OBJECTIONS TO EVIDENCE AND TESTIMONY
(From the Ice Files)

FRCP stands for Federal Rules of Civil Procedure. It is recommended that litigants familiarize themselves with these rules and refer to them frequently when studying this material.

"**If you don't raise an objection, you don't have an objection**" (except for plain error).

Plain error:
See FRCP 103(d) - an error sufficiently serious to justify considering it on appeal despite a failure to observe the usual procedural requirement for saving error for review (very prejudicial.). Most likely to be effective where Defendant's constitutional rights have been affected (if not violated).

Object to all like evidence or you can object to none. Do not offer like evidence as that to which you have objected. The court may rule that you have waived your prior objection. Better to elicit the facts you want in evidence through direct or cross-examination of opposition witness.

Objections are not to be used to hide the facts. It is best to state this in your introductory remarks to a jury.

Objections are raised before evidence is presented to trier of fact. Motions to Strike are after evidence has been presented to trier of fact (though a judge is allegedly not influenced as is a jury).

General Use:
State your objection clearly, state the reason for your objection, if only part of the statement/question/exhibit is objectionable, so state or it may be difficult to sustain your objection at trial or on appeal. See FRCP 103(a)(1)

Grounds: All the grounds ever known or heard: (See FRCP 403)

1) incompetent - fails to state grounds
2) irrelevant - has nothing to do with the matters at hand
3) immaterial - may have relevance to the matter at hand but is not important
4) vain repetition - posturing
5) illegal
6) inadmissible
7) **unfair prejudice** These three (7, 8, 9) are the most likely to be
8) **confusion of the issue** successful upon review or appeal
9) **misleading the jury/court**
10) undue delay
11) waste of time
12) needless presentation of cumulative evidence

Hearsay:
Explain the need, in justice or fairness, for producing the original information so that trier of fact may see him, and his source of knowledge may be explored.

INTRODUCTION

The objective of this handbook is to provide a means by which litigants can acquire a reasonable proficiency in using the rules of evidence applied throughout all jurisdictions in the United States.

There are two broad categories of evidence, direct and circumstantial, to which the rules of evidence apply:

1) Direct evidence tends to prove a fact without a need for inference or presumption; if true, it conclusively establishes the fact.

2) Circumstantial evidence provides proof of collateral facts from which inferences may be drawn about matters directly in issue. The same evidence may be direct concerning one fact and circumstantial concerning another. The testimony of a witness that he saw a knife in the defendant's hand at a certain time and place, for example, is direct evidence of the fact that the defendant had possession

of a knife at that particular time and place. It also is circumstantial evidence that can help to prove that the defendant committed an armed robbery at or near that time and place.

There are no citations to cases or statutes in this handbook. It is not meant to be used as a reference work, and litigants would be ill-advised to rely upon it when confronted with a specific evidentiary problem. The great majority of rulings on evidence during a trial, however, are made without reference to specific authority and on the basis of the judge's understanding of the relevant rule. Accordingly a good general understanding of the rules of evidence is essential to functioning effectively as a litigator. These basic rules have been modified in many ways, both by legislative enactment and by appellate decisions among the fifty-one jurisdictions. In addition, a great deal of discretion in applying the rules of evidence is reposed in the trial bench. Judges within the same jurisdiction may apply them differently.

Generally speaking, the prevailing trend is to relax the traditional technical approach of the common law more permissive about admitting evidence, for example, relegating matters of competence of the area of weight. In other words, considerations that might formerly have excluded evidence now merely detract from its weight-that is-its persuasive value.

An objection must be made on the proper ground. If it is not, and it is overruled, an objection on the correct ground cannot subsequently be raised on appellate review.

The balance of this material deals solely with objections based on evidence. There are other phases of a trial, however, in which an opponent can engage in objectionable conduct. These include jury selection, opening statement, trial misconduct, judicial misconduct, and closing argument. A brief resume of such misconduct follows.

Jury Selection:
It is improper for litigants to argue the merits of the case and to secure commitments to prejudge the evidence. It is also improper to frame the questions to the jurors (voir dire) in any manner which indicates any of the facts alleged in the case. It is improper to stray so far from the issues in questioning the jury that the matter is obscured (e.g. asking questions about the attitude of jurors to capital punishment in a burglary case). The matters of educating jurors about the law and asking about their attitudes towards applicable principles of law fall into the "gray" area of judicial discretion. Limited inquiry in these areas is commonly permitted. The propriety of repetitious interrogation varies with the situation.

Opening Statement:
It is improper for litigants 1) to argue the case; 2) make statements that will not be supported by the evidence; 3) refer to the financial condition of a party (unless it is in issue); 4) to mention such matters as the presence of absence of insurance coverage, the fact of subsequent repairs, settlement discussions, any matter precluded by court order, or any statement made as a part of plea negotiations.

Trial Misconduct:
It is improper for litigants 1) to argue objections to evidence in the presence of the jury, 2) to direct a personal attack against another lawyer, 3) to testify in a case the litigants is trying, 4) to re-ask a question to which an objection has been sustained, 5) to show the jury an exhibit which has not been admitted into evidence, or 6) to refer to a party's ethnic or religious background.

Closing Argument:
It is improper for litigants 1) to make personal attacks on a party or a witness other than with respect to credibility; 2) to misstate the evidence; 3) to ask jurors to place themselves in the position of a party to the action; 4) to make statements concerning personal beliefs; 5) to refer to insurance or payments from a collateral source; 6) to mention the remarriage of a plaintiff in a wrongful death action; 7) to appeal to jurors' self-interest as, for example, to their role as taxpayers when they are serving in a suit against a governmental agency; 8) to discuss similar cases and amounts of damages awarded in other cases; 9) to refer to the wealth or poverty of a party; or 10) to make racial, political, or religious comments.

Judicial Misconduct:
In some jurisdictions it is improper for a judge to express an opinion about the evidence. In those jurisdictions where it is permitted he must not do so in such a way as unduly to prejudice a party. A judge should not conduct an adversarial type of cross-examination of a witness.

Procedure:
In the event that objectionable conduct occurs, the appropriate remedy is to ask that litigants be admonished, that the jury be instructed to disregard the conduct, or, in extreme cases, that a mistrial be declared.
Hearsay Objections - Rarely Encountered

Form:
“Objection, your Honor. The question calls for hearsay.” When a hearsay objection is made, the burden shifts to the proponent of the evidence to state the exception and persuade the court that the evidence comes within it.

Ancient Writings:
Statements in writings that have been relied upon as true, such as statements in deeds and wills, where the writings are over a certain age (which varies with the jurisdiction), are admissible. The requirements for authentication are satisfied by the showing that the document is regular on its face and has been kept in a suitable location.

Reputation:
Reputation evidence within a family or a particular community (business or residential), as to family pedigree, family history (for example, marriages and baptisms), community history, and land boundaries, is admissible.

Dying Declarations:
A statement as to cause of death made by a victim when he is aware of his impending demise is admissible. The statement may be in response to a question; it need not be spontaneous. Some jurisdictions admit dying declarations only in criminal homicide cases.

Hearsay Exception: - Public Records

Form:
"Objection, your Honor. The question calls for hearsay." When a hearsay objection is made, the burden shifts to the proponent of the evidence to state the exception and persuade the court that the evidence comes within it.

Definition:
Public records are admissible under the following conditions: 1) the keeping of the record is required by law, 2) the entries are made in the course of official duties, and 3) the entries are made under the general supervision of the recording official. Entries need not have been made at or near the time the reported matter occurred. Certified copies of public records which have an attached or included attesting certificate are admissible without foundational testimony.

CAUTION: The record may be admissible, but that does NOT verify the content of the record. Only that the record exists in its current form.

Authentication:
Since public records are self-authenticating, it is not necessary to lay a founding regarding their mode of preparation by calling a custodian of the records. Opposing litigants, however, can produce evidence to show that the above stated criterion for admissibility has not, in fact, been satisfied, and that the sources of information or other circumstances indicate a lack of trustworthiness. This does not affect the admissibility of the public record but, rather, the weight to be accorded it.

Nature of Public Records:
Records, reports, statements, or compilations of data in almost any form from public offices or agencies can be public records. Birth certificates, death certificates, and weather reports are common examples of public records. Traffic accident reports prepared by police officers, however, are not self-authenticating public records. The come within the “Past Recollection Recorded” exception.

Opinions:
General speaking, an opinion recited in a public record is deleted except when the opinion relates to collateral matters only. Even then, the opinion must be based entirely on firsthand observations of the person preparing the record or it will be excluded in any event.

Absence of Record:
In some jurisdictions, a statement by a custodian of public records attesting to the absence of a public record is admissible.

Hearsay Exceptions:

Past Recollection Recorded

Form:
"Objection, your Honor. The question calls for hearsay." When a hearsay objection is made, the burden shifts to the proponent of the evidence to state the exception and persuade the court that the evidence comes within it.

Definition:
A recitation of fact contained in a writing is admissible if the witness has no present memory concerning the matter, provided that certain conditions are satisfied. The writing itself it not placed into evidence unless it is offered by an opponent.

Conditions for Admission Follow:

Knowledge. The witness must have first hand knowledge of the event at 6the time of occurrence.

Preparation of Writing. The writing must have been prepared by a witness or by a third party and examined by the witness, at or near the time the facts or events occurred. The witness must testify that the facts or events as recorded were true, and the report was accurate when prepared.
Some jurisdictions hold that a writing is admissible even though it was prepared some time subsequent to the event if the witness testifies that the facts were fresh in his memory at the time he recorded them, or when he examined the writing prepared by a third party.

If the writing is not in the witness' handwriting and he dictated it, the transcriber's testimony is necessary unless the witness read and corrected the writing after its preparation.

Customary Practice:
A witness need not remember an event or the preparation of a report if the circumstances surrounding its preparation attest to the accuracy thereof. Ordinarily, a witness simply testifies to a customary procedure that he followed in preparing the report. Police reports of traffic accidents or portions thereof, often are admitted in this manner. This procedure can also be used with other kinds of evidence, such as photographs, for example.

NOTE: This reminds us that, if we wish to use Affidavits to preserve evidence, Affidavits should be prepared, signed, and notarized as soon after the event as possible.

FORMER TESTIMONY

Form:
"Objection, your Honor. The question calls for hearsay." When a hearsay objection is made, the burden shifts to the proponent of the evidence to state the exception and persuade the court that the evidence comes within it.

Definition:
If a witness is unavailable, his testimony given at a previous trial or in a deposition is admissible.

Conditions of Admissibility:
Unavailability. A privilege from testifying, a refusal to testify, a lack of memory, physical or mental illness, all can constitute unavailability. When there is an assertion that the witness is physically unavailable, due diligence must have been exercised in attempting to secure his presence.

Some courts permit the use of affidavits to lay a foundation as to unavailability others require live testimony. If the witness is beyond the reach of compulsory process, some jurisdictions require an attempt to persuade the witness to voluntarily return.

Identity of Parties. The litigation must between the same parties or their privies - that is - their heirs, personal representatives, assignees, successors in interest, etc. In some jurisdictions an identity of interest, that is, a common interest in the subject matter of the litigation, without more, is sufficient even though the parties have no relation to the parties in the case in which the testimony was given.

Identity of Issues. There must be substantial identity as to factual issues.

Cross-Examination. There must be a showing not only that there was an opportunity to cross-examine in the former proceeding but, in addition, that the motive for cross-examination was substantially the same as in the present proceeding.

See: Best Evidence Rule (The highest available degree of proof must be used)

DECLARATION AGAINST INTERESTS

Form:
"Objection, your Honor. The question calls for hearsay." When a hearsay objection is made, the burden shifts to the proponent of the evidence to state the exception and persuade the court that the evidence comes within it.

Definition:
An out of-court declaration by a third party against his interest is admissible if the Declarant is unavailable to testify. A third party is a person who is not party to the litigation. (Caveat. A statement implicating that the defendant, as well as the Declarant, may not necessarily be admissible in a criminal trial.)

A declaration may be written, oral, or it may be inferred from conduct. An example of the latter would be the act of fleeing. To qualify such conduct as a declaration, it is necessary to show surrounding circumstances, such as probable knowledge of the act from the commission of which it is contended the person is fleeing and the opportunity to have committed it on the part of the person fleeing.
A statement need not actually have been against the Declarant's interest; he need only have reasonably believed that it was at the time he made it. The theory underlying the rule is that a reasonable person would not have made the statement unless he believed it to be true.

Further Definitions of "Against His Interest":
Pecuniary. The statement is against the Declarant's financial interest.
Penal. The statement tends to make the Declarant liable to criminal prosecution.
Social Disgrace. The statement tends to subject the Declarant to ridicule, embarrassment, scorn, or hatred.

Some jurisdictions do not recognize the penal and social disgrace categories.

Definition of "Unavailable":
The Declarant must be dead, insane, too ill to appear in court, protected by privilege, beyond the jurisdiction of the court, or his whereabouts unknown.

Conditions for Admission:
It must be shown that the Declarant had knowledge of the fact concerning which he made the statement, and that it is reasonable to assume that he believed the statement was against his interest at the time he made it. In many instances the requisite knowledge and belief can be inferred from the statement itself.

A party offering the evidence must demonstrate that there was no apparent motive to falsify. Generally speaking, a showing as to immediate surrounding circumstances is sufficient for this purpose.

Mixed Statements:
Statements that include portions that are self-serving and/or opinions, as well as portions that are statements of fact, are mixed statements. Regarding such statements, the self-serving portion must be deleted. If the objectionable portion cannot be deleted, the court may reject it entirely. As for opinions that ordinarily would be admissible if the Declarant were present to testify.

CONTEMPORANEOUS STATEMENT (Present Tense Impression/Res Gestae)

Form:
"Objection, your Honor. The question calls for hearsay." When a hearsay objection is made, the burden shifts to the proponent of the evidence to state the exception and persuade the court that the evidence comes within it.

Definition:
A contemporaneous statement refers to the words spoken as part of a transaction that impart meaning to the transaction. These words sometimes are referred to as the "Res Gestae" or the "Present Sense Impression" of a transaction.
Although the words need not be triggered by a startling event, they must be virtually contemporaneous with the event and must describe or explain it.

Comment: In some jurisdictions contemporaneous statements are limited to statements about the Declarant's own conduct. In other jurisdictions the witness who heard the statement, or someone else who did not hear the statement, must have observed the same event/transaction and testified concerning it.

Business Entries and Hospital Records

Caveat:
The admission of business entries and hospital records is governed by statute. The statements in this section are based on generally accepted principles.

Form:
"Objection, your Honor. The question calls for hearsay." When a hearsay objection is made, the burden shifts to the proponent of the evidence to state the exception and persuade the court that the evidence comes within it.

General Rule:
Records made in the regular course of business, at or near the time of occurrence of the event recorded, are admissible into evidence.

Definition of Business:
Every kind of organization, profession, occupation, or calling that regularly keeps records, including governmental and nonprofit entities, generally qualifies as a business.

Original Record:
A record may take almost any form, including microfilm, tapes, and discs. A carbon or photo static copy is considered to be an original.

Laying the Foundation:
It is not necessary to call each participant in the process. The authenticating witness must be someone who is familiar with the procedure and who can identify the records (or that portion of the record that constitutes the exhibit), who can testify that they were kept in the regular course of business by persons who had a duty to record the information, and who can explain the mode of preparation. He need not be a supervisor, and he need not have made any of the entries. A record prepared for the purpose of litigation does not qualify as a business record.

Nature of the Record Keeping:
Someone originally must have had personal knowledge of the events, including the time the entries were made and the time of the occurrence of the events to which the entries relate. The entries may represent transfers from other writings, such as sales slips and invoices. Such latter writings do not have to be produced. In the event that opposing litigants wants to examine them, he has the responsibility for subpoenaing them.

Depending upon circumstances, an entry may be made within a reasonable time after occurrence of the event. Records may be kept informally. If they are of such a nature that they are relief upon in operating a business, they usually are admissible. It is not necessary for a proponent to prove lack of motive to misrepresent.

Scope of Business Records:
The concept of business records is not restricted to debits and credits. Such things as index cards, employment records, time cards, check stubs, and employee reports are all business records. However, if the purpose of a record, such as an employee accident report or police traffic accident report, is primarily related to either prosecuting or defending a potential claim, it is inadmissible as a business record. All or a portion of such a document, nevertheless, may be admissible under the "past recollection recorded" exception to the hearsay rule.

Opinions, Conclusions, and Declarations:
Opinions, conclusions, and declarations contained in business records do not necessarily render them inadmissible. Courts are practical in their approach. If an opinion, conclusion, or declaration in the record is a violation of privilege, unduly prejudicial, or lacking in personal knowledge, either the statement is deleted or the jury is instructed to disregard it. If the opinion, conclusion, or declaration concerns only peripheral matters, however, the court may not require its deletion.

Absence of Entry:
It is proper to prove an absence of an entry to show that a transaction did not occur if the regular course of business was to make an entry of such a transaction within a reasonable time of its occurrence.

Compilations:
Balance sheets, profit and loss statements, and other compilations are admissible in evidence, but not as business entries. (See Voluminous Records in Sec. "Best Evidence".)
Federal Rules of Evidence:
Business entries include memoranda, reports, and data compilation in any form. Opinions and diagnoses can be admissible as business entries if they are a part of business records that are regularly kept and maintained in a trustworthy manner.

Hospital Records
The same general rules, applicable to the authentication of business entries, apply also to hospital records. Some states have made hospital records self-authenticating by means of a sworn declaration, thus eliminating the need for the appearance of a live witness.

Opinions, Conclusions, and Declarations:
Patients. Statements of patients contained in hospital records relating to the occurrence of an accident are inadmissible on the patient's behalf unless admitted as a prior consistent statement for the purpose of rehabilitating the patient or as a spontaneous declaration. Statements of patients as to present physical condition, and pain and suffering, which are recorded at or near the time they are made are, in many jurisdictions, admissible to prove pain and suffering, particularly if the attending physician considered them in making his diagnosis.

Nurses. Generally speaking, records by nurses of matters they have observed, such as symptoms, acts, conditions, or events, are admissible. Diagnostic statements by nurses are not admissible and must be deleted.

Physicians. Recordings of symptoms, acts, conditions, or events observed by physicians are admissible. While the rend is to allow diagnostic statements to remain in the record, nevertheless, if the statement relates more directly to a critical issue in the litigation, than a peripheral matter, the majority of courts will delete it as hearsay, thus requiring the physician to appear and testify so that he can be subjected to cross-examination.
Laying the Foundation for X-rays:
The modern view is to regard X-rays as hospital records. If a traditional foundation is required, the following must be established: 1) date, 2) qualified operator, 3) procedure used, 4) method of identification of film, 5) an accounting of the custody of the film.

ADMISSIONS OF A PARTY (see also FRCP 36)

Form:
"Objection, your Honor. The question calls for hearsay." When a hearsay objection is made, the burden shifts to the proponent of the evidence to state the exception and persuade the court that the evidence comes within it.

Definition:
A statement of fact made by a party or, in certain circumstances, by his agent, employee, assignor, coconspirator, or predecessor in interest, inconsistent with the party's present position in the litigation is admissible against said party. The statement need not be against the interest of the party at the time it is made; subsequent events can make it so.

Nature of Statement:
A statement may be either written, oral, or non-verbal.

Conduct. Acts such as flight, refusal to take a test, evasive or equivocal responses, and attempts to avoid detection are considered to be admissions. Not all conduct, however, is admissible. For public policy reasons some matters are excluded. Examples of this are subsequent repairs and the settlement of other claims arising out of the same accident.

Adoption. A person can adopt a statement of another person, either expressly or implicitly, by manifesting agreement with it.

Silence. A failure to respond, complain, deny, or mention a matter when it would have been appropriate to do so, can constitute an admission unless it is constitutionally protected as, for example, the right to remain silent in the fact of an accusation of criminal conduct. The mere fact of a party's presence at a time when words are spoken does not make evidence of such words admissible.

Party:
"Party" includes an agent or employee of a party to a lawsuit if the agent or employee is acting within the scope of his authority. Traditionally, it had to be shown that the agent-Declarant was an authorized spokesman. The modern view is that it is sufficient to show that the statement relates to his employment duties. Party also includes a partner, coconspirator (in both civil and criminal cases), or an accomplice of a party, if the statement was made in furtherance of the joint venture and prior to its dissolution. A statement made by another member of a joint venture in furtherance of a joint objection, is admissible against the party, even though the statement was made before the party joined the venture.

"Predecessors in interest" includes, among others, assignors and prior title holders. Admissibility is limited to statements made by the predecessor in interest before he divested himself of his interest in the common property.

Principal/Safety. Declarations of a principal can be admissible against the surety if they are made in the ordinary course of the principal's business.

Laying a Foundation:
A statement must tend to prove or disprove a material fact. It makes no difference when the party made the statement (as already pointed out, this is not true as to a predecessor in interest). It is not necessary to show the time, place, and parties present when the statement was made. These matters, however, can be the subject of cross-examination. An admission against the interest is admissible even if the party-Declarant would not be competent to testify on his own behalf as to the statement, since he did not have first-hand knowledge of the matter contained in the admission.

Fact or Opinion:
In some states, only declarations of fact are admissible; in others, conclusions of law and opinions are also admissible. A party need not be aware that his statement was against his interest at the time he made it. An admission can be offered only against a party, not for him.

Declarant's Rights:
If any portion of a statement is admitted into evidence, then the whole statement is admissible. A party can explain an admission, ascribing it to error, mistake, inadvertence, immaturity, intoxication, etc.
An admission is inadmissible if the Declarant was not competent at the time he made it. Incompetence would include his being too young, senile, dazed, intoxicated, mentally incompetent, etc. Some jurisdictions hold to the contrary, admitting the statement, but allowing an explanation of the circumstances.

HEARSAY

Form:
"I object on the ground that this question calls for hearsay."
"Objection, your Honor. The question calls for hearsay."

Definition:
Hearsay is testimony concerning what a person said other than while testifying in court in the present proceeding, and is offered as proof ofthe truth of the matter asserted. It is excluded because it cannot be tested by cross-examination. Hearsay can be verbal or non-verbal. Non-verbal hearsay includes any means used as a substitute for speaking, such as a written letter, a symbol, or a nod of the head. A shake of the head in response to a question where there is an intent to communicate, can be the basis for a hearsay objection.

Generally speaking, however, conduct must be assertive to be hearsay; that is, it must be intended to be a substitute for verbal communication. A few jurisdictions also treat non-assertive conduct as hearsay.

General Rule:
Hearsay evidence is admissible unless it is within one of the recognized exceptions. For multiple hearsay to be admissible, each portion of it must fall with an exception. Certain hearsay statements are admissible because the circumstances surrounding their utterance indicate that they are sufficiently trustworthy to be considered by the trier or fact.

Non-Hearsay:
Testimony as to what someone said outside court, offered simply to prove that the words, were, in fact, spoken (verbal acts) is not hearsay.

This kind of evidence is used in the following instances:

1). to prove state of mind of the Declarant - to demonstrate knowledge of a situation or establish motive or plan. The evidence may be excluded if the court believes surrounding circumstances show a Declarant's intent to mislead.

2). to demonstrate that the Declarant was conscious.

3). To establish justification for the conduct of a third person - for example, that of a police officer in making an arrest on the basis of conversations he has heard or that have been related to him. Such conversations are considered to be verbal acts.

4). to prove such a matter a slander (defamatory oral statement) or the terms of an oral contract. The critical question in determining whether an out-of-court statement is hearsay or non-hearsay is the purpose for which the statement is offered. If the facts and terms of the utterance itself, rather than references contained within the utterance to other facts are at issue in the trial, then the utterance is not hearsay. Sentences posing questions or giving order usually are not hearsay.

Federal Rule:
The Federal Rules do not exclude hearsay if the statement 1) is as reliable as evidence admissible under other hearsay exceptions, 2) is offered to prove an essential fact, 3) is better proof than other available evidence, and 4) the opposing side is given notice of the intent to offer the statement and the name and address of the Declarant. This exception is applied with caution by the courts.

Comment:
A common tactic is to offer testimony as being within the "state of mind" exception, even though the state of mind of the Declarant is irrelevant. A hearsay objection, standing along, is legally insufficient. The objection must also have to be on the basis of irrelevancy.

The modern view is that if an otherwise hearsay statement is admissible for the purpose of impeachment (a prior inconsistent statement), or as a prior consistent statement (to rehabilitate an impeached witness), it can be considered as substantive evidence.

FEDERAL RULES OF EVIDENCE

Comment:
The Federal Rules of Evidence exhibit a liberal attitude. They de-emphasize technical objections and emphasize discretion of the trial judge.
They must be read in relation to each other; a given problem may involve several rules. Some have implications not readily apparent.

Best Evidence Rule:
Mechanically reproduced documents are considered to be duplicate originals.

Business Records:
[FRCP 803(6)] A business entry is a memorandum, report, recording, or compilation of data in any form, of acts, conditions, opinions, or diagnoses, made at or near the time of occurrence from information transmitted by a person with knowledge, provided that it was made in the course of a regularly conducted business activity, and it was regular practice to make such an entry. The entry must be factual. An authenticating witness need not have personal knowledge of the entry; ordinarily, this witness is the custodian of records. If the process lacks trustworthiness, however, the entry will not be admitted.

Expert Testimony:
[FRCP 701-706] Expert testimony is admissible if it will assist the trier of fact to understand the evidence or to determine a fact in issue; it is not excluded because it embraces an ultimate issue of fact. An expert need not disclose the underlying facts for his opinion on his direct testimony [FRCP 705].

Hearsay:
The Federal Rules contain almost thirty exceptions to the hearsay rule. The exceptions, however, do not necessarily mirror those found in the state rules. The prior statement of a party, for example, is considered to be non-hearsay rather than an exception to the hearsay rule.

The Federal Rules include a "catchall" exception [FRCP 807] that allows the court to admit hearsay if it has a degree of reliability equivalent to that of any of the enumerated exceptions, provided that certain conditions are satisfied. In practice it is seldom used because there is not much that is sufficiently trustworthy that does not gall within the other exceptions.

Note: If a treatise is established as "reliable authority", either by a witness or on the stand or by judicial notice, it can be read to the trier of fact as direct testimony. It usually is not an easy task to persuade the court to take judicial notice of such a treatise [FRCP 803(18)].

Impeaching Evidence:
Impeaching evidence, such as a prior inconsistent statement of a witness, cannot be considered for any purpose other than impeachment.

Official Reports:
A report of an official investigation containing opinions and conclusions is admissible. If it lacks trustworthiness, however, it can be excluded. Many items in public reports are kept out because they set forth a hearsay statement instead of making a finding that the statement is true.

Preliminary Fact Determination:
In determining preliminary fact questions concerning the admissibility of evidence, the court is not bound by the rules of evidence except those pertaining to matters of privilege.

DEPOSITIONS [FRCP 27, 30, 31, 32..]

Comment: Depositions can be used to impeach a witness, to refresh the recollection of a witness, to serve as past recollection recorded, to be used as an admission or statement of a party, and to be used as evidence of a witness' former testimony.

Impeachment:
Generally speaking, it is improper to ask a witness, "Didn't you say in your deposition...?" This type of question is argumentative.

The proper technique after a witness has testified contrary to the testimony in his deposition, is to establish, by questions directed to the witness, that he witness had his deposition taken at a particular time and place that he knew he was under oath and that his testimony was being recorded. Litigants then should indicate what portion of the deposition he desires to read, that is, the part that is

contrary to the in-court testimony of the witness, be stating the page and line where he will commence reading, and the page and line where he will cease reading. Opposing litigants must then be given an opportunity to read this portion of the deposition transcript and object, if he desires, before the examining litigants may read it to the trier of fact.

Deponent A Party:
The deposition of a party to the action is admissible for any purpose when it is offered by an opposing party, subject to the standard objections of relevancy, competency, etc. The court, however, may not allow cumulative portions to be read, that is, portions that are repetitious. (See Sec. "Hearsay Exceptions: Admissions of a Party" and FRCP 1007).

Former Testimony:
A deposition may be read at a trial where the witness is unavailable at the time of trial. (See Sec. "Hearsay Exceptions: Former Testimony").
Past Recollection Recorded:
In rare instances a deposition may be received into evidence as past recollection recorded. (See Sec. "Hearsay Exception: Past Recollection Recorded" and FRCP 803(5)).

Refresh Recollection:
A deposition may be used to refresh the recollection of a witness. (See Sec. "Refreshed Recollection".)

Caveat:
An objection to the form of a question, whether leading, argumentative, etc., is deemed waived unless the objection is made at the time of the deposition. Substantive objections such as hearsay can be made initially at trial.

DEMONSTRATIVE EVIDENCE

Form:
"Objection, your Honor. The diagram lacks an adequate foundation."

Definition:
Demonstrative evidence is evidence that is created and was not a part of the incident or transaction giving rise to the litigation. It can be, for example, a model, a medical prosthesis, a diagram, a graph, or a blow-up of a document. It can be especially constructed for the trial, or in the case of a medical prosthesis, for example, it can be something manufactured for purposes other than use as a courtroom exhibit.

Comment:
Demonstrative evidence is more likely to be misleading, prejudicial, or cumulative than other kinds of evidence. If it is used for illustrative purposes only, it need not be exactly to scale.

Laying the Foundation:
Demonstrative evidence must be a "fair" depiction. Slight differences affect the weight accorded to it and do not preclude its admissibility. (See Sec. "Preliminary Fact Determination".)
The critical question is whether the exhibit unduly exaggerates or distorts the subject.

CROSS-EXAMINATION

Form:
"I object on the ground that this question exceeds the scope of direct examination."
"Objection, your honor. The question is beyond the scope of direct testimony."

Purposes of Cross-Examination:
To bring out additional facts or to impeach a witness.

Impeachment is the process of attacking the credibility of a witness. A witness can be impeached on cross-examination by questions relating to his accuracy of recollection, capacity to observe, impartiality, prior inconsistency of statements, and felony convictions, even though these matters were not inquired into on direct examination.

Latitude of Cross-Examination:
Some jurisdictions permit cross-examination on any issue; others limit it strictly to matters brought out in direct examination of a witness. The modern view is to allow cross-examination on any matter that logically tends to rebut an unfavorable inference which might be drawn from direct examination, that is, on any matter relevant to the subject matter of the direct examination. Generally

speaking, the latitude of cross-examination is broader if the witness is 1) a party to the action, 2) an expert, or 3) a witness against a defendant in a criminal case.

The fact that no objection was made on direct examination to inadmissible evidence does not give a cross-examiner the right to cross-examine concerning such inadmissible matters except in the following situations:

1) to offset highly prejudicial direct testimony, for example, where, under certain circumstances a witness makes a broad statement such as "I never take a drink";
2) to place evidence in the proper context, the remainder of a conversation or writing, for example.

Leading Questions:
Ordinarily, leading questions are allowed on cross-examination unless the witness is obviously friendly to the cross-examiner or his client. Whether to allow such questions is a matter of judicial discretion.

Collateral Matters:
The traditional rule prohibiting impeachment on matters collateral to the issues, that is, facts that have no direct relation to or immediate bearing on the issues in question, has been considerably relaxed. The modern view is that this is a matter left largely to the discretion of the trial judge.

"Why" Questions:
If a lawyer asks a "why" type of question on cross-examination, he gives a witness an opportunity to inject otherwise inadmissible matters. It is a matter of judicial discretion, thereafter, as to whether such testimony can be rebutted. Ordinarily, a cross-examiner should never ask a witness "why" he did something.

Restrictions on Cross-Examination:
A defendant in a criminal case can be cross-examined, and, with some limitations, about prior felony convictions.

Generally speaking, a cross-examiner may not assume facts in cross-examining a lay witness; however, with respect to expert witnesses, the court, in its discretion, may allow litigants to assume facts for the purpose of testing the reasonableness of the expert's opinion.

It is improper to repeat the testimony of another witness on the stand and ask if it is a lie or the truth. Such testimony is irrelevant.

Answers to Questions Relating to Collateral Matters:
Generally speaking, a cross-examiner must accept the answers he receives to questions relating to collateral matters. A character witness, for example, may be asked on cross-examination if he has heard of certain wrongful acts on the part of a party to the action. The cross-examiner must then accept the answer as given by the witness. He will not be allowed to introduce evidence specifically for the purpose of showing that the witness had knowledge of such wrongful acts; otherwise, collateral matters could take undue time and perhaps mislead the trier of fact. Evidence of such wrongful acts, however, may be admissible for the purpose of rebutting character evidence.

Cross-Examining Own Witness:
Hostile witness. If a lawyer calls a witness who obviously is hostile to the lawyer or his client, the lawyer may cross-examine the witness in the customary manner, including the use of leading questions.

Hearsay Declarants. A lawyer may call and cross examine any individual whose purported statement has been introduced by the other side under an exception to the hearsay rule.

CONSTITUTIONAL REQUIREMENTS

Criminal

Rules of evidence covered to criminal as well as civil trials [FRCP 1101]. In criminal cases evidence may be inadmissible because it was obtained in a manner that violated the constitutional rights of the defendant.

Laying the proper foundation for the admission of evidence in criminal cases may require showing that constitutional requirements have been satisfied. The constitutional provisions most often encountered are those relating to self-incrimination, that is, those concerning confessions and admissions, and unlawful search and seizure. Also frequently encountered are requirements pertaining to "due process of law." For example, respecting identification evidence, the manner in which it was obtained may have been unduly suggestive in its influence on the witness.

The impact of both federal and state constitutional provisions upon every aspect of criminal trials, including the evidence-taking process, is of paramount significance. A lawyer cannot properly handle criminal matters unless he is thoroughly familiar with these provisions.

Meeting constitutional requirements is, in a sense, akin to showing that an expert has the necessary qualifications to testify, or that a document satisfies the requirements of the business entry exception to the hearsay rule.
In other words, in a legal sense the process of satisfying constitutional requirements concerns the competency of otherwise relevant evidence.

A determination as to whether constitutional requirements have been satisfied involves a preliminary fact determination that at times must be held outside the presence of the jury (See Sec. "Preliminary Fact Determination"). Often these determinations are made pursuant to a pretrial motion. In any event, it is the responsibility of the defense attorney to object on the basis that the evidence is inadmissible because a particular constitutional requirement has not been satisfied.

Generally speaking, prosecutors anticipate such objections, routinely laying the necessary foundation by showing that relevant constitutional requirements have been satisfied.

The general subject of whether a defendant's constitutional rights have been violated in gathering evidence is the subject of more appellate decisions than is any other area of the law, civil or criminal. Literally speaking, thousands of opinions have been published to date in this field, and they continue to flow from high and intermediate courts in unabated number.

Constitutional requirements concerning the gathering of evidence are not rules of evidence, and, accordingly, are not within the realm of "preliminary facts" that must be established before otherwise relevant evidence is admissible.

Because of their importance, however, this section has been included to alert litigants to their existence and to show how they fit into the evidence-taking process.

COMPOUND

Form:
"I object on the ground that the question is compound."
"Objection, your Honor. The question is compound."

Definition:
A question is a compound question if it contains two or more questions. A single answer to it can be confusing, since the witness might answer one part in the negative and the other in the affirmative.

Examples:
"Mr. Jones, did you, or did anyone else, talk to Mrs. Smith at that time?"
"Did Miss Brown type this letter in your presence and call Mr. Blue on the phone regarding this transaction?"

CHARACTER EVIDENCE

Form:
"Objection, your Honor. The question calls for irrelevant character evidence."

Rule:
Generally speaking, evidence of a character trait cannot be used as circumstantial evidence of a person" conduct. For example, proof that a person is a cautious, careful person is not admissible to prove that he drove his car in that manner at a given time and place. Such evidence is deemed to be irrelevant.

Exceptions:
There are exceptions to this rule. The truthfulness of any witness is always relevant, except when the witness is also the defendant in a criminal trial. Other than this exception, an opponent may call a witness to testify that another witness, or party, has a reputation in the community for untruthfulness. In a criminal trial the defendant has the option of placing his character in issue, not only as to truthfulness but also as to other traits; for example, that he is a law abiding and peaceful citizen. If, and only if, the defendant calls one or more witnesses to testify about his character may the prosecution do so as well. The prosecution must limit its evidence to the particular traits the defendant has placed in issue.

Further, in criminal cases both the prosecution and the defendant can offer evidence as to the relevant character traits of a victim. The prosecution may do so even if the defendant chooses not to. For example, in an assault case the prosecution can attempt to show as a part of its case in chief, that the victim has a reputation as a peaceful person, and a defendant pleading self-defense can attempt to show that the victim has a reputation for violent conduct.

Laying the Foundation:
Character traits are proved by reputation. Reputation may be based on discussion or on a lack of discussion, the latter being a fact from which an inference can be drawn.

Caveat. On direct testimony a witness as to reputation cannot testify concerning particular discussions and events. He can be cross-examined, however, about specific events and conversations.

The character witness must be 1) a member of a community (residential, social, or business) to which the party or witness whose character is in issue also belongs, and 2) must have been a member of the community for a reasonable length of time. The character witness must also be able to state that he knows what the reputation of the party or witness is for the particular character trait in issue.
In some jurisdictions, including the federal courts, a character witness can state his own opinion as to a party's or a witness' character trait if he is personally acquainted with the party or the witness, and has known him well enough to have formed a reliable opinion.

Cross-Examination:
On cross-examination a character witness can be asked if he knows or has heard of a fact that would indicate something to the contrary of the trust of the witness' testimony; for example, that the party, or witness whose character is in issue, was convicted of a certain crime. The fact must be logically relevant to the character trait and the cross-examiner must ask the question in good faith - that is - he must have a basis for believing that the fact forming the basis for the question is true. This belief can be based on information that itself is inadmissible.

BEST EVIDENCE

Form:
"I object on the ground that this is not the best evidence of the contents of _____."
"Objection, your Honor. The evidence fails to comply with the Best Evidence Rule."

Definition:
The original writing, for example, the original contract in an action for the breach of written contract, must be produced when its terms are in issue unless failure to produce it is satisfactorily explained. The reason is that primary evidence affords the greatest certainty. Secondary evidence is something other than the original. "Original" includes duplicate (signed) copy and, in the modern view, photo static copies if they are made in regular course of business. A certified copy is considered an original public record.

"Writing" encompasses every means of recording: handwriting, typewriting, printing, photographs (including X-rays), sound recordings, videotapes, movies, and computer printouts being the most common.

The objection, "not the best evidence", is to a form of incompetence in that the proper foundation has not been laid for introducing secondary evidence of the contents of a writing, that is, of a copy or oral testimony.

Laying a Foundation for Introducing Secondary Evidence:
A proponent of secondary evidence of a writing must demonstrate that the original cannot be obtained through the exercise of reasonable diligence; that is, that it 1) has been destroyed, 2) has been lost (in which case a diligent search must be conducted), 3) is beyond the jurisdiction of the court and in the possession of a third party, 4) is under the control of an opponent who had notice to produce the writing in court, or 5) is a public record that cannot be removed. Absence of the original must not be due to any fraudulent act on the part of the party seeking to introduce secondary evidence. If the document is under the control of an opponent, litigants must serve a "Notice to Produce" requiring the production of the original at trial before secondary evidence is admissible.

Secondary Evidence:
Ordinarily, any secondary evidence, including simply the testimony as to a witness' recollection, is sufficient. A few jurisdictions, however, require the best available secondary proof, such as a mechanically reproduced copy. The authenticating witness should testify that the copy is an accurate reproduction of the original. If a witness testifying without a copy he must have read the original, be able to remember it, and be able to state the substance of the contents of the original.

Exceptions to the Best Evidence Rule:
Collateral Matters. If the writing does not relate to an important issue, but only to a peripheral or collateral matter, secondary evidence is admissible if it is inexpedient to obtain the original.

Voluminous writings:
Summaries prepared by experts are admissible when the original writings are voluminous, provided that he actual records are available for use in cross-examination. Financial statements of various kinds are common examples of summaries.

Important Distinction:
A fact which exists independently of a writing, but which is reflected in a writing, can be proved apart from the document. The writing is not then in itself at issue. Examples follow:
1). Payment of wages - the cancelled paycheck need not be produced.
2). Debt - a promissory note reflecting the debt need not be produced.
3). Ownership of property - the deed or other indicia of ownership need not be produced.
4). Marriage - the marriage license need not be produced.

The fact that a writing has been made describing or memorializing a fact does not prevent proof of the fact by other evidence. However, when the specific nature of the contents of such writing are in issue, the Best Evidence rule is applicable.

Not Applicable:
The Best Evidence rule does not apply to the nature, appearance, or condition of physical objects. Testimony may be offered as to these matters without offering the object itself in evidence, even if the object is available.

ASSUMING FACTS NOT IN EVIDENCE

Form:
"I object on the ground that the question assumes a fact not in evidence."
"Objection, your Honor. litigant’s question assumes a fact (facts) not in evidence.

Definition:
A question that assumes unproved facts to be true is objectionable, since it seeks to bring before the trier of fact, facts to which no evidence has been introduced. Further, it traps a witness info affirming the truth of the assumed fact without, in many cases, this being his intention.

Examples:
The classic example is the "When did you stop beating your wife?" question, where there has been no evidence that the witness has ever struck his wife. “Did you know that...?", Have you heard...?": This type of question, whether on direct or cross-examination, is likely to assume unproven facts.

Exception:
In the case of experts and, on occasion, lay witnesses, the court, in the exercise of its discretion, may allow litigants on direct examination to assume a fact in question upon a representation that litigants will subsequently offer evidence of the assumed fact. The question and answer, however, are subject to a motion to strike if such evidence is not subsequently introduced.

It is, nonetheless, a common practice to assume facts in the cross-examination of experts as a way of testing the credibility of their opinions, even though evidence of such assumed facts will not be forthcoming.

ARGUMENTATIVE

Form:
"I objection on the ground that the question is argumentative."
"Objection, your Honor. Litigant is arguing the witness."

Definition:
The purpose of the question is to persuade the trier of fact rather than to elicit information. The question calls for an argument in answer to an argument contained in the question; or it calls for no new facts, but asks the witness to agree to conclusions drawn by the questioner. A lawyer may not argue or pick a quarrel with a witness.

Examples:
"Can you tell this court what you mean so that we will know what you are talking about?"
"Isn't your answer to my question different from your testimony on direct examination?"
"You're not telling the truth, are you?"
"How can you remember what happened on October 10th when you cannot remember anything that happened on the 11th or 12th?"

"Did you hear Mr. Doe testify yesterday that...?"
"Didn't you testify this morning that...?"

Comment:
The court, in its discretion, may allow argumentative questions on cross-examination or in direct examination of a hostile witness.

ASKED AND ANSWERED

Form:
"I object on the ground that the witness has already answered that question."
"Objection, your Honor. That question has already been asked and answered."

Definition:
This objection is to a form of immateriality. It attempt to prevent a waste of time by unnecessary repetition and to avoid the giving of undue emphasis to particular potions of the evidence. It applies not only when an answer has not been given, but also when the witness has stated that he does not know or remember the matter.
Exception:
Repetitious questions may be permissible in an attempt to refresh the memory of a witness, to clarify a point, or, in cross-examination, to lay a foundation for impeachment by way of a prior inconsistent statement. Generally speaking, more liberality is granted repetitious questions on cross-examination.

Comment:
"Asked and Answered" is not a proper form of objection, but is commonly used and recognized. The correct objection is that the question is "cumulative". If the question is crucial, or if there is a good reason to repeat it, for example, because a juror was inattentive, litigants should be allowed to re-ask it.

AMBIGUOUS AND UNINTELLIGIBLE

Form:
"I object on the ground that the question is (ambiguous) (unintelligible) in that _____."
"Objection, your Honor. The question is (ambiguous) (unintelligible."

Definitions:
Ambiguous. Equivocal, uncertain, capable of being understood in two or more possible senses. Unintelligible. Not capable of being understood by the witness or the jury.
Hearsay Exception:

Spontaneous Exclamation (Excited Utterance)

Form:
"Objection, your Honor. The question calls for hearsay."

When a hearsay objection is made, the burden shifts to the proponent of the evidence to state the exception and persuade the court that the evidence comes with it.

Definition:
A statement made on impulse, that is, an excited utterance made in connection with a startling occurrence rather than on reflection, is admissible as a spontaneous exclamation. The statement can be about any startling event. The Declarant must have had an opportunity to see or hear whereof he speaks. This knowledge will not be inferred from the content of the statement. The Declarant may be a third party and need not be a competent witness; for example, he could be considered incompetent on the basis of age. The Declarant need not be present in court. In fact, it is not necessary to identify the Declarant so long as the circumstances indicate that he actually observed the event.

A witness may testify concerning his own spontaneous statement.

A third party can testify concerning the statement even though the Declarant is available but is not called to testify.

Spontaneity:

A lack of time for reflection is the key factor. There is a broad latitude of judicial discretion as to the permissible time interval between an event, which must be of a startling nature, and a statement about it. The statement, however, must be directly related to the shock impact of the event. The critical issue is whether the Declarant was still upset by the event when he made the statement. An intervening period of unconsciousness does not render a statement made on awakening inadmissible. Most jurisdictions do not require a Declarant to have been a participant in the event.

The modern trend is to admit declarations of opinion. This trend, however, does not extend to opinions about ultimate issues of legal responsibility, such as "The guy in the green car is at fault."

Examples of Admissible Spontaneous Exclamations:
"He's going to kill himself at that speed."
"Look, he's running the red light."
"God, my brakes have failed."

STATE OF MIND

Form:
"Objection, your Honor. The question calls for hearsay.

When a hearsay objection is made, the burden shifts to the proponent of the evidence to state the exception and persuade the court that the evidence comes within it.

Definition:
If a Declarant's state of mind is a fact in issue (Declarant need not be a party to the litigation), evidence of his declarations relative to his state of mind is admissible. Declarations can be oral, written, or may be inferred from conduct, for example, the use of signals.

State of Mind:
Mental Condition. Intent, knowledge, malice, motive, design, competency, belief, assent, etc. Emotional Condition. Anger, affection, ill will, fear, etc.

Physical Sensation. Pain and complaints about bodily condition. Exclamations concerning then-existing pain or other bodily condition, as distinguished from a narrative of past complaints, are admissible. A few jurisdictions, nevertheless, do admit statements of past bodily condition. Admissibility is not restricted to exclamations made at the time an injury was inflicted.

Laying the Foundation:
A statement must be made contemporaneously, or nearly so, with the time of the relevant state of mind. Where the statement was made and who was present must also be shown.
Note: A witness can testify as to his state of mind on previous occasion. It would be inadmissible hearsay, however, for a third party to testify as to what the Declarant told him his state of mind was on that previous occasion.

Proving Other Facts by State of Mind Evidence:
A statement of memory or belief by an unavailable Declarant cannot be used to prove a fact remembered or believed. A statement by an unavailable Declarant, however, as to his intention to do something is admissible as evidence that he in fact did it, for example, that he revoked his will. A statement by "A" an unavailable Declarant, that he was going to meet "B" in a certain place, can be used as circumstantial evidence to prove that "A" went to said place; it cannot be used as circumstantial evidence to prove that "B" went there.

The modern trend is to admit evidence of the conduct and statement of a third party, indicating the state of mind of said third party, as circumstantial evidence in appropriate situations. Suppose for example that the issue is the competency of an individual. The conduct, including statements of another, that is, a third party, toward that individual can be shown, demonstrating that, by his (the third party's) conduct toward the individual whose competency is as issue, it is apparent that the third party regarded the said individual as a normal, competent person. From this circumstantial evidence, an inference of competency may be drawn. Obviously, a foundation of acquaintanceship and opportunity to observe must first be established.

Miscellaneous:
State-of-mind statements are not rendered inadmissible because they re self-serving.

A Declarant need not testify or be present in court. Most jurisdictions allow a doctor to testify what the plaintiff/patient, or a member of his family told the doctor incident to treatment or examination in order to show the basis for the doctor's opinion. Some states exclude such testimony if the doctor saw the plaintiff/patient only for the purpose of testimony. Any portion of such statement that seeks to attribute fault for an injury would be excluded. Statements made to the doctor concerning the cause of an injury, however, as contrasted with an attempt to attribute fault for an injury, are admissible so long as they pertain to diagnosis or treatment.

Caveat: Lawyers sometimes attempt to introduce inadmissible hearsay evidence by invoking the state-of-mind exception when the Declarant's state of mind is irrelevant.

IMMATERIAL

Form:
"I object on the ground that the question calls for an immaterial answer."
"Objection, your Honor. The evident is immaterial."

Definition:
Evidence having slight relevancy is considered to be immaterial. Evidence that is relevant but has little probative value, at least not commensurate with the time required for its use, is immaterial: its bearing on the point in issue is too remote, uncertain, or cumulative to affect it significantly.

Accordingly, the circumstances of each case determine whether particular evidence is immaterial.

Note: In practice, the distinction between materiality and relevance tends to be blurred. Often materiality is regarded as subsumed by relevance.

Remoteness. A matter of degree, concerning which the lapse of time is only one factor to be considered.
Cumulative. Repetitious evidence, that is, evidence tending to prove the same point upon which other evidence has already been offered, may be immaterial because of the time that would be consumed in its presentation. In other words, its probative value is substantially outweighed by the probability that its admission will consume an undue amount of time.

Note. In making an objection, many lawyers use the ground "cumulative" rather than the technically correct "Immaterial". Generally speaking, however, this usage is acceptable.

Basis for the Rule:
Practical considerations in the operation of courts prevent them from hearing every matter that might logically be relevant. These considerations include not only the matter of the consumption of time, but also the genesis of side issues that would unduly distract the trier of fact from the main issues.

Collateral Facts:
Evidence concerning collateral facts is not always immaterial. If a collateral fact renders a material fact either more probable or improbable, it may be admissible. Evidence of similar conduct in other instances, for example, may be admissible to rove intent or knowledge.

Federal Rules of Evidence:
The definition of relevance in the Federal Rules of Evidence includes what is traditionally considered to be a matter of materiality.

IMPEACHMENT

Form:
"I object. This attempt to impeach the witness is improper because _____."

Definition:
Impeachment is the act of questioning or discrediting the credibility of a witness. Impeachment can be predicated on many matters. These include 1) prior contradictory or ambiguous statements, 2) interest in the outcome of a case, 3) bias, 4) conviction of a felony, 5) relationship to a party, 6) poor character for honesty or veracity (not bad character in general), 7) hatred, 8) friendship, 9) gratitude, 10) compensation received for
testifying, 11) lack of opportunity to observe, and 12) lack of ability to observe or remember.

Who May Be Impeached:
Own Witness. The modern view is to allow unrestricted impeachment of one's own witness and to use impeaching testimony as substantive evidence except in criminal cases. Under the traditional view, hostility or surprise must be shown the witness.

Hearsay Declarant. If a hearsay Declarant, whose statement falls within one of the exceptions, is not called as a witness, his statement may be impeached only by 1) evidence that demonstrates the he had no personal knowledge concerning the subject matter of his statement, or 2) evidence that he made an inconsistent out-of-court statement, even though he has had no opportunity to explain or deny that statement in court.

Impeachment Technique:

Preliminary Disclosure of Impeaching Evidence.
In the modern view litigants can inquire about a witness' prior inconsistent statement, oral or written, without preliminary disclosure of the statement, either to the witness or to opposing litigants. Beyond that, litigants can introduce prior inconsistent statements of a witness without giving the witness an opportunity to explain the inconsistency if the witness has not been permanently excused from further testifying.

Most jurisdictions, nonetheless, do require that the witness be given an opportunity to explain a prior inconsistent statement before it can be received into evidence. Most states, however, follow the traditional rule that requires litigants to show the inconsistent statement of the witness (and, upon request, to opposing litigants) or to advise him of the specifics of an oral statement before questioning him concerning it. The same rules apply to the use of depositions for the purpose of impeachment as apply to the use of other written material.

Marking the Impeaching Document.

Some judges do not require that a document used solely to impeach be marked at all; some insist that it be marked for identification only; others insist that it be formally introduced.

Testing the Witness.
When it is sufficiently important, the ability of a witness to observe, remember, and recount facts unrelated to a case can be inquired into in order to test his capacities. Generally speaking, however, other witnesses cannot be summoned for the purpose of contradicting a witness' testimony concerning these unrelated facts.

Contradictory Statement. It is not necessary to prove an unequivocal and totally contradictory statement in order to impeach a witness. A material variation is sufficient.

Memory Loss. If a witness claims memory loss, his prior statements concerning a matter may, if the loss appears to be feigned, be deemed to be inconsistent with his current testimony.

Failure to Mention. It is proper to show failure on the part of a witness to mention on a prior occasion material matter presently testified to by him, if it would have been natural for him to mention the material matter on the prior occasion.

Conduct. Specific acts of conduct, other than those resulting in a felony conviction, may not be proved to impeach a witness' character trait. Nevertheless, the court may allow inquiry as to specific acts on cross-examination of the character witness if the conduct is relevant to the percipient witness' character for untruthfulness. Ordinarily, however, a cross-examiner must accept the character witness' answers, and, generally speaking, cannot produce extrinsic evidence to contract the character witness' answer (For exceptions to this rule, see Sec. "Cross-Examination".)

A specific act of conduct may be admissible for the purpose of impeachment other than as it relates to character; for example, a witness' conduct in operating a device is admissible to show that he is familiar with it, and thereby impeach his testimony that he is not.

Felony Conviction. All jurisdictions permit impeachment by showing that the witness has been convicted of a felony. Some restrict it, however, to felonies involving deceit or fraud, and also consider whether the probative value outweighs the prejudicial effect. In criminal cases, some jurisdictions restrict the use of felony convictions to recent ones and exclude those involving crimes similar to the crime charged.

Payment of Consideration:
Bias may be demonstrated by showing that for whatever reason the other party has paid, promised to pay, or even hinted at paying, to a witness, or on his behalf, money or other consideration. This includes money paid in settlement of a claim.

Collateral Matters:
Under the traditional view, impeachment was not allowed on collateral matters because it consumed too much time, caused undue prejudice, and tended to mislead the jury. This matter is within the court's discretion and has been considerably relaxed in recent years. Nevertheless, if litigants cross examines on collateral matters, he must accept the answers. Generally speaking, he cannot bring in contradictory proof. (For exceptions to this rule,
See Sec. "Cross-Examination".)

Expert Witness:

Before a text can be used to impeach an expert witness, it must be established that he witness considered or relied upon the text in forming his opinion.

Special Rules:
Privilege. A matter of privilege - a confidential communication, for example, may prevent the use of an inconsistent statement for the purpose of impeachment.

Character Evidence. A cross-examiner may ask a character witness whether knowledge of certain facts would change that witness' opinion. Such questions must be asked in good faith; that is, the cross-examiner must have reason to believe that the facts are true.

Use of Impeaching Evidence as Substantive Evidence. In some jurisdictions, the prior inconsistent statement of a witness can be used as substantive evidence, as well as impeaching evidence, in civil cases.

Rehabilitation:
Character. If evidence of bad character or a party or a party's witness has been introduced by the other side, the testimony of character witnesses may be introduced by way of rebuttal.

Prior Consistent Statement. If a witness' prior inconsistent statement has been admitted or there is a charge of bias, improper motive, or recent fabrication, a prior consistent statement is admissible. In some jurisdictions, the consistent statement must have been made before the inconsistent statement or the bias, improper motive or motive for fabrication is alleged to have arisen.

Felony Conviction, Bad Reputation, Bias. Ordinarily, a witness cannot be rehabilitated by means of a prior consistent statement if he has been impeached on the basis of felony conviction, bad reputation, or bias.

INCOMPETENT

Form:
"I object on the ground that this person is incompetent to be a witness because he has no personal knowledge concerning the matter."
"I object on the ground that a sufficient foundation has not been laid showing _____."
"I object on the ground that this evidence is incompetent in that it was illegally obtained by _____."
"Objection, your Honor. There has been insufficient authentication of this exhibit."

Definition:
Evidence that fails to meet legal requirements as to validity is incompetent evidence. Incompetent evidence is that based on suspicion, surmise, or guess. To be competent, evidence must come from a reliable source. Demonstrating reliability is what is commonly referred to as "laying a foundation".

Incompetent Witness:
Expert. A witness not shown to be qualified to give an opinion (see Sec. "Opinions/Conclusions").

Lay. A witness who lacks the requisite mental capacity, usually because of age, senility, or mental illness. Also, a witness who is unable to articulate answers, or who does not have personal knowledge of the matter, or cannot understand his duty to tell the truth. If a child is to be a witness, the court usually makes a determination concerning competency before permitting the child to testify.

Personal Knowledge: A lay witness must have been present and have observed an event or heard the conversation he relates. Some uncertainty in recollecting what happened affects the weight of the evidence, but does not make it inadmissible. Evidence cannot be admitted conditionally; establishment of personal knowledge cannot be deferred. Anything perceptible to the five senses constitutes competent evidence. The necessary foundation cannot be established by asking a "Do you know of your own knowledge" type question because knowledge can be gained in ways other than by actually perceiving an event. Actual perception must be shown.

Voir Dire: If there is a question about the competency of a witness, litigants should ask permission to take the witness on voir dire, a procedure that interrupts direct examination and is essentially cross-examination, limited to matters bearing on the competency of the witness - that is - on the qualifications of an expert and the personal knowledge/mental capacity of lay witnesses. Leading questions are permissible.

Lay Witness. Before a lay witness testifies, opposing litigants has the right to voir dire (question) the witness concerning the basis of his personal knowledge of a fact he is about to testify to if his actual knowledge of the matter is questionable.

Expert Witness. litigants is entitled to voir dire an expert witness concerning his qualifications if there is any question about his expertise before he gives his opinion.

Authenticating Evidence/Laying the Foundation:
For an illustrative example as to the proper procedure for authenticating a writing, see Technique Re Writing in Sec. "Preliminary Fact Determination".

Photographs, Maps, Etc. In presenting photographs, maps, X-rays, etc., there must be testimony to the effect that the exhibit is an accurate portrayal. Any deviation in accuracy must be explained.

Films and Recordings. Does the evidence correspond to what actually happened? Did the means used to reproduce the action or situation do so accurately and without distortion? If these questions cannot be answered affirmatively, the evidence is incompetent.

Demonstrative Evidence. Objects exhibited in court, such as weapons, clothing, tools, etc. must be identified. The identification need not be positive in a literal sense; reasonable probability is sufficient. Furthermore, it must be shown that the object is in the same condition as it was on the critical date or that any changes in condition can be explained and accounted for.

Models and Exhibits. If the evidence is an exhibit representing a reconstruction, it must be established that it is in accord with the testimony of witnesses who have described whatever has been reconstructed. To make the model admissible, it is necessary only to show substantial similarity between a model or exhibit and the actual object in issue. A model or exhibit can be larger or smaller than what it depicts, but should be according to scale.
Slight differences between the two, however, affect the weight to be accorded the evidence rather than its admissibility.

Scientific Evidence: There must be testimony to the effect that the scientific evidence in question is recognized and accepted, however, is not required.

Examples of this can be found in testimony concerning the following: fingerprints, ballistics, sobriety, and material identification.
Tests and Demonstrations:
The conditions under which an experiment is performed must be similar to those surrounding the actual occurrence.

Illegally Obtained Evidence: This kind of evidence is incompetent evidence in criminal cases. It is, for example, anything secured as the result of an involuntary confession or an illegal search and seizure. Generally speaking, evidence obtained by compulsory physical testing (fingerprints, voice, handwriting, photographs, etc.) is admissible. The court, in a criminal case, may reject it, however, if the compulsion used was extreme.

Common Problems In The Area of Competency.

Signatures. A witness to an actual signing, an expert who has compared a questioned signature with a genuine exemplar, or a lay person who is familiar with the signature at issue, may testify as to authenticity. Also, the trier of fact may make a comparison of the signature at issue with a genuine exemplar.

Telephone Conversation. The identity of a conversant may be established, either by voice recognition by the witness or by inference from the fact that the person answering the listed number identified himself.

Chain of Custody. When a physical object that is fungible, such as a drug, is involved, one need not negate all possibility of tampering but, insofar as practical, must show a complete chain of possession of such a nature that it appears that the integrity of the object has not been impaired. The whereabouts of the object from the time of initial possession until delivery into court must be accounted for. This requirement may be relaxed somewhat in civil cases, but not in criminal cases.

Special Situations: A conclusive presumption can make evidence to the contrary incompetent. That a mother is married and had access to her husband during the time of conception, gives rise to a conclusive presumption of legitimacy. An owner is always competent to testify concerning the value of his own property.

Dead man’s Statute. Generally speaking, this type of statute prohibits any person with an interest in the matter from testifying concerning a transaction with the decedent when the testimony adversely affects the interest of the decedent's estate. Various jurisdictions have modified the Dead man’s Statute in different ways; some leave it to the trial court's discretion.

IRRELEVANT

Form: "I object on the ground that the question calls for an irrelevant answer."

Definition of Relevance:
Relevant evidence is that which influences the issues, having probative value in proving a fact. If evidence has any tendency to make a material fact more or less probable than it would be without the evidence, it is relevant. It is evidence that tends to render probable a

certain inference important in the case. Relevance is a matter of logic and experience. All evidence must be relevant. Relevant evidence, however, may be excluded for other reasons, such as the fact it is hearsay.

Even if evidence is logically relevant, it may be legally irrelevant and hence inadmissible if its probative value is substantially outweighed by the danger that it will 1) unduly prejudice the jury, 2) mislead or distract the jury, 3) cause undue delay, 4) waste court time, 5) raise collateral issues, or 6) involve the presentation of needlessly cumulative evidence.

Generally speaking, the problem of relevancy lies more with circumstantial than with direct evidence. Circumstantial evidence is evidence which to any reasonable degree establishes the probability or improbability of a fact in controversy. It tends to prove or disprove a fact from which an inference can be drawn concerning an ultimate fact in controversy.

Note: The modern trend is to merge the concept of materiality into the ambit or relevance.

Common Kinds of Relevant Circumstantial Evidence:

Habit, custom (provided that parties had notice of their custom), similar acts and occurrences (including other crimes), flight, concealment, etc. are common ,kinds of relevant circumstantial evidence.

Circumstantial evidence provides a basis for drawing inferences about contested issues, such as motive, knowledge, intent, identity, absence of mistake, common scheme, guilt, mental state, etc. For example, though evidence of other crimes or un-charged criminal conduct may not be introduced to prove that a defendant is a bad person, it may be introduced to show such matters as motive, intent, plan, or absence of mistake. The court must balance the probative value of such evidence against its prejudicial impact.

General Considerations:
Relevancy may depend upon establishing a preliminary fact (laying a foundation). Evidence of a person's conduct may not be relevant, for example, unless it is first shown that the person was an employee or agent of a party to the lawsuit. Proving employment or agency is establishing the preliminary fact, laying the foundation for the admission of evidence of the person's conduct. Where evidence is relevant to an issue but tends to be unduly prejudicial in its impact, the court must weigh conflicting values in determining admissibility.

Inadmissible As A Matter of Public Policy.
Relevant evidence may be inadmissible as a matter of public policy, regardless of the logical bearing it might have on an issue. Included within this category are evidence of 1) settlement offers, 2) subsequent repairs, 3) subsequent precautions taken to prevent a reoccurrence of an accident, and, for the most part, 4) character. (See Sec. "Character Evidence" for exceptions). The reason for the policy, insofar as settlements and subsequent repairs are concerned, is that, otherwise, they would be discouraged. However, such evidence may be admissible on another basis, such as to show ownership or control, to prove feasibility if that is denied, or to establish a basis for impeachment.

JUDICIAL NOTICE

Form:
"I request the court to take notice of the fact that _____ is true as stated in _____ on page _____."
"I object on the ground that this matter is not a proper subject of judicial notice for the reason that _____."
"Objection, your Honor. This is not a proper subject for judicial notice."

Definition:
When facts are indisputable, the usual requirements for formal proof are relaxed. A fact may be judicially noticed if it is uniformly well-established and capable of ready ascertainment and verification by reference to a commonly accepted authoritative source. If such is the case, there is no need for formal proof other than that of producing the source material.

Authoritative Sources:
A reference source must have been prepared by neutral persons and be of a type generally used and relied upon as accurate in the normal course of business, including the business of governmental and non-profit bodies. The court must find the reference source to be trustworthy. No further proof is needed. The following examples may, though not necessarily, be considered authoritative sources: historical works, books of science or art, encyclopedias, lists and directories, maps and charts, statutes, and reported judicial decisions of other states.

Exception:
Judicial notice does not encompass medical texts in tort cases.

Caveat:
Judicial notice may be taken of the truth of a court file and its contents. This includes the clerk's minutes. However, judicial notice may not be taken of a statement of fact contained in a pleading or declaration that is part of the court file. Such statement would be hearsay. The truth of such a statement must be established independently.

A court file is introduced by "reference", that is, its receipt into evidence is recorded in the court's minutes and it is assigned a number or a letter. The file, however, is not actually marked and is not retained with the other exhibits.

One alternative branch of a question is specific and detailed, and the other vague: "Was the sound like the scream of a woman in fear or was it otherwise?"

Permissible Leading Questions:
The court may allow leading questions in the following instances:

To Refresh The Recollection Of A Witness. A hazy recollection affects the weight to be accorded testimony rather than its admissibility.

To Deal With A Hostile Witness. When a party calls a hostile witness as its own witness. Also, the court may find hostility if the witness' testimony amounts to surprise or is evasive.

To Deal With A Handicapped Witness. When a witness has difficulty expressing himself or is ignorant, young, aged, timid, weak-minded, infirm, or embarrassed.

To Establish Preliminary Foundational Matters. Leading questions commonly are used in identifying exhibits and establishing preliminary foundational facts which are not at issue, such as residence, employment, etc., so as to speed up the trial.
To Sanitize The Answer. If part of an out of-court statement is admissible and part is inadmissible, and a general question may require a witness to state all of it, a leading question (with advance court approval) should be used to direct the witness to the admissible portion only.

Cross-Examination:
Leading questions are proper on cross-examination except when it is apparent that the witness is biased in favor of the cross-examiner's client.

Note. To ask leading questions, litigants should begin questions with such phrases as "Isn't it correct...?", or such words as "Was...?", "Did...?", and "Is...?".

MISQUOTING A WITNESS

Form:
"I object on the ground that litigant is misquoting the witness. What the witness stated was, '_____'."
"Objection, your Honor. Litigant is misquoting the witness."

Definition:
A question that mis-states what a witness has said is objectionable.

MOTION TO STRIKE

Form:
"I move to strike on the ground that _____."

Definition:
If the question is proper, but the answer is objectionable, a motion to strike is used rather than an objection. If an answer is given before litigants can object, a motion to strike is made preliminarily to making an objection, litigant must state a reason for failure to object - for example, that an answer was unduly quick, and must then state his specific objection as to why either the question is improper or the answer is inadmissible.

A lawyer must make an objection as promptly as it is feasible to do so; he cannot wait to see if the answer is favorable to his client. When an appropriate opportunity for an objection does not present itself, however, then a motion to strike is proper.

Grounds For A Motion To Strike:
1) The answer was too quick, it was non-responsive, or it was a volunteered statement;
2) the basis for the objection did not appear until a subsequent time, usually incident to cross examination, if, for example, it turned out that a witness actually did not have personal knowledge; or
3) the opposition failed to prove a foundation for conditionally admitted evidence. An example of the latter would be if the court had allowed a witness to express an opinion upon representation by litigants that a subsequent witness would testify to the foundational facts and the witness failed to do so.

General Rules:
A motion to strike must be specific, and must be made as soon as the reason is apparent. If the motion to strike is too broad, it is properly denied. The burden if on the adverse party to move to strike conditionally admitted evidence; that party must renew his motion at the conclusion of his opponent's case, if appropriate, or the objection is deemed to be waived.

Technique:
Litigants may strike an answer in order to make an objection to the question in cases where the evidence might be admissible, but the form of the question is objectionable. If the evidence is inadmissible under any theory, litigants should move to strike the answer on suitable grounds, for example, that it is hearsay. Litigants should also ask the court to admonish the jury to ignore the stricken evidence. If the answer is highly prejudicial and its impact cannot be erased, then litigants should consider a motion for a mistrial.

NARRATIVE ANSWER

Form:
"I object on the ground that the question calls for a narrative answer."
"Objection, your Honor. The question calls for a narrative response."

Definition:
A question inviting a narrative type of answer is so broad, general, or indefinite, that it affords the witness an opportunity to inject inadmissible matter into his answer. Each question should limit the witness to a specific answer.

Whether such an objection should be sustained is discretionary with the court. No rule forbids narrative answers as such.

Examples:
"Tell us what everyone did."
"What happened the next day?"
"What occurred after Mr. Jones' arrival?"
"What do you now about this accident?"

Note: This type of objection is applicable, though rarely invoked, to questions asked on cross-examination.

Narrative responses often are allowed concerning preliminary matters and when it is unlikely that inadmissible evidence will be forthcoming; for example, experienced witnesses, such as policemen and experts, may be allowed to testify in narrative fashion. Generally speaking, narrative responses are allowed more extensively in non-jury trials than in jury trials. In particular, narrative responses are commonly employed in family law matters.

NON-RESPONSIVE

Form:
"I move that the answer to the question be stricken as non-responsive."
"Objection, your Honor. I move to strike the answer. It is non-responsive."

Definition:
An answer that goes beyond the scope of the question and includes subject matter not called for by the question is non-responsive. Any voluntary statement by a witness is non-responsive.

Note. An answer is not necessarily non-responsive simply because it is unexpected or broader than anticipated. If the answer is independently admissible, only the examiner can move to strike it as non-responsive. If it is not independently admissible, opposing litigants can move to strike it on the basis that it is hearsay, a conclusion, etc.

Objections - General Comments

Evidence may be competent and yet be objectionable as hearsay, privileged material, irrelevant, etc.; for example, a document may be authentic but contain inadmissible hearsay statements. To be admissible, evidence must satisfy all possible grounds for objection.
An objection should be clear and timely. It should be made at the first available opportunity. Normally, it should be made immediately after the question has been asked.

Form:
Throughout this document, the technically proper form of objection has been used. However, as a matter of practice, an abbreviated form often is employed.

Examples:
"Objection. Incompetent."
"Objection. Hearsay."
"Objection. Leading."
"I object. Irrelevant."
"I object. No proper foundation."

Specificity:
The grounds for objection should be specific. If only a portion of proffered evidence is objectionable, or it is objectionable only concerning certain parties, the objection must so specify; otherwise, there is no error if it is overruled.

Multiple of omnibus objections, such as "irrelevant, immaterial, and incompetent" should be avoided. Generally speaking, a multiple objection will not protect the record on appeal unless all of the grounds stated are sound.
Argument:
Objections should be argued outside the hearing of the jury, either at the side bar or in chambers. Ordinarily, a request to argue, either before a ruling is made or as part of a request for reconsideration of a ruling, comes from litigants.

Offer Of Proof:
An offer of proof presents objected-to-evidence; that is, it is a representation of what a witness would say if allowed to testify. It is made to persuade the judge to overrule the objection, and, if the objection is sustained, to enable an appellate court to determine whether the trial court committed an error in sustaining the objection and if it did whether the error is harmless or reversible.

Technique. Offers of proof are always made outside the presence of the jury. The following language should suffice: "Your Honor, before you rule, may be approach the bench?" At the side bar: "Your Honor, may I make an offer of proof of what this witness will testify to?"

Some judges allow litigants to question the witness outside the presence of the jury. This procedure is preferable. If not, litigants relates on the record, in narrative fashion, what the witness will testify to.

Continuing Objections:
If it is appropriate, litigants should make a continuing objection In doing so, he must make certain it is understood that the objection extends to all similar evidence. For example: "I objection on the ground that _____." If he is overruled: "It appears that litigants is asking, or is about to ask, a series of questions that will raise the same point of law. May it be understood that I am making a continuing objection to this entire line of questioning on the ground stated, and that the court is making a similar ruling on each question."

Reasons For Objection or Not Objecting:

For.
1) To exclude improper evidence;
2) to make a record for appeal;
3) to protect a witness from undue harassment.

Not.
1) It may alienate the trier of fact; this is especially true in jury cases;
2) there is a danger of highlighting harmful evidence;
3) negligible harm is threatened.

OPINIONS/CONCLUSIONS

Form:
"I object on the ground that
1) the question calls for an inadmissible opinion (conclusion);
2) a sufficient foundation has not been laid showing that the witness is qualified as an expert;
3) this is not a proper subject for expert testimony; or
4) the witness is basing his opinion on improper matter."

Ordinarily, the objection would reflect only one of these grounds, such as "Objection, your Honor. The question calls for a conclusion."

Comment:
Generally speaking, an inadmissible opinion (conclusion) is incompetent evidence because there is a lack of sufficient foundation for its admission. An objection that the answer would invade the province of the trier of fact, or that it calls for an opinion on an ultimate fact, is obsolete and generally no longer recognized. The word "conclusion" is often used instead of opinion" in characterizing the testimony of lay witnesses.

Lay Witness:
A lay witness may testify to an opinion if
1) his testimony is based on his personal perception (firsthand knowledge);
2) it is a type of opinion normal persons form constantly and correctly;
3) the testimony can adequately be given only in the form of an opinion because the inferences (conclusions/opinions) are so intimately connected with the act of perception that they cannot be separated. Giving a description that communicates underlying data would be an uninformative waste of time or even an impossibility, for example, estimating the speed of a car or the distance it traveled.

Examples of Admissible Lay Opinions.
A lay witness can testify about his own intent, motive, knowledge, or mental condition. (Whether he was depressed, angry, happy, etc.) Lay witnesses generally can testify concerning speed, distance, size, appearance, demeanor, sobriety, state of health, the identity of a person, amount, weight, the identification of voice or handwriting (provided that the witness has heard one or seen the other a sufficient number of times), the pain and suffering of others, and the nature of substances (smooth, rough, wet, granular, etc.)

They can also testify to the existence of absence of signs of joy, excitement, nervousness, anxiety, disgust, surprise, embarrassment, sympathy, despondency, displeasure, satisfaction, anger, etc. Although a lay person cannot testify about what was on another's mind, he can testify about appearances. Permissible

Language. Testimony using such terms as "slow", "fast", and "pretty fast" has been held to be admissible.

Speculation. A witness may not give an opinion on matters that require guess or speculation. A witness' "understanding" is inadmissible because it may be based on conjecture.

Absolute Conviction. A witness need not be positively certain about the accuracy of his testimony. The matter of certainty concerns the weight, that is, the persuasive impact, to be accorded testimony.

Impression. A witness can testify to his impressions, such as those concerning the substance of a conversation, if his memory is faint; again, a matter of weight rather than admissibility is involved.

Inadmissible Conclusions. Words that reflect conclusions having a legal significance, such as "agreed", "promised", "consented", and "fault" are objectionable unless the witness is relating a conversation in which these words were spoken.
Expert Witnesses:
Foundation For Opinion. Expert opinion evidence is admissible if the subject matter is enough beyond the common experience and understanding of an average layman that the opinion of an expert would assist the trier of fact. The court must decide on the necessity for opinion evidence, the sufficiency of the witness' qualifications, and the propriety of the matter relied upon in formulating the opinion.

Comment. Ordinarily, an expert evaluates the facts in the case. Although it rarely occurs, he may instead instruct the jurors and/or the judge about principles they need to know in order to themselves evaluate the facts without the expert evaluating the specific facts of the case himself. Qualifications.

An expert witness must have skill, knowledge, training, or experience in his field of expertise. He need not have special education qualifications, such as a college degree. The degree of qualification usually affects only the weight of the expert's testimony. The modern view is to be liberal in assessing the adequacy of an expert's qualifications.

Voir Dire. If there is reason to believe an opposing expert is not qualified, litigants must determine whether to interrupt direct testimony and cross-examine the expert about his qualifications before he (the expert) proceeds to testify. If a litigant decides to voir dire the expert, he should so state such as "I would like to take the witness of voir dire." Failure to conduct voir dire may be construed as a waiver of the matter of the witness' competency, that is, of the sufficiency of his qualifications to testify as an expert. If voir dire is not conducted, an expert can still be questioned about his qualifications as part of the regular cross-examination, and such cross-examination can affect the weight to be accorded his testimony as contrasted with its admissibility.

Basis Of Opinion. The factual basis for an expert opinion must be either 1) personal observation; 2) information presented to the expert during the trial (by use of a hypothetical question) and/or 3) matter communicated to the witness outside the courtroom (documents, exhibits, and statements).

In evaluating factual matter, the modern trend is to allow an expert to rely on anything normally relied upon by other experts in his field, that is, on anything that has gained "general acceptance" in arriving at opinions. He may rely on opinions of others; statements of third parties not involved in the action; and knowledge derived from books (learned treatises), articles, lectures, etc., written and given by others. However, an expert may not rely upon irrelevant or speculative material in arriving at his opinion. The material upon which expert opinion is based need not, by itself, be admissible; it may, for example, be hearsay. Traditionally, an expert could not rely on matter that was inadmissible. The court, nevertheless, can keep an expert opinion out if the opinion will have the effect of bringing before the trier of fact inadmissible matter that is unduly prejudicial.
In personal injury cases, a doctor may testify even though he has not examined the plaintiff or talked to a doctor who has, provided that he has familiarized himself with the plaintiff's medical records or provided that he testifies in response to hypothetical questions.

Nature of Opinion. Concerning the matter of certainty of opinion, some jurisdictions say it must be "reasonably probable", others say "reasonably certain", and still others say it needs only to be helpful, even if it is only a "possibility". In any event, an expert witness may have some doubt; he need not be absolutely certain. His use of such words as "might" and "could have", however, subject his testimony to being stricken as speculative and conjectural.
Common Subjects For Expert Testimony. Time of death, force, number of blows, diagnosis and prognosis concerning physical condition, reconstruction of accidents, mental competence, custom and trade practice, etc., are all common subjects for expert testimony.

Invading the Province of the Fact Trier. The modern view is that an expert can give his opinion on an ultimate issue in a case, for example, on the matter of negligence in malpractice litigation. An expert cannot, however, testify to a matter which lay trier of fact is able to determine without expert assistance.

Hypothetical Questions. They may be used as a technique to impart knowledge to an expert who lacks personal knowledge. Each assumed fact must be based on evidence that there has been or will be introduced. In the modern view, a hypothetical question need not state all of the pertinent evidence; it may be framed to reflect only the examiner's theory. In many jurisdictions, however, it must include all undisputed, material facts. The court may allow a question based on assumed facts on litigant’s assurance that evidence concerning the assumed facts will be supplied later.

Caveat. A hypothetical question cannot be framed so that the expert must resolve conflicts in the evidence. If the hypothetical question is unduly long, it may be kept out on the basis that it tends to be confusing.

In many jurisdictions, including the Federal Courts, an expert need not disclose the facts underlying his opinion before giving that opinion. Accordingly, hypothetical questions are no longer required in these jurisdictions.

It is good practice to ask the court to require of opposing litigants that all hypothetical questions be written out and submitted in advance, since it is extremely difficult to cope with lengthy questions.

Generally speaking, the use of hypothetical questions on direct testimony is diminishing.

Cross-Examination of an Expert.
Litigants may inquire into
1) The source of knowledge,
2) The reasons for an opinion,
3) The specific matter on which the opinion is based,
4) Other considerations that played a part in reaching an opinion,
5) The amount of the witness' compensation,
6) Testimony given by the witness in other trials involving similar issues, and
7) Publications by the witness which are inconsistent with his present position.

For the purpose of testing the competence and credibility of an expert, hypothetical questions which assume facts that will not be introduced into evidence can be asked on cross-examination subject to the court's discretion.

Types of Experts. There are seemingly an infinite variety of expert witnesses. Some of the field where experts are commonly used are: accident reconstruction, accounting, defective products, economics, environment, fire, handwriting, insurance, medicine, patents, safety, securities, vocational rehabilitation, and foreign law.

Federal Rules. On direct examination, an expert need not disclose the facts underlying his opinion.

PAROL EVIDENCE RULE

Form:
"I object on the ground that the question calls for inadmissible parol evidence."
"Objection, your Honor. The evidence violates the parol evidence rule and does not come within any exception."

Definition:
Extrinsic evidence may not be introduced to vary, contradict, add to, or eliminate the terms of an integrated written instrument. An integrated written instrument is one that is intended to be a complete and final expression of agreement.

Comment:
The parol evidence rule is not a rule of evidence but a rule of substantive law. It is replete with exceptions and its application varies greatly among various jurisdictions. It is not a guide to interpretation, but a rule as to what can be interpreted.

Exceptions to the Rule:
1) If there is a mutual mistake regarding some point of the writing.
2) If the validity of the agreement is disputed. The dispute includes allegations of illegality, absence or failure of consideration (even though the fact of consideration is recited in the agreement), proof of fraud or duress in agreement is dependent upon a condition precedent which did not occur. Such exceptions do not vary the agreement; they simply demonstrate that there is, in fact, no agreement.
3) If particular language has an unusual meaning because of custom and trade usage, even though the words have an ordinary, unambiguous meaning, parol evidence is admissible to prove the custom and trade usage. It must first be demonstrated that the special trade meaning is certain, distinct, and was known to all concerned at the pertinent time.
4) If the parties to the agreement have performed it, evidence of the performance is admissible to show how the parties interpreted the agreement.
5) If there is ambiguity. An inconsistency in the terms, or a referral to something that is in fact non-existent, may be resolved or explained by extrinsic evidence. Evidence may be introduced to explain and resolve a parent ambiguity, that is, an obvious one. If the agreement is clear on its face, but ambiguous when it is applied, the modern view is to admit evidence to resolve latent ambiguity. Evidence is not, however, admissible to explain terms free of ambiguity.
6) If there are consistent additional terms. The court must first determine as a preliminary fact whether the parties intended the written agreement to be a complete expression of their understanding. The party offering the evidence has the burden of showing that the writing does not reflect the complete understanding. Accordingly, evidence is admissible that shows any matter about which the contract is silent and concerning which the contract was not intended to cover.
7) If there are multiple writings. If may be shown that two or more writings were intended to serve as a single agreement.
8) If there are prior or contemporaneous oral agreements. Evidence of prior or contemporaneous oral agreements which are independent of and not inconsistent with the contract is admissible.
9) If the date of execution set forth in the agreement is not the actual date of execution, the latter can be proved by parol evidence.
10) If a party to an agreement lacked the capacity to contract, that lack of capacity can be demonstrated by parol evidence.
11) If the agreement does not reflect the relationship of the parties on one side of the contract, that relationship may be shown by parol evidence.

Note. Not every exception is applicable in all jurisdictions, nor are exceptions applied and interpreted in the same fashion in all jurisdictions.

Modern Trend:
The modern trend is to admit, without any special showing of ambiguity, etc., evidence of agreements reached prior to and contemporaneous with the writing, as well as evidence of prior negotiations which tend to demonstrate intent. The trend also is to admit evidence of circumstances prior to and contemporaneous with the writing that have a bearing on it.

Note: The parol evidence rule applies only in an action between the parties to an integrated written agreement. If the litigation involves a stranger to the agreement, both sides may introduce evidence contradicting its terms. One party to a contract cannot testify to what he personally intended certain words in the contract to mean.

The parol evidence rule does not apply to 1) informal agreements, 2) writings that are only memoranda of an agreement, or 3) paragraphs which are mere recitals of facts ("whereas" clauses).

PRELIMINARY FACT DETERMINATION

Definition:
Ordinarily, the proponent of an item of evidence must lay a foundation before offering the item into evidence. Laying a foundation means giving proof of facts or events that are a condition to admissibility. The trial judge resolves these preliminary questions upon which the admissibility of items of evidence depends.
Specific Situations:
1) Whether an expert is qualified.
2) Whether a writing was actually prepared by its alleged author.
3) Whether an agent has the authority to act or speak.
4) Whether an exception to the hearsay rule applies; for example, whether a statement is in fact a spontaneous declaration.
5) Whether conditions necessary to the admissibility of secondary evidence under an exception to the best evidence rule have been satisfied.
6) Whether a child or an alleged incompetent is in fact incompetent to testify.
7) Whether a lay witness has personal knowledge of the fact to which he is testifying.
8) Whether a confession is voluntary.
9) Whether evidence is inadmissible because it is a privileged communication when that objection is raised. In that event, the court must first resolve the matter of privilege before the evidence can be considered further - for example - the existence of an alleged confidential relationship out of which arises a privilege of nondisclosure. If the court finds such a relationship exists, it precludes admission of otherwise relevant evidence having its genesis in the relationship.

There are two kinds of preliminary fact determination - 1) those decided by the court with finality and 2) those about which the court determines only whether a sufficient foundation has been laid for the issue to be presented to the trier of fact (whether judge or jury) with ultimate determination of the issue then to be made by the trier of fact. Examples of the first kind are presented in numbers 1, 4, 5, 6, and 9 in the paragraph above. Examples of the second are presented in numbers 2, 3, 7, and 8 of the paragraph.

Criteria Of Determination:
Evidence will be excluded only if the evidence of a preliminary fact essential to admissibility is too weak to support a favorable determination by trier of fact. In making his determination, the judge listens only to the proponent's evidence. If the judge finds the preliminary fact to be true for the purpose of admitting the evidence, it does not mean, however, that he or the jury, in deciding the issues in the case, must accept the evidence as true. The opposing party can introduce evidence which contradicts the evidence introduced to establish a preliminary fact. For example, a document may be received into evidence and subsequently rejected as a forgery by the finder of fact on the basis of evidence produced by the opposing party.

Voir Dire. The direct testimony of a witness to a preliminary fact may be interrupted to conduct a voir dire examination of his competency to testify (see Sec. "Opinions/Conclusions" for voir dire technique).

Conditional Admission:
In instances where all preliminary facts have not been established, the judge may admit evidence conditionally, if litigants represents that missing facts will subsequently be proved. A conditional admission is subject to a motion to strike (see Sec. "Motion to Strike").

Technique Re Writings:
An item of evidence is first marked for identification (usually with a number for the plaintiff and a letter of the alphabet for the defendant). Litigant then says to the witness: "I show you plaintiff's number four for identification." It would be improper for him to say: "I now hand you a letter purportedly signed by the deceased." The lawyer is not a witness.

Before presenting the letter, however, the lawyer should ask the witness about the witness' familiarity with the signature of the deceased. Once he has established that the witness is familiar with said signature, the lawyer can ask the witness whether he recognizes the signature in the exhibit. If the witness does recognize it and testifies that it is the signature of the deceased, litigants then states to the court: "I move the admission of exhibit four for identification into evidence as plaintiff's exhibit four."

The same number or letter should be used to identify an exhibit that is used for its official designation after its receipt into evidence.

Physical Evidence:
An object can be identified by its distinctive characteristics by a witness who has demonstrated familiarity with those characteristics. If there are no distinctive characteristics (as in the case with a fungible substance like marijuana) the proponent must establish a "chain of custody"; that is, he must account for its whereabouts from the time it was taken into possession until it is produced in court. He must show that it was kept safely and that it is in substantially the same condition as when initially received.

Photographs and Videotapes:
Any person familiar with the scene or object depicted at the relevant time may authenticate a photograph, videotape, or movie.

X-rays:
Some judges consider x-rays to be business or hospital records. If a complete foundation for an x-ray is needed, see Sec. "Hearsay Exception: Business Entries and Hospital Records".

Note: In some jurisdictions, technical evidentiary objections, such as hearsay, are not applied to the determination of preliminary facts. In these jurisdictions, declarations or affidavits can be used to establish preliminary facts.

PRIVILEGED COMMUNICATIONS

Form:
"I object. The question calls for disclosure of a privileged communication between attorney and client. On behalf of Mr. _____, the client, I claim the privilege."
"Objection, your honor. The question calls for a privileged communication between the witness and his lawyer."

Definition:
Communications made in the course of a protected relationship, and incident to it, are presumed to be confidential. Privileges are construed strictly because they restrict complete disclosure of evidence. Conversations not concerned with the relationship are not protected. The person invoking the privilege has the burden of proving its existence.

Professional Privilege:
Attorney/Client. This privilege exists solely for the benefit of a client who was seeking legal advice. The attorney has a duty to claim it for the client. A client can assert his privilege even if he is not a party to the action. The client does not waive the privilege if he testifies about facts discussed with his lawyer that were not part of a confidential communication. If he testifies to a portion of a confidential communication, however, he waives the privilege as to the remainder. The privilege includes communication to the secretary, investigator, and other employees of the attorney.

Caveat. Facts observed by the attorney while in the client's presence are not protected, nor are communications from a third party to the attorney, even if the objective was to assist the client.

Work Product. Work Product is the matter produced by the attorney. To be absolutely privileged, it must be primarily the impressions and conclusions of the attorney, or a model or other exhibit prepared by or at the direction of the attorney. If the evidence, for example, is the statement of a witness taken by the attorney, its primary nature is the witness' knowledge and the attorney's role is secondary. In this kind of situation there is a conditional privilege. In the latter instance, the other side may obtain a copy of the statement if it is unable to obtain a statement from the witness without undue hardship, has acted diligently in the matter, and the evidence is highly relevant.

Physician/Patient. This privilege exists solely for the benefit of the patient. It prohibits compulsory disclosure of information confidentially transmitted between a patient and his physician. The physician has a duty to claim the privilege on behalf of his patient. Two exceptions follow: 1) the patient, or the person claiming through the patient, is a litigant, and the information is relevant to an issue in the litigation; 2) the communication pertains to a criminal act. The second exception applies to both criminal and civil litigation.

The privilege covers any information a physician gains in examination of the patient, including laboratory reports, x-rays, charts and notes. The presence of nurses and other assistants does not destroy the privilege.

Other Relationships:
Other confidential relationships such as journalist/informant, psychotherapist/patient, and clergyman/penitent are governed by the same general rules. The kinds of relationships that are protected vary among jurisdictions.

Waiver of Privilege:

The information involved (knowledge on the part of the client/patent) must not knowingly be transmitted to a third party except one who is assisting the lawyer/physician (secretary, nurse, investigator, laboratory assistant, etc.), or the client/patient (client's/patient's insurance company, for example). If it is so transmitted, the courts generally find that the communication is not confidential.

Power to waive the privilege resides solely in the holder, that is, the client/patient cannot waive the privilege for another. After death, an executor or administrator may claim the privilege, although in some jurisdictions the privilege ends with the patient's death. When the estate is closed, the privilege ends.

A privilege is waived when the holder voluntarily discloses privileged information to a third party, testifies about it in court on direct examination, or fails to claim that privilege when opportunity to do so arises.

Marital Communications:
Definition. Confidential communications, including acts as well as words between husband and wife in a valid or voidable marriage are protected from disclosure. Both spouses can assert the privilege.

Confidential. Knowledge by one spouse that a third party is overhearing the conversation does not make the communication non-confidential for the other spouse, who is still protected by the privilege.

Waiver. One spouse cannot waive for the other. The death of a spouse or the dissolution of a marriage does not destroy the privilege. Once the privilege is waived, however, it is waived forever.

Exceptions. This privilege does not apply to communications in aid of a crime; however, a mere revelation of plans relative to the prospective commission of a crime is privileged. There is no privilege in cases of litigation between spouses, or people claiming through them, or where a crime against a spouse or a child of a spouse is alleged.

Nonexistent. The circumstances of a communication may indicate that it was not intended to be confidential.

Eavesdropper: Commonly, an eavesdropper may not testify about any privileged communication.

Right Not To Testify Against A Spouse: A married person has a privilege not to testify against his or her spouse. A valid or voidable marriage must exist, but the privilege terminates with the dissolution of the marriage. This right is different from that protecting a confidential communication. For example, it would apply to testifying about an automobile accident.
This privilege is available to a spouse not a party to the action. He or she can answer questions that are not adverse to the litigant spouse's position and still retain the privilege. The privilege also exists if both spouses are on the same side in a lawsuit.

One spouse must testify for the other spouse if called by the latter.

Who Can Claim Privilege. In some jurisdictions, only the witness spouse can claim the privilege; in others, only the party spouse. In still others, either spouse can claim the privilege. Finally, there are some jurisdictions in which the privilege is not recognized.

Non-Existent Privilege.
No privilege exists
1) in litigation between spouses,
2) in incompetency proceedings, or
3) in criminal proceedings involving harm to a spouse or a child of the spouse. In some jurisdictions there is no privilege respecting testimony concerning an event which transpired before the marriage took place.

Form:
"If the court pleases, any examination of this witness will violate the witness' privilege not to testify against her husband. I request the court advise the witness of her right to refuse to answer."

Claim of Privilege:
If the person possessing a privilege is not present, the judge may invoke it on that person's behalf, regardless of its nature.

SELF INCRIMINATION

Definition.
A witness has a constitutional right not to give testimony that may tend to incriminate him. This right applies to civil as well as criminal cases. The word "incriminate" refers only to statements that would render a person liable to prosecution under a criminal statute. It does not encompass statements that would give rise only to civil liability.

Form:
"I refuse to answer for the reason that my answer might tend to incriminate me."

Non-Existent Privilege.
There is no privilege if
1) the statute of limitations governing criminal prosecution has run,
2) the witness has been either convicted or acquitted of the crime involved,
3) immunity from prosecution has been granted,
4) the danger is imaginary or unsubstantial.

Miscellaneous.
Although there is no privilege against giving answers subjecting one to civil liability, a few states extend the privilege to questions that would tend to disgrace or degrade the witness. A corporation has no privilege as to incrimination.

Caveat: The law pertaining to privilege varies among the states.

REFRESHED RECOLLECTION

Definition:
Any writing, regardless of author, date of preparation, or nature and accuracy of its contents, may be used to refresh the memory of a witness. A photograph may also be used for this purpose. A copy of writing, as well as an original, may be used. Depositions commonly are used for this purpose.

Technique:
The proponent shows the writing to the witness and asks him to read it silently. Then he asks the witness if his memory is revived. If so, the witness can testify.

Right to Examine:
An opposing lawyer is entitled to examine a writing preliminary to its use, and to use it during cross-examination. In many jurisdictions, but not all, the opposing lawyer also has the right to examine any writing used outside the courtroom by the witness to refresh his recollection. Although such a writing is inadmissible hearsay if offered by the lawyer using it, opposing litigants may introduce into evidence these portions of it relating to the witness' testimony.
Undue Suggestion:
Though there is, in a sense, no limit to the number of references a witness may make to a writing, the judge may preclude use of the writing and strike testimony relative to it if the writing appears to be unduly suggestive. In practice, a judge rarely strikes such testimony, since it ordinarily is regarded as a matter affecting the weight to be accorded the testimony rather than its admissibility.

SCIENTIFIC AND EXPERIMENTAL EVIDENCE

Comment:
An objection to scientific evidence is based on the principle of incompetency, that is, on failure to lay a proper foundation.

Foundation:
1) when experimental evidence is offered - for example, skid tests is an auto accident case - it is necessary to demonstrate a similarity of conditions between the accident and the experiment. It also must be shown that a trained, qualified person conducted the experiment.
2) If a scientific instrument or test is involved - for example, a blood test or chemical analysis - it is necessary to show some scientific acceptance. It is not necessary, however, to establish infallibility or general scientific acceptance. Determination of whether a scientific test or instrument has received enough acceptance by experts in the field to justify its admission into evidence, is a preliminary fact to be resolved by the court. A few jurisdictions require only that an expert vouch for the theory and the instrument.

Modern Trend:
Courts are becoming more liberal in admitting scientific evidence. Practicalities compel the use of standard scientific evidence. Practicalities compel the use of standard scientific instruments, materials, and tables, even though hearsay implications may be involved. Judicial notice is commonly taken of the reliability of scientific instrumentalities, materials, and tests. Electrocardiograms, for example, are accepted without offering expert testimony about the scientific principles underlying them.

Administration Of Tests And Operation Of Devices:

It is always necessary to call the technician who conducted the test and it may be necessary to call an expert to vouch for the general scientific acceptance of the instrumentality or test. The technician can testify that the instrument was in good working order, and that the proper procedures were followed, as well as testifying to the test results. A technician who conducts a test need not understand all of the steps in manufacture of a device, nor does he have to know, for example, in chemical tests, whether the chemicals have actually been properly compounded. He must, however, have reasonably good training and experience in conducting the particular test about which he testifies. If a device, such as radar or an intoximeter is used, the expert/technician must show that it recently has been tested and/or is in good working order, but he need not eliminate all possibility of inaccuracy.

Tape Recordings:
Judges will judicially notice the reliability of recorders and the theory underlying them. They recognize, however, that tape tampering is a possibility, and accordingly, some insist that a complete foundation be laid. This process includes testimony 1) the operator was qualified, 2) that the conversation was recorded at a certain time and place, 3) that the equipment was in good working condition, 4) that the proper procedure was followed, 5) that the recording has been preserved in its original form and content, and

SPECULATION

Form:
"I object on the ground that the question calls for speculation by the witness."

Comment:
Technically speaking, this objection falls within the realm of incompetency, that is, of failure to lay a proper foundation. As a practical matter, the objection "speculation" is commonly employed and accepted.

Definition:
A witness may testify to facts based on his own personal knowledge, or, in some instances, he may give an opinion. In either event, he may not base his answer upon speculation. The following is an example of an improper question because it leads to speculation: "Is it possible, Mr. Jones, that there were other conversations?".

A lay witness can give his opinion only concerning matters he personally has perceived and that are within the common experience of non-experts - speed and size for example. He may not base his opinion on ambiguous matters not within the common experience of lay persons; this is speculation. An answer based on conjecture is a speculative answer.

Expert Witness. An expert witness may give his opinion even if he has no personal knowledge of the facts. The information concerning the facts may be related to him. He may not, however, base his opinion on speculative matters. If the data on which he basis his opinion includes so many uncertain and varying factors that he is required to guess, his testimony is speculative.

FIVE STEP OBJECTION PROCESS
BASICS

LITIGANT SAYS:	JUDGE SAYS:
I OBJECT	OBJECTION DENIED (OVERRULED)
I TAKE EXCEPTION	EXCEPTION NOTED
I MOVE THE COURT TO CERTIFY THE QUESTION	DENIED
I MOVE THE COURT FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL	MOTION DENIED
I HEREBY SERVE NOTICE UPON THE COURT OF MY INTENTION TO FILE A PETITION WITH THE COURT OF APPEALS FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL	

These are simply the basics.