

# Trial Evidence in the Civil Case

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# Overview of the today's presentation

- Basics you need to know;
- Practice Tips;
- Situational analysis- recommendations;
- Tactics / Strategy when approaching certain pieces of evidence;

Standard Procedure: Witness,  
Document, Video, Picture is being  
called or introduced.

What purpose is the  
evidence being offered?

# ORE 102: Purpose and Construction

- The purpose of these rules is to provide procedures for the adjudication of causes to **the end that the truth may be ascertained and proceedings justly determined.**

# ORE 103: Rulings on Evidence

- (A) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
  - (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
  - (2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Offer of proof is not necessary if evidence is excluded during cross examination.
  - Once the court rules definitely on the record, either before or at trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.
- (B) Record of offer and ruling. At the time of making the ruling, the court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.
- (C) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury. (D) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

# ORE 104: Preliminary Questions

- Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (B). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
- (B) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
- (C) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall also be conducted out of the hearing of the jury when the interests of justice require.
- (D) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.
- (E) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

# Relevance serves as the first Gatekeeper Function for the Court

Court uses this as the first exclusion of unhelpful evidence at trial.



Before you proceed to  
foundation arguments...

You will argue Relevance

# Evidence is Relevant

Evidence Rule 401 Evidence is relevant if:

- **(a)** it has any tendency to make a fact more or less probable than it would be without the evidence; and
- **(b)** the fact is of consequence in determining the action.

# Background to consider on Relevancy

- Describes factors that bear on the decisions the jury is set out to solve.
- Relevance is relational – it carries meaning only in context.

# Words to Use when Arguing Relevance

- What is the proposition the evidence is being used to prove?
- What issue is the evidence offered to prove?
- Is the legal issue material to the substantive cause of action or the defense in the case?
- Will the evidence be probative (positive or negative affect) on the proposition?
- Look at the pleadings

# Advisory Note on 401

- “Relevancy is not an inherent characteristic of any item of evidence, but exists only as a relation between an item of evidence and a matter properly provable in the case”
  - Relationship – there is some connection between the two things based on inferences.
  - Pen in right hand, infers they write with her right hand;



What is a fact of  
consequence?

# “fact of consequence” -

- “A fact of consequence to the determination of the action” describes facts that relate to
  - Elements of a legal claim or defense;
  - The credibility of a witness;
  - Helpful background information;
  - Develops the story for the jury;



# Relevancy – easiest test to satisfy

- If the evidence has the smallest tendency to suggest that some fact is true or untrue, then it passes the test.
- Relevance is relational – it carries meaning only in context of case.
- Sam is a supervisor of the truck drivers for a corporation. (Fact)
- Then the question should be asked is “relevant to what.”
  - If Plaintiff files a law suit against the Corporation for Negligence, then relevant as to training;
  - If Plaintiff sues Corporation for damages due to failing to pay a promissory note, then it is not relevant.

# Example: Advisory Notes:

- Homicide Case: Prosecution introduces evidence showing a motive on the part of the defendant.
  - Such evidence does not establish that it is more probable than not that the defendant committed the crime;
  - Satisfies 401; It is more probable that the defendant committed the crime with the evidence admitted than without it.

# Questions to ask with Relevancy

- What is the proposition the evidence is being used to prove?
- What issue is the evidence offered to prove?
- Is the legal issue material to the substantive cause of action or the defense in the case?
- Will the evidence be probative (positive or negative affect) on the proposition?
- Look at the pleadings for guidance;
- Look at the facts of the story line supporting the themes of the case.



# Key to Relevancy

- Defendant who is accused of rape- find stuffed animals in his apartment
- “Any Tendency” – very lenient standard – if it shifts the fact finder’s view of facts, even the smallest degree; then relevant.



If evidence is relevant, most likely the evidence is admissible.

Remember :There must be a fact or condition in the chronology of the case, before admission of the evidence.



# Protect your client.

Start by challenging the evidence relevancy.

# Purpose of this step:

- Flush out the arguments the proposing party is making when publishing the evidence;
- Raise arguments you may believe the Proponent may make and see what reaction happens;
- See the court's reaction;
- No argument is off limits at this point;
- Push the court to see what the limit is as it comes to arguments;

# Evidence v. Arguments Made by Counsel

- Evidence will have multiple purposes;
- What arguments are being made after the introduction of the evidence;
- Will counsel use the evidence in an improper way?

# “Flush Out”

- Improper arguments:
  - Identify the arguments before they get to the jury;
  - Preliminary Rulings on the arguments in relationship to the evidence;
  - Demonstrate to the court the improper basis for the arguments;

# Second Step: Challenge the Foundation of the Evidence

Can they authenticate the evidence.

*EVIDENTIARY FOUNDATIONS*

Edward J. Imwinkelried

Why attack the foundation?





# Typical Objections with Foundation Arguments

# Typical Foundation Grounds

- Competency of a witness – Rule 601
- Qualification of an expert – Rule 603
- Personal Knowledge of the witness, document, etc. Rule 702
- Opinion Testimony – attack the basis – Rule 701-705
- Hearsay Exceptions – rule 803-804;
- Authenticating any document

Don't Forget Procedure: Judge will admit the evidence only after the proper foundation is offered.

Judges can deviate.

# Always Remember

If your opponent cannot make a challenge to the authenticity of the evidence, then it should be admitted.

# Where are we at in the process?

- Relevant;
  - Is the evidence going to be used improperly?
- Foundation;
  - Can you gain ground with your case by attacking the foundation;
- Next Step:
  - Admissibility;
  - Prejudice v. Probative;

Best Tool at This Point

# ORE 105: Limited Admissibility

- When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request of a party, shall restrict the evidence to its proper scope and instruct the jury accordingly.

# Author Comments:

- “In many instances an item of evidence can be used for multiple purposes.”
- “Frequently, item of evidence may be admissible for one purpose, but inadmissible for another purpose.”
- This does not mean – inadmissible for one purpose, it is therefore completely inadmissible.
- Courts tend to admit evidence. Rule 105 applies.



# What to remember...

- Rule 105 use to admit evidence;
- Rule 105 use to limit the purposes the evidence is being introduced for.
- Rule 105 upon request, allows the court to limit the scope of what the evidence is introduced for.

# Author's comment:

- “Rule 105 applies, and the court **must** upon request, instruct the jury as to the limited purpose of the evidence.”
- A failure to do this is reversible error.

## *Harrington v. State* 19 Ohio St. 264 (1869)

- “[i]nstructions advising the jury of the object for which particular items of evidence are admitted and cautioning them against being misled by their improper use, are certainly proper, and are often called for by the circumstances of the case.”

Key: Rule 105 has a very close relationship to Rule 403.

# ORE 403: Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Undue Delay

- (A) **Exclusion mandatory.** Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.
- (B) **Exclusion discretionary.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.

Typically- if with limiting instruction,  
the evidence is still highly prejudicial-  
the evidence is out.

So how does this apply?

Probative v. Prejudicial



Probative

# Probative Means

- “means to make something more or less likely.”
  - If there is a positive or negative tendency, then probative.
  - Alternative: a “chain of inferences can be constructed that connects the evidence to issues in the case.”
  - If there is one inference, then it is probative

# Mistakes with Probative

- Probable – 50% standard does not equate to probative
- Evidence is not probative simply because it makes some fact more or less probable;
- The fact itself must be related to the cause of action, that is – the fact matters to someone who is trying to decide the case;

# Purpose of the Rule

- Exclude evidence that carries a substantial risk that the jury will respond in an emotional, rather than a rational way, or will be confused and misled.

Evidence's tendency to tempt the jury to decide the case on an improper, usually emotional basis.

# What are some emotions the jury would decide the case on?

- Fear
- Anger
- Disgust
- Resentment
- Pity

If the evidence is prejudicial, then jurors have come to a conclusion based on emotion not on the facts.





What we (trial lawyers)  
assumes the court does.

# Judge's Part.

- Rule 403 embodies the doctrine that the trial judge may exclude logically relevant evidence, if in his or her judgment, the evidence dangers outweigh its probative value;
  - At the outset, the judge must determine the probative evidence?
  - How clear is the evidence?
  - How strong is the logical link between the evidence and the fact it is offered to prove?
  - How positive is the witness?
  - The judge identifies the countervailing dangers.
  - The judge balances the probative value against the dangers.

How to do this.

# Step #1

Question to ask: after the jury sees this evidence, what conclusions are they going to draw from the document, photo, etc/.

# Step #2

Question: ask what affect will the evidence have on the jury once they see it?

What improper ways could the defense utilize the evidence.

# Sympathy, Misleading, Confusing Issues?

- How can the evidence be mis-interpreted?
- How will the jury be mis-led?
- What are the inferences from the evidence?
- What emotions does the evidence stir?
- What sympathies are aroused?

Specific Strategies with getting  
past 403 Objections.



# Rule 102:

- The purpose of these rules is to provide procedures for the adjudication of causes to the end that the **truth may be ascertained and proceedings justly determined.**
- The principles of the common law of Ohio shall supplement the provisions of these rules and the rules shall be construed to state the principles of the common law of Ohio unless the rule clearly indicates that a change is intended.

# What does this mean?

- According to the Author Comment:
  - Rules are not a detailed guideline for all evidence – case law will supplement whether the evidence comes in.
  - The rules are constantly redeveloping, expanding and contracting.

# Compare to the Federal Rules

- Federal Rules call for :
  - Secure fairness in administration;
  - Eliminate unjustifiable expense and delay
  - Promote growth and development in the law.
  - Staff Notes: 1980 reference the Ohio Rule of Evidence being drafted off the Federal Rules.

# Making the Argument to the Court:

- Argue the following:
  - Rules of evidence are flexible and on a case by case basis;
  - The court has the ultimate say on admissibility –
    - They can set the stage as to how evidence should be admitted.
    - Trial courts turned over on appeal when they restrict evidence;
    - For Example: Hearsay – excluded under one rule but admitted under another, then the evidence should be admitted;
  - Courts tend to favor admitting all probative evidence;
  - Use Rule 102 with expert testimony in achieving the truth;

A Judge's control over the  
presentation of evidence

# Rule 611

- (A) Control by the Court: The court shall exercise reasonable control over the mode and the order of interrogating witnesses and presenting evidence so as to:
  - (1) make the interrogation and presentation effective for the ascertainment of the truth;
  - (2) avoid needless consumption of time, and;
  - (3) protect witness from harassment or undue embarrassment.
- (B) Scope of Cross-Examination: Cross- examination shall be permitted on all relevant matters and the credibility of a witness;
- ( C) Leading Questions: Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness testimony. Ordinarily leading questions should be permitted on cross-examination...



# ORE 105 – Rule permits the Restriction of Evidence

- Area that is incompletely or inadequately developed;
- Barring inquiry into an area where there is a collateral proceeding;
- Lacks probative value
- Limit Rebuttal testimony



Reminders

You can ask the court to examine the witness if an offer of proof or rehabilitation is made.

Remember: make this attack  
prior to the evidence being  
published before the jury.

If you loose the objection-

File a motion of continuing objection to the specific area of questioning.

If you are on the other side  
of the attack...

# Other ways.

- If the objection is sustained- ask the court if the objection is sustained due to the manner in which you are seeking its introduction.
  - Attempt to get the evidence a different way.
  - Request to introduce the evidence conditionally, try to survive the motion to strike
  - Preserve through an offer of proof. Mark the transcript.