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New York Evidentiary Foundations

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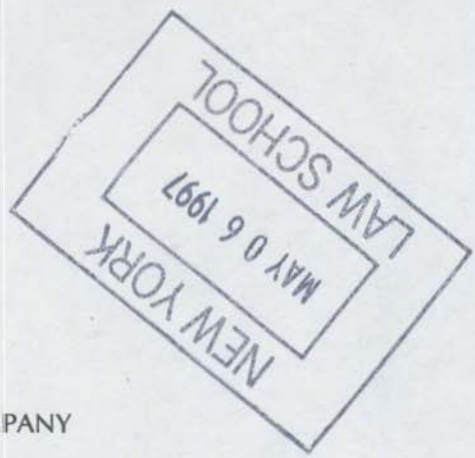

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PREFACE

Most law students take an evidence course of limited value. While the students may learn certain sorts of evidentiary doctrines, they seldom learn how to put this abstract knowledge into action. When they go into court, whether the court be a real one or the simulated one of a trial advocacy program, they are often unsure how to present the information necessary to have evidence admitted into or excluded from a trial or hearing. As a result, many beginning attorneys do not know how to present the evidentiary foundations necessary for trying a case.

To help fill this gap, Professor Edward J. Imwinkelried prepared a collection of simple foundations for law students and young trial attorneys. That collection became *Evidentiary Foundations* (1980). That book has proved to be a valuable source for both law students and lawyers. Approximately 50,000 copies of it have been sold, and it has been used by over sixty law schools.

Last year, The Michie Company and Professor Imwinkelried asked me to revise *Evidentiary Foundations* to make it more useful to New Yorkers. New York attorneys especially need specially tailored evidence materials. New York evidence law, unlike that of most jurisdictions, is not based on the Federal Rules of Evidence. Consequently, the evidentiary foundations necessary in New York are often different from those used elsewhere, and lawyers whose law school educations have been based on the Federal Rules of Evidence are often unaware of the differences.

Harold Baer, Jr. and E. Stewart Jones, Jr., were enlisted to assist in this project. With their distinguished backgrounds as trial judge and trial attorney, they understand as well as anyone the concrete use of evidence law in New York. The work was also incalculably aided by the research assistance of Karen November.

All of us join in expressing the hope that *New York Evidentiary Foundations* will prove helpful to New York law students and attorneys.

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Chapter 1

INTRODUCTION

A. INTRODUCTION

This text illustrates how to apply New York evidence law to lay sufficient foundations for the introduction of items of evidence. Most sections of the text use the following format.

First, you will find a discussion of an evidence doctrine. The discussion focuses on New York evidence law. Since the principal purpose of this text is to teach trial technique rather than the evidentiary doctrine, the textual discussion of the doctrine is relatively short and contains few case citations.[1] The discussion will also occasionally refer to the Federal Rules of Evidence. Many law school courses in evidence today concentrate only on the Federal Rules of Evidence, and for attorneys with this education, it can be useful to see how the New York evidentiary doctrines compare with the analogous federal rules.[2]

Second, the text breaks the doctrine down into a list of foundation elements. These elements are the historical facts and events which constitute the foundation. Each element is numbered.

Third, the section contains a sample foundation for the evidentiary doctrine. Each question in the body of the sample foundation is numbered; the number corresponds to the element of the foundation the question relates to. Thus, the numbered foundation shows how each element in the doctrine converts into concrete questions in the courtroom. In the sample foundations, "J" means judge, "W" means witness, "P" the proponent of the evidence, "O" the opponent of the evidence, and "C" the court officer, clerk, or court reporter. The foundations assume that a jury is present. The procedure would be a bit more informal in a bench trial. There, where the judge is the trier of fact as well as arbiter of the law, some foundation questions may be dispensed with, depending on the judge. Especially in busy jurisdictions, it is likely that, ostensibly to move the case along, foundation questions may be dispensed with or at least telescoped.

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[1] The reader can find ample authority in such treatises as EDITH L. FISCH, FISCH ON NEW YORK EVIDENCE (2d ed. 1977, with its latest supplement) and JEROME PRINCE, RICHARDSON ON EVIDENCE (10th ed. 1973, with its latest supplement).

[2] For an overview of those distinctions, see HAROLD J. BAER, JR., FEDERAL RULES OF EVIDENCE AND THEIR NEW YORK STATE PARALLELS (1986).

B. LAYING A FOUNDATION — IN GENERAL

1. LEGAL RULES

For our purposes, the most important procedural rule is that the proponent of an item of evidence must ordinarily lay the foundation before formally offering the item into evidence. For example, the proponent of a letter must present proof of its authenticity before offering it into evidence. Proof of the letter's authenticity is part of the letter's "foundation" or "predicate." Substantive evidence law makes proof of authenticity a condition precedent to the letter's admission into evidence. Whenever evidence law makes proof of a fact or event a condition to the admission of an item of evidence, that fact or event is part of the foundation for the evidence's admission.

The trial judge generally has discretion to deviate from this procedural rule; the judge may vary the order of proof and admit the evidence subject to the subsequent proof of the foundation. However, judges are reluctant to use this discretion. Proof of the foundation before the evidence's admission is usually the more logical order of presentation. Moreover, if the judge admits the evidence subject to subsequent proof of the foundation and the proponent later fails to present the proof, the judge will be in an awkward position. At the very least, the judge will have to instruct the jurors to disregard the evidence they have already heard. If the judge believes that the instruction will be ineffective and the jurors will be unable to put aside the evidence, the judge may have to grant a mistrial. Hence, whenever possible, the proponent should lay the foundation or predicate before formally offering the item of evidence.

When the foundation must come in with a subsequent witness, you ask the court to take the evidence subject to connection. With a writing, the material should not be read or shown to the jury until the subsequent witness has presented the necessary foundation.

2. PRACTICAL RULES

When you draft a line of questioning, you should follow three cardinal rules: be simple, be brief, and be prepared.

First, always use the simplest, most easily understood term. The trial attorney must communicate effectively with lay witnesses and jurors. Effective communication with lay persons requires that the trial attorney use lay diction. Jonathan Swift quite properly condemned the attorneys of his day for using "a peculiar Cant and Jargon of their own that no other mortal can understand ...." Sadly, many modern trial attorneys are guilty of the same literary sin. There is no need to resort to "prior" and "subsequent" if "before" and "after" will do quite nicely. There is no need to refer to "motor vehicle" when the word "car" is available. There is no justification for using "altercation" when

the attorney could say "fight." Trial attorneys should realize that the examination of witnesses is a test of communicative skill rather than of vocabulary.

Second, be brief. Rudolph Flesch has pointed out that there is an inverse relation between the length of a sentence and its comprehensibility; the longer the sentence, the lower the level of reader or hearer comprehension.[3] Reading psychology studies document that the maximum length of a written sentence should be twenty-five words; if the sentence is any longer, reader comprehension drops off markedly. It is more difficult for a hearer to absorb a spoken sentence than it is for a reader to absorb a written sentence. Consequently, many experienced trial attorneys strive to limit their questions to ten or fifteen words in length. If the spoken question exceeds fifteen words, it can be very difficult for the witness and jurors to follow. This is also true, of course, for summations and opening statements.

Third, be prepared. Both the attorney and the witness must be well-prepared for trial. If the attorney falters or pauses too long during direct examination, the examination loses its flow and rhythm. If the witness appears uncertain during questioning, at the very least the jurors will doubt the quality of the witness' memory. The attorney must review the contemplated testimony with the witness before trial; the attorney should have the witness review the witness' deposition and other pretrial statements to refresh the witness' recollection. Frequently, cross-examination includes questions about the preparation and how much time a witness has spent with the lawyer. Witnesses should not be shy about being forthright about time spent preparing, nor should lawyers be shy about spending the preparation time. In our opinion, the more preparation time, the better.

C. LAYING A FOUNDATION ON DIRECT EXAMINATION

The general rules for laying foundations apply to direct examination. The direct examiner should lay a foundation before offering the evidence, and the examiner should observe the cardinal rules of simplicity, brevity, and preparation. In addition, there are some additional rules the direct examiner must be familiar with.

1. LEGAL RULES

One such rule is that the technical evidentiary rules do not apply to some foundational questions. New York law is analogous to Federal Rule of Evidence 104(a), which provides: "[p]reliminary questions con-

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[3] *See* RUDOLPH FLESCH, HOW TO WRITE PLAIN ENGLISH: A BOOK FOR LAWYERS AND CONSUMERS 20-32 (1979).

cerning ... the admissibility of evidence ... shall be determined by the court .... In making its determination it [the court] is not bound by the rules of evidence except those with respect to privileges."[4] Suppose that the proponent is offering a witness' former testimony at a prior trial. Part of the foundation for the former testimony exception to the hearsay rule is establishing that the witness is unavailable at the present trial. Thus, the trial judge must decide whether the witness is not available, and in deciding this foundational question, the judge can consider evidence that would otherwise be inadmissible. The proponent could ask an investigator on the witness stand to relate a third party's statement that the former witness had moved to Sweden. The third party's statement would usually be inadmissible hearsay; the third party was outside the courtroom when he or she made the statement, and the proponent is offering the statement for the truth of its assertion. Since, however, the judge is not bound by the rules of evidence in deciding this foundational question, the hearsay rule does not apply. Most often, however, counsel will be able to discuss with his or her adversary that the witness is unavailable and reach an agreement about that fact and simply announce it to the court. Do not waste your time or the court's if you can help it.

A second rule to bear in mind is that leading questions are usually forbidden on direct examination when the examination is beyond eliciting preliminary pedigree information. Leading questions suggest the desired answer to the witness. Since the witness is presumably friendly to the direct examiner, the witness will probably follow the lead. Suppose that the plaintiff's brother was a witness to the accident. The plaintiff alleges that the defendant was speeding. The plaintiff calls her brother as a witness. It would be impermissibly leading for the plaintiff's attorney to ask, "Isn't it true that the defendant was going eighty miles an hour?" There is a serious risk that the witness, the plaintiff's brother, will simply follow the attorney's lead rather than attempting to give the most accurate testimony. On direct examination, the law prefers that the attorney use the non-leading question, "In your opinion, what was the defendant's speed?"

In addition to knowing the general prohibition of leading questions on direct examination, the direct examiner must realize that the prohibition is merely a norm rather than an absolute rule. There are numerous exceptions to the norm. One notable exception is that the direct examiner may use leading questions on preliminary matters. Most judges limit the scope of this exception to such matters as the witness' occupation and setting the scene for events. However, some judges construe "preliminary" very broadly and liberally permit leading ques-

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[4] *See* People v. Lynes, 64 A.D.2d 543, 406 N.Y.S.2d 816 (1978), *aff'd*, 49 N.Y.2d 296, 401 N.E.2d 405, 425 N.Y.S.2d 295 (1980).

tions on foundational matters. Another exception is that the direct examiner may use mildly leading questions to refresh the memory of a forgetful witness. Finally, the direct examiner can use leading questions when a hostile witness has been called. It is the common practice of many plaintiffs' attorneys, especially in medical negligence cases, to call the adverse party or parties as part of the direct case. Under New York law, "[a]n adverse witness may be cross-examined, and leading questions may be put to him by the party calling him ...."[5] The general rules of cross-examination, thus, apply to the direct examination of hostile witnesses.[6]

2. PRACTICAL RULES

Whenever possible, comply with the technical evidentiary rules. Even if the law arguably permits you to disregard those rules in laying a foundation, your departure will often prompt an objection. The opponent may not realize that the technical rules are inapplicable, or, in bad faith, the opponent may be searching for any pretext to disrupt your direct examination. The ideal direct examination is flowing and uninterrupted; without distracting objections, the direct examiner gives the witness an opportunity to tell a story to the jurors. You want to minimize the risk that the opponent will interrupt your foundation with an objection. Every time you disregard the technical rules in your foundational questions, you risk a distracting objection.

The same practical considerations lead to the conclusion that whenever possible, you should use non-leading questions on direct examination. You want to reduce the risk that your foundation will be interrupted by a leading question objection. Moreover, if you have a good witness, you want the witness to do the talking. By using leading questions, which must be answered "Yes" or "No," you restrict the witness' opportunity to speak, and the jurors may suspect that you are putting words in the witness' mouth. If the witness projects honesty and intelligence, you want to use open-ended, non-leading questions. The witness should be center stage. Juror psychology studies suggest a further reason to avoid leading the witness. One study found that the more acute jurors note the difference between leading and non-leading questioning. More important, when the jurors note that the attorney is leading a particular witness, they tend to infer that the attorney is doing so because the attorney lacks faith in the witness. Understandably, after drawing that inference, the jurors discount the witness' credibility. If you have a good witness, non-leading questions are tactically preferable on direct examination. Finally, some judges will com-

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[5]Becker v. Koch, 104 N.Y. 394, 401, 67 N.Y.S. 899, 901, 10 N.E. 701 (1887).

[6]*See, e.g.*, Segreti v. Putnam Community Hosp., 88 A.D.2d 590, 592, 449 N.Y.S.2d 785 (1982).

ment on the inappropriate use of leading questions, and these remarks may cause the attorney embarrassment, which can also affect the jury's view of the witness' credibility.

To ensure that your questions are non-leading, begin as many as possible with the words, "who," "what," "which," "when," "where," "how," and "why." If you begin a question with one of these words, you will find that it is very difficult to make the question leading. Indeed, many trial judges use the rule of thumb that questions beginning with these words are not leading. In this text, we have tried to begin every question in the sample foundations for direct examination with one of these words. In the sample foundations, the word is in capital letters. We hope that reading questions beginning with these words will help you to develop the skill and habit of phrasing non-leading questions.

Do not begin every sentence of direct examination, however, with one of these words; that practice would make your direct examination annoyingly monotonous. As professional writers say, you want "elegant variation" in the phrasing of your questions. Sometimes you will not want an interrogatory sentence. When you elicit background information about your witness, you can use imperative sentences; for example, you may command the witness to "Please tell us where you work." To highlight the subdivisions of your direct examination, you may use declarative sentences such as "Now I want to ask you a few questions about what happened at the hospital." Even when you use interrogatory sentences, as we have seen, evidence law sometimes permits you to use gently leading questions, which can add a little variety.

D. LAYING A FOUNDATION ON CROSS-EXAMINATION

The general rules for laying a foundation also apply here. Most of the general rules apply with even greater force on cross-examination. On cross, many judges are very reluctant to permit the examiner to introduce an item of evidence before presenting the foundational proof. On cross-examination, the witness is often hostile to the examiner; and the judge is more skeptical of the examiner's assurance that the witness will give favorable testimony at a later point in the examination. The norms of simplicity and brevity also apply with greater force on cross-examination. The hostile witness will often strain to misinterpret the question. The cross-examiner wants to frame questions that are so clear and so short that they cannot be misinterpreted. Furthermore, in addition to knowing the general rules for laying foundations, the cross-examiner must be cognizant of several special rules for cross.

1. LEGAL RULES

You will occasionally encounter a trial judge who believes that an attorney may not introduce an exhibit during the cross-examination of

an opposing witness. That belief is erroneous.[7] Although some courts in criminal cases permit cross-examination about any relevant proposition,[8] cross-examination in New York, as under Federal Rule of Evidence 611(b), is generally confined to the subject matter of the direct examination and to issues of credibility. But if the exhibit relates to a matter raised on direct examination, "new exhibits properly may be introduced during cross-examination."[9] The judge has discretionary control over the order of proof; the permissibility of introducing exhibits during the cross-examination "lies in the discretion of the trial judge."[10]

Since the witness is often hostile to the cross-examiner, the law permits leading questions on cross-examination. While leading questions are permissible on cross, argumentative questions are objectionable. An argumentative question challenges the witness about an inference from the facts in the case. Assume that the witness testifies on direct examination that the defendant's car was going eighty miles an hour just before the collision. You want to impeach the witness with a prior inconsistent statement. It would be permissible, leading cross-examination to ask, "Isn't it true that you told your neighbor, Mrs. Ashton, at a party last Sunday that the defendant's car was going only fifty miles an hour?" The cross-examiner may legitimately attempt to force the witness to concede the historical fact of the prior inconsistent statement. Now assume that the witness admits the statement. It would be impermissibly argumentative to ask, "How can you reconcile that statement with your testimony on direct examination?" The cross-examiner is not seeking any additional facts; rather, the cross-examiner is challenging the witness about an inference from the facts. Questions such as "How can you expect the jury to believe that?" are similarly argumentative and objectionable. The attorney may argue the inferences during summation or closing argument, but the attorney must ordinarily restrict his or her questions to those calculated to elicit facts.

2. PRACTICAL RULES

You should avoid argumentative questions for practical as well as legal reasons. If a hostile witness is intelligent, the witness usually will not easily concede the favorable inference you want to draw. An argumentative question often prompts a heated exchange between the cross-examiner and the witness. The lay jurors sympathize with the

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[7] J. TANFORD, THE TRIAL PROCESS: LAW, TACTICS AND ETHICS 388 (1983).

[8] *See, e.g.*, People v. Hadden, 95 A.D.2d 725, 464 N.Y.S.2d 134 (1983); People v. Kennedy, 70 A.D.2d 181, 420 N.Y.S.2d 23 (1979).

[9] TANFORD, *supra* note 7.

[10] TANFORD, *supra* note 7.

lay witness, and you can antagonize the jurors by arguing with the witness. This is especially true with a child or with the spouse of an injured party. Unless the witness has a particularly abrasive personality, arguments between the attorney and witness are usually "no-win" situations for the attorney. If the attorney appears to dominate the exchange, the jurors may infer that the attorney does not want the witness to tell the whole truth; but if the witness appears to dominate, the jurors may conclude that the attorney is diffident — perhaps because the attorney lacks faith in his or her case. Elicit the historical facts you are morally certain the witness will concede, and draw your inferences during closing argument.

As a general proposition, you should consistently use leading questions on cross-examination. You ordinarily do not want to give a hostile witness any opening. Do not give that witness an opportunity to explain by asking "Why?" If you want to impeach a witness with a conviction, ask, "Isn't it true that in 1978, a New York court convicted you of perjury?" If you want to prove a prior inconsistent statement, ask, "Isn't it a fact that right after the fight, you told the officer that the hallway was so dark that you couldn't identify your attacker?" You can preface your questions with "Isn't it true ...?," "Isn't it correct ...?," or "Isn't it a fact ...?" to maintain control over the witness; or you can make a declarative statement and add a tag sentence such as "Isn't that true?" at the very end of your question. The key to good cross-examination is control of the witness.

We have attempted to begin every question in the sample foundations for cross-examination with such prefatory language. The preface is in capital letters. Our purpose is to help the reader develop the habit of consistently using leading questions on cross-examination. Again, we do not advocate beginning every question with blatantly leading introductory language. Sometimes you will want to use non-leading questions. For instance, you may suspect that an adverse child witness has a memorized story. As the cross-examiner, you might want to pose an open-ended, non-leading question to the witness to give the child another opportunity to repeat the story verbatim. In other cases, if the topic is safe, you can use gently leading questions, beginning with such words as "Is," "Was," and "Did." However, the primary failing of neophyte cross-examiners is that they do not lead enough. We have deliberately exaggerated and begun every cross-examination question with blatantly leading language to underscore the importance of maintaining witness control. Albert Krieger, the former president of the National Association of Criminal Defense Lawyers, has remarked that under the guise of asking questions, a good cross-examiner actually makes factual assertions and forces the witness to express assent on the record. Put another way, whatever you do, do not simply elicit a second time the testimony that came out on direct.

Finally, remember that your demeanor and tone should ordinarily be friendly even when you are using narrowly-phrased, leading questions. You want the opposing witness to cooperate. You will not get that cooperation if your demeanor is combative or offensive. Quite to the contrary, if your demeanor is aggressive, the witness will put up his or her defenses, and you will have a very difficult time eliciting favorable information. You will sometimes want to make a show of righteous indignation at an opposing witness caught in an obvious lie; but when you are using the opposing witness to lay a foundation, the wisest tactic is to be friendly and low-key.