PRO SE
HAND BOOK

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This is a work in progress sheet for those who can not afford an attorney or want to know how an attorney should proceed in your case. Most of these notes were taken from blogs , books and lots and lots of State and Federal websites. Citations are recorded at the end , and may or may not be present since the web is changing so fast.

INTRODUCTION

Whether it's the high cost of lawyers' fees or growing distrust of lawyers in general, there is a mounting trend these days for more people to fight without a lawyer.
Those who know "How to Win in Court" are winning. Those who don't are losing.

The American Bar Association (ABA) reports

60% of the public can't afford a lawyer.
20% simply don't want to spend the money.
50% just don't trust lawyers!

Yet ½ of all court proceedings involve at least one pro se party. Too many pro se people are losing ... needlessly! Ever wonder why you were never taught anything about court procedure or the rules of evidence in your tax-supported schools?

If you must hire a lawyer:

- know what the lawyer should do
- Don't pay for incompetence or laziness
- Don't let your lawyer cheat you
- Know how to demand effective legal service!

If you can't afford a lawyer:

- Force the court to protect your rights
- Draft proper pleadings
- Get evidence in the record
- Make effective courtroom objections
- Move the court to get what you want

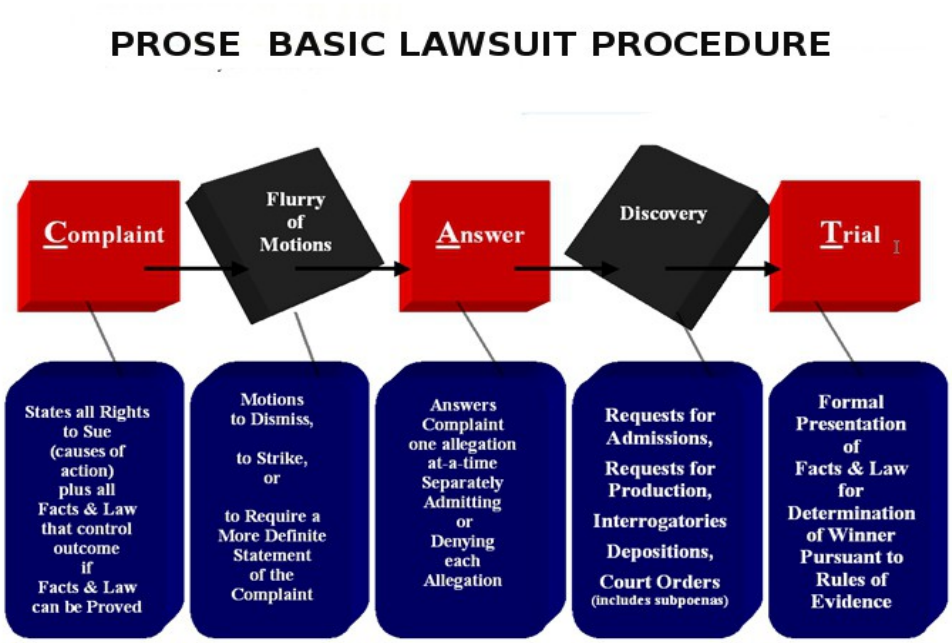
Who benefits from your legal ignorance? You guessed it. Lawyers!

- Most pro se people know nothing about the official Rules of Evidence that control the judge and all parties and their lawyers.
- Most pro se people know nothing about the official Rules of Procedure that control the judge and all parties and their lawyers.
- Most pro se people have no idea what "due process" really is.
- Most pro se people can't recognize the opposing lawyer's dirty tricks.
- Most pro se people assume what "admissible evidence" is and don't know what stuff isn't.
- Most pro se people draft their pleadings and motions incorrectly - usually with far too many words!
- Most pro se people don't know why it's vital to write proposed orders for the judge to sign.
- Most pro se people don't know why, when, or how to make effective objections in court.
- Most pro se people don't understand what facts are critical to winning a case and what facts are of no consequence.
- Most pro se people muddy the legal waters with court-confusing insignificance.
- Most pro se people don't know how to find and cite controlling appellate opinions in support of their motions.
- Most pro se people don't arrange in advance of every proceeding to have a court stenographer present, so they can control the judge.
- Most pro se people waste valuable court time with non-essentials, fail to appreciate the needs of others who have other problems to bring before the court and, as a consequence, tend to make judges dread pro se cases and hate pro se people.

Lawsuits come down to a simple process. The following graph shows how a lawsuit progresses. Notice the three boxes CAT , Complaint ,Answer & Trial.

- Complaint
- Answer
- Trial

The case begins when the plaintiff or prosecutor complains. The defendant then has an opportunity to answer. The real fight is in the discovery process ... not at trial as TV leads you to believe!



Know the 6 types of lawsuit complaints.

Every lawsuit starts with a complaint.

- The plaintiff in the chart sues Defendant A and Defendant B.
- Defendant B counter-claims against Plaintiff.
- Defendant A cross-claims against Defendant B.
- Defendant B counter-cross-claims against Defendant A.
- Defendant A files a third-party complaint against Third Party Defendant.
- Third-Party Defendant counter-claims against Defendant A.

Every winnable case can be won before trial. All you need to know is how to use a handful of tools effectively.

- Proper pleadings.
- Evidence discovery tools.
- Motions and memoranda.
- Courtroom objections.

Pleadings frame the case and tell the court what the fight is about.

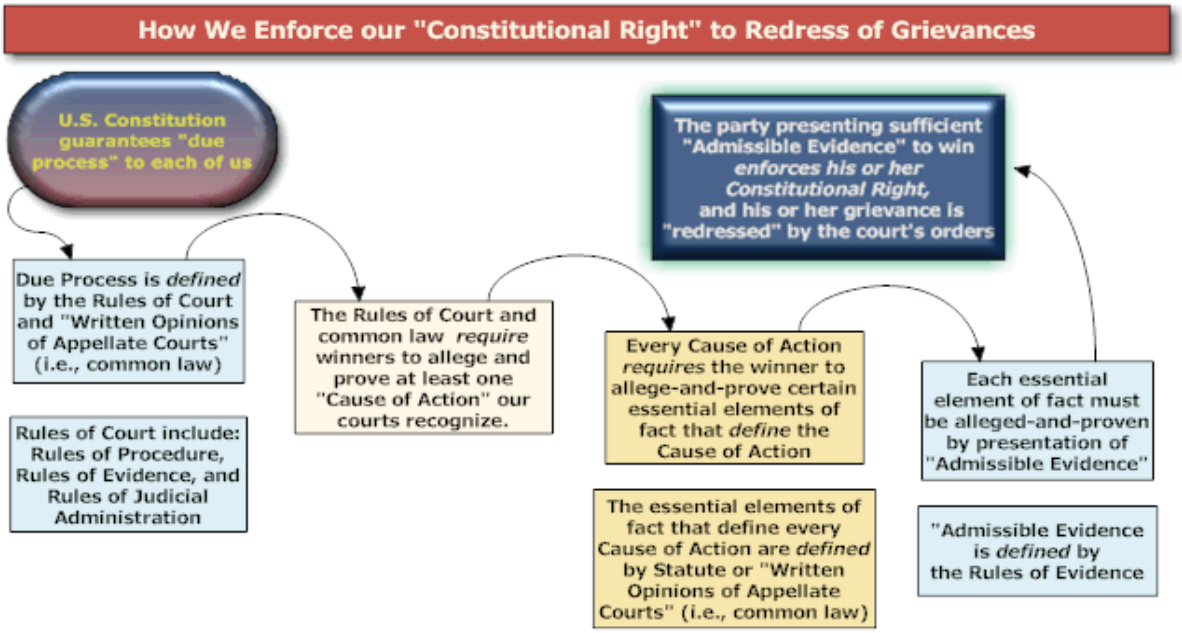
- Evidence proves the facts alleged.
- Motions "move" the court to act.
- Courtroom objections put the judge on notice he will be appealed if he rules against you!

There are two (2) kinds of law!
The first kind is "substantive law". Law that determines the outcome of a case based on admissible evidence.

The second kind we call "procedural law". Rules of court that determine what evidence will be admitted, who gets to talk, what issues will be heard, etc.

Losers rush into court demanding the judge to enforce substantive law in their favor, but they don't know the first thing about the rules of court or how to use them to get their way. It's like holding a winning hand in a game of cards but not knowing how to tactically apply the rules of the game to win.

It doesn't matter if you have "the law on your side" if you don't know how to use the rules of court to win. Those who know how to use the rules tactically do win consistently!



Pro se people often do not get justice. Why?
Let's examine a few facts:

- Most pro se people don't know the rules.
- Most pro se people don't know how to prevent the lawyer on the other side from playing tricks with the rules.
- Most pro se people make assumptions about what is "admissible evidence" and stuff that isn't.
- Most pro se people don't know how to draft their pleadings or motions properly.
- Most pro se people don't know why it's important to write proposed orders for the judge to sign.
- Most pro se people don't know why, when, or how to make effective objections in court.
- Most pro se people don't understand what facts are critical to winning a case and what facts are of no consequence but only muddy the waters with court-confusing insignificance.
- Most pro se people don't know why it's so vitally important to cite controlling appellate cases in support of their pre-trial and trial motions.
- Most pro se people don't know how to arrange for a written transcript to be made of all proceedings before the court, so they can control the judge.
- Most pro se people waste valuable court time with non-essentials, fail to appreciate the needs of others who have their own problems to bring before the court and, as a consequence, tend to make judges dread pro se cases.

Those who don't lose ... consistently! The following are of things YOU must do to win.

- Draft proper pleadings with all fact elements
- Obtain all necessary evidence before trial
- Make effective oral motions
- Draft effective written motions
- Use online legal research
- Draft compelling memoranda
- Insure a written record of all proceedings
- Object promptly to all errors of opponent
- Object promptly to all errors of judge
- Renew objections to all un-cured errors of judge
- Keep your opponent's evidence out
- Get your evidence in
- Stop opponent from proposing false orders
- Offer to draft all orders
- Stop opponent's lawyer from testifying

Word War - The LAW of the Case:
Every case is won or lost on only two (2) things!

- The Admissible Evidence and
- The Law of the Case

You don't need to know "every law" ever written! You just need to know "the law of the case" ... your case! Consider the fellow piling things in the balance shown here. Imagine he is "building his case". He doesn't have a great number of things on his side. He has a wee bit more than the other side, and that's all it takes to win!

You may ask, "How can a pro se litigant win against someone with a lawyer?"
The answer is simple! You don't need to know everything lawyers know!
You only need to know: The law of your case and How to use the rules to force the court to admit your evidence and enter the orders you seek. The only "law" you need to know is the law that affects your case! Once you know the law of your case is, the rest is simply convincing the court that the law of the case is what you say it is, and You have more admissible evidence of the facts that "fit" the law

First there is a Complaint, a summons is given by the court clerk. A summons is served to the opposing counsel. **File original complaint and a summons and have it served.**
If you dont have it served , the Judge can drop the case for lack of inpersonae. In some jurisdictions the commencement of a lawsuit is done by filing a summons, claim form and/or a complaint. These documents are known as pleadings, that set forth the alleged wrongs committed by the defendent with a demand for relief. In other jurisdictions the action is commenced by service of legal process by delivery of these documents on the defendent by a process server; they are only filed with the court subsequently with an affidavit from the process server that they had been given to the defendent(s) according to the rules of civil procedure. You have to give a copy to other side, If your not an attorney you can do C**ertificate of Service**. Verification is when you sign it.

During the flurry of motions a defendant can avoid answering the complaint lawsuit by many methods.

- **Motion to dismiss - failure to state a cause of action, or out of jurisdiction , wrong court**
- **Motion to Strike - some portion is scandelous or impertenent**
- **Motion for a more Definite Statement - complaint is ambiguous or vague.**

If complaint is well pleaded it will have a number of complaints numbered one by one.

Defendent will answer complaint allegations , one allegation at a time separately admitting or denying each allegation. If you dont know or understand the question you put, without knowledge.

There are also affirmative defenses. They will be explained later on in this document.

Defendant can also answer with a counter- claim, where the denfendant counter sues .
Cross claim sue a co-defendant. Answer answers the complaint.
Discovery is the key to getting the law in record.

If you must hire a lawyer:

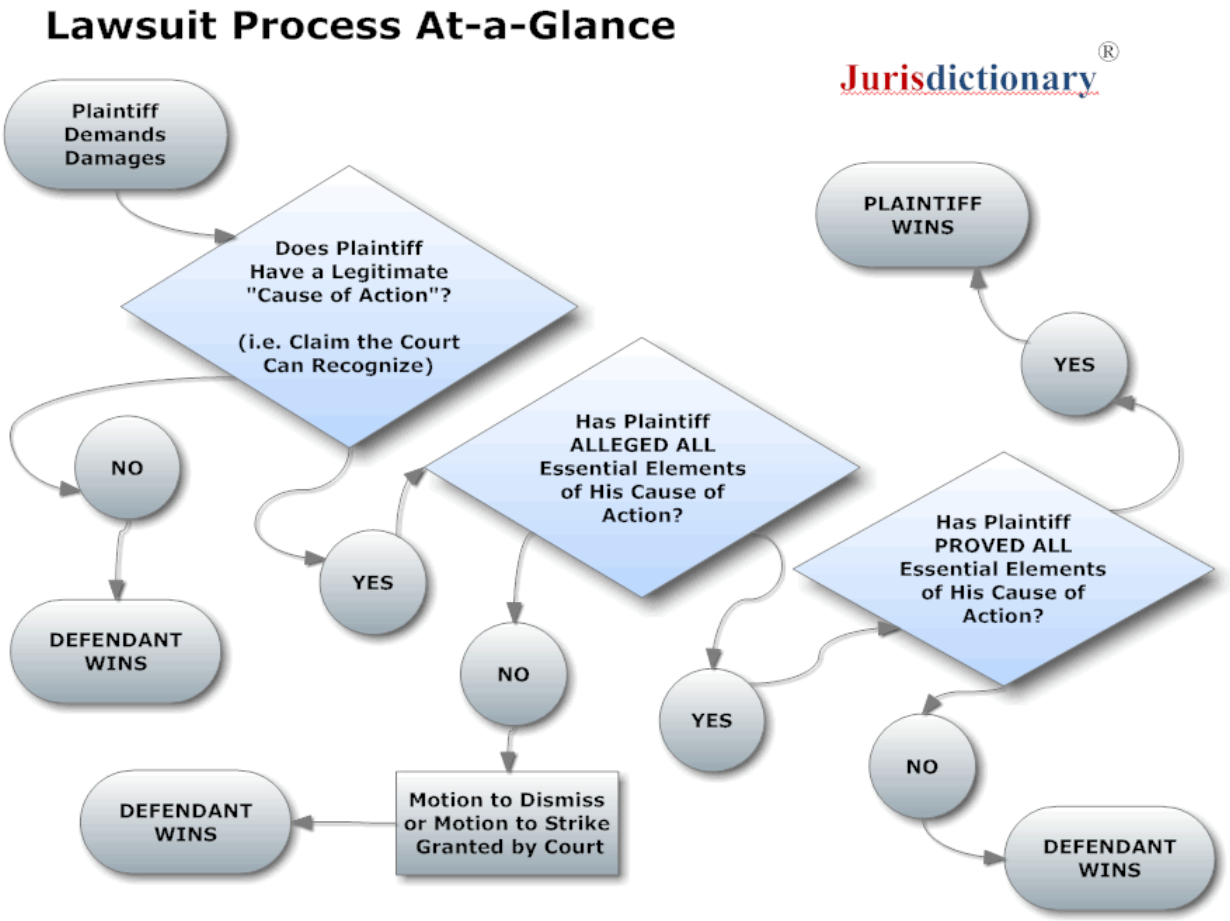
- Know what the lawyer should do.
- Don't pay for incompetence or laziness.
- Don't let your lawyer *cheat* you!
- Know how to demand effective legal service!

If you can't afford a lawyer:

- Force the court to protect your rights.
- Draft proper pleadings.
- Get evidence in the record.
- Make effective courtroom objections.
- Move the court to get what you want!

How do lawsuits begin ?

Law suits begin with the filing of a complaint in the proper court. The person filing the suit is often referred to as the plaintiff ; the person or entity against whom the case is filed is often



referred to as the defendant .

In some areas of law, such as family court, the person filing the complaint is the petitioner , and the person against whom the case is filed is the respondent.

The complaint states the plaintiff's version of the facts, the legal theory under which the case is brought (negligence, for example), and asks for certain damages or other relief. The plaintiff also files with the court clerk a request that a summons (or notice) be issued to the defendant. In many jurisdictions, the summons will be served by a deputy sheriff or special process server. In other jurisdictions, it may be served by mail. It notifies the defendant that a lawsuit has been filed against him or her.

After being notified, the defendant has a certain period of time to file an answer admitting or

denying the allegations made in the complaint.

#1 - THE LAW OF THE CASE

The law of the case is usually very simple!

No matter what kind of case yours is, if you'll trust me for just a moment (and check me on this) you'll find that every lawsuit turns on what we lawyers call "the law of the case". Every last one of them. Every single one!

Every foreclosure case turns (win or lose) on a very few legal principles that control the outcome of foreclosure - the rights of the lender versus the rights of the borrower. We attorneys call these principles "the law of the case" of foreclosure. It doesn't matter how big the bank or lender is. It doesn't matter how little the borrower is. The law of the case is the law of the case PERIOD!

The law of the case controls the outcome for those who know how to use the rules of court (evidence and procedure) to prove what the law requires.

Automobile negligence, contract disputes, malpractice, slander, false imprisonment ... whatever a case is about, you'll find "the law of the case" is simple and usually easy to find. This course even shows you how to use online legal research to find the law of your case!

You don't need to know every law there is to win a simple contract dispute. The law of the case in a contract dispute is usually no more than a few appellate court opinions and perhaps a statute or two at most. Once you know how to find and can cite the official authorities that state the law of the case of contracts, you're halfway home!

The rest of the business of winning is simply using the rules to (1) allege what the law of the case requires, and (2) prove what you've alleged ... whether you're a plaintiff bringing the case or a defendant trying to avoid the line of fire!

Using On-Line Legal Research ...

Find the Law that Controls the Judge! Otherwise, you cannot hope to win! You cannot win without citing "legal authority". You cannot cite "legal authority" if you don't know how to find it.

The judge is not "legal authority". Judges are required to obey "legal authority". Go tell a judge your personal opinions about the law and how you think he should rule, and see how far it gets you!

The only opinions that count in court are written opinions of appellate court justices. Your opinions count for nothing in court. Control the judge with "legal authority" by researching and citing appellate court opinions. Controlling judges is what wins cases! Your opponent will cite legal authorities. You must do the same ... if you want to win. Learn how to find and cite legal authorities.

#2 - THE RULES OF EVIDENCE AND PROCEDURE

Now assume you've found the law of the case that fits the facts of your lawsuit. You have the official citations that command victory for you IF you allege and prove what the law of the case requires. This is where the rules of evidence and procedure come into play ... and these are incredibly easy to learn! Let's say plaintiff is coming after you to foreclose on your home. The first thing you do is find the law of the case that will control the outcome in your state. You now know what must be alleged by the plaintiff and proven by the plaintiff in order for the plaintiff to win. You also now know what you must allege in affirmative defenses and what you need to do with discovery and motions to prove the plaintiff cannot meet the burden of the law. This stuff is really easy once you see how the separate parts fit together! You have tremendous power ... once you know how the game is played to win! If you start to offer evidence and, before you can get it before the court, the other side objects and the judge sustains your opponent's objection, you must move the court to allow you to make clear on the record what your evidence was going to be and what it would tend to prove!

Making an offer of proof.

Expect your opponent to try to stop you. Be prepared to make an offer of proof immediately ... or risk losing needlessly! An offer of proof shows the court on the record what the offered evidence is and what the evidence tends to prove Failure to get evidence admitted is fatal! If you don't get your evidence admitted and don't make an offer of proof, you'll have nothing to appeal if you lose! If you don't make an offer of proof, the record will not show the appellate court what the evidence would have been. There'll be nothing in the record for the appellate court to review! Appellate courts will not examine evidence that wasn't made part of the record at the trial level. You can't introduce

evidence for the first time on appeal.

#1 - All lawsuits turn on the law of the case.

#2 - All lawsuits are won (or lost) by clever (or clumsy) use of the rules of court to cite the law of the case and prove the facts. That's all there is to lawsuits - every one of them!

Sadly, too many people never discover the power to win that's theirs. Therefore, evil people who know how to find the law of the case and use the rules of court take advantage of them!

The Burden of Proof

You must understand who has the burden of proof ... and why it matters! If you're being sued, the other side has the burden of proof. If the other side files a motion, they have the burden of proof. But, sometimes the burden shifts back-and-forth.

Knowing who has the burden is critical.

Don't be victimized by lawyers tricking you into thinking the burden is yours, making you struggle to "disprove" a fact or the application of law ... when the burden is not on you! The burden is always on the party asserting a fact or law to prove what he asserts. It's never your job to disprove what he asserts! Many cases are won by simply forcing the court to require the opponent to "put up or shut up". Think how this can be applied to foreclosure or credit card cases! A credit lender asserts his alleged debtor owes, and far too often the alleged debtor spins his wheels trying prove he doesn't owe ... instead of forcing the creditor to prove what he claims or be dismissed! Knowing how to shift the burden is power to win! Why be tricked by other members of my profession?

There are always "work around's" . If you start to offer evidence and, before you can get it before the court, the other side objects and the judge sustains your opponent's objection, you must move the court to allow you to make clear on the record what your evidence was going to be and what it would tend to prove! This is called making an offer of proof!

Expect your opponent to try to stop you. Be prepared to make an offer of proof immediately ... or risk losing needlessly!

An offer of proof shows the court on the record:

- What the offered evidence is and
- What the evidence tends to prove

Failure to get evidence admitted is fatal!

If you don't get your evidence admitted and don't make an offer of proof, you'll have nothing to appeal if you lose! If you don't make an offer of proof, the record will not show the appellate court what the evidence would have been. There'll be nothing in the record for the appellate court to review! Appellate courts will not examine evidence that wasn't made part of the record at the trial level.

You can't introduce evidence for the first time on appeal.

2

Causes of Action

Cause of Action is a set of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party. The term also refers to the legal theory upon which a plaintiff brings suit (such as breach of contract, battery, or false imprisonment). The legal document which carries a claim is called a Complaint in U.S. federal practice and in many U.S. states. It can be any communication notifying the party to whom it is addressed of an alleged fault which resulted in damages from which it originates, often expressed in amount of money the receiving party should pay/reimburse.

How do you pursue a Cause of Action? Plaintiff pleads or alleges facts in a complaint, the pleading that initiates a lawsuit. A cause of action generally encompasses both the legal theory (the legal wrong the plaintiff claims to have suffered) and the remedy (the relief a court is asked to grant). Often the facts or circumstances that entitle a person to seek judicial relief may create multiple causes of action. Although it is fairly straightforward to file a Statement of Claim in most jurisdictions, if it is not done properly, then the filing party may lose his case due to simple technicalities.

There are a number of specific causes of action, including:

- contract-based actions
- statutory causes of action
- torts such as assault, battery, invasion of privacy, fraud, slander, negligence, intentional infliction of emotional distress
- suits in equity such as unjust enrichment and quantum meruit.

The points a plaintiff must prove to win a given type of case are called the "elements" of that cause of action. Judge may sanction you , you may pay attorneys fee's if you do not have a valid case. Not all wrongs have a remedy. When you think you have a CAUSE OF ACTION element or elements that are for that particular case the you can sue.

Example: Claim of negligence the elements are:

- The (existence of a) duty
- Breach (of that duty)
- Proximate cause (by that breach)
- Damages.

Frivolous lawsuits will only hurt you. Make sure you follow Rule 11,part B of the Federal Civil Procedures which states:
Representation to the Court. By Presenting to the court a pleading written motion , or other paper --whether by signing, filing , submitting , or later advocationg it - an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief , formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
(2) the claims , defenses and other legal contentions are warranted by existing law or by nonfrivolous argument for extending, modifying , or reversing existing law or for extablishing new law;
(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
(4) the denials of factual contentions are warranted on the evidence or , if specifically so identified , are reasonably based on belief or lack of information.

3
Motions

What is a motion?
A motions is a formal request made to a judge for an order or judgment. Motions are made in court all the time for many purposes: to continue (postpone) a trial to a later date, to get a modification of an order, for temporary child support, for a judgment, for dismissal of the opposing party's case, for a rehearing, for sanctions (payment of the moving party's costs or attorney's fees), or for dozens of other purposes. Most motions require a written petition, a written brief of legal reasons for granting the motion (often called "points and authorities"), written notice to the attorney for the opposing party and a hearing before a judge. However, during a trial or a hearing, an oral motion may be permitted.

Motions are not pleadings but are requests for the judge to make a legal ruling. Some of the most common pre-trial motions include:

- Motion to Discover. A motion by which one party seeks to gain information from the adverse party.
- Motion to Dismiss. This motion asks the court to dismiss the suit because the suit doesn't have a legally sound basis, even if all the facts alleged are proven true.
- Motion for Summary Judgment (sometimes called motion for summary disposition). This motion asks the court for a judgment on the merits of the case before the trial. It is properly made where there is no dispute about the facts and only a question of law needs to be decided.

If a complaint does not allege facts sufficient to support every element of a claim, the court, upon motion by the opposing party, may dismiss the complaint for failure to state a claim for which relief can be granted.

The defendant to a cause of action must file an "Answer" to the complaint in which the claims can be admitted or denied (including denial on the basis of insufficient information in the complaint to form a response). The answer may also contain counterclaims in which the "Counterclaim Plaintiff" states its own causes of action. Finally, the answer may contain affirmative defenses. Most defenses must be raised at the first possible opportunity either in the answer or by motion or are deemed waived. A few defenses, in particular a court's lack of subject matter jurisdiction, need not be plead and may be raised at any time.

Why bother struggling to prove obvious facts?

Every court (state or federal) provides a method for getting around the necessity of proving obvious

facts. This method is called "Judicial Notice". The process is simple. You should always use it when you can! You can make opponents' legal bullets bounce off your chest once the court takes judicial notice of an obvious fact, because the court's order settles the issue ... PERIOD! Obvious facts don't have to be "proven", if you can get the court to enter an order taking judicial notice of them. You can move the court to enter an order taking judicial notice in writing or you can move the court by voice in the courtrooom.

Vocal motions are called "ore tenus" motions.

Written motions are always best (because they become part of the written record of the case without paying a court reporter to provide a transcript) but if you're caught at a hearing and need to do so, make an ore tenus motion (i.e., a spoken motion) and be prepared to back it up by showing that the fact you want noticed is "obvious".

If was nearly 27 years ago when I was just beginning my career as a licensed attorney. My client was suing her former landlord to recover her security deposit. The mean old landlord claimed she damaged his property by cutting down a tree in the backyard.

The tree was a Brazilian Pepper tree, a nuisance plant here in Florida. The tree is related to poison ivy, poison oak, poison sumac. It's really more of a bush than a tree, though they grow quite large here in the Sunshine State. The University of Florida reports some people express respiratory problems associated with the bloom period of the tree, while others suffer from dermatitis after contact.

The State of Florida has even developed a detailed management plan for the pest plant, including creation of a Brazilian Pepper Task Force!

So, here I was arguing for my client at a hearing to get her deposit back from her stupid, greedy landlord looking to make a fast buck by playing on the ignorance of others.

Of course I had a court reporter with me, taking down every word said by me, my client, the landlord, and the judge. That's why I won more often than others. Making a record is essential to victory (even though it does cost a bit to pay the court reporter to attend).

My client and I came to the hearing with photographs of the inside of the house she'd been renting to show how she had re-painted, cleaned the oven, scrubbed the floors, and left the place

immaculate. That's what we thought the landlord's defense was: that she'd left the place a mess. When I saw her photographs (and the fact that her friend had taken the pictures, a friend we brought with us to testify to the accuracy of the pictures, if necessary) it seemed obvious to me we would win hands down.

Then the landlord starts whining about his lovely tree in the backyard and how my client had so rudely and without his permission cut it to the ground and dragged the branches out to the street for the city trash collectors to take them away.

By some stroke of God's Grace I'd recently read of the Brazilian Pepper and health problems it was causing, so I simply said, "Your honor, I move the court for an order taking judicial notice that the Brazilian Pepper has been adjudged a nuisance plant in Florida and therefore has no commercial value to justify the landlord's witholding my client's security deposit."

What happened next was wonderful. The judge smiled, evidently pleased at the opportunity I presented for him to tell us what he knew of this pesky bush. He leaned back in his giant leather-backed chair and actually put his hands behind his head as if he were going to tell a long story to his grandchildren. And, what a story it was. He went on for at least 10 minutes about the problems he and his family had and the concern officials have with the invasion of this plant from Argentina where it was seen as an attractive ornamental. He talked about rashes on his own hands received from whacking away at the menace in his own backyard.

Then, suddenly, he leaned forward in his chair, turned toward the landlord with a menacing leer and pronounced, "Motion granted. Judgment for the plaintiff." So, client got her deposit money.

If a fact is commonly known, you can move the court to enter an order taking judicial notice of the fact - and then you need not struggle to prove the fact. It is a fact for all purposes throughout the remainder of the case!

Of course, like all other motions, the best way to make them is to write them on paper, file the original with the clerk, serve a copy on the opposing party, prepare a proposed order granting your motion, and set a hearing to argue your motion and get your proposed order signed.

How to Dodge a Lawsuit

Do you wan to dodge a lawsuit?

Whether you're a plaintiff or defendant, you must know what smart defendants do to dodge lawsuits. If a defendant is served with a complaint, he may dodge the lawsuit by filing motions to avoid filing an Answer! **This is called the "flurry of motions".**

Once a defendant files an Answer, he's locked in and misses this chance to dodge the lawsuit altogether. Don't file an Answer if you can dodge the lawsuit with a "flurry of motions". Inexperienced lawyers and pro se people make the avoidable mistake of filing an Answer to plaintiff's Complaint ... instead of using the flurry of motions.

- Motion to Dismiss
- Motion to Strike
- Motion for More Definite Statement

Each of these motions postpones the necessity of filing an Answer to the Complaint ... and gains you valuable time and evidence-gathering opportunities! In some cases it puts an end to the case. Period! Failure to use the Flurry of Motions weakens your case. Learn how to use the Flurry of Motions at How to Win in Court

4

How to PLEAD YOUR CASE

A lawsuit begins when the person bringing the suit files a complaint. This first step begins what is known as the pleadings stage of the suit. Pleadings are certain formal documents filed with the court that state the parties' basic positions. Common pre-trial pleadings include:

- Complaint (or petition or bill). Probably the most important pleading in a civil case, since by setting out the plaintiff's version of the facts and specifying the damages, it frames the issues of the case. It includes various counts - that is, distinct statements of the plaintiff's cause of action - highlighting the factual and legal basis of the suit.
- Answer. This statement by the defendant usually explains why the plaintiff should not prevail. It may also offer additional facts, or plead an excuse.
- Reply. Any party in the case may have to file a reply, which is an answer to new allegations raised in pleadings.
- Counterclaim. The defendant may file a counterclaim, which asserts that the plaintiff has injured the defendant in some way, and should pay damages. ("You're suing me? Well then, I'm suing you.") It may be filed separately or as part of the answer. If a counterclaim is filed, the plaintiff must be given the opportunity to respond by filing a reply.

Be Precise . Do not use legalese language you do not know . Do not make it too wordy. Keep it simple. (KISS) . The plaintiff's job is to state their case clearly. They state their cause of action , state liability and damages. You now MOVE THE COURT. If you dont move the court nothing happens. The pleadings frame the case. We say what the case is about . What we are going to prove. You can amend the pleadings , because you found out something you didn't know before . MOVE THE COURT to amend the pleadings if they have already answered. If they have not answered your pleadings you can keep amending up to court date .

If you need to prove a fact, example someone owns a vehicle. If he admits it , its for the record. Complaint is one page, a pleading. Make sure you have the right court, in your jurisdiction. State written agreement . Put in pleadings any facts that they will admit . Owning a car, doing some action. This way you dont need to prove it later . If person admits it , its there for all intent and purposes.You have used your pleading for DISCOVERY. If its CAUSE OF ACTION you want to put it in the pleadings. If they are going to deny it or not , you want to put it in the pleadings because it has to be there. If you dont want to go through the trouble of deposing someone , subpoeaing bank records for proof, as an example , then you go ahead and put that in the complaint. Try to make it one page. Judges are lazy and they dont like to read. You have to basically make is simple for them.

Pleadings are complaints, answers, affirmative defenses, and replies to defenses.

Pleadings state cases , they state causes of action , factual elements that support the causes of action. Thats what makes the case. The affirmative defense is a defense. Statue of limitations, paid with receipts. Pleadings establish the case. Make sure you frame the case appropriately. Trick a lawyer. Trying to prove something until most effective moment you are at trial. You make is so they cannot ammend their pleadings so they wont get relief. Dont tip them off. Wait till they move to trial.

Statutes

One of the biggest case-losing mistakes is mis-reading statutes. If you don't know what the law says, you'll have a devilishly hard time getting a judge to agree with you! Statutory language must be interpreted according to well-established "rules of statutory interpretation".

The rules of statutory interpretation are vital to winning your case. You need to know how courts interpret what the law makers meant when they wrote the law! Too many "assume" they know what a statute says, but the only opinion that counts is what controlling appellate courts say a statute says. Appellate courts apply rules of statutory interpretation. You must learn these rules ... if you want to win!

One of the biggest case-losing mistakes is mis-reading the law.

- Constitutions
- Rules
- Statutes
- Codes
- Court Rulings

You must never let a judge or opposing party or his lawyer to play games with words. Knowing these rules (more completely explained in my course) gives you the knowledge-power you need to put a stop to the word games! If a reasonable person would read "bicycle" to mean a two-wheeled vehicle powered only by legs and feet, no judge or lawyer should be allowed to stretch the meaning to include mopeds or motorcycles. Judges and lawyers should be compelled to agree that a law says "plainly" what it says and that it means it. Sometimes judges and lawyers twist words to reach an outcome they desire. YOU must know these rules so you can put a stop to it before it causes you to lose your case!

So? What if the meaning is plain but the context is confusing?

For example, according to the rule of "ejusdem generis" (simply Latin for "of the same type"), general terms at the end of specific lists include only things of the same type as those specifically mentioned in the list. If a provision lists "oranges, grapefruit, lemons, and other fruit", the doctrine of ejusdem generis limits the phrase "other fruit" to mean other citrus fruit. Apples and pears are not included. One may assume the provision includes other citrus, e.g., kumquats, limes, tangelos, etc. However, strawberries and grapes are not included. The term ejusdem generis means, in essence, of the same type.

Other Legal Documents

If you don't know what a law actually says, you'll have a difficult and hard time getting a judge to agree with you! For example, the primary rule of statutory interpretation statutes is the "Plain Meaning Rule". This rule requires judges to give words in the law their "plain meaning" - what an ordinary reasonable person would believe a word means in the context of the statute where it's found.

Judges should never be allowed to play games with lawmakers' words.

If a reasonable person would read "bicycle" to mean a two-wheeled engine-less vehicle powered only by legs and feet, no judge should allow a party to stretch the meaning to include mopeds or motorcycles. Judges should be compelled to agree that a law says "plainly" what it means and mean nothing more. But, sometimes judges and lawyers will twist the words to reach an outcome they desire. YOU must know how to handle these situations and put a stop to it before it causes you to lose your case!

5

MEMORANDUMS

In a short motion - MOTION TO DISMISS for failure to state a CAUSE OF ACTION , and you have a citation to a case or a citation to a statute, you dont need a separate MEMORANDUM , the MEMORANDUM is contained in your motion. Its a combination motion with MEMORANDUM as the argument. But if you have a complex motion, its better to write your motion - and write a separate MEMORANDUM in support for PLAINTIFF's motion for SUMMARY JUDGEMENT. Then you can write your cases , point by point. Have a nice outline, and submit it to the court. This way if it goes to trial it will be in the record. Regardless if the judge needs it or not. You write a MEMORANDUM, facts that relate to CAUSE OF ACTION, and law that applies to the causes of action. Keep it Simple. Come right to the point.

Cite cases, statutes, rules or constitutions. Many loose on constitutional rules. There are better ways to win case. Case law is better for judge. The 5th court has ruled like this before. Judicial notice is where you MOVE THE COURT to enter an order , on the record, finding that a certain thing is true. It has to be relevant to the case. You have to file a motion. You have to notice the other side. If its refering to some official document which is a treaty etc , you attach the official document to the motion with Judicial notice . If its a treaty he has to acknowledge it. Judicial notice makes judge rule on a treaty or another state treaty . Comparitive judicial notice. Always be preparing for an appeal. Answerable to higher up.

How do you keep your case from going to appeal? Always be prepared for an appeal. Have a court reporter, always make your record . Never get anything that is not admissable. Do your homework. The judge see's that your building your case. What do I have to send up to appellate court. Cant supoena the judge or court reporter. Approaching the bench. Tell the truth. Move the court. Tell him the law, talk about due process.

Understand Due Process. Everyone has power to make the court do something. Constitutions mean nothing , if you cant make a record, have a hearing , bring in evidence . Its not just the law, its Due Process. Show respect to the court , but also be prepared to threaten the judge if

you find that the judge is too friendly to the opposing counsel. Always have a court reporter present , and be prepared to recuse the judge if you find that the opponent is related with your opponent. Always be prepared to appeal.

"This court should XX because 4th district court of appeals in Jones vs Johnson 286.77 florida dca 1987 , then quote exactly as it appears. Support your own arguments. When you have an argument in writing its in the record. Its done , its in. "first the foregoing issue has not been ajudicated - no evidence has been presented to contradict PLAINTIFFs allegations with regard to the foregoing issue. You have not completed DISCOVERY." Cant get SUMMARY JUDGEMENT if DISCOVERY is still in motion. Direct quote from citation Epstein vs Guidance Corporation - giving the judge answers. Give him some cases. "Its a Reversable error to grant SUMMARY JUDGEMENT without DISCOVERY."

Prepare every pleading or memorandum as if your going to Appellate Court.

Cases above you that do rule in your favor. Caption , Title , Preamble, State the issues and state the argument and support the argument with citations and then theres a WHEREFORE CLAUSE.

I pray the court will Order - Deny the defendents motion. Do this and here are the cases and this is what they say. Copies of the cases. You can't argue cases on the fly, you need a copy before hand to read and understand them. If opposing cousel brings up citations and you were not give a copy, you can ask for a 10 minute recess to read the copy . Opposing the other sides motions is one reason to write a memorandum . Oppose their citations "Opposing counsel is trying to mislead this honorable court" by citing. Heres what they really say. Good for appellate court.

READING AUTHORITIES

Constitutions , Statutes and anotated statutes. Head notes of cases. Can look up case.

6

DISCOVERY

Law suites are won or lost on evidence. Not all facts are evidence. Many come up empty handed. They think that letter is going to come in as evidence. Anything not admissable is not evidence. If your opponent doesn't know what he is doing. Bring any kind of evidence. Judge is not to declare anything is not admissable. And if the judge brings up the not admissable, raise hell. Have that court reporter write down everything you say. Get right to the point of almost being thrown in jail. Stand up for your rights and say "Your honor , judges are not suppose to help one side or the other. And if you offer evidence and its not admissable and the other side doesn't object , its the other side's job to object not the judges. Keep him straight. The discovery tool is called a Request for Production. You can use it to get documents or things ... of all descriptions.

Requests for Production are simply papers requiring your opponent to produce documents and tangible things you list in your request ... so you can inspect them and copy them for your own use. Even though they're called "requests", they force your opponent to produce ... or go to jail.

Protect yourself from the crooked, deceitful hide-the-ball game lawyers play!

You can get your opponent's toothbrush or bank records, if they will help you win your case ... and either your opponent turns them over or you can send your opponent to jail!

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You can use it to get documents or things ... of all descriptions.

Requests for Production are simply papers requiring your opponent to produce documents and tangible things you list in your request ... so you can inspect them and copy them for your own use. Finding evidence was never easier! Even though they're called "requests", they force your opponent to produce ... or go to jail. Protect yourself from the crooked, deceitful hide-the-ball game lawyers play!

Five tools for DISCOVERY

- Request for Admissions
- Request for Production
- Interogatories - written questions. served back under oath.
- Depositions - person called to testify , usually accompanied by a Request for Production
- Court Authorities - supoenaes, right to go to someones business. Use mostly first three.

What ever will give you evidence for your case.

The Major Tools you will USE.

- Request for Admission - admit the truth of the following, and state fact
- Request for Production - get letters books,contracts ,
- Interogatories - simply questions , use them sparingly

Identify the person signing the interogatories , the signatures and name of the person who answered the interogatories. So why did you waste an interogatory to answer a question that you know he answered? You use them upfront and use them sparingly. Some used at the end , right before trial. There is nothing you cant get before trial. Get everything upfront , admissions, production of documents, interogatories . Affidavits are inadmissable. An affidavit is not a court statement made to PROVE A CASE as a matter of certainty. An affidavit is here say. Heresay is an out of court statement offered to prove the truth of a matter of certain. If you have an affidavit and the person who signed comes in to court , then he can say what the affidavit says is true, but that's his testimony. If the affidavit is not a witness, not a party, didn't get dipose, its heresay, its an out of court statement. Party's affidavit - subject to cross examined.

Documents speaking for themselves - Gov documents. Letter from Aunt or mechanic is not admissable, its heresay , it means you can cross examine the witness during trial. Rules of Evidence and Compelling Discovery - evidence - many attorneys file request for discoveries, file interogatories , file request for admissions and nobody answers. So they dont file a motion to compel or file a motion to compel but never set it for a hearing. So, they never get to the Discovery part of the pleadings. Part of getting Discovery is to compel.

Request for admission - true or false , yes no questions. Use them sparingly.
Request for production - vague , ambiguous, thats why you file motion to compel.
Be specific with dates. Court wont make them bring records from 1930's. Advantage of making them produce a record is that they can not object to it if its brought out in trial. Notice that complaint has to be numbered.

To slow down the court know which requests to answer. Defendant should ask for specific questions and answer specific question. PLAINTIFF's first request response to this particular request will make plaintiff ammend his pleading to be more specific.

As a defendent , second request should be to ask about the second request etc. "I want to know what documents are responsive to this request" . Instead of getting a box of documents.

If interogatories are lies then you can file a motion to show cause why they shouldn't be held in contempt of court . Other side will take Depositions at so and so office at so and so date. For DISCOVERY and for use in hearings or in trial. Set a number of hours, if they dont show up, then you file a motion why they shouldn't be held for contempt of court. If the court orders an order ordering them to show cause why they shouldn't be held in contempt of court and they dont show cause, Judge enters an order of contempt. Motion to show cause before Motion for contempt. You cant file a motion for contempt unless person was under a court order in the first place. Cause its not contempt to disobey me, but is contempt to disobey the court. Judge has to show cause, ok mother died, next week comes - motion for contempt. Now judge gives him more time, if not there, file affidavits, judge will order him to jail. Supoena power, just call attorney , defendent or opposing person to create a deposition. If he does not agree, then go to judge for deposition. judge will order a deposition. If unreasonable. Get an order. Supoena is just an order to appear. Judge or court can motion for contempt.

Pre-trial Conferences

Judges use pre-trial conferences with lawyers for many purposes. One type of conference gaining popularity is the status conference (sometimes called the early conference). This conference —held after all initial pleadings have been filed—helps the judge manage the case. Judges use it to establish a time frame for concluding all pre-trial activities and may set a tentative trial date at this

time.

In some jurisdictions, certain kinds of disputes—such as disagreements over child custody—must be referred to a third party that will try to facilitate a settlement. If the jurisdiction has such court-annexed alternative dispute resolution (for example, arbitration or mediation), the judge may refer the case to that program at this hearing. Arbitration involves submitting the dispute to a neutral third party who renders a decision after hearing arguments and reviewing evidence. It's generally quicker and less expensive than a full-fledged trial. In mediation, a third-party mediator who is neutral assists the parties to reach a negotiated settlement of their differences. The mediator uses a variety of techniques to help them come to agreement, but he or she is not empowered to decide the case. Both arbitration and mediation are typically private, so they have the added benefit of helping the parties avoid publicity.

In at least 28 states, court-annexed arbitration or mediation is automatic for many cases, for example, those under a certain dollar amount. Even though these cases must initially be sent to arbitration or mediation, sometimes the losing party in arbitration or mediation may appeal, which sends the case back into the court system.

Judges also use pre-trial conferences to encourage settling cases. At the conference, the judge and the lawyers can review the evidence and clarify the issues in dispute.

If a case hasn't been settled, many courts set a time for an issue conference. The lawyers usually appear at this hearing before a judge without their clients and try to agree on undisputed facts or points of law. Such agreements are called stipulations . The issue conference can shorten the actual trial time by determining points that don't need to be proved during the trial. If a settlement doesn't take place through pre-trial conferences, the judge sets a date for the trial.

State all rights to sue, plus all facts and law that control the outcome, if the facts and law can be proved. Answer the complaint, we answer one allegation at a time, admitting individual paragraphs. DISCOVERY can start at beginning, the complaint is part of where you start. Make some statements to admit or deny.

To begin preparing for trial, both sides engage in discovery . This is the formal process of exchanging information between the parties about the witnesses and evidence they'll present at trial.

Discovery enables the parties to know before the trial begins what evidence may be presented. It's designed to prevent "trial by ambush," where one side doesn't learn of the other side's evidence or witnesses until the trial, when there's no time to obtain answering evidence.

Your Deposition Powers

Your Deposition Power ... When, Why, What, and How ...

Slay your opponent with depositions! Happy Deposition But! Like other tools in your "Lawyer's Little Red Toolbox", depositions are best used:

- At the right time,
- For the right reason,
- In the right way!

A deposition is not a friendly coffee-klatch! It's not a "social event". Beware of sneaky lawyers, who try to turn the serious fact-finding business of deposition into a friendly "conversation". Do not allow it. When you see it begin, stop it immediately! Lawyers will try to lead deposition witnesses into a false sense of safety by seeming "friendly", asking questions about Aunt Suzy's recipe for butterscotch cookies or where Uncle Bill spent his vacation last year. This is not to get at facts but to trick the witness into "chatting", to get you and the witness off-guard so improper questions can be "popped" in while you day-dream about how many quarters you put in the parking meter outside. "I understand you're quite a golfer, Mr. Witness." Don't be duped. Your opponent's lawyer doesn't care a thing about the witness' golfing. He's on a fishing expedition. He's after something else.

One of the most common methods of discovery is to take depositions. A deposition is an out-of-court statement given under oath by any person involved in the case. It is to be used at trial or in preparation for trial. It may be in the form of a written transcript, a videotape, or both. In most states, either of the parties may take the deposition of the other party, or of any other witness. Both sides have the right to be present during oral depositions. Depositions enable a party to know in advance what a witness will say at the trial. Depositions can also be taken to obtain the testimony of important witnesses who can't appear during the trial. In that case, they're read into evidence at the trial. Often a witness's deposition will be taken by the opposing side and used to discredit the witness's testimony at trial if the trial testimony varies from the testimony taken during the

deposition. (A lawyer might ask a witness at trial, “Are you lying now or were you lying then?”)

Usually depositions consist of an oral examination, followed by cross-examination by the opposing side. In addition to taking depositions, either party may submit written questions, called interrogatories , to the other party and require that they be answered in writing under oath. If one party chooses to use an interrogatory, written questions are sent to the lawyer representing the other side, and that party has a period of time in which to answer.

Depositions are simply a chance to show people things and ask them questions while they are under oath ... and with an official court reporter making a written record.

The deponent (person being deposed) is exposed to criminal penalties for perjury.

Depositions are your opportunity to put your opponent and every necessary witness under oath before trial and get answers to questions that go beyond the tight restrictions of the rules of evidence that control at trial! However it's done, taking depositions is simply one of putting a witness under oath in the presence of a court reporter (who administers the oath and records all that's asked and answered) and in the presence of your opponent (and his counsel, if he has a lawyer) who may also ask questions of the witness.

Knowing how and when to take depositions gives you a major advantage over your opponent.

Slay your opponent with depositions!

Like other tools in your "Lawyer's Little Red Toolbox", depositions are best used:

- At the right time,
- For the right reason,
- In the right way!

A deposition is not a friendly coffee-klatch! It's not a "social event".

Beware of sneaky lawyers, who try to turn the serious fact-finding business of deposition into a friendly "conversation". Do not allow it.

Other methods of discovery include

- subpoenaing or requiring the other side to produce books, records or other documents for inspection (a subpoena is a written order issued by a court compelling a person to testify or produce certain physical evidence such as records);
- having the other side submit to a physical examination
- asking that a document be submitted for examination to determine if it is genuine.

Normally, dont take depositions untill you know what case is about. Most situations , you will get one shot at your opponent. Other side will file a motion for protective order, wont get to get deposition again. Only time before trial to speak . Save till just before trial. This way you can present it in case. Lawyers get paid to go to trial. If your the plaintiff and you dont have a lawyer, you can talk to the other side and go around the attorney. Elements have to be met for a lawsuit to proceed. Depositions are taken only after you have done the first three.

7

How you PROVE A CASE

Know What the Law Actually Says and Means!

One of the biggest case-losing mistakes is mis-reading the law.

- Constitutions
- Rules
- Statutes
- Codes
- Court Rulings
- Other Legal Documents

If you don't know what a law actually says, you'll have a devilishly hard time getting a judge to agree with you! Understanding the "rules of language interpretation" is essential ... not only to winning lawsuits but to obtain success in other pursuits of life as well.

Legal language must be interpreted according to the "rules of language interpretation".

Understanding the rules of language interpretation are vital to winning your case. You DO want to win, don't you? Too many otherwise clever people "assume" they know what a law says, when the only opinion that counts in court is what appellate justices say the law says.

Appellate justices apply the rules of language interpretation. You must also learn the rules ... if you want to win!

For example, one of the principles rules is the "Plain Meaning Rule". This rule requires judges to give words their "plain meaning", i.e., what an ordinary reasonable person would believe a word means in the context where it's found. You must never let a judge or opposing party or his lawyer to play games with words. Knowing these rules (more completely explained in my course) gives you the knowledge-power you need to put a stop to the word games!

If a reasonable person would read "bicycle" to mean a two-wheeled vehicle powered only by legs and feet, no judge or lawyer should be allowed to stretch the meaning to include mopeds or motorcycles. Judges and lawyers should be compelled to agree that a law says "plainly" what it says

and that it means it.

Sometimes judges and lawyers twist words to reach an outcome they desire. YOU must know these rules so you can put a stop to it before it causes you to lose your case! So? What if the meaning is plain but the context is confusing?

For example, according to the **rule of "ejusdem generis"** (simply Latin for "of the same type"), general terms at the end of specific lists include only things of the same type as those specifically mentioned in the list. If a provision lists "oranges, grapefruit, lemons, and other fruit", the doctrine of ejusdem generis limits the phrase "other fruit" to mean other citrus fruit. Apples and pears are not included. One may assume the provision includes other citrus, e.g., kumquats, limes, tangelos, etc. However, strawberries and grapes are not included. The term ejusdem generis means, in essence, of the same type.

Facts & Law

The key here is to get to the truth. The truth may never be known so facts may only be your version. Not every case is winnable. Not every wrong has a remedy. This is where witnesses , contracts , journals, receipts ,books , bank records, etc. Everything comes from your previous motions, discovery & interogatories.

Liability and Damages - Do we have the facts ? Do we have the law? What do we have to prove? We have to prove that the other side is legally liable for our damages, and prove that we were damaged as a direct and proximate result.

Who proximately caused the damages? The Court wants to know proximate causation. Who is responsible? You have to prove if in fact a person was hurt and prove who is liable. Every CAUSE OF ACTION arises because someone had a duty that the law recognizes and they breached and as a result , someone breached it. There also has to be a proximate, or a close relationship between the causation and the damages.

Know the Law do your RESEARCH

If facts are true, know the law and statutes. Legal research includes cases, statutes, rules and constitutions. Thats your research. Use the Law library. Its important that you cite the law

correctly.

Blue Book - contains cases. Always have a copy of the case for the judge and to the opposing party. Winning by ambush days are over, make copies of everything to opposing party. Always helping judge - 4th district court said this etc. Control the judge with "legal authority" by researching and citing appellate court opinions. Controlling judges is what wins cases! Your opponent will cite legal authorities. You must do the same ... if you want to win.

8

How to MOVE THE COURT

- Set the Motion for hearing - Schedule a hearing , go to hearing
- Present the facts and the law
- Prove Liability and damages
- The judge rules

Dont ask or beg. Not about persuasive speech. Make the court move. You have the rules, you cited the statutes, cited the facts. Judge will have to move the court. If judge doesnt like you , you instruct the court what to do. Before you move court, court has no responsibility to move anything. He can deny or grant the motion but he cant do nothing. You set it for hearing.

Go to hearing " Yes sir, Im here on a motion to compel DISCOVERY under rule 1.380 , Im entitled to sanctions . He didnt answer within the time it was necessary to answer the questions. All the requests were made seeking to inquire into the facts that will lead to admissable evidence and case law is such and such Jones vs Johnson 486. defendent had 30 days to answer . Judge cant grant or deny the motion. Judge has to do something. Your honor for a moment, Your order is he has to produce these records. Always have a court reporter there , or if there is one , make sure you get a certified copy of whats said or pleadings. What ever it takes. If judge refuses file a petition of mandamus to a higher court. Sooner or later he will sign it. Orders are real simple.
Make sure you say " I MOVE THE COURT"

If your the defendent , dont MOVE THE COURT. Let it sit there if someone has sued you for damages. Court doesn't move my itself. If PLAINTIFF' files the motion don't you go and set it for hearing. In some states if it goes for one year without any movement , defendent can file a move to have it dismissed for failure to prosecute, then its over with. If its your case , file your motion, attach your notice of hearing. take depositions, do DISCOVERY. Dont expect the judge to do anything. Then get Judgement.

If you are looking for Judicial Remedy, there are two kinds of remedy

- Equitable remedy - damages - injunction - court orders someone to do something
- Money Damages - Remedy at Law

If you do not state all the elements , you will have your case dismissed.

Offers of Proof in Court

If you start to offer evidence and, before you can get it before the court, the other side objects and the judge sustains your opponent's objection, you must move the court to allow you to make clear on the record what your evidence was going to be and what it would tend to prove!

This is making an offer of proof.

Expect your opponent to try to stop you.

Be prepared to make an offer of proof immediately ... or risk losing needlessly!

An offer of proof shows the court on the record:

- What the offered evidence is and
- What the evidence tends to prove

Failure to get evidence admitted is fatal! If you don't get your evidence admitted and don't make an offer of proof, you'll have nothing to appeal if you lose!

If you don't make an offer of proof, the record will not show the appellate court what the evidence would have been. There'll be nothing in the record for the appellate court to review! Appellate courts will not examine evidence that wasn't made part of the record at the trial level.

You can't introduce evidence for the first time on appeal.

9

Jurisdiction and Venue

The plaintiff must decide where to file the case. A court has no authority to decide a case unless it has jurisdiction over the person or property involved. To have jurisdiction, a court must have authority over the subject matter of the case and the court must be able to exercise control over the defendant, or the property involved must be located in the area under the court's control. The extent of the court's control over persons and property is set by law.

Certain actions are transitory . They can be brought wherever the defendant may be found and served with a summons, and where the jurisdiction has sufficient contact with one of the parties and the incident that gave rise to the suit. An example would be a lawsuit against a business--it would probably be sufficient to file suit in any county in which the business has an operation, and not necessary to file suit in the county where it its headquartered.

Other actions - such as foreclosing on a piece of property - are local. They can be brought only in the county where the subject of the suit is located.

Venue refers to the county or district within a state or the U.S. where the lawsuit is to be tried. The venue of a lawsuit is set by statute, but it can sometimes be changed to another county or district. For example, if a case has received widespread pre-trial publicity, one of the parties may make a motion (request to the judge) for C**hange of Venue** in an effort to secure jurors who haven't already formed an opinion about the case. Venue also may be changed for the convenience of witnesses.

10

Preparing for Hearings or Trial

Most court cases can be won before trial.

All you need to know is how to use a handful of tools effectively.

- Proper pleadings.
- Evidence discovery tools.
- Motions and memoranda.
- Courtroom objections.

Pleadings frame the case and tell the court what the fight is about.

Evidence proves the facts alleged.

Motions "move" the court to act.

Courtroom objections put the judge on notice he will be appealed if he rules against you!

11

Offensive Strategies

There are three very good tools for getting the evidence you need to protect or attack your opponent. Evidence is what helps you win cases.

1. One way to find evidence is with **Interrogatories**. Interogatories are just written questions that must be answered under oath ... or someone goes to jail! For example, one interrogatory used is to serve on the opponents reads, "Identify all persons having first-hand knowledge of any material fact alleged in the pleadings of this case and, with regard to each such person, state what they know about each such fact and how they came to know it." No matter who is trying to hide it!

Rule 26(b) Federal Rules of Civil Procedure provides, "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense â€" including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action."

2. **Request for Admissions** for finding evidence. A request for admissions is simply a list of facts you serve on your opponent that he is required to answer within a set amount of time or have those things treated as admitted! Requests for Admissions are POWERFUL! If you know how to use them tactically. Requests for admissions are like leading questions! They can find evidence your opponent is trying to hide. They can turn your opponent inside-out! Don't be hoodwinked by lack of legal knowledge. None of what you need to win is rocket science! Don't let lawyers trick you!
You have a God-given right to find the evidence you need to win. You can get your opponent's toothbrush or bank records, if they will help you win your case ... and either your opponent turns them over or you can send your opponent to jail!

3. The last discovery tool is called a **Request for Production**. You can use it to get documents or things ... of all descriptions. Requests for Production are simply papers requiring your

opponent to produce documents and tangible things you list in your request ... so you can inspect them and copy them for your own use. Even though they're called "requests", they force your opponent to produce ... or go to jail. Protect yourself from the crooked, deceitful hide-the-ball game lawyers play!

Creating a complaint is very simple ,just make sure your in the right court. Tell the judge why the court has subject matter jurisdiction. Then the general factual allegations and compensation . For small claims court , normally an under $5000 lawsuit, you are not going to say "this is an action for money damages in excess of $15,000". If it isnt, then this court has no jurisdiction, and defendent can bring MOTION TO DISMISS. Next allege the facts. Only one CAUSE OF ACTION, state PLAINTIFF and defendent . Contract is attached. defendent breached contract etc. State facts that support elements. You have to state ultimate facts. Something like " We had written agreement." . Show that you complied with your side of the contract. Next put how the defendent failed to comply on their part , and how you suffered damages. Next is the WHEREFORE CLAUSE that tells the judge what the Plaintiff wants. Money damages against defendent , where such further relief this court seems reasonable under the circumstances. Judge might decide not to give you interest, but make sure you add that amount.

For a multi-count complaint enter facts that support multiple counts. Example , you entered into a verbal agreement. List each count separately.

Ex parte orders can be issued without anyone but the plaintiff. They only last for a short time , typically 10 - 14 days . After that , the party who asked for the Ex parte order has to go back to court and prove that there are grounds for a permanent order.

The Use of Judicial Notice Motions

Why struggle to prove obvious facts?

Every court (state or federal) provides an easy way to prove obvious facts. The method is called "Judicial Notice". And, you should do it whenever you can. Make your opponents' legal bullets bounce harmlessly off your educated chest by moving the court to take judicial notice of obvious facts. Don't spend valuable court energy trying to prove what the court must admit when you move it to do so. Once the court takes judicial notice of a fact, the court's order settles the issue for all

purposes.

Here's a story of a simple use of Judicial Notice cases:

A Pro Se student went to try to recover a security deposit from her former landlord, who claimed she owed him for cutting down a tree. The tree was a Brazilian Pepper tree, a nuisance plant here in Florida, related to poison ivy, poison oak, and poison sumac. She didn't spin her wheels trying to prove that tree was worthless. She said, "Your honor, I move the court for an order taking judicial notice that Brazilian Pepper trees have been deemed a nuisance plant in Florida and therefore have no commercial value to justify this landlord's witholding my client's security deposit."

The judge smiled, pleased at the opportunity to tell us what he knew of this pesky bush. He leaned back in his leather-backed chair and put his hands behind his head as if he were going to tell a story to his grandchildren. He talked about those nasty trees for at least 10 minutes, detailing problems he and his family had and reciting concern officials have with the invasion of this plant from Argentina where it was seen as an attractive ornamental. He talked about rashes he received on his own hands after whacking away at one of the menace trees in his own backyard.

Suddenly, he leaned forward, turned toward the landlord, pronounced, "Motion granted. Judgment for the plaintiff." She got her deposit money.

If a fact is commonly known, move the court to take judicial notice.

12

Defensive Strategies

Avoiding the Answer

Most lawyers will file a motion to get out of answering a question, even if its legitimate or not. We want to MOVE THE COURT to enter an order to MOTION TO DISMISS ? No , we are moving the court to enter an order dismissing the complaint for failure to State the CAUSE OF ACTION.

You want to dodge the lawsuit with a "flurry of motions". Once a defendant files an Answer, he's locked in and misses this chance to dodge the lawsuit altogether. Don't file an Answer if you can dodge the lawsuit with a "flurry of motions". Inexperienced lawyers and pro se people make the avoidable mistake of filing an Answer to plaintiff's Complaint ... instead of using the flurry of motions.

- MOTION TO DISMISS the complaint
- Failure to state a CAUSE OF ACTION
- Failure to join an indispensible party
- Lack of infersodum jurisdiction
- Lack of subject matter jurisdiction
- Motion to Strike
- MOTION TO DISMISS
- Motion for more definate statement
- If your really innocent NEVER ACCEPT A PLEA DEAL

Each of these motions postpones the necessity of filing an Answer to the Complaint ... and gains you valuable time and evidence-gathering opportunities! In some cases it puts an end to the case. Period! Failure to use the Flurry of Motions weakens your case. MOVE THE COURT to enter the order dismissing the complaint. Motion denied, you have to ask judge why, because you did not give him the case .

Rules , Statues, Constitutions , Cases, sometimes public policy will strengthen you case. Give the judge the case to make it easier .

"Wherefore I ask you to do motion to strike persuant to the rules xxx."

To dismiss for failure to state CAUSE OF ACTION , has no bearing on the case.

Attach a copy of the case. Set it for hearing. Argue about if its stricken from the jury.

20 days to file .

If you dont want to answer complaint , file on 19th day. Your statement should contain no verbs, be

vague and ambiguous. Defendent can not reasonably be required to frame a responsive pleading. cite rule to state the complaint more definately or in the alternatively to be dismissed.
Three ways to get out of answering. Restate the complaint. Most have to pay. Savvy businessman finds out that attorney has to rewrite.

Answering, there is no need to admit if any part of that particular paragraph is false. Only way to help opposing counsel is if you admit. So whenever you can deny in true honest truth you should deny. And whenever you can say , you have no idea what he is talking about , you can say "without knowledge". You dont have to explain it. Judges dont read responses. This is only done when it comes time to trial. This is when you framed you pleadings. Lots of complaints come to judge but judge will never see it. Keep pleadings simple - state your causes of action , dont explain when you answer , admit or deny or without knowledge . Use an affirmative defense everytime when you can . Bring up all statues , statues of fraud , statues of limitations, whatever your defense is. I wasn't there. Make that an affirmative defense. Bring in other people. Co-defendent , file counter-claim, cross claims. Third party complaints. Dont help the other guy. Dont admit anything. KISS , dont add anymore than what is necessary. Go through each count. Dont say anymore . Answer and counter-claim. Add lawsuit to an answer. Plaintiff failed to pay. Dont make it complicated.
Cross claim - within answer you have lawsuit against C defendent. They shared responsibility.
Third Party complaint. Affirmative defense. You have to respond.

For a bail bond you only need to come up with 10%, they post the bail, and you get out. When you appear in court, the bond is released. If bail is too high for you to afford, at the arraignment , which typically happens within 48 hours, make a motion to the court for a bond reduction to lower the amount of bail. Cite that you are not a flight risk due to living in same home for x amount of years, or never been in trouble before, still live with parents , most likely you will get out on a personal recognizance bond.
Plea Deals . Since it usually cost the court system lots of money to take your case to trial expect multiple plea deals. If your truly innocent it will be very difficult to prove you guilty.
If your guilty there is still one last hope : Deferred adjudication
Deferred adjudication is a form of plea deal available in various jurisdictions, where a defendant pleads "guilty" or "No Contest" to criminal charges in exchange for meeting certain requirements laid out by the court within an allotted period of time also ordered by the court. Upon completion of the requirements, which may include probation, treatment, community service, some form of community supervision, or some other diversion program, the defendant may avoid a formal conviction on their record or have their case dismissed.[1] In some cases, an order of *non-disclosure* can be obtained, and sometimes a record can be expunged. Anyone offered Deferred Adjudication in exchange for a guilty plea should first consult their attorney regarding the exact consequences of doing so. In all jurisdictions, the case itself that resulted in the Deferred

Adjudication remains in the record permanently, though what effect this has and how the record can be discovered or disclosed varies. For example, the record always remains visible to law enforcement and some high-level government background checks, but some states allow for the record to be rendered inaccessible to the public or private-sector background checks.

The Difference between the 5th and 6th Amendment Right to Counsel

Both the Fifth and Sixth Amendments to the U.S. Constitution involve the right to counsel. While sometimes overlapping, there are several differences between these rights.

The Fifth Amendment right to counsel was recognized as part of Miranda v. Arizona and refers to the right to counsel during a custodial interrogation; the Sixth Amendment ensures the right to effective assistance of counsel during the critical stages of a criminal prosecution.

Under the Fifth Amendment, a person must be given Miranda warnings, including informing the suspect of their right to an attorney, before a custodial interrogation by a government agent. If an individual is not warned of his or her Miranda rights, any information gained through an interrogation is inadmissible in court. Miranda warnings were put in place to allow a suspect to consult with an attorney before a custodial interrogation, even though the suspect may not have been formally arrested. The definition of "in custody" can be quite confusing with the United States Supreme Court finding that in prison does not necessarily mean "in custody" for Miranda purposes.

Under the Sixth Amendment, an individual facing criminal charges is entitled to the effective assistance of counsel. The right to an attorney under the Sixth Amendment is triggered once criminal proceedings begin against an individual. Criminal proceedings are initiated through a formal charge, preliminary hearing, information, indictment, or arraignment.

Arrest does not necessarily mean the beginning of criminal proceedings if the suspect is not formally charged, and therefore does not always trigger Sixth Amendment protections. The Sixth Amendment right to assistance of counsel applies to all "critical stages" in a criminal proceeding. The Supreme Court has held that critical stages include arraignment, post indictment line-ups, post indictment interrogation, plea negotiations, and entering a plea of guilty.

There are several differences between these two rights. While the Fifth Amendment right to counsel may apply before a person has been arrested, the Sixth Amendment right to counsel does not attach until after criminal proceedings have begun against an individual.

In contrast to the Fifth Amendment right to an attorney, the Sixth Amendment right to counsel is offense-specific, meaning that once invoked, the Fifth Amendment right to an attorney forbids police to question a suspect on any matter until the suspect has a chance to speak to an attorney. On the other hand, under the Sixth amendment right to counsel, the suspect is entitled to have their attorney present at interrogations and proceedings involving the specific offense, but police may question the suspect on unrelated matters outside the presence of their attorney which was the basis for the aforementioned United States Supreme Court ruling that being in jail or prison does not mean “in custody” for Miranda. (25)
"You have the right to remain silent."

Any devotee of TV crime dramas or police procedural shows hears the phrase regularly. But new court decisions in recent years have chipped away at that principle.

Take the case of California resident Richard Tom. In 2007, he broadsided a car, injuring a girl and killing her sister. At the accident scene, he asked to go home but was told no. He wasn't handcuffed, but police held him in the back of a police car. At no point did he ask the police about the victims. During his trial for vehicular manslaughter, prosecutor Shin-Mee Chang told the jury that Tom's failure to ask about them pointed to the "consciousness of his own guilt."

"His complete lack of concern for the occupants of the car that he had just broadsided was one factor that showed his indifference to the consequences of his reckless driving that night," Chang says.

But didn't Tom have the right to remain silent — to not ask about the victims? For decades, television shows like Columbo and the Law and Order series have told us: "You have the right to remain silent. Anything you say can and will be used against you in a court of law."

But the truth is, it's not that simple. Courts have found that suspects don't have to be read their rights upon arrest, but only right before they are interrogated. And there can be a long lag time between the two.

In the case of Richard Tom, for example, he was in custody for two hours before he was read his rights. Earlier this year, the California Supreme Court ruled in Tom's case, and said his silence at the scene of the accident could be used against him.
Related NPR Stories
High Court: Speak Up If You Want To Remain Silent June 1, 2010

Obama Rethinking 'Miranda' Rights May 11, 2010

"The California Supreme Court has left us in a no-win situation, where as soon as you are arrested the prosecutor can use anything you say [and] anything you don't say against you," says Marc Zilversmit, Tom's attorney.

The U.S. Supreme Court issued a similar decision in 2013, in a case involving a suspect's silence prior to arrest. In that case, the suspect voluntarily answered police questions for nearly two hours but refused to talk in depth about a gun found in his house. The prosecutor used that against him at trial.

"Most people assume that if you have a right and you exercise it, that's all you need to do," says Stanford law professor Jeff Fisher.

Fisher says the courts' rulings set a trap for the unwary. The courts said the only exception is if defendants expressly tell police they are invoking their Fifth Amendment rights. Fisher says the rulings affect every kind of criminal case, including white-collar investigations where suspects are often questioned at length before being arrested. (26)

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Common traps.

Do you hold winning cards (law and facts)?

Then you can win *before* trial!

1. There is *no* evidence you cannot get in *before* trial.
2. There are no witnesses you cannot question under oath *before* trial.
3. There are no documents or things you cannot get in *before* trial.
4. There are no legal arguments you cannot make *before* trial.
5. There is nothing going to happen *at* trial that cannot be made to happen *before* trial.

The "trying" of your case with the first pleading and continues with discovery and motions *before* trial.

Common reasons cases go to trial are*:*

1. Lazy lawyer who didn't do the pre-trial work he *could* have done.
2. Stupid lawyer who didn't know how to do the pre-trial work he *could* have done.
3. Greedy lawyer who didn't want to do the pre-trial work he *could* have done.
4. No lawyer and no idea how to do the pre-trial work that *could* have been done.

The failed authentication letter. How do you know its authenticated.? The affidavit is heresay. Objection your honor its heresay.
If person can be cross-examined its authenticated. Telephone court records. Make them bring the records. Chain of custody for records. Your case can just disappear. Its heresay. When to object. When you have a basis. You didnt preserve your record. You didnt object for heresay. If you want appelate court to honor your objection you need to cite the rule. Rule XXX. What was the basis of the objection. Judicial Notice, a fact is a fact. Making the Judge Notice authority. Dont overuse it. Judges dont like it.
Simplyfing The evidence rule - admissability. Credibility, Reliability, Relevance (affects the outcome), Not relevant. Has to be relevant to the case. Objection your honor its irrelevant. Objection sustained.
Child testimony - not reliable. Relevance and Reliability , Credibility , Competence, Privilege, relevant but wont come in if its privilege. If its prejudicial - cant be used. photos , object on basis that its inflamatory and undooly prejudice the court . Not privileged but prejudicial.
Presumes, never had a will 3 days before she dies , leaves everything to relative. Carpenter presumption. Undue influence. Jury is allowed to presume the undo influence. Evidence in a nutshell. Attorney Client privilege. Who owns attorney client privilege. Client owns privileged.

Spousal privilege. Evidence , inconsistent prior statement.

Threaten appeal!

Repeat internet legal mythology, demand to see his oath of office, challenge his jurisdiction based on the color of the fringe on the courtroom flag, and you'll get absolutely nowhere!

Cite appellate court opinions that agree with you and what you want ... and threaten appeal if the judge doesn't agree with those appellate court opinions!

It's stupid to march into court demanding one's "Constitutional Rights", expecting the judge to admit your evidence, deny evidence and tricks presented by your opponent, and award judgment in your favor. It just doesn't work that way!

Make it clear that you will win on appeal if the judge rules against you!

Know What the Law Actually Says and Means!

One of the biggest case-losing mistakes is mis-reading the law.

- Constitutions
- Rules
- Statutes
- Codes
- Court Rulings
- Other Legal Documents

Understanding the "rules of language interpretation" is essential ... not only to winning lawsuits but to obtain success in other pursuits of life as well. Legal language must be interpreted according to the "rules of language interpretation". Understanding the rules of language interpretation are vital to winning your case. Too many otherwise clever people "assume" they know what a law says, when the only opinion that counts in court is what appellate justices say the law says. You must never let a judge or opposing party or his lawyer to play games with words. Knowing these rules (more completely explained in my course) gives you the knowledge-power you need to put a stop to the word games!

Sometimes judges and lawyers twist words to reach an outcome they desire. YOU must know these rules so you can put a stop to it before it causes you to lose your case!

14

Essential Court Room Objections

Essential Objections Checklist

A quick-reference list for your trial notebook.

By Leonard Bucklin

Excerpted from Building Trial Notebooks

There are only a couple dozen common evidence objections that are likely to be used in most trials. Every experienced civil trial lawyer hears them over and over. There are a number of other objections that can be made. Some evidence texts give lists of 150 or more. But for all practical purposes, there are only the basic two dozen that you need to remember with unqualified certainty and sure familiarity. Put a copy of this "Form: Objections Checklist" in your trial notebook behind Tab 16, "Law."

WARNING. Most objections are not allowed to be made during depositions. For the much shorter list of valid or invalid objections during depositions refer to the discussion in §40.3 of this book.

Following this alphabetical listing is a short discussion, in order, of each of the objections, in the format of (1) a form statement of the individual objection, (2) a short discussion for quick reference, and then (3) a form response to the objection.

The Basic Two Dozen: Quick alphabetical list for reference and refreshment.

1. Admitted.
2. Argumentative.
3. Assumes facts not in evidence.
4. Best evidence rule.
5. Beyond the scope of direct / cross / redirect examination.
6. Completeness.
7. Compound question / double question.
8. Confusing / vague / ambiguous.
9. Counsel is testifying.
10. Form.
11. Foundation.
12. Hearsay (rules 801, 802, 803 and 804).
13. Improper impeachment.
14. Incompetent.
15. Lack of personal knowledge.
16. Leading.
17. Misstates evidence / misquotes witness / improper characterization of evidence.
18. Narrative.
19. Opinion (rules 701 and 702).

20. Pretrial ruling.
21. Privileged communication.
22. Public policy.
23. Rule 403 (undue waste of time or undue prejudice/immaterial/irrelevant/ repetitive / asked and answered / cumulative / surprise).
24. Speculative.

Admitted.

"OBJECTION: Your Honor, the matter already has been admitted by a stipulation which is in the record [or already has been established by the court's order]. Under Rule 403 we do not need to waste time on something that does not have to be decided."

DISCUSSION: If a matter has been admitted, it does not need to be the subject of any testimony or evidence to be considered as true. The mechanics of getting the item considered by the trier of fact depends on whether it is a bench or jury trial. If the trial is to the court, simply draw the judge's attention to the admission as being a part of the record in the case. If the trial is to the jury, formally move the court to instruct the jury that the fact is to be taken as being a part of the evidence.

Sometimes a party may wish to avoid having evidence with a strong emotional appeal brought before the jury and may agree to a fact to avoid the troubling evidence. Thus, for example, a defendant driver might admit that he was under the influence of intoxicating beverages to avoid the jury viewing a police videotape showing his DUI arrest and his woeful condition or his combativeness at the scene. Once having admitted the fact, the party will want to object to evidence of the fact to prevent the emphasis of the fact or the emotional component of the evidence of the fact.

The objection that "it already has been admitted" is not a valid objection *in itself*. Under Federal Rule 402 all relevant evidence is admissible, even though it is undisputed. The objection of "admitted" is correctly an objection under Rule 403 for the court to exclude relevant testimony or exhibits as needlessly cumulative and therefore as a waste of time. Rule 403 should be mentioned if you are doing the objecting.

"The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute."

Advisory Committee's Notes on Fed. Rules Evid., Rule 401.

If your adversary is making the "admitted" objection, show the judge the following language from *United States v. Grassi*:

"In *Parr v. United States*, 255 F.2d 86, 88, cert. denied, 358 U.S. 824 (1958), we held that, as a general rule, a party may not preclude his adversary's proof by an admission or offer to stipulate." ... A piece of evidence can have probative value even in the event of an offer to stipulate to the issue on which the evidence is offered. A cold stipulation can deprive a party "of the legitimate moral force of his evidence," 9 *Wigmore on Evidence* §2591 at 589 (3rd ed. 1940), and can never fully substitute for tangible, physical evidence or the testimony of witnesses. In most cases, a party has the right "to present to the jury a picture of the events relied upon." *Parr, supra*, 255 F.2d at 88."

United States v. Grassi, 602 F.2d 1192 (5th Cir. 1979), *vacated and remanded on other grounds*, 448 U.S. 902 (1980).

RESPONSE: "Your Honor, under Evidence Rule 402, we have a right to present undisputed evidence, even though adverse counsel does not want it in the case. Does the Court wish us to approach the bench and show the court an excellent citation on the point?"

Argumentative.

"OBJECTION: Your Honor, the question is argumentative; counsel is arguing with the witness instead of asking for facts."

DISCUSSION: Argumentative questions, when directed to an adverse witness, frequently are not recognized by counsel or even the court. If the same question were directed to the examiner's friendly witness, it would be recognized as leading and not calling for any facts from the witness. Addressed to an adverse witness, a question is argumentative if it does not call for new facts, and merely asks the witness to agree or disagree with a conclusion drawn by the examiner from proved or assumed facts. See *Mattfeld v. Nester*, 32 NW2d 291 (Minn. 1948). Argumentative questions may be proper if directed to an adverse party, as an attempt to secure a judicial admission contrary to the position of the party. Argumentative questions also may be proper if an opinion has been given by the witness. Then counsel may properly state different facts than those used by the witness in forming his/her opinion and inquire if a different conclusionary opinion is correct. Allowance of argumentative objections, like all the other objections within the rubric of "objection as to form" (which see, below) is within the discretion of the trial judge.

RESPONSE: "Your Honor, I am testing the testimony of this witness."

Assumes fact not in evidence.

"OBJECTION: Your Honor, the question assumes facts not in evidence. We are here to ask for facts from the witnesses, not assume that a fact exists."

DISCUSSION: The facts which are not in evidence cannot be used as the basis of a question, unless the court allows the question "subject to later connecting up." A court in the interest of good administration and usage of time may allow the missing facts to be brought in later.

RESPONSE: "Your Honor, we will have those facts later in the case, but this witness is here now and it is the best use of time to ask that question now."

Best evidence rule.

"OBJECTION: Your Honor, this is not the best evidence. The original document is the best evidence."

DISCUSSION: There are three aspects to the "Best Evidence Rule." The first aspect is the one most often invoked today: ordinarily a non-expert witness is not allowed to describe what is in a document without the document itself being introduced into evidence. Put the document into evidence first, then have the lay witness talk about what is in it.

The second aspect is requiring the original document to be introduced into evidence instead of a copy — if the original is available. The original is not available if a search for it did not find the original, or if it is in the hands of an adversary, or it is beyond the jurisdiction of the court to subpoena. Requiring the original document (the best evidence) to be available for examination insures that nothing has been altered in any way. The best evidence rule arose during the past centuries when a copy was made by hand, often by persons not trained to be careful and often not exact as to each word. Parties and courts sensibly assumed that, if the original was not produced, there was a good chance of a scrivener's error (or fraud if the copy were handwritten by a party to the litigation). Now that "copy" usually means a photocopy, or an automatic printout of electronic data entries, the chance of a copy containing a mechanical error is slight. Courts are reluctant to require needless effort to find the original if there is no dispute about the fairness and adequacy of a photocopy. The court has discretion to allow a copy to be used instead of the original.

Fed. Rules Evid., Rule 1001, 1002, 1003, and similar state evidence code provisions allow the use of mechanically produced duplicates unless a party has raised a genuine question about the accuracy of the copy or can show that its use would be unfair. However, there is always a danger of a judge requiring the original of a document, so you must be ready to produce originals of any documents involved in your case or to produce evidence of why you can't.

The third aspect of the best evidence rule is that in past centuries, compilations of documents only involved a few documents. Hence, at one time, the original documents had to be offered into

evidence, not someone's summarization of the decrements. Today, compilations or summaries of voluminous records (typical in printouts of individual entries of electronic entries in the format of a report of all the entries) present the problem of perhaps thousands of documents or data entries to be considered by the trier of fact. Modern evidence law has solved the problem by providing that:

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

Fed. Rules Evid., Rule 1006.

RESPONSE: Dependent on the aspect of the Best Evidence rule involved in the objection: [Offer the document into evidence] ["Your Honor, this is admissible as a copy under Evidence Rule 1003"] ["Your Honor, this is a summary admissible under Evidence Rule 1006"].

Beyond the scope of (direct, cross, redirect) examination.

"OBJECTION: Your Honor, this question is beyond the scope of the direct examination (cross-examination)."

DISCUSSION: Although the court has discretion to allow it, ordinarily the scope of a cross-examination cannot exceed the scope of the direct examination. Likewise, redirect examination ordinarily cannot exceed the scope of the cross-examination. The purpose for restricting an examination to the scope of the opponent's last previous examination is to prevent an ever-enlarging and never-ending scope of testimony.

The dictionary meaning of "scope" is "the area covered by a given activity or subject." Therefore, how you define the "scope of the examination" is important in making the objection or in responding to it. For example, an objector may be better off to define the scope of direct examination as "events on January 6th," instead of "why and how the accident happened."

In the testimony of an expert, the scope of what is within the direct examination is not limited to the exact items the expert talked about. Because the expert is an expert in an entire field and is there to explain items in the field of endeavor, the scope of direct is usually understood to be everything in the expert's field of knowledge that bears on the case in issue. Thus the cross-examination can delve into other aspects of the case, including asking questions to confirm parts of the examiner's own case.

RESPONSE: "Your Honor, this is within the scope of the direct examination (cross-examination) because [explain]."

Completeness.

"OBJECTION: Your Honor, we object to counsel only introducing part of the writing (conversation/act/declaration). Under the evidence rule providing for completeness, we move to introduce additional parts now.

DISCUSSION:

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 contemporaneously with it.

Fed. Rules Evid., Rule 106. [Emphasis supplied.]

Rule 106 is an expression of what Wigmore termed "the rules of completeness." VII *Wigmore on Evidence* 2094, et seq. (3d ed. 1940). The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repairing an adverse jury impression if delayed to a point later in the trial. See *McCormick on Evidence* §56. Many states have rules similar to the federal Rule 106. The longer Texas rule is given below for an example.

When part of an act, declaration, conversation, writing or recorded statement is given in evidence

by one party, the whole on the same subject may be inquired into by the other, and any other act, declaration, writing or recorded statement which is necessary to make it fully understood or to explain the same may also be given in evidence, as when a letter is read, all letters on the same subject between the same parties may be given. Writing or recorded statement includes depositions.

Texas Rules Evid., Rule 107.

This is a good example of how federal and state rules differ. Notice the federal rule is limited to writings and recorded statements and does not apply to conversations; the Texas rule, given as an example above, goes on to add physical acts, oral declarations by one person, and conversations. Cf., *Minnesota Rules Evid*., Rule 107, Comment ("the rule is not intended to apply to conversations"). The Texas rule adds provisions that prevents arguments (which you might want to make in other states) about, whether a deposition is a writing or record statement or something else; or, whether a letter written 10 years earlier by the opposite party to the correspondence can be introduced.

The federal rule, but not all state rules, makes it mandatory for the trial court to allow objecting counsel to put their portions into evidence at the same time. The federal rule of completeness allows you to interrupt the adversary's presentation of evidence and introduce part of your own. In practice, this rule of completeness arises most often when an opposing attorney reads part of a deposition into evidence, or introduces only portions of a document. The rule of completeness does not in any way require you to introduce the other portions when your opposition does; instead you may chose to develop the matter on cross-examination or as part of your own case, which may well be preferable.

RESPONSE: "Your Honor, of course when I finish reading this into the record, counsel can read whatever else she feels relevant to add."

Compound question; double question.

"OBJECTION: Your Honor, this is a double question. If the witness answers, it will be confusing as to which part of the question is being answered."

DISCUSSION: A compound question asks two or more separate questions within the framework of a single question. The objection is generally reserved for situations where, if the witness answers "yes" or "no," it will be confusing as to which part of the question is being answered. It is one of those objections that falls within the rubric of the "objection as to form" (discussed below).

RESPONSE: Separate the question into the two parts.

Confusing / vague / misleading / ambiguous.

"OBJECTION: Your Honor, the question is ambiguous. The witness may not know with certainty what is being asked, and we may not know with certainty what the answer tells us."

DISCUSSION: Confusing / vague / misleading / ambiguous are all words that convey the objection that the question is not posed in a clear and precise manner so that the witness knows with certainty what information is being sought. The objection appeals to the court's discretion in providing a fair trial without witnesses being confused.

RESPONSE: "Your honor, I can restate that question."

Counsel is testifying.

"OBJECTION: Your Honor, counsel is trying to testify himself, instead of having the witness do it."

DISCUSSION: The objection that "Counsel is testifying" is heard so often, that we include it in this list of "the basic two dozen." However, the objection usually could just as well be phrased as "leading" or "argumentative" or "assumes facts not in evidence." The objection is to parts of the question which contain facts or opinions not in evidence.

RESPONSE: Depending on the type of question, respond, as you would to an objection for "leading" or "argumentative" or "assumes facts not in evidence."

Form.

OBJECTION: “Your Honor, we object to the form of the question.”

DISCUSSION: An objection that the “form” is improper is a generalization, which includes diverse problems (each of which is a specific objection). The objection is heard a great deal, and honored by courts quite often when they see the specific problem. Other times, the court does not rule on the objection, but simply directs adverse counsel to “Rephrase your question, counsel.” The objection of “form” should instead be a specific objection that the question:

- Is a double question.
- Is misleading or ambiguous (to either witness or jury).
- Is argumentative.
- Is prejudicial or abusive in its insinuations.
- Is leading.
- Is repetitious.
- Assumes facts not in the record.
- Fails to include relevant facts found in the record.
- Calls for a legal conclusion.
- Calls for mere speculation.
- Calls for an opinion.
- Calls for a narrative.

RESPONSE: “Your Honor, may counsel be requested to inform the court in what specific is the form of my question insufficient, so that I can remedy any problem?” (Then, when informed, restate the question to eliminate the bad form.)

WARNING. Just saying “Objection to the form” or “Objection to the foundation” is a lazy indefinite generalization, which includes every possible way the form or foundation is wrong. There are dangers in making the general objection of “form” or “foundation.” See the discussion at “State your specific grounds briefly” in §52.2 of this text.

Foundation.

“OBJECTION: Your Honor, we object to the lack of foundation because [*e.g.*, there is no showing of the witness’s time and place of observation of the facts called for].”

DISCUSSION: Evidence is competent if the proof that is being offered meets certain traditional requirements of reliability. The preliminary showing that the evidence meets those tests is called the foundational evidence. If there is no objection made to the lack of foundation before the testimony is received, the objection is waived. If an objection to the foundation if not made; the testimony cannot later be the subject of a motion to strike.

The objecting attorney must identify what is necessary to correct the lack of foundation for the deponent to answer. If the questioning attorney asks what is wrong with the foundation, then the objector either must provide specific details of what is missing in the foundation or else be ruled to have waived the objection by making a senseless objection. (“An objection to foundation is futile unless it is sufficiently specific to afford the opposing party opportunity to cure it.” *United States v. Michaels*, 726 F.2d 1307, 1314 (8th Cir. 1984).)

If the witness is a layperson, the usual foundation objection is a lack of showing that the witness has personal knowledge of the facts which the question seeks. If the witness is an expert, the usual foundation objection is a lack of showing that the expert is qualified to give the opinion sought.

RESPONSE: “Your Honor, may counsel be requested to inform the court in what specific is the foundation insufficient, so that I can remedy any problem?” (Then, when informed, restate the question or otherwise provide the specific missing part of the foundation.)

Hearsay (rules 801, 802, 803, and 804).

"OBJECTION: Your Honor, this calls for hearsay."

DISCUSSION: Hearsay is not admissible unless it comes within one of the many exceptions. Hearsay is evidence and can be used by itself to support a verdict if it is received without objection.

Fed. Rules Evid., Rules 801, 803, and 804 (or the equivalent state rules) must be in your trial notebook or otherwise available to you during trial. The exceptions to the hearsay objection are so important — and needed so often during trial — we are going to give you an outline in this quick reference checklist.

WARNING. The following is a partial outline (not the full text) of the Federal hearsay rule. This trial notebook outline is here only to refresh your memory when the full applicable state or federal rule is not available to you.

Rule 801. "Hearsay" is 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.

A statement is **not hearsay** if —

(1) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, ***and*** the statement is

(A) Inconsistent with the declarant's testimony and was given under oath;

(B) Consistent with the declarant's testimony and is offered to rebut an expressed or implied charge against the declarant of recent fabrication or improper influence or motive;

(C) One of identification of a person made after perceiving the person.

(2) The statement is offered against a party **and** is a statement

(A) Made personally by the party;

(B) Of which the party has manifested an adoption or belief in its truth;

(C) By a person authorized by the party to make the statement;

(D) By the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship;

(E) By a co-conspirator of a party.

Rule 803. The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

(1) Present sense impression. A statement describing or explaining an event or condition, made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Mental, emotional, or physical condition. 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.

(4) Made for medical treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted,

the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted business activity. A memorandum, report, record, or data compilation, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12) or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

(7) Absence of entry in records kept in regularly conducted business activity, to prove the nonoccurrence or nonexistence of the matter.

(8) Public records and reports. Records, reports, statements, or data compilations of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law and as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings, factual findings resulting from an investigation made pursuant to authority granted by law unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records of births, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry by evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) (12) and (13) Family Facts. Religious organization's statements of personal or family history, contained in a regularly kept record. Marriage, baptismal, and similar certificates issued at the time of the act or within a reasonable time thereafter. Family records of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property, if the record is a record of a public office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purposes of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents, to wit: a document in existence 20 years or more, the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history among members of a person's family, or among a person's associates, or in the community, concerning a person's birth, adoption,

marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of a person's personal or family history.

(20) Reputation concerning boundaries of or customs affecting lands in the community; or reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character. Reputation of a person's character among associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment.

(23) Judgments as to personal, family, or general history, or boundaries.

Rule 804 (A). A witness is unavailable if the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying;

(2) Refuses to testify despite an order of the court to do so;

(3) Testifies to a lack of memory of the subject matter of the declarant's statement;

(4) Is unable to be present due to death or physical or mental illness or infirmity;

(5) Is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance by process or other reasonable means.

Rule 804 (B). The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

(4) Statement of personal or family history of the declarant's own history or a statement concerning the personal or family history of another person, if the declarant was so intimately associated with the other's family as to be likely to have accurate information.

Hearsay is an objection you are bound to hear at least once in every trial. Refresh your memory of the list of exceptions before the trial.

RESPONSE: "Your Honor, this is an exception to the hearsay rule, under Evidence Rule [cite]."

Improper impeachment.

"OBJECTION: Your Honor, this is outside the boundary of proper impeachment."

DISCUSSION: The evidence rules generally only authorize the following methods of impeachment:

1. Point out contradictory evidence or prior inconsistent statements;
2. Show bias or prejudice (paid witness, stands to gain by verdict one way, friend, or rival of party);

3. Show reputation for poor character for honesty;
4. Show conviction of a crime that involved dishonesty or false statement or imprisonment for more than one year;
5. Show poor memory, or lack of physical or mental ability to observe, remember, or recount;
6. On cross-examination, ask the witness to agree that he committed specific instances of past conduct bearing on the witness's credibility for truthfulness. Except for criminal convictions, the witness's answer is conclusive, and extrinsic evidence is not allowed to contradict what the witness says concerning his own conduct.

Read Fed. R. Evid., Rules 404, 607, 608 and 609, or your equivalent state rules of evidence, for the exact rules, which in each jurisdiction have defined limitations on types and use of impeachment material. "Yet the trial court has discretion to exclude impeachment evidence, including a prior inconsistent statement, if it is collateral, cumulative, confusing, or misleading." *People v. Douglas*, 50 Cal. 3d 468, at 509, 788 P.2d 640 (1990).

RESPONSE: "Your Honor, I am asking items which bear upon the witness's credibility."

Incompetent.

"OBJECTION: The witness is incompetent because...." (The exhibit is incompetent because....)

DISCUSSION: The term "competency" refers to the minimal qualifications someone must have to be a witness. In reference to an exhibit, the term "competency" refers to the minimal foundation that physical items must have to be an exhibit. For both a person and an exhibit, "competency" also refers to a lack of any statutory or other legal bar based on public policy.

In order to be a witness, a person other than an expert (experts are a special case discussed later in the text), must meet six basic requirements:

1. Take some kind of oath to tell the truth.
2. Have perceived something relevant to the case. A lay witness may only testify to matters about which the witness has personal knowledge. Fed. R. Evid., Rule 602 says "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." That means the attorney asking the questions should first establish by preliminary questions that the person has actual personal knowledge of something relevant.
3. Be able to remember what he or she perceived.
4. Be able to communicate in some sensible way.
5. Not be disqualified by some statutory or other legal bar based on public policy. See discussion, below, regarding the public policy objections.

Young children must be shown to be capable of understanding the oath and communicating in some sensible way. The usual rule is that a child is competent if the child can recollect and narrate the facts and has a moral sense of obligation to tell the truth. The judge and attorneys have to question the child to determine the communication skills of the child and also question to determine if the child understands the difference between true and false, and will tell the truth.

RESPONSE: "Your Honor, [respond to asserted specific lack]."

Lack of personal knowledge.

"OBJECTION: Your Honor, there is no showing of personal knowledge by the witness."

DISCUSSION:

A [non-expert] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness.

Fed. Rules Evid., Rule 602.

With some qualifications, experts can testify to facts they used in their process of building an opinion, even if they do not have personal knowledge of the facts supporting the opinion. See Fed. Rules Evid., Rule 703.

RESPONSE: [Establish by preliminary questions that the person has actual personal knowledge.]

Leading.

"OBJECTION: Your Honor, counsel is leading and coaching the witness."

DISCUSSION: "Leading" is the legal ritual word for the benefit of the judge and appellate court. "Coaching" is the word you might want to add to your statement of the objection in front of a jury, so the jury understands why you are preventing what may to them appear to be a reasonable question.

The problem with a leading question is that the question itself suggests the answer that the examiner wants to have. A leading question often, but not always, can be answered with a "yes." To encourage witnesses telling facts in their own way, leading questions are not allowed on direct examination when an attorney is examining his/her own friendly or neutral witness. When an attorney has called a hostile witness (which may be someone other than the adverse party) leading questions are allowed in direct examination. Leading questions are always proper in cross-examinations.

Federal R. Evid., Rule 611(c) provides that "leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness." Leading questions are most dangerous involving matters of dispute, and the danger disappears if there is no controversy. Accordingly, leading questions are proper when the testimony sought is merely preliminary to disputed matter. *Lestico v. Kuehner,* 283 N.W. 122 (1939). The times that leading questions may be "necessary to develop" the direct testimony of the witness include not only preliminary matters, but also when questions are needed to switch topics or direct the attention of a witness to a specific event, or leading questions are needed for soft conversational approaches if the witness is a child or is emotionally disturbed, or leading questions are needed because the witness's memory needs to be refreshed.

The allowance of leading questions, or questions which assume facts not yet proven, is discretionary with the trial judge. Unless there appears an abuse of discretion, the appellant court will not reverse the trial court's ruling.

RESPONSE: "Your Honor, this question is only preliminary to move us quickly to the matters in issue." OR, "Your Honor, the witness is a hostile witness."

Misstates evidence / misquotes witness / improper characterization of the evidence.

"OBJECTION: Your Honor, counsel is misstating the evidence."

DISCUSSION: The trial court has inherent power to administer the trial so that it is fair. Almost universally, to the "misstating the evidence" objection, the court will respond with: "The jury has heard the evidence and can determine what the evidence was." Then, the court will overrule the objection. That reaction of the judge takes the judge out of her problem of having to judge accuracy by the standard of her own memory. It is rare that the judge's discretion on this objection will be disfavored by a reviewing court.

If the judge is 99% not likely to rule in your favor, and the judge's ruling will not make any difference on an appeal, why make the objection? The value of making this objection is to both wake up the witness to pay attention and not mindlessly answer the question, and also to call the attention of the jury to the fact that the earlier testimony was different that counsel states in her question.

RESPONSE: "Your Honor, it is not a misstatement, and certainly the court and jury have heard the evidence."

Narrative.

"OBJECTION: Your Honor, the question calls for a long narrative. It can produce irrelevant or

otherwise inadmissible testimony before the court can receive an objection and rule on it."

DISCUSSION: In the evidence presentation mode used in this country, the normal form (of questioning followed by direct answers to the questions) is designed to allow the adverse counsel the opportunity to interpose an objection before the witness directly answers the question in the hearing of the jury. Thus, an improper item never is heard by the jury, because there is a ruling before the witness speaks. When the witness is asked to give a long narrative answer, an improper item can be conveyed to the jury before there is an opportunity to object or the court to rule. Timely objections to volunteered inadmissable testimony contained within what otherwise is proper description of events are needed if the exclusionary system of evidence is to be preserved. After inadmissable testimony is heard, the problem is trying to effectively cause the jury to "unring the bell." The court's instruction to ignore what they just heard is psychologically ineffective.

Tactically, objecting to a long narrative by an expert witness also has the advantage of preventing an expert witness or other verbally gifted witness from captivating the attention of the audience with what could be a quarter-hour unbroken polished show.

RESPONSE: "Your Honor, the narrative simply is going to preliminary matters which I thought we all would like to hear before we get to other questions." OR, "Your Honor, this simply asks for a short description of the scene as a unified whole, before we get to detailed aspects." OR, "Your Honor, this simply asks for a short description of the science and technical maters involved."

Opinion (rules 701 and 702).

"OBJECTION: Your Honor, the question calls for an opinion (conclusion), and the witness is not qualified to give the opinion."

DISCUSSION: In regard to a lay person (non-expert), this objection is made to the competence of a lay person giving an opinion, and a foundation to turn the witness into an expert is not possible. In regard to an expert, this objection is made to the competence of the expert because of inability of the expert to pass the gatekeeping requirements for experts.

Layperson's opinion.

Non-expert witnesses are to give facts. Generally, it is the province of the judge or jury to make the conclusions to be drawn from those facts. Fed Rules Evid., Rule 701:

OPINION TESTIMONY BY LAY WITNESSES. 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's 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.

Some matters are within the normal range of knowledge or understanding of the ordinary layperson, but can best be reported by the layperson in terms of an opinion. "Consequently, a lay witness may testify that a person was 'drunk' or that a car was traveling 'fast.'" *Comment*, Rule 701, *Tenn. R. Evidence*. Nonexpert witnesses have been allowed to give answers in the form of opinions as to such things as physical condition and appearance of health. *See, Hoffer v. Burd*, 49 NW2d 282 (ND 1951); *Nichols v. Kluver*, 237 NW 640 (ND 1931) (wife re husband's injury). Questions of physical condition are sometimes mingled with questions of medical or legal opinion so as to cause a court to keep the opinion out of evidence. *See, Huus v. Ringo*, 39 NW2d 505 (ND 1949) (whether plaintiff can do work he did before accident). If you have a problem looming, check the ALR annotations for material on admissibility of lay opinions. *See,* 56 A.L.R.3d 575, *admissibility of nonexpert opinion testimony as to weather conditions*; 66 A.L.R.2d 1048, *admissibility of opinion evidence as to point of impact or collision in motor vehicle accident case*; 37 A.L.R.2d 967, *admissibility of opinion of nonexpert owner as to value of chattel*.

Important in many cases is the common holding that owners of property are entitled to give an opinion to the value of their own property even though they are not experts in valuation. Owners, due to that ownership, are presumed to have special knowledge of the value of their own property." *See, Tokles and Son, Inc. v. Midwestern Indemnity Company,* 65 Ohio St 3d 621 (1992); and *Evans*

v. Evans (W. Va. 1997) ("we find that under Rule 701 [1994] of the West Virginia Rules of Evidence, the owner of destroyed or damaged personal property is qualified to give lay testimony as to the value of the personal property based on his or her personal knowledge"). Most courts have permitted the owner of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. *See, Lightning Lube, Inc. v. Witco Corp*., 4 F.3d 1153 (3d Cir. 1993) (no abuse of discretion in permitting the plaintiff's owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of the business). But see cases like *Jim's Hot Shot Serv. v. Continental W. Ins. Co.,* 353 N.W.2d 279 (N.D. 1984) holding that although the owner can testify, the opinion may be legally insufficient to support a verdict if the value opinion is without any valid basis.

The (c) part of the federal rule 701 ("and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702") was added when the federal courts changed their rule 702. The reason for the 701 amendment was to prevent evasion of Rule 702 requirements by offering the opinions of experts as "lay opinions" rationally based on perception. Cf., *United States v. Dulcio*, No. 04-13838 (11th Cir. Mar. 8, 2006). (Prosecution offered lay opinion testimony from drug agents re modus operandi of narcotics dealers. Because this testimony was founded on specialized knowledge, it should have been offered as expert testimony, not lay opinion.)

The distinction in the federal courts regarding admissibility of opinions used to be between lay *witnesses* and expert *witnesses.* With the 2000 amendments to rules 701 and 702, the scholarly legal distinction is now between lay *opinions* and expert *opinions.* However, trial court analysis still tends to be in terms of lay versus expert witnesses. Therefore, in any trial courtroom, you probably will still be best served if you argue to the judge in terms of the witness classification of lay versus expert. Certainly in those states who did not adopt amendments similar to the federal rules, the scholarly legal distinction regarding admissibility of opinions is still in terms of lay versus expert *witnesses*, not lay versus expert *opinion*.

Silencing Lawyers

Lawyers cannot "testify". They do it anyway. Because people allow it! The rules forbid it. You can stop it. You must stop it, if you want to win! This tactics can only touch on this very important point of lawsuit warfare. you can stop the lawyer on the other side from cheating!

That's right! It's cheating for lawyers to testify. Why? They lack "legal competence" to act as witnesses!

Lawyers lack personal, first-hand knowledge of the facts of their client's cases. In legal terms, we say they lack the requisite "competence" to testify. The only people who can testify to facts are people who have "personal, first-hand knowledge" of the facts.

YOU MUST STOP LAWYERS FROM TESTIFYING!

They will sneak it in whenever they can. They will do all they can to get into the record facts for which they have no witnesses, documents, or things to prove those facts. Not only that, but they will "testify to facts" for which they have witnesses just to emphasize the facts, and this too is against the rules. The rules forbid lawyer testimony!

Lawyers will sneakily talk about facts that they have no witness to talk about, no documents or other things to use to prove the facts they talk about. They will "tell" the court the facts they cannot prove ... against the rules! It is cheating of the highest order!

But, they will do it ... if you allow it! It is against the rules ... rules that are your friend! If you allow it, you weaken your case. If you allow enough of it, you will lose!

Next time the lawyer on the other side starts leading his own witness or telling the court what the facts are, you jump to your feet and say, ***"Objection, your Honor. Counsel is testifying. Counsel lacks personal first-hand knowledge of the facts to which he (or she) is testifying. Move to strike."***

If the judge allows the cheating to continue, object again! Many lawyers are afraid of the judges, so

if you hire a lawyer and pay the lawyer good money, don't be surprised when your lawyer (who is taking your good money) fails to object when his friend the lawyer on the other side begins to testify! If you have a lawyer, insist that your lawyer objects to any introduction of facts by lawyers on the other side! People pay lawyers to fight for them, but many lawyers refuse to fight the judge! But, fighting judges is part of what it takes to win! And, objecting forcibly is part of the tactic of winners! If you don't have a lawyer, YOU MUST OBJECT!

Expert's opinion.

The federal courts and some states have a Rule 702 that reads like this:

Federal Rules Evid., Rule 702. TESTIMONY BY EXPERTS. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Some states have the pre-2000 version, which reads like this:

North Dakota Rules Evid. RULE 702. TESTIMONY BY EXPERTS. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The difference between the two categories of rules reflects the different methods of approach to admissibility to expert opinions: either the pre-2000 "*Frye*" standards, still used in many states, or the post-2000 "*Daubert/Kumho* tests," used in the federal courts and many states. Basically, in the federal courts and those following a like standard, the court acts aggressively as a gatekeeper, making an initial decision as to whether the expert's opinion is "good enough" to be considered by the jury. The courts following the pre-2000 version act only to determine if the witness has expert knowledge (not at the opinion) and then allow the jury to make the decision whether the opinion is "good enough" to be reliable. For a 20-page, general analysis of how to get expert witness opinions in or out see *www.bucklin.org/Daub_TofC.htm*. For a specific state-by-state analysis of expert testimony opinion admissibility and objections thereto, I heartedly recommend Peter Nordberg's excellent site at *www.daubertontheweb.com,* which contains current information and incisive analysis.

RESPONSE to objection regarding layperson: "Your Honor, this is a matter which is within the normal range of knowledge or understanding of an ordinary layperson, and can best be discussed in terms of an opinion within Rule 701."

RESPONSE to objection regarding expert: "Your Honor, the witness is an expert and entitled to draw a conclusion."

Pre-trial ruling specifically barred asking the question in open court.

"OBJECTION: Your Honor, the Court's pre-trial rulings have stated that this line of testimony is improper and should only be discussed in a further conference with the court in chambers."

DISCUSSION: Today's pretrial motions practice trial have made pre-trial evidence rulings have consequences of major proportion. It important that you understand completely the theory and practice of at-trial objections regarding evidence which was the subject of a pre-trial admissibility order. The law is confusing, but from the perspective of "been-there, done-that," after some discussion, we'll give you three rules of thumb to follow.

In the pre-trial motion rulings, the court may have made determinations of what evidence can, or cannot, be admitted. Always in some jurisdictions and sometimes in every jurisdiction, these pre-trial rulings are *not* final. Often it is required that at the trial itself the question has to be asked, or the exhibit offered, again by the counsel, even if the pre-trial ruling was against him/her. It is only the ruling at trial that is a final ruling. We cannot state this too strongly. Error is not always

preserved by the granting or denying of a motion in limine. *See, Hartford Acc. & Indem. Co. v. McCardell*, 369 S.W.2d 331 (Tex. 1963). Many states insist that in every situation, it is the court's subsequent exclusion or admission of relevant evidence — at the trial, not the pretrial ruling on a motion for admission or exclusion — that is the final ruling. *See, Schutz v. Southern Union Gas Co.*, 617 S.W.2d 299, 303 (Tex. Civ. App.—Tyler 1981, no writ). Not only is the ruling at trial the only final ruling, but if you have received an adverse pre-trial ruling on admissibility, if you fail to ask the question, or offer the exhibit when you are in the trial, you may be deemed to have waived your offer of evidence! The theory of this two-stage process (pre-trial ruling is preliminary, final ruling is made only during the trial itself) is that the trial court should have a chance during the actual trial to determine if at that point the trial court wants to change its ruling.

The law of the sundry states and federal circuits is quite varied on the question of whether a losing party on an pre-trial evidentiary ruling must renew an objection or offer of proof when the evidence is or would be offered at trial, in order to preserve a claim of error on appeal. Some courts have held that a renewal at the time the evidence is to be offered at trial is always required. *See, Collins v. Wayne Corp*., 621 F.2d 777 (5th Cir. 1980). In contrast, other courts have held that renewal of the offer of proof or of the objection is not required if (1) the issue decided is of a type which may be decided as a final matter before the evidence is actually offered, and (2) the trial judge stated her ruling was final and presentation of the evidence or objection to it does not have to be presented at the trial for a final ruling. *See, Rosenfeld v. Basquiat,* 78 F.3d 84 (2d Cir. 1996). The problem with that latter formulation for the trial lawyer, of course, is guessing what the appeals court will decide is "a type which may be decided...," and what the trial court "intended to rule...." What is a trial lawyer to do to act in a "fail-safe" mode during trial?

Our answer is simplify your life and follow three rules of thumb in all cases, in all courts.

1. If you lost on your pre-trial attempt to have the evidence admitted – at trial always offer the evidence again. At the Notes of the Federal Advisory Committee to Fed. Rules Evid., Rule 103, there is an extended discussion on whether you must offer the evidence again. You may not have to offer it again. But the safe way to be sure you have preserved the point on appeal is to offer it again at the trial.

WARNING. If there is a court order of the sort discussed below (following the TIP), act in compliance with the order — obey — follow the order and approach the bench first, at that point in the trial.

2. If you won on your pre-trial attempt to have the evidence excluded and there was *not* a court order of the sort discussed below (following the TIP), you again must object on all the grounds you used in winning at pre- trial (*See,* e.g., lack of foundation, Rule 403 balancing, et cetera). Ask to approach the bench to revisit the matter if the court does not want to immediately grant your objection.
3. If you won on your pre-trial attempt to have the evidence excluded and there *was* a court order of the sort discussed below (following the TIP), object on the ground that the Court's pre-trial rulings have stated that this line of testimony or exhibit is improper. Ask to approach the bench. Make the same objections that you made in pre-trial to the evidence. Then object to adverse counsel violating the court's order. Then sit back and enjoy the court's attack on adverse counsel for ignoring the court's pre- trial order.

TIP: In pre-trial rulings, if you win, get the provision below inserted in the court's order.

The best pre-trial rulings by a trial judge add a provision that the question should not be asked, or exhibit offered, without first approaching the bench for the court's order at that point. This preserves the virginity of the jury from exposure to the potentially inadmissable evidence, but still allows the required offer of evidence at that point in the trial. At the sidebar, or in chambers, you must renew all of your arguments or objections that you made pre-trial; the judge will make a final, in-trial, ruling on the record, outside the hearing of the jury. Then you go back to the jury and continue. At that point, back before the jury, if the judge reverses himself and allows the evidence, you do not have to object again (assuming that during sidebar or chambers conference before you returned to the jury, you renewed your objection and were definitely overruled).

Section 17.2 contains a form of order, for plaintiffs, for you to request the court to sign (§17.3 for defendants is similar). It says:

ORDER. The foregoing Motion in Limine by Plaintiff has been presented to me. Upon all files and proceedings herein, the separate paragraphs of the Motion are hereby granted, or denied as I have indicated immediately below each of the paragraphs in the Motion. The attorney(s) for the Defendant(s) is instructed:

a. Not to interrogate witnesses concerning the prohibited items, or to mention to the jury in any manner those items, without Defendant's attorney first obtaining permission outside the presence and hearing of the jury; and

b. To personally admonish the Defendant and Defendant's witnesses to refrain from mentioning to the jury in any manner the prohibited items, without Defendant's attorney first obtaining permission outside the presence and hearing of the jury.

Some judges add that type of paragraph to their orders automatically, but most do not. For your maximum benefit, as the prevailing party in a pre-trial motion keeping evidence out, hand the judge a form paragraph to include in the court's pre-trial order.

If the trial court *has* ordered in its pre-trial rulings that the matter should not be inquired about in front of the jury without again coming to the court at that point in the trial, the court may take very stringent measures indeed. Given such an order, the other side may be in contempt of the court's order and suffer punishment for misbehavior. Even if there was no contempt, and the mentioning was inadvertent, the court can order various punishments to correct the prejudice caused by the order-violation, up to and including ordering a mistrial, or waiting until the case has ended and then granting a new trial. *See, Orvis v. Calkins Indiantown Citrus Co.*, (4th Dist Appeals, FL, 2003) (inadvertent mention sufficient for new trial order).

If you are in court with this quick-reference checklist in your trial notebook, and you quickly need to argue for or against the court granting (a) a curative jury instruction, (b) a directed judgement on some issue involved, (C) an immediate mistrial, or (d) a mistrial or new trial to be granted if the offending party wins a verdict — follow the four point format for argument suggested by the following case.

[1] ...consider whether the evidence excluded by the court's order was deliberately introduced or solicited by the party, or whether the violation of the court's order was inadvertent.... [2] also consider the inflammatory nature of the violation such that a substantial right of the party seeking to set aside the jury's verdict was prejudiced.... [3] [also consider] the likelihood that the violation created jury confusion, wasted the jury's time on collateral issues, or otherwise wasted scarce judicial resources.... [4] also consider whether the violation could have been cured by a jury instruction to disregard the challenged evidence.

Honaker v. Mahon, 210 W. Va. 53, 552 S.E.2d 788 (2001).

RESPONSE: [Assuming court's order *did prohibit* you asking the offending question during the trial without counsel first approaching the bench for permission]: "Your Honor, I do not believe this falls within the matters already ruled upon. May we approach the bench to discuss that?"

Privilege.

"OBJECTION: Your Honor, the question calls for privileged matters (stating the nature of the privilege)."

DISCUSSION: A privilege is a right of an individual not to testify. In federal court, in civil actions, a privilege is determined in accordance with state law. (There are three main exceptions to that statement regarding priority of state law: (1) the Federal Constitutional Fifth Amendment privilege against self-incrimination, (2) the privilege for federal grand jury proceedings and (3) the work product rule protecting attorneys' mental impressions.)

There are a variety of privileges in the state laws across the country, and they are handled in a variety of ways. For example, in California, the law protecting newspersons provides only an immunity from being adjudged in contempt; it does not prevent the use of other sanctions for

refusal of a newsman to respond to discovery when he is a party to a civil proceeding. *KSDO v. Superior Court of Riverside County*, 136 Cal.App.3d 375 (4th Dist. 1982). Recognizing the impossibility of discussing such varied privileges in a quick reference to objections, we will simply give you a laundry list of the common privileges:

- The Fifth Amendment to the United States Constitution. *Pillsbury Co. v. Conboy,* 459 U.S. 248 (1983) (the privilege is available in civil proceedings); *Baxter v. Palmigiano,* 425 US 308 (1976) ("the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them"). The privilege does not extend to records required by statute to be kept. *United States v. Doe*, 465 US 605 (1984).
- Accountant — Client.
- Attorney — Client.
- Attorney Work Product. Federal law distinguishes between opinion (core) and ordinary work product of attorneys. Core work product consists of mental impressions and conclusions and is given absolute protection. Ordinary work product consists of primary information, such as a witness's recorded statement or objective data collected by the attorney; it is given only limited protection and may be obtained upon a showing of substantial need and undue hardship. Fed. Rules Civ. P., Rule 26 (b)(3); *Robinson v. Texas Auto Dealers Assn*., 214 FRD 432, at 444 (E.D. Tex, 2003).
- Clergy.
- Husband — Wife.
- Joint Defense or Common Legal Interest.
- Jury (Grand and Petit) Proceedings.
- Mediation Discussions and Offers of Settlement. The protection granted by Fed. Rules Evid., Rule 408 is not a privilege grant. It is a public policy protection. But some states have special statutes granting a privilege not to testify.
- Mental Health Records.
- Physician — Patient.
- Psychotherapist — Patient.
- Trade Secret.

RESPONSE: "Your Honor, the matter is not privileged because...."

Public policy.

"OBJECTION: Your Honor, the [specify the statute, rule or common law doctrine] says it cannot be admitted into evidence. It is incompetent evidence."

DISCUSSION: The objection regarding public policy does not consist of a optional right of an individual not to testify. The objection based on public policy refers to a non- optional class of evidence that cannot be introduced, no matter that the person who holds the evidence wants to testify. The term "incompetent" is use as a generalized reference to evidence which cannot be introduced because it violates various rules against being allowed. If you are in front of judge only, using the term "incompetent" does not add anything to your specific objection (and by itself an objection of "incompetent" is so general as to be regarded by the courts as meaningless and not a valid objection). But if you are in the hearing of a jury, adding the term "incompetent" may soften somewhat their idea that you and a lawyer's law are blocking good evidence they want to hear or see.

The variety of subjects forbidden by state and federal law is wide. The only unity of concept is "public policy forbids." To give you some idea of the variety of statutory subjects you should

consider, here is a small listing of subjects of frequent prohibition, based on public policy:

- Dead Man's Statute. The dead man's statutes are state laws with so many exceptions, twists and turns they are a minor favorite of bar examiners. The public policy is to protect estates from false claims. Most dead man statutes provide that a party to the litigation who has an interest adverse to the estate is not a competent witness as to matters against the estate. The claim must be supported instead by written documents or disinterested testimony.
- Medical Expense Payments. Evidence of the payment of medical expenses to show liability for negligence leading to the medical expenses are inadmissable. Fed. Rules Evid., Rule 409.
- Medical Review Records. Most states forbid discoverability or admissibility of the records of a medical review committee of a hospital. It is a legislative policy decision to promote the ability of a hospital to discover medical malpractice above that of the injured person to discover the malpractice.
- Motor Vehicle Accident Records. Most states have statutes regarding some aspect of motor vehicle accident evidence, about which some energetic legislators felt strongly. E.g., that police accident reports are or are not admissible in evidence; that lack of seat belt use cannot be introduced into evidence; that police blood alcohol tests are not admissible unless strict conditions are met.
- Parole Evidence Rule. The "parole evidence rule" has long been a rule of law in the English speaking world. In the absence of fraud or mutual mistake, oral statements are not admissible to modify, vary, or contradict the plain terms of a valid written contract between two parties. It has been enacted in statutory form in some states, but is available in all states under common law. The public policy is to promote commercial certainty if the contract is clear. If terms of the contract are ambiguous or clearly susceptible to more than one meaning, then parole evidence is admissible to show what the parties meant at the time of making the contract and how they intended it to apply. ("Parole" means oral evidence.)
- Settlement Discussions. Evidence of mediation or settlement discussions is not admissible to prove liability for the claims that were being discussed. Fed. Rules Evid., Rule 408.
- Subsequent Remedial Measures. Evidence of subsequent remedial measures is not admissible to show previous negligence or culpable conduct. Fed. Rules Evid., Rule 407.
- Withdrawn Guilty Plea. Evidence of a guilty plea that is later withdrawn, or any statements made in connection with it. Fed. Rules Evid., Rule 410.
- Witness is Attorney. Ethical rules prohibit a lawyer from serving simultaneously as a witness and an advocate. Generally, a party's lawyer who attempts to testify is subject to having to choose between being a witness or continuing as a lawyer in a case. The "witness/advocate rule" is subject to misuse, especially if an adverse party can subpoena the other side's lawyer to be a witness and then file a motion to disqualify her from representing her opponent because of the witness/advocate rule. This would deprive a person of their chosen attorney. Accordingly, most state ethics codes and courts are more strict on applying the rule when a lawyer herself decides on being a witness rather than it being the adverse party who seeks the testimony.

RESPONSE: [Depends on the statute or rule involved.]

Rule 403.

"OBJECTION: Your Honor, this calls for evidence that is excluded under Rule 403. May we approach the bench to discuss this further?"

DISCUSSION: Any time you want to rely on Rule 403 in front of a jury, do it by rule number. Consider the alternative of saying this in front of the jury: "Objection, Your Honor, this evidence is so powerful and prejudicial that if the jury hears it they will decide against my client." That alternative way is a guarantee that: (a) if the judge overrules your objection, the jury will agree with your own assessment of how important it is; (b) if the judge sustains your objection, the jury will

know there is really bad evidence out there against your client justifying any punishment they can give your client! So, object using the Rule 403 number, and ask to talk to the judge out of the hearing of the jury.

Rule 402 states the fundamental principle of American evidence law, to wit:

All relevant evidence is admissible, except as otherwise provided by [the Constitution, statutes, and other court rules]. Evidence which is not relevant is not admissible.

That principle, dividing evidence into the two classes (relevant is admissible and not- relevant is not-admissible) is "a presupposition involved in the very conception of a rational system of evidence." Thayer, *Preliminary Treatise on Evidence* 264 (1898). It constitutes the foundation upon which the structure of admission and exclusion rests.

Generally, skillful attorneys can make almost anything relevant. "Relevant" simply means an item *tends* to prove or disprove some fact or issue. *Williams Elec. Co-op v. Montana-Dakota Utility Co.*, 79 NW2d 508 (ND 1956); Fed. Rules Evid., Rule 401.

The question under Rule 403 is whether evidence in the class of "relevant evidence" is material enough (makes enough difference) to be admitted when balanced against (a) unfair prejudice to a party or (b) time waste. The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances range all the way from inducing decision on a purely emotional basis, to nothing more harmful than wasting time. Rule 403 calls for balancing the probative value of and need for the evidence against the harm likely to result from its admission. *Fed. Rules Evid, Rule*, Rule 403, provides (as do state rules and the common law) that:

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.

Determining "probative value" is at the discretion of the judge. Generally, the discretion of the trial judge as to probative value of the evidence will be upheld. Thus it has been held that it is within the discretion of the trial judge to allow or disallow testimony as to the speed of a car some distance from the scene of the accident. *See, Thompson v. Nettum*, 163 NW2d 91 (ND 1968). In general, the judge determines probative value of evidence by:

- How directly related is the evidence to the disputes?
- How important is the evidence to the jury's decision?
- How much other evidence on the point has already been introduced or is available to be introduced?
- How far removed is the evidence in space or time from the people, places, and events being litigated?
- Will the evidence introduce inadmissable issues on which jurors may have strong feelings or prejudices, such as drugs, sex, and illegal immigration.
- Will the evidence carry strong emotions likely to overwhelm any reason or logic of the weight of the evidence?

The amount of "unfair prejudicial effect" also is determined by the judge. The word "*unfair*" is the key.

The rule is directed to unfairly prejudicial evidence, not simply prejudicial evidence. Indeed, no verdict could be obtained without prejudicial evidence. *United States v. Noland*, 960 F.2d 1384, 1387 (8th Cir. 1992). After all, "the admission of evidence is generally calculated to benefit one side to the prejudice of the other." *Bell v. City of Milwaukee*, 746 F.2d 1205, 1277 (7th Cir. 1984). "'Unfair prejudice'... means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Advisory Committee Note, Rule 403, *Fed. Rules Evid.* Prejudice is unfair if it is the result of something other than the relevance of the evidence. *See, State v. Kringstad*, 353 N.W.2d 302, 310 (N.D. 1984). Stated otherwise, "any

prejudice due to the probative force of evidence is not unfair prejudice."

State v. Zimmerman, 524 N.W.2d 111, 116 (N.D. 1994).

The Evidence Rule 403, like the common law, keeps out admissible evidence only if its probative value is *substantially outweighed* by the danger of unfair prejudice. It is not a test of mere preponderance of unfairness. Unfair prejudice must "substantially outweigh" the probative force of the evidence. If you are the proponent of the evidence, draw to the trial court's attention that if the balancing test of Rule 403 is being used, the court must resolve all doubt in favor of admission. If the court says it is "a close question," the evidence should go in. Any doubts about admissibility of evidence under Rule 403, such as doubts about the existence of unfair prejudice, confusion of issues, misleading, undue delay, or waste of time, should be resolved in favor of admitting the evidence, if necessary giving a contemporaneous warning instruction to the jury or an admonition in the charge. 1 *Weinstein's Evidence*, ¶ 403[01], at 403-11, 403-12 (1994).

In determining whether to exclude evidence under Rule 403, courts should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.

State v. Randall, 2002 ND 16, ¶ 15, 639 N.W.2d 439.

[T]he exclusion of relevant evidence under Rule 403 is an extraordinary remedy to be used sparingly.

K-B Trucking Co. v. Riss Int'l Corp., 763 F.2d 1148, 1155 (10th Cir. 1985).

Rule 403 also mentions "confusion of issues" and "waste of time" as grounds for exclusion. "Confusion of issues" means that too many issues will be injected into the jury room, causing confusion in reasoning. "Waste of time" addresses whether the offered evidence is simply so weak and removed from the issues being litigated, or so cumulative of other similar evidence, that is not worth the time involved to consider it. That is where the objections of "repetitive" or "asked and answered" are resolved. No rule of evidence or procedure prohibits an attorney from asking the same question over and over again to secure a different answer or to clarify a point. This objection is usually invalid because the question usually is a question by the interrogating counsel to pin down an ambiguous or evasive answer. However when it has merit, it is Rule 43 that is the authority for the objection.

McCormick's view was that unfair surprise would be, by itself, a ground for exclusion. The federal committee instead adopted the view of most courts and of Wigmore that surprise, by itself, was not a ground for exclusion, so surprise is not listed in Rule 403. The official comments of the Federal Advisory Committee in a mild manner suggest that in lieu of exclusion of evidence: "it has been stated that granting a continuance is the proper remedy for unfair surprise." *See, Gerhardt v. K.,* 327 N.W.2d 113 (N.D. 1982) at note 7 ("the proper remedy for unfair surprise is a continuance").

Two qualifications should be noted to the view that continuance, not exclusion, should be used if the offered evidence is a surprise:

- Exclusion may be the only available remedy if a party deliberately withholds information in response to discovery interrogatories or depositions. Exclusion as an enforcement device may be necessary to preserve the system of discovery.
- Sometimes a piece of evidence may be prejudicial and that prejudice may be compounded by the element of surprise. That combination may make the piece of merely prejudicial evidence excludable on the ground of "unfair prejudice."

The court's choices regarding a Rule 403 ruling on admitting evidence surprising the adverse party may be categorized as being among:

- No exclusion of the evidence (for inadvertent surprise and no prejudice);
- Continuance (for inadvertent surprise and prejudice); and
- Exclusion (for inexcusable surprise and prejudice).

This manner of analysis is illustrated in *Krech v. Erdman,* 233 N.W.2d 555 at 557 (MN 1975). The

court upheld the trial court's admission of a neurologist's testimony, although disclosure of the expert witness was not made until the day before trial.

Trial courts have a duty to suppress such evidence where counsel's dereliction is inexcusable and results in disadvantage to his opponent. In situations where the failure to disclose is inadvertent but harmful, the court should be quick to grant a continuance and assess costs against the party who has been at fault. Here, however, defendant did not seek a continuance upon learning that the doctor would testify. The trial court was justified in finding that defendant did not sustain prejudice which was attributable to his having had only brief notice of the doctor's appearance.

RESPONSE: "Your Honor, the exclusion of relevant evidence for unfairness under Rule 403 is an extraordinary remedy. There is nothing unfair about this evidence."

Speculative.

"OBJECTION: Your Honor, it calls for the witness to guess and speculate."

DISCUSSION: Anything that invites a witness to guess is objectionable. A guess is not a fact; a guess is not an opinion based on the appropriate standards for an opinion. Speculation as to what possibly could have happened, or what possibly could happen, is of little probative value. Greater freedom is allowed with expert witnesses, but still the expert is limited by Rule 702 strictures.

RESPONSE: "Your Honor, this is an expert giving an expert opinion within the scope of her expertise."

Leonard Bucklin has been elected a Fellow of the International Academy of Trial Lawyers, which attempts to identify the top 500 trial lawyers in the U.S. He served as a Director of the Academy from 1990 to 1996. He is also a member of the Million-Dollar Advocate's Forum, which is limited to plaintiffs' attorneys who have won million or multi-million dollar verdicts, awards, and settlements.

On the other side of the table, Mr. Bucklin has been placed in Best's Directory of Recommended Insurance Attorneys as a result of superior defense work and reasonable fees for over 35 insurers. His legal experience spans 40 years, and has been balanced between commercial and personal work, between office practice and litigation, and between plaintiff and defense work. He is the author of *Building Trial Notebooks*, from which this article is excerpted.

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Legal Research

Ignorance of the Law is NO EXCUSE!
Do you know how to find the official law that will decides who wins your case?
Do you know how to find and read appellate case reports?
Do you know how to find and read statutes, code, and ordinances?

If you went to court before personal computers and the internet, you'd be digging through dismally dry and boring stacks of look-alike books in a law library (if you could find one nearby).

Back then, winning required hundreds of hours turning dusty pages, pulling piles of books from the stacks, spreading them on a library table, and taking notes on a yellow pad in search of support.

All that has changed. Thanks to the internet and price competition, online legal research is now within the reach of most pocketbooks.
How to find "case" law.
Learn how to cite the law in your pleadings, motions, memoranda, and briefs.
Clever argument is not enough. You cannot win without finding and citing official legal authorities that control judges. Be assured your opponent will cite legal authorities favoring their case.
You must do the same if you want to win.
Find the Law that Controls the Judge! Otherwise, you cannot hope to win!
You cannot win without citing "legal authority". You cannot cite "legal authority" if you don't know how to find it. The judge is not "legal authority". Judges are required to obey "legal authority".
Go tell a judge your personal opinions about the law and how you think he should rule, and see how far it gets you! The only opinions that count in court are written opinions of appellate court justices. Your opinions count for nothing in court. Control the judge with "legal authority" by researching and citing appellate court opinions.

16

Sample Cases

Example A. PLAINTIFF states CAUSE OF ACTION is Breach of Contract . First prove existance of a contract. Breach of contract. Damages that resulted.
defendents job to prove PLAINTIFF can't prove the elements of that CAUSE OF ACTION.
Negligence ,common law duty to apply the golden rule. We know that certain results are foreseable, then we create a CAUSE OF ACTION, because there was a foreseable result, duty arises , duty was breached. That's what negligence is. Prove liability.

Example B. Tortourous interference with an advantageous relationship. The existence of an advantageous business relationship , the intentional and unjustified inteference. Knowledge of this relationship. You need to know the elements of that particular CAUSE OF ACTION.
Duty , Breach & Damages - Two businesses , both have to know Duty to each other and relationship.

Example C. Before 1944 Young men left for war , came back and would find out that their best friend was with your wife. You could sue due to alienation of affections (aoa) , aoa is a tort action brought about by deserted spouse against a third party alleged to be resposnsible for failure of marriage. Usually the spouse's lover. (Also can be used against family members, couselers and therapists or clergy members who advised divorce) Since 1935, this TORT has been abolished in 42 states, including New York.[1] Alienation is, however, still recognized in Hawaii, Illinois, North Carolina, Mississippi, New Mexico, South Dakota, and Utah..

Example D. Person being sued for credit card debt by Sears.
You Request Sears to produce for inspection and copy all documents signed by defendents, persuant to rule 'I want to see the originals'. Had 30 days to produce documents. Asked to extend date, Never extend date if you have them. Its their mistake. You tell them your filing for SUMMARY JUDGEMENT .
So Sears drew up Summary of **dismissal without prejudice**. Which means she can file the lawsuit again. So still go for SUMMARY JUDGEMENT . **Never agree to dismissal without prejudice. Dismissal without prejudice means she can file again**. DONT AGREE to dismissal without prejudice. Still go for SUMMARY JUDGEMENT set it for hearing. **YOU WANT DISMISSAL WITH PREJUDICE**

Example E I received a letter from comcast stating "Comcast will provide your name, address and other information as directed in the Order and Subpoena unless you or your attorney file a protective motion to quash or vacate the subpoena in the court where the subpoena was issued..." Force them to file individually against you, rather than against a class of infringers. See if you can find other cases in which their lawsuits have been dismissed based on lack of evidence, especially with prejudice. See if you can find any judges who have been critical of them in their rulings. Judges seem to be increasingly finding that an IP address alone is not sufficiently specific, but that won't necessarily prevent it from going to court.

Example D. How do you sue for slander or libel?
Slander is spoken. In print, it's libel.
Written and therefore libel. Phone calls would be slander. State makes a difference.
It is not slander/libel if it is true. Defamation requires false statements that harm the reputation of a third party. You may be able to get an injunction against the former client prohibiting them from defaming your company or yourself. Find out what your state options are.
Because there's an imminent threat of harm,
you probably should act quickly.

Example E Can I sue for wrongful termination - Not in California

At-will employment is a doctrine of American law that defines an employment relationship in which either party can immediately terminate the relationship at any time with or without any advance warning,[1] and with no subsequent liability, provided there was no express contract for a definite term governing the employment relationship and that the employer does not belong to a collective bargaining group (i.e., has not recognized a union). Under this legal doctrine:

“ any hiring is presumed to be "at will"; that is, the employer is free to discharge individuals "for good cause, or bad cause, or no cause at all," and the employee is equally free to quit, strike, or otherwise cease work.[2]

17

LEGAL TERMS

TORT law is a civil wrong. TORT law deals with situations where a person's behavior has unfairly caused someone else to suffer loss or harm. A TORT is not necessarily an illegal act but it is an act or inaction that causes harm to another. The law allows anyone who is harmed to recover their loss. To prevail (win) in a TORT law case the PLAINTIFF (person suing) must show that the actions or lack of action was the most likely cause of the harm.

PLAINTIFF (Π in legal shorthand), also known as a claimant or complainant, is the term used in some jurisdictions for the party who initiates a lawsuit (also known as an action) before a court. In other words, someone who tries to sue. By doing so, the PLAINTIFF seeks a legal remedy, and if successful, the court will issue judgment in favor of the PLAINTIFF and make the appropriate court order (e.g., an order for damages).

SUMMARY JUDGEMENT is a judgment entered by a court for one party and against another party summarily, i.e., without a full trial. Such a judgment may be issued on the merits of an entire case, or on discrete issues in that case

Adjudication is the legal process by which an arbiter or judge reviews evidence and argumentation including legal reasoning set forth by opposing parties or litigants to come to a decision which determines rights and obligations between the parties involved. Three types of disputes are resolved through adjudication:

- Disputes between private parties, such as individuals or corporations.
- Disputes between private parties and public officials.
- Disputes between public officials or public bodies.

Omnibus hearing is a pretrial hearing. It is usually soon after a defendant's arraignment. The main purpose of the hearing is to determine the admissibility of evidence, including testimony and evidence seized at the time of arrest. The prosecutor and the defendant's counsel attend the hearing to discuss pretrial matters pertaining to the case.

Subpoena duces tecum (or subpoena for production of evidence) is a court summons ordering the recipient to appear before the court and produce documents or other tangible evidence for use at a hearing or trial. The subpoena duces tecum is similar to the subpoena ad testificandum, which is a writ summoning a witness to testify orally. However, unlike the latter summons, the subpoena duces tecum instructs the witness to bring in hand books, papers, or evidence for the court. In most jurisdictions, a subpoena usually has to be served personally.
A court order by which an individual is required to perform, or is restrained from performing, a particular act. A writ framed according to the circumstances of the individual case.

An injunction commands an act that the court regards as essential to justice, or it prohibits an act that is deemed to be contrary to good conscience. It is an extraordinary remedy, reserved for special circumstances in which the temporary preservation of the status quo is necessary. An injunction is ordinarily and properly elicited from other proceedings. For example, a landlord might bring an action against a tenant for waste, in which the right to protect the land-lord's interest in the ownership of the premises is at issue. The landlord might apply to the court for an injunction against the tenant's continuing harmful use of the property. The injunction is an ancillary remedy in the action against the tenant. Injunctive relief is not a matter of right, but its denial is within the discretion of the court. Whether or not an injunction will be granted varies with the facts of each case. The courts exercise their power to issue injunctions judiciously, and only when necessity exists. An injunction is usually issued only in cases where irreparable injury to the rights of an

individual would result otherwise. It must be readily apparent to the court that some act has been performed, or is threatened, that will produce irreparable injury to the party seeking the injunction. An injury is considered irreparable when it cannot be adequately compensated by an award of damages. The pecuniary damage that would be incurred from the threatened action need not be great, however. If a loss can be calculated in terms of money, there is no irreparable injury. The consequent refusal by a court to grant an injunction is, therefore, proper. Loss of profits alone is insufficient to establish irreparable injury. The potential destruction of property is sufficient. Injunctive relief is not a remedy that is liberally granted, and, therefore, a court will always consider any hardship that the parties will sustain by the granting or refusal of an injunction. The court that issues an injunction may, in exercise of its discretion, modify or dissolve it at a later date if the circumstances so warrant. Types of Injunction

A preliminary or temporary injunction is a provisional remedy that is invoked to preserve the subject matter in its existing condition. Its purpose is to prevent dis-solution of the plaintiff's rights. The main reason for use of a preliminary injunction is the need for immediate relief.
Preliminary or temporary injunctions are not conclusive as to the rights of the parties, and they do not determine the merits of a case or decide issues in controversy. They seek to prevent threatened wrong, further injury, and irreparable harm or injustice until such time as the rights of the parties can be ultimately settled. Preliminary injunctive relief ensures the ability of the court to render a meaningful decision and serves to prevent a change of circumstances that would hamper or block the granting of proper relief following a trial on the merits of the case.
A motion for a preliminary injunction is never granted automatically. The discretion of the court should be exercised in favor of a temporary injunction, which maintains the status quo until the final trial. Such discretion should be exercised against a temporary injunction when its issuance would alter the status quo. For example, during the Florida presidential-election controversy in 2000, the campaign of george w. bush asked a federal appeals court for a preliminary injunction to halt the manual counting of ballots. It sought a preliminary injunction until the U.S. Supreme Court could decide on granting a permanent injunction. In that case, Siegel v. Lepore, 234 F.3d 1163 (11th Cir. 2000). the U.S. Court of Appeals for the Eleventh Circuit refused to grant the injunction, stating that the Bush campaign had not "shown the kind of serious and immediate injury that demands the extraordinary relief of a preliminary injunction."
Preventive Injunctions An injunction directing an individual to refrain from doing an act is preventive, prohibitive, prohibitory, or negative. This type of injunction prevents a threatened injury, preserves the status quo, or restrains the continued commission of an ongoing wrong, but it cannot be used to redress a consummated wrong or to undo that which has already been done.
The Florida vote count in the presidential election of 2000 again serves as a good example. There, the Bush campaign sought preventive injunctions to restrain various counties from performing recounts after the Florida results had been certified. The Bush campaign did not attempt to overturn results already arrived at, but rather attempted to stop new results from coming in. In turn, the Gore campaign attempted to obtain a preventive injunction to prevent Florida's secretary of state from certifying the election results.
Mandatory Injunctions Although the court is vested with wide discretion to fashion injunctive relief, it is also restricted to restraint of a contemplated or threatened action. It also might compel Specific Performance of an act. In such a case, it issues a mandatory injunction, commanding the performance of a positive act. Because mandatory injunctions are harsh, courts do not favor them, and they rarely grant them. Such injunctions have been issued to compel the removal of buildings or other structures wrongfully placed upon the land of another.
Permanent Injunctions A permanent or perpetual injunction is one that is granted by the judgment that ultimately disposes of the injunction suit, ordered at the time of final judgment. This type of injunction must be final relief. Permanent injunctions are perpetual, provided that the conditions that produced them remain permanent. They have been granted to prevent blasting upon neighboring premises, to enjoin the dumping of earth or other material upon land, and to prevent Pollution of a water supply.
An individual who has been licensed by the state to practice a profession may properly demand that others in the same profession sub-scribe to the ethical standards and laws that govern it. An

injunction is a proper remedy to prevent the illegal practice of a profession, and the relief may be sought by either licensed practitioners or a professional association. The illegal Practice of Law, medicine, dentistry, and architecture has been stopped by the issuance of injunctions.
Acts that are injurious to the public health or safety may be enjoined as well. For example, injunctions have been issued to enforce laws providing for the eradication of diseases in animals raised for food.
The government has the authority to protect citizens from damage by violence and from fear through threats and intimidation. In some states, an injunction is the proper remedy to bar the use of violence against those asserting their rights under the law.
Acts committed without Just Cause that interfere with the carrying on of a business may be enjoined if no other adequate remedy exists. A Trade Secret, for example, may be protected by injunction. An individual's right of personal privacy may be protected by an injunction if there is no other adequate remedy, or where a specific statutory provision for injunctive relief exists. An individual whose name or picture is used for advertising purposes without the individual's consent may enjoin its use. The theory is that injunctive relief is proper because of a celebrity's unique property interest in the commercial use of his or her name and likeness (i.e., their right of publicity).
Restraining Orders A Restraining Order is granted to preserve the status quo of the subject of the controversy until the hearing on an application for a temporary injunction. A Temporary Restraining Order is an extraordinary remedy of short duration that is issued to prevent unnecessary and irreparable injury. Essentially, such an order suspends proceedings until an opportunity arises to inquire whether an injunction should be granted. Unless extended by the court, a temporary restraining order ceases to operate upon the expiration of the time set by its terms.

Contempt
An individual who violates an injunction may be punished for Contempt of court. A person is not guilty of contempt, however, unless he or she can be charged with knowledge of the injunction. Generally, an individual who is charged with contempt is entitled to a trial or a hearing. The penalty imposed is within the discretion of the court. Ordinarily, punishment is by fine, imprisonment, or both.

An emergency injunction is a temporary directive from a court ordering someone to cease or continue a specific behavior, depending on the nature of the case. Emergency injunctions are used in cases where people can demonstrate that an injunction is needed to prevent serious harm or damages beyond financial damages in the immediate future. The person who initially requested it will need to provide supporting evidence to get a permanent injunction. It can be a stopgap measure to address an immediate situation while preparing for more long-term legal action.

Emergency injunctions can be used in a wide variety of settings including abuse cases, patent infringement cases, and child custody cases. To grant an emergency injunction, a judge must be shown that serious harm will occur unless the injunction is put in place. For example, in a divorce involving abuse, the abused partner might request an emergency injunction to order the other partner to stay away, on the grounds of personal safety concerns. If the abused partner has documentation like a history of police calls to the residence to address domestic violence complaints, the judge can grant the injunction.

Writ of Mandamus A writ or order that is issued from a court of superior jurisdiction that commands an inferior tribunal, corporation, Municipal Corporation, or individual to perform, or refrain from performing, a particular act, the performance or omission of which is required by law as an obligation. A writ or order of mandamus is an extraordinary court order because it is made without the benefit of full judicial process, or before a case has concluded. It may be issued by a court at any time that it is appropriate, but it is usually issued in a case that has already begun.

Continuance The adjournment or postponement of an action pending in a court to a later date of the same or another session of the court, granted by a court in response to a motion made by a party to a lawsuit. The entry into the trial record of the adjournment of a case for the purpose of

formally evidencing it. Parties in a lawsuit file pleadings (written statements presenting each side of the case before trial to elucidate the issues to be resolved). A plaintiff whose complaint fails to state a Cause of Action is not entitled to a continuance to correct this failure, but a defendant can make a motion for a dismissal of the action. Nor can a defendant whose answer to the plaintiff's complaint does not allege a meritorious defense cure this deficiency by seeking a continuance, but the plaintiff might make a motion for a Summary Judgment in his or her favor. A continuance may be granted, however, in a case that was scheduled for trial before the issues were joined or clearly established. After a trial has begun or while motions are made pending the decision, a court can grant a continuance provided adequate grounds exist.

Exculpatory evidence is the evidence favorable to the defendant in a criminal trial, which clears or tends to clear the defendant of guilt.[1] It is the opposite of inculpatory evidence, which tends to prove guilt. United States, police or prosecutor are not required to disclose to the defendant any exculpatory evidence they possess before the defendant makes a plea (guilty or not guilty). Per the Brady v. Maryland decision, prosecutors have a duty to disclose exculpatory evidence even if not requested. Though it is true that the prosecution is not required to search for exculpatory evidence and must only disclose the evidence it has in its possession, custody or control, the prosecution's duty to disclose includes all information known to any member of its team, e.g., police, investigators, crime lab, etc.
In Brady v. Maryland, the U.S. Supreme Court held that such a requirement follows from constitutional due process and is consistent with the prosecutor's duty to seek justice.
Example
A victim is murdered by stabbing and an accused person is arrested for the murder. Evidence includes a knife covered with blood near the victim and the accused found covered in blood at the murder scene by the police. During the investigation, the police interview a witness claiming to have watched the stabbing occur. The witness makes a statement to the police claiming the stabbing was by another unknown person, not the accused.
The witness's statement is exculpatory evidence, since it could introduce reasonable doubt as to the guilt of the accused. The police believe the witness's account is not true or the witness is unreliable and choose to not follow up on the lead.
The prosecutor is obliged to inform the accused and their attorney of the witness statement even if the police doubt the witness's version of events. If they fail to do so, the defendant would have grounds for appeal or for a motion to dismiss.

court docket - cases in a court calendar.

motion - n. a formal request made to a judge for an order or judgment. Motions are made in court all the time for many purposes: to continue (postpone) a trial to a later date, to get a modification of an order, for temporary child support, for a judgment, for dismissal of the opposing party's case, for a rehearing, for sanctions (payment of the moving party's costs or attorney's fees), or for dozens of other purposes. Most motions require a written petition, a written brief of legal reasons for granting the motion (often called "points and authorities"), written notice to the attorney for the opposing party and a hearing before a judge. However, during a trial or a hearing, an oral motion may be permitted.

plea - in criminal law the response by an accused defendant to each charge of the commission of a crime Pleas are entered orally at arraignment (first court appearance) or a postponed arraignment.

- Pleas are normally "not guilty" , "guilty" , "no contest"
- no contest - admitting facts but unwilling to plead guilty
- delatory plea - challengin jurisdiction of the court or claiming they are wrong defendant

continuance - n. a postponement of a date of a trial, hearing or other court appearance to a later fixed date by order of the court, or upon a stipulation (legal agreement) by the attorneys and approved by the court or (where local rules permit) by the clerk of the court. In general courts frown

on too many continuances and will not allow them unless there is a legitimate reason. Some states demand payment of fees for continuances to discourage delays.

Vacate - *To annul, set aside, or render void; to surrender possession or occupancy.*
The term *vacate* has two common usages in the law. With respect to real property, to vacate the premises means to give up possession of the property and leave the area totally devoid of contents. To vacate a court order or judgment means to cancel it or render it null and void.

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Miscellaneous Topics

Can the mother of my children take them to live in another state without getting my consent? I am the non-custodial parent.
You must file for more custody or file an action against her right to move with your child. Some times the courts may find no merit for her to move such a distance. Her merits for move would consist of 1) a better paying job or marrage to improve quality of life. 2) If the bulk of her family lives in the state to where she is moving. 3) If she is not moving on a whim or a split decision to interefer with fostering and on going relationship with the non-custodial parent.

http://family.findlaw.com/child-custody/child-custody-relocation-laws.html

I am a small email hosting company. Can I legally view my customer's emails?
18 USC § 2702 forbids a company like yours from disclosing the content of an electronic communication unless they have consent of the intended recipient, or they read it by accident and find evidence of a crime therein, or certain other narrow exceptions apply.

I and many others are being sued by a Company after signing a contract for satellite services and finding out that its down half the time. We all want to get out of our service contracts and when we do we get sued for breaking the contract. Who do we complain to for companies like this ?
Complain to the State(s) Attorney General(s) and Consumer Affairs; also the State(s) Secretary(ies) of State may have offices for this type of thing. Further, possibly call your local U.S. Attorney's office for more ideas. Also, search the BBB website(s) for this company for exisitng complaints --- and also make one. (Plus search for other respective agencies which may be able to help.)
Also do Admissions & Production of Docs. Admit Defendant has no balance owing. Please Produce Original or a Certified copy of Contract/Agreement, showing all parties involved, signatures and terms of the contract. In many states, (Read your Rules of Civ. Procedure on Discovery - Admissions) it states if Admissions aren't Answered within ___# of days, it is deemed Admitted!
I had an attorney tell me, that's how he wins most of his lawsuits. Just an idea.

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http://www.patriotnetwork.info/ Yes, THE Robert Clarkson

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How to fight Copyright trolls
http://fightcopyrightrolls.com
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http://www.digitaltrends.com/web/ip-address-not-enough-to-identify-online-pirates-judge-rules/

Free Legal Help
Volunteer Lawyer for the Day
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http://www.reddit.com/r/legaladvice/
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Case Research:
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Local Court house
Local Bar Association

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27 http://www.compellingdiscovery.com/ Very good blog