I. Overview of Evidence

A. Introduction

The fundamental contest between the parties is the admission or exclusion of persuasive evidence. Counsel should not permit the ability to introduce evidence to overwhelm the fundamental, strategic or tactical thinking as to how to win the case. Too often, less-experienced counsel simply introduce everything they can, rather than setting priorities and thinking about the case from the fact-finder's point of view. For example, in a case involving preferences and new value, even if the judge will allow evidence about the solvency of the debtor, it is rarely useful to introduce it. It is more likely to confuse the fact-finder and diffuse the issues rather than clarify. Similarly, opposing counsel often objects simply to win the objection rather than think through the significance of the underlying evidence. It is in that context that counsel must approach the technical aspects of the rules of evidence.

Counsel begins with the theory of the case – that is, the case's basic themes and core disputes. It is beyond the scope of this handbook to review that aspect of trial practice. In essence, however, evidence that is not important should not be the focus of an evidentiary fight. For example, if the theory of the case is that the company was insolvent at the time of the transfer of assets, evidence that relates to profitability or lack thereof six months later is of very limited usefulness. On the other hand, evidence that the accounts receivable were overstated by 75 percent the day before the transfer is central to the case. Thus, even if there is some evidentiary way to get the former fact into evidence, proponent counsel should think twice before taking that step. Similarly, should counsel offer that evidence, opposing counsel should consider carefully whether an objection is worth the effort.

At the practical level, from the proponent's view the rules of evidence are like a corridor with a number of doors. It does not matter how many doors are closed; if counsel can find one open door, then the evidence is admissable. To extend the metaphor, if counsel can open no door fully, then counsel must try to find a way of getting at least some of the evidence before the fact-finder.

From the opposite point of view, the opponent must think through all the possible avenues and shut them down. This thought process requires anticipation of opposing arguments and preparation of supporting ones. It also requires a sense of strategy to focus on matters that are important rather than immediate.

B. Direct Examination

The object of direct examination is to establish the factual and legal basis of the case. Other than a case based on warring experts, rarely is any case won on cross examination. Thus, as a general rule, the focus should be on the witness and not on the attorney. When preparing the examination, the questioning counsel must stand in as the surrogate for the fact-finder and ask the questions that are necessary to elicit the relevant facts. Quite frequently, the journalist's traditional "who, what, when, where, why and how" are just as relevant in this context (and have the benefit of not leading the witness on direct).

Breaking this down, there are really three categories of information. First, what does the fact-finder need to know? The essential evidence relates to the elements of the cause of action. The party with the burden of proof must focus on evidence that supports the allegations; the defending party's direct case must incorporate evidence that contradicts the elements or establishes an affirmative defense.

Second, there is information that the fact-finder would like to know – not essential but contextual. For example, the motives behind a particular transaction may not be necessary information for the fact-finder, but they are often something of interest. Such context makes a direct case compelling and interesting. Further, even in the driest of cases, there is always some emotional component that inevitably affects the fact-finder.

Finally, there may be things that counsel realizes would normally be part of the narrative but that, for some reason or another, will not be introduced. Rather than simply pretend that this omission does not exist, counsel will plan for direct testimony that explains or minimizes the impact of such a

hole in the narrative. Similarly, to the extent that counsel can anticipate the counter case, counsel may want to mitigate or otherwise anticipate the case to minimize its impact.

From a technical point of view, counsel must keep the focus on the witness. Not only are nonleading questions generally required, they are also a good idea. The purpose of the questions is not only to introduce relevant facts, but also to create the shape and rhythm of the testimony.

The most common form of such structure is chronological. It is common because it is often the best choice. Not only is it simple from the point of view of the witness, it also makes it easy for the fact-finder to comprehend. Another common approach, particularly in business cases, is first to break the testimony down by topic and then use chronology within each topic. As long as counsel makes clear when a new topic is taken up, this approach is also relatively easy for witnesses and fact-finders.

There are other possible approaches. In deciding how to structure testimony, however, counsel must always keep an eye on two things: the legal issues such as proving elements and complying with the rules of evidence, and the need to make the testimony comprehensible, persuasive and credible to the fact-finder. Failure to consider both objectives may result in structuring a witness' direct testimony in a way that disserves the client because it may not be as clear and relevant.

Before turning to specific issues of technique, one final structural point should be addressed. It is a common tendency for counsel to focus on the strengths of their case rather than the weaknesses. Emotionally, it is difficult to focus on the parts of a case that create fear or anxiety. Nonetheless, as part of a direct case, counsel must confront and, if possible, defuse such weaknesses by (i) minimizing the problem, (ii) explaining the problem away, or (iii) challenging the credibility of the witnesses supporting that weakness.

The purpose of technique in direct examination is to facilitate the substantive goals of counsel; it is not a goal in itself. Thus, while counsel can

always improve technique, it should be a byproduct of the effort to build and present a persuasive case.

The starting point, therefore, is simplicity. Counsel must ruthlessly eliminate anything that unnecessarily complicates the presentation of the facts or distracts the fact-finder from the goals. Counsel should start this process by avoiding any effort to "talk like a lawyer" during the presentation of a direct case.

> Not – *Please state your name and spell your last name*.
>
> Instead – *Please introduce yourself to the court and spell your last name for the court reporter*
>
> Not – *What transpired when you exited the vehicle?*
>
> Instead – *What happened after you got out of the car?*
>
> Or even – *What happened next?*

Counsel should instruct the witness to do the same. During preparation counsel should ruthlessly eliminate unnecessary professional jargon or arcane expressions. Obviously, counsel cannot eradicate every such term, but the absolute minimum is the goal. Further, since counsel and the witness will consider and plan for the inclusion of technical terms, they can also build in any necessary explanation or examples.

In the same spirit, simple questions are better than complicated questions. Any question that has too many clauses is better chopped into two questions. The active voice is better than the passive. Thus, this:

> *What did you test next?*

is better than

> *What was the next thing that was tested?*

The first question involves the witness, and the jury, much more directly in the process than the abstraction in the second.

In addition to the actual words used by counsel and the witness, pacing is important. As counsel approaches important points, it is worthwhile to slow matters down, both by asking more particular questions and asking them more slowly. Indeed, even silence can be important – a pause after making a point not only emphasizes that point, it gives the fact-finder an opportunity to make a note.

C. OBJECTIONS

For all but the most experienced counsel, the sole purpose for objections is the *exclusion* of *problematic* evidence. There is no point in objecting to evidence that is technically inappropriate if it does not harm one's case. Thus, the first question objecting counsel should ask is whether the objection is worth the investment of counsel's and the court's time. Even if counsel prevails, if all counsel has accomplished is a brief disruption followed by the rephrasing of a question or forcing opposing counsel to establish a foundation that he or she can, in fact, establish, then counsel has accomplished nothing and has wasted everyone's time. Put another way, if there is no reasonable expectation of exclusion of the evidence for more than a few moments, an objection is unlikely to be worthwhile. Indeed, such an objection may emphasize the importance of the evidence that the judge might otherwise have missed without an objection.

Even if the judge may exclude the evidence, the next question is whether counsel cares about the admission of otherwise improper evidence. If the evidence really does not matter, then there is no reason to object. Similarly, even if counsel is asking a leading question, if the exchange is not important, there is rarely a purpose served in propounding an objection.

From a technical perspective, counsel should find out ahead of time how the judge prefers to have objections stated. Some prefer just to have counsel object, while others would prefer a one or two word reference to the grounds. Some may require reference to the specific rules of evidence, and

others will even permit some level of explanation. Counsel fights the judge's preferences at his or her own peril.

Assuming counsel intends to object, such objection must be quick and audible. Most judges are not interested in objections that are too late – that is, made after a witness has answered – or too unsure. Thus, counsel should rise and speak crisply and loudly (unless the court has indicated a preference for counsel not to rise). Local custom determines whether counsel simply says the word "objection," objects with a catch phrase such as "objection – hearsay" or interposes a "speaking objection" such as "objection, your Honor, that is totally irrelevant because it has nothing to do with any of the elements of the case." In most cases, any extended discussion will generally be held at sidebar if there is a jury.

D. Cross Examination

Counsel wins few cases on cross examination. The best cross examination makes its points clearly and then ends. Counsel should carefully plan to control the witness and keep the focus on the cross examiner.

Since the witness is usually hostile, counsel should think through each evidentiary point. Counsel must establish foundations with care and with the assumption that the witness will not be trying to help. This is particularly true with documents that counsel introduces during cross examination.

To the extent that the object of cross examination is impeachment, counsel should follow this structure:

- Lock in the statement to attack.
- Confirm the circumstances of the prior inconsistent statement (deposition, affidavit, etc.).
- Confirm the existence of the prior statement.
- Move on.

Under no circumstances should counsel ask the witness to reconcile the two statements. This simply gives the witness a chance to think up and proffer some explanation that will diminish the effect of the point. Even if the witness offers such an explanation during redirect, it will sound weaker because it is elicited by the proponent of the testimony.

E. DOCUMENTS

Every document counsel introduces should either be part of an essential foundation or should be part of an overall advocacy plan. Put another way, just because counsel can introduce a document does not mean that he or she should. Counsel should consider what will happen when the fact-finder goes back to make a decision; if counsel introduces 200 exhibits, it is unlikely that the judge or jury will give any of them significant consideration and scrutiny. In contrast, if counsel introduces the most important thirty exhibits, the judge or jury will be able to take each one into account.

In this context, counsel should strongly consider summaries of extensive exhibits. Similarly, to the extent that counsel can use excerpts from or sumarize a lengthy document, it will help focus counsel's case.

F. EXPERTS

Experts – witnesses who will render opinions – must meet two types of evidentiary tests. First, counsel must ensure that his or her testimony qualifies under the *Daubert* standard for expert testimony. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Second, the testimony must also qualify under Rules 701 and 702.

Detailed discussion of *Daubert* is beyond the scope of this monograph, but the essentials are as follows:

- The methodology is an acceptable methodology;
- The expert is qualified to apply that methodology;
- The expert's data collection procedures are appropriate; and
- The expert has properly applied the methodology.

Once counsel establishes these points, then the court has satisfied its gatekeeper function (under Rule 104).

Turning to the evidentiary requirements, counsel must establish:

- The expert has the necessary qualifications;
- The expert has an opinion; and
- An expert opinion would be useful to the fact-finder.

Of course, simply meeting the minimal requirements of the rules of evidence is not necessarily the best advocacy. At its best, the expert can act both as a teacher and as an advocate without being discounted as a mere mouthpiece. Both functions are important, and counsel should structure the examination to enhance both functions.

The application of *Daubert* in financial cases is not always intuitively obvious. In some contexts, whether a particular transaction was properly accounted for under Generally Accepted Accounting Principles (GAAP) really does not trigger any *Daubert* analysis. In that context, if the witness is an accountant simply interpreting accounting rules and applying them to particular circumstances, there is rarely an objection. On the other hand, a witness who purports to assign a value to a good, service or license, or who seeks to project profits out over time may face significant attacks on his or her credentials or methodology.

G. MOTIONS *IN LIMINE*

One way of raising evidentiary issues early is by a motion *in limine* (literally, a motion "on the threshold"). These motions serve several purposes. First, to the extent that there are somewhat complex evidentiary issues, it allows counsel to raise them when the judge has time to reflect rather than in the middle of a trial. Second, if counsel is seeking a *voir dire* (that is, a special hearing focusing solely on the evidentiary basis for testimony), it gives the court time to have such a hearing before the trial. Finally, even if the court postpones consideration of the issue until the trial, counsel has educated and sensitized the court to the issue ahead of time.

Typical motions *in limine* include:

- challenges to expert testimony
- exclusion of inappropriate damage calculations
- exclusion of prejudicial evidence, particularly when there is a jury or the evidence could be time-consuming
- exclusion of evidence based on a failure to disclose or untimely disclosure
- exclusion of evidence based on defective discovery responses
- exclusion of evidence based on statutory limitations
- exclusion based on prior invocation of Fifth Amendment rights.

This, of course, is not a comprehensive list.

There are three key strategic questions counsel must address in considering such a motion. First, will the court consider the issue waived if not raised pre-trial? Some courts will hold that counsel has waived discovery issues or *Daubert* issues if not timely asserted. Whether this is technically correct or not does not matter if the court has this view; the point of trial practice is never the goal of examination.

Second, can opposing counsel cure the defect if it is raised before trial? If there is a foundational issue or similar problem that is potentially curable, counsel may choose not to give advance notice of the problem. In contrast, if the problem is not curable, there is no disadvantage to a motion *in limine*.

Third, if the exclusion or inclusion of the particular piece of evidence has impact on how the case is developed, then the motion *in limine* is strategically important.

Finally, counsel should consider the complexity of the issue. If there is some unusual characteristic of the evidentiary point, or if it depends on a less-familiar point of law, there is some advantage to beginning the dialogue with the trial judge as early as possible.

In general, counsel should make motions *in limine* short and focused. Counsel should consider them to be more in the nature of a detailed objection than a complex briefing. They are particularly important in the context of jury trials, but counsel can use them in bench trials as well, especially when the resolution may shorten the trial.