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## Direct Examination: Some Evidentiary and Practical Considerations

W. Dent Gitchel

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DIRECT EXAMINATION: SOME EVIDENTIARY AND PRACTICAL CONSIDERATIONS

W. Dent Gitchel\*

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## INTRODUCTION

Direct examination is the *sine qua non* of a trial. The lawyer's other functions during the trial—conducting voir dire, opening statement, cross-examination and closing argument—are undeniably of great importance, but direct examination is the most basic skill of the trial lawyer.<sup>1</sup>

Voir dire, when the lawyer is allowed to conduct it, can set the tone for the entire trial and affords the lawyer his only opportunity to converse directly with the jurors. Opening statement can and should condition the jury to understand the evidence it is about to hear. Closing argument affords the lawyer the opportunity to suggest to the jurors the inferences they should draw from the evidence they have heard and tell them why his client should win. Cross-examination serves to place the testimony of the other side's witnesses in proper perspective. All these elements of the trial, however, are mere supports for the central component of the lawsuit—the presentation of the evidence supporting the lawyer's theory of the case. This evidence, the essence of the case, must be presented through the direct examination of witnesses.

Much is written and spoken about the "art" of cross-examination. Although cross-examination may be more dramatic, it is usually icing on the cake of the lawsuit. Direct examination, on the other hand, while perhaps more mundane, must be conducted effectively if one is to present the case to the client's best advantage.<sup>2</sup> It is a skill which can be mastered by any lawyer through adequate preparation and acquired technique, together with a mastery of the law of evidence.

There is a vast gulf between the classroom and the courtroom. In the classroom students learn the venerable concepts of the law of evidence and the rules by which they can be applied to factual situations, but it is impossible to learn *how* to utilize the law of evidence in a classroom. It is necessary to learn the law of evidence as an academic discipline before attempting to prepare and try a lawsuit; but the metamorphosis from understanding the abstract principles of evidence law to mastering the rules of evidence as useable implements with which to construct a symmetrical case-in-chief must occur in a courtroom. Mere mastery of evidentiary principles without the ability to apply them in

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1. See J. TANFORD, *THE TRIAL PROCESS* 329 (1983).

2. See C. McCORMICK, *McCORMICK ON EVIDENCE* § 5, at 9 (3d ed. 1984).

action is of little benefit to the trial lawyer.

On the other hand, an effective communicator who does not have a meaningful understanding of the law of evidence is severely handicapped in the presentation of her case. Practical courtroom skills are of little utility if the lawyer does not understand the evidentiary rules that govern the admissibility of evidence. Objections to proffered evidence will be sustained because the lawyer does not understand the evidentiary theories under which the evidence is at least arguably admissible. Many an ill-founded objection has been sustained because the proponent of the evidence was unable to explain why the evidence should be admitted.

Many treatises and other works on the law of evidence exist,<sup>3</sup> but all concentrate on the doctrine and rules governing the introduction of evidence and devote relatively little attention to trial techniques. Likewise, many works have been written on effective trial techniques,<sup>4</sup> but all give the evidentiary principles behind those techniques relatively short shrift. This article represents the author's attempt to begin bridging that gulf between the law school evidence class and the moment when the lawyer stands alone in the courtroom faced with the task of employing those venerable tenets, so well-learned and little-exercised. We shall discuss some of the basic evidentiary considerations involved in the planning and execution of a direct examination, as well as some practical techniques that may be employed in order to use the law of evidence to advantage when the judge says, "Call your first witness."<sup>5</sup>

## I. SOME PRELIMINARY PRACTICAL CONSIDERATIONS

### A. Sequencing the Case

The order in which the lawyer will present witnesses should be a major consideration in trial preparation. Chronological order is the usual, but by no means exclusive, way to present testimony. The principles of primacy and recency are important to consider. The principle of

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3. See generally M. GRAHAM, *EVIDENCE TEXT, RULES, ILLUSTRATIONS AND PROBLEMS* (1983); G. LILLY, *AN INTRODUCTION TO THE LAW OF EVIDENCE* (1978); C. MCCORMICK, *MCCORMICK ON EVIDENCE* (3d ed. 1984); P. ROTHSTEIN, *EVIDENCE* (2d ed. 1981); S. SALTZBURG & K. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* (4th ed. 1986); J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* (1986); J. WIGMORE, *EVIDENCE* (Chadbourn rev. 1970); I. YOUNGER & M. GOLDSMITH, *PRINCIPLES OF EVIDENCE* (1984).

4. See generally P. BERGMAN, *TRIAL ADVOCACY* (1982); S. GOLDBERG, *THE FIRST TRIAL* (1982); K. HEGLAND, *TRIAL AND PRACTICE SKILLS* (1984); J. JEANS, *TRIAL ADVOCACY* (1975); R. KEETON, *TRIAL TACTICS AND METHODS* (1973); T. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* (1980); J. TANFORD, *THE TRIAL PROCESS* (1983).

5. See generally Enfield, *Direct Examination of Witnesses*, 15 ARK. L. REV. 32 (1961).

primacy states that people tend to believe that which they hear first.<sup>6</sup> Counterbalancing factors, however, may cause the trier of fact to weigh information presented later more heavily in forming a final judgment. For example, defense counsel, as a part of voir dire or opening statement, will usually ask the jurors to withhold judgment until they have heard all the evidence. This can result in a recency effect—a greater acceptance of facts presented later.<sup>7</sup> A case-in-chief is like a hammock—if both ends are tied securely, it will probably hold up even if it sags a little in the middle.

Many cases dictate their own sequence, and the lawyer has little leeway in determining the order in which his witnesses will be called. For instance, in a case arising out of an automobile accident to which there was only one eyewitness, the eyewitness often must be called first to paint the background for the scene. Other witnesses will then be called to fill in details according to their knowledge. A policeman may testify about his investigation of the accident after it occurred. An ambulance driver may tell what she saw when she arrived at the scene. It would make little sense to call witnesses with limited knowledge before the eyewitness has provided an overall background. The policeman and ambulance driver only paint in details. The case is often brought to its dramatic climax by calling the plaintiff to the stand to allow the jury to hear her story firsthand.

The lawyer is somewhat limited in sequencing the case by the availability of witnesses. Simple considerations of courtesy and good sense dictate that the lawyer not subpoena all his friendly witnesses whose testimony may last only ten or fifteen minutes and have them sit in the courthouse all day.

## B. The Lawyer's Demeanor

### 1. *The lawyer's physical position*

The trial lawyer should emphasize her witness' testimony, not call attention to herself. The witness should be center stage (although most courtrooms are not arranged in that manner), and the lawyer must divert attention from herself and direct the jury's attention to the wit-

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6. The pioneering study, which coined the term "primacy," is reported in Lund, *The Psychology of Belief*, 20 J. ABNORMAL & SOC. PSYCHOLOGY 174, 183-91 (1925). See also Lawson, *Order of Presentation as a Factor in Jury Persuasion*, 56 KY. L.J. 523 (1968); Linz & Penrod, *Increasing Attorney Persuasiveness in the Courtroom*, 8 LAW & PSYCHOLOGY REV. 1, 8 (1984).

7. See J. THIBAUT & L. WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 43-45, 51 (1975); Lana, *Three Theoretical Interpretations of Order Effects in Persuasive Communications*, 61 PSYCHOLOGY BULL. 314 (1964).

ness.<sup>8</sup> If a juror glances at counsel during the witness' answer and sees the lawyer reading her next question, the juror will receive the subtle message that the witness is not worth listening to. If a juror sees the lawyer fidgeting, writing, or searching for a document during the witness' answer, that juror's attention will be diverted so that he will be less likely to hear the witness' important testimony. If the evidence is not important enough to demand undivided attention, the lawyer should not call the witness. On the other hand, when a juror sees the examining lawyer standing attentively still, intent on the witness and his testimony, the juror will likely return his attention to the place it belongs—the witness.

The direct examiner should position herself as far away from the witness as possible.<sup>9</sup> Ideally, she should be at the far corner of the jury box. This causes the witness' voice to project across the jury box and causes the witness to appear to be looking at<sup>10</sup> and speaking to the jury.<sup>11</sup>

## 2. *The lawyer must listen.*

A lawyer's main task during a trial is to listen. A moment's diversion can be disastrous, and failure to listen is the inexperienced lawyer's most common mistake. The lawyer should not whisper to his client at counsel table. He must not think about his closing argument while witnesses are testifying. He must listen to every word spoken.

The most important time to listen is while he is examining his own witnesses. Listening to the witness is absolutely essential to effective direct examination. The witness will lead the lawyer if the lawyer has prepared the witness properly. If the lawyer listens, the witness will usually indicate by his answer what the next question should be.

## 3. *The lawyer must watch the witness.*

The direct examiner must keep her eyes on the witness. By watching the witness the lawyer picks up valuable information that the jury

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8. See T. MAUET, *supra* note 4, at 86; J. TANFORD, *supra* note 1, at 329.

9. The lawyer's freedom of movement is often restricted by the judge, some requiring counsel to remain behind the lectern or even seated while examining witnesses. Some states impose such restrictions by rule. See, e.g., R. UNIF. DECORUM DIST. CTS. MINN. 15, 51 MINN. STAT. ANN. 490 (West 1980); N.C. GEN. RULES OF PRAC. FOR THE SUPER. & DIST. CTS., 12 ANN. R. OF N.C. 1985.

10. Witnesses who avert their gaze are perceived to be less credible. Hemsley & Doob, *The Effect of Looking Behavior on Perceptions of a Communicator's Credibility*, 8 J. APPLIED SOC. PSYCHOLOGY 136 (1978).

11. See L. NIZER, *MY LIFE IN COURT* 55 (1963).

is also observing. The witness' demeanor—the fidgeting, perspiration or downcast eyes—can often reveal more about the effect the witness is having on the jury than his words.<sup>12</sup> The lawyer who is not watching her witness will miss this.<sup>13</sup>

The eyes *really are* the windows of the soul; so look the witness right in the eye. It is difficult not to concentrate on what someone is saying when looking him in the eye. Direct examination should be conversational, and eye contact with the lawyer puts the witness at ease. The examiner can use eye contact to control her witness. When the lawyer is looking expectantly at him, the witness is likely to continue talking. When the lawyer looks down or away the witness is likely to interpret the lawyer's demeanor as a signal to stop talking.

### C. The Interrogative Dialogue

The basic building block of our Anglo-American adversary trial is the interrogative dialogue. The law of evidence and the trial process are based on the assumption that witnesses will answer specific questions. This dialogue most effectively assures opposing counsel the opportunity to interpose objections before inadmissible matters are mentioned. The opponent may object to the evidence after the witness states the objectionable matter and request that the judge admonish the jury to disregard the testimony, but once the answer is heard by the jury such an instruction is hardly effective<sup>14</sup> and a mistrial on this ground is rare.

For all of these reasons, it has long been recognized that a judge may sustain an objection to narrative answers.<sup>15</sup> This is entirely in the judge's discretion, and the rules of evidence<sup>16</sup> do not contain any prohi-

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12. See S. BALDWIN, *ART OF ADVOCACY—DIRECT EXAMINATION*, § 1.05[5][a] (1981); Pryor & Buchanan, *The Effects of a Defendant's Demeanor on Juror Perceptions of Credibility and Guilt*, 34 J. COMMUNICATION 92 (1984); Note, *Nonverbal Communication in the Courtroom: Attorney Beware*, 8 LAW & PSYCHOLOGY REV. 83 (1984).

13. See F. BAILEY, *TO BE A TRIAL LAWYER* 34-35 (1982).

14. Studies indicate that such admonitions may actually intensify the prejudicial effect of the inadmissible testimony. Kalven, *A Report on the Jury Project of the University of Chicago Law School*, 24 INS. COUNSEL J. 368, 377-78 (1957).

15. See C. McCORMICK, *supra* note 2, 6, at 12.

16. The FEDERAL RULES OF EVIDENCE became effective July 1, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (1975). Many states also have codified their laws of evidence. Arkansas adopted a version of the REV. UNIF. R. EVID. effective July 1, 1976. ARK. STAT. ANN. § 28-1001 (1979). The Arkansas Rules, with several specific and important exceptions, are the same as the Federal Rules, including the section numbers. For convenience, future reference to "Rules" or "Rule" in this article will indicate the Federal and Revised Uniform Rules of Evidence. Unless a different Arkansas or Uniform Rule is mentioned, the reader may assume that the Arkansas and Uniform Rule is the same as the Federal Rule.



bition against witnesses giving narrative testimony.<sup>17</sup> Nevertheless, under the court's broad power to control the mode of interrogating witnesses<sup>18</sup> most judges will sustain objections to overly broad narrative answers.<sup>19</sup>

A lawyer who uses the narrative technique to have a witness blurt out inadmissible testimony acts unethically.<sup>20</sup> The lawyer has a duty to avoid eliciting clearly inadmissible testimony, and a duty to elicit arguably inadmissible testimony in an interrogative manner so that opposing counsel has the opportunity to object and the court has the opportunity to rule.<sup>21</sup>

From the proponent's point of view, the narrative is often not as effective as the question-and-answer method. It is easier, in that anyone can simply ask a witness to tell his story, but the trial lawyer is responsible for making sure the jury hears the testimony on his side of the case in a manner which will enhance his theory of the case. Most inexperienced witnesses are frightened and cannot tell their tales coherently without the interrogator directing them. Any lawyer who doubts that this is so should recall his own attempts to state his theory of the case clearly and concisely in opening statement. If it is difficult for highly trained legal scholars and trial advocates to tell the story, what an insurmountable obstacle it must be to the typical witness.

With the foregoing caveats, counsel should consider that narrative testimony can be extremely effective.<sup>22</sup> The judge has a duty to "make the interrogation and presentation effective for the ascertainment of truth . . ." <sup>23</sup> and may allow narrative testimony if he feels it will advance that objective. A narrative by an articulate witness, relating admissible evidence, can be the most effective way to present that evidence to the jury.<sup>24</sup> As a proponent, counsel must evaluate his witnesses. Most cannot safely be turned loose to give a narrative; but some witnesses, often those who have testified a number of times, can

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17. See generally Denbeaux & Rinsinger, *Questioning Questions: Objections to Form in Interrogation of Witnesses*, 33 ARK. L. REV. 439 (1979).

18. FED. R. EVID. 611(a) and Unif. R. Evid. 611(a) [hereinafter referred to as FED. & UNIF. R., EVID.].

19. See, C. MCCORMICK, *supra* note 2, § 6, at 12.

20. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(e) (1986), which states: "A lawyer shall not in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence."

21. *Id.*

22. C. MCCORMICK, *supra* note 2, § 5, at 9.

23. FED. & UNIF. R. EVID. 611(a)(1).

24. See 3 F. BUSCH, *LAW AND TACTICS IN JURY TRIALS* § 344, at 394-95 (1960).

be asked to narrate their relevant knowledge with favorable effect.<sup>25</sup> To interrupt this type of witness with specific questions would probably detract from the impact of his testimony.

## II. THE REQUIREMENT TO ASK NONLEADING QUESTIONS

The rules of evidence set forth the general rule: "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony."<sup>26</sup> This is qualified by another section that states:

The court shall exercise reasonable control over the mode and 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 witnesses from harassment or undue embarrassment.<sup>27</sup>

The reasoning behind the traditional general rule that leading questions are not permitted on direct examination is that a friendly or impartial witness will most likely tell the truth if answers are not suggested to him.<sup>28</sup> The judge's discretion is necessarily quite broad and reversal for allowing improper leading questions is rare.<sup>29</sup>

Aside from their general impropriety, leading questions diminish the witness' credibility.<sup>30</sup> The jury expects every witness to testify spontaneously from his own knowledge without being prompted. Testimony will be more likely to be believed if the witness tells his story without clues to what he is expected to say.

One way to avoid leading questions is to work without notes as much as possible. Of course, almost every lawyer needs some notes. In fact, a jury might suspect a lawyer with no notes at all of being unprepared. However, the lawyer's notes should be brief reminders to inquire into each necessary area or to introduce certain exhibits which must be

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25. One experiment indicated that question-and-answer testimony was never significantly more effective than narrative, but that sometimes narrative testimony was more effective. Conley, O'Barr & Lind, *The Power of Language: Presentational Style in the Courtroom*, 1978 DUKE L.J. 1375, 1386-89.

26. FED. & UNIF. R. EVID. 611(c).

27. FED. & UNIF. R. EVID. 611(a). See *Spears v. State*, 280 Ark. 577, 660 S.W.2d 913 (1983).

28. See C. McCORMICK, *supra* note 2, § 5, at 10.

29. See 3 J. WIGMORE, *supra* note 3, §§ 774-78. But see *Alexander v. Chapman*, 289 Ark. 238, 711 S.W.2d 765 (1986) (trial court failed to stop leading questions after 28 objections to leading defendant's expert witnesses in medical malpractice case).

30. See E. IMWINKELRIED, *EVIDENTIARY FOUNDATIONS* 4 (1980).

authenticated through this witness. The lawyer who works without notes, watching and listening to the witness, finds that her questions become responsive to the witness' answers and are unlikely to be leading.

### A. Exceptions

Despite the general prohibition of leading questions on direct examination, a number of exceptions have arisen.<sup>31</sup> In many instances, permitting leading questions on direct is more likely to elicit truthful responses than limiting the interrogator to nonleading questions.<sup>32</sup> In recognizing the trial court's discretion to permit leading questions on direct, the rules simply recognize the well-established common-law evidentiary principle.<sup>33</sup>

#### 1. *The hostile witness*

This exception to the rule against asking leading questions on direct, the only one which is specifically incorporated into the rules of evidence, is stated as follows: "When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions."<sup>34</sup>

Whether a witness is hostile has traditionally been considered a preliminary matter of fact left to the determination of the trial judge.<sup>35</sup>

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31. See generally Enfield, *supra* note 6, at 35.

32. "In spite of the danger of suggestion by questions, there arise situations in which these dangerous questions become a necessity—situations in which the risk of losing useful testimony outweighs the risk of false suggestion." 3 J. WIGMORE, *supra* note 3, § 776, at 169.

33. See *Southern Cotton Oil Co. v. Campbell*, 106 Ark. 379, 153 S.W. 256 (1913) (trial judge's allowance of leading questions on direct examination did not constitute reversible error); *Midland Valley R.R. v. Hamilton*, 84 Ark. 81, 104 S.W.540 (1907) (evidence of leading questions on direct at trial did not result in substantial prejudice to claims of the plaintiff); *Wallace v. Bernheim*, 63 Ark. 108, 37 S.W. 712 (1896) (exceptions by trial judge to general rule concerning leading questions not grounds for reversible error). Dean Wigmore, in fact, ascribed an almost cosmic origin to the rule: "From the beginning, and continuously, it has been declared that the application of the principle is to be left to the discretion of the trial court." 3 J. WIGMORE, *supra* note 29, § 770, at 157 (emphasis in original).

In 1869, Arkansas adopted a Code of Civil Procedure based upon the Kentucky code which was, in turn, based upon New York's Field Code. Section 652 of the ARK. CIV. C. contained the following language: "On the direct examination, leading questions are not allowed, except under special circumstances, making it appear that the interests of justice require it." ARK. CIV. C. § 652 (1868). This provision was repealed when the UNIFORM RULES OF EVIDENCE were adopted in 1975. 1975 Ark. Acts No. 1143, § 2. See also C. McCORMICK, *supra* note 2, § 6, at 12.

34. FED. & UNIF. R. EVID. 611(c).

35. *Swaim v. State*, 257 Ark. 166, 514 S.W.2d 706 (1974). See generally Denbaux & Risinger, *supra* note 17, at 458.

Even the adverse party was not always considered to be hostile.<sup>36</sup> The last sentence of Rule 611(c) appears to change the established law significantly<sup>37</sup> by allowing leading questions when examining adverse parties and witnesses *identified with them*<sup>38</sup> whether or not they are in fact hostile.<sup>39</sup> Other witnesses must be shown to be hostile before the direct examiner may ask them leading questions.<sup>40</sup>

## 2. *The child witness*

Common-law rules of competency have largely been replaced by a presumption that all witnesses are competent,<sup>41</sup> leaving it to the jury to determine the weight to be given the witness' testimony. The Federal Rules accept the general proposition that all persons are competent to be witnesses, but yield to state rules governing competency on issues in

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36. *Swaim*, 257 Ark. at 171, 514 S.W.2d at 711. The Arkansas court cited with approval *Sinclair v. Barker*, 236 Or. 599, 390 P.2d 321 (1964), a personal injury suit by a guest passenger in an automobile against the host, who had insurance. The plaintiff called the defendant as a witness. The trial court allowed leading questions without a finding of hostility in fact. The appellate court (although affirming on this point because no error was prejudicial enough to warrant reversal) held that the trial court had misinterpreted the rule, saying: "Leading questions may be allowed upon the direct examination of an adverse party if he appears to be hostile to the examiner. Usually he is; sometimes he is not." 236 OR. at 607, 390 P.2d at 325. The court went on to say: "Whether such witness is hostile and the extent to which leading questions may be put to him are within the sound discretion of the trial court." 236 OR. at 607, 390 P.2d at 326. The Oregon statute governing form of questions was almost identical to the Arkansas statute in effect at that time. See *supra* note 33. Dean McCormick agreed that hostility of an adverse party must be shown and makes no mention of any witness, even an adverse party, being subject to leading on direct without a showing of hostility: "[T]he entire matter of the allowability of leading questions is discretionary. . . ." C. McCORMICK, *supra* note 2, § 6, at 12.

37. *Haney v. Mizell Memorial Hosp.*, 744 F.2d 1467, 1477-78 (11th Cir. 1984).

38. Before enactment of the FEDERAL RULES OF EVIDENCE the use of leading questions in federal courts was governed by FED. R. CIV. P. 43(b) (abrogated by the FED. R. EVID.). Rule 43(b) allowed leading questions only of "an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party . . ." without a showing of hostility.

39. Under FED. R. EVID. 611(c) a witness determined by the court to be "identified with" the adverse party (such as an employee), although not "hostile" in fact to the proponent of his testimony, may be interrogated by leading questions.

40. Arkansas retained the traditional rule requiring a showing of hostility in fact in all cases until adoption of the Rules of Evidence in 1976. Present ARK. UNIF. R. EVID. 611(c) is identical to the Federal Rule.

41. Most recent cases when competency of a witness has been challenged have involved either the witness' drug ingestion or mental competence. The witness is usually allowed to testify. See, e.g., *United States v. Saenz*, 747 F.2d 930 (5th Cir. 1984) (mental competence) *cert. denied*, 105 S. Ct. 3531 (1985); *United States v. Odom*, 736 F.2d 104 (4th Cir. 1984) (mental competence); *United States v. Gutman*, 725 F.2d 417 (7th Cir. 1984) (mental competence), *cert. denied*, 469 U.S. 880 (1984); *United States v. Hyson*, 721 F.2d 856 (1st Cir. 1983) (drug use); *United States v. Lightly*, 677 F.2d 1027 (4th Cir. 1982) (criminal insanity); *United States v. Meerbeke*, 548 F.2d 415 (2d Cir. 1976) (drug use), *cert. denied*, 480 U.S. 974 (1977).

civil cases to which state law supplies the rule of decision.<sup>42</sup> States, such as Arkansas, which have adopted the Revised Uniform Rules of Evidence or another code, have also followed the trend to allow all persons to testify.<sup>43</sup> Therefore, child witnesses who formerly were held incompetent to testify<sup>44</sup> are now often allowed to testify if the court determines that they have personal knowledge<sup>45</sup> and understand the meaning of telling the truth.<sup>46</sup>

Because child witnesses often have difficulty relating matters within their knowledge without some prompting, most courts allow the examiner to ask leading questions.<sup>47</sup> The same judicial discretion to al-

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42. FED. R. EVID. 601.

43. ARK. UNIF. R. EVID. 601 simply provides: "Every person is competent to be a witness except as otherwise provided in these rules."

44. The common law left the determination of competency of child witnesses to the court. Persons 14 years of age or older were presumed to be competent and there was no presumption applicable to children below that age. *Payne v. State*, 177 Ark. 413, 6 S.W.2d 832 (1928) (seven-year-old held competent to testify due to his showing of intelligence and understanding of obligation to tell the truth); *Crosby v. State*, 93 Ark. 156, 124 S.W. 781 (1910) (10-year-old held incompetent to testify due to his inability to understand right from wrong); *Flanagin v. State*, 25 Ark. 92 (1867) (error to exclude testimony of 13-year-old without inquiry into degree of his understanding). See *Barnhart, Theory of Testimonial Competency and Privilege*, 4 ARK. L. REV. 377, 386-387 (1950). Section 663 of the old ARK. CIV. C. included among those statutorily declared incompetent "infants under the age of ten years, and over that age if incapable of understanding the obligation of an oath." The Code was soon held not to apply to criminal cases. *Warner v. State*, 25 Ark. 447 (1869). The trend toward allowing children to testify (and leaving the weight to be given their testimony to the jury) can be identified emerging at an early date. In a case involving the hearsay statement of a six-year-old boy, the Arkansas Supreme Court held that if the statement was otherwise admissible under an exception to the hearsay rule, the fact that the declarant was incompetent would not bar its admission. *Beal-Doyle Dry Goods Co. v. Carr*, 85 Ark. 479, 108 S.W. 1053 (1908). The same court held that the Code created a presumption that persons over 10 years old were competent. *Lamden v. St. Louis S.W. Ry.*, 115 Ark. 238, 170 S.W. 1001 (1924). The arbitrary, absolute prohibition of testimony by persons under 10 in civil cases was finally laid to rest before enactment of the UNIFORM RULES OF EVIDENCE by Act 375 of 1971, which provided: "Any infant, regardless of age, shall be competent to testify in a civil action if capable of understanding the obligation of an oath."

45. FED. & UNIF. R. EVID. 602 provides: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter."

46. FED. & UNIF. R. EVID. 603 provides: "Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so."

47. See *United States v. Rossbach*, 701 F.2d 713 (8th Cir. 1983) (15- and 17-year-old rape victims); *United States v. Littlewind*, 551 F.2d 244 (8th Cir. 1977) (13- and 14-year-old rape victims); *Scantling v. State*, 271 Ark. 678, 609 S.W.2d 925 (1981) (11-year-old rape victim who was visibly upset at trial); *Hamblin v. State*, 268 Ark. 497, 597 S.W.2d 589 (1980) (13-year-old sexual molestation victim in order to elicit truth); *Reynolds v. State*, 220 Ark. 188, 246 S.W.2d 724 (1952) (nine-year-old children, rape victim and witness); *West v. State*, 209 Ark. 691, 192 S.W.2d 135 (1946) (11-year-old rape victim); *Begley v. State*, 180 Ark. 267, 21 S.W.2d 172 (1929) (16-year-old victim of assault with intent to rape, inexperienced in the ways of the world and appearing embarrassed); *Wallace v. State*, 177 Ark. 892, 9 S.W.2d 21 (1928) (11-year-old

low leading questions is extended to other witnesses with communication problems, such as those who are weak-minded or deficient in the English language.<sup>48</sup>

### 3. *The witness whose recollection is exhausted*

Sometimes a witness who once knew relevant information no longer recalls that information. In such cases the law of evidence accommodates the proponent by allowing the witness to refresh his memory by referring to some writing or object.<sup>49</sup> To lay a predicate for refreshing recollection or reading a document containing past recollection recorded,<sup>50</sup> leading questions are usually necessary and are normally allowed.<sup>51</sup>

### 4. *Preliminary and undisputed matters*

In jurisdictions following the Federal or Revised Uniform Rules of Evidence, these rules, including the rule against leading questions, generally do not apply to matters characterized as "preliminary."<sup>52</sup> Since these matters of fact are determined by the court,<sup>53</sup> it is deemed more

rape victim because of her youth, inexperience and ignorance); *Crank v. State*, 165 Ark. 417, 264 S.W. 936 (1924) (12-year-old assault victim in order to elicit truth). *But see State v. Orona*, 92 N.M. 450, 589 P.2d 1041 (1979) ("[E]very word describing the alleged offense [came] from the prosecuting attorney. . ."), *Id.* at —, 589 P.2d at 1045.

48. *See Preston v. Denkins*, 94 Ariz. 214, 382 P.2d 686 (1963) (witness 78-years-old, in poor health, who had difficulty recalling events); *Campion v. Lattimer*, 70 Neb. 245, 97 N.W. 290 (1903) (25- or 27-year-old prosecutrix in paternity suit who was "very full of apprehension"). *See also* 3 J. WIGMORE, *supra* note 3, § 778; C. McCORMICK, *supra* note 2, § 6, at 13; Denbeaux & Risinger, *supra* note 17, at 463-64; Note, *Witnesses*, 27 ARK. L. REV. 229, 258 (1973) (Special Evidence Edition). In a criminal seduction case the prosecutrix, who was 17 at the time of trial, was asked on direct: "State whether or not you would have permitted him to have intercourse with you had it not been for that promise [of marriage]?" In overruling an objection, the trial judge said: "It is a little leading, but it does seem you can't get the information without a little leading." The appellate court, affirming, stated: "[T]he witness was young and had been subjected to a long and searching cross-examination, a reading of which indicates that she was probably both timid and ignorant." *Murray v. State*, 151 Ark. 331, 336, 236 S.W. 617, 618 (1922).

49. FED. & UNIF. R. EVID. 612. *See infra* Section VII(B).

50. FED. & UNIF. R. EVID. 803(5). *See infra* Section VII(C).

51. *See M. GRAHAM, supra* note 3, at 63-65; E. Imwinkelried, *supra* note 30, at 3-4 (1980); C. McCORMICK, *supra* note 2, § 6, at 13. *But see Denbeaux & Risinger, supra* note 17, at 460 (warning of the danger inherent in permitting leading questions for this purpose).

52. FED. & UNIF. R. EVID. 104(a) provides: "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 . . . . In making its determination it is not bound by the rules of evidence except those with respect to privileges." *Id.* *See also* E. IMWINKELRIED, *supra* note 30, at 3 (1980).

53. FED. & UNIF. R. EVID. 104(a). *See Foxworth v. State*, 263 Ark. 549, 566 S.W.2d 151 (1978).

likely to produce just results if the judge and lawyers are not bound by formal rules of evidence as to these matters.

Some matters of fact are undisputed and the court will usually allow these to be treated summarily by the use of leading questions.<sup>54</sup> This is primarily a time-saving device courts utilize to expedite the trial. For example, "Officer, did you investigate an accident at the corner of Fourth and Poplar at around 9:30 on the evening of July 7, 1986?" is a leading question. Both counsel know that the officer did investigate that accident. It is undisputed that he will answer the same way whether a leading question is asked or a series of nonleading questions are asked. To save time, the court will allow leading questions covering these undisputed preliminary matters.

Transitional statements by counsel to direct the witness to the next area of inquiry are usually tolerated in the interest of expedience.<sup>55</sup> "Now, directing your attention to the morning of June 8. . . ."

## B. What is a Leading Question, Anyway?

A leading question is one that suggests the answer to the witness.<sup>56</sup> There is no clear dichotomy between leading and nonleading. Some questions are clearly either nonleading or leading, but there are many degrees between.

Generally, questions that begin with the words, "who," "what,"

54. When a witness is asked about matters preliminary to the main topics of controversy—matters essential to be brought out, and yet not themselves in controversy—such as the witness' name, age, residence, relationship to the parties, and the like, it is obvious that there is usually no danger of improper suggestions, simply because there is no motive for it.

3 J. WIGMORE, *supra* note 3, § 775, at 168. See generally K. HEGLAND, *supra* note 4, at 16; C. MCCORMICK, *supra* note 2, § 6, at 13.

55. See E. IMWINKELRIED, *supra* note 30, at 4; C. MCCORMICK, *supra* note 2, § 6, at 13; Denbeaux & Risinger, *supra* note 17, at 462-63.

56. C. MCCORMICK, *supra* note 2, at 11. In *Northwestern Nat'l Casualty Co. v. Mays*, 273 Ark. 16, 616 S.W.2d 734 (1981) a question by defense counsel to his expert medical witness whether the difference between the witness' 5% impairment rating of the plaintiff and the plaintiff's physician's 25-50% impairment rating was due to a different meaning given by each to the word "disability" was held properly excluded as leading.

It has been suggested that leading by "suggestion" and leading by seeking "ratification" are separate concepts. Denbeaux & Risinger, *supra* note 17, at 448-52. The Arkansas Supreme Court seems to have adopted this distinction, citing the foregoing article and stating: "Suggestion occurs when a question indicates the answer desired and ratification occurs when a question is suggestive, contains factual detail which could and should originate with the witness and the witness adopts the detail and the form in which it is expressed." *Alexander v. Chapman*, 289 Ark. 238, 246, 711 S.W.2d 765, 769 (1986). "Ratification" seems to be nothing more than a degree of suggestion, rather than a separate concept.

“when,” “where,” “why,” or “how” are not leading.<sup>57</sup> “Why” questions are useful in two situations. First, they can add a note of spontaneity to a rehearsed direct examination. Second, “why” is the classic redirect question after the witness has been impeached with a prior inconsistent statement. “Please explain why you said ‘x’ on the prior occasion.”

A statement ending with an interrogative word or phrase (or simply a rising inflection of the voice) is clearly leading and is the raw material from which effective cross-examinations are built. A question that begins with “didn’t you” is almost always leading. A question that begins with “did you” may be leading or not, depending upon whether the question suggests the answer to the witness. Merely stating the alternative in an otherwise leading question will not cure it, for example, “Did you or did you not . . .?”

### III. A BASIC OUTLINE FOR DIRECT EXAMINATION

Although each witness is a unique challenge and there can be no universally applicable formula for presenting direct testimony, the following general outline for organizing the sequence of testimony on direct should be useful in preparing to examine most witnesses.

#### A. Introduce the Witness

Trial counsel should pretend that the witness is a friend she is introducing to the jury. After asking his name, she should ask something interesting and personal such as where he works.<sup>58</sup> She should use simple, conversational language; for instance, “What is your job?” not “What is the nature of your employment?”

#### B. Accredit the Witness

Since credibility is so important, the lawyer should ask some questions that will enable the witness to impress the jury with what a fine, upstanding, believable person he is.<sup>59</sup> Counsel must be careful not to cross the line into the forbidden territory of character evidence. Generally, the character of a witness is considered irrelevant and inadmissi-

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57. See E. IMWINKELRIED, *supra* note 30, at 4.

58. Evidence of religious beliefs, however, is not admissible to enhance or impair credibility. FED & UNIF. R. EVID 610.

59. One survey indicated that jurors tended to convict or acquit depending on whether they liked the victim. Sannito & Arnolds, *Jury Study Results: The Factors at Work*, 5 TRIAL DIPLOMACY J. 6, 9 (Spring 1982).



ble,<sup>60</sup> and evidence of his truthful character is admissible only after his character for truthfulness has been attacked on cross-examination.<sup>61</sup>

### C. Position the Witness in the Action

The lawyer must lay a foundation to establish that the witness has personal knowledge of the subject about which he is going to testify.<sup>62</sup> Not only is this foundation required by the law of evidence, but also by common sense. This foundation must be solid enough to support the weight the lawyer hopes the jury will give to the witness' testimony.<sup>63</sup>

### D. Elicit the Witness' Information

Here the advocate is asking the witness to add whatever he knows to the client's painting. This is the heart of his testimony. The proponent should be particularly careful to ask nonleading questions during this critical stage of the examination. The information elicited now must be impressed on the jury's mind. The hammock principle of sequencing<sup>64</sup> applies to the arrangement of each witness' testimony as well as to the arrangement of the order of the entire case. Start strong<sup>65</sup> and end strong.

The lawyer also must be aware of pacing. It is helpful to think of the witness' testimony as a film that can be speeded up or run in slow motion. The boring or unhelpful parts may be speeded up by use of the narrative style or the leading question (subject to the admonitions discussed in Section II, *supra*). The crucial parts of the testimony can be slowed down by asking precise questions which elicit the testimony in

60. FED. & UNIF. R. EVID. 404(a). Some character evidence going to the witness' truthfulness is allowed for purposes of impeachment of credibility. FED. & UNIF. R. EVID. 607-09. Reputation or opinion evidence of the character of an accused in a criminal trial may be introduced by the accused through *other witnesses*. FED. & UNIF. R. EVID. 404(a)(1) & 405(a). See *Finnie v. State*, 267 Ark. 638, 593 S.W.2d 32 (1980).

61. FED. & UNIF. R. EVID. 608(a)(2). See *Beard v. Mitchell*, 604 F.2d 485 (7th Cir. 1979); *United States v. Lechoco*, 542 F.2d 84 (D.C. Cir. 1976).

62. FED. & UNIF. R. EVID. 602 states:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

See generally *Gorby v. Schneider Tank Lines*, 741 F.2d 1015 (7th Cir. 1984); K. HEGLAND, *supra* note 4, at 24; S. SALTZBURG & K. REDDEN, *supra* note 3, at 305-06 (1982).

63. See generally 1 L. SCHWARTZ, *PROOF, PERSUASION AND CROSS-EXAMINATION: A WINNING NEW APPROACH IN THE COURTROOM* § 2:05, at 207-08 (1973).

64. See *supra* § I(a).

65. See generally *Parker, Applied Psychology in Trial Practice*, 7 DEF. L.J. 33 (1960).

small pieces.<sup>66</sup> To allow a typical witness to tell the critical part of his story in a narrative fashion is to risk having the jury miss the important facts in the mass of information flowing forth. Lawyers, because of their intimate knowledge of the evidence, sometimes forget that the jury does not know what is important and what to listen for. The jury, however, will only hear the evidence one time, and the lawyer's questions must make the witness emphasize those facts the jury should remember.

The advocate must be wary of the witness' conclusions. Each individual's perception is colored by his life experiences, and each may draw conclusions which may not be warranted by the physical facts. It has often been said that ordinary witnesses may normally testify only to facts, not conclusions.<sup>67</sup> Though this maxim is simple to state, it does not square with reality because no one can relate anything without stating conclusions. The rules of evidence have significantly expanded the admissibility of lay conclusions,<sup>68</sup> but those conclusions must be based upon personal observation.<sup>69</sup> Before trial the lawyer must test each witness' conclusions by inquiring into the basis as if cross-examining the witness.<sup>70</sup> A conclusion without an adequate factual basis will be given little weight by the jury.

The lawyer should consider bringing out damaging testimony on direct to minimize its effect when elicited on cross-examination. However, this technique should be saved for really damaging or prejudicial information that is certain to be brought out on cross-examination,<sup>71</sup> such as an eyewitness' prior felony conviction. Inexperienced lawyers often overdo this technique. The idea is merely to mention the damaging matter in passing on direct as if it is of no particular significance, not to dwell on it. If the admissibility of the damaging evidence on cross-examination is in question, the lawyer should seek a ruling before the witness takes the stand whether the cross-examiner will be allowed to inquire into the matter. A favorable ruling keeps the entire matter from the jury—a result far more favorable than merely diminishing the

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66. See J. JEANS, *supra* note 4, § 9.16, at 223 (1975); T. MAUET, *supra* note 4, at 91-93. With some articulate witnesses this process may be reversed, J. JEANS, *supra* § 9.5, at 216-17.

67. See C. McCORMICK, *supra* note 2, § 11, at 26-27.

68. See S. SALTZBURG & K. REDDEN, *supra* note 3 at 445-46.

69. FED. & UNIF. R. EVID. 701. See K. HEGLAND, *supra* note 4, at 23 and *infra* § VI(A).

70. See J. TANFORD, *supra* note 1, at 340-41. The lawyer must, however, be careful of suggesting specific words to the witness. Witnesses who use words that they could be unlikely to use in ordinary speech have been found to be less credible. See Conley, O'Barr & Lind, *The Power of Language: Presentational Style in the Courtroom*, 1978 DUKE L.J. 1375, 1389-90.

71. See K. HEGLAND, *supra* note 4, at 16-19.

damage wrought by the evidence.

#### E. Quit

Do not be repetitious. To attempt to emphasize points by repeating the witness' answer or eliciting the same answer several times is inappropriate.<sup>72</sup>

### IV. RESPONDING TO OBJECTIONS

Both lawyers are entitled to a ruling on every objection made. Some trial judges, either attempting to avoid error in the record or because they were not listening, simply nod, say "proceed" or otherwise avoid ruling on objections. The court reporter cannot record a judge's nod. Sometimes nervous lawyers assume that an objection is sustained and go on to the next question before the judge has an opportunity to rule. Had the lawyer merely waited patiently, the judge might have overruled the objection. If the court tries to let the matter slide by without ruling, counsel should try to force the judge either to sustain or overrule the objection. This can be done tactfully by asking the judge what his ruling was. Two basic types of objections are encountered while conducting direct examinations—objections to the form of the question and objections to the admissibility of the testimony elicited.

#### A. Objection to the Form of the Question

Objections to the form of the question are almost always made to the leading nature of the question. When the opponent's objection to leading the witness is sustained, the examiner should rephrase the question so that it is not leading. He should never let the objection pass without eliciting the information originally sought by the leading question. Proceeding to a different area of inquiry immediately after a sustained objection to leading is likely to leave the jury with the impression that the lawyer was caught trying to do something improper. On the other hand, when the examiner elicits the same information with a nonleading question or series of questions, opposing counsel appears to have been attempting to keep proper information from the jury and the examiner appears to be in control. People are naturally curious and jurors want to hear all the relevant evidence (as well as irrelevant mat-

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72. See S. BALDWIN, *ART OF ADVOCACY—DIRECT EXAMINATION* § 1.04[8] (1981). However, some repetition of facts enhances the likelihood they will be remembered and believed. See G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS* 708-09 (1978); Colley, *Principles of Direct Examination*, 2 *TRIAL DIPLOMACY* J. 13, 15-16 (Spring 1979).

ters that they are not allowed to hear). The lawyer who satisfies their curiosity by extracting the evidence over objection becomes a hero while the lawyer who objected to the form of the question becomes an obstructionist.

## B. Objection to Admissibility of the Testimony

When opposing counsel objects to the testimony elicited, three cardinal rules govern the conduct of the proponent of the evidence:

### 1. *Respond when possible*

If the judge looks at the examiner for a response, he should briefly and concisely state why he believes the testimony is admissible. If successful, he can persuade the judge to admit the evidence. "Your Honor, it's admissible as a declaration against interest under Rule 804(b)(3)." While it is not necessary to cite the specific rule upon which the examiner relies, to do so is impressive to many judges and intimidating to many lawyers who are not intimately familiar with the rules of evidence. The response must be addressed to the court, rather than the opponent.<sup>73</sup>

### 2. *Do not argue with the ruling*

Many lawyers yield to the temptation to argue with the judge after he has sustained an objection. The court often then says something like, "Counsel, I have ruled. Proceed." Some lawyers become rattled, assume that the objection will be sustained, do not listen as the judge overrules the objection, and then continue to argue. The judge may then say, "I *overruled* the objection, Counsel. Why don't you get on with it and ask the witness the question." This scenario hardly makes the direct examiner appear smooth and efficient in the eyes of the jury.

### 3. *Make an offer of proof after a sustained objection*

If the case is lost because admissible evidence is excluded by the court, counsel's remedy will be on appeal. If the trial record does not show what the proof would have been, the appellate court will have no

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73. Courtroom etiquette dictates that counsel speak only to the judge except when the judge gives permission either to question a witness or address the jury. Counsel is never justified in carrying on a verbal exchange with opposing counsel in open court. Counsel should stand whenever he speaks. The judge is always addressed as "Your Honor," not "Ma'am" or "Sir." Statements and arguments to the jury are prefaced with, "May it please the court." See generally S. BALDWIN, *supra* note 72, § 1.05.

information upon which to base a reversal.<sup>74</sup> Therefore, the proponent of the evidence must make an offer of proof to preserve the issue by causing the record to show what the evidence would have been had it been admitted.<sup>75</sup> Rule 103(a)(2) requires only that "the substance of the evidence [be] made known to the court. . . ." This may be accomplished either by inclusion of a tangible proffered exhibit in the trial record, having the witness answer the questions that would have been asked in trial had the rejected testimony been allowed, or by the lawyer's statement on the record of what the proof would have been.<sup>76</sup> The offer will be made out of the hearing of the jury.<sup>77</sup>

The law of evidence provides one safeguard for the party whose lawyer made no offer of proof when error is so clear that a miscarriage of justice obviously occurred because the evidence was excluded.<sup>78</sup> In case of "plain errors affecting substantial rights" an appellate court can take notice although the errors were not brought to the attention of the trial court.<sup>79</sup>

## V. HANDLING AND INTRODUCTION OF EXHIBITS

The efficient handling and introduction of exhibits (which is normally done as a part of the direct examination process) is an important

74. See *Perkins v. Volkswagen of America*, 596 F.2d 681 (5th Cir. 1979).

75. FED. & UNIF. R. EVID. 103 states:

(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

\* \* \* \*

(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.

In *Killman v. State*, 274 Ark. 422, 625 S.W.2d 489 (1981) the appellate court found no reversible error when the trial court in a battery case ruled inadmissible the testimony of a psychiatrist as to the nonviolent tendencies of the accused. Defense counsel did not make an offer of proof or make known to the trial court the purpose of the testimony. See also *Boykin v. State*, 270 Ark. 284, 603 S.W.2d 911 (1980); *Parker v. State*, 268 Ark. 441, 597 S.W.2d 586 (1980). See generally E. IMWINKELRIED, *supra* note 30, at 14; J. WALTZ & J. KAPLAN, *MAKING THE RECORD* 57-71 (1982).

76. See J. WALTZ & J. KAPLAN, *supra* note 75, at 61-66.

77. FED. & UNIF. R. EVID. 103(c); See also J. WALTZ & J. KAPLAN, *supra* note 75, at 70-71.

78. FED. & UNIF. R. EVID. 103(d).

79. *Id.* UNIF. R. EVID. 103(d) omits the word "plain." This arguably indicates a more lenient attitude in Arkansas with regard to the availability of reversal without an offer of proof. In *Henderson v. State*, 279 Ark. 435, 652 S.W.2d 16 (1983), the Arkansas Supreme Court determined that the trial court erred in sustaining the prosecutor's objection to defense counsel's attempt to show bias of the prosecution witness by asking "what type of deal" the prosecution had given him in order to obtain his testimony. Even though defense counsel made no offer of proof at the trial, the appellate court found the offer to be unnecessary since the substance of the question was apparent and the information sought was not available to defense counsel.

source of building credibility with the jury. The technique of handling exhibits properly is simple, but precise. The technique requires organization and discipline to master but, when mastered, causes most other aspects of practical evidence law to come into focus. Since the proper handling of exhibits requires a basic, overall command of the law of evidence, this skill enables the trial lawyer to better organize all his evidence, better analyze and organize his case, and in the end win more cases. The old adage that a picture is worth a thousand words is unassailably true. Knowing how to get exhibits into evidence expeditiously, particularly over the objection of the opponent, places a lawyer in command of the courtroom. Conversely, attempting to introduce exhibits only to have objections sustained is an effective way to lose a lawsuit.

Many judges are helpful to struggling lawyers. However, it hardly enhances the lawyer's image with the jury, after he has asked a number of questions only to have repeated objections based upon his failure to lay the proper foundation sustained, to have the judge say, "Counsel, perhaps it would help if you asked the witness. . . ."

#### A. The Importance of Making a Record

As with all parts of the trial, the lawyer handling exhibits has two audiences: the jury (his primary audience), and the appellate court, which will review the record if the case is appealed. The appellate court will have only the record to tell it what happened at the trial. It is crucial that the record clearly identify every bit of evidence presented. The following two simple rules will, if followed, assure that the trial lawyer does not get hopelessly confused, confuse the court reporter and jury, and ultimately confuse and offend the appellate court.

##### 1. *Keep a list of exhibits*

The lawyer must keep an accurate record of the identifying number of each exhibit offered by each party, the exhibit number when introduced, a brief description of the exhibit, and whether it was received in evidence. He will refer to this list time and time again during trial.

##### 2. *Always refer to each exhibit by number*

Every exhibit must be marked with a number for identification before or at the time it is first mentioned. Thereafter, it should always be referred to by its number. The lawyer should never merely say "this letter" or "this photograph." Every proposed exhibit should be referred

to as, "what has been marked for identification as plaintiff's (or defendant's) exhibit \_\_\_\_" until it is received into evidence. After it is received into evidence, it is part of the record of the case and the "for identification" should be dropped. It should then always be referred to by its number, such as "defendant's exhibit 5."

## B. The Requirements for Admissibility

Exhibits are subject to the same five restrictions as testimonial evidence: they must be relevant;<sup>80</sup> they must be unprivileged;<sup>81</sup> they must not be hearsay, or must be admissible under some exception to the hearsay rule;<sup>82</sup> they must be admissible under the best evidence rule;<sup>83</sup>

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80. FED. & UNIF. R. EVID. 401 defines the concept of relevance, which includes materiality as an element. The determination whether evidence is relevant is a matter left to the discretion of the trial court. *Kellensworth v. State*, 278 Ark. 261, 644 S.W.2d 933 (1983); *Hamblin v. State*, 268 Ark. 497, 597 S.W.2d 589 (1980); *Dooley v. Cecil Edwards Constr. Co.*, 13 Ark. App. 170, 681 S.W.2d 399 (1984); *James v. State*, 11 Ark. App. 1, 665 S.W.2d 883 (1984). Rule 402 states the basic proposition that only relevant evidence is admissible. Rule 403 gives the court power to exclude relevant evidence if it is unduly prejudicial, confusing, misleading, time-consuming or cumulative. Photographic evidence spawns many disputes, often because the proffered photographs are gruesome. Sometimes they are allowed: *Fairchild v. State*, 284 Ark. 289, 681 S.W.2d 380 (1984); *Cotton v. State*, 276 Ark. 282, 634 S.W.2d 127 (1982); *Robinson v. State*, 269 Ark. 90, 598 S.W.2d 421 (1980); *Williams v. State*, 267 Ark. 527, 593 S.W.2d 8 (1980); *Morrison v. Firemen's Ins. Co.*, 4 Ark. App. 351, 631 S.W.2d 310 (1982); *Tucker v. State*, 3 Ark. App. 89, 622 S.W.2d 202 (1981). Sometimes they are excluded: *Bliss v. State*, 282 Ark. 315, 668 S.W.2d 936 (1984); *Harris v. Damron*, 267 Ark. 1141, 594 S.W.2d 256 (1980); *Ellis v. State*, 4 Ark. App. 201, 628 S.W.2d 871 (1982). The weighing process is illustrated in *Earl v. State*, 272 Ark. 5, 612 S.W.2d 98 (1981). See also *Kuntzelman v. Black*, 774 F.2d 291 (8th Cir. 1985).

81. Article V of the Federal Rules of Evidence deals with privileges. It contains only one rule, Rule 501, which merely states that privileges are those required by the Constitution, statutes or "principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." FED. R. EVID. 501 defers to the applicable state law of privileges as to elements of a civil case for which state law provides the rule of decision.

The Supreme Court included a number of codified privileges when it submitted the proposed Federal Rules of Evidence to Congress. The Congress, however, decided to leave federal courts with great discretion to apply privilege rules according to the particular facts of each case. See *C. McCORMICK*, *supra* note 2, § 76, at 182. See also *Trammel v. United States*, 445 U.S. 40, 47 (1980); *Mitchell v. Roma*, 265 F.2d 633 (3d Cir. 1959). Nonetheless, the Supreme Court's proposed rules of privilege did set practical standards and many courts have followed them. See *J. WEINSTEIN & M. BERGER*, *supra* note 3, § 501, at 501-28.

Arkansas adopted the Revised Model Rules of Evidence that contain essentially the same rules of privilege as the Supreme Court's original proposed Federal Rules. They embody the more commonly accepted privileges in federal and state courts. ARK. UNIF. R. EVID. 501-12 included privileges as to the following relationships and rights: (1) lawyer-client; (2) physician/psychotherapist-patient; (3) husband-wife; (4) clergyman-penitent; (5) voting; (6) trade secrets; (7) state secrets; and (8) identity of informers.

82. FED. & UNIF. R. EVID. 801 defines hearsay. FED. & UNIF. R. EVID. 802 says it is not admissible unless made so under an exception. FED. & UNIF. R. EVID. 803 and 804 are lists of exceptions.

and they must be authenticated.<sup>84</sup> The series of questions that must be asked of a witness or several witnesses in order to clear the hurdles is known as the "foundation" or "predicate." The proponent of the exhibit must "lay the foundation" by clearing all five evidentiary hurdles before the exhibit may be received into evidence.

The first four hurdles are often self-evident from the nature of the exhibit. For example, the relevance of the contract that is the subject of the suit is apparent. However, each element of admissibility must be established through some evidence in the record before the exhibit may be received in evidence, and if relevance is not apparent it must be shown. For example, if receipt of notice is an element in the case, and the party claiming to have given notice offers a letter purporting to constitute notice, that letter only becomes relevant when some testimony is presented from which a trier of fact may deduce that the letter was received by the other party.<sup>85</sup> If relevance has not yet been established at the time an exhibit is offered, it may be conditionally admitted subject to being "connected up" later by counsel.<sup>86</sup>

The fifth hurdle, authenticity, must be specifically established for each exhibit introduced. The general concept of authenticity is that each exhibit must be shown to be what it purports to be.<sup>87</sup> Some kinds of documents, primarily public documents under seal or certificate, are self-authenticating, which means that no foundation need be laid to establish that the documents are what they purport to be.<sup>88</sup> Even if a document is considered self-authenticating, the other four prerequisites to admissibility must still be considered and appropriate questions asked.

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83. FED. & UNIF. R. EVID. 1001-05.

84. FED. & UNIF. R. EVID. 901-03.

85. See *Swink & Co. v. Carroll McEntee & McGinley, Inc.*, 266 Ark. 279, 584 S.W.2d 393 (1979) (proof of routine practice of mailing confirmations of security transactions together with evidence that one party received confirmation through the process was sufficient to present a jury question whether another party received confirmation); see also FED. & UNIF. R. EVID. 406; see *Phillips v. State*, 271 Ark. 96, 607 S.W.2d 664 (1980) (robbery victim's clothes found during search of defendant's home admissible when connected to defendant).

86. FED. & UNIF. R. EVID. 104(b). When evidence is conditionally admitted, counsel must remember to "connect it up" before resting his case. A motion to strike the evidence as irrelevant, sustained by the court and coupled with an instruction to the jury to disregard it, can be devastating.

87. FED. & UNIF. R. EVID. 901. The rule lists several types of authenticating evidence that are sufficient. However, the list is suggestive, not exclusive, and any evidence showing that the document is authentic should suffice. See generally S. SALTZBURG & K. REDDEN, *supra* note 3, at 696-702.

88. FED. & UNIF. R. EVID. 902.



### C. Stipulations

Stipulations are time-savers for the court. They help make the trial more interesting for the jury by minimizing the number of "lawyer questions" asked in order to lay proper foundations and they save work for the lawyers. However, to use stipulations effectively the lawyer must know their consequences. By agreeing to an ill-advised stipulation the lawyer may allow the opposing party to get inadmissible evidence into the record by agreeing to its admissibility. On the other hand, the lawyer who is unsure of the consequences may refuse to stipulate when to do so would give away nothing, please the court and save work.

Two kinds of stipulations apply to exhibits. First is the stipulation that the exhibit is admissible. When admissibility is stipulated, all objections are waived; the proponent need lay no foundation, and may simply announce the stipulation and offer the exhibit into evidence.

The second type of stipulation with regard to exhibits is that of authenticity. When this stipulation is made, no foundation is required to establish that the exhibit is what it purports to be. However, the other requirements of admissibility are not stipulated and the opponent may raise an objection on any of those grounds, that is, relevance, privilege, hearsay, or best evidence.

### D. The Method of Laying the Foundation

The lawyer who handles exhibits efficiently makes a positive impression on the jury. The lawyer who uses the following well-established and relatively simple method for presenting exhibits will have little trouble getting admissible exhibits into evidence.<sup>89</sup>

#### 1. *Qualify the witness*

Questions must be asked to establish that the witness has personal knowledge about the exhibit.<sup>90</sup> For example, if the exhibit is a photograph of the scene of an accident, the witness should be asked if she was at the scene of the accident at the relevant time and whether she observed what the scene looked like.

#### 2. *Refer to the marked exhibit*

Exhibits should be marked with numbers or letters for identifica-

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89. See generally E. IMWINKELRIED, *supra* note 30, at 55-56.

90. FED. & UNIF. R. EVID. 602.

tion before trial, and many courts require this procedure. If an exhibit has not been previously marked for identification, the lawyer should have it marked by the court reporter before first referring to it in trial. The first reference to the exhibit and all references thereafter should be by number.

The proponent should not describe the exhibit before the witness identifies it. He should merely say, "I have here what has been previously marked plaintiff's exhibit 6 for identification."

### 3. *Show the exhibit to opposing counsel*

The opponent is entitled to examine the exhibit before it is presented to the witness for identification, even though the opponent probably will have seen the exhibit before trial and will often have a copy of it. After all, the copy presented in court may be altered. Therefore, the proponent must always show the exhibit to opposing counsel before showing it to the witness. The jury does not know that both lawyers are already intimately familiar with every exhibit. To show an exhibit to opposing counsel appears fair and courteous. If the proponent neglects to show the exhibit, the skilled opponent, knowing of her absolute right to look at each proposed exhibit, will ask the court to tell the proponent to show it to her, and the court will do so to the embarrassment of the proponent.

### 4. *Ask permission to approach*

Some courts allow lawyers virtually unlimited freedom of movement. Others severely restrict the physical movement of lawyers. Many courts require counsel to obtain the permission of the court before approaching the bench or the witness box. A trial lawyer should always ask permission before approaching the witness box in each case until the judge says permission is unnecessary, even if she has tried dozens of cases before the judge and knows the judge does not require it. In the first place, it is simply good manners. In the second place, the lawyer avoids a reprimand from the judge should it be required. In the third place, even if permission is not required, the lawyer requesting permission appears to the jury to be courteous and respectful of the court. In short, there is no reason not to ask permission, and several reasons for always doing so.

### 5. *Show the witness the exhibit*

The lawyer should hand the witness the exhibit, saying something

like, "I show you defendant's exhibit 7 for identification. Please examine it." The lawyer should back away and give the witness an opportunity to examine the exhibit. The lawyer should not attempt to tell the witness what the exhibit is.

#### 6. *Ask the necessary foundation questions*

At this point the witness sits with the exhibit in hand, having examined it. The lawyer must now lay the foundation.<sup>91</sup> Some common foundation questions to be inserted at this step will be discussed below in Section V(E).<sup>92</sup>

#### 7. *Offer the exhibit into evidence*

Unless the exhibit is formally offered and received into evidence by the court, the witness may not testify about it, the jury cannot examine it, and it is not part of the record on appeal. After being received in evidence, the "for identification" is dropped when referring to the exhibit. It becomes simply, "plaintiff's exhibit 8."

#### 8. *Examine the witness about the exhibit*

After the exhibit is in evidence, it is proper to ask questions about it other than those necessary to lay the foundation for its admissibility. In the case of a photograph depicting the scene of an accident, the witness may now be asked to describe the contents of the photograph by pointing out to the jury various things shown in the photograph. The witness' testimony about what is shown in the exhibit is helpful to the jurors as they interpret it for themselves.

#### 9. *Publish the exhibit to the jury*

Publication of an exhibit to the jury simply means showing it to them. This can be done by reading relevant portions of a document, distributing copies of a document, or passing the exhibit through the jury box (as with a photograph). Sometimes lawyers get so absorbed in the trial, struggling to overcome objections and get their exhibits into evidence, that they forget to show them to the jury. When this happens, the jury is deprived of the evidence in reaching a verdict and will feel resentful toward the responsible lawyer. The word "publish" should not be used when asking permission to show an exhibit to the jury. Instead,

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91. *See supra* § V(B).

92. *See infra* § V(E).

the lawyer should simply ask to “show,” “read,” or “pass” the exhibit.

### E. Some Common Foundation Questions

When the lawyer arrives at step 6 of the method of laying a foundation,<sup>93</sup> he must decide what questions to ask the witness in order to establish admissibility of the exhibit. Some types of exhibits are so routinely introduced that similar questions may be used to lay the foundation in most cases. Questions applicable to three of these common types of exhibits—real evidence, letters and business records—are discussed here.

#### 1. *Real Evidence*<sup>94</sup>

Real evidence consists of things that have some independent evidentiary significance in the case, rather than being merely illustrative of other testimony.<sup>95</sup> Examples are *the* gun with which the accused shot the victim, *the* bottle that contained a poisonous beverage, or *the* stick with which the defendant beat the plaintiff. It is essential to show that the item presented in court is actually the item in question. It must also be established that the item is in the same condition as at the time of the occurrence in question, or that any change in its condition is so minor that its probative value remains greater than its prejudicial effect.<sup>96</sup> Three propositions must be explored: (1) What is it? (2) how can you recognize it? (3) is it in the same condition as at the relevant time (usually when the witness first saw it)?

##### a. What is it?

The first proposition, “What is it?” can be established by one, nonleading question. Maybe the simplicity of this question makes it almost impossible for many lawyers to ask. The lawyer should not detract from the witness’ credibility by asking a leading question such as, “Can you identify defendant’s exhibit 9 as the knife you saw in the victim’s hand?” The lawyer should simply ask the witness what the object is.

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93. See *supra* § V(D)(6).

94. See generally E. IMWINKELRIED, *supra* note 30, at 81-85.

95. C. McCORMICK, *supra* note 2, § 212, at 667.

96. *Id.* See FED. & UNIF. R. EVID. 403.

b. How do you recognize it?

The questions that must be asked to establish the second proposition, "How do you recognize it?" are determined by the character of the object itself. Objects that have a unique characteristic, so that there is little likelihood that the item presented is not actually the item in question, can usually be authenticated by pointing out the unique characteristic.<sup>97</sup> A gold plated cigarette lighter engraved with the defendant's initials is an example. Testimony that the witness recognizes the object by reference to the unique characteristic is usually sufficient to show that it is truly the object in question. After the witness answers, counsel may move on to the third area of inquiry.<sup>98</sup>

Some types of real evidence, however, do not contain unique characteristics, and a "chain of custody" must be established to show that this exhibit is actually the thing it purports to be. Indistinguishable or fungible items such as bags of cocaine and whiskey bottles cannot be shown to be *the* item unless their whereabouts are accounted for from the moment they became relevant to the case. Some person must testify from personal knowledge as to the whereabouts of the item each moment so as to trace its custody from the event<sup>99</sup> to the trial, or to some time before the trial when the object's relevance to the action is established, as when a bag of cocaine seized from the defendant has been analyzed. If it is shown that the bag was seized from the defendant and its custody is accounted for through the time its contents were tested and found to be illegal drugs, the whereabouts or possibility of tampering after that should not affect the item's admissibility. Each witness will normally be asked when and how the evidence came into her possession, what she did with it and when and how she relinquished custody of it.

c. Is it in the same condition?

The questions that must be asked to establish the third proposi-

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97. See FED. & UNIF. R. EVID. 901(b)(4).

98. Many judges require a chain of custody to be established for evidence that the logic of the law of evidence would make admissible without accounting for its whereabouts from event to trial. Particularly in criminal cases in which the prosecution is the proponent of the evidence, judges tend, if they err at all, to err on the side of caution and keep evidence out whenever there is a question as to its admissibility. When in doubt, the lawyer should be prepared to establish a chain of custody.

99. Minor omissions in the chain, particularly when not pointed out by the opponent, may not be fatal. *Titus v. State*, 268 Ark. 9, 593 S.W.2d 164 (1980); *Meador v. State*, 10 Ark. App. 325, 664 S.W.2d 878 (1984).

tion, that the item is substantially unchanged, also depend upon the character of the item itself.<sup>100</sup> The unchanged condition of items not subject to tampering or alteration, such as guns,<sup>101</sup> monkey wrenches, and tire tools, may be established by asking the witness whether the evidence is in the same condition as when first observed. Items that can more readily be altered or tampered with must be treated more carefully by courts, and testimony to establish that there is a probability<sup>102</sup> that the evidence is substantially unchanged is required.<sup>103</sup> The availability of such testimony depends on the care with which evidence was preserved before trial<sup>104</sup> by the investigative agency, the party, or those under the direction of the lawyer. After a witness testifies that the object left her possession substantially unchanged from the time it entered her possession, she must be prepared to say what protective steps were taken to assure that no one tampered with or altered the evidence. To enable their personnel to establish this point on the witness stand, investigative agencies have established procedures for labelling evidence, giving receipts when it changes possession, and storing it in evidence lockers to which only authorized persons have access.

## 2. Letters

The foundation required for admission of a letter differs according to the purpose for which the letter is offered.<sup>105</sup> When the relevance of a letter depends upon the identity of the sender, that identity must be proven, usually by identification of the signature.

The first question of the witness authenticating a letter should be, "Do you recognize plaintiff's exhibit 1?" Then the witness should be asked, "Under what circumstances?" and he should describe the circumstances that enable him to authenticate the letter. For example, "I wrote and mailed it to the plaintiff." or, "I typed it for Ms. Evans and placed it in the outgoing mail." or, "I received it in the mail."

Finally, the signature of the writer must be identified. If the writer is testifying, he can identify his own signature. Any witness other than

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100. See *State v. Lewis*, 401 A.2d 645 (Me. 1979).

101. *State v. Kroepflin*, 266 N.W.2d 537 (N.D. 1978).

102. *Hoover v. Thompson*, 787 F.2d 449 (8th Cir. 1986) (missing seal on blood sample went to credibility, not admissibility. Court must be satisfied to reasonable probability that article is unchanged).

103. See *Horne v. State*, 12 Ark. App. 301, 677 S.W.2d 856 (1984) (murder victim's shirt admissible although his mother had washed it).

104. See *Ballou v. Henri Studios, Inc.*, 656 F.2d 1147 (5th Cir. 1981).

105. For an excellent treatment of the authentication of private writings, including sample questions, see E. IMWINKELRIED, *supra* note 30, at 56-62.

the writer, however, must be able to recognize the signature as that of the alleged writer. Nonexpert opinion as to handwriting is admissible if the opinion is based on familiarity not acquired for purposes of the instant litigation.<sup>106</sup> When eliciting the opinion of a lay witness concerning a signature or other handwriting, the lawyer must establish how the witness became familiar with it. For instance, after the witness testifies that this is Ms. Evans' signature, the lawyer might ask, "How do you recognize it?" to which the witness, her secretary, will reply, "I've seen her sign it hundreds of times in the office." Handwriting may also be authenticated by having an expert witness compare the writing on the exhibit with an authenticated example of the alleged writer's handwriting or signature.<sup>107</sup> In some cases, the jury may make the comparison itself,<sup>108</sup> in which case authentication of the handwriting becomes a matter of weight, not admissibility.<sup>109</sup>

### 3. *Business records*

In addition to authenticating documents as the business records of a business entity, the proponent is faced with the problem that business records are hearsay. Authentication is usually easily accomplished, but the hearsay objection can only be overcome if the requirements of the "business records" exception to the hearsay rule are met.<sup>110</sup> The language of the exception as contained in the rules<sup>111</sup> provides a checklist for the examiner. The following questions will normally establish the

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106. FED. & UNIF. R. EVID. 901(b)(2). See *United States v. Barker*, 735 F.2d 1280 (11th Cir. 1984), cert. denied, 469 U.S. 933 (1984); *United States v. Barron*, 707 F.2d 125 (5th Cir. 1983); *United States v. Pitts*, 569 F.2d 343 (5th Cir. 1978), cert. denied, 436 U.S. 959 (1978).

107. FED. & UNIF. R. EVID. 901(b)(3). See *United States v. Mauchlin*, 670 F.2d 746 (7th Cir. 1982).

108. FED. & UNIF. R. EVID. 901(b)(3). See *Greater Kansas City Laborers Pension Fund v. Thummel*, 738 F.2d 926 (8th Cir. 1984).

109. See *United States v. Clifford*, 704 F.2d 86 (3d Cir. 1983).

110. FED. & UNIF. R. EVID. 803(6) describes a record admissible as an exception to the hearsay rule as:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190 (E.D. Pa. 1980); *Cates v. State*, 267 Ark. 726, 589 S.W.2d 598 (1979).

111. FED. & UNIF. R. EVID. 803(6).

requirements of the "business records" exception to the hearsay rule: (1) When was the record prepared? (2) Who transmitted the information from which it was prepared? (3) What knowledge did the person transmitting the information have of the matters contained therein? (4) Was the record kept in the course of a regularly conducted business activity?<sup>112</sup> and (5) Was it the regular practice of the organization to make the record?<sup>113</sup>

## VI. THE PRESENTATION OF EXPERT TESTIMONY

### A. The Nature of Opinions

The inferences or conclusions to be drawn from facts in evidence are the province of the jury. For this reason, the law of evidence has long forbidden ordinary witnesses to suggest the inferences or conclusions that should be drawn from the facts they relate. They may only testify to what they have sensually perceived, and their testimony must be based on personal knowledge.<sup>114</sup>

There is, however, no clearly defined line between relating facts and stating an opinion. No person can speak without expressing conclusions based upon personal experience. Recognizing that the search for a dividing line between fact and opinion is fruitless, and that any line drawn would be arbitrary and artificial, modern evidence codes have liberalized the opinion rule to allow lay witnesses to express rational opinions based on their personal observation,<sup>115</sup> always subject to the discretion of the court to decide whether the opinion will be helpful to the jury in understanding the evidence.<sup>116</sup> To this extent, every witness

112. See *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254 (9th Cir. 1984).

113. See *United States v. Lemire*, 720 F.2d 1327 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984). See generally *E. IMWINKELRIED*, *supra* note 30, at 62-65, 170-73.

114. FED. & UNIF. R. EVID. 602.

115. *Smith v. Davis*, 281 Ark. 122, 663 S.W.2d 165 (1983) (point of impact of automobiles); *Tillman v. State*, 275 Ark. 275, 630 S.W.2d 5 (1982), *cert. denied*, 459 U.S. 1201 (1983) (statement that car had backed out of driveway before witness saw it, based on its position and movement when witness saw it); *Avery v. State*, 271 Ark. 584, 609 S.W.2d 52 (1980) (sanity); *Mathis v. State*, 267 Ark. 904, 591 S.W. 2d 679 (1979) *overruled on other grounds, sub nom. Rogers v. State*, 10 Ark. App. 19, 660 S.W.2d 949 (1983) (whether shooting was accidental or intentional).

116. FED. & UNIF. R. EVID. 701 states:

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

See *Miller v. Tipton*, 272 Ark. 1, 611 S.W.2d 764 (1981) (testimony that defendant was "going like a bat out of hell" was excluded as not helpful); see also *Graham v. State*, 2 Ark. App. 266, 621 S.W.2d 4 (1981) (testimony that defendant was "scared to death" excluded as irrelevant).



is a potential expert.

As the world becomes more technologically complex, evidence becomes more difficult for jurors to understand, and it becomes more difficult for them to decide what inferences they should draw from evidence presented. To aid the jury's understanding, whenever the court determines that it would be helpful<sup>117</sup> to the trier of fact to have the benefit of an expert's opinion on a subject<sup>118</sup> a witness who has been qualified as an expert<sup>119</sup> on that subject may be allowed to suggest to the jury what inferences should be drawn from the facts in issue.<sup>120</sup>

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117. *Caldwell v. State*, 267 Ark. 1053, 594 S.W.2d 24 (1980). However, despite the "helpfulness" standard established by the Uniform Rule, the Arkansas Supreme Court still occasionally dredges up the discarded standard that the testimony must be "beyond the jury's ability to understand." *B. & J. Byers Trucking, Inc. v. Robinson*, 281 Ark. 442, 665 S.W.2d 258 (1984) (accident reconstruction). When the subject matter is within the knowledge or experience of the jury, it may not meet the "helpfulness" criterion. *United States v. Arenal*, 768 F.2d 263 (8th Cir. 1985).

118. The question whether expert testimony will assist the trier of fact is sharply presented when a party seeks to present the result and interpretation of some novel scientific or experimental technique. The traditional test, first enunciated in *Frye v. United States*, 293 F.2d 1013 (D.C. Cir. 1923), is that "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Id.* at 1014. In *Frye*, testimony concerning the results of a predecessor of the polygraph test was refused. *Frye* is still followed by many courts. See Gianelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197 (1980). Since the advent of the Federal Rules, some commentators have argued that although "general acceptance" might be a valid prerequisite for a court to take judicial notice of novel scientific evidence, the standard for its admissibility should be governed by the general principles of helpfulness in Rule 702 and relevance versus harmful effect in Rule 403. C. MCCORMICK, *supra* note 2, § 203, at 607. See also J. WEINSTEIN & M. BERGER, *supra* note 3, § 702[03], at 702-18; McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 IOWA L. REV. 879 (1982). Even under the helpfulness-relevance-harm analysis, courts continue to reject evidence of polygraph examination results. See *Brown v. Best Prods. Inc.*, 18 Ohio St. 3d 32, 479 N.E. 2d 852 (1985); *State v. Brown*, 297 Or. 404, 687 P.2d 751 (1984). A newer type of "lie detector" test, the psychological stress evaluator or voice stress test, has met similar rejection by courts. See *Sabag v. Continental South Dakota*, 374 N.W.2d 349 (S.D. 1985).

119. Whether the witness is qualified is left to the discretion of the trial court. *Blair v. State*, 284 Ark. 330, 681 S.W.2d 374 (1984); *Parker v. State*, 268 Ark. 441, 597 S.W.2d 586 (1980); *Dixon v. State*, 268 Ark. 471, 597 S.W.2d 77 (1980); *Beck v. State*, 12 Ark. App. 341, 676 S.W.2d 740 (1984); *Whaley v. State*, 11 Ark. App. 248, 669 S.W.2d 502 (1984). The standard in Arkansas is whether the witness has knowledge of the subject beyond that of ordinary persons. *Dildine v. Clark Equip. Co.*, 282 Ark. 130, 666 S.W.2d 692 (1984). See also *Koelzer v. Bagley*, 13 Ark. App. 48, 680 S.W.2d 111 (1984). *But cf.* *Williams v. Carr*, 263 Ark. 326, 565 S.W.2d 400 (1978) (trial court was reversed for allowing a funeral director to give his opinion of what constitutes "more than normal grief," where his qualifications were that he had participated in over 200 funerals during 24 years and had attended an "institute of mortuary science"). Demonstrated practical experience may be as sufficient as academic training in qualifying a witness as an expert. *Circle J. Dairy, Inc. v. A.O. Smith Harvester & Prods., Inc.*, 790 F.2d 694 (8th Cir. 1986). Compare *Friendship Heights Assoc. v. Vlastionil, A.I.A. Koubek*, 785 F.2d 1154 (4th Cir. 1986).

120. FED. & UNIF. R. EVID. 702 states: "If scientific, technical, or other specialized knowl-

The witness qualified as an expert in a subject, unlike the lay witness offering an opinion, is not limited to facts personally observed in forming his opinion.<sup>121</sup> The same witness may be a lay witness as to some matters, an expert expressing an opinion based on personal observation as to others, and an expert basing his opinion on facts made known to him as to still other issues. A treating physician may, for example, express his opinion as to the nature and duration of his patient's injuries based upon his personal observation;<sup>122</sup> but a physician who has never seen the patient may also express such an opinion based solely on his review of the patient's medical history made available to him for examination before trial.<sup>123</sup> An expert with no prior knowledge of the case may be allowed to sit in the courtroom and hear the testimony in the case, then offer his opinion based on that testimony.<sup>124</sup>

## B. The Hypothetical Question

The facts made known to an expert and upon which he bases his opinion may be assumed. In other words, the lawyer may ask the expert to assume the existence of certain facts and ask the expert to express his opinion based on those assumed facts. A question seeking an expert's opinion based upon a set of assumed facts is called a hypothetical question. The law requires that all relevant facts be included in a hypothetical in order for the opinion to be relevant. This is time-consuming at best, requiring lawyers to devote much time to the careful drafting of hypothetical questions and triggering objections as to the content of the questions. At worst, it allows lawyers to prepare long hypotheticals that, in effect, constitute an extra closing argument made during examination of the expert<sup>125</sup> with the lawyer recounting the

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edge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." The expert's testimony may be excluded if the court finds it would confuse the jury. *United States v. Curnew*, 788 F.2d 1335 (8th Cir. 1986); *cert. denied*, 107 S. Ct. 438 (1986).

121. FED. & UNIF. R. EVID. 703. See *Campbell v. State*, 265 Ark. 77, 576 S.W.2d 938 (1979); *Bowman v. McFarlin*, 1 Ark. App. 235, 615 S.W.2d 383 (1981).

122. See *Rheingold, The Basis of Medical Testimony*, 15 VAND. L. REV. 473, 489-91 (1962).

123. *Id.*

124. When the rule excluding witnesses from the courtroom is invoked (FED. & UNIF. R. EVID. 615), the judge has discretion whether to allow the expert witness to remain and hear the testimony as a basis for his opinion. *Arkansas Power & Light Co. v. Melkovitz*, 11 Ark. App. 90, 668 S.W.2d 37 (1984).

125. The closing argument is, in essence, the lawyer's opportunity to suggest to the jury the inferences that they should, in that lawyer's view of the case, draw from the evidence.

facts to his best advantage and the witness, with all the credibility conferred upon him by judicial acceptance as an expert, suggesting the inference to the jury.<sup>126</sup>

The hypothetical question, though still viable, does not have to be used as frequently because the rules of evidence give lawyers more flexibility in eliciting expert opinions.<sup>127</sup> In jurisdictions that have adopted modern codes of evidence, the expert may offer his opinion without first disclosing the underlying basis for that opinion unless the court, in the exercise of its duty to assure a fair trial,<sup>128</sup> requires that the data upon which the witness relies be revealed before he states his opinion.<sup>129</sup> If the expert has an insufficient or flawed basis for his opinion, this fact may be brought out on cross-examination.<sup>130</sup>

Subject to the right and obligation of the judge to rule otherwise, the lawyer operating under the rules has the option to use a hypothetical question, to ask the expert to describe the basis of his opinion, or to elicit the opinion, after qualifying the witness as an expert,<sup>131</sup> without asking the basis of the opinion. Obviously, if a credible expert has a sound basis for his opinion, the lawyer will give him an opportunity to describe that basis.

### C. Use of Inadmissible Data

Another provision of the rules that facilitates the lawyer's presentation of expert testimony in trial is the relaxation of the doctrine that required every matter upon which the expert based his opinion to be admissible in evidence. Under the traditional rule, a treating physician could not testify that he based his diagnosis partly on an x-ray report provided by a radiologist because the contents of the x-ray report would be hearsay. Before the treating physician could offer an opinion based in part on the x-ray report, the radiologist would have to be called as a witness to get the report into evidence. Calling witnesses to authenti-

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126. See Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 426-27 (1952).

127. See S. SALTZBURG & K. REDDEN, *supra* note 3, at 451.

128. FED. & UNIF. R. EVID. 611(a) provides: "The court shall exercise reasonable control over the mode and 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 witnesses from harrassment or undue influence."

129. FED. & UNIF. R. EVID. 705.

130. *Id.* See Arkansas State Highway Comm'n v. Schell, 13 Ark. App. 293, 683 S.W.2d 618 (1985); Bull v. Brantner, 10 Ark. App. 229, 662 S.W.2d 476 (1984).

131. The qualification of the witness as an expert involves asking a series of questions, the answers to which demonstrate the requisite "knowledge, skill, experience, training, or education" to enable him to give his expert opinion on the subject. FED. & UNIF. R. EVID. 702. See Advisory Committee's Note, 56 F.R.D. 183, 282 (1973).

cate everything the expert witness relied on in forming his opinion is a time-consuming process, is valueless to the jury, and can be prohibitively expensive for the parties. Recognizing that experts in other field rely on the work product of colleagues in performing their work without worrying whether it is hearsay, the rules provide that the matters relied on by the expert need not themselves be admissible in evidence if they are of a type reasonably relied on by experts in the witness' field.<sup>132</sup> The treating physician, for example, may now testify that he relied on x-ray reports in making his diagnosis, so long as he testifies that to do so is a reasonable practice in his field of expertise.<sup>133</sup> Those reports would be admissible if a qualified witness were called to authenticate them.

The rule that the matters upon which the expert relies do not themselves have to be admissible is, however, broader in its practical effect at trial. It opens the door for counsel to make the jury aware of the existence of otherwise inadmissible evidence, which could not be introduced on its own merit, by having an expert witness state that he based his opinion in part on that evidence.<sup>134</sup>

#### D. Direct Examination of the Expert

The presentation of expert testimony involves four steps. Each step may be emphasized or minimized depending upon such factors as the qualifications of the expert, the subject matter of the testimony, or the manner in which the expert reached his opinion. It is the trial lawyer's responsibility to plan the presentation of the testimony—its pacing, the emphasis to be placed on each of the four steps, whether to employ the narrative style, the sequence of the steps—in order to make the testimony most impressive to the jury.

An expert witness is placed on the stand for one ultimate purpose—to state an opinion. Therefore, the lawyer must remember that the question eliciting the opinion and the opinion itself are the climactic event of this witness' testimony. Every question and answer must be planned to assure that every juror hears and remembers that opinion. In cases in which the expert's testimony is complex or lengthy, it is

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132. FED. & UNIF. R. EVID. 703. See *Dixon v. Ledbetter*, 262 Ark. 758, 561 S.W.2d 294 (1978).

133. See Advisory Committee's Note, *supra* note 131, at 283.

134. This rule is, of course, subject to the relevance-harm balancing test of FED. & UNIF. R. EVID. 403. It has been suggested that a limiting instruction should often be utilized to explain to the jury that the inadmissible data was not admitted for its truth. S. SALTZBURG & K. REDDEN, *supra* note 3, at 467.

often best for the lawyer to ask for the opinion early while the jury is still attentive. The rules now give the lawyer this option.<sup>135</sup> In other cases, those in which the witness is a captivating speaker and the subject matter of his testimony is interesting, the lawyer may elect to bring the presentation to a dramatic climax by eliciting the opinion with her last question.

The four steps are: (1) Establish the expertise; (2) tie the expert to the case; (3) establish the basis for the opinion; and (4) ask for the opinion. Steps 1 and 2 should always be done in that order. Step 1 is a prerequisite in order to allow the witness to express an opinion.<sup>136</sup> Step 2 is necessary to establish that the testimony will assist the jury<sup>137</sup> and to meet the test of relevancy.<sup>138</sup> The order of steps 3 and 4 may be reversed depending on the considerations discussed above.

### 1. *Step 1: Establish the expertise*

If the witness is a nationally recognized authority in his field, the lawyer will undoubtedly dwell on his background and qualifications.<sup>139</sup> Opposing counsel will often offer to stipulate the qualifications of the undeniable expert in order to keep the jury from hearing them, thereby minimizing the witness' credibility, while appearing generous and reasonable. Some judges, in the interest of moving the case along, will cut off the examiner before she has had the witness describe all of his qualifications, but the proponent should resist the opponent's tactic by responding with a statement such as, "Your Honor, I appreciate counsel's offer, but I believe the jury is entitled to hear the outstanding qualifications of Dr. Schweitzer." On the other hand, if the witness' qualifications, while sufficient to qualify him to give his expert opinion, are inferior to the opponent's expert on that subject, the lawyer may wish to ask only enough qualification questions to convince the court that the witness' opinion should be allowed.

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135. FED. & UNIF. R. EVID. 705.

136. FED. & UNIF. R. EVID. 702.

137. *Id.*

138. FED. & UNIF. R. EVID. 401 requires all evidence to be relevant, *i.e.*, tending to make the existence of some fact of consequence in the trial more or less probable. FED. & UNIF. R. EVID. 403 gives the court broad discretion to exclude relevant evidence if its probative value is substantially outweighed by danger of prejudice, confusion, misleading the jury, delay, waste of time, or needless presentation of cumulative evidence. *See Gruzen v. State*, 267 Ark. 380, 591 S.W.2d 342 (1979), *cert. denied*, 449 U.S. 852 (1980), *aff'd*, 276 Ark. 149, 634 S.W.2d 92 (1982), *cert. denied*, 459 U.S. 1020 (1982).

139. "The qualifications of an expert are like the pedestal for a statue—the more imposing, the nobler the subject above it appears." L. NIZER, *supra* note 11, at 314.

The direct examiner should have the witness explain the significance and importance of professional degrees and certifications. For instance, the physician witness who is board certified in his speciality should be asked to describe what he had to do to obtain certification.

### 2. *Step 2: Tie the expert to the case*

This step is no different from the procedure the direct examiner follows with every witness, lay or expert. In order for jurors to give weight to the witness' testimony, they must know how the witness learned what he is to testify about. The jury wants and is entitled to know how this expert gained the familiarity with the facts in issue which renders his opinion worthy of consideration. He may have gained his knowledge by actual observation (such as a real estate appraiser who performed an appraisal of property), by examination of furnished data (such as a statistician testifying based on furnished personnel records), by listening to testimony in the trial (used primarily as a last-resort alternative to previously furnished data to contradict the opponent's expert), or by listening to assumed facts related in the question (the hypothetical).

This aspect of the direct examination, like all others, should be managed by the lawyer to maximize the witness' credibility. If the witness is a real estate appraiser who conducted a thorough examination of the property, he should be allowed to go into detail in describing the property. If the witness is a physician testifying for the defense whose only contact with the plaintiff was a brief physical examination and a review of the treating physician's records, the direct examiner may wish to have the witness describe everything he did during the examination in detail to create the impression of greater involvement in the case. On the other hand, if the witness is an accountant whose procedures and practices are likely to bore the jury, the lawyer may, after qualifying him, only ask one or two questions to establish that he did examine the books in question and then immediately elicit the opinion.

### 3. *Step 3: Establish the basis*

This step may be taken either before or after having the witness state his opinion. In many cases, the expert may be asked his opinion and then asked, while he has the jury's attention, "Sir, how did you arrive at that opinion?" The decision rests on such factors as the witness' personality and the interest or boredom inherent in the subject matter. In other cases, the lawyer may have the expert describe the

basis in detail and conclude the direct examination with the opinion, thereby drawing the examination to a climax. The opinion should always be the focal point of the direct examination of an expert witness.

The lawyer should force the expert to use ordinary, understandable words instead of professional jargon. The prepared lawyer will have become familiar with much of the technical terminology, but he must remember that the jury is hearing the testimony for the first time, and will only hear it once. "Collar bone" is just as accurate and much more generally understood than "clavicle."

#### 4. Step 4: Ask for the opinion

The most important thing for the proponent of expert testimony to remember is to precisely articulate the question asking for the opinion. Sometimes the expert opinion is the only thing that will get the plaintiff past a motion for directed verdict, and it is of utmost importance that the record reflect an opinion that states the relevant inference that the lawyer will later urge the jury to draw during her summation. This entails a knowledge of the substantive law governing the case. In a medical malpractice case, as an example, the proponent must know whether the relevant standard of care imposed in that jurisdiction relates to the community in which the alleged malpractice occurred or whether a more general standard of care is applicable.<sup>140</sup> The opinion is

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140. An enlightening example of the necessity of knowing exactly what to ask when eliciting an opinion is afforded by the history of the rule forbidding opinions on the "ultimate issue." These traditionally were held to invade or usurp the province of the jury. See C. McCORMICK, *supra* note 2, § 12; 7 J. WIGMORE, *supra* note 3, § 1921. Following a number of cases that had abandoned the rule (see *People v. Wilson*, 25 Cal.2d 341, 153 P.2d 720, (1944); *Clifford-Jacobs Forging Co. v. Industrial Comm'n*, 19 Ill.2d 236, 166 N.E.2d 582 (1960); *Dowling v. L.H. Shattuck, Inc.*, 91 N.H. 234, 17 A.2d 529 (1941); *Schweiger v. Solbeck*, 191 Or. 454, 230 P.2d 195 (1951)), FED. & UNIF. R. EVID. 704 specifically jettisoned it: "[T]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." See Advisory Committee's Note, *supra* note 131, at 284 (1973). After John Hinckley, the man who shot President Reagan, was acquitted of a charge of attempted murder by reason of insanity largely because of the expert testimony of psychiatrists, a public outcry arose for abolition of the insanity defense. Congress, effective October 12, 1984, amended FED. R. EVID. 704 to add a Section (b) stating:

No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issue are matters for the trier of fact alone.

No one knows for sure what FED. R. EVID. 704(b) means or what its effect will be. See S. SALTZBURG, *supra* note 3, at 267-69 (3d ed. 1985 cumulative supplement). Arkansas has not adopted any limiting amendment to UNIF. R. EVID. 704. *But see Caldwell v. State*, 267 Ark. 1053, 594 S.W.2d 24 (1980) (excluding opinion of qualified expert on human perception on basis that it invaded the province of the jury). The Arkansas Supreme Court has drawn a distinction between

best elicited by asking two questions similar to the following: (1) Mr. Expert, have you formed an opinion whether . . . ? (2) What is that opinion?

## VII. WHAT TO DO IF THE WITNESS FORGETS

The law of evidence recognizes that the human memory, like an automobile battery, is subject to failure and so provides a set of jumper cables. Counsel can use these jumper cables to connect the witness to some external power source and recharge the witness' memory battery. This evidentiary set of jumper cables is the rule allowing use of a writing or object to refresh the memory of the witness whose power of recollection is temporarily exhausted.<sup>141</sup>

If the witness' memory battery still remains dead after she has reviewed a writing in an attempt to recharge it, the law allows the writing itself to be read to the jury, provided certain requirements are met to ensure its reliability as a substitute for the witness' present recollection.<sup>142</sup> This is so although the writing is clearly hearsay. In some cases when the witness is present and subject to cross-examination, the law simply classifies her earlier statement as nonhearsay.<sup>143</sup>

Lack of memory makes a witness as unavailable as physical absence, and the rules of evidence include lack of memory among the situations that constitute unavailability.<sup>144</sup> If the witness with an un-rechargeable memory previously testified, and the present opponent had an opportunity and similar motive to examine,<sup>145</sup> the witness' prior statement may be admissible as a substitute for the witness' live testimony.<sup>146</sup>

### A. The Importance of Preparation

By interviewing witnesses as early as possible in the investigation

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opinions that merely embrace an ultimate issue and those that tell the jury which result to reach. *Gramling v. Jennings*, 274 Ark. 346, 625 S.W.2d 463 (1981). *See also* *Ethridge v. State*, 9 Ark. App. 111, 654 S.W.2d 595 (1983).

141. *See* C. McCORMICK, *supra* note 2, § 9, at 18. *See also* *infra* § VII(B).

142. FED. & UNIF. R. EVID. 803(5). *See* *infra* § VII(C). *See also* *United States v. Massachusetts Maritime Academy*, 762 F.2d 142 (1st Cir. 1985).

143. FED. & UNIF. R. EVID. 801(d)(1). *See* *infra* § VII(D).

144. FED. & UNIF. R. EVID. 804(a)(3).

145. In a civil case, the opportunity and similar motive to cross-examine may be found in a predecessor in interest, but in a criminal case the opposing party in the prior hearing or deposition must have been the same as the opposing party in the present case. FED. & UNIF. R. EVID. 804(b)(1).

146. *Id.* *See* *infra* § VII(E).



and preparation stages of the lawsuit, the lawyer may obtain statements that can be used to refresh recollection or read as past recollection recorded in case the witness' memory later falters or fails. If there is a chance that the witness will become unavailable (by loss of memory or otherwise), a deposition can preserve the testimony of the witness for trial.<sup>147</sup>

## B. Refreshing Recollection<sup>148</sup>

Writings or objects may be used to refresh a witness' recollection at two times: before she takes the stand, or while she is testifying. If it is discovered while preparing the witness to testify that she has forgotten facts she once knew, any writing or object may be used to rekindle recollection.<sup>149</sup>

Unless the court so requires, traditionally there has been no requirement to make available to the opponent a writing used to refresh the witness' recollection before the witness takes the stand.<sup>150</sup> As submitted to Congress by the Supreme Court, Federal Rule of Evidence 612 required that such documents be made available. As amended by

147. See FED. & UNIF. R. EVID. 804.

148. See generally S. SALTZBURG & K. REDDEN, *supra* note 3, at 415-19.

149. Other means of refreshing recollection have also been utilized. Among the most intriguing and troublesome is hypnosis. Courts have taken three approaches to hypnotically induced testimony. Some have allowed it, considering its weight to be a matter for the jury. See, e.g., *United States v. Waksal*, 539 F. Supp. 834 (S.D. Fla. 1982), *rev'd*, 709 F.2d 653 (11th Cir. 1983); *Clark v. State*, 379 So. 2d 372 (Fla. Dist. Ct. App. 1979); *State v. Greer*, 609 S.W.2d 423 (Mo. App. 1980), *vacated*, 450 U.S. 1027 (1981); *State v. McQueen*, 295 N.C. 96, 244 S.E.2d 414 (1978), *overruled*, *State v. Peoples*, 319 S.E.2d 177 (N.C. 1984). Others have allowed it only if certain safeguards have been followed to minimize the chance that the testimony is the result of suggestion or fantasy rather than true refreshed recollection. See, e.g., *United States v. Charles*, 561 F. Supp. 694 (S.D. Tex. 1983); *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981); *State v. Beachum*, 97 N.M. 682, 643 P.2d 246 (1981); *State v. Long*, 32 Wash. App. 732, 649 P.2d 845 (1982); *State v. Armstrong*, 110 Wis. 2d 555, 329 N.W.2d 386 (1983). Still others have ruled it inadmissible as inherently unreliable. See, e.g., *United States v. Valdez*, 722 F.2d 1196 (5th Cir. 1984); *Collins v. Superior Ct.*, 132 Ariz. 180, 644 P.2d 1266 (1982); *People v. Shirley*, 31 Cal.3d 18, 181 Cal. Rptr. 243, 641 P.2d 775 (1982), *cert. denied*, 459 U.S. 860 (1982); *State ex rel Collins v. State*, 52 Md. App. 186, 447 A.2d 1272 (1982); *Commonwealth v. Kater*, 388 Mass. 519, 447 N.E.2d 1190 (1983); *State v. Mack*, 292 N.W.2d 764 (Minn. 1980); *People v. Hughes*, 59 N.Y.2d 523, 466 N.Y.S. 2d 255, 453 N.E.2d 484 (1983). Arkansas has recently joined the third group of jurisdictions which exclude hypnotically induced testimony as being inherently unreliable. *Rock v. State*, 288 Ark. 566, 708 S.W.2d 78 (1986), *cert. granted*, 107 S. Ct. 430 (1986). See generally C. MCCORMICK, *supra* note 2, § 206, at 631-34; Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CAL. L. REV. 313 (1980); see also *Sprynczynatyk v. General Motors Corp.*, 771 F.2d 1112 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1263 (1986).

150. *Goldman v. United States*, 316 U.S. 129 (1942); *Needleman v. United States*, 261 F.2d 802 (5th Cir. 1958), *cert. denied*, 362 U.S. 600 (1960).

Congress and finally adopted, the Rule makes production of writings or objects used to refresh recollection before the witness takes the stand discretionary with the judge.<sup>151</sup> The Uniform Rule is in accord with the Federal Rule.<sup>152</sup> The court has discretion to order that any writing or object so used be made available to the opponent at the trial, hearing or deposition where the witness is testifying.<sup>153</sup>

If the writing or object is used to refresh the recollection of the witness while testifying, the opponent is always entitled to examine it, cross-examine the witness about it, and introduce relevant portions of it into evidence.<sup>154</sup>

It should be noted that no hearsay problem exists with items used to refresh the witness' memory because the writing or object itself is neither read from nor offered as an exhibit.<sup>155</sup> The witness merely examines it, is able to remember again, and finally testifies from personal knowledge without referring to the thing. The proper way to lay the foundation for use of a writing or object to refresh the witness' memory when the witness says, "I don't remember," is to ask the witness, "Would it help refresh your recollection if you were to look at . . . ?" If the witness says, "yes," then counsel can ask to approach, hand the witness the item that the witness said would refresh her memory, and ask the witness to examine it. If the witness says "no," the lawyer is

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151. FED. R. EVID. 612. See HOUSE COMMITTEE ON JUDICIARY, FED. RULES OF EVIDENCE, H.R. REP. NO. 650, 93d Cong., 1st Sess., p. 13 (1973), reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1075, 7086. See, e.g., *Cosden Oil & Chem. Co. v. Karl O. Helm Aktiengesellschaft*, 736 F.2d 1064 (5th Cir. 1984); *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138 (D. Del. 1982). FED. R. EVID. 612 also excepts statements covered by the Jencks Act, 18 U.S.C. § 3500 (1982). The Jencks Act provides, in essence, that pretrial statements of government witnesses need not be disclosed until after the witness has testified.

152. UNIF. R. EVID. 612. See *Goodwin v. State*, 263 Ark. 856, 568 S.W.2d 3 (1978).

153. FED. R. EVID. 612 only mentions "hearing" while UNIFORM R. EVID. 612 more specifically mentions "trial, hearing, or deposition in which the witness is testifying." Battles have been waged over whether a privileged writing used to refresh recollection may be ordered produced. It has been held that use of such a document for this purpose constitutes a waiver of the privilege and that it must be produced. See *Wheeling-Pittsburgh Steel Corp. v. Underwriters Laboratories, Inc.*, 81 F.R.D. 8 (N.D. Ill. 1978). But see *Leucadia, Inc. v. Reliance Ins. Co.*, 101 F.R.D. 674 (S.D.N.Y. 1983).

154. Fed. & Unif. R. Evid. 612(2).

155. A sheriff who had reduced a defendant's oral statement to writing but did not obtain the defendant's signature on the statement was allowed to use the writing to refresh his own recollection while testifying. *Wilson v. State*, 277 Ark. 43, 639 S.W.2d 45 (1982). See also *United States v. Andrade*, 788 F.2d 521 (8th Cir. 1986) (use of notes made by another person also present at interview to refresh was proper); *United States v. Scott*, 701 F.2d 1340 (11th Cir. 1983), cert. denied, 464 U.S. 856 (1983); *Singleton v. State*, 274 Ark. 126, 623 S.W.2d 180 (1981), cert. denied, 459 U.S. 882 (1982) (use of inadmissible, inflammatory photographs to refresh permitted).

out of luck. After the witness has reviewed the document or object, the lawyer should retrieve it and proceed with the examination. The witness may not read aloud from a writing used to refresh.<sup>156</sup>

### C. Past Recollection Recorded

When a forgetful witness still cannot remember matters he once knew after having attempted to revive his recollection, the law allows a memorandum or record made or adopted<sup>157</sup> by the witness when the matter was fresh in his mind to be read into evidence.<sup>158</sup> Although the document is hearsay, it is considered inherently reliable if made while events were fresh in the witness' memory.<sup>159</sup> The technique of reading prior recollection recorded is often useful in examining witnesses who have made detailed lists or reports based upon personal observation, but cannot now recall all the details contained in the list or report.<sup>160</sup> Examples are inventory takers and accident investigators.

Since the testimony of the witness, if he could remember, would have been oral, the document containing past recollection recorded may only be read to the jury, not introduced as an exhibit.<sup>161</sup> This policy avoids giving the evidence greater weight than it would have had if the witness had been able to testify from present memory.

The foundation that must be laid<sup>162</sup> before reading past recollection recorded to the jury is contained in the rule.<sup>163</sup> First, it must be established that the witness does not have sufficient recollection to enable her to testify fully and accurately.<sup>164</sup> Second, it must be estab-

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156. See Kalo, *Refreshing Recollection: Problems with Laying a Foundation*, 10 RUT.-CAM. L.J. 233 (1979). See also J. TANFORD, *supra* note 1, at 337.

157. For a criticism of the "adoption" limitation on use of these statements, see S. SALTZBURG & K. REDDEN, *supra* note 3, at 576-77.

158. FED. & UNIF. R. EVID. 803(5). These reports and memoranda are, of course, hearsay and FED. & UNIF. R. EVID. 803(5) is an exception to the hearsay rule. The exception for past recollection recorded is an old and well-established one. See *United States v. Kelly*, 349 F.2d 720, 770 (2d Cir. 1965); Annotation, *Refreshment of Recollection by Use of Memoranda or Other Writings*, 82 A.L.R.2d 520 (1962); Annotation, *Refreshment or Recollection by Use of Memoranda or Other Writings*, 125 A.L.R. 80 (1940).

159. See *Owens v. State*, 67 Md. 307, 316, 10 A. 210, 212 (1887).

160. M. GRAHAM, *EVIDENCE TEXT, RULES, ILLUSTRATIONS AND PROBLEMS* 66 (1983).

161. FED. & UNIF. R. EVID. 803(5).

162. See *United States v. Judon*, 567 F.2d 1289, 1294 (5th Cir. 1978) (error to admit memorandum as prior recollection recorded without laying proper foundation).

163. FED. & UNIF. R. EVID. 803(5).

164. *Id.* See *In re Corrugated Container Antitrust Litig.*, 756 F.2d 411 (5th Cir. 1985). It may be forcefully argued that since the rationale for the exception is that the earlier statement is more than likely accurate (more so, even, than the witness' present testimony), these statements should be admissible under this exception to the hearsay rule regardless of the witness' ability to

lished that the witness once had knowledge of the matter.<sup>165</sup> Third, it must be established that the memorandum or record concerns the matter in question.<sup>166</sup> Fourth, the memorandum or record must have been made or adopted by the witness.<sup>167</sup> Fifth, it must have been prepared when the matter was fresh in the witness' memory.<sup>168</sup> Sixth, the witness must state that the document reflects his past knowledge accurately.<sup>169</sup>

The exception to the hearsay rule for prior recollection recorded must be read in conjunction with two other rules of evidence.<sup>170</sup> Rule 801(d)(1) governs admissibility of prior inconsistent statements made under oath; Rule 804(b)(1) governs admissibility of former testimony of unavailable witnesses. The drafters could have included the subject matter of Rule 803(5) in either of these rules, but elected to treat it separately because the other two situations are more specialized in application.<sup>171</sup> Trial counsel must be aware of the interlocking character of these three rules so that she can make maximum use of prior, out-of-court statements of her witnesses.

#### D. Prior Statements Classified as Nonhearsay

The first rule under which the hearsay exception for prior recollection recorded could have been included is the rule that excludes prior statements of a witness from the definition of hearsay under certain circumstances.<sup>172</sup> If a forgetful witness acknowledges the foundational elements necessary to read a statement to the jury under the exception

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remember. *Jordan v. People*, 151 Colo. 133, 376 P.2d 699 (1962), *cert. denied*, 373 U.S. 944 (1963); *Hall v. State*, 223 Md. 158, 162 A.2d 751 (1960); *State v. Bindhammer*, 44 N.J. 372, 209 A.2d 124 (1965). The imposition of the requirement of lack of memory in FED. & UNIF. R. EVID. 803(5) is a policy decision, based upon the drafters' feeling that without the requirement there might be widespread use of statements carefully prepared before trial for the sole purpose of introducing them in evidence in place of the witness' live testimony. See Advisory Committee's Note, *supra* note 131, at 306.

165. FED. & UNIF. R. EVID. 803(5).

166. *Id.*

167. *Id.* The memorandum need not have been prepared personally by the witness, and several persons may have been involved in its preparation, so long as it is adopted by the witness. See *Rathbun v. Brancatella*, 93 N.J.L. 222, 107 A. 279 (1919).

168. FED. & UNIF. R. EVID. 803(5). Freshness in the witness' memory does not necessarily mean that the document must have been prepared contemporaneously with the event. See *United States v. Senak*, 527 F.2d 129, 141-42 (7th Cir. 1975) (three years after the event). *But see* *Parliament Ins. Co. v. Hanson*, 676 F.2d 1069 (5th Cir. 1982) (exclusion of witness' notes not made contemporaneous with events at issue, and made in anticipation of litigation).

169. FED. & UNIF. R. EVID. 803(5).

170. FED. & UNIF. R. EVID. 801(d)(1) and 804(b)(1), respectively.

171. See Advisory Committee's Note, *supra* note 131, at 306.

172. FED. & UNIF. R. EVID. 801(d)(1).

for prior recollection recorded, the nonhearsay rule is not needed.<sup>173</sup> However, if the witness denies having made the statement or its accuracy, the exception for prior recollection recorded cannot be used. In this situation, a prior statement of a witness is admissible for substantive purposes<sup>174</sup> if the witness is on the stand and subject to cross-examination, and the statement meets one of the following criteria: It is inconsistent<sup>175</sup> and given under oath in a trial, hearing, proceeding, or deposition;<sup>176</sup> it is consistent, but only when used to rebut an attack on the witness during cross-examination charging recent fabrication, improper influence, or improper motive;<sup>177</sup> or, it is a statement identifying a person.<sup>178</sup>

Two other differences between use of statements classified as nonhearsay and use of hearsay statements admissible as prior recollection recorded should be noted. First, the nonhearsay statement must have been made by the witness himself, and may not be the adopted statement of another. Second, nonhearsay statements themselves, if admissible, may be made exhibits.

### E. Former Testimony of Unavailable Witnesses

Most hearsay exceptions apply whether or not the witness is available;<sup>179</sup> others apply only if the witness is unavailable.<sup>180</sup> Among the

173. See Advisory Committee's Note, *supra* note 131, at 293.

174. This is as opposed to being admissible only for the purpose of impeaching the witness' credibility. The rules for using prior inconsistent statements of witnesses are contained in FED. & UNIF. R. EVID. 613. Whether the prior statement of a witness is admissible for the truth of the matters asserted therein or merely for impeachment purposes can make the difference between whether a prosecutor survives a motion for directed verdict. See *California v. Green*, 399 U.S. 149 (1970). The constitutional issue whether or under what circumstances use of prior out-of-court statements of witnesses by prosecutors may violate the confrontation clause is beyond the scope of this article. See U.S. CONST. amend. VI. For the United States Supreme Court's most recent pronouncement on the confrontation issue, see *Lee v. Illinois*, 106 S. Ct. 2056 (1986).

175. See Perroni, *Impeachment of One's Own Witness by Prior Inconsistent Statements Under the Federal and Arkansas Rules of Evidence*, 1 UALR L.J. 277 (1978).

176. FED. R. EVID. 801(d)(1)(A). In Arkansas, prior inconsistent statements of witnesses are admissible for substantive purposes in civil cases even if not made under oath. *ARK. UNIF. R. EVID. 801(d)(1)(i)*. *Hawthorne v. Davis*, 268 Ark. 131, 594 S.W.2d 844 (1980); *Slavens v. State*, 1 Ark. App. 245, 614 S.W.2d 529 (1981).

177. FED. R. EVID. 801(d)(1)(B); *ARK. UNIF. R. EVID. 801(d)(1)(ii)*; *Todd v. State*, 283 Ark. 492, 678 S.W.2d 345 (1984). The statement must antedate the motive to fabricate. See *George v. State*, 270 Ark. 335, 604 S.W.2d 940 (1980). See also *United States v. Blankinship*, 784 F.2d 317 (8th Cir. 1986); *United States v. Hernandez*, 779 F.2d 456 (8th Cir. 1985).

178. FED. R. EVID. 801(d)(1)(C); *ARK. UNIF. R. EVID. 801(d)(1)(iii)*.

179. FED. & UNIF. R. EVID. 803.

180. FED. & UNIF. R. EVID. 804.

situations that constitute unavailability<sup>181</sup> is the one in which the witness "testifies to a lack of memory of the subject matter of his statement."<sup>182</sup> Therefore, when a witness says he cannot remember, the hearsay exceptions based on unavailability may be utilized by the examiner. One such exception makes the former testimony of the witness admissible, but only if the party against whom the testimony is now offered (or in civil actions a predecessor in interest) had both the opportunity and a similar motive to examine the witness in the former proceeding or deposition.<sup>183</sup>

At first blush, it would seem that if forgetfulness renders a witness unavailable, there would be no need to have both this exception allowing former testimony of the witness to be introduced and the exception allowing use of prior recollection recorded regardless of the witness' availability. The exception for prior recollection recorded could have been included here. However, the drafters of the rules perceived a difference in the concepts of unavailability in the two rules and elected to treat the exceptions for prior recollection recorded and for former testimony separately.<sup>184</sup>

The foundation requirements for the former testimony exception are different from those for the prior recollection recorded exception. The witness must first testify to a lack of memory.<sup>185</sup> Second, it must be shown that the party against whom the testimony is now offered had an opportunity to examine the witness in the former proceeding.<sup>186</sup> Since only parties have the right to examine witnesses, this means that the earlier proceeding must either have been in the present action, or that the present opponent was a party in the former proceeding.<sup>187</sup> Fi-

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181. The other situations are: Exemption by the court because of a privilege; refusal to testify despite a court order to do so; death; physical or mental illness or infirmity; absence if the proponent shows inability to procure his presence despite process or other reasonable means. FED. & UNIF. R. EVID. 804(A). See *Lewis v. State*, 288 Ark. 595, 709 S.W.2d 56 (1986).

182. FED. & UNIF. R. EVID. 804(a)(3).

183. FED. & UNIF. R. EVID. 804(b)(1). See *California v. Green*, 399 U.S. 149 (1970). Arkansas takes a narrower view of the former testimony exception, holding that preliminary hearings do not afford sufficient opportunity or motive for cross-examination to make testimony given there admissible under this rule. *Scott v. State*, 272 Ark. 88, 612 S.W.2d 110 (1981). There is a statutory procedure in Arkansas whereby the state, after giving notice to a defendant, can take evidence to be preserved for trial. ARK. STAT. ANN. § 43-626 (1977).

184. See Advisory Committee's Note, *supra* note 131, at 306.

185. FED. & UNIF. R. EVID. 804(a)(3).

186. FED. & UNIF. R. EVID. 804(b)(1).

187. In *Bolden v. Carter*, 269 Ark. 391, 602 S.W.2d 640 (1980), the plaintiff, a police officer, sued to recover for personal injuries resulting from an alleged assault and battery. The defendant had been stopped by the plaintiff for a traffic violation and gave the plaintiff a broken jaw and ribs rather than receive a traffic citation. The defendant sought to introduce the former

nally, there must have been a similar motive to examine the witness concerning the matter.<sup>188</sup> This requires similarity of issues, and may be defeated if the party offering the testimony in the present trial is not the party who offered it in the former proceeding.<sup>189</sup>

### CONCLUSION

The most skilled carpenter cannot construct a building without a hammer. Try as he might he cannot drive the nails with his bare hand. Without a hammer, the boards cannot be connected. With a hammer, though, he is able to join the raw materials together into a unified whole.

The hammer, however, is a mere inanimate object, completely ineffectual until used by a person who knows how to drive a nail. A hammer in the hand of one who does not know how to use it is of no value at all. Although he may be able to describe the hammer in minute detail, unless he can drive a nail with it, his knowledge of the hammer is impotent. It is one thing to describe a hammer; it is quite another to drive a nail.

The law of evidence is the lawyer's hammer. It is the tool that enables him to nail together the raw materials of his client's case. But like the hammer, the law of evidence is of no avail to the lawyer who does not know how to use it as a tool. Mere academic familiarity with the law of evidence is useless unless the lawyer has the dexterity to employ it in the courtroom as an instrument with which to combine the disparate elements of his case into a comprehensible structure.

The lawyer has many things to consider when planning and executing the direct examination of witnesses. Many of the considerations are practical—where to stand, how to sequence the questions, the order of the witnesses, whether to allow a witness to narrate. However, all of these practical decisions, even if made correctly, are for naught if the lawyer is unable to get his client's case before the jury because he does not understand the law of evidence.

The lawyer who can combine these two necessary ingredients of

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testimony of three character witnesses who had testified on his behalf at the trials of the criminal charge resulting from the incident (both of which resulted in convictions, but both of which were reversed). The witnesses had become unavailable since the criminal trials. Since the plaintiff police officer had not been a party in the criminal case and had no right to examine the witnesses in that proceeding, and since the state was not the plaintiff's predecessor in interest, the testimony was not allowed.

188. FED. & UNIF. R. EVID. 804(b)(1).

189. See Advisory Committee's Note, *supra* note 131, at 323; *California v. Green*, 399 U.S. 149 (1970).

successful direct examination, knowledge of evidence and practical skill, will emerge victorious more often and can always rest secure in the knowledge that he has represented his client well. His colleagues will admire him and the judges before whom he appears will respect him.



