

## EVIDENCE ADVOCACY — THE JUDGE'S PERSPECTIVE

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When a trial lawyer becomes a trial judge, the earth moves. Nothing in the trial lawyer's training or experience prepares him or her for the role of neutral arbiter. Everything looks and sounds different. It is not just that he or she has acquired the power to decide. It is more than the fact that all participants are looking up at him or her, waiting for a ruling. The real change is the realization that he or she now has to be right as often as possible. People are looking.

It has been twenty-five years since the first time I walked up those steps to the highest chair in the courtroom. On that day, I learned two important lessons. First, I realized that everyone was standing because some guy with a gun was telling them to, a point that seems obvious but is really hard to grasp, if not retain. Second, I realized I had to rule in favor of somebody and, obviously, against somebody.

This Article will address the following question: What makes a judge rule one way and not the other?

### *JUDGES ARE NOT THE SAME*

I do not believe there is any universal answer to this question. Judges are different people and, therefore, do things for different reasons. Still, they have human attributes, and that means they react to stimuli. Successful trial lawyers understand that trying cases involves a methodology for winning over the judge. It is an aspect of advocacy. Favorable judicial rulings might not always carry the day, but they certainly ease the path to success. They enable trial lawyers to pursue their clear, consistent, and, hopefully, persuasive theory of the case — their story.

As a general rule, in close cases, judges, like juries, will decide in favor of the people they like and trust and against the people they

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do not like and do not trust. If these qualities must be rated, trust and distrust carry the most weight. The question then becomes the following: What do trial lawyers do that makes judges trust them?

One of the first things trial lawyers do is acquire an intimate knowledge of the rules of evidence. Then, they learn how to use the rules in a courtroom. They understand that part of preparing for trial is proceeding on the assumption that their opponents will object to everything. They are ready for those objections. And because they have thoroughly anticipated their opponents' case, they are ready to make good-faith evidentiary challenges to the evidence, statements, and arguments that will be presented by the other side.

### Effective Evidence Advocacy

Effective evidence advocacy is much more than an academic exercise. When done correctly, evidence advocacy accomplishes more than one purpose. First, obviously, it will win a particular ruling. But there is more to it than that. It is a confidence builder. Competent trial lawyers are taken more seriously than incompetent trial lawyers — by both judge and jury. Part of competence is the ability to handle evidentiary situations.

It does not escape a jury's attention when lawyers consistently win evidentiary points at trial. It is a way of controlling the course of the trial, and jurors get caught up in that process. It is a trust stimulus. Then, there is the other side of that coin. If the lawyer is seen as a blunderer, unable to get in his or her exhibits or successfully deliver three questions in a row, the jury will be inclined to distrust all of that lawyer's endeavors.

Another advantage of competent evidence advocacy is the impact it has on opponents. It intimidates. When opponents see how committed in time, thought, and energy the evidence advocate is, the white flag often comes out and there is peace in our time.

### WINNING THE JUDGE

My focus is on winning over the judge. Here, too, a conditioning process is going on. The lawyer who wins the judge's confidence usually will win the close rulings. The judge does not think of it that way, at least not right away, but that is what happens. I am reluctant to call it a brainwashing technique, because that probably would be an overstatement. It is more of an instinctive judicial vote of confidence.

Effective evidence advocacy begins early. Lawyers must recognize that while they may have been living with the case and its issues, the judge has not. It is not demeaning to assume that the judge has not spent all of his or her waking time preparing for the evidentiary questions each case presents. An evidentiary point that is a *raison d'être* for the trial lawyer might be a minor glitch on the judge's screen.

It is the lawyer's job to prepare the judge, and it makes no difference whether the judge is perceived as less than a bright light or a reincarnation of Oliver Wendell Holmes. In fact, a smart judge can pose a more formidable obstacle to enlightened rulings.

All judges, at one time or another, rule by sound — not by analysis or even deep thought. That is, it sounds like hearsay or it sounds like it does not matter. Judges must rule quickly. They do not have the time or inclination to reflect and analyze each objection that is made. Sometimes they guess. The ruling is reflexive, based perhaps on a comfort level or some vague and undefined sense of fairness. Once the ruling is made, it is carved in stone as judicial hubris takes hold. Ruling quickly and correctly on a consistent basis is not as easy as it looks.

### *THE PLACE FOR VICTORY*

Evidentiary disputes are won or lost on the trial-court floor, and the appeal rarely matters because appellate courts use an abuse of discretion standard to review a trial judge's evidentiary rulings. Abuse of discretion is a virtual guarantee of finality for the trial judge's ruling. So, at trial,

[t]he proponent must offer and the opponent must resist evidence at the right time, for the right reason, in the right way. That is the clear meaning of [Federal Rule of Evidence] 103. The failure to adhere to the requirements of [Rule] 103 invites probable failure in the trial court and almost certain defeat on appeal. Without an understanding of the operation of [Rule] 103, a trial lawyer will step into a morass of waiver.<sup>1</sup>

Appellate courts, in the absence of compelling circumstances, are not inclined to devote much time and effort to reviewing a trial judge's evidentiary rulings. At trial, when an objection is made,

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1. Thomas A. Mauet & Warren D. Wolfson, *Trial Evidence* 19 (Aspen L. & Bus. 1997).

judges often move to the side and ask the proponent, “Where are you going with this?” Sometimes the proponent’s response is successful, sometimes it is not. Waiting too long to explain direction is a risky business. Important evidence can be lost.

It is essential, then, that the judge know the purpose of the evidence being offered. Why is it being offered? What is it for? What does it do? If the judge knows the “why” of the evidence, a better-considered ruling will be made.

### *GET IN EARLY*

I believe in early entry. Giving the judge a clear, uncluttered roadmap of the case before the trial begins creates a distinct advantage. It is a mistake to underestimate the impact of a trial brief that sets out the serious evidentiary issues the judge will have to face. Early notice of the decisions relied on to make evidentiary points is greatly appreciated in judicial circles. Copies of key decisions are usually welcome. Here, at the beginning, lawyers can begin to establish their bona fides. The positions they take must be sensible and responsible. The law must not be misstated. Admitting that the other side is right about something, when appropriate, is a confidence builder.

The motion in limine is a time-tested technique for establishing the evidentiary high ground. In the federal courts, Rules 104(a) and (b) authorize the judge to determine preliminary evidentiary questions.<sup>2</sup> Written motions are better than oral motions, and can be aimed at getting something in or keeping something out.

Lawyers should keep in mind that there is judicial reluctance to try cases in chambers before the jury is empaneled. Some issues are not worth raising before trial. At this point, as in every stage of the trial, lawyers must steer a course between effective advocacy and annoying nitpicking. For example, excessive “leading” objections to trivial matters will lead to a reduced level of judicial confidence.

However, I do not encourage submissive behavior. Lawyers do not have to live easily with a judge’s mistakes. The best course is to help the judge avoid a mistake. After an objection is made, judges at times will look to the proponent for a non-speaking response. The following is an example:

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2. *Id.* at 15–16.

Question:           What did he say to you?  
Opponent:           I object, that is hearsay.  
Judge:               Counsel?  
Proponent:           We are not offering this testimony for its  
                          truth; it is offered to show why the witness  
                          reached for his gun.

But there are other times, particularly as the trial day nears an end, when the judge does not ask for a response. I suggest that the proponent of the testimony respond to the objection anyway, before the judge rules. Once the judge rules, the likelihood of a judicial change of mind is not great, especially when the request for a changed ruling is made in the presence of the jury. At those times, the robe gets heavy.

Not every battle is worth fighting, but the important ones are. An underused weapon is the offer of proof. Rule 103(a)(2) and its common-law counterpart are more than just indispensable methods for preserving an issue for appeal. An offer of proof can be an effective way to get the trial judge to change his or her mind. It does happen.

The offer of proof should be made as soon as possible, outside of the jury's presence. Sometimes a judge will tell the lawyer to wait for the next break. In that case, the issue should be raised at the next break and not forgotten. The excluded evidence should be spelled out for the trial judge, in narrative, or preferably, in question and answer form. Then, the proponent can explain why the excluded evidence matters and why it must be presented to the jury.

### *THE WRONG APPROACH*

Because the trial-court floor is the real, and often final, battle ground for evidentiary issues, trial lawyers must be equipped with the right weapons. They must understand that evidentiary issues cannot be reduced to a discrete rule. I am not convinced that the traditional casebook method of teaching evidence, with its emphasis on appellate decisions, adequately prepares students to be evidence advocates. I am not sure that law students understand why evidence law matters.

Evidence law is not an academic exercise. The law of evidence controls the way rational, decent people conduct a fair and just fact-finding process in an adversary system. The fact-finder must be given reliable evidence that matters, that aids in resolving disputes,

that does not violate constitutional guarantees or desirable social policy, and, certainly, that does not do unfair harm to the rights of litigants.

The evidence rules, whether code or common law, bring real life, with all of its strengths and weaknesses, into the courtroom. The rules are grounded in probabilities because that is how we live. If we waited for certainty before making important decisions, we would never leave the house.

Jurors, better than lawyers, understand that they are to use their life experience when making decisions. They know that honest people do not change their stories, and they know that dishonest people will avoid answering fair and clear questions. They also know when someone is trying to confuse or divert them. They respect a story that is clear and honest.

Effective evidence advocacy allows a lawyer to tell his or her story to the jury. It also allows a lawyer to erect a barrier to a story that should not be told. Either way, there must be a methodology for dealing with evidentiary issues as they come up at trial.

### *THE THREE Rs*

Professor Thomas A. Mauet and I have written about a three-step process for confronting evidentiary issues in the trial court.<sup>3</sup> We think it works for trial lawyers and trial judges. We call it “The Three Rs” — relevance, reliability, and rightness.<sup>4</sup> Alliteration aside, the words stand for a progressive analysis that will quickly and efficiently address most evidentiary issues that arise at trial.

#### The First R — Relevance

The first step is relevance.<sup>5</sup> If the evidence being offered is not relevant, the inquiry is over.<sup>6</sup> The evidence does not come in.

To be relevant, the evidence must have “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”<sup>7</sup>

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3. *Id.* at 1–8.

4. *Id.* at 2.

5. *Id.*

6. *Id.*

7. Fed. R. Evid. 401 (2000).

There is no litmus test for determining relevance. It will vary from judge-to-judge and from case-to-case. Relevance should be tested “in the light of logic, experience, and the ways of human behavior.”<sup>8</sup> As a result, relevancy is a moving target.

Determinations of relevancy are driven by substantive law<sup>9</sup> — the issues made by the pleadings, civil or criminal. The proponent of the evidence must have a clear idea of the purpose, the “why” of the evidence. He or she has the burden of clearly and quickly explaining that purpose to the judge.

Failure to deliver a statement of purpose, either in advance or at the time of the offer, explains why so many law students, lawyers, and, sadly, judges immediately think hearsay when an out-of-court statement is offered. They started in the wrong place, with the second R. Until we know why the evidence is being offered, we cannot place it in any category.

### The Second R — Reliability

We know that irrelevant evidence is not admissible.<sup>10</sup> Rule 402 states that all relevant evidence is admissible, unless excluded by the Constitution, an act of Congress, the Federal Rules of Evidence, or a Supreme Court rule.<sup>11</sup> It is this “unless” that moves the inquiry to the second R — reliability.<sup>12</sup> Even if the evidence is relevant for the offered purpose, it still must be reliable to be admitted.<sup>13</sup>

This second R, reliability, is at the heart of the rules-driven evidence scheme. We have decided that fact-resolvers must not base their decisions on unreliable evidence — no matter how relevant.<sup>14</sup> “The stakes are too high,” and the risk is too great.<sup>15</sup> Standards of reliability create ways of resolving disputes that have some measure of order, predictability, and correctness of judgment.<sup>16</sup>

So we say that witnesses must be competent.<sup>17</sup> Nonexperts must testify from personal knowledge<sup>18</sup> or, when testifying in the form of

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8. Mauet & Wolfson, *supra* n. 1, at 3.

9. *Id.*

10. Fed. R. Evid. 402 (2000).

11. Mauet & Wolfson, *supra* n. 1, at 3.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. Fed. R. Evid. 601 (2000).

18. Fed. R. Evid. 602 (2000).

opinion or inference, must rationally base their testimony on their perceptions.<sup>19</sup> That is, we say there must be a “foundation” for a nonexpert’s testimony.<sup>20</sup>

We say hearsay is not admissible because, given the lack of oath and confrontation, it is not trustworthy.<sup>21</sup> But then we carve out a multitude of exceptions and nonhearsay provisions because we feel some comfort in saying that these out-of-court statements, introduced for their truth, are trustworthy or bear adequate indicia of reliability.<sup>22</sup>

Our notions of reliability require that voices and documents be identified or authentic,<sup>23</sup> and that writings, recordings, and photographs be original or satisfy some other form of accuracy analysis.<sup>24</sup>

Expert testimony, of course, must be relevant or “fit” the issues in the case, but the real battleground for admissibility has to do with reliability. Experts must base their opinions on reliable principles and methodology, and they must apply those principles and methods reliably to the facts of the particular case.<sup>25</sup>

### The Third R — Rightness

This is not a complete list of reliability considerations, but it will do to bring us to the third R — rightness. “Is it right to admit the evidence?”<sup>26</sup> Even if the evidence is relevant and reliable, is there some good reason to keep it away from the trier of fact, especially a jury?

This third R reflects barriers to relevant and reliable evidence that are set up by the law.<sup>27</sup> Actually, there are two kinds of barriers.<sup>28</sup>

The first kind of barrier reflects social and political judgments more than it does legal principles. Here, with some exceptions, we bar subsequent remedial measures in personal injury cases.<sup>29</sup>

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19. Fed. R. Evid. 701 (2000).
  20. Fed. R. Evid. 703 (2000).
  21. Fed. R. Evid. 802 (2000).
  22. Fed. R. Evid. 801(d), 803, 804, 807 (2000).
  23. Fed. R. Evid. 901, 902 (2000).
  24. Fed. R. Evid. 1001–1008 (2000).
  25. Fed. R. Evid. 702 (2000).
  26. Mauet & Wolfson, *supra* n. 1, at 4.
  27. *Id.*
  28. *Id.*
  29. Fed. R. Evid. 407 (2000).



Whatever relevance compromises and offers to compromise might have, we ordinarily do not allow evidence of them to be admitted.<sup>30</sup> Payments of medical and similar expenses are not allowed,<sup>31</sup> and, because of the desirability of guilty pleas in criminal cases, evidence of withdrawn guilty pleas and statements made during plea discussions are usually prohibited.<sup>32</sup> With some exceptions, evidence of liability insurance is not admissible,<sup>33</sup> nor is a victim's past behavior in sex-offense cases.<sup>34</sup> Then, of course, there are the numerous privileges created by federal common law and state law.<sup>35</sup>

The second kind of barrier to relevant and reliable evidence has to do with "the ways trials are conducted and the ways juries should and should not reach decisions."<sup>36</sup> It is found in Rule 403 and its state-law counterparts.<sup>37</sup> I am persuaded that not enough attention is paid to Rule 403, in the law schools or in the trial courts. It is underused.

With a few notable and limited exceptions,<sup>38</sup> Rule 403 claims rarely succeed on appeal. Reviewing courts usually characterize "Rule 403 as an extraordinary remedy to be used sparingly because it permits the trial court to exclude otherwise relevant evidence."<sup>39</sup>

I believe that not enough attention is paid to Rule 403, but I am convinced it can be and often is an effective trial-floor technique. It can persuade. But, it has to be understood. It requires a balancing or weighing process, an exercise of broad judicial discretion rarely questioned on appeal.<sup>40</sup> I have observed that, at times, trial judges will rule that the evidence being offered is irrelevant when they in

30. Fed. R. Evid. 408 (2000).

31. Fed. R. Evid. 409 (2000).

32. Fed. R. Evid. 410 (2000).

33. Fed. R. Evid. 411 (2000).

34. Fed. R. Evid. 412 (2000).

35. Fed. R. Evid. 501 (2000).

36. Mauet & Wolfson, *supra* n. 1, at 4.

37. Fed. R. Evid. 403 (2000).

38. *See e.g. Old Chief v. U.S.*, 519 U.S. 172, 191 (1997) (holding that the trial court abused its discretion by admitting evidence of the defendant's prior conviction for firearms possession because the probative value of such evidence was substantially outweighed by the risk of unfair prejudice).

39. *U.S. v. Meester*, 762 F.2d 867, 875 (11th Cir. 1985) (holding that trial court abused its discretion by admitting evidence of the defendant's prior conviction for assault because the risk of prejudice outweighed the probative value of the evidence).

40. Broad judicial discretion can be, and always has been, a risky business. "[I]n Lord Camden's words, it is the law of tyrants . . . . In the best it is oftentimes caprice; in the worst it is every vice, folly, and passion to which human nature is liable." *McGautha v. Cal.*, 402 U.S. 183, 285 (1971).

fact, perhaps unconsciously, have conducted a Rule 403 weighing to keep out relevant evidence that is not worth the time or trouble.

### TWO AREAS OF CONCERN IN RULE 403

Rule 403 addresses two areas of concern.<sup>41</sup> The first area of concern has to do with judicial efficiency.<sup>42</sup> Relevant and reliable “evidence may be excluded if its probative value is substantially outweighed . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”<sup>43</sup> That is, the judicial boredom factor. It is hard to measure or predict, and it could vary according to the time of day — more gets in during the morning — or the weight of the judge’s judicial and extra-judicial calendars.

The second area of concern addressed by Rule 403 has to do with the integrity of decisionmaking.<sup>44</sup> Relevant and reliable evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury . . . .”<sup>45</sup>

There are two operative words in this area of Rule 403 — “substantial” and “unfair.”<sup>46</sup> Trial lawyers and trial judges should forge a mental picture of an old-fashioned balancing scale. On one side, the admissibility side, is placed the probative value and the proponent’s honest need for the evidence. On the other side, the exclusion side, go all the pertinent reasons for exclusion contained in Rule 403.<sup>47</sup> A substantial tipping of the scales is required to exclude the evidence.<sup>48</sup> For prejudice to be a factor, the trial judge must be persuaded that *unfair* prejudice would be injected into the trial by the evidence being offered.<sup>49</sup> Just being prejudicial is not enough. Any adverse evidence is prejudicial to the party it is being offered against.<sup>50</sup> Trial judges like to point that out.

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41. This section, including the quoted language from Rule 403, is derived from Thomas A. Mauet & Warren D. Wolfson, *Trial Evidence* 83–84 (Aspen L. & Bus. 1997).

42. *Id.* at 84.

43. *Id.*

44. *Id.* at 83.

45. Fed. R. Evid. 403.

46. *Id.*

47. Mauet & Wolfson, *supra* n. 1, at 83.

48. *Id.* at 83.

49. *Meester*, 762 F.2d at 875 (quoting *U.S. v. McRae*, 593 F.2d 700, 707 (5th Cir. 1979)).

50. *Id.*

Admittedly, Rule 403 does not promise easy exclusion of relevant and reliable evidence. Admissibility is presumed.<sup>51</sup> The opponent of the evidence bears a heavy burden of tipping the scales to exclusion. But I insist that forceful advocacy of Rule 403 interests makes a powerful and often overlooked argument on the trial-court floor. It persuades trial judges. It moves them by appealing to their sense of fairness and their desire to protect the integrity of the fact-finding process. Judges understand the risk of jurors misusing evidence, even in the face of proper limiting instructions. They understand that jurors should not be deterred from their duty by feelings of outrage, anger, or sympathy. They want the jury to reach the right decision for the right reasons.

I might be describing judges in a more idealistic vein than is justified by the practical experience of some trial lawyers, especially in criminal cases when evidence is offered by the prosecution. However, that is not a reason to abandon the approach I advocate. Cynicism about trial judges results in the surrender of a powerful weapon for keeping out unfairly prejudicial evidence. Additionally, assuming that the trial judge is motivated to do right, and not simply desirous of obtaining a certain result, brings out the best in that judge. At worst, I am recommending a triumph of hope over experience.

I cannot document or cite to authority for these propositions. However, appellate decisions record only the times that trial judges rejected the Rule 403 argument. They do not begin to count the times the argument succeeded.

### CHARACTER EVIDENCE

Character evidence presents fertile ground for Rule 403 analysis. We know the federal rules and common-law decisions, with some exceptions, present barriers to the use of character evidence to prove a person acted in conformity with that character on a particular occasion.<sup>52</sup> The evidence is not barred because it is irrelevant. On the contrary, it is barred because it is too relevant. It invites potential misuse.<sup>53</sup>

Yet, Rule 404(b) allows evidence of a person's other crimes, wrongs, or acts if it has some relevant purpose other than proving

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51. Mauet & Wolfson, *supra* n. 1, at 84.

52. Fed. R. Evid. 404(a)–(b) (2000).

53. *Michelson v. U.S.*, 335 U.S. 469, 480 (1948).

conformity — such as motive, opportunity, intent, knowledge, identification, etc.<sup>54</sup> The rule does not prohibit relevant evidence of other crimes or wrongful acts that might be taken by the jury as conformity evidence, because that is an inevitable byproduct of the Rule's purpose.<sup>55</sup> Reviewing courts ordinarily will be satisfied if trial judges give limiting instructions on request and if the evidence is confined to its relevant purpose and not misused by its proponent. The only way to keep this evidence out is to persuade the trial judge of the grave danger that the jury will use the evidence to conclude that the defendant is a bad man, or that he did it before so he must have done it again — limiting instruction or not. Sometimes it works and sometimes it does not. The best place — almost always the only place — for excluding the evidence is the trial-court floor.

### NEW CHARACTER RULES

Passage of Rules 413, 414, and 415 injected a new urgency for forceful Rule 403 advocacy. These rules depart from the courts' traditional rejection of character evidence as conformity evidence.<sup>56</sup> In civil and criminal cases involving charges of sexual assault or child molestation, the Rules authorize the admission of evidence of prior sexual assaults or child molestations committed by the defendant "for its bearing on any matter to which it is relevant."<sup>57</sup> The clear purpose of these rules is to allow conformity evidence.<sup>58</sup>

Everyone seems to agree that Rules 413, 414, and 415 admissibility is subject to a Rule 403 analysis.<sup>59</sup> Because of the devastating nature of prior sexual assault or child molestation evidence offered to prove conformity on the occasion charged, the opposing lawyer's task is clear: convince the trial judge of the grave danger to the

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54. Fed. R. Evid. 404(b).

55. *Id.*

56. *Dowling v. U.S.*, 493 U.S. 342, 345 (1990).

57. Fed. R. Evid. 413(a), 414(a), 415(a) (2000).

58. *U.S. v. McHorse*, 179 F.3d 889, 903 (10th Cir. 1999).

59. See e.g. *U.S. v. Eagle*, 137 F.3d 1011, 1016 (8th Cir. 1998) (holding that, although Rules 413 and 414 allow evidence of prior sexual crimes, a judge must still conduct a balancing test under Rule 403 before admitting such evidence).

integrity of the fact-finding process. It will not be easy,<sup>60</sup> but it can be done.<sup>61</sup>

### HOW THE METHOD WORKS

For a quick study of how the Three R method plays out, take the situation we pose in *Trial Evidence*.<sup>62</sup>

The case involves a claim that Acme's negligent construction of a natural gas tank with faulty welds caused an explosion that injured the plaintiff. She tries to offer evidence that before her injury Acme had in its files letters complaining of four other tank explosions after faulty welds were observed. The letters say someone was killed in each explosion.

There are two relevant purposes for offering the letters, she argues. First, they are offered to prove notice to Acme that it has defective welds on the tanks — the reason why the tank exploded in this case. Second, they are offered to prove causation — the faulty welds.

The judge looks to the substantive law of the case. Notice and causation are important issues and clearly relevant. The first R is satisfied.

But is the evidence reliable for the offered purposes? Acme contends the letters are hearsay. They are out-of-court assertions being offered for their truth. No, responds the plaintiff, they are not hearsay because they are being offered to show Acme received them and knew about them.

Because the reasons for offering the letters are clear, the judge should have little trouble deciding which purpose survives the reliability examination. The letters are not reliable to prove causation because the statements in them depend upon the credibility of the out-of-court declarant. They are hearsay for that purpose, and no exception to the rule applies.

But the reliability analysis for notice is different. The letters are not being offered for the truth of their statements. They are being offered to show Acme was, or should have been, aware that people

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60. See e.g. *U.S. v. Larson*, 112 F.3d 600, 605 (2d Cir. 1997) (stating that there was no abuse of discretion in allowing evidence of prior sexual crimes occurring sixteen to twenty years ago).

61. See e.g. *U.S. v. Guardia*, 135 F.3d 1326, 1332 (10th Cir. 1998) (holding that there was no abuse of discretion in excluding evidence of uncharged conduct because such evidence would mislead the jury).

62. Mauet & Wolfson, *supra* n. 1, at 6–7.

were saying the tanks had faulty welds. They are not hearsay at all. They are reliable for the purpose of proving notice.

But that is not the end of the inquiry. The third R now comes into play. Acme contends unfair prejudice substantially outweighs whatever probative value the letters have to prove notice. The danger is that the jury will misuse the evidence, taking it as proof that the welds were in fact defective, an improper purpose that no limiting instruction will cure. And, says Acme, hearing that other people were killed in explosions will inflame the jury, causing it to base its verdict on emotion, not evidence. The plaintiff's response is that notice to Acme is an important part of her case and that there is no other way to prove it.

At this point, the judge should recognize the broad discretion granted by the Federal Rules of Evidence and common-law decisions. The balancing scales are put to work. When conducting the weighing process, the judge will consider how effective a limiting instruction might be and how grave the danger of jury misuse might be. Certainly, the judge is free to impose a condition: "I will admit the letters to prove notice, but you must excise all references to people being killed in explosions." Whatever the decision, the substantial odds are it will be unscathed by appellate review.

### *CONCLUSION*

Evidence battles are won on the trial-court floor. Preparing for them and presenting a persuasive position to the trial judge are indispensable elements of successful trial advocacy. Lawyers must have an effective battle-plan, whether the evidentiary issue is anticipated or is a matter of surprise. The art of persuasion applies to evidentiary disputes just as firmly as it does to opening statements and closing arguments. It is all advocacy, and it all matters.