

“Making Sense of the Rules of Evidence and Assembling a Proper Trial Notebook,” By William Markham, San Diego Attorney (© 2011)

When I was a young, inexperienced attorney, I wanted nothing more than to go trial, but I really lacked a sound understanding of the rules of evidence. I urgently sought to cure the gap in my knowledge, but to my dismay I found the rules of evidence to be excessively complicated and almost incomprehensible – a great, unruly mass of tortuous rules and procedures that governed the showing of evidence at trial.

1. In vain did I read hornbooks, treatises, the evidence statutes themselves and the case law on point. Some books on evidence even proved counter-productive, leaving me more confused afterwards than I had been before! In time I discovered three very good books on evidence, which I highly recommend when you need to delve deeply into the matter:

(1) The Rutter Group’s Practice Guide for Trials in California Courts, which provides an excellent explanation and system for understanding the rules of evidence;

(2) Brockett and Kecker’s superb guide on cross-examination ("Effective Direct & Cross-Examination"); and

(3) Edwin A. Heafey's handbook on evidentiary objections allowed under California law ("California Trial Objections.")

Unlike these three books, which offer lengthy and superb explanations, I have tried in this article simply to set forth *a list of simple rules to explain the key points*. For all the rest, refer to the above guides, and read the statutes themselves as well as the case law on point. Even more important, try cases yourself and watch others do so in your spare time.

Here in the meantime is my short list of the key rules for handling evidence.

How to Learn the Rules of Evidence. The only way to understand the law of evidence is to *try cases, watch others try cases, and read about the law of evidence* in treatises, practice guides, the statutes themselves and the case law. You must do all of these things, and nothing else can take their place. Over time the rules and uses of evidence will sink in and become second nature to you, but it takes *time, practice, observation, and reading!*

What Is Evidence? Evidence is used to prove and disprove facts that remain in dispute at trial, including whether or not a given witness is trustworthy. By evidence, I mean live testimony, video testimony, documents, photos, onsite inspections, and other objects that can be displayed or shown. The basic idea is to show your evidence to the finder of fact (judge or jury) in order to make your case and discredit your adversary’s case. When appropriate, you might also seek to exclude evidence that is helpful to your adversary.

What the Rules of Evidence Are Used to Accomplish. Broadly speaking, you use the rules of evidence in order to have your evidence admitted and your adversary’s evidence excluded!

Your Trial Notebook and Evidence Grid. Before you can present your evidence, you must figure out which evidence you wish to present and which evidence is potentially harmful to your case.

To this end, you must prepare an *evidence grid*: For each cause of action at issue, list each element of the cause of action and then list each item of evidence that tends to prove or disprove the element. Once you have performed this task for all of your causes of action, you will have listed all of the evidence that you wish to present as well as all of the evidence that you dread, some of which you may seek to have excluded.

The basic rule for excluding evidence is two-fold: First, is this evidence harmful? If not, even if you can object to its admission, do not do so. Second, if it is harmful, then ask yourself whether you have a colorable argument for excluding it? If not, don't make the attempt. If so, make an excellent effort to have the evidence excluded.

Once you have completed your *evidence grid*, you should place in it your *trial notebook*, which in turn should be so complete and thorough that "a monkey could pick it up, walk into the courtroom, and try the case." (The quote belongs to one of my favorite colleagues). Your trial notebook should include the following:

An outline of your opening statement and a case chronology;

Your evidence grid;

An index of witnesses and your witness folders;

An index of exhibits (proposed, authenticated, admitted by stipulation, admitted during trial) and all proposed and admitted exhibits;

(You might sometimes keep your witness folders and exhibits in a separate box and merely place your indexes of witnesses and exhibits in the trial notebook.)

All motions in limine, opposing papers, and rulings on these motions;

Bench memoranda (typically on difficult points of evidence);

Stipulated jury instructions and each party's proposed jury instructions. Where possible, use CACI instructions in California state court and the 9th Circuit's model instructions in the district court of the Ninth Circuit. Only when strictly necessary, use specially prepared instructions that are *spare, easy to follow, as simple as possible, and obviously supported by controlling case law, which should always be cited and quoted below the proposed instruction* (your author has learned these points the hard way!);

Stipulated verdict forms and each party's proposed special verdicts;

The trial briefs;

All pre-trial orders and any standing order on trial procedure;

Key pleadings and discovery responses; and

An outline of your closing argument.

Each witness folder should contain an outline of the examination or cross-examination, and each

cross-examination should be *scripted*, word for word, with the answer to each question printed below and cross-referenced to the source that provides each answer (*e.g.*, a deposition clip, an exhibit, a discovery response, etc.). The cross-reference (a video clip of deposition testimony or an admitted exhibit) should be ready to be shown by your trial technician within 20 seconds or less. Each witness folder must have a copy of each exhibit that you plan to show to the witness. If the witness is a party, it should include a copy of the notice of appearance and accompanying proof of service. If the witness is a non-party, it must include a copy of the trial subpoena and accompanying proof of service. It should also provide all known contact information for the witness. It is your burden to make sure that you have arranged to have your witnesses in the courtroom when you wish to call them!

After preparing your evidence grid and trial notebook, you will have a very good idea of exactly which items of evidence you seek to introduce and which items you might prefer to have excluded. Never try to exclude evidence unless there is a good reason for doing so. Otherwise, you give the appearance of seeking to suppress the truth or of playing games with the rules of evidence, and this will make poor impression on jurors, who wish to hear the truth, not a truncated version of it, unless the "truth" is so tedious and incomprehensible that they would willingly pay money to whichever party will first allow them to leave! This last point leads us to the first principle of trying complex cases: *The aim is to explain complicated, difficult matters so that they can be readily understood and seem simple! Some practitioners seem almost to enjoy doing the opposite -- transforming a simple matter into a hopelessly complex morass that is beyond the grasp and patience of the victims who must try to make sense of it!* But I digress.

Where appropriate, try to have unfavorable evidence excluded by a motion in limine, so that it never sees the light of day during trial. Make the effort only if you have sound arguments to urge. Otherwise, you might offend the trial judge.

Now it is time to consider the following points, which are *the key rules of evidence in a nutshell*:

Relevance. Broadly speaking, relevant evidence is any *evidence that tends to confirm or disprove a disputed fact*. It is therefore always helpful to keep in mind the facts that you seek to prove or disprove at trial. That is why an evidence grid and a well-organized trial notebook are indispensable: They help you not only to organize your case and make a good impression, but also to analyze and present your case persuasively. Follow your evidence grid and don't allow your adversary to embroil you in pointless, confusing controversies over irrelevant non sequiturs! All too often litigants become embroiled in unending tit-for-tats over minor facts that have little bearing on the key issues. A good litigator will hammer home the key points as well as all of the necessary ones and not seek to disprove everything his adversary has tried to prove merely because his adversary has tried to prove it!

The Rule Against Hearsay. The first question you should ask yourself is whether each item of your evidence is hearsay or non-hearsay. *Non-hearsay evidence is limited to the following*: Testimony given by a live witness while on stand, by which he recounts what he remembers having said, done, heard, seen, felt or smelled! If the witness testifies to what he remembers hearing, it is hearsay *only if the testimony is offered to prove that what he heard was true*; otherwise, the testimony is not hearsay, but rather is offered to prove only that the witness actually heard what he says he heard ("I heard the sound of a shotgun," – which might be useful

in a murder case; or "He told me that the car could fly in orbit and so it would cost me \$64 million to purchase it"— which might be admitted as "verbal acts" in a fraud case.)

Certain evidence is hearsay, but is deemed exempt from the rule against hearsay. This evidence is (1) testimony given by a party during deposition; and (2) evidence introduced to prove a party admission (i.e., "The defendant told me that he buried the weapon in order to escape being detected").

Anything else is hearsay – all other statements and all documents of any kind. Presumptively, hearsay evidence is inadmissible. Fortunately, there are 47 kajillion exceptions to the rule against hearsay. If, as is often true, your case depends on hearsay testimony, figure out which exception to the hearsay rule might be applicable to the hearsay evidence whose admission you seek. If the law on point is complicated, or if you fear that the judge might be unfamiliar with the hearsay exception that you plan to invoke, brief the matter before trial either in a motion in limine or in your trial brief, or have a bench memorandum ready at hand, so that when you proffer the evidence and the other side objects, you can request a side bar and instantly provide citations and argument that address the matter.

When Admitted. Even if evidence is not hearsay or is admissible hearsay, it comes in *only if it is relevant, there is a proper foundation for it, its probative value is not exceeded by its prejudicial effect, and it is not otherwise excluded because of a privilege or immunity.*

Foundation. This is the bane of every junior litigator. Foundation is merely shorthand for *establishing certain predicate facts whose existence must be proven before the evidence in question becomes admissible.*

Lack of foundation might mean that the proponent of an item of evidence has failed to establish that the evidence is relevant: "Counselor, why do you want to show photos of the Prime Minister naked in bed in this case, which concerns a commercial contract dispute over warranties for jet fighter aircraft?" "Your Honor, because the prime minister was having an affair with Olga Maximillion, a Russian spy who persuaded him to have England buy the jets from Aeroflot, a ruinous company.")

Lack of foundation might mean that the proponent of a document or photo has failed to establish its authenticity, which can be established by stipulation or by having a witness confirm that he prepared or received the document or took the photo.

Lack of foundation might mean that the proponent of testimony has failed to establish that his witness has a present memory of having seen, heard, felt, touched or smelled something. Such a witness must establish that he remembers having made the observation, and that he was physically able to do so. ("Do you remember where you were last year on December 22 at approximately 10:00 a.m.?" "Yes." "How is it that you can remember where you were at this time.?" "I will never forget that day as long as I live." "Where were you?" "I was at the intersection of Main and Smith, seated in my car, stopped at a red-light." "Do you remember what you observed?" "Yes." "What did you observe?" "I observed a truck come barreling through the intersection at a very high rate of speed, smashing into two cars, which both exploded into fireballs.")

Lack of foundation might mean that the proponent of hearsay evidence has failed to establish that the hearsay evidence falls within an allowed exception to the rule against hearsay.

Lack of foundation might mean that the proponent of an item of privileged evidence has failed to make a showing that the privilege has been waived or is otherwise inapplicable.

Thus "foundation" merely refers to predicate facts that you must prove in order to have admitted an item of evidence (testimony, an exhibit, etc.) that proves or disproves a disputed fact. It is an exercise in logic.

If your adversary keeps objecting on the ground of foundation, and if the judge keeps sustaining the objection, ask for a sidebar and request an explanation of what foundation is lacking. The trial judge should oblige you unless the deficiency is patently obvious.

Probative Value vs. Prejudicial Effect. Evidence can be excluded even if it is otherwise admissible, if its probative value is "substantially outweighed" by its prejudicial effect. The trial court has broad discretion to make the determination. Any attorney who wishes to exclude on evidence on this ground should make the attempt by bringing a motion in limine before the jury is ever seated.

Privileges and Immunities. Sometimes a good practitioner will knowingly waive a privilege, perhaps calling to the stand his client's former attorney in order to have him explain important matters to the jury. But always be mindful of the applicable privileges and immunities, which you can use to exclude otherwise admissible evidence. There are significant exceptions to these privileges and immunities that you must also consider.

The above approach merely give you the basics. The above three guides give you specific explanations. Whenever you have a key evidence problem, you must review the applicable statutes (*e.g.*, the California Evidence Code or the Federal Rules of Evidence) as well as case law interpreting this evidence.

Before going to trial, read over the applicable statutes and read the key ones with care. You will get better and better at handling evidence each time you try a case.