

## ARTICLES

### JACOB'S VOICE, ESAU'S HANDS: \* EVIDENCE-SPEAK FOR TRIAL LAWYERS

Edward D. Ohlbaum \*\*

I know it is not fashionable to speak this way, but I must confess, I love the law of evidence. Applying the law of evidence is what separates lawyers from the citizenry; it is our currency in the courtroom. The law of evidence is a friend of the trial lawyer and it gives judges the opportunity to be fair.<sup>1</sup> It also provides trial lawyers with a game plan on how to be persuasive in ways that often have little to do with winning or losing the objection and everything to do with reminding the jurors why they are in court and entitled to the verdict. Two commentators, both former judges and trial lawyers

---

\* In the Book of *Genesis*, when the patriarch Isaac summons his son, Esau, to bestow his fatherly blessing, Esau's younger brother, Jacob, comes forward and attempts to trick Isaac into believing that he, Jacob, is Esau. He wears goat skins on his arms and neck because Esau is a "hairy man." Isaac asks his son to identify himself and to hold out his arms. As Jacob comes forward, Isaac reaches out and exclaims, "The voice *is* Jacob's voice, but the hands *are* the hands of Esau." *Genesis* 27:22 (King James) (emphasis in original).

\*\* © Edward D. Ohlbaum, 2001. All rights reserved. Professor of Law and Director of Trial Advocacy and Clinical Legal Education, James E. Beasley School of Law, Temple University. Hugh C. Culverhouse Visiting Professor of Law, Stetson University College of Law, Spring 1999.

Thanks to colleagues Jo Anne Epps, Eleanor Myers, and Len Sosnov for helpful suggestions and critiques of earlier drafts.

1. Federal Rule of Evidence 102 (2000) provides the following:

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Rule 403 states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403 (2000).

and current evidence teachers — one of whom is an author in this Symposium<sup>2</sup> — put it well:

The Rules bring real life, with its strengths and weaknesses, into a courtroom, to be presented, in most cases, to an untrained audience. The audience will create its own version of the story of the case, reflecting each member's life experiences and intelligence.<sup>3</sup>

Temple University has given me a lifetime contract to teach evidence, and I delight in writing, consulting, and talking about the law of evidence — probably far too much for my own, my students', or anyone else's good. Like many meaningful relationships, my love of evidence did not start out this way. I had to work to understand it and learn how to handle and celebrate its opportunities through my own voice.

I started my career as a public defender, where the informal cult lines were drawn between the “trial lawyers” and the “lawmen.” As trial lawyers, we did not have time for substantive, procedural, or evidentiary law unless it directly and specifically insinuated itself in our cases. We were busy with the facts — the who did what to whom, when, why, and by what means; the states of events and of mind; and what people did, felt, imagined, knew, believed, and thought. Professor Michael E. Tigar captures this trial lawyer gestalt by recounting the advice that an old-school warhorse gave to a court-bound rookie carrying a volume of cases under each arm: “Throw away those books boy. Go get yourself a witness.”<sup>4</sup> And so we did — gladly.

Having left full-time practice for full-time teaching, I have been able to take the time to develop a more mature relationship with the law of evidence. I now recognize that evidentiary principles of law are often the bedrock of persuasive advocacy for two reasons. First, the law of evidence is analytically integrated with the law of trial advocacy. This is not because, given a fair hearing, the lawyer who grounds objections, offers of proof, and motions in limine on the law of evidence is more likely to control the proofs; rather, it is because

---

2. Warren D. Wolfson, *Evidence Advocacy — The Judge's Perspective*, 31 *Stetson L. Rev.* 35 (2001).

3. Thomas A. Mauet & Hon. Warren D. Wolfson, *Trial Evidence* § 1.1., 1–2 (Aspen L. & Bus. 1997).

4. Michael E. Tigar, *Voices Heard in Jury Argument: Litigation and the Law School Curriculum*, 9 *Rev. Litig.* 177, 177 (1990).

the analytical underpinnings of the respective evidentiary rules and principles provide key elements of persuasion. Trial lawyers who articulate these evidentiary principles in their questions and speeches become more persuasive advocates simply because many of the principles on which the rules of evidence are based are the same principles that govern persuasive courtroom performance.

Second, evidentiary concepts are fundamentally interconnected to trial advocacy principles. The relationship between evidence and trial advocacy enables the advocate to demonstrate how an underlying evidentiary principle makes his or her presentation more believable, and it permits the advocate to make an opponent pay a price for having abused or disregarded the relationship. Trying cases is principally about asking questions and making speeches. To do so persuasively requires the type of two-pronged approach that confronted the patriarch Isaac — the hands-on discipline of the advocate and the voice<sup>5</sup> of the evidence teacher.

In its broadest sense, the law of evidence is composed of rules of evidence and those rules of procedure, decisional law, and statutes that govern the proofs.<sup>6</sup> The policies, concepts, and principles that underlie the rules are invariably rooted in what might be called the law of trial advocacy or the techniques of persuasion.

Stated another way, the trial lawyer who understands what a rule or statute is designed to protect or prohibit is a more persuasive advocate for three reasons. First, challenges to admissibility — commonly called objections, motions in limine, and offers of proof — are opportunities to argue how a particular piece of evidence either introduces extraneous and unreliable issues or supports counsel's theory of the case. While this discussion often takes place at the bench, it also may occur in front of the jury. Regardless of whether the evidence is ultimately admitted, making and meeting objections is the trial lawyer's opportunity to ultimately persuade the fact-finder as to why the evidence is (un)reliable, (un)believable, and (un)supportive of counsel's position. Next, evidentiary considerations that craft and shape examinations are likely to be more persuasive because the respective foundation for admissibility contains touchstones for persuasion. Finally,

---

5. See Julius G. Getman, *Colloquy: Human Voice in Legal Discourse: Voices*, 66 *Tex. L. Rev.* 577, 577–579 (1988) (describing the “professional voice of legal education”).

6. Kenneth S. Broun et al., *McCormick on Evidence* vol. 1, § 1, 2 (John William Strong ed., 4th ed., West 1992).

speeches provide the platform to teach the jury why, and precisely how, the governing principles or the purposes of the applicable rules underscore the reliability of counsel's presentation. Speeches also tell why, in certain cases, these principles and policies discredit and disadvantage opposing counsel who choose to ignore them.

For many courtroom lawyers, evidence is regarded as an obstacle to avoid, rather than an opportunity to persuade. Both objecting and proffering inevitably invite the advocate to discuss the purpose or relevance of the evidence in question. To persuade the judge to exclude or include evidence, the trial lawyer must summarize the projected proof, its evidentiary basis or lack thereof, and most important, its projected impact on the case. Making and meeting objections provide recurring opportunities to re-argue the case as it relates to the evidence that is subject to scrutiny. Yet, trial lawyers customarily approach evidence like the mythological Greeks approached the three-headed Cerberus who stood guard at Hades — humbly, deftly, and with trepidation — hoping to ultimately survive, but expecting to be harmed in the process. Believing that both judges and juries disfavor objections, many lawyers only object when necessary to protect the record.

The Federal Rules of Evidence are designed to ensure that errors are resolved at trial and that verdicts are upheld.<sup>7</sup> Rule 103 is a reminder that appellate relief will not occur unless evidentiary error involves substantial or constitutional rights.<sup>8</sup> The rules place the obligation on the trial lawyer to initiate the enforcement process by objecting “timely,” or when an error first becomes apparent. Where error is not called to the court's attention, any right to relief is waived.

There is an inherent tension between trial judges and lawyers about how much of the objection or offer-of-proof dialogue counsel may conduct in front of the jury. The rules provide for sidebar conferences “to prevent *inadmissible* evidence from being suggested to the jury by any means, such as making statements or offers of proof.”<sup>9</sup> Yet, trial lawyers frequently are asked by both judges and each other to defend or explain the basis of an objection or offer in open court. When such an invitation to speak is issued, it would be impolite and certainly imprudent to refuse. I have written elsewhere

---

7. Edward D. Ohlbaum, *Objections and Offers: Tell It Again, Sam*, 25 Litig. 8, 8 (Spring 1999).

8. Fed. R. Evid. 103(a) (2000) (“Error may not be predicated upon a ruling . . . unless a substantial right of the party is affected . . .”).

9. Fed. R. Evid. 103(c) (emphasis added).

about legal, ethical, and tactical considerations that shape the trial lawyer's decision about where, when, and how to object and proffer.<sup>10</sup> Yet, regardless of whether the evidence skirmish occurs at sidebar or before the jury, the advocate's job is to guide, teach, and persuade. Many judges also listen for the buzzword or ritualistic incantation with which they are familiar, but that jurors find unintelligible. Yet, popular adages, such as "not offered for the truth of the matter asserted" and "lack of foundation," add little more than confusion. Some catchphrases are simply meaningless, such as the phrase "res gestae."<sup>11</sup>

The phrase *res gestae* has long been not only entirely useless, but even positively harmful. It is useless, because every other rule of evidence to which it has ever been applied exists as a part of some other well-established principle and can be explained in the terms of that principle. It is harmful, because by its ambiguity it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both. It ought therefore wholly to be repudiated as a vicious element in our legal phraseology. No rule of evidence can be created or applied by the mere muttering of a shibboleth. There are words enough to describe the rules of evidence. Even if there were no accepted name for one or another doctrine, any name would be preferable to an empty phrase so encouraging to looseness of thinking and uncertainty of decision.<sup>12</sup>

---

10. Edward D. Ohlbaum, *Basic Instinct: Case Theory and Courtroom Performance*, 66 Temple L. Rev. 1, 44-55 (1993); Ohlbaum, *supra* n. 7, at 1.

11. *Black's Law Dictionary* 1173 (5th ed., West 1979) (defining "res gestae" as "literally things or things happened and therefore, to be admissible as exceptions to the hearsay rule, words spoken, thoughts expressed, and gestures made, must all be so closely connected to occurrence or event in both time and substance as to be part of the happening").

12. John Henry Wigmore, *Evidence in Trials at Common Law* vol. 6, § 1767, 255 (James H. Chadbourn ed., Aspen L. & Bus. 1976). Although the courts still use the phrase "res gestae," many judges have condemned the phrase. For example,

Holmes, J.: "The man that uses that phrase shows that he has lost temporarily all power of analyzing ideas." J.B. Thayer's memo books as cited by E.R. Thayer in his teaching notes recording a report by Samuel Williston (1895). L. Hand, J.: "[A]s for 'res gestae' . . . if it means anything but an unwillingness to think at all, what it covers cannot be put in less intelligible terms." [Melvin, J.:] "Definitions of *res gestae* are as numerous as the prescriptions for the cure of rheumatism and generally about as useful."

Michael M. Martin, *Basic Problems of Evidence* § 13.06, 357 n. 174 (6th ed., ALI 1988) (internal citations omitted, emphasis in original).

Many of these phrases, such as “offered merely because it was said,” are bewildering at best. Still others convey a misunderstanding and misapplication of a rule, like “the document speaks for itself.”<sup>13</sup> In the tournament of skill held within the courtroom arena, there is little understanding of, less appreciation for, and only rare application of the law of evidence as an armament of persuasion.

Trial lawyers become persuasive when they take the time to understand the rules and to translate them into intelligible sound bites that advance counsel’s theory.

### I. OBJECTIONS AND OFFERS

Too often, lawyers adopt an objection strategy that is principally directed to protecting the “record” for appeal, but that pays little consideration to the objection’s effect on the jury. Ever fearful of failing to preserve evidentiary error for appellate court consideration, a lawyer’s mission is to make sure that the court reporter has recorded his or her objection to *any* judicial blunder, mistake, or impropriety that might conceivably bring relief. But even where objections have been properly preserved,<sup>14</sup> the chances of appellate relief are — as the old joke goes — two: slim and none. As then Chief Judge William J. Bauer of the United States Court of Appeals for the Seventh Circuit put it with literary concision:

We review the district court’s determination for abuse of discretion, noting that “appellants who challenge evidentiary rulings of the district court are like rich men who wish to enter the Kingdom: their prospects compare with those of camels who wish to pass through the eye of the needle.”<sup>15</sup>

---

13. The phrase loosely refers to Federal Rule of Evidence 1002 (2000), a rule of admissibility that states that when the contents of a document are material or significant, the writing must be offered. However, once the document is admitted, it may be published or displayed to the jury, subject to the discretion of the court, in a variety of ways, such as by reading it, displaying it on an overhead, or providing individual copies to the jurors. Secondary evidence of the contents — i.e., what a witness recalls about the contents — is admissible only when the document is unavailable through no fault of the proponent. Fed. R. Evid. 1004 (2000).

14. The law governing objections is set forth in Federal Rule of Evidence 103. To adequately preserve an evidentiary error for appeal, an objection must be timely and specific (unless it is “plain”), the error must affect a party’s “substantial right,” and the evidence may not be admissible on any other basis. Fed. R. Evid. 103.

15. *U.S. v. Coleman*, 179 F.3d 1056, 1061 (7th Cir. 1999) (quoting *U.S. v. Emenogha*, 1 F.3d 473, 477 (7th Cir. 1993) (quoting *U.S. v. Glecier*, 923 F.2d 496, 503 (7th Cir. 1991))).

The time to win is at trial.<sup>16</sup> Objections and offers of proof should be articulated, not as the first step in a precarious journey through an appellate quagmire, but as a persuasive speech to a fact-finder about how specific evidence substantiates counsel's theory and negates his or her opponent's theory of the case. Where the court does not prohibit brief speaking objections and offers<sup>17</sup> — whether in front of the jury or at sidebar — the objection dialogue is the lawyer's opportunity to articulate how an evidentiary concept helps answer a specific question. By addressing the value or policy that drives the evidentiary principle at issue, the lawyer's pitch becomes more persuasive.

As I wrote in another context:

Both objecting and proffering inevitably invite the advocate to discuss the purpose or relevance of the evidence in question. To persuade the judge to exclude or include evidence, the trial lawyer must summarize the projected proof, its evidentiary basis or lack thereof, and, most importantly, its projected impact on the case. Stated another way, both objections and offers of proof summon the trial lawyer to present the case theory as it relates to the evidence that is subject to scrutiny. Although cast in the context of legal argument, objections and

---

16. Mauet & Wolfson, *supra* n. 3, at § 1.1., 1 n. 1 (citing Margaret A. Berger, *When If Ever, Does Evidentiary Error Constitute Reversible Error?*, 25 Loy. L.A. L. Rev. 893 (1992) (“where the author found 30 reversals based on evidentiary error in the federal district courts during 1990 — 17 in civil cases, 13 in criminal cases — from a total of more than 10,000 cases tried”)).

17. That lawyers seek to deliver what have been branded mini-closing speeches is not only understandable, but is promoted by the law of evidence and advocacy. These speeches are what the decisional law invites and what the law of advocacy encourages. Significantly, notwithstanding the folklore, appellate courts have admonished trial counsel for saying too little, rather than too much. Repeatedly, counsel have been admonished not to assume that the court is familiar with the theory and to err on the side of full rather than limited exposition. *See generally* *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174 (1988) (stating that an offer of proof for preserving any argument to exclude evidence must be apparent from the context of the questions asked); *U.S. v. Santos*, 932 F.2d 244, 254 (3d Cir. 1991) (holding that the standard of review for specific objections raised on appeal is “plain” error); *Reese v. Mercury Marine Div. of Brunswick Corp.*, 793 F.2d 1416, 1421 (5th Cir. 1986) (stating that Federal Rule of Evidence 103(a)(2) requires counsel to specifically articulate the grounds for admitting evidence); *U.S. v. Garcia*, 531 F.2d 1303, 1307 (5th Cir. 1976) (holding that objections will be reversed only on “plain” error); *U.S. v. Madruga*, 810 F.2d 1010, 1014 (11th Cir. 1987) (stating that the grounds for an underlying objection must be specific, but not a “ritualistic incantation”). Notwithstanding the absence of a specificity requirement in Rule 103(a)(2), by “offering to prove” evidence, counsel is obligated to state the specific grounds for admissibility as Rule 103(a)(1) requires him or her to do when making objections. Fed. R. Evid. 103(a).

offers provide trial counsel with opportunities to argue facts in an effort to persuade the judge to accept the lawyer's theory in making evidentiary rulings. It is the trial lawyer's opportunity to make a speech about how specific evidence substantiates the lawyer's case theory and negates the case theory of the opponent.<sup>18</sup>

#### A. Hearsay

The typical "hearsay" exchange provides counsel with the opportunity to persuade by referring to evidentiary principles. An out-of-court statement may be subject to the hearsay prohibition only when the statement is offered for the truth of its specific contents.<sup>19</sup> Of course, an out-of-court statement may be admitted for its truth if it falls within a hearsay exception.<sup>20</sup> The typical hearsay exchange proceeds as follows:

Q: What did she tell you?

A: She told me that she was going to . . . .

O: Objection, hearsay.

Q: Not offered for the truth of the matter asserted.

This colloquy has been remarkably unhelpful to the judge and, to put it most charitably, virtually unintelligible to the jury. To decide whether a statement is admissible for a nonhearsay purpose, is defined as nonhearsay, or fits within a hearsay exception, the judge invariably needs to know the contents of the statement. Without that knowledge, the judge has ceded the determination of

---

18. Ohlbaum, *supra* n. 7, at 10.

19. Under the Federal Rules of Evidence, there are a variety of statements that are defined as nonhearsay and, thus, exempt from the hearsay prohibition. Such statements include prior inconsistent statements taken under oath and subject to perjury, prior consistent statements, statements of identification, and admissions. Fed. R. Evid. 801(d)(1), (2) (2000).

20. The hearsay exceptions are found in Federal Rules of Evidence 803, 804, and 807. *See* Fed. R. Evid. 803 (2000) (giving exceptions to the hearsay rule even though the declarant is available); Fed. R. Evid. 804 (2000) (allowing exceptions to the hearsay rule when the declarant is unavailable); Fed. R. Evid. 807 (2000) (allowing an exception to the hearsay rule for statements not "covered by Rules 803 or 804 but having equivalent circumstantial guarantees of trustworthiness"). States have promulgated statutes, rules of procedure, and additional rules of evidence providing other hearsay exceptions. *E.g.* Fla. Stat. § 90.803 (2000).

admissibility to the lawyer with the right quip, and the jury has been treated as an uninvited interloper.

We should give the lawyers a bit more credit and consider the same type of dialogue in one of Hollywood's trial movies, *Jagged Edge*.<sup>21</sup> In this film, newspaper publisher Jack Forrester was prosecuted for the premeditated murder of his wife Paige, co-owner of the paper and heiress of the publishing empire, because she intended to divorce him. In support of its theory, the prosecution called Virginia Howell, a "friend" of the decedent wife, who testified as follows:

Q: Mrs. Howell, describe your relationship with Paige Forrester, please.

A: Well, we were like sisters.

Q: What did she say about her relationship with her husband?

O: Objection, Your Honor, it calls for hearsay.

Q: Your Honor, this testimony is being offered to show the state of mind of Paige Forrester; therefore, it is an exception to the hearsay rule.

O: Mr. Krazny [the prosecutor] has shown no connection between the state of mind of Mrs. Forrester and my client, and the charges in this case.

J: I will allow it, subject to the connection to Mr. Forrester.

Q: Now, Mrs. Howell, what did Paige Forrester say about her relationship with her husband?

A: She knew that he didn't love her, and she was sure that he was seeing someone else.

Q: And did she tell you anything else?

A: She was going to tell her husband that she wanted a divorce.<sup>22</sup>

---

21. *Jagged Edge* (Columbia Pictures 1986) (motion picture). *Jagged Edge* starred Jeff Bridges, Glenn Close, Peter Coyote, John Dehner, and Best Supporting Actor Nominee Robert Loggia. Roy Pickard, *The Oscar Movies* (4th ed., Facts on File 1994).

22. *Jagged Edge* (Columbia Pictures 1986).

Responses to hearsay should be phrased in the affirmative. Rather than telling the judge what the evidence is not offered to prove, tell the court why it should come in — as Krazny did — and what the evidence is so that the court may determine whether it is relevant. Where, as here, counsel names but fails to spell out the nonhearsay purpose or hearsay exception under which the statement is offered, the court is left with counsel's blackletter formalistic pronouncement and the jury is left with lawyer-speak. A statement offered to show the declarant's "state of mind"<sup>23</sup> may qualify for admission as nonhearsay evidence of a mental state ("There are divorce lawyers lurking in my closets.") or as an exception to the hearsay rule ("I want a divorce."). Where the declarant expresses a present intention to take future action ("I will ask him for a divorce."), the statement is admissible as evidence that the action was taken as the actor portended.<sup>24</sup> A dialogue in which both lawyers may take advantage of the policies within the hearsay rule and state-of-mind exception might proceed as follows:

- Q1: Please describe your relationship with Paige Forrester.
- A: Well, we were like sisters.
- Q1: What did she say about her relationship with her husband?
- Q2: Objection, Your Honor, the question calls for hearsay. He is asking the witness to repeat a statement made by someone whose credibility this jury cannot evaluate.
- Q1: This testimony is an exception to the hearsay rule because it is offered to show the state of mind of Paige Forrester. If permitted, Mrs. Howell will testify that Mrs. Forrester told her that she knew the defendant did not love her and that she was going to tell him that she wanted a divorce. Mrs. Forrester's statement to her friend that she planned to tell the defendant she wanted a divorce is evidence not only of her desire to

---

23. Federal Rule of Evidence 803(3) provides the following:

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

24. *Mut. Life Ins. Co. v. Hillmon*, 145 U.S. 285, 295–300 (1892); *Shelden v. Barre Belt Granite Employer Union Pension Fund*, 25 F.3d 74, 79 (2d Cir. 1994).

end the relationship, but proof that she spoke with the defendant and made him aware of her intentions.

A problem with such exchanges is that, where unregulated, they provide a license for a lawyer to make speeches that may contain inadmissible evidence that the jury has no right to hear. Even where the discussion takes place outside the presence of the jury,<sup>25</sup> trial lawyers should remember that the judge is also a fact-finder whom they must persuade. Making and meeting objections also gives a trial lawyer an opportunity to introduce himself or herself to the judge as an advocate who is familiar with the law, respectful of the court's responsibility to control the gates of admissibility, and ready to help the judge in defending evidentiary determinations by offering short discourses, which may serve as the basis of the judge's opinion. Regardless of whether the evidence is admitted or excluded, judges and juries will assess the trial lawyer and the strength of the case based on the way that counsel objects.

#### B. Other Act Evidence

Evidence of other and often unrelated acts, good and bad — and regardless of whether they resulted in any criminal or disciplinary action — may be admissible for a variety of very different reasons. For example, evidence that a witness was drinking earlier may be offered to challenge his or her competency to testify,<sup>26</sup> perception of an event,<sup>27</sup> or partiality, such as retaliation for firing as a result of drinking.<sup>28</sup> This evidence also may be used to prove notice or an essential element of a claim,<sup>29</sup> such as negligent entrustment or unfitness to parent;<sup>30</sup> to rebut an opponent's claim, such as of

---

25. Federal Rule of Evidence 103(c) provides the following:

In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

26. See Fed. R. Evid. 601 (2000) (noting that, except as stated in the Federal Rules of Evidence, every person is competent to be a witness).

27. See Fed. R. Evid. 602 (2000) (stating that a witness may testify only if he or she has personal knowledge).

28. See Fed. R. Evid. 607 (2000) (“The credibility of a witness may be attacked by any party . . .”).

29. See Fed. R. Evid. 405(b) (2000) (allowing specific instances of a person's conduct to be admitted into evidence if his or her character is an element of the charge against him or her).

30. See Fed. R. Evid. 404(b) (2000) (“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”).

wrongful termination or liability;<sup>31</sup> as a component of impeachment by bad acts, such as lying about a drinking problem; for a criminal conviction,<sup>32</sup> where being drunk is an element of the crime; or as pertinent trait evidence, such as sobriety.<sup>33</sup>

Federal Rule of Evidence 404(b) dictates that evidence of uncharged conduct is *never* admissible to prove propensity.<sup>34</sup> This prohibition on admissibility is so, not because the evidence is irrelevant, but because of the danger that it will be too persuasive in an unfair way. As Justice Robert H. Jackson explained in *Michelson v. United States*:<sup>35</sup>

[I]t is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.<sup>36</sup>

The risk is so great that any alternative purpose that the prosecution proffers — such as intent, preparation, identity, knowledge, motive, opportunity, and absence of mistake or accident — must be clearly identified, and the inferences sought to be drawn from the evidence must be precisely specified.

A persuasive offer of uncharged conduct evidence comes from another one of Hollywood's giants, *The Caine Mutiny*.<sup>37</sup> This film

---

31. See Fed. R. Evid. 608(b) (2000) (allowing counsel to cross-examine a witness concerning specific instances of his or her conduct in order to attack the credibility of the witness).

32. See Fed. R. Evid. 609 (2000) (allowing evidence of a witness's criminal conviction for the purposes of impeachment).

33. Fed. R. Evid. 404; Fed. R. Evid. 405.

34. Fed. R. Evid. 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

35. 335 U.S. 469 (1948).

36. *Id.* at 476 (citing John Henry Wigmore, *Evidence in Trials at Common Law* vol. 1, § 57 (3d ed., Little, Brown & Co. 1940)).

37. *The Caine Mutiny* (Columbia Pictures 1954) (motion picture). *The Caine Mutiny* starred Humphrey Bogart, Jose Ferrer, Van Johnson, Fred MacMurray, and E.G. Marshall. *Id.* The film garnered six Oscar nominations — including Best Picture — and was based on

tells the story of the court-martial of two naval officers for mutiny as a result of their displacement of their captain, Lieutenant Commander Queeg, during a typhoon at sea. Their defense was that Queeg was deranged. Defense counsel Barney Greenwald's offer of proof during his cross-examination of Queeg combined all of the elements of legal reasoning and persuasive speech.

The Court: A word of caution before you proceed with your examination, Mr. Greenwald. The court recognizes that the defense is compelled to try to challenge the competence of Lieutenant Commander Queeg. Nevertheless, all the requirements of legal ethics and military respect remain in force.

Greenwald: Thank you, Sir.

Q: Mr. Queeg, during the period that the *Caine* was towing targets, did you ever steam over your own tow line and cut it?

J. Advocate: Objection, I beg the court's indulgence, but I must say the defense outrages the dignity of this proceeding.

Greenwald: The Judge Advocate wants the defense to switch to a guilty plea. He thinks the report of the psychiatrist closes the case, but I say it is up to you line naval officers, not doctors, to judge the captain's performance of duty, and I must review that performance of duty for the navy to render a judgment.

The Court: Objection overruled.

Greenwald: Now Sir, did you ever steam over your own tow line and cut it?<sup>38</sup>

This exchange is an example of a "big city" cross-examination. Counsel took it right to the witness — without warmup or pleasantries. Notwithstanding that the defense lawyer was wearing the

---

Herman Wouk's novel. Leslie Halliwell, *Halliwell's Film and Video Guide 1998*, at 121 (John Walker ed., rev. ed., HarperPerennial 1998).

38. *The Caine Mutiny* (Columbia Pictures 1954).

same dress blues as the judge, jury, and judge advocate, there is no question that, for him, this trial was an away game. Any question about where the court's sympathies first lie was resolved by its initial admonition to Greenwald. The cross-examination worked so well because the uncharged conduct of cutting the tow line was placed in the exact *factual* context that the court approved.

## II. EXAMINATIONS

Questioning that respects the rules of evidence does not invite objection interruptions. Consequently, proper questioning is more likely to sustain a jury's focus and, accordingly, is more apt to be convincing. An objection-free examination is tighter, sharper, clearer, and ultimately more compelling. Stated another way, evidentiary foundations are matters of both admissibility and persuasion.

### A. Refreshing Recollection

When a witness is unable to testify about specific facts or events because of memory loss, counsel may refresh the witness's recollection under Federal Rule of Evidence 612.<sup>39</sup> The procedure requires the examiner to present the witness with a device for review — generally the witness's earlier statement or testimony — in an effort to help the witness remember a forgotten fact. Any document may

---

39. Federal Rule of Evidence 612 (2000) states,

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either —

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

be provided to the witness,<sup>40</sup> regardless of when, where, or by whom it was made.<sup>41</sup> Once the witness's memory has returned, the witness may testify, but without the use of the statement. Whether the witness is testifying from a refreshed memory of what he or she earlier knew — as opposed to what he or she just read in court — is first an issue of admissibility and then one of weight. To help the jury assess the credibility of a witness who testifies to remembering a forgotten fact, the rule permits the opponent to question the witness on the statement, to read sections from it, and to offer those sections of the statement that the witness used.

Although Rule 612 and the hearsay prohibition bar the proponent from disclosing the contents of the refreshing statement on direct examination, courts commonly permit witnesses who have prepared reports, such as experts and police officers, to consult their writings as they testify, especially when the subject matter of the testimony is lengthy and detailed. Taking advantage of the rule this way may fortify the witness and put details literally at the witness's fingertips.

The practice of allowing witnesses to refresh their memories with prepared reports is not without costs. The marking, discussion, and use of notes at the beginning of an examination often detracts from the persuasiveness of a witness's testimony. Referring to notes raises questions of a witness's memory of the entire event, promotes paper shuffling, and directs the witness's attention to the document and away from the jury. To avoid these problems, the writing — whatever its form — should be taken out only when necessary and used at the precise point when the witness does not remember, as the rule requires.<sup>42</sup>

## B. The Rule of Completeness

Federal Rule of Evidence 106 is designed to prevent a witness from reading a document out of context and misleading the jury.<sup>43</sup>

---

40. In the discretion of the court, counsel can refresh the recollection of a witness through leading questions. *U.S. v. Templeman*, 965 F.2d 617, 619 (8th Cir. 1992).

41. For example, in *United States v. Darden*, an informant refreshed his memory with a Drug Enforcement Administration agent's notes. 70 F.3d 1507, 1540 (8th Cir. 1995).

42. Fed. R. Evid. 612.

43. Fed. R. Evid. 106 advisory comm. n. (West 2000). Federal Rule of Evidence 106 provides:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered

When a witness reads a document out of context, the opponent may offer any other part of the document or any other document that restores the context and “ought in fairness to be considered contemporaneously with it.”<sup>44</sup> While the rule applies to a variety of writings,<sup>45</sup> it is most often raised when a prior inconsistent statement is used to impeach a witness. As an alternative to delayed gratification, the rule permits the opponent to offer additional documentation during the impeachment.<sup>46</sup> For example, when a witness is challenged with an earlier statement or transcription of testimony in which the witness had taken a different position from his or her trial testimony, the rule permits the opposing lawyer to introduce another section from the statement or transcript — or any other document — that may help the witness explain the apparent inconsistency.<sup>47</sup>

A tight and crisply executed impeachment by an inconsistent statement requires a witness to admit that he or she made a statement — it does not permit a witness to explain why he or she said it. Notwithstanding a cross-examination that provides room for the witness to say only, “Yes, I said it,” or “No, I did not say that,” judges often permit a challenged witness to explain the inconsistent statement during cross-examination. When the witness either denies making, or attempts to explain, the inconsistency, any part of that statement — or any other statement from the witness that supports the denial or explanation — may be admissible during the impeachment.<sup>48</sup> By giving opposing counsel the opportunity to interrupt an impeachment and insist on introducing the complete document or other writing, Rule 106 provides the witness with additional protection against the misuse of his or her earlier statement.<sup>49</sup> A lawyer who gets caught misleading a jury during the

---

contemporaneously with it.

44. Fed. R. Evid. 106.

45. Popular examples of writings include prior statements, recorded recollections, business and official records, miscellaneous official records, and summaries. *See generally* Fed. R. Evid. 612 (giving requirements for a witness to use a writing to refresh his or her memory); Fed. R. Evid. 613 (2000) (stating that a witness does not have to be shown his or her prior statement when examined as to that statement); Fed. R. Evid. 801 (giving the applicable definitions under the hearsay rule); Fed. R. Evid. 803 (giving examples of writings that fall under hearsay exceptions); Fed. R. Evid. 1006 (2000) (stating that any writings that cannot be conveniently examined due to the volume of the writing may be summarized).

46. Fed. R. Evid. 106.

47. *Id.*; Fed. R. Evid. 613(b).

48. Fed. R. Evid. 106.

49. *Id.*

impeachment of a witness by inaccurately, incompletely, or unfairly quoting from a document succeeds in simultaneously rehabilitating the witness and discrediting himself or herself.

When a witness is impeached with an inconsistent statement, many lawyers reflexively and abusively invoke Rule 106. These lawyers are often successful, even though the statement has not been read out of context.<sup>50</sup> Where the witness's explanation is persuasive and the supporting documentation is plainly helpful, simply reading the earlier statement may better serve impeaching counsel — assuming the document is independently admissible.<sup>51</sup>

When examining counsel impeaches a witness with a statement that has been taken out of context and there is additional documentation that tends to support the witness's explanation or denial of the statement, the rule of completeness does not require counsel to correct it on the spot.<sup>52</sup> However, patience pays off because opposing counsel's strong-arm tactics may result in self-strangulation. When counsel impeaches a witness with an out-of-context or less-than-complete statement and cuts off the witness's attempted explanation, a redirect examination — guided by the policy of Rule 106 — can be especially lethal, as the following vignette illustrates:

Q: During cross-examination, counsel asked you about a statement you made in your deposition about the telephone call. When you began to explain to him what you meant, he interrupted your answer and told you that you will have the opportunity to explain later. That time is here, so I am going to ask you some questions that now allow you to do just that. First, please pick up your deposition and turn to page seventy-six, lines eight through ten, which is the answer that counsel asked you about.

Please read those lines — the lines that counsel asked you to read.

A: [Reads lines]

---

50. Reliance on Federal Rule of Evidence 801(d)(1)(B) to offer the statements as prior consistent statements also is misplaced when the statements in dispute do not precede and thus cannot rebut any motive to lie. *Tome v. U.S.*, 513 U.S. 150, 158 (1995).

51. For example, an "admission" would be independently admissible. Fed. R. Evid. 801(d)(2). If the witness is not a party, Rule 613 requires counsel to confront the witness with the earlier statement and give the witness an opportunity to "explain or deny" the inconsistency before extrinsic evidence is admissible. Fed. R. Evid. 613(b).

52. Fed. R. Evid. 106.

Q: Did your answer end there?

A: No.

Q: Please read the rest of your answer.

A: [Reads additional lines]

Q: Were those the lines that you began to read when counsel asked you to stop reading?

A: Yes.

Q: Please turn to page eighty-six, lines twenty to twenty-five. Is that where you also discussed the telephone call?

A: Yes.

Q: In response to counsel's question, which was, "And that was all you discussed during the telephone call?" please read your answer.

A: [Reads lines]

Q: Did counsel ask you about this passage when he questioned you today?

A: No.

Q: Please tell us what you said about your requirements in the telephone conversation.

Federal Rule of Evidence 106 puts the impeaching lawyer on notice that the rest of the writing or statement may be introduced.<sup>53</sup> Counsel's "fairness" during the impeachment of a witness with an inconsistent statement is a relevant consideration and may trigger an interruption in the flow of an examination, the admission of rebutting evidence, and perhaps most important, an examination of counsel's fairness in challenging the witness. Under Rule 106, counsel may use writings, "which ought in fairness to be considered,"<sup>54</sup> to help a witness do the following: (1) explain the acknowledged inconsistency or support the denial of having made the inconsistency, (2) place the inconsistency in context, (3) avoid

---

53. *Id.*

54. *Id.*

misleading the jury, and (4) explain how opposing counsel has unfairly used the witness's statement or testimony.<sup>55</sup> Fairness and professionalism are two topics that any lawyer least wants to discuss. Rule 106 places this concern squarely within the execution of impeachment.

### C. Preliminary Determinations of Admissibility

Determinations of admissibility belong to the trial judge.<sup>56</sup> Admissibility issues include whether judicial notice may be taken, a presumption may be imposed, privilege exists, competency and expertise have been established, evidence is relevant or must be excluded for social policy reasons, a nonhearsay purpose or exception has been shown, and testimony about the contents of a writing is permissible.<sup>57</sup> The facts that the respective rules require the court to determine in resolving these preliminary issues directly bear on the weight of the evidence and the credibility of the witness, but the jury must assess the persuasiveness of the proof.

### D. Lay Opinion

A lay witness may testify to an opinion that is based on his or her firsthand knowledge and that reasonably may be drawn from the underlying facts.<sup>58</sup> As long as the court is satisfied that the witness has seen or otherwise knows what the witness claims to know, and that the opinion will be "helpful" to the jury, the witness may testify to it. Rule 701 is a rule of preference for facts, not of wholesale admissibility for conclusions.<sup>59</sup> A conclusion is helpful

---

55. *U.S. v. Soures*, 736 F.2d 87, 91 (3d Cir. 1984) (citing *U.S. v. Marin*, 669 F.2d 73, 84 (2d Cir. 1982)); *U.S. v. Glover*, 101 F.3d 1183, 1190 (7th Cir. 1996) (citing *U.S. v. Velasco*, 953 F.2d 1467, 1475 (7th Cir. 1992)).

56. Federal Rule of Evidence 104(a) (2000) 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, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

57. *Id.*

58. Federal Rule of Evidence 701 (2000) states,

If the witness is not testifying as an expert, the witness' 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 the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

59. *Id.*

only when there is a sufficient factual basis for it. Whether a factual basis is sufficient with proof of observation of the behavior or event in question or whether it requires a description of the behavior or evidence of the witness's life experience with the behavior, are matters within the discretion of the trial court.<sup>60</sup> Yet, effective advocacy dictates that the more detail the witness provides, the more persuasive the witness's opinions will be. For example, although it may be permissible for a witness to testify that he or she "watched the man pause and collect himself," a witness is far more persuasive if he or she describes a man who "stopped walking, straightened himself up, put his hands on his face, pushed his hair down with his hands, and then ran his hands down his shirt and pants," before venturing the opinion that the man "paused to collect himself."

#### E. Hearsay Foundations

Statements that the rule against hearsay<sup>61</sup> would otherwise bar are admissible if they are made under specifically defined circumstances that demonstrate their underlying reliability.<sup>62</sup> These circumstances have been codified as the hearsay exceptions.<sup>63</sup> Each exception specifies requirements that, when met, permit the court to admit the statement.<sup>64</sup> Whether these requirements have been met, and whether other grounds for exclusion have been eliminated,<sup>65</sup> are determinations for the court.<sup>66</sup> In making these determinations, the court may consider evidence that is inadmissible itself,

---

60. Fed. R. Evid. 104(a).

61. Hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c).

62. For definitions of circumstances underlying reliability, see Federal Rules of Evidence 803, 804, and 807.

63. Fed. R. Evid. 803; Fed. R. Evid. 804; Fed. R. Evid. 807.

64. Fed. R. Evid. 802 (2000).

65. According to the rules, a statement that qualifies as a hearsay exception must be relevant, based on firsthand knowledge, stated by a competent witness, properly authenticated, and an original document where the contents of a writing are offered. *See generally* Fed. R. Evid. 401 (2000) (defining relevant evidence); Fed. R. Evid. 601 ("Every person is competent to be a witness"); Fed. R. Evid. 602 (stating that a witness must have personal knowledge of a matter in order to testify to that matter); Fed. R. Evid. 901 (2000) (giving the requirements to authenticate evidentiary evidence for admissibility); Fed. R. Evid. 1002 (requiring the original document when that document is used to prove its contents).

66. Fed. R. Evid. 104(a).

such as affidavits<sup>67</sup> and other hearsay statements, as well as the contents of the statement under review.<sup>68</sup> The determination of admissibility is simply the trial judge's factual finding that the proponent demonstrated that the statement satisfies the respective requirements of a hearsay exception.

However, admissibility is one thing, persuasion is another. Even when the court admits a statement as an exception to the hearsay rule, the weight with which the jury will assess it often is a matter of how persuasive the guarantees of reliability within the respective exceptions have been presented. For example, "factual findings" resulting from an official investigation are admissible as part of a report unless the court finds that "the sources of information or other circumstances indicate lack of trustworthiness."<sup>69</sup> Even when admissibility of the official report is presumed, the conclusions become more persuasive when counsel can show the following: (1) the timeliness of the investigation, (2) the special skill or experience of the official who conducted the investigation, (3) whether a hearing was held and the level at which it was conducted, (4) whether the hearing was evidentiary with an opportunity to conduct cross-examination, and (5) any possible motivation problems of the type associated with determining whether sources of information or other circumstances indicate lack of trustworthiness.<sup>70</sup> Cutting corners by foregoing proof of these foundational components of reliability — even where they are not needed for admissibility — may compromise believability.

#### F. Contemporaneousness Exceptions

The first four exceptions to the hearsay rule establish, as a primary predicate, the notion of contemporaneousness. Statements made at a time closely related to the event are less likely to be the products of deliberate or conscious misrepresentation. Although proof of a temporal relationship between the event and the out-of-court statement describing or relating to it alone may be sufficient for admissibility, it is often unpersuasive.

---

67. See Fed. R. Civ. P. 43(e) (West 2000) (authorizing a judge to use affidavits when deciding motions based on facts not appearing on the record).

68. See Fed. R. Evid. 104(a) (allowing the court to disregard evidentiary rules when considering the admissibility of evidence).

69. Fed. R. Evid. 803(8)(C).

70. Michael H. Graham & Edward D. Ohlbaum, *Courtroom Evidence* 165–166 (NITA 1997).

The respective theories underlying each of the four hearsay exceptions provide touchstones that, when addressed in examinations and arguments, make an otherwise admissible statement more believable. A present sense impression<sup>71</sup> becomes more believable when the jury hears that the impression was made while the declarant was watching the event unfold and, like a sportscaster, described the action as it developed with the type of language and enthusiasm that naturally accompanies on-the-scene descriptions.

An excited utterance<sup>72</sup> is given more weight when the jury learns that the declarant was talking about an event while under its spell, using concomitant phrases, body language, and frenzied tones experienced at the time, rather than expressions made moments later when the witness took the time to reflect, organize his or her thoughts, and put forth an account that may have been the result of design and plan.

A statement expressing only the actual state of mind, emotion, or physical condition<sup>73</sup> at the time it exists, free from other factual assertions such as its causation, is reliable because of its probable sincerity. A statement made for purposes of medical diagnosis or treatment<sup>74</sup> is more credible when counsel explores the witness's strong motivation to be truthful based on his or her belief that the effectiveness of treatment largely depends on the accuracy of the information that the witness has furnished.

### G. Original Documents

When the contents of a writing are necessary to prove a material issue in the case, the rules of evidence express a preference for the writing, rather than testimony about what it says.<sup>75</sup> The original document is preferred because, when the terms of a document are in issue or when proof comes only from the specific terms, it is the terms themselves that must be presented. Once the document is admitted and a witness is asked to read it, some lawyers object that "the document speaks for itself." Besides being silly, this objection is just plain wrong and should have gone out with the Edsel for two reasons.

---

71. Fed. R. Evid. 803(1).

72. Fed. R. Evid. 803(2).

73. Fed. R. Evid. 803(3).

74. Fed. R. Evid. 803(4).

75. Fed. R. Evid. 1002.

First, documents do not speak — people do — unless counsel has gone high-tech with a CD-ROM and a computer program that gives a voice to a deposition transcript. The phrase, “the document speaks for itself,” invariably comes when counsel appropriately asks the witness to read from a document, point out items in a picture, or confirm that a writing contains a fact. The objection is most often a misapplication of the original writing rule (i.e., best evidence), which requires counsel to ensure that where the contents of a writing are material, the writing must be displayed or read without the witness or opposing counsel summarizing or editing the contents.<sup>76</sup>

Second, few lawyers wind their witnesses up and let them “speak for themselves.” Witnesses are introduced, accredited, and directed to help present their accounts. Similarly, documents should be addressed in the context of a properly authenticated examination and then read or published in ways that allow their language to be best understood. Professor Michael E. Tigar resonantly notes that a trial lawyer should not let anyone speak for himself or herself:

[T]he advocate does not let “orphaned communications” loose in the courtroom. Every communication must have a recognized voice or source and must be seen to have been made at a certain time and place. We know that the meaning of words is vitally determined by who said them, to whom, and in what context.<sup>77</sup>

### III. SPEECHES

A trial lawyer who argues his or her case by referring to the underlying theories of evidentiary rules and policy, and holds his or her opponent accountable for failing to have done so, becomes a more persuasive and effective advocate. At the argument stage, the laws of evidence and trial advocacy are more than merely interdependent — they must be joined at the hip. The closing argument affords counsel the opportunity to teach the jury what the rules of evidence permit and prohibit; and how, in the vein of respective rules, his or her opponent’s tactics, strategies, and questioning techniques make his or her own case more persuasive.

---

76. *See id.* (“To prove the content of the writing . . . the original writing . . . is required.”).

77. Michael E. Tigar, *Persuasion: The Litigators’ Art* 30 (ABA Sec. of Litig. 1999).

### A. Leading Questions

Consider the subject of leading questions. Unless special circumstances dictate otherwise, leading questions are not permitted on direct examination.<sup>78</sup> After all, it is the witness who has the firsthand knowledge and is obligated to testify in the language of perception. What happens when opposing counsel continues to lead the witness and either counsel does not object or his or her objections are overruled? It is payday in summation, using the law of evidence as the closing theme. For example:

Members of the jury, do you remember counsel's examination of Lou Jones, her own witness, and how she put words in his mouth? That she basically testified for him? What does that tell you about Mr. Jones's knowledge of what happened and, as important, counsel's confidence in what Mr. Jones had to say? If Mr. Jones's own lawyer does not trust him to tell the truth, why should you?

### B. Firsthand Knowledge

An argument to the jury challenging a witness's firsthand knowledge follows the same principles. Federal Rule of Evidence 602 requires lay witnesses to testify to only what they know firsthand. Witnesses are also permitted to express opinions or draw inferences based on firsthand knowledge, which are helpful to the jury.<sup>79</sup> As discussed earlier, an opinion tends to be more persuasive when the jury hears the factual basis that entitled the witness to express it.<sup>80</sup> When counsel asks the witness to cut to the chase and fails to develop the underlying factual basis for the witness's opinion, an opponent's closing may force counsel to pay for taking the shortcut.

For example, in a situation where a witness testified that a culture of discrimination existed in her law firm that accepted — if not encouraged — discrimination, but provided few examples of discriminatory behavior, counsel might argue the following:

She told us they discriminated. But how would she know? What is her basis of knowledge? Did they bother to tell you? They are asking you to accept her opinion because she said it. Why didn't

---

78. Fed. R. Evid. 611(c) (2000).

79. Fed. R. Evid. 701.

80. See *supra* nn. 58–60 and accompanying text (discussing opinion testimony).

they ask her how she knew? Were they scared of what she would say?

### C. Prior Inconsistent Statements

One of the most effective and frequently used armaments in the trial lawyer's arsenal is impeachment by prior inconsistent statement.<sup>81</sup> Federal Rule of Evidence 613 provides that the witness does not need to be shown his or her written inconsistent statement before being examined about it,<sup>82</sup> but must be given an opportunity to explain or deny the statement where extrinsic evidence of the statement is offered.<sup>83</sup> The rule does not require a particular time for denial or explanation, although many judges read Rule 613(b) or invoke Rule 611(a) to require that counsel confront the witness with his or her prior inconsistent statement during cross-examination.<sup>84</sup> Many appellate courts have upheld the trial court's decision to exclude extrinsic evidence, unless the witness is *first* given the opportunity to explain or deny the prior inconsistent statement.<sup>85</sup> Other appellate courts have allowed the impeaching party to offer extrinsic proof without first questioning the witness about the statement.<sup>86</sup>

When counsel takes the time to confront a witness persistently with his or her inconsistencies, the closing argument presents the opportunity to bring it all together. Professor Tigar, in his book *Examining Witnesses*,<sup>87</sup> first discusses and then demonstrates its effectiveness:

Members of the jury, do you remember when I spent about a half-hour reading Mr. Smith all the things he said before, and

---

81. See *supra* nn. 43–55 and accompanying text (discussing impeachment of witnesses using prior inconsistent statements).

82. Fed. R. Evid. 613(a).

83. Fed. R. Evid. 613(b).

84. Fed. R. Evid. 611(a).

85. *E.g. U.S. v. Bonnett*, 877 F.2d 1450, 1462 (10th Cir. 1989) (holding that the witness must be confronted with the prior inconsistent statement when the statement is used for impeachment purposes); *U.S. v. Sutton*, 41 F.3d 1257, 1260 (8th Cir. 1994) (holding that allowing a prior inconsistent statement for impeachment purposes is within the discretion of the judge).

86. *E.g. Wilmington Trust Co. v. Mfrs. Life Ins. Co.*, 749 F.2d 694, 699 (11th Cir. 1985) (recognizing no proper sequence to the admission of an inconsistent statement); *U.S. v. Young*, 86 F.3d 944, 949 (9th Cir. 1996) (dictating a party's right to explain an inconsistent statement at any time).

87. Michael E. Tigar, *Examining Witnesses* 27–28 (ABA Sec. of Litig. 1993).

making sure he said them, and that he was under an oath when he did? I guess some of you must have said, “What is that lawyer doing, wasting time with that?” I want to suggest I was doing something very important. I was giving Mr. Smith a chance to deny he swore to those things, and he didn’t deny it. I didn’t want anybody in this courtroom to say we didn’t give him a chance. Because make no mistake, the evidence that you heard shows something pretty serious. This fellow Smith tells two different stories under oath. He is a person who would lie under oath, and he admits that. You have got to decide whether he lied here in your faces, and whether what he told when it was all fresh and before the prosecutors put pressure on him wasn’t the real story. In order to decide that, you would need Mr. Smith to admit that he said those things, and that’s what I was asking him to do.<sup>88</sup>

#### D. Character

An accused may offer evidence of character to rebut the charges against him or her.<sup>89</sup> The character evidence must be logically connected to the crimes with which he or she has been charged. He or she may offer opinion and reputation evidence of character, but not specific instances of conduct.<sup>90</sup> The rationale for this rule is that a person tends to behave consistently with the kind of person he or she is, and an accused should not be denied the opportunity to offer reputation and opinion testimony regarding his or her examined life.

Once the accused offers evidence of good character, the prosecution has the right to cross-examine reputation and opinion witnesses concerning relevant specific acts of conduct of the person whose character is being offered into evidence.<sup>91</sup> Inquiry into convictions, indictments, arrests, and professional discipline, as well as conduct, rumors, and reports that are inconsistent with the character trait(s), are permitted.<sup>92</sup> Examination about such matters explores the character witness’s familiarity with the accused’s reputation, the basis and scope of that knowledge, and the witness’s standards for measuring “good” and “bad” character. Additionally, the state may call its own witness to testify to the defendant’s “bad” character.<sup>93</sup>

---

88. *Id.*

89. Fed. R. Evid. 404(a)(1).

90. Fed. R. Evid. 608(b).

91. Fed. R. Evid. 405(a).

92. Fed. R. Evid. 608; Fed. R. Evid. 609.

93. Fed. R. Evid. 404(a)(1).

For example, Frank Johnson was prosecuted for a murder committed on March 17, 1999. He called Jerry Parker to testify to his reputation for good character to support his contention that he did not commit the murder.

DEFENSE COUNSEL:

Q: Mr. Parker, tell us how you know Mr. Johnson.

A: We have worked together for the past fifteen years.

Q: How do you characterize your relationship?

A: We are friends.

Q: Have you heard others speak about him or has his name come up in conversations?

A: Yes.

Q: Based on what you have heard, what is his reputation in the community for being a peaceful, nonviolent, and law-abiding citizen?

A: Excellent.

Assume that the prosecutor cross-examined Parker, pointing out that his familiarity with Johnson's reputation was limited to the workplace and was formed based on comments made by co-workers in the context of Johnson's work. Because there are no convictions, arrests, or specific instances of pertinent misconduct, there is no factual basis for the prosecutor to ask about them.

In the closing argument, defense counsel might explain to the jury why Parker was called, what the law of character evidence means, particularly with reference to the questions that opposing counsel are required and permitted to ask, and why they are significant. For example:

You heard from Jerry Parker, Frank Johnson's friend and co-worker, a man who has known Frank for fifteen years. He tells you that among the people who work with Frank every day — some of whom have known him for all those years — he is regarded as a peaceful, nonviolent, and law-abiding man.

What does that mean? How significant is it when a friend comes in and talks about your reputation, which is what others say

about your character when you are not there? The judge will tell you that a man's reputation, this man's reputation, with nothing more, can raise a reasonable doubt as to his guilt by itself.

But there is more. When an accused calls a character witness, he puts his character in issue. His lawyer may ask only about his reputation, as I did, and not about specific examples of nonviolence. But the prosecution can. If Mr. Johnson had ever been convicted, indicted, arrested, disciplined for, or even committed any violent or illegal act, the prosecutor could have asked Mr. Parker whether he had known or even heard any mention of it. But you heard none of those questions. Because there was nothing to ask about, just as there was nobody who told you that Frank Johnson is a violent man. You now know that the man whom you will soon be asked to judge is known by those who see him every day. Those people know him best to be a family man, a working man, a good and decent law-abiding man, and a man of balance. That is what character is — how you behave when no one is looking.

#### IV. CONCLUSION

Trial lawyers, as well as advocacy teachers, uniformly recognize trial advocacy as an art — not a science. But art, too, requires technique and disciplined application. “Even Rembrandt once had to learn to mix paints and hold a brush,”<sup>94</sup> Michelangelo to hold the chisel, and Caruso to hit the high C. The art of advocacy, of asking questions and making speeches to persuade the audience, demands the application of a disciplined methodology to a lawyer's voice. When we communicate, we should be mindful that the language of the courtroom, our mother tongue, is the law of evidence. When we speak this language, we should take full advantage of its rich and expressive lexicon — its idioms, jargon, and colloquialisms. And best of all, we should speak with the authority and passion that our language provides.

---

94. Irving Younger, *The Advocate's Deskbook: The Essentials of Trying a Case* 1 (PH L. & Bus. 1989).