



PROGRAM MATERIALS
Program #36178
July 8, 2026

Mastering Courtroom Success: Winning Your Trial and Appeal

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CELESQ CLE

EFFECTIVE ADVOCACY IN TRIAL & APPELLATE PRACTICE

I. Delivering an Effective Opening Statement

A. Opening Statements for Judge and Jury

As with many portions of this Course, entire courses can and have been taught, and books written, just on this sub-topic, in this case, opening statements for judge and jury. With that in mind, the following rules or advice are applicable to both bench and jury trials, except where otherwise indicated.

B. Especially for a jury trial, “tell a story”,

a. For example, if you are trying a personal injury case to a jury, representing the plaintiff, your story would start with how well the plaintiff was doing until defendant’s negligence “changed everything”, how the accident changed the life of the plaintiff and his or her family, how defendant’s failure to exercise good judgment, or was just negligent or deliberate action, were solely responsible for what happened, and how plaintiff was damaged.

C. Do not “over promise”, be sure that whatever you tell the judge and jury that you are going to prove, that you actually can “deliver” during the trial.

D. Give a logical sequence of what you intend to and will prove throughout the trial.

E. You should also anticipate not only the other side’s opening statement, but also the evidence they will use, and what they will use, and what they will prove.

F. Particularly in a jury trial, and especially if there are difficult issues which you have to overcome (for example, that your client is a convicted felon), you will remind the jury that during *voir dire* they promised to keep an open mind, until they hear all of the evidence.

G. Among the differences for an opening statement in a bench trial are the following:

1. Unlike a jury, the judge will be more familiar, and in many cases, far more familiar, with your case before the opening statement.

I. For that reason, the judge either may request that you waive opening statements, or that the judge may tell you that it is up to you, but that the court is already familiar with the case.

2. Another key difference is that in most or all bench trials, there will be important legal issues for the judge to determine. You should be ready to address those legal issues in your opening statement to the judge.

H. A lot depends on the expected length of the trial.

1. Especially with a short jury trial, you should be very conscious that the jury (and perhaps even the judge) will be well aware of your opening statement, at the time of your closing statement.
2. On the other hand, if it is expected that the trial, especially a jury trial, will last weeks or months, your emphasis is just to give your “roadmap”, knowing that by the time you deliver your summation, the jury, and maybe even the judge, will have little recollection of your opening statement.
3. As alluded to above, your opening statement should be a “roadmap”, for the judge or jury, or both, as to what is going to come.
4. As for jury trials, although somewhat true for bench trials too, do not be overly technical, make the opening statements as interesting and to the point as possible.
5. Another factor to consider is not to say anything in your opening statement which, at least in theory, could cause the court, in what would be a very rare, but occasionally could happen, direct a verdict against your client, just based upon what is said in the opening statement.
6. Only as to bench trials, you should be ready to defend what you say in our opening statement, in case the judge treats your opening statement as interactive, and either questions you about points that you have raised in your opening statements, or gives you direction as to how to proceed with it.
7. As for all opening statements, while you should be careful what you say, avoid reading. Maintain eye contact with the jury (in a jury trial), or with the judge in a bench trial.

I. Maximizing the Impact of Opening Statements.

- A. You should introduce your case theme and, where relevant and interesting,

the “key players” in the case.

- B. Where appropriate, you should lay out the sequence of events.
 - 1. Whether or not to give the sequence of events or “history”, depends upon what you need to emphasize in the case.
- C. Introducing supporting and damaging evidence.
 - 1. You should particularly alert the jury to key supporting evidence, especially if it may be difficult for them to understand the relevance, if you wait until you actually introduce that evidence.
 - 2. As for damaging evidence, if you are certain that the other side will be offering damaging evidence against you, you may want to “draw the teeth” and alert the jury that it will be coming and why it should not be determinative of the case.
- D. Preparing judge and jury to focus on specific elements of trial presentation.
 - 1. Consistent with the above, you should at least give the judge and jury some explanation of the type of evidence that they will be seeing and hearing.
- E. Opening Techniques that simply do not work.
 - 1. While it should be obvious, a boring opening statement will not engage the jury, and not cause them to be predisposed in your favor.
 - 2. Consistent with the above, do not lay out a lot of details in your opening statement.
 - 3. To the contrary, where appropriate, such as in a personal injury case where you are representing the Plaintiff, the best approach is to “tell a story” in your opening statement.
 - 4. Do not overdo, at least at this point, criticizing or attacking the other side.
- F. Cutting out unnecessary clutter.
 - 1. Consistent with the above, not only should you not overdo details in

your opening statement, but you should not tell the jury facts which are unimportant or irrelevant to your case.

II. Motions *In Limine*

- A. Motions *In Limine* are an excellent opportunity to obtain a pretrial ruling, preferably well in advance of the trial, as to issues that you expect to be contested.
- B. The principal benefit of Motions *In Limine* is that it enables you to prepare for trial, based upon the judge's ruling on that motion.

1. If you are the movant, and you are asking the court to either allow you to put certain exhibits into evidence, or to bar the other side from putting certain exhibits into evidence, how the court rules will help you to better prepare for trial.

2. If the court rules in your favor, then you can be confident that you will be allowed to put in that piece of evidence that you want to, or that the other side will not be allowed to introduce certain issues or evidence.

3. On the other hand, if your motion is denied, then you have notice that you must alter your strategy.

- a. For example, if there is evidence you want to introduce and the court denies your motion, then you know you are going to have to try to prove that point with different evidence.

- b. If the court, in denying your motion, is going to allow the other side to raise issues or evidence which are detrimental to your case, then you have learned from the court's ruling what you will need to do to combat or rebut that evidence.

III. Other Motions Made During the Course of the Trial

- A. Turning to pre-trial motions which you need, but may not have envisioned, there are a few.
 2. As noted above, the most likely one is a motion in limine whereby you would move for a court determination, in advance of trial, to get a ruling as to whether, for example, certain evidence will be allowed or not allowed at

the trial.

- a. Fortunately, at least as to motions in limine, most courts will allow them at any time, be it well before the trial, or literally on the eve of trial or even during the course of the trial.
 - b. Nevertheless, as soon as you realize that you should make a motion in limine you must, to the extent that you can, “drop everything” and make the motion.
 - c. Assuming you can get a ruling on your motion in limine, before you have to address the issue at the trial itself, you can prepare or modify your trial strategy, based upon what the court rules on your motion in limine.
3. Not so flexible is dispositive motions, particularly motions for partial or complete summary judgment.
- a. Most, if not all, courts set deadlines for when dispositive motions can be made, which deadline may or may not be in the scheduling order.
 - b. Hopefully, even if you are delayed in realizing that you can and should make a dispositive motion in your case, there is still time to do so.
 - c. In that case, as with difficulties with the scheduling order, to the extent that you can, you should “drop everything” and make the dispositive motion.
 - d. Not so easy is if there is insufficient time to do so, or the deadline for making a dispositive motion has passed.
 - i. In that case, hopefully the judge will be flexible in giving you more time to make the dispositive motion.
 - ii. What would be particularly helpful is if you can demonstrate to the judge that there were unforeseen developments in the

case, which now make it appropriate for you to make a dispositive motion

- e. Failing that, the “next best thing” is to be ready to make a dispositive motion during the course of the trial.
- f. There are several dispositive motions that can be made, during the course of the trial, be it a jury or bench trial.
 - i. You can make a motion for a directed verdict at any time, in fact, even, in theory, you can make such a motion based upon the opening statements of the attorneys (rarely granted), if the attorney discloses in the opening statement what you consider is sufficient to ask the court for an immediate ruling.

IV. Post-Verdict Motions

- A. It is more likely that you will be making motions to dismiss or for directed verdicts at the close of various portions of the trial, such as after the plaintiff rests its case, or the defendant rests their case.
 - 1. This is where you, even if you overlook making a pretrial dispositive motion, should have your arguments and your legal research ready, so that you can hopefully convince the court to grant your motion, at the time that you make it.
 - 2. You should also be ready to make a motion for a directed verdict, especially in a jury trial, after both sides have rested their case, and before the case is given to the jury.
 - 3. As I expect all of you are aware, even after there is a jury verdict, you can, and in most cases, absolutely should, make a motion for a “Judgment NOV” (judgment notwithstanding the verdict).
 - 4. There are similar motions that can also be made after the jury comes in, such as that the verdict is against the weight of the evidence and, even if insufficient to grant judgment to your side, warrants the

judge ordering a new trial on some or all of the issues..

V. Direct Examination

A. Preparation Tips for the Direct Examination.

1. Establishing the main theme.
 - a. You should, through your direct examination, let the jury hear and see how the testimony and evidence presented with those witnesses support the main theme of your case, which you should have laid out in your opening statement.
2. Organizing the order of testimony.
 - a. There are not set rules for all cases. The order should be dictated by the nature of your case and what you are trying to prove.
 - b. On the other hand, especially if the chronology of events is important, then you should have your witnesses testify sequentially, to help you develop and show the jury “your side of the story” in the sequence that it occurred.
3. Preparing witnesses.
 - a. If the witness has given a deposition in that case, or a related case, you must insist that the witness re-read the transcript of their deposition, so that, unless they have an honest reason for changing their testimony, their direct examination at trial is consistent with their deposition testimony.
 - b. You are usually free to discuss the direct examination testimony of a favorable witness.
 - c. As should be obvious, if a witness is not favorable, and especially if he or she is a hostile witness, you would not have the “luxury” of going over their testimony with them in advance.
 - d. You should script your questions, so that you have a “roadmap” for your direct examination, but still know your case so well that you

can depart from the scripted questions, based upon the answers you receive, especially answers you were not expecting.

- e. If the witness is a favorable witness, you not only can discuss the witness' testimony in advance, but you can have a "rehearsal" of your direct examination.
- f. In fact, you are allowed to give a copy of your script of questions to your witness, in advance.
 - i. Caution the witness that you may be departing from that script, not only based upon their answers at the trial, but also based upon developments in the case before they testify.
 - ii. Tell them **NOT TO BRING THE SCRIPT TO COURT WITH THEM**, as it may "get into the wrong hands".

4. Formulating effective questions.

- a. So much depends upon the nature of your case, that there is no overall rule or advice for formulating effective questions. The nature of the case will largely determine the best way to proceed.
- b. Having said that, throughout your preparation and delivery of direct examination, you must take into account the rules of evidence.
 - i. For example, with few exceptions, you are not allowed to ask leading questions on direct examinations.
 - ii. With the above in mind, formulate your questions so that they do not require a "yes" or "no" answer, since that is the best way to avoid asking leading questions.
- c. This goes with the above advice about preparing witnesses, be certain that your questions are easy to understand, even for hostile witnesses.
- d. Do not ask compound questions, i.e., each question should only be seeking one answer, be it a short or long response.

B. Areas of Direct Examination.

1. Specific approaches to impeachment.
 - a. As should be obvious, if a witness is favorable to you, then you are not going to impeach your new witness. In fact, at least in theory, you are not allowed to impeach your own witness.
 - b. With a hostile witness, you are allowed leeway to impeach that witness, and if the judge allows, to ask leading questions.
 - c. While there are several techniques, one that you absolutely should follow is if that witness has given a deposition in your case or a related case, be ready to impeach them, by showing that their testimony at trial, on key points, differs from their sworn testimony at their deposition.
 - d. You also could and should impeach a hostile witness, in effect, by bringing out their interests or bias in a result contrary to your position in your case.
2. Fact Testimony.
 - a. Most or all of your witnesses will be fact witnesses, i.e., they will be testifying about the facts that support your case and rebut the other side's case.
 - b. The questions and answers should emphasize how and why the witness was able to accurately report what they saw or heard and what occurred.
 - c. Where appropriate, you should use the fact witness to introduce evidence.
 - d. To the extent that the witness is neutral or, in any event, does not "have skin in the game", you want to, at least subtly, bring out that this witness who gives favorable testimony has no incentive to lie or shade his or her testimony in her favor.
3. Expert Testimony.
 - a. One can, and this writer has given, an entire CLE course just on expert testimony, so this course must be limited to just the "high

points”.

- b. In order to introduce expert testimony, you must first establish, through the expert witness’ experience or education, how or why they qualify to give expert testimony.
 - c. Always keep in mind that the judge has a great deal of discretion as to whether or not to allow a witness to give expert testimony.
 - d. The witness’ expertise may be the result of formal training or on job work and training.
 - e. Even if the other side is willing to stipulate that your witness is an expert, you probably still should insist that the witness give their background, in order to impress the jury and make them more likely to accept the opinion that is going to be given.
 - f. You should prepare the expert not only for direct examination, but also for cross-examination.
4. Causation.
- a. The fact or expert testimony, or both, should establish the causation, especially in a personal injury case, of how the defendant caused the accident, and that the injuries were caused by that accident, and not some other cause.
5. Liability.
- a. An essential part of every case is to establish the liability of the defendant and, if there is a counterclaim, the defendant proving that the plaintiff has liability.
 - b. With the above in mind, your witnesses should be supporting, and help you prove, liability of the other side, especially if there is a bifurcated trial, i.e., the initial trial is only to determine if there is liability.
6. Damages.
- a. Similarly, in order for there to be a recovery, there must be damages.
 - b. On the other hand, at least in theory, the damages could be nominal,

although you may be able to obtain, in certain limited cases, punitive damages.

- i. Although a large part of the course could just be on punitive damages, suffice it to say that New York, and some of the other jurisdictions, are particularly inhospitable to awarding punitive damages.
 - ii. In fact, at least in New York, there are certain types of cases where, by Court of Appeals case law, you cannot obtain punitive damages, such as in breach of contract cases.
- c. As with liability, especially if you have a bifurcated trial so that the second trial is only over the amount of damages, each of your witnesses must support, either with fact or expert testimony, the amount of damages that you are seeking.
 - d. On the other hand, where both liability and damages are at issue at trial, your witnesses potentially should be giving testimony to support both your liability and your damages claims. Analyze carefully what you hope to prove and establish with each witness.

7. Foundation.

- a. Foundation is more at issue when you are introducing documentary or similar evidence.
- b. The witness should be able to identify, from his or her own personal knowledge, what that document is and how they know that.
- c. The witness should also be able to explain what that document or exhibit shows, unless it is obvious.
- d. As with most or all direct testimony, the foundation that you need to establish is dictated by the type of evidence and type of case.
 - i. For example, if you are putting a contract into evidence, the witness should be able to testify, from his or her personal knowledge, how they know that this is the contract that was

signed by the parties. Ideally, the witness was there and saw the parties sign or, if the witness is one of the parties, he or she can testify that they both signed, hopefully at the same time and in the same place.

- ii. Another example is if you are introducing a photograph into evidence the witness, besides testifying what the photograph shows (unless it is obvious), should be able to testify that the photograph accurately reflects what it shows, and that the photograph has not been altered or changed since the time that it was taken.

C. Persuasive Witness Testimony - How to:

1. Develop the story and make it interesting.
 - a. Consistent with most of the previous material, you are using your witnesses to tell what occurred and, as much as possible, to make it interesting.
 - b. In those cases when you have the “luxury” of choosing between witnesses who would establish the same thing, you would choose the one who will be easiest to understand and best able to describe the events understandably and in an interesting way.
 - c. While all the other advice regarding direct testimony helps here, you should diligently avoid unnecessary or boring material, which neither helps to develop the story or make it interesting.
2. Integrate a Theme.
 - a. The case you present must be consistent, from your opening statement and throughout the testimony of your witnesses and exhibits put into evidence.
 - b. Regardless of whether the witness is hostile or not, you still must consider and use the direct testimony of each witness to give the relevant facts to the judge and jury, to support the theme of your

case.

3. Adjust to the Specific Audience.
 - a. “Easier said than done”, since except for a few questions you ask during the voir dire of the jury (if a jury trial), or the judge asks, your “audience” is a group of strangers who you know little about.
 - b. On the other hand, you have, from the voir dire, some indication of the background of your jurors.
 - c. Moreover, especially in a big case and if you have significant financial resources to do it, you used jury experts who researched the background of your jurors.
 - d. Therefore, if you think that you have a more educated or “pro-plaintiff” jury, for example, you may be able to tailor your questions somewhat to that audience.
 - e. On the other hand, the key is to make certain that all of the essential elements are proven by your case, regardless of the “specific audience”, if for no other reason than the case you present must successfully withstand any motion to dismiss or for a directed verdict.
4. Limit the Scope
 - a. Consistent with everything before, you want the witness to only testify from their personal knowledge and about matters which are relevant and either support your case, or rebut the other side’s case.
5. Handle and Introduce Exhibits.
 - a. As explained previously, you are using your witnesses, on direct examination, to establish the foundations necessary to introduce your exhibits into evidence.

Authenticate Documents.
 - b. Also consistent with the rest of these materials, your witness must be able to tell, and your questions must be customized to draw that

out, how the witness knows, from their personal knowledge, that the documents you are offering into evidence are authentic.

6. Humanize.

- a. Again, “easier said than done”, especially since you may be forced to use an unlikeable or unsympathetic witness to prove one of the essential facts of your case.
- b. As pointed out previously, sometimes you will have the “luxury” of being able to choose witnesses to prove the same thing. If so, one of your major considerations is whether this is a witness that you can “humanize” before the jury.
- c. Regardless of how good or sympathetic your witness is, you should try to bring out in direct examination, if consistent with the theme, in what ways the witness may be likeable or sympathetic.

7. Anticipate and Neutralize Cross-Examination.

- a. You should absolutely identify what weaknesses or exposure you have with a given witness on cross-examination.
 - i. In fact, if you are “on the fence” as to whether to call this witness at all, if you determine that there are things that may come out in cross-examination which would be particularly detrimental to your case, you may opt not to call that witness at all.
- b. If the witness is favorable to you, as part of your preparation of that witness, you are allowed to and should discuss with them what they should expect to be asked on cross-examination.
- c. In fact, again if they are a friendly witness, you are allowed and should conduct a practice cross-examination. Doing so not only will give the witness an opportunity to deal with the kind of questions they will be asked, but should also make them feel a little more comfortable about the experience.

D. Is Interim Commentary Allowed? How Do You Use it Well?

1. As a general rule, you are not allowed to make interim commentary. The only time you are supposed to speak to the jury is in opening and closing statements.
2. On the other hand, when you are in the course of asking direct examination questions, you can give “signals” or, in effect, interim commentary, by saying something like “different subject”, as you transition to a different area of questioning. At a minimum, doing so will help the judge and jury to follow your case.

E. Preparing Direct Testimony of witnesses

1. Direct Examination of your own client - Always meet with your client in advance of trial and discuss his/her testimony. You should emphasize that the witness’ testimony is their testimony, not yours. Nevertheless, you can discuss ways that their testimony can be given to be more effective.
2. Other witnesses favorable to your case - If at all possible, as with your own clients, you should meet with (or at least communicate by telephone) those witnesses who are favorable to you. As with your own client, favorable witnesses should be counseled on the most effective way to give their testimony, all along reminding them that it is their testimony, not yours.
3. Tips for preparing all favorable witnesses
 - a. If they have been deposed or testified in this case or a related case insist that they re-read their deposition, or other trial, testimony. If they find any mistakes, corrections or updates, they should be ready to explain them, if asked about them either on direct or cross-examination.
 - b. Just as to depositions or prior testimony, all prior written statements of the witness, especially affidavits or pleadings in this or any other case, must be reviewed by you and the witness. They should read those prior written statements and be ready, if necessary, to explain or justify any differences between those written statements and their current testimony.

- c. Script your direct examination questions and give your script to the witnesses, or at least give them a sequential outline of the questions you will ask them. Do so just so that they are prepared and forewarned of what you will be asking them. While they should read the scripted questions in advance, they should not bring them to Court. You also must counsel them that you may be departing from the script, based upon what occurs at trial, or even based upon the answers they may give to preceding questions.
- d. Ask and discuss with them any concerns they may have, such as the acoustics in the Courtroom.
- e. General advice:
 - I. Tell them to dress appropriately, but comfortably;
 - ii. Tell them not to discuss their testimony with anyone other than you;
 - iii. Counsel them to get enough sleep and, if they regularly exercise, to do so on the day of the trial.
- f. General advice for Courtroom conduct:
 - I. Encourage them to be respectful to everybody.
 - ii. During direct examination, they should look at you, unless the judge asks a question, and then turn to the judge.
 - iii. Tell them that if while on the witness stand they cannot hear everything that you are saying, to immediately say so, so that you can speak louder.
 - iv. Tell your witness that although he/she should look at you when you are asking the questions, if it is a jury trial, they should, as much as possible, look and direct their answers at the jury; if it is a bench trial, it is appropriate for them to just look at you.

- v. Also counsel them that if they need a bathroom or other break, they should say so immediately.
- vi. You should tell them, particularly if the witness is your client and will be sitting in the Courtroom during the entire trial, that they are “on the stage”, even when they are not actually testifying. Make them realize that the jury and the judge may be watching them, even when they are not actually testifying on the witness stand.
- vii. Even though they will have read the script of questions or in your outline in advance, insist that they listen carefully to your questions and if they do not hear or understand them, to say so immediately. If you possibly can, rehearse their testimony with them.

VI. Cross- Examination : Irving Younger’s Ten Commandments (By Judge Younger’s own admission he probably could have limited it to six or seven, but Ten Commandments sounded better).

- A. Be brief - short - if brief it will be remembered.
- B. Short questions -plain words. For example, “car” instead of “motor vehicle”.
- CC. “You will never, never, never ask anything other than leading questions”.
- D.. Ask only questions that you know what the answers are going to be.
 - 1. One exception is if you do not care what the answer is; be certain that you do not care.
 - 2. Another exception is for more experienced trial lawyers where you ask “escalating questions”; if you do not like where the answers are going, then you drop the line of questioning.
- E. Listen to the witness’ answer; be ready for it; do something with it.
- F. Do not quarrel with the witness; instead, sit down and explain your disagreement with the witness, to the jury, in your summation.

- G. “Never, never, never allow the witness to repeat what he said on direct examination” , if it is bad for your case. If the jury hears it once they may not remember it. If they hear it more than once, they are more likely to remember it.
- H. Do not permit the witness to explain anything.
- I. Avoid the one question too many; “go up to the line, but do not cross it”.
- J. There is a special case you rarely will have an opportunity to use, but if used correctly, it could make you a famous trial lawyer. It is the subtle question which seems to have no purpose; you save the point for summation when you then satisfy the jury’s curiosity as to why you asked that question.

VII. Re-Direct Examination

A. The big question is whether you should do a Re-Direct Examination

1. If your witness has held up well on Cross-Examination, it is not worth the risk of doing a Re-Direct Examination which could unexpectedly assist the other side.
2. The bigger concern is whether you are going to “open the door” to something that will enable your adversary to benefit from on Re-Cross Examination .

a. That is less of a concern in jury trials ,since the judge will presumably limit Re-Cross Examination to the matters that were covered under Re-Direct, i.e., Re-Direct will be “closed”, as opposed to the “open” Direct and Cross-Examination.

b. The same may not be true in a bench trial where, while theoretically the Re-Cross should similarly be limited to what was covered on Re-Direct, courts are more likely to give leeway as to matters that were open on Re-Direct, particularly because, at least in theory, the same witness could be called by the other side to cover the same areas as was covered on Re-Direct and Re-Cross.

B. When you should or must do Re-Direct Examination

1. If something came out during Cross-Examination that is particularly harmful to your case, or something was “left dangling” that could be misunderstood by the trier of fact, you may have no choice but to do Re-Direct Examination.

2. Also factoring into your decision is the extent to which you are confident that your witness, who may or may not have been prepared by you for what may have to be covered in Re-Direct Examination, will give you the answers you want or need on Re-Direct Examination.

C. In all events, limit your Re-Direct Examination only to those points or issues that you feel are necessary or particularly helpful.

VIII. Re-Cross Examination

A. Whether or not you should conduct a Re-Cross Examination

1. Similar to the concerns about whether or not to do a Re-Direct Examination, since there is usually no limit on Re-Direct Examination as to issues that may have been covered or opened on Re-Re-Cross Examination, carefully consider whether, based upon what came out in Direct and Re-Direct Examination and your Cross-Examination, it is best to “leave well enough alone”.

B. Similar to the above comments regarding Re-Direct Examination in bench trials, if you open up an issue on Re-Cross Examination, the judge, in a bench trial, may allow the other side more leeway and allow them on Re-Re-Direct Examination to cover more than what you covered in your Re-Cross Examination.

C. While, in the usual Cross and Re-Cross Examination the witness is not favorable to you anyway, you may be less concerned whether or not they will understand what you are trying to get from them.

1. On the other hand, on rare occasions, when, for example, the other side has called a witness favorable to you or, even called your own client, as part of their case, so that your Cross-Examination was of a favorable witness, you should also consider whether or not to do a Re-Cross Examination, whether this favorable witness is sufficiently prepared to give you the answers you want or need in the Re-Cross Examination.

IX. Review of Basic Evidence Rules: Key Evidence Rules, Case Law and Updates:

“Getting Your Evidence In, Keeping Your Opponent’s Evidence Out”

A. Hearsay rules, some experts consider the rules of evidence the hearsay rules, and

its exceptions. The details of that rule will be covered below in this section of this Outline.

B. Key Evidence Rules - Relevance

1. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the proceeding, or more probable or less probable than it would be without the evidence
2. All relevant evidence is admissible, except as otherwise provided or required by the constitution of the United States or the constitution, statutes, or common law of New York State.
3. Relevant if the evidence must tend to prove a fact that is material to the litigation. See, e.g., *People v Stevens*, 76 N.Y.2d 833, 835 (1990).
4. It is basic to our law of evidence that all facts having rationale probative value are admissible, unless there is a sound reason to exclude them, or unless there are specific laws or rules forbidding their admissibility. See, *Wigmore on Evidence* (3rd Edition, 1940), pg. 293.
5. The Court of Appeals has repeatedly said that all relevant evidence is admissible, unless its admission violates some exclusionary rule. See, e.g., *People v. Alvino*, 71 N.Y.2d 233, 241 (1987); *People v Lewis*, 60 N.Y.2d 321, 325 (1987).
6. Completing and explaining writing, recording, conversation or transaction.
 - a. When part of a writing, conversation, recorded statement, or testimony, or evidence of part of a transaction is admitted, any other part of that writing, conversation, recorded statement or testimony, or evidence of any other part of the transaction, may be admitted when necessary to complete, explain, or clarify the previously admitted part. The timing of the admission of such additional parts is subject to the Court's discretion.

I. This rule is derived from long-standing Court of

Appeals precedent which recognizes that when evidence has been admitted, an adverse party may offer evidence necessary to complete, or clarify the evidence that has been introduced. See, e.g., Rouse v. Whited, 25 N.Y. 170, 174-175 (1862).

- b. Where a statement or part of a conversation is given in evidence, whatever was said by the same person in the same conversation, that would anyway qualify or explain the statement, is also admissible.
- c. Under this rule, one part of a party's own statement is admitted against that party is an admission against that party's interest, the party may offer into evidence any part of the statement which completes the statement . See, e.g., People v. Dlugash, 41 N.Y.2d 725, 736 (1977).
- d. Similarly, when a witness has been impeached by a statement the witness previously made, other parts of the statement may be admitted to clarify or explain the statement. See, e.g., People v. Ochoa, 14 N.Y.3d 180, 187 (2010).
- e. The Court has discretion to allow evidence where the timing of that previously admitted evidence is relevant.
- f. The rule of completeness has been expressly provided in CPLR §3117(b), which provides that "If only part of a deposition is read at the trial by a party, any other party may read any other part of the deposition which would in fairness be considered in connection with the part read".

C. Conditional Relevance (Evidence offered "subject to connection").

- 1. When the admissibility of offered evidence depends on the introduction of further evidence to fulfill the requirements of admissibility, the Court

may admit the offered evidence after, or subject to, receipt of that further evidence. Upon failure of a party to fulfill the requirements of further evidence, the offered evidence must be struck, and the jury instructed to disregard it, or, if undo prejudice has resulted, the court may grant a mistrial.

D. Exclusion of Relevant Evidence.

1. A court may exclude relevant evidence if its probative value is outweighed by the danger that its submission would:
 - a. Create undo prejudice to a party;
 - b. Confuse the issues and mislead the jury;
 - c. Prolong the proceeding to an unreasonable extent without any corresponding advantage to the offering party; or
 - d. Unfairly surprise the opposing party, and no remedy other than exclusion could cure the prejudice caused by the surprise.

E. Restricted Admissibility of Relevant Evidence

1. Evidence may be admitted for one purpose, but not for another, or as to one party, but not as to another.
2. In a trial by jury, the Court shall provide an instruction on the scope of the evidence to the jury, or as may be necessary, or required by a request of a party or by statute or additional ruling.

F. Character Evidence - Evidence of a person's character is not admissible to prove that the person acted in conformity therewith, except for the following:

1. In a civil or criminal proceeding, evidence of a person's character is admissible where that character is an essential element of a crime, charge claim or defense.
2. In a criminal proceeding, a defendant may offer evidence of a character that is relevant to prove the defendant acted in conformity therewith, on a particular occasion and, if the evidence is admitted, the people may rebut that evidence.

3. In a criminal proceeding where the defendant interposed the defense of justification based on the defense of self or another, evidence of the victim's reputation for violence and prior specific acts of violence by the victim against defendant or others, if known to the defendant and reasonably related to the crime charged, is admissible on the issue of the defendant's belief of the necessity of defending himself or herself or another person from impending harm. Such evidence is not admissible to prove that the defendant was the initial aggressor. Also relevant is evidence of the victim's prior threats against the defendant, whether known to the defendant or not, to prove that the victim was the initial aggressor.
4. In a civil or criminal proceeding, evidence of the character of a witness may be admissible to impeach the witness.
5. When evidence of a person's character is admissible, the only proof may only be made by testimony as to that person's reputation for the relevant character trait.
6. If a witness offers such reputation evidence as to a person's character, that witness may be asked on cross-examination whether the witness has heard that the person has been convicted of a crime or engaged in conduct, other than the crime(s) or conduct with which Defendant is charged, that is inconsistent with that reputation.

G. Habit

1. Habit of a person or routine practice of an organization of a deliberate and repetitive practice by a person or organization in complete control of the circumstances under which the practice occurs (as opposed to conduct, however frequent, yet likely to vary from time to time depending on the circumstances).
2. Evidence of a person's habit or an organization's routine practice is admissible to prove that a person or organization acted in conformity with that habit on a particular occasion.

H. Liability Insurance

1. Evidence that a person was or is not insured against liability is not admissible to prove that the person acted negligently or otherwise wrongfully or that the person should be held strictly liable, or to establish damages;
2. Is admissible to prove some other fact relevant to a material issue, such as agency, ownership or control over premises where the accident occurred or the instrumentality that causes the accident or bias or prejudice of a witness.
3. Offers to compromise.
 - a. Evidence of furnishing, or offering or promising to furnish, or accepting or offering or promising to accept, valuable consideration compromising or attempting to compromise a claim which is disputed as to either validity or amount of damages, shall be inadmissible as to proof of liability for or invalidity of the claim or the amount of damages.
 - b. Evidence of any conduct or statement made during compromise negotiations shall also be inadmissible. The provisions of this rule shall not require the exclusion of any evidence, which is otherwise discoverable, solely because such evidence was presented in the course of compromise negotiations.
 - c. The exclusion established by this rule shall not limit the admissibility of such evidence when it is offered for another purpose, such as providing bias or prejudice of a witness, negating a contention of undo delay or proof of an effort or prosecution.
4. Payment by Joint Tortfeasor
 - a. In an action for personal injury, injury to property or for wrongful death, any proof as to payment by or for settlement with another joint tortfeasor or one claimed to be a joint tortfeasor, or for or by a defendant in mitigation of damages, shall be taken out of the hearing of the jury.

attorney involves the preparation, execution, or revocation of any Will of that client or other relevant instrument.

6. The Court of Appeals has long viewed the attorney/client privilege as premised on the rationale that “one seeking legal advice may be able to confide fully and freely to his or her attorney, secure in the knowledge that his or her confidences will not later be exposed to public view to his or her embarrassment or legal detriment”. See, e.g., *Matter of Priest v Hennessy*, 51, N.Y.2d, 62, 67-8 (1980).
7. The Court in the above-cited *Priest* cases sets forth that for the privilege to apply, an attorney-client relationship must exist, and such relationship “arises only when one contacts an attorney in his capacity as an attorney for the purpose of obtaining legal advice or services”. Once such relationship is established, the privilege will encompass a confidential communication made between the client and the attorney, which was made for the purpose of obtaining or providing legal assistance to the client.
 - a. Communications that relate solely to non-legal personal or business matters fall outside of the privilege.
8. An exception to the general rule that the presence of a third-party precludes a finding of confidentiality is the judicially recognized “common interest exception”. Under this exception, where two or more clients have separately retained counsel to advise them of matters of common legal interest, confidential communications that are revealed to one another for the purposes of furthering a common legal interest retain their confidential status.
9. The privilege may extend to confidential communications between the agents of the client and agents of the attorney, provided they are assisting in the legal representation involved. For example, an interpreter acting as “agent, adviser to the client, to facilitate communications”, as provided in *Matter of Putnam*, 257 N.Y. 140, 143-144 (1931).
10. The privilege may extend to communications between the attorney and a

consultant retained by the attorney to assist the attorney in providing legal services to the client and not to testify, for example, an accountant, economist, or investment banker, may also be protected by the privilege. See, United States v. Kovel, 296 F. 2d 918, 921-2 (2nd Cir. 1961).

11. Certain details about the attorney/client relationship are not protected by the privilege. For example, in *Matter of Priest v Hennessy*, supra, the Court of Appeals held that the fee arrangements between the attorney and client, including the amount of the retainer and the identity of a person paying the fee, do not ordinarily constitute a confidential communication, and for that reason, are not usually considered as privileged communications.
12. CPLR §4593 (a) permits the privilege to be invoked in any judicial, administrative, or legislative proceeding. Under that provision, unless the client has waived the privilege, the attorney, the attorney's employees, the client's agents, and an eavesdropper cannot be compelled in any such proceeding to disclose a privileged communication.
13. A client may waive the privilege under certain circumstances, for example, the following:
 - a. When the client gives authority to an agent to waive the privilege, such as in *People vs. Cassas*, 84 N.Y.S. 2d 718, 722 (1995).
 - b. When the client disclosed the communication to another person. See, People v Patrick, 182 N.Y. 131, 175 (1905).
 - c. When the client is a defendant in a criminal case and places his sanity in issue, the privilege is waived as to communications between the defendant and a psychiatrist retained by the attorney, and the psychiatrist may accordingly testify for the prosecution that he determined that defendant was sane. See, People v Edney, 39 N.Y.2d 620, 625 (1976).
 - d. The Appellate Divisions have uniformly held that inadvertent disclosure does not automatically result in a waiver of the privilege. Instead, the party making the disclosure may avoid a finding of

waiver by showing:

- i. The party had no intention to disclose the matter and took reasonable steps to prevent any disclosure;
- ii. The party promptly took reasonable steps to rectify its mistake upon the discovery of the disclosure, and
- iii. The party in possession of the matter will not be prejudiced if it cannot use the matter.

J. Spousal Privilege - A husband or wife shall not be required, or without consent of the other if living, allowed, to disclose a confidential communication made by one to the other during the marriage.

1. The spousal privilege protects confidential communications induced by the marital relationship. The privilege is designed to protect the strength of the marital bond and will only encompass confidential statements that are induced by the marital relationship and prompted by the affection, confidential loyalty engendered by such relationship. See, e.g., *People v Mills*, 1 N.Y.3d 269, 276 (2003).
2. The key inquiry is whether the communication was induced by the marital relationship itself; if so, the privilege will attach. See, *Poppe v. Poppe*, 3 N.Y.2d 312 (1957).
3. For the privilege to apply, the parties must actually be legally married at the time the communication is made.
4. The privilege applies no matter what medium of communication is used.
5. Communications that would have been made regardless of the marriage's existence are not protected.
6. The privilege does not apply to communications between spouses of threats by one spouse against the other made during the course of physical abuse, because the declarer is not relying upon any confidential relationship to preserve secrecy.
7. The privilege does not apply to communications or statements made by

spouses in the presence of others. See, People v. Melski, 10 N.Y.2d 78, 84 (1961).

8. Whether a communication is covered by this spousal privilege and therefore privileged, is a preliminary question of fact to be determined by the trial judge.
9. The privilege belongs to the spouse who made the confidential communication. See, Prink v Rockefeller Ctr., 48 N.Y.2d 309, 314 (1979).

K. Self Incrimination

1. In a criminal proceeding :
 - a. In a criminal proceeding, no person shall be compelled in any criminal case to be a witness against himself or herself.
 - b. When a defendant does not testify on his or her own behalf, neither the Court nor the prosecutor may comment adversely thereon.
2. In a civil proceeding:
 - a. A competent witness shall not be excused from answering a relevant question, on the ground only that the answer may tend to establish that he owes a debt or is otherwise subject to a civil lawsuit.
 - b. A competent witness may otherwise decline to give an answer which will tend to accuse himself or herself of a crime or expose him or her to a penalty or forfeiture in response to a specific question.
3. When during the course of a testimony, a witness invokes the privilege, the Court must determine the degree of prejudice, if any, to the party's right to examine the witness impaired by the witness' invocation of the privilege and, upon that determination, take appropriate action to dissipate any prejudice.
4. In a civil case, invocation of the privilege may permit the jury to consider the failure to answer questions of a witness who is a party "in assessing the strength of evidence offered by the opposite party on the issue which the witness was in a position to controvert". See, e.g., Marine Midland Bank

- v. *Russo Produce Co.*, 50 N.Y.S.2d 31, 42 (1980).
5. An unfavorable inference may be drawn against the party who exercises the privilege against self-incrimination. Prince, Richardson, on Evidence §5-710.
 6. However, it has been held by the Appellate Division that an adverse inference may not be drawn against a party in a civil action where the privilege is invoked by a non-party witness. See, Andrew Carothers, M.D., P.C. v. Progressive Insurance Reliances. Co., 150 A.D.3d, 192, 203-204 (1st Dept., 2017).
- L. Physician, Dentist, Podiatrist, Chiropractor and Nurse.
1. The privilege is pursuant to CPLR §4504.
 2. Unless the patient waived the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry, Podiatry, or Chiropractor shall not be allowed to disclose any information which may be acquired in attending a patient in a professional capacity, and which was necessary to enable him or her to act in that capacity. A relationship of a physician and patient may exist between a medical corporation, a professional service corporation, a university faculty practice corporation organized to practice medicine or dentistry, and the patient to whom they render professional medical services to.
 3. A patient who, for the purpose of obtaining insurance benefits, authorizes the disclosure of any such privileged communication to any person shall not be deemed to have waived the privilege.
 4. Mental or physical condition of a deceased patient. A physician or nurse shall be required to disclose any information as to the mental or physical condition of a deceased person privilege, except information which would tend to disgrace the memory of the decedent, either in the absence of an objection by a party to the litigation or when the privilege has been waived.
- M. Confidential Communications to Clergy:

1. Unless the person confessing or confiding waives the privilege, a clergyman or other minister of any religion or duly accredited Christian Science practitioner, shall not be allowed to disclose a confession or confidence made to him in his professional capacity as a spiritual adviser.
2. This rule is specifically provided by CPRL §4505.
3. The Court of Appeals has held that the privilege originally applied only to communications with members of the clergy who were prevented from disclosing the substance of such communications under the rules or practices of their religion. See, *Lightman v. Flaum*, 97 N.Y.2d 128, 134 (2001).
4. In order for the privilege to apply, there must be reason to believe that the information sought required the disclosure of information under the cloak of the confessional or was in any way confidential, for it is only confidential communications made to a clergyman in his spiritual capacity which the law protects with this privilege. See, *Matter of Keeman v. Gigante*, 47 N.Y.2d 160, 166 (1979).
5. In New York there is to be a single inquiry: Whether the communication in question was made in confidence and for the purpose of obtaining the spiritual guidance. See, *People v Carmona* , 82 N.Y.2d 603, 609 (1993).
6. In that same *Carmona* case, the Court of Appeals gave examples of communications to which the privilege did not apply, such as:
 - a. Disclosures were made to a rabbi for the purpose of obtaining his assistance in securing an attorney for a favorable plea bargain. See, *People v. Drelich*, 123 A.D.2d 441 (2nd Dept., 1986).
 - b. Where a congregant apologized to a priest, and the priest's capacity is a victim, and solicited the priest's aid in contacting an attorney. See, *People v. Schultz*, 161 A.D.2d 970 (3rd Dept., 1990).
 - c. Where a priest informed a congregant about allegations made against him by his wife and step-daughter and warned him that the authorities would be advised, unless he quit his job at a daycare

center. See, Matter of N. & G. Children, 176 A.D.2d 504 (1st Dept., 1991).

N. Psychologists

1. This privilege is provided for by CPLR §4507.
2. The confidential relations and communications between a psychologist and his client are based on the same principles as those provided by law between attorney and client.
3. A client who, for purpose of obtaining insurance benefits, authorizes the disclosure of any such privileged communication to any person shall not be deemed to have waived the privilege.
4. For the privilege to be invoked, CPLR §4507 requires the psychologist to be registered under Education Law §153.
5. The psychologist's client may waive the privilege, expressly or implicitly. See, e.g., Matter of Charles R. R., 166 A.D.2d 753, 764 (3d Dept., 1990).
6. There are statutory exceptions to this privilege, provided for in the Family Court Act and the Social Services Law, for claims of suspected child abuse or maltreatment, or similar claims.
7. The privilege may be dispensed with in any criminal proceeding, when necessary to enforce a constitutional right of the defendant. See, Pennsylvania v. Ritchie, 48 U.S.39 (1987); People v. Bridgeland, 19A.D.3d 1122, 1125 (4th Dept., 2005).
8. It has also been held that where a witness' credibility was "crucial" and there was a good faith basis to believe that her testimony was false, the psychologist privilege "must yield to Defendant's constitutional right of confrontation". See, People v. Jaikaran, 95 A.D.3d 903,904 (2nd Dept., 2012).

O. Social Worker

1. This privilege is provided for in CPLR §4508.
2. A person licensed as a 1 master social worker or a licensed clinical social

worker shall not be required to disclose a communication by a client, or his or her advice given thereto, in the course of his or her professional employment, nor shall any clerk, stenographer, or other person working for the same employer, as such social worker or for such social worker being allowed to disclose any such communication or advice given thereon.

3. There are some exceptions to the Social Worker privilege, which include the following:
 - a. If the client authorizes the disclosure.
 - b. If the client reveals to a social worker the contemplation of a crime or harmful act;
 - c. Where the client is a child under the age of 16 and the information indicates that the client has been the victim or subject of a crime;
 - d. Where the client waives its privilege by bringing charges against such social worker and such charges involve confidential communications between the client and the social worker.
4. A client who, for the purposes of obtaining insurance benefits, authorizes the disclosure of any such communication to a person shall not be deemed to have waived the privilege.
5. For the privilege to apply, the social worker must be a licensed master social worker or a licensed clinical social worker, under Education Law §54.
6. The privilege only protects the communications to a social worker that was intended to be confidential. See, *People v. Alaire*, 148 A.D.2d 731, 737 (2nd Dept., 1989).
7. If the communications to a social worker is knowingly made in the presence of a third-party, the privilege does not apply. See, *Matter of Ellers*, 37 Misc. 3d 1219 (A.) (S. Ct. Dutchess Cty., 2012).
8. Communication that reveals the contemplation of a crime or harmful act, though purportedly to be confidential, is by statute expressly non-privileged.

CPLR §4508 (a)(2).

P, Library Records.

1. This is provided under CPLR §4509.
2. Library records which contain names or other personally identifying details regarding the users of public, free association, school, college and university libraries and library systems of this State, including, but not limited to, records related to the circulation of library materials, computer database searches, interlibrary loan transactions, reference queries, requests for photocopies of library materials, title reserve requests, or the use of audio-visual materials, films or records, shall be confidential, and not be disclosed, except as such records may be disclosed for the proper operation of such library, and shall be disclosed upon request or consent of the user pursuant to subpoena, Court order, or otherwise required by the statute.

Q. Rape Crisis Counselor -

1. This exception is provided by CPLR§4510.
2. A rape crisis counselor shall not be required to disclose a communication made by his or her client to him or her, or advice thereon, in the course of his or her services, nor shall any clerk, stenographer, or other person working for the same program, as a rape crisis counselor or for the rape crisis counselor be allowed to disclose any such communication or advice given thereon, nor shall any records made in the course of the services given to the client or recording of any communications made by or to a client be required to be disclosed, nor shall the client be compelled to disclose such communication records.
3. The following exceptions do apply:
 - a. A rape crisis counselor may disclose such otherwise confidential communication to the extent authorized by the client;
 - b. A rape crisis counselor shall not be required to treat as confidential

communication by a client which reveals the intent to commit a crime or harmful act;

c. In a case in which a client waives the privilege by instituting charges against the rape crisis counselor or the rape crisis program and such action or proceeding involved confidential communications between the client and the rape crisis counselor.

4. The privilege may only be waived by the client, the personal representative of a deceased client or, in the case of the client who has been adjudicated incompetent or for whom a conservator has been appointed, the committee or conservator.

5. A client who, for the purpose of obtaining compensation under law, authorizes the disclosure of any privileged communication to an employee of the office of victim services or an insurance representative shall not be deemed to have waived the privilege created by this section.

R. Laying a Foundation: Practical Examples and Tips.

1. Using the Rules of Evidence.

a. Applying the rules of evidence covered above, will usually provide the basis for your introducing events, or when you are opposing introduction of evidence, your doing so.

2. Real Evidence

a. “Real Evidence” is any tangible object or sound recording of a conversation that is offered into evidence.

b. Real evidence is admissible upon a showing that it is relevant to an issue or proceeding (See “I” above.), is what it purports to be, and has not been tampered with. Proof that an object has not been tampered with and it is what it purports to be depends upon the nature of the object and, in particular, whether the object is “patently identifiable” or “fungible”.

I Patently identifiable evidence is real evidence that possessed

unique or distinctive characteristics or markings and is not subject to material alterations that is not readily apparent; evidence identifying the object normally will constitute the required proof.

- ii. Fungible evidence is real evidence that is capable of being altered, contaminated or replaced, or is a sound recording, in addition to testimony identifying the objective proof, that the proffered evidence has not been tampered with is required and may be satisfied by the following:
 - a. A chain of custody - testimony of those persons who handled the object or recording from the time it was obtained or recorded to the time it is presented in Court to identify the object or recording and attest to its unchanged condition;
 - b. Proof of circumstances that provide reasonable assurances of the identity and unchanged condition of the object or recording.

S. Sound Recording.

1. A sound recording of a conversation is admissible upon the following:

- a. Upon testimony of a participant in, or a witness to, the conversation that the recording is unaltered and completely and accurately reproduces the conversation at issue;
- b. By combination of testimony by a participant and an expert establishes the completeness, accuracy and absence of any alteration of the recording;
- c. In addition to evidence concerned with the making of the recording and identification of the speakers, by establishing a “chain of custody” (testimony of those who handle the recording from the time it was made to the time it is presented in court to identify the

recording and attest to its custody and unaltered condition).

2. The Court may, in an exercise of its discretion, exclude real evidence.
3. The Court requirements of admissibility of real evidence is a showing that it is relevant to an issue in the proceeding, that it is what it purports to be, and that it has not been tampered with. See, *People v. Julian* , 41 N.Y.2d 340, 342 -3 (1977).
4. The Court of Appeals in *People v Ely*_, 68N.Y.2d520 (1986), stated that the foundation requirements for the admissibility of sound recordings must be made by “clear and convincing” proof. 68 NY2d 520, 527.
5. In *Grucci v Grucci*_, 20 NY3d 893, 896-7 (2012), the Court applied the above Ely rule to civil actions. The Court held that “the predicate for admission of tape recordings and evidence is clear and convincing proof that the tapes are genuine and that they have not been altered”.
6. The admission of real evidence is subject to the discretion of the Court, and in exercising such discretion the Court will consider whether to exclude the proffered real evidence when its probative value is outweighed by countervailing factors such as to mislead, confuse, divert, or otherwise prejudice the purposes of the trial. See, *Hudson v. Lansingburgh, Cent. School Dist.*, 27 A.D.3d 1027, 1030 (3rd Dept., 2006).
7. Demonstrative Evidence
 - a. Demonstrative evidence is a visual, graphic or sound aid used to explain or illustrate a witness’ testimony or the presentation of the proponent’s case.
 - b. A visual, graphic aid proffered as demonstrative evidence may be exhibited to the trier of fact provided that it is a fair and accurate depiction or presentation of what it purportedly depicts or represents and it helps the fact finder to better understand the testimony of a witness or a presentation of a party’s case.
 - c. The Court may, in the exercise of its discretion, exclude the offered

demonstrative evidence.

- d. The proffered demonstrative evidence must fairly and accurately represent what its proponent claims it represents. See, People v Burns, 33 N.Y. 2d 343 (1974).
 - e. The offered demonstrative evidence need not be identical in all aspects to what it illustrates or explains. Variations or differences which are minor and inconsequential are not a basis for exclusion, See, Balm v Triumph Corp., 71 A.D.2d 429, 438, 439 (4th Dept., 1979).
 - f. The Court, in deciding whether to allow the proffered demonstrative evidence, must determine whether it will be helpful to the trier of fact to better understand the testimony of a witness or the presentation of the proponent's case. See, People v Miranda, 23 N.Y.2d 439 (1969).
8. Demonstration or Experiment - Demonstration or Experiment may, in the discretion of the Court, be authorized when the result of the demonstration or the experiment will be probative of an issue in the case; if it can reasonably be conducted in Court under conditions substantially similar to the conditions at the time of the occurrence at issue; that it will not unreasonably delay or disrupt a trial; and will be helpful to, and will not mislead or confuse the jury.
- T. Person's Appearance or Capability - When a person's appearance, condition, or capability is relevant to an issue in a proceeding, the appropriate aspect of the person's appearance, condition, or capability may, subject to the discretion of the Court, be exhibited to the trier of fact.
- U. Photographs
- 1. A photograph may be admitted into evidence upon the showing that it is relevant and properly identified and authenticated as a fair and accurate representation of what it purportedly depicts.

2. An authenticated photograph of a deceased or of an injury is admissible in the discretion of the Court if it tends to prove or disprove a disputed or material issue, to illustrate or elucidate other relevant evidence, or to corroborate or disprove other evidence offered or to be offered, and if its probative value outweighs the prejudice or undue prejudice.
3. While an appropriate witness' testimony is usually what is necessary to establish the foundation, where no witnesses are available who have viewed the subject matter portrayed, it is possible to have valid alternative grounds for syndicating the photograph and admitting it into evidence, such as testimony, especially that by an expert, tending to establish that the photograph truly and accurately represents what was before the Court. *People v Price*, 29 NY3d 472, 477 (2017); See, *People v. Burns*, 183 A.D.3d 835 (2nd Dept., 2020).

V. Viewing of Premises

1. In a civil proceeding, during the course of a trial, if the Court is of the opinion that a viewing or observation by the jury of a premise or a place where alleged injuries to personal property were sustained in an accident or occurrence claimed to have been the cause thereof or any other premises or place involved in the case will be helpful to the jury in determining any material factual issue, it may, in its discretion, at any time before the commencement of the summations, order that the jury be conducted to such premises or place for such purpose.
2. In a criminal proceeding, if the court is of the opinion that a viewing or observation by the jury of a premise or a place where an offence on trial was allegedly committed, if any other premises or place involved in the case will be helpful to the jury in determining any material factual issue, it may, in its discretion, at any time before the commencement of the summations, order that the jury be conducted to such premises or place for such purpose.
3. Common procedural requirements

- a. The jury must be kept together throughout under the supervision of an appropriate public servant or servants appointed by the Court and the Court itself must be present throughout. In a civil proceeding, the parties to the action and counsel for them may, as a matter of right, be present throughout, but such right may be waived. In a criminal proceeding, the prosecutor, the defendant, and counsel for the defendant may as a matter of right be present throughout, but such right may be waived.
 - b. The purpose of such an inspection is solely to permit visual observation by the jury of the premises or place in question, and neither the court, the parties, counsel for parties or the jury may engage in discussion or argumentation concerning the significance or implications of anything under observation or concerning any issue in the case.
4. Exhibits to the Jury - Upon retiring to deliberate, the jurors may take with them any exhibits received in evidence at the trial which the Court, after according the parties an opportunity to be heard upon the matter, in its discretion, permits them to take.

W. Judicial Notice of Facts

1. Judicial Notice of Fact as used in this rule means a court's declaration of the existence of a fact normally decided by the trier of fact, without requiring proof of the fact.
2. Facts that may be judicially noticed are:
 - a. Facts of such common knowledge within the community where the court sits that they cannot reasonably be the subject of dispute;
 - b. Facts that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned;
 - c. Certain facts contained in undisputed records of a court, such as prior orders, or documents therefrom, which would not otherwise be

admissible. A court may take judicial notice of fact, whether requested or not.

3. The parties are entitled to an opportunity to be heard on whether a court should take judicial notice. In the absence of prior notification, a party shall, upon request, be given an opportunity to be heard after judicial notice has been taken.
4. Judicial notice may be taken at any stage of a hearing, trial, or other proceeding.
5. In determining the propriety of taking judicial notice of a fact, any source of relevant information may be consulted or used, whether or not furnished by a party, and the rules of evidence shall not apply except for privilege.

X. Judicial Notice of Law.

1. Every court shall take judicial notice, without request, of the common law, constitution or public statutes of the United States and of every state, territory, and jurisdiction of the United States and of the official compilation of codes, rules and regulations of the state, except that relate solely to the organization or internal management of an agency of the state and of all local laws and county acts.
2. Judicial notice may be taken without request of private acts and resolutions of the congress of the U.S.A. and the legislature of the state; ordinances and regulations of officers, agencies or governmental sub-divisions of the state or of the U.S.A. and the laws of foreign countries or their political sub-divisions. Judicial notice shall be taken of matters specified above, if a party requests it, if the court has sufficient information to enable it to comply with the request, and has given each adverse party notice of his intention to request. Notice shall be given in the pleadings or prior to the presentation of any evidence of the trial, but a court may require or permit other notice.

Y. Hearsay

1. Definition of Hearsay: Hearsay is an out-of-court statement of a declarant offered in evidence to prove the truth of the matter asserted in the statement;
2. The declarant of the statement is a person who is not a witness at the proceeding or, if the declarant is a witness, the witness uttered the statement when the witness was not testifying in the proceeding.
3. A statement of the declarant may be written or oral, or non-verbal, provided a verbal or non-verbal conduct is intended as an assertion.
4. Hearsay admitted without objection may properly be considered by the trier of fact and can be given such probative value as under the circumstances it may possess. See, *Matter of Findlay*, 253 NY 1, 11(1930).
5. However, in the interest of justice the appellate court may reverse the judgment, and grant a new trial, where there is a fundamental trial error, even though no objection was made at the trial. See, *People v. Clegg*, 18A.D.2d 694 (2nd Dept. , 1962).
6. A statement which is not offered to prove the truth of the matter asserted therein is not hearsay. See, *People v. Salko*, 47 NY2d 230, 239 (1979).
7. If the statement is not offered for its truth, and is offered merely to show that the words were uttered or the contact was engaged in, the issue of admissibility then becomes whether it is relevant and whether its probative value is substantially outweighed by the potential of unfair prejudice to the party against whom the statement is admitted.
8. Admissibility of hearsay is limited by the confrontation clause, in criminal cases.

Z. Admission by a Party

1. A statement of a party which is inconsistent with a party's position in the proceeding is admissible against the party, if the statement is one of the following:
 - a. Made by a party in an individual or representative capacity and offered against the party in that capacity, regardless of the party's lack of personal knowledge of the facts asserted by the party;
 - b. Made by a person in a relationship of privity with the party and the statement concerns the party's and the person's joint interest;
 - c. Made by an agent or employee of a party whom the party authorized to make a statement concerning the subject. The required authorization may be expressly given by the party, or implied from the scope of the agent's duties or employment.
2. This rule does not bar the admission of an employee's statement where it is admissible on other grounds.
 - a. Admission by adopted statements.
 - I. An out-of-court statement made by a person which is inconsistent with a party's position in the proceeding is admissible against that party, if the party heard and understood the statement and assented to the statement by word or conduct.
 - ii. Usually, an out-of-court statement that is made by a person which is inconsistent with a party's position in the proceeding is admissible against that party, if the party heard and understood the statement and provided an equivocal or evasive response or remains silent when he or she would reasonably have been expected to deny the statement and had an

opportunity to do so.

3. In a criminal proceeding, when, before or after a defendant's arrest, the defendant is silent following a statement made to the defendant by a person the defendant knows to be a member of law enforcement, during the performance of his or her duties, the defendant's silence is not admissible as an admission or to impeach the defendant's testimony, except as follows:
 - a. The silence of the defendant, who at the time was a law enforcement officer, in the face of an accusation of criminal conduct by a fellow officer is admissible, if the defendant was under a duty to inform his or her superiors of his or her activities.
 - b. A defendant who, prior to trial, makes a voluntary statement relating to the criminal transaction at issue and then provides testimony at the criminal proceeding with respect to that transaction, may be impeached by the defendant's omission of critical details from the defendant's pretrial statement that would have been natural to include in that statement.
4. A party's failure to respond to a written statement directed to a party may not be used to establish the party's consent to the statement.
5. A person who understands and clearly expresses his or her assent to a statement of another that contains a statement against the interest of the assenting party adopts that statement as his or her own, and the statement is admissible in evidence as an adoptive admission.
6. An adoptive admission occurs when a party acknowledges and assents to something already uttered by another person, which does become effectively that party's own admission. See, *People v. Campney*, 94 NY2d 307, (1999).

AA. Ancient Documents

1. A statement in a document is admissible if it is proved to be in

existence for more than 30 years, and its authenticity is supported by its proper custody or otherwise accounted for, and it is free from any indication of fraud or invalidity.

2. If the genuineness of an ancient document is established, it may be received into evidence to prove the truth of the facts stated therein. See, Tillman v. Lincoln Warehouse Corp., 72 A.D.2d 40, 44-5 (1st Dept. , 1979)
3. While the Court of Appeals has not held that this exception applies to non-real property documents, the Appellate Division has so held, See, e.g., Estate of Essig v. 5670 58 St. Holding Corp., 50 A.D.3d 948, 949 (2nd Dept., 2008).

BB. Co-Conspirator Statement

1. A statement made by a defendant's co-conspirator made in furtherance of the conspiracy, during the course of the defendant's involvement in the conspiracy, or prior to the defendant joining the conspiracy, or after the defendant's active involvement has ceased, but the conspiracy continues, is admissible to prove the conspiracy and the crime that was the subject of the conspiracy regardless of the availability of the co-conspirator.
2. Statement against penal or pecuniary interest.
 - a. A statement made by declarant based upon personal knowledge which, at the time of its making, the declarant knew it was contrary to the declarant's pecuniary or proprietary interests, or tended to subject the declarant to criminal liability, is admissible, provided the declarant is unavailable as a witness.
 - b. In a criminal proceeding, the following applies:
 - I. Where the statement is testimonial, such as a plea allocution, it is not admissible against the defendant;
 - ii. Where the statement is not testimonial and tends to

expose the declarant to criminal liability and is offered against the defendant, the statement is admissible only as to that part which is dis-serving to the declarant, and when evidence independent of the statement establishes that the statement was made under circumstances which render it highly probable that it is truthful, and;

iii. Where the statement tends to expose the declarant to criminal liability and is offered to prove the guilt of the defendant, the statement is admissible only when the evidence independent of the statement establishes a reasonable possibility that the statement might be true.

c. It is settled law that an exception to the hearsay rule is for “declarations against interest”, for certain statements that are dis-serving to the declarant at the time they were made. See,

People v. Brown, 26 N.Y.2d 88, 91 (1970).

I. In *People v. Brown*, supra, the Court of Appeals held that the unavailability of the declarant must be established before a declaration against interest can be admitted and that unavailability may be established by the declarant’s death, absence beyond the jurisdiction or privileged refusal to testify. However, the decision does not preclude the recognition of other grounds of unavailability, in order for the exception to apply.

d. In using in a criminal case, the Court of Appeals has held that there must be some evidence, independent of the declarant

itself, which establishes a reasonable possibility that the statement might be true, See, *People v. Soto*, 26 NY3d 455, 457 (2015); *People v Settles*, 46 NY2d 154, 168, 169-170 (1978).

CC. Declaration of Future Intent

1. Where an out-of-court statement of the declarant describes the declarant's then-existing intent and has offered to prove subsequent conduct, it is admissible as follows:
 - a. A declarant's out-of-court statement of an intention to aid a particular conduct is admissible to prove that the declarant engaged in that conduct, provided there is independent evidence of the statement's reliability, that is, a showing of circumstances which all but rule out a motive to falsify, independent evidence that the declarant was at least likely to have engaged in that conduct.
 - b. Where the statement also indicates an intention to engage in a particular conduct with another person, such statement is admissible to prove that such other person engaged, in fact, in that conduct, as follows:
 - I. If the declarant is unavailable;
 - ii. If the statement of the declarant's intent unambiguously contemplated some future action by the declarant, either jointly with a non-declarant or which required the non-declarant's cooperation for its accomplishment;
 - iii. To the extent that the declaration expressly or impliedly refers to a prior understanding or arrangement with a non-declarant, it must be inferred under the circumstances that the understanding or arrangement occurred in the recent past, and that the

declarant was a party to it, or had competent knowledge of it, and;

- iv. If there is independent evidence for liability, that is, a showing of circumstances that all but rule out a motive to falsify, evidence that the intended future acts were at least likely to have actually taken place.

DD. Dying Declaration

1. In a prosecution for homicide, a statement of the deceased is admissible when it is based upon personal knowledge, made by a declarant in an extremis, while under a sense of impending death with no hope of recovery, concerning the cause or circumstance of the deceased's pending death.

EE. Excited utterance

1. A statement about a startling or exciting event made by a participant in, or a person who personally observed, the event that is admissible, regardless of whether the declarant is available as a witness, provided their statement was made under the stress of nervous excitement resulting from the event and was not a product of studied reflection and possible fabrication.
2. A much discussed and much used rule derives from formulations of this exception to the hearsay rule, as stated in various Court of Appeals decisions, such as *People v Johnson*, 1 NY3d 302, 306 (2003).
3. *People v. Brown*, 70 NY2d 513, 518 (1987) held that "An excited utterance is one made under the immediate and uncontrolled domination of the senses and during the brief period when consideration of self-interest could not have been brought fully to bear by recent reflection".
4. Statements that fall within this exception or generally made contemporaneously or immediately after a startling event, which

affected or was observed by the declarant, and relates to the event
See, People v Nieves, 67 NY2d 125, 135 (1986).

5. Among the requirements is, as the Court of Appeals has cautioned, it must be “inferrable” that the declarant had an opportunity to observe personally the event described in the declaration. See, People v. Fratello, 92 NY2d 565, 571 (1968),
6. In criminal actions, a statement admitted under this section may still be barred by the Confrontation Clause of the Federal and New York State Constitutions, if it is found to be “testimonial”.

FF. Forfeiture by Wrongdoing

1. Where a witness in a proceeding is unwilling to testify or testify to the full extent of the witness’ knowledge, a party forfeits the right to preclude that witness’ prior out-of-court statement(s) as hearsay, or on the ground that the party will be denied the right to confront the witness, if the party offering the statement proves by clear and convincing evidence the following:
 - a. The opposing party, personally or with the aid of others, engaged or acquiesced in misconduct aimed at least in part at preventing the witness from testifying, and;
 - b. Such misdeeds were a significant cause of the witness’ decision not to testify or to testify fully.

GG. Impeachment of Hearsay Declarant

1. When hearsay evidence has been admitted, the credibility of the declarant may be impeached by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The admission of that impeachment evidence is accordingly not conditioned on affording the declarant an opportunity to deny or explain.
2. When hearsay evidence is admitted, the trial court may in its discretion preclude evidence of impeachment. The court may

consider the possibility that, if impeachment is not allowed, the jury will be misled into giving too much weight to the hearsay evidence; on the other hand, the party against whom the hearsay evidence is offered may unfairly benefit from the party's own wrongful conduct because the opposing party will have no opportunity to rehabilitate the witness by clarifying any unclear or inconsistent testimony proffered as impeaching evidence.

HH. Past Recollection Recorded.

1. A memorandum or record made or adopted by a witness concerning a matter about which that witness had knowledge, but which the witness lacks sufficient present recollection to enable the witness to testify fully and accurately, even after reading the memorandum or record is admissible, provided:
 - a. The memorable record was made or adopted by the witness when the matter was fresh in the witness' memory, and ;
 - b. The witness testifies that the memorandum or record correctly represented the witness' knowledge and recollection when made.

II. Statement of Pedigree

1. An out-of-court statement by a declarant concerning the declarant's or another person's birth, adoption, death, lineage, marriage, legitimacy or other relationship between or among family members or other similar fact of personal or family history, made before the controversy, is admissible even though the declarant had no means of acquiring personal knowledge of the matter stated, provided that the relationship of the declarant with a family is established by some proof independent of the declaration itself, and the declarant is not available as a witness.
2. A statement admissible under this exception may be in any form.
3. A witness may testify to his or her own pedigree.

JJ. Present Sense Impression

1. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition as it was unfolding or immediately thereafter is admissible, regardless of whether the declarant is available to testify, provided that there is evidence, independent of the statement, that supports:
 - a. The accuracy of the contents of the statement, and
 - b. That the statement was made contemporaneously with the event or immediately thereafter.
2. The Appellate Divisions have indicated that time lag of a few seconds after the event ended and a statement was made will satisfy the element of “immediately thereafter”. *See, People v. Haskins*, 121 AD3d 1181, 1184 (3rd Dept., 2014)
3. On the other hand, a delay of 7 minutes after the end of the event will not satisfy the element of “immediately thereafter”. *See, People v Demand*, 268 AD2d 901, 902 (3rd Dept., 2000).
4. Excited utterances and “present sense impression” are very similar constants. However, “excited utterances are the products of the declarant’s exposure to a startling or upsetting event that is sufficiently powerful to render the observer’s normal reflective processes inoperative”. On the other hand, “present sense impression” are declarations or descriptions of events made by a person who is perceiving the event as it is unfolding.

KK. Prior Consistent Statement and Circumstances

1. A statement of a witness made prior to his or her testimony and consistent with that testimony is admissible when offered to rebut an expressed or implied claim of recent fabrication and when the statement was made prior to the circumstances supporting that claim.

LL. Prior Inconsistent Statement and Circumstances

1. In a civil proceeding, if a witness testifies at a proceeding and is subject to cross-examination concerning a statement made by the witness prior to the proceeding, the statement is admissible if the statement is inconsistent with the witness' testimony and the statement contains sufficient indicia of reliability justifying its admissibility.
2. In a criminal proceeding, if a witness testifies at a proceeding and is subject to a cross-examination concerning a statement made by the witness prior to the proceeding, the statement is admissible if the statement is inconsistent with the witness' testimony, but solely for impeachment purposes.

MM. Prior Judgment of Conviction

1. In a civil proceeding, evidence of final judgment, judging a person guilty of a crime is admissible as prima facie evidence of the facts involved in the criminal judgment.
2. In a criminal proceeding, if in the course of a criminal proceeding, any witness, including the defendant, is properly asked whether he or she was previously convicted of a specified offense and answers in a negative or in equivocal manner, then the party adverse to the one who called him or her may independently prove such conviction. If in response to proper inquiry whether he or she has been convicted of any offense the witness answers in a negative or in equivocal manner, the adverse party may independently prove any previous conviction of the witness.

NN. Prompt Outcry - Evidence that the victim of a sexual assault promptly reported the matter to another person is admissible.

1. For the purpose of assessing the credibility of the complainant with respect to the commission of the offense;
2. When relevant, and to the extent necessary, to explain the

investigative process and complete the narrative of the offense leading to the defendant's arrest.

OO. Reputation Evidence.

1. Character Trait - Evidence of reputation among a "community of individuals" of a person's character trait is admissible when that character trait is provable
 - a. Community of individuals exists whenever the person's associations have such quantity and quality as to permit the person to be personally observed by a sufficient number of individuals to give reasonable assurance of reliability of that reputation.
 - b. The foundation for the admission of such reputation evidence requires that a witness testifies to the views of a sufficient number of individuals who have had sufficient experience with the person whose reputation is being testified to.
 - c. Reputation may not be proved by evidence of specific acts of a person, or by a witness' opinion of a person's character.
 - d. Evidence of a defendant's bad reputation for a relevant character trait is not admissible, unless the defendant first offers evidence of his or her good reputation for that character trait.
2. Pedigree - Evidence of reputation about family, before the controversy initially arose, as to matters of pedigree, such as a person's birth, death, lineage, marriage, legitimacy and relationships between or among family members is admissible.
3. Lands. Evidence of longstanding reputation in a relevant community as to boundaries, or customs affecting, lands at issue, existing before the controversy arose is admissible.

PP. State of Mind

1. An out-of-court statement by declarant describing the declarant's state of mind at the time the statement was made, such as intent, plan, motive, design or mental condition and feeling, but not including a statement of memory or belief to prove the fact or belief, is admissible, even though the declarant is available as a witness.
2. An out-of-court statement by declarant describing the declarant's physical condition at the time the statement is made is admissible, providing the declarant is unavailable at the time of the proceeding.

QQ. Statement Made for Medical Diagnosis or Treatment.

1. A statement by a declarant to a healthcare professional for purposes of medical treatment and diagnosis, which describes medical history, or past or present symptoms, pain or sensations, or their general cause, and is germane to diagnosis or treatment is not excluded by the hearsay rule, even though the declarant is available to testify.

RR. Business Records Exception

1. Any writing or record made by a memorandum or record of any act, transaction, occurrence of event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was in the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter See, CPLR §4518(a); CPL 60.10; *People v Ortega*, 15 N.Y. 3d610 (2010).

SS. Social Media, E-mails or Text Evidence

1. The admissibility of social media, e-mails or text evidence are subject to all of the foregoing regarding foundation, knowledge of the witness and so forth. For example, if an email or text evidence is being offered, then the witness must lay a foundation for his or

her knowledge that the email or text is in its original form and how the witness knows the source of the email or text.

2. All of the other rules of evidence would similarly apply to proffered social media, e-mail or text evidence, for example, relevance, hearsay, and in a criminal case, such issues as the right to confrontation.

TT. Witness Testimony and Reports

1. A witness' testimony and reports (for example, a written report previously written by that witness) would be subject to all of the forgoing evidentiary requirements for admissibility.
2. For example, just as with emails, etc., the witness' testimony, and previous written reports, etc. would have to be relevant to the proceeding, and not violate, for example, the hearsay rule.
 - a. For example, the witness' previous written report is accepted into evidence, and it contains a reported statement by an out-of-court declarant, being offered to prove the truth of what it asserts, then as within the rule for hearsay within hearsay, the statement would have to independently be admissible under an exception to the hearsay rule.

X. Protecting Your Record for Appeal

- A. As important as it is to win your trial, if your result is appealed, then the appeal or appeals become the "final word".
- B. While it is usually thought that the losing party is the one who will be impacted by whether the issue of a mistake or erroneous ruling by the lower court is preserved for the appeal, it is also important for the party that wins the trial.
 1. Even the winning party at trial, when defending that trial win at the appellate court, wants to be certain that whatever evidence or ruling is necessary to sustain or affirm your victory is in the record.
- C. What is key for the losing side is that they timely and clearly objected to what is

now the issue on appeal.

1. As for evidentiary issues, you must have timely objected to the question or response or both in the lower court, so that the trial judge had an opportunity to rule on the issue.

a. For example, if a question calls for inadmissible hearsay evidence, you must have timely objected on that basis in the trial court, in order to preserve the issue for appeal.

b. Picking up on the same example, if it is not until the answer is given that it appears that the statement is inadmissible, such as if it is based upon inadmissible hearsay, then you must have timely objected and asked the court to strike the hearsay testimony from the record; if it is a jury trial, you must ask the judge to instruct the jury to disregard the question and the answer.

D. There are numerous other objections that must be timely made during the trial , in order to preserve the issue for appeal.

1. For example, if the judge includes anything in his or her charge to the jury that you maintain is erroneous, after the judge delivers the charge but before the judge sends the jury out to deliberate, you must, on the record, clearly state your objection to that part of the charge that you feel is erroneous, or something that you maintain must be included in the charge; the judge can call the jury back into the courtroom to correct or add to the charge to the jury.

E. There are several motions that need to be made, if you are going to be able to argue on appeal that the trial court's ruling was erroneous.

1. What are usually key are dispositive motions, such as requesting a directed verdict or judgment notwithstanding the verdict (judgment NOV) after the jury has announced its verdict.

F. When in doubt, make and reiterate your objections.

1. You may feel that you have protected the record if you have a standing

objection to a certain line of questioning or evidence, especially if the court acknowledges that you have that standing objection.

2. Nevertheless, this is definitely a circumstance where you want to have “both belt and suspenders”; even if you annoy the judge, you should reiterate your objection, notwithstanding that the court has acknowledged that you have a “standing objection”, as the appellate court may not be satisfied that you have protected the record with your standing objection.

XI. Delivering an Effective Closing Statement

A. Closing Statements for Jury and Bench Trials

1. As with opening statements, entire CLE courses, and even books, have been written about the closing statements. The following is key advice or pointers for your closing statement.
2. The closing statement, especially in a jury trial, is considered by many trial lawyers as the most important part of the trial.

B. On a related point, with a jury trial, it is considered an advantage to be the last person to give the closing statement, since that will be the last thing that the jury hears (except for the judge’s charge), and your adversary will not have an opportunity to rebut what is said in the closing statement.

1. In most cases, the procedural rules will dictate who will close first, who will close last, and whether there is a right of rebuttal.
2. Nevertheless, there will be cases where, depending upon counterclaims and other procedural devices, you may be able to “turn the tables” on the other side, and be the last to close.
3. If you are not going to be the last attorney to give your closing statement , you should tell the jury that the reason that your adversary is closing last is because of the procedural rules.
 - a. With that in mind, especially if you are concerned that your adversary will take advantage of being the last one to give the closing statement, say to the jury that because you will not get

another opportunity to speak to them, tell the jury that when listening to the other side's closing argument, they should say to themselves something like: "If Mr. Smith was going to have the opportunity to respond to this, this is what Mr. Smith would say."

- C. Particularly with a jury trial, although also with a bench trial, in your closing statement you should remind the judge, or jury, or both, what you promised to prove in your opening statement, and how you delivered on that promise.
- D. To the contrary, if your adversary failed to deliver on any of his or her promises from their opening statement, this is your opportunity to point out to the jury that while your adversary promised one thing or another during their opening statement, they failed to deliver on that promise, during the course of the trial.
 - 1. As with the opening statement, if there are any bad facts in your case, particularly if they were issues during *voir dire* of the jury, again remind the jury that they promised, during *voir dire*, to have an open mind, and to render a verdict based upon the evidence at the trial, and not any preconceived notions they may have had, going into the trial.
 - 2. In a jury trial, and especially if you feel some or all of the evidence amply supports your case, tell the jury, in your closing statement, that they have the right to request to take in with them, during the deliberations, any of the evidence that was offered at trial, and you urge them to take some or all of that evidence with them.
 - 3. As to jury trials, you should already have had a charging conference with the judge, so that you have a very good idea of what the judge will charge the jury. Be sure to incorporate what you know the judge is going to say to the jury, in your closing statement.
 - 4. With a bench trial, as with the opening statement, you must be ready not only to show how the law supports your case, but be ready, in case the judge is interactive, to answer his or her questions regarding those legal issues.
 - 5. In all closing statements finish on a "high point". Regardless whether it is

a bench trial, or a jury trial, you want the person or people who are going to decide your case to best remember, and be hopefully favorably influenced, by the last thing you said.