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Trials and the Federal Rules of Evidence

Roger J. Miner ‘56

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FEDERAL COURT PRACTICE

March 29, 1985    Rochester
April 19, 1985    New York City
May 3, 1985      Albany

Cosponsored by the Committee on Federal Courts and the Committee on Continuing Legal Education of the New York State Bar Association
FEDERAL COURT PRACTICE
Program Description

The Committee on Federal Courts and the Committee on Continuing Legal Education of the New York State Bar Association are pleased to offer this up-to-date, timely and traditionally popular day-long course on basic federal civil practice. This course will focus on practice and procedure in the federal district court and is designed to familiarize the general practitioner, general litigator, or other attorney who has not had extensive exposure to the federal court system with the theory, practice and tactics of litigation civil matters in federal court.

Written materials, prepared by the faculty and other experienced federal litigators, will be distributed to each registrant.

In addition to discussing the theory and law of federal court practice, the speakers will offer helpful, practical tips and guidance on handling all aspects of a civil case in federal court, based upon their own respective experiences and favored tactics. The program is designed to provide practical "nuts and bolts" information and places particular emphasis on discovery. The faculty will highlight many of the differences between civil practice in state court and in the federal district court. Included within each speaker scheduled speaking time will be the opportunity for panel discussion and audience questioning.

This course should be a valuable introduction for those without an extensive background in federal civil practice, but in addition should be a useful review for more experienced practitioners who may want to brush up on their skills and knowledge.

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Program Agenda

8:30-9:00 a.m. PROGRAM REGISTRATION (outside meeting room)
9:00-9:45 COMMENCEMENT OF THE ACTION (JURISDICTION, VENUE, PLEADINGS)
9:45-10:30 MOTION PRACTICE INCLUDING TEMPORARY RESTRAINING ORDERS AND ORDERS TO SHOW CAUSE
10:30-10:45 COFFEE BREAK
10:45-11:30 DISCOVERY — AN OVERVIEW
11:30-12:15 p.m. DISCOVERY — DEPOSITIONS
12:15-1:30 LUNCH (on your own)
2:15-3:00 CALENDAR PRACTICE AND PRETRIAL CONFERENCES
3:00-3:15 COFFEE/SOFT DRINK BREAK
3:15-4:15 TRIALS AND THE FEDERAL RULES OF EVIDENCE
4:15-5:00 APPEALS
5:00 ADJOURNMENT

Registration Information and Form
ADVANCE REGISTRATION: Advance registration is recommended. Seating is limited in all locations, and registration will be taken on a first-come, first-served basis. If you plan to register shortly before or on the day of the program, please contact our Registrar at 1-800-582-2452 (in the Albany and surrounding areas dial 463-3724) so that we can notify you of any possible last minute changes. Tape recording of NYSBA seminars is not permitted.
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SEMINAR REGISTRATION Please enroll me in FEDERAL COURT PRACTICE. Coursebook will be distributed at the program to program attendees and is included in registration fee. NYSBA members $65.00; Non-members $90.00; Student members $25.00. I will attend the program at:
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# Program Locations

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<th>Address Details</th>
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<tr>
<td>Friday</td>
<td>ROCHESTER HILTON</td>
<td>175 Jefferson Road, Rochester, NY 14623</td>
</tr>
<tr>
<td>March 29, 1985</td>
<td>(716) 475-1910</td>
<td>(NYS Thruway Exit 46, then Route 252 West off I-390 North)</td>
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<tr>
<td>Friday</td>
<td>NEW YORK PENTA HOTEL</td>
<td>(formerly the New York Statler) 401 Seventh Avenue at 33rd Street, New York, NY 10001</td>
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<td>April 19, 1985</td>
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<td>AMERICANA INN</td>
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<td>May 3, 1985</td>
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Please, if you receive multiple copies of this brochure, pass them along to other colleagues who may be interested in this program.
I. **CIVIL TRIALS**

A. **Trial by Jury**

1. **Right to Jury Trial** - The seventh amendment provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law." **See also** Fed. R. Civ. P. 38(a).

2. **Jury Demand** - Party may indorse demand on pleading but written demand for trial of any issue as of right must be made no later than ten days after the service of last pleading directed to such issue. Fed. R. Civ. P. 38(b). Unless issues to be tried are specified in demand, all issues triable by jury are covered. Where trial of only certain issues is demanded, other party may serve demand for trial on other issues within ten days after original demand or within lesser time prescribed by court. Fed. R. Civ. P. 38(c). Demand may not be withdrawn without consent of all parties. Fed. R. Civ. P. 38(d). Failure to serve and file (filing required by Fed. R. Civ. P. 5(d)) constitutes waiver. Fed. R. Civ. P. 38(d). Court may permit withdrawal of waiver under very limited circumstances. Fed. R. Civ. P. 39(b);

3. **Use of Jury in Non-Jury Cases** - Court may impanel advisory jury on motion or *sua sponte*. Also, with consent of the parties, Court may order jury trial of non-jury issues except in actions against the United States where the pertinent statutes call for a non-jury trial. Fed. R. Civ. P. 39(c). Jury acts in advisory capacity on equitable claims where legal and equitable claims are presented in same case. Likewise, as to a claim against the United States where a third party claim is triable by jury as of right.

4. **Consolidation and Bifurcation** - Joint trial or consolidation may be ordered as to actions involving common questions of law or fact. Fed. R. Civ. P. 42(a). A separate trial on any claim or issue may be ordered to further convenience, avoid prejudice "or when separate trials will be conducive to expedition and economy." Fed. R. Civ. P. 42(b). General Rule 40 N.D.N.Y. permits the Court to order a separate trial on issue of liability in personal injury and other civil litigation where it may be decided as a prerequisite to determination of other issues.
5. **Jury size** - Although the normal jury consists of twelve members, most districts provide for six members by Local Rule. E.g., General Rule 45 N.D.N.Y. Parties may stipulate for any number of jurors less than twelve. They also may stipulate for a verdict or finding by a stated majority. Fed. R. Civ. P. 48. N.B. Otherwise, a unanimous verdict is required in civil cases in District Courts. Up to six alternate jurors may be impanelled. Fed. R. Civ. P. 47(b).

6. **Examination of Prospective Jurors** - Although voir dire examination is conducted by the Court in most cases, Fed. R. Civ. P. 47 provides that the Court may allow the attorneys to conduct the examination. The Rule also allows the attorneys to supplement the Court's voir dire with such additional questions as the Court deems proper. The additional questions generally will be asked by the Court. A set of voir dire questions should be submitted prior to the commencement of examination.

7. **Challenging Prospective Jurors** - Each side is entitled to three peremptory challenges, and multiple parties on each side are considered a single party unless the Court allows additional peremptory challenges to be exercised jointly or severally. 28 U.S.C. § 1870. Peremptory challenges for alternate jurors are allowed as follows: one for one or two; two for three or four; and three for five or six. Fed. R. Civ. P. 47(b). "All challenges for cause or favor, whether to the array
or panel or to individual jurors, shall be determined by the court." 18 U.S.C. § 1870. The challenge for cause must be made before the jury is impanelled and failure to challenge is considered a waiver. Peremptory challenges are exercised under the "jury box" system or the "struck jury system." See United States v. Blouin, 666 F.2d 796 (2d Cir. 1981).

8. Opening Statements and Closing Arguments - An opening statement generally is limited to a discussion of the facts to be proved. It should avoid statements of law, arguments or detailed descriptions of anticipated testimony. Where it clearly appears from the opening statement that there is no basis for the claim, a verdict may be directed. See generally 5 A.L.R.3d 1405. The right to make a closing argument is subject to various restrictions. Counsel is permitted to argue that certain conclusions may be drawn from the evidence and applicable law, but may not comment on matters not in evidence, matters based only on personal knowledge and beliefs, principles of law contrary to the instructions of the Court and personal characteristics of witnesses and parties having no relevance to the issues on trial. Reasonable time limitations may be imposed by the Court.

9. Issuance of Subpoena For Attendance At Trial - Subpoenas are issued by the clerk at the request of any party. The subpoena may also command the production of designated books,
papers, documents or tangible things. Service may be made at any place within the district where the trial is to be held or at any place outside the district within 100 miles of the place of trial. Service is also allowed at any "place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place where the district court is held." Fed. R. Civ. P. 45(e)(1). Fees and mileage as prescribed by 28 U.S.C. § 1821 must be tendered.

10. **Order of Presentation; Objections** - The Court is enjoined to exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence. Fed. R. Evid. 611(a). Although cross-examination should be limited to subject matter of direct examination and credibility matters, the Court may allow inquiry into additional matters. Fed. R. Evid. 611(b). Leading questions are allowed under certain conditions. Fed. R. Evid. 611(c). Objections to evidence must be timely made, Fed. R. Evid. 103(a)(1), offers of proof should be considered, Fed. R. Evid. 103(a)(2), and exceptions are unnecessary, Fed. R. Civ. P. 46. The Court may call and interrogate witnesses, Fed. R. Evid. 614, and has the discretion to allow the reopening of a case for the reception of additional evidence. *Skogen v. Dow Chemical Co.*, 375 F.2d 692 (8th Cir. 1967).
11. **Trial Motions** - (a) **Motion for a Directed Verdict** - Fed. R. Civ. P. 50(a) - may be made after opening statements, at the close of an opponent's evidence or at the close of all the evidence. The grounds for the motion must be specified. The test is whether the facts and inferences point so strongly and overwhelmingly in favor of one party that reasonable people could not arrive at a contrary verdict. *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737, 742-43 (2d Cir. 1975), cert. denied, 424 U.S. 955 (1976).

(b) **Motion for Judgment Notwithstanding the Verdict** - Fed. R. Civ. P. 50(b) - may be made only if motion for directed verdict is denied and must be made within ten days after entry of judgment or discharge of jury without a verdict. This period may not be extended by stipulation or order.

12. **Jury Instructions** - Written requests to charge should be submitted. The Court is required to inform counsel of its proposed rulings on the requests prior to argument, and specific objections must be made to each instruction or failure to instruct before the jury retires. Fed. R. Civ. P. 51. The rule requires the court to instruct the jury after arguments are completed, but it has been suggested that argument should follow the charge.

13. **Verdicts** - The Court has the discretion to require a general verdict, a special verdict in the form of a separate
written finding as to each issue of fact, or a general verdict accompanied by written interrogatories upon one or more issues of fact. Fed. R. Civ. P. 49. Counsel should submit proposed forms of verdicts, including special verdicts and interrogatory proposals.

14. **Motion for New Trial** - Fed. R. Civ. P. 59 allows a motion for a new trial "in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." The motion must be served not later than ten days after the entry of judgment and may be joined with a motion for judgment notwithstanding the verdict.

15. **Improving the Work of Juries - Experiments in the Second Circuit** - Attorney participation in the voir dire; individual voir dire questioning of jury panelists out of the presence of other panelists; pre-instructing the jury; allowing jurors to submit questions; affirmatively advising jurors that they may take notes; furnishing the jury with a copy of the charge; tape recording the court's charge.

B. **Non-Jury Trials**

1. **Procedure** - Generally, the procedure for the conduct of a non-jury trial is the same as the procedure for the conduct
of a jury trial. The judge has the same responsibilities as the jury in the determination of factual issues. "In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not." Builders Steel Co. v. Commissioner of Internal Revenue, 179 F.2d 377, 379 (8th Cir. 1950).

2. Trial Motions - Defendant may move for involuntary dismissal after plaintiff has completed the presentation of evidence "on the ground that upon the facts and the law the plaintiff has shown no right to relief." Fed. R. Civ. P. 41(b). The Court then may determine the facts and give judgment against the plaintiff or may defer judgment until the close of all the evidence.

3. Findings - The Court must make findings of fact and conclusions of law in all cases tried without a jury or with an advisory jury. "It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court." Fed. R. Civ. P. 52(a). Findings of fact will not be disturbed unless "clearly erroneous." Counsel should submit proposed findings and conclusions in every non-jury case.

4. Masters and Magistrates - The Court may refer to a special master the duty to make findings in matters of account,
or of difficult computation of damages, or upon a showing that some exceptional condition requires it. Fed. R. Civ. P. 53(b).
Objections to the master's report may be made, but the findings must be accepted by the Court unless clearly erroneous. Fed. R. Civ. P. 53(e)(2). A magistrate may be designated to serve as a special master. 28 U.S.C § 636(b)(2).

5. **Post Trial Motions** — Within ten days after entry of judgment, a party may move the Court to amend its findings or to make additional findings. Fed. R. Civ. P. 52(b). This motion may be joined with a motion for a new trial. "On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment." Fed. R. Civ. P. 59(a)(2).

II. **Evidence**

1. **With certain exceptions, the Federal Rules of Evidence apply to all proceedings in the courts of the United States and before United States Magistrates.** Fed. R. Evid. 101. The Rules are divided into eleven Articles as follows:

   I. General Provisions (Fed. R. Evid. 101-106)

   II. Judicial Notice (Fed. R. Evid. 201)
III. Presumptions in Civil Actions and Proceedings
(Fed. R. Evid. 301-302)

IV. Relevancy and Its Limits (Fed. R. Evid. 401-412)

V. Privileges (Fed. R. Evid. 501)

VI. Witnesses (Fed. R. Evid. 601-615)

VII. Opinions and Expert Testimony (Fed. R. Evid. 701-706)

VIII. Hearsay (Fed. R. Evid. 801-806)

IX. Authentication and Indentification (Fed. R. Evid. 901-903)

X. Contents of Writings, Recordings, and Photographs
(Fed. R. Evid. 1001-1008)

XI. Miscellaneous Rules (Fed. R. Evid. 1101-1103)

2. Preliminary Questions - Except where evidence is admitted subject to connection in the first instance, issues relating to the admissibility of evidence, the existence of a privilege and the qualification of a person to be a witness are determined by the Court, which is not bound by the rules of evidence (except as to privilege) when inquiring into those matters. Fed. R. Evid. 104(a) and (b).

3. Limited Admissibility - A limiting jury instruction may be requested to restrict the scope of evidence admissible as to one party or for one purpose but inadmissible as to another party or purpose. Fed. R. Evid. 105.
4. **Relevant Evidence** - Although all relevant evidence generally is admissible, Fed. R. Evid. 402, the Court may exclude such evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

5. **Habit and Routine** - Evidence of the habit of a person or the routine practice of an organization may be received to prove that conduct on a particular occasion was in conformity with the routine or practice. Fed. R. Evid. 406. Neither corroboration nor eyewitness testimony is necessary to support such evidence. McCormick's definition of "habit" is adopted in the Advisory Committee Notes: "one's regular response to a repeated specific situation."

6. **Character Evidence** - Character or reputation may be in issue in certain civil actions. Proof by testimony as to reputation or by testimony in the form of an opinion may be made where evidence of character or of a trait of character is admissible. Fed. R. Evid. 405(a). Where character or character trait "is an essential element of a charge, claim, or defense, proof may also be made of specific instances of . . . conduct." Fed. R. Evid. 405(b).
7. **Subsequent Remedial Measures** - Evidence of such measures is inadmissible to prove negligence or culpable conduct, except "when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." Fed. R. Evid. 407. The exclusion applies to strict liability cases tried in the Second Circuit. Cann v. Ford Motor Co., 658 F.2d 54 (2d Cir. 1981), cert. denied, 456 U.S. 960 (1982)

8. **Compromise** - Offers to compromise and statements made in settlement negotiations are inadmissible to prove liability for or invalidity of the claim or amount. Exceptions: evidence presented in the course of negotiations but otherwise discoverable; evidence offered to prove bias or prejudice of a witness or to negative a contention of undue delay; evidence proving an effort to obstruct a criminal investigation or prosecution. Fed. R. Evid. 408.

9. **Privileges** - (a) Where federal law supplies the rule of decision on a claim or defense to which the privilege is pertinent - Unless specifically provided by (1) the U.S. Constitution (2) federal statute or (3) rules prescribed by the Supreme Court under statutory authority, questions of privilege are governed by federal common law.

(b) Where state law provides the rule of decision respecting an element of a claim or defense, however, "the
privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law." Fed. R. Evid. 501.

10. **Impeachment of Witness**

   (a) "The credibility of a witness may be attacked by any party, including the party calling him." Fed. R. Evid. 607. **Compare with** N.Y. Civ. Prac. Law § 4514 (impeachment of own witness only by prior statement under oath or in writing subscribed by witness).

   (b) **Credibility of Witnesses** may be attacked or supported by opinion or reputation evidence limited to truthfulness or untruthfulness. **But**, truthful character evidence is admissible only after character for truthfulness has been attacked by opinion or reputation evidence or otherwise. Fed. R. Evid. 608(a). Specific instances of conduct, other than conviction of crime, cannot be proved by **extrinsic evidence**. The Court may permit specific instance inquiry on cross-examination of a witness "(1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified." Fed. R. Evid. 608(b).

   (c) **Evidence of conviction of crime** will be admitted if elicited from the witness or established by public record if the
crime "(1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment." Fed. R. Evid. 609(a). With certain exceptions, a conviction over ten years old is not admissible under this Rule. Fed. R. Evid. 609(b).

11. **Refreshing Memory** - If a witness uses a writing to refresh his memory while testifying, the adverse party is entitled to have the writing produced for inspection and to introduce the portion relating to the testimony. In the discretion of the Court, a writing used for memory refreshment prior to the giving of testimony also may be ordered produced. Fed. R. Evid. 612.

12. **Prior Statements of Witness** - Where a witness is examined as to a prior statement, the contents need not be revealed to him at the time of examination but must be disclosed to opposing counsel. Fed. R. Evid. 613(a). Except as to admissions of a party-opponent, extrinsic evidence of a prior inconsistent statement cannot be admitted "unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him
thereon, or the interests of justice otherwise require." Fed. R. Evid. 613(b).

13. **Witnesses Called by the Court** - On its own motion or at a party's suggestion, the Court may call witnesses and may interrogate such witnesses as well as those called by any party. Fed. R. Evid. 614(a) and (b).

14. **Exclusion of Witnesses** - The Court must order witnesses excluded when a party so requests and may make such an order sua sponte. The following may not be excluded: a natural person party; an officer or employee designated as the representative of a corporate party; and "a person whose presence is shown by a party to be essential to the presentation of his cause." Fed. R. Evid. 615.

15. **Experts and Opinions**

   (a) An expert witness, qualified as such by knowledge, skill, experience, training or education may testify to assist the trier of fact to understand the evidence or determine a factual issue. Fed. R. Evid. 702. The expert may give an opinion without prior disclosure of underlying facts or data. Fed. R. Evid. 705. The facts or data may be those perceived or made known to the expert. "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." Fed. R. Evid. 703. Opinion evidence is
not inadmissible because it involves ultimate issues. Fed. R. Evid. 704.

(b) **Court-Appointed Experts** - On motion of any party or **sua sponte**, the Court may enter an order to show cause why expert witnesses should be not appointed. Appointments may be made as agreed by the parties or the Court may select the expert. Compensation may be ordered to be paid by the parties in such proportion as the Court directs and thereafter charged as costs. Fed. R. Evid. 706(a) and (b).

(c) **Learned Treatises**, established as reliable authority, may be read into evidence (but not received as exhibits) to the extent relied upon by an expert in direct examination or called to the expert's attention on cross-examination. Fed. R. Evid. 803(18).

(d) **Lay Witnesses** may testify to opinions rationally based on perceptions and helpful to an understanding of the testimony or the determination of facts in issue. Fed. R. Evid. 701.

16. **Hearsay and Non-Hearsay** - (a) The Rules define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). "Statement" is defined as an oral or written assertion and as
nonverbal conduct intended as an assertion. Fed. R. Evid. 801(a).

(b) The prior statement of a witness is not hearsay if given under oath subject to penalty of perjury at a trial, hearing, or other proceeding or in a deposition. Fed. R. Evid. 801(d)(1).

(c) The admission of a party-opponent is not hearsay. This includes "a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship." Fed. R. Evid. 801(d)(2)(D).

17. Hearsay Exceptions - Twenty-three specific exceptions to the hearsay rule are listed in Fed. R. Evid. 803. A twenty-fourth listed exception relates to statements not covered by the first twenty-three "but having equivalent circumstantial guarantees of truthworthiness." Fed. R. Evid. 803(24). Certain forms of hearsay are admissible when a witness is unavailable because of court exemption, refusal to testify despite a court order, lack of memory, inability to be present because of death, illness or infirmity, or inability to procure the attendance of a witness by process or other reasonable means. Fed. R. Evid. 804(a). Some of the significant specific hearsay exceptions are as follows:

(a) Present sense impression. Fed. R. Evid. 803(1).
(b) Excited utterance. Fed. R. Evid. 803(2).
(c) Then existing mental, emotional, or physical condition. Fed. R. Evid. 803(3).

(d) Statements for purpose of medical diagnosis or treatment. Fed. R. Evid. 803(4).

(e) Recorded recollection. Fed. R. Evid. 803(5).

(f) Records of regularly conducted activity. Fed. R. Evid. 803(6). This rule represents an expansion of the old business record exception and includes memoranda, reports, records or data compilations kept by any business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(g) Public records and reports. Fed. R. Evid. 803(8). Included are "factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." Id.

18. Authentication - Certain items, such as public documents under seal, certified copies of public records, official publications and newspapers and periodicals may be received in evidence without extrinsic evidence of authenticity. Fed. R. Evid. 902. Where authentication or identification is required for admissibility, there must be "evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901. The Rule provides examples of such
evidence: nonexpert opinion on handwriting, voice identification, comparison with authenticated specimens, etc.

19. **Originals, Duplicates, and Other Evidence of Contents** -

Original writings, recordings or photographs must be produced to prove their contents. Fed. R. Evid. 1002. However, duplicates are admissible to the same extent as originals "unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Fed. R. Evid. 1003. Other evidence of the original contents of a writing, recording or photograph may be admitted under certain circumstances. Fed. R. Evid. 1004.

20. **Depositions as Evidence** -

(a) A deposition may be used by any party to impeach the testimony of the deponent "or for any other purpose permitted by the Federal Rules of Evidence." Fed. R. Civ. P. 32(a)(1). The deposition of a party or of the representative of a corporate entity "may be used by an adverse party for any purpose." Fed. R. Civ. P. 32(a)(2).

(b) The deposition of a witness may be used for any purpose if the witness is dead; more than 100 miles from the place of trial or outside the United States; unable to attend because of age, illness, infirmity or imprisonment; or unable to be subpoenaed. In the case of "exceptional circumstances" not
covered by the foregoing, application may be made to the Court to allow the deposition of a witness to be used. Fed. R. Civ. P. 32(a)(3).

(c) If part of a deposition is offered in evidence by one party, "an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts." Fed. R. Civ. P. 32(a)(4).
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Objectionable Objections

by Joseph M. McLaughlin

As a trial judge, I hear countless objections that range from the outrageous ("Your Honor, he is a liar.") to the hilarious ("Your Honor, he can't do that.") to the close-but-no-cigar ("I object. The statement was made in the absence of my client.") to the simply obscure ("I object. It's irrelevant, immaterial, and incompetent."). Arguments over the admissibility of evidence often leave the darkness unobscured. For example, "Your Honor, it's admissible as part of the res gestae." Much of this is due to the logorrhea to which our profession is particularly susceptible. And the rest of it is due to bad habits that have dulled the edges of evidentiary distinctions so carefully honed in law school.

This article will sweep into one pile most of the sillier objections. I will then sift through the pile to determine whether any ideas lie at the bottom of the heap.

Why should the trust and estates lawyer merely give property in a will when, with little effort, one can "give, devise, and bequeath" the same property? And why should a trial lawyer object that evidence is hearsay, when he can just as easily fulminate that it is "incompetent, immaterial, and irrelevant?" The answer is that the words are not fungible. They mean different things.

Evidence is never incompetent. People are. Properly used, the term "incompetent" means that a witness who proposes to testify lacks the minimal testimonial qualities to make his testimony acceptable.

Typically, the witness suffers from some physical or mental impairment that makes his testimony worthless. Another illustration is the Dead Man's Statute, which makes people who are interested in the outcome of a lawsuit incompetent to testify to a transaction with a decedent. The same evidence coming from the mouth of another witness, however, would be admissible. Accordingly, it is sloppy usage to object that the testimony is incompetent. Rather, the objection should be that the witness is incompetent.

Immateriality means that under the pleadings and the substantive law, the proposed evidence does not address an issue in the case. Thus, for example, in a worker's compensation case, it is no defense that the plaintiff employee was guilty of contributory negligence. Accordingly, evidence that the plaintiff was chattering idly with a fellow employee when the plaintiff's hand went into the printing press is inadmissible in an action against the employer, not because it is irrelevant or incompetent, but because it is immaterial.

Relevancy, unlike materiality and competence, is not a legal notion at all. Rather, it is a logical concept. Under Fed. R. Eivd. 401, evidence is relevant if it has "any tendency to make the existence of a material fact" more probable or less probable than it would be without the evidence. In a personal injury action arising out of a car accident, for example, evidence that the plaintiff was sexually promiscuous would be irrelevant to the material issue of pain and suffering.

Hearsay

Most lawyers have mastered the distinction between hearsay and nonhearsay, which is the use of words to prove the truth of what the words say as distinct from merely proving that the words were uttered. Nevertheless, when it comes to invoking the twenty-five or thirty exceptions to the hearsay rule, lawyers often fuse two or three exceptions into one with a consequent loss of clarity.

1. Res gestae. Res gestae has become to the modern trial lawyer what limbo was to the medieval theologian—a place to isolate miscellaneous exceptions to the hearsay rule that do not fit neatly under any other exception. The term should be avoided.

Res gestae has at least five distinct usages. Only one is correct. Properly used, the term refers to words that are uttered as part of a legal transaction and impart legal coloration to the transaction. We know, for example, that if a person unintentionally destroys his will, the will is not revoked. On the other hand, if he rips up the will and says at the same time, "I hereby revoke my will," the words become part of the act, and just as a witness may testify to what he saw, he may also testify to the contemporaneous words that he heard.

Unfortunately, the notion has arisen that words uttered as part of any transaction somehow become part of that transaction and may thus be testified to. In criminal cases, for
example, I have heard countless defense lawyers ask the arresting officer:

Q. "And, sir, what did the defendant say when you arrested him?"

The answer sought is the defendant's statement:

A. "I'm innocent."

The argument is often made that the defendant's exculpatory statement is admissible as part of the res gestae. It is not.

A statement by the defendant when he is arrested is not a part of the legal transaction in the same sense as a statement by a testator when he revokes the will. Accordingly, the defendant's exculpatory statement, if admissible at all, must come in either as an exception to the hearsay rule or as nonhearsay.

Only in an unusual situation is there a hearsay exception to admit an exculpatory statement when offered by the defendant. It is not an admission for the simple reason that it is consistent with the defendant's position in court. Obviously, it is not a declaration against the defendant's interest. Occasionally the statement will qualify as an excited utterance or as a declaration of present state of mind. See United States v. DiMaria, 727 F.2d 265 (2d Cir. 1984).

When offered by the defendant, the exculpatory statement cannot be viewed as nonhearsay. It is offered to prove the truth of the matter asserted, which is to say, that the defendant is innocent. It may be worth noting, in passing, that the prosecution might be entitled to use the exculpatory statement as nonhearsay if it were offered as false exculpatory evidence, indicating a consciousness of guilt. In any event, it does not advance the argument one whit to cast it in terms of res gestae.

In an earlier era, res gestae was used to describe a spontaneous declaration or, as it is more commonly known now, an excited utterance. Fed. R. Evid. 803 (2) deals with this exception to the hearsay rule. Again, applying the term res gestae simply creates confusion.

Another older usage of the term refers to statements by a person about his bodily condition ("My back hurts") or mental condition ("I hate Del Verro"), and these too are expressly dealt with in Fed. R. Evid. 803 (3)(4). They should not be clouded by references to res gestae.

2. Admissions and declarations against interest. There is no such thing as an "admission against interest." There are admissions, and then there are declarations against interest.

An admission is an out-of-court statement by a party that is inconsistent with the position he later takes in court. It need not have been against his interest when made. For example, when a person files his income tax in April, he may believe it in his interest to understate his income. Nevertheless, if he later brings a personal-injury suit and seeks to recover lost income, his tax return would be admissible against him if he asserts that he lost more income than he reported on his tax return.

A declaration against interest is an out-of-court statement, almost invariably made by a nonparty, which statement was known by him to be against his interest when made. Thus, a statement by Brown that he shot Del Verro might be admissible in Smith's behalf if Smith were prosecuted for the murder of Del Verro. The rationale, of course, is that normal people do not go around admitting murders unless they are, in fact, murderers.

Since an admission is made by a party (or his agent), the rules of evidence permit statements like these to be used even though the party is available to testify. A declaration against interest, on the other hand, since it is made by a stranger, may be used only if the stranger is not available to be called as a witness.

3. Self-serving. One of the more dissonant chords in the symphony of a trial is the objection that evidence is "self-serving." Since the whole purpose of a lawsuit is to serve self, it must be at once apparent that there is no rule of evidence excluding self-serving statements.

Writings, when offered to prove the truth of the matter contained in them, are hearsay. If the writing does not fall within any exception to the hearsay rule, then the writing is inadmissible, not because it is self-serving, but because it is hearsay. On the other hand, if the writing falls within an exception, then the writing is admissible even if it happens to be self-serving.

Most business records, for example, are self-serving. Yet they are perfectly admissible. Appellate courts occasionally become impaled on this distinction when they are dealing with accident reports. Indeed, the United States Supreme Court, in Palmer v. Hoffman, 318 U.S. 109 (1943), stumbled awkwardly over the self-serving aspects of a railroad accident report. The Court held that such a report did not qualify as a business record. Modern courts, however, reject this and hold that if the accident report is kept in the regular course of business and otherwise qualifies, the self-serving nature does not affect admissibility. See, e.g., Toll v. State, 32 A.D. 2d 47, 299 N.Y.S.2d 589 (N.Y. App. Div. 1969).

4. Presence of Client. One of the hardest edges in the field of evidence is the assumption that if a statement is made in the presence of a party, that statement is admissible. In an action by Fielder against Parker for breach of contract, for example, Fielder produces Jones to testify that Jones was
in a barroom one night and heard the bartender say that Parker had not kept his part of the bargain. The judge asks: "Was Parker present in the bar that night?" The parties agree that Parker was, and the judge then admits the bartender's statement through the lips of Jones. Is this error? Yes.

It is difficult to trace the origin of this heresy. As with every heresy, there is a grain of truth in it. The "presence-of-the-client" rule is probably the illegitimate offspring of the rule that the party's silence may, in certain circumstances, constitute an admission. Under well-defined, narrow conditions, where an accusation is leveled at a party, and he has an oppor -

portunity to deny it, and every normal human instinct would suggest that he would deny it, then a court may construe the party's silence as acquiescence in the truth of the charge. It is rare that all the conditions can be met to invoke this doctrine.

In the barroom hypothetical, I cannot imagine anyone ruling that Parker should have denied a patron's charge that the party had breached a contract. It most assuredly is not the rule that any statement made in the presence of a party may be offered against him in evidence.

Cross-Examination

In criminal cases, it is not uncommon for the prosecutor to cross-examine the defendant by repeating the prosecution testimony (often from a policeman) and then to ask the defendant: "Is that testimony a lie?" This technique is pure rhetoric. If the testimony is contrary to the defendant's testimony, which it always is, the answer is obvious. The prosecution testimony is either mistaken or an outright lie. In either case, the question is one for the jury and not for the defendant to answer on cross-examination.

In the same vein, it is improper to pose questions in a manner that requires the defendant to characterize the prosecution's witnesses as liars. Leaving aside that this line of cross-examination wastes everyone's time, the defendant's belief that other witnesses are lying is simply irrelevant.

There are several objections that run the gamut from well-founded but ineptly articulated to just plain silly. It is amazing how often they are heard.

1. Calls for operation of the witness's mind. The question put to the witness is: "Was the car going fast or slowly?" The objection: "Your Honor, I object. The question calls for the operation of the witness's mind." Heaven forbid! The judge should rule the question proper, and permit the witness to answer.

What the objector probably intends to raise is that the question calls upon a lay witness to express a conclusion. Under Fed. R. Evid. 701, however, even a lay witness may express his opinion on the speed of a moving vehicle. In any event, if the objection is under Rule 701, it should be stated in terms of an objection to conclusions rather than to the "operation of the witness's mind."

2. Nonresponsive answer. The question is: "As the defendant approached the intersection, what color was the traffic light?" The answer is: "The defendant was driving fast and..." The objection is: "Your Honor, I move to strike the answer on the ground that it is nonresponsive." The judge should deny the motion and permit the answer to stand.

Nonresponsiveness is a problem between the questioner and the witness. It is none of the adversary's business. In other words, the only person who can move to strike a nonresponsive answer is the person who put the question.

A moment's reflection suggests the reason. If the non-responsive answer is independently admissible (and the speed of a moving vehicle is), it would serve no purpose to strike it. The questioner would only have to ask the question directly. If the non-responsive answer is inadmissible, then the adversary should move to strike on whatever ground makes it inadmissible, e.g., it is hearsay, a conclusion of the witness, and so on.

3. Asked and answered. There is no rule of evidence that bars the asking of the same question twice. If the question is crucial, or if there is good reason to repeat it (perhaps Juror No. 4 was asleep the first time), a party should be permitted to re-ask the question. Analytically, the motion is one under Fed. R. Evid. 403 to move the trial along because the questioner is propounding cumulative questions. It is the rare judge who will sustain an objection to a question as asked and answered, and more time is usually wasted over the objection than permitting the repetition of the question.

4. Argumentative. The question is: "Did you intend to make a gift?" The objection is: "I object. The question is argumentative." The objection should be overruled, and the witness should be permitted to answer.

Whatever the question may be, it certainly is not argumentative. An argumentative question is one that seeks to frame a question matter that properly belongs in a summation. For example, the question, "How can you remember the events of five years ago, when you cannot even remember what dress you wore yesterday?" does not really seek an answer. Rather, it seeks to embarrass the witness and pick a fight with her. This should be left to summation.

The question, "Did you intend to make a gift?" is proper since any witness is competent to testify about his own state of mind. That the ultimate question in the case may be whether a gift was intended does not bar the question, because Fed. R. Evid. 704 expressly sanctions opinion testimony even on "an ultimate issue to be decided by the trier of fact."

5. Calls for a narrative. The question is, "Tell us what happened on June 3, 1980." The objection is, "I object. The question calls for a narrative." Whether the objection should be sustained rests in the discretion of the court.

There is no rule of evidence that forbids narratives. The rules forbid only inadmissible testimony. Accordingly, if there is substantial assurance that an uninterrupted narrative by a witness will not result in a flood of inadmissible statements, the court may permit such testimony.

Some witnesses have had more time in the trial pit than many lawyers. Policemen and experts come readily to mind. If reasonably intelligent and well-prepared, these witnesses may be given their head and may be permitted to testify without the jerks and jounces of the lawyer's questions. It
is a judgment call by the trial judge for which he is rarely second-guessed.

6. *Ex parte considerations.* In a criminal case, the prosecutor surrenders to the defendant a statement made before trial by the key prosecution witness. The statement has been redacted to eliminate several paragraphs. The defendant says, "Your Honor, may I request that you review the original document *ex parte?*" The statement is meaningless.

There are three terms that lawyers persist in confusing, perhaps because two of them are in Latin: off-the-record, ex parte, and in camera.

An off the record discussion is one that is not recorded by the court reporter. It is a useful device to take care of housekeeping details of the trial without cluttering up the record. It is important to remember, however, that evidence off the record cannot be considered by an appellate court even to reverse a judgment of conviction. If, therefore, in an off the record discussion, something of importance develops, it should be dictated into the record to preserve it for appellate purposes.

An ex parte communication is one between the court and a party without notice to the adversary. It may or may not be on the record, but in any event, it is frowned upon.

In camera is Latin for in chambers. It means that the trial judge will look at some piece of evidence or perhaps even conduct a part of the trial in the privacy of his chambers. A record should always be made of what occurred, and both sides should be present.

7. *Offer of proof.* I am surprised at how few offers of proof are made. It is my experience that when an objection is sustained, most lawyers simply grumble something like, "May I have an exception?" and let the matter drop. This can be dangerous.

In the first place, few jurisdictions require a formal exception to a ruling on evidence. When a party has made an objection and it has been ruled on, there is no need to make a formal exception.

In the second place, the party who proffered the evidence is playing Russian roulette if he does not make an offer of proof. Suppose he was right and the trial judge was wrong. How can an appellate court that agrees with him determine whether the error is reversible or harmless? Unless the answer that would have been given is clear from the record, the trial judge must be affirmed in the absence of an offer of proof.

An offer of proof may be made in one of two ways. Most judges prefer that it be done at side-bar or during a recess by having the lawyer simply dictate into the record what he knows (not believes) the witness would have said in response to the question. If the proffered testimony is crucial, an alternative and more precise way to make an offer of proof is to get the objectionable answers on the record. This can be done by dismissing the jury while the lawyer asks the questions that the judge has already ruled to be objectionable.

**Techniques of Objection**

An objection, besides being clear, must be timely. It should be made at the first available opportunity, which normally means the moment the objectionable question is put.

If the question is proper, but the answer is objectionable, then the correct procedure is a motion to strike, rather than an objection. The trial lawyer is entitled to more than "motion granted" from the judge. An instruction should be given to the jury to disregard the answer. Incidentally, it is worth noting that if the question is improper, but this is not noticed until after the answer is given, it is technically too late to move to strike at that point, although the judge has discretion to grant such a motion.

When an objection is made, the ground may usually be stated in a word or two without the encumbrance of having to conduct a side-bar conference. For example, it is sufficient to say:

"I object – hearsay."

"I object – it's not a business record."

"I object on the ground that it is irrelevant."

If further elaboration is required, then a side-bar conference is unavoidable, although judges – and more importantly, juries – hate them.

Apropos timely objections, perhaps the single most commonly overlooked objection is that of variance. Where the plaintiff proves one theory, and then offers evidence of another, if the defendant does not make timely objections to evidence supporting the second theory (on the ground of materiality), most judges will deny a later motion to strike all the testimony on the second theory.

In a recent malpractice case, for example, the complaint alleged that the defendant doctor had performed an operation negligently. While I had, of course, read the pleadings, I did not intrude when the plaintiff began an extensive direct examination of his own client about the risks involved in the operation of which he had been advised by the doctor. This, of course, represented a change of theory from simple malpractice to lack of informed consent. However, I did not conceive it to be my duty, in the absence of an objection, to intervene, and extensive testimony came out concerning the doctor's failure to warn the plaintiff about the risks of the operation. Later in the case, the defendant moved to strike all testimony concerning the lack of informed consent, and the plaintiff cross-moved to amend the pleadings to conform to the proof.

In denying the motion to strike and granting the plaintiff's motion to conform, it was clear to me that all the evidence on the point had been developed on the record, and that the jury was in position to decide that question. Nothing could be gained by taking that question from them at the last minute. On the other hand, if the defendant had been alert to object to the variance the moment the irrelevant questions were put, I undoubtedly would have sustained the objection.

Objections serve two purposes. They keep impermissible evidence from being heard by the jury and, perhaps more importantly, they preserve for appellate review whatever error was committed in the trial court. Occasionally, these purposes are at cross-purposes. A short-tempered jury may be able to ignore an objection which the judge has sustained. (Please turn to page 65)
Preserving the Privilege
by Samuel R. Miller

Whether you successfully invoke the attorney-client privilege can make or break a case. The consequences of waiving the privilege may be serious in any case, and especially so in complex civil litigation and white-collar criminal proceedings. Despite much recent litigation on the scope and application of the privilege, the limits of the privilege remain unsettled, especially in the corporate context.

It is possible to bolster a claim of privilege for confidential communications between a client and counsel. It is also possible to waive the privilege without intending to do so. This article suggests how to protect confidential communications from compelled disclosure on the grounds that the privilege has been waived or does not apply.

The purpose of the attorney-client privilege is to promote freedom of consultation between a lawyer and his client and to encourage full discussion of the facts without the fear that disclosure can later be compelled from the lawyer without the client’s consent. See Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

Dean Wigmore gives this definition of the attorney-client privilege, which has been adopted by federal courts:

1. Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such,
2. The information sought and communicated concern matters within the scope of the client’s corporate duties.
3. The employees were aware that the communications with counsel were ordered so that the corporation could obtain legal advice.
4. The communications were ordered to be confidential, and they remained confidential.

The party asserting the privilege has the burden of establishing that it applies. By using the Upjohn decision for guidance, you may strengthen a claim that a communication between a client and a lawyer is privileged. Consider the steps that follow.

Counsel should direct investigations. Corporate employees often undertake investigations and make reports before the lawyer is notified of potential legal claims. There is a real risk that these reports will not be protected from disclosure. For example, courts have held:

- that a preliminary investigation, by management, of foreign payments alleged to be illegal was not privileged, even though the report was later forwarded to counsel. In re Grand Jury Subpoena, 599 F.2d 504 (2d Cir. 1979);
- that investigative reports prepared after a fire in a dormitory by the defendant university’s security office and a commit-