had a key.

However, one could just as easily infer from the same direct facts that the robber knew how to pick locks or, even, that the house was unlocked when the robber arrived, that he locked the door behind him when he left with the loot!

The evidence here is susceptible of at least three separate inferences, each as likely as the others - so, according to the rule, none of the inferences can be established as circumstantial "evidence" since there are other evidences contrary reasonable inferences just as likely.

Don't be trapped by the circumstantial evidence game!

Some crooked litigants might try to convince a jury to infer from the preceding direct facts that the homeowner must have robbed his own house, if he was the only one known to have a key! Do you see how dangerous this kind of reasoning is?

The direct fact evidence is absence of any sign of forced entry.

The first inference is that the robber had a key.

Second inference built on the first is that the owner must be the robber, because he is the only one known to have a key.

The second is stacked on the first *and is therefore disallowed (*unless *you* allow it).

The inferred conclusion that the home-owner robbed his own house is stupid, yet thousands upon thousands have suffered great loss or remain in prison even at this hour because this sort of illogical game is permitted to proliferate in our courts because of legal ignorance.

You will not be tricked!

Only the truth is true.

Motion in Limine

Any time prior to trial (and in some cases even during trial) any party may file what we call a motion *in limine* (pronounced lim'-ih-nee) to exclude evidence the other party is trying to offer, if the evidence should never be heard.

The term means "at the threshold", at the beginning, preliminarily. It applies to the motion's being brought *before* trial (in most cases) to preliminarily prevent introduction of evidence that is irrelevant, shocking, or impermissibly prejudicial.

Moving the court for an order *in limine* to prevent offers at trial of adverse evidence is a very smart thing to do.

In an actual case I handled some years ago, the defendants tried to besmirch our client by getting into evidence some fist-fight he'd been involved in with an off-duty police officer. Now a fist-fight with an off-duty police officer had *absolutely nothing* to do with the issues in the case, but to let the jury hear about it would impermissibly prejudice the jury against our client. Perhaps he was provoked. Perhaps the off-duty police officer insulted his wife. The fact of the fight had nothing at all to do with the issues in the case. So a motion *in limine* was filed and granted to prevent the opponent's lawyers from poisoning the well.

Some judges don't like motions *in limine*. They don't want to be bothered by the necessity of ruling on evidence before trial. Don't fall into the trap of being afraid of judges. We'd like to make the judge happy, but not if it means losing our case!

Motions *in limine* are authorized by the rules and are used often by *winning lawyers*.

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

You now know the ins-and-outs of evidence.

You can now use the *official* evidence rules to control your local court.

Don't rely on judges to help you get evidence in or keep it out. That's not what judges are for, as you should know by now, this far into the course.

Move the court for orders to get what you want ... *and set your motions for hearing!*

Object and state the grounds for your objections whenever anyone (*especially* the judge) tries to ignore the rules.

Control your case by keeping the other side from getting control in the first place.

Stay on the offensive, no matter which side you're on ... plaintiff or defendant.

Study the *official* rules of evidence that control in your jurisdiction. The *official* evidence rules for your jurisdiction can probably be read start to finish in less than an hour ... an hour very well spent!

You owe it to yourself to learn the *official* rules that control your local court.

Follow what you've learned in this class to get your evidence IN and keep your opponent's evidence OUT.

MICHELLE GOMEZ: Your subscription expires October 26, 2020

Take this quiz to see how much you still need to learn.

Some items may seem like "trick questions", but there is only *one* correct answer to each.

Remember: Reading *carefully* is essential to success in court.

Take this and all quizzes as many times as you wish.

However, to be properly prepared for your battles in court, go back over the classes until you get at least a "B" on every quiz.

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