SECTION 7
THE RULES OF EVIDENCE
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Introduction

This is a brief article about the treatment of evidence in American courts. Specific examples are used to describe the process. They illustrate some of the more commonly-encountered issues in the law of evidence. Due to space limitations, consideration of many important rules has been omitted. The intent is to provide the Karelian legal professional, with a general sense of how the admissibility of evidence is determined.

General Principles of Evidence

The introduction of evidence is the means by which facts are established in the courtroom. This is true whether the fact-finder is a judge or a jury. From the fact-finder's perspective, the body of evidence at the beginning of a particular case is like an empty chalkboard. Admissible evidence produces information on the chalkboard from which the fact-finder must derive the facts to decide the case. Evidence which is ruled inadmissible does not appear on the chalkboard, and cannot be considered by the fact-finder.

Items of evidence come in many forms. 'Testimonial' evidence includes statements of witnesses from the witness stand, and

sometimes, reports of their statements made outside of the courtroom. The latter type of evidence is often inadmissible because of the 'hearsay rule', more about ~~which~~ that later. 'Documentary' evidence includes any type of writing. 'Demonstrative' evidence, such as a photograph, a gun, or a piece of clothing, appeals directly to the senses without the need for testimony or writings. 'Scientific' evidence, introduced through 'expert' witnesses, concerns reliable inferences which may be drawn from scientific or mathematical principles which are outside the knowledge of the average layman.

The Fact-Finding Process

In order to better understand the rules of evidence, one must consider the nature of the fact-finding process itself. In a jury trial, the jury does the fact finding, and the judge determines the admissibility of the various items of evidence offered. The burden of establishing the admissibility of particular pieces of evidence falls upon their proponent.

In a non-jury trial, the judge hears the proposed evidence, and then determines its admissibility, thereby deciding whether to consider or disregard it. The concept is supportable in theory, but difficult in practice. For example, assume Mr. Jones testifies that he was told by Mr. Smith that Mr. Smith saw a person running from the scene of an accident. The fleeing person was wearing an unusual green jacket. When the defendant's apartment was searched, an unusual green jacket was seized. If the 'green jacket

testimony' were to be elicited from a witness in a non-jury trial, and the party against whom it was offered were to object successfully, the judge would have heard the evidence, but would be required to ignore it in deciding the case. To some, this may appear to be an impossible task.

In a jury trial, the fact-finder can be effectively insulated from inadmissible evidence. Rulings on the admissibility of evidence are made outside the presence of the jury. If, after the judge considers the proponent's 'offer of proof', the evidence is ruled inadmissible, its proponent is forbidden from introducing that evidence, and is forbidden from otherwise referring to it in the presence of the jury. On the other hand, if the evidence is ruled admissible, the testimony is introduced when the jury returns to the courtroom.

The Mechanics of Introducing Evidence

Battles over the admissibility of evidence should be conducted efficiently, both to avoid the displeasure of the fact-finder, and not waste the jury's time. Long before trial, the lawyers know most of the items of evidence which they will attempt to introduce into evidence. An early effort should be made to identify all such items of evidence, in order to anticipate and plan for likely objections by opposing counsel.

At trial, each side's items of evidence are given sequential identifiers. In a typical criminal trial, the government's exhibits will be referred to as Exhibits 1, 2, 3, and so on, while

the defendant's exhibits will be referred to as Exhibits A, B, C, and so on. For ease of reference, proposed exhibits are marked before trial, and before the judge rules upon their admissibility. From that point on, all courtroom participants should refer to each exhibit by its proper designation. Use of the identifier 'Government's Exhibit 7' is both simpler and clearer than referring to the, 'six-page letter, dated December 10, 1993, from David Smith to Peter Jones'.

Under such circumstances, lack of discipline in the heat of trial inevitably leads to references such as 'the letter', when in fact the witness has testified about several letters. Confusion predictably arises on the part of the judge, the jury, opposing counsel and the witness, to the overall detriment of the trial process. Such references are also confusing on appeal, when the appellate court reviews the transcript of the trial proceedings.

Most judges prefer that all items of evidence be marked (numbered or lettered) well in advance of trial. Some judges even require the parties to exchange lists of proposed evidence. Years ago, 'trial by ambush' was the norm. Advantage could be gained through surprise tactics, such as the calling of an unannounced witness, or the introduction of undisclosed pieces of evidence. The modern preference, however, is for predictability and orderliness. The judge simplifies and speeds up the trial by making decisions on the admissibility of evidence before trial. In turn, early rulings on the admissibility of evidence give the lawyers greater insight into the likely outcome of the case, and

thereby increase the likelihood of settlement. Settlements, of course, save court time.

A pre-trial ruling on the admissibility of evidence is obtained through the filing of a 'motion in limine'. Generally, such motions are filed 'defensively' by a party anticipating the offer of prejudicial evidence. The moving party seeks a pre-trial ruling from the judge that one or more pieces of anticipated evidence is or are inadmissible.

Assume, for example, that relevant, but highly prejudicial, homicide photographs are listed as proposed exhibits by the prosecution. Rather than waiting until the trial for the judge to rule on their admissibility, the defense lawyer can file a motion in limine, arguing that the prejudicial value of the photographs outweighs their probative value, thus rendering them inadmissible. The pre-trial ruling minimizes the risk that the jury will be unfairly influenced by inadmissible evidence, and allows the lawyers to represent their clients better. It also makes the trial process move more quickly and smoothly, conserving court time and jury concentration.

Lawyers must always try to make the trial interesting for the jurors, and keep them focused on the critical issues. If the jurors are forced to endure time-consuming arguments on issues of admissibility, their focus will be taken off the issues which are central to the case. When the judge rules on such motions during the trial, the jury must be removed from the courtroom. Similarly, conferences between the lawyers and the judge in the judge's

chambers detract from the time which can be devoted to the trial itself. Either way, less is accomplished, and the trial takes longer. The judge's patience is tested, and the jury's concentration is challenged. This interferes with the lawyer's overriding objective of trying the case as persuasively as possible.

Admissibility of Evidence

One could argue that no limits should be placed on the type and quantity of evidence which is 'written' upon the chalkboard. Why not let the fact-finder sift through all of the evidence, and determine what to consider, and which to disregard. The American legal system, however, has a policy of placing limits on the type and scope of evidence which can be considered by the fact-finder. There are a number of rationales for this policy, including a desire to admit only reliable evidence, and a need to conserve judicial resources.

Determinations concerning the admissibility of evidence, in whatever form, are made by the judge. Under some circumstances, the judge may rule that a particular piece of evidence is admissible for one purpose, but not another, or as against one party, but not another. Under such circumstances, the judge must instruct the jury accordingly, limiting the manner in which they are to consider the evidence. The effectiveness of such 'limiting instructions' is the subject of some debate.

When a party wishes to oppose the introduction of a particular piece of evidence by another party, an 'objection' is made. The objecting party is required to state the grounds of the objection, unless they are apparent from the circumstances. Furthermore, if the judge's ruling proposes to exclude the evidence, the proponent of the evidence must preserve the issue for appeal by making an 'offer of proof', so that the appellate court will know, in the event of an appeal, the nature of the proposed evidence.

Witnesses

In order for a witness to be permitted to testify, he or she must meet certain requirements relating to 'competence'. For example, children below a certain age are generally deemed not competent to testify. Furthermore, proposed witnesses of any age who lack a certain level of mental capacity, are likewise disqualified from testifying. One standard by which this 'competency' qualification is measured, is by the proposed witness's ability to understand the oath of truthfulness which he or she must take prior to providing testimony. In the case of young children, or even marginally competent adults, this area is often explored in simple terms, by inquiring whether, and to what extent, the proposed witness has an appreciation of the difference between right and wrong, and an appreciation of the importance of telling the truth, given the seriousness of the setting.

The American system of trials encourages open courtrooms. It is believed that the fairness of the system can best be preserved

by subjecting it to public scrutiny. There are times, however, when the judge can, and will, exclude certain individuals from the proceeding. Only under the rarest of circumstances is the courtroom actually closed to all parties but the participants. Cases dealing with delinquent, abused and neglected children are essentially the only area in which this occurs. Often, however, non-party fact witnesses are excluded from the courtroom except during the course of their testimony. The rationale for this practice is that the witness should be testifying based upon his or her own recollection, not based upon evidence to which he or she has been exposed during the trial prior to taking the witness stand. Theoretically, once the witness has testified, it might appear that he or she should be free to observe the balance of the trial. Occasionally, however, witnesses are recalled to the witness stand, either in rebuttal, or to provide additional testimony. As such, non-party fact witnesses should be 'sequestered', and not allowed to listen to any of the other testimony in the case, under most circumstances. At the request of either side, sequestration is generally ordered as a matter of course.

Relevance

A fundamental pre-condition to the admissibility of evidence is that it be relevant. Evidence is relevant if it makes a material fact more or less likely. Taken in this light, the threshold test of relevance is not difficult to pass. An example

from the Alcid case is illustrative. In a previous related judicial proceeding, a co-conspirator of Mr. Alcid was leaving the courthouse after being called as a witness against Mr. Alcid. The witness and Mr. Alcid saw each other from a distance. Witnesses in the vicinity observed the co-conspirator give a 'thumbs up' sign to Mr. Alcid. The co-conspirator's testimony had exculpated Mr. Alcid on a particular issue. The prosecutor sought to introduce testimony concerning this incident, claiming that it raised an inference that the co-conspirator had falsely given exculpatory evidence regarding Mr. Alcid. The judge ruled this evidence inadmissible, concluding that the 'thumbs up' sign was susceptible of a number of different interpretations. Admittedly, it could be construed in the manner in which the prosecutor suggested. Alternatively, it could have been a simple gesture of recognition, or a desire to wish Mr. Alcid luck. The judge concluded that the relevance of the 'thumbs up' sign had not been established, and for this reason, testimony about it was not permitted.

Relevance does not make a piece of evidence admissible per se. Even relevant evidence must be assessed to determine whether its probative value outweighs its prejudicial effect. This type of analysis is illustrated in a prosecutor's attempt to introduce numerous graphic photographs of a homicide victim in a case in which the defendant claims justification by means of self-defense. The defendant does not deny the killing, but claims that he shot the victim justifiably, out of a well-founded fear that the victim was about to shoot him.

Assume that the photographs have some relevance. They depict where the victim fell after he was shot. Assume that this is an issue in the case. On the other hand, the graphic content of the photographs will have a powerful emotional, and arguably improper, effect upon the fact-finder. In balancing the relevance of this proposed evidence with its prejudicial value, if the position of the victim's body is truly relevant, and if there is no other suitable evidence which is probative of that issue, the judge would likely allow one of the photographs into evidence, probably selecting the least graphic. The others would likely be excluded, since their relevance is overcome by their potential for improper prejudice.

There are other circumstances in which relevant evidence is excluded. From a practical standpoint, court time is a finite resource. Accordingly, limits must be placed on the amount of time and evidence which is permitted to prove a particular question of fact. For example, if a defendant relies upon self-defense in a homicide case, his state of mind at the time of the killing is obviously relevant. Assume that there were six individuals present while the victim is supposed to have acted in a threatening manner toward the defendant. Technically, the testimony of all six witnesses is relevant to the defendant's case. But, if each witness testifies to the same set of facts, the testimony of each additional witnesses becomes cumulative, duplicative, and of decreasing relevance.

At some point, the judge would likely rule the testimony of additional witnesses inadmissible for those reasons, notwithstanding its relevance. Under such circumstances, the question of whether the court should allow the testimony of one, two or even more witnesses, would likely turn, in large part, upon the centrality of the issue to the case. In the example given, the defendant's state of mind is critical to the issue of guilt or innocence. For that reason, the defense would probably be given a fair amount of latitude.

Hearsay

Fundamental to the rules of evidence is the notion that admissible evidence should be trustworthy. There are types of evidence which are inherently suspect, considering their nature or source. For example, imagine that a witness is called to testify about a statement which was made on a previous occasion by a third party concerning an observation which the third party had made. Such evidence is often inadmissible, because the better person to testify about the observation would be the observer, not an intermediary to whom the observation was communicated. After all, the observer's ability to present the observation accurately is critical to the fact-finder. Through the proposed intermediary witness, the circumstances of the observation, and the evidentiary weight to which it is entitled, will be more difficult to assess.

This principle is illustrated by the earlier-described 'green jacket' example, wherein Mr. Smith, the eye witness, is not present

in court, and the fact finder can only learn about Mr. Smith's observations through the testimony of Mr. Jones. Mr. Smith's eyesight plays an important part in the credibility of the reported observation. The lighting conditions are important, as is the proximity of the eye witness to the fleeing individual. The eye witness's line of sight may have been blocked by intervening objects. Depending upon the circumstances, the weight which should be accorded the witness' testimony could vary dramatically. The eye witness may have poor vision, and may have made his observations from a great distance, through a grove of trees, across a busy street, at dusk. Perhaps the eye witness has a motive to falsely accuse the defendant. On the other hand, he might have perfect vision, an unobstructed opportunity to observe under ideal conditions, and no motive to testify falsely.

The attorney for the accused would undoubtedly want to cross-examine the eye witness about the circumstances under which the observations were made. Since the eye witness is unavailable for cross-examination, the value of the 'identification testimony' reported by a third party is of questionable value.

The 'hearsay rule', one of the most complex and frequently encountered rules of evidence, arises out of this type of fact pattern. The rules of evidence define hearsay as follows:

> Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Hearsay is inadmissible unless it qualifies under one of a number of exceptions. Volumes have been written on this complex subject. All that is necessary, at this stage, is that the reader have an awareness of the general proposition. The rule embodies the general notion that witnesses should testify only about facts concerning which they have personal knowledge. 'Second hand observations' are generally inadmissible.

Privileges

There are categories of clearly relevant evidence which are inadmissible because public policy favors keeping the information confidential. This situation applies to conversations in which one of the parties is a confidant, such as a lawyer, doctor, clergyman or spouse.

Assume that a criminal defendant admits his guilt to his attorney during the course of representation. In the absence of the privilege, the prosecutor could subpoena the defense lawyer as a witness, and elicit the fact of the admission. While such a practice might appear to be an effective means of obtaining a just result, countervailing considerations forbid the introduction of such evidence.

The public policy underlying the inadmissibility of confidential lawyer-client communications is that the United States Constitution affords criminal defendants a right to counsel in the case of serious crimes. If a defendant feared the disclosure of confidential statements made to his or her lawyer, the right to

counsel would be a right in name only. In the interest of preserving the lawyer-client relationship, such admittedly dispositive evidence is inadmissible.

For similar reasons, there is a privilege against unconsented disclosure of confidential statements which are made by a patient to a health care provider for the purpose of diagnosis and/or treatment. Such statements can only be disclosed with the permission of the patient. As with the attorney-client privilege, it is deemed to be more important to encourage individuals to be open and honest with their health care providers than it is to make such evidence available in court proceedings.

These various privileges 'belong' to the person who makes the confidential statement to the confidant. It is that individual's right of confidentiality which is being protected. But the person who possesses the privilege is free to waive the privilege, should it seem appropriate. Generally, the law construes the institution of a legal proceeding as a waiver of the privilege if the subject matter of the suit requires proof of the otherwise-privileged matter. For example, if a criminal defendant seeks to avoid a criminal conviction on the grounds of insanity, he cannot refuse disclosure of his psychiatric records.

Similarly, in the context of a civil suit, an individual who seeks compensation for personal injuries waives any claim of privilege in his medical records. Since it is the claimant's burden to establish the extent to which the injuries were caused by the culpable actions of the defendant, it would be unfair to deny

the defendant access to records which might refute the claimant's contentions.

Opinion Evidence

Testimonial evidence generally involves the witness describing observations which he or she has made. The witness is generally not allowed to testify about the inferences which may be drawn from those observations. This type of opinion evidence is inadmissible because the drawing of inferences is the job of the fact-finder. For example, a witness may be permitted to testify that he saw the defendant strike a pedestrian with his car, and then drive away at a high rate of speed. The witness should not be permitted to testify that the defendant intended to flee. Such a conclusion is not an observation, but an inference. Perhaps the defendant was rushing off to seek medical help for the injured pedestrian.

Opinion evidence is sometimes admissible. There are circumstances in which the opinions of duly qualified 'experts' are admitted into evidence. Under such circumstances, a threshold determination must be made by the judge that the subject matter of the proposed expert testimony is not within the knowledge of the layman, and that the expert's testimony would help the fact-finder's determination of a material fact. If a defendant is charged with driving while intoxicated, and the prosecutor offers to introduce a chemical analysis of the defendant's blood at the time of the vehicle's operation, expert testimony is generally

required, and admissible, to help the fact-finder understand the scientific evidence.

The expert's qualifications must be established before his testimony is admitted. Those qualifications can be established through evidence of relevant education and experience. In the foregoing example, if the threshold qualifications were to be established, the expert would be permitted to testify concerning the significance of the blood alcohol concentration test to which the defendant had been subjected.

Conclusion

It must be reiterated that this article covers only a small portion of the law of evidence on the most superficial level. The reader who wishes to study the subject in greater depth should obtain a complete copy of the rules of evidence.

Rules of evidence, being procedural in nature, are adopted separately in each of the United States. Although those state-adopted rules have much in common, they have many differences. The study of the law of evidence of a particular state requires reference to its particular rules. The handful of rules which are attached are taken from the Vermont Rules of Evidence. They are similar to the Federal Rules of Evidence which apply in federal courts throughout the country.

A copy of the table of contents of the Vermont Rules of Evidence is also attached at the end of this article. It is intended to place into context the selected rules which are

reproduced in full. Perhaps, it is one of the resources from which a 'Karelian Rules of Evidence' could eventually be produced.

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