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Summer 2015

Evidence for Your First Federal or N.Y. Trial

Gerald Lebovits



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New York University School of Law

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**For the
Young Lawyers:**

Rules of Evidence For Your First Federal Or New York Trial



By Katerina Milonas and Hon. Gerald Lebovits¹

You took evidence in law school. You studied evidence for the bar exam. But as you prepare for your first trial, you quickly realize that you do not know how to introduce evidence or ask a witness a question - or how to object to evidence or a question. If so, this article is for you. It covers the basic rules of evidence as they apply to federal and New York civil and criminal trials.

Evidence lies in the heart of proving your client's case and disproving your adversary's case. As a plaintiff's attorney or prosecutor, you must give the court sufficient evidence to prove each element of your claim. As a defense attorney in a civil or criminal case, you must introduce evidence proving your defenses or disproving your adversary's allegations.

The primary source of the law governing the admissibility of evidence in federal court are the Federal Rules of Evidence (FRE). The rules, derived from the common law, apply to civil and criminal cases, with no significant distinctions between them. New York State has adopted its own rules, mostly through caselaw. The Civil Practice Law and Rules (CPLR) and the Criminal Procedure Law (CPL) also include articles dealing with evidence. These rules follow the FRE but sometimes take a stricter approach for admissibility.

Admissibility

Two principal themes that govern the rules of evidence are admissibility and judicial discretion. As a general rule, evidence is admissible if it is relevant and competent. Relevance is a threshold issue that relates to the tendency of the evidence to make a material fact more or less probable than it would be without the evidence. This is called probative value. Relevant evidence must relate to the person, time, or event involved in the litigation. The key concept is proximity. The more proximate the evidence is to a case, the higher its probative value.

Evidence is competent if it is not subject to a specific exclusionary rule or to a judicial-balancing exception. The rules give judges broad discretion to balance probative value with pragmatic considerations and deny admission of relevant evidence if considerations such as fact-finding accuracy, prejudice, and trial efficacy substantially outweigh probative value. The most common grounds on which a judge may refuse to admit even relevant evidence are unfair prejudice, waste of time, confusing evidence, and

unduly cumulative evidence.

Lawyers must distinguish between admissibility and the weight of the evidence. Admissibility is a matter of including evidence in the record. Weight is the strength of the evidence in tending to prove or disprove a disputed issue. The volume of evidence and the number of witnesses do not determine the weight or strength of proof. When in doubt, judges admit evidence, especially during bench (nonjury) trials, but they do not give it much weight when making their decision. Witnesses might be competent but not credible, or their testimony might be admissible but insufficiently relevant to affect the judge's decision.

Introducing Evidence

To introduce evidence into the trial record, you must first authenticate the evidence (prove that the evidence is genuine) and then formally present it to the court. Sometimes a formal presentation of the evidence is unnecessary. Evidence also becomes part of the record through judicial notice, stipulations between parties, and presumptions.

Under the doctrine of judicial notice, the court recognizes a fact as true without a formal presentation of evidence. Appropriate for judicial notice are indisputable facts that are common knowledge in the court's jurisdiction or are capable of verification by resort to easily accessible resources of unquestionable accuracy. In a civil trial, a court could take judicial notice that at 1:30 p.m. on June 5, the time and day of the accident, the sun had not set yet; it is common knowledge that the sun does not set before 1:30 p.m. Judicial notice can be discretionary or mandatory. Exercising its discretion, a court may take judicial notice of a fact *sua sponte*. On a party's request, the court must take judicial notice of an appropriate fact. A court may take judicial notice of a fact at any time or at any stage of the action or proceeding.

A stipulation is another tool lawyers use to admit, exclude, or withdraw evidence. For example, the parties might agree to allow copies of documents to be admitted instead of originals or to enter into an agreement concerning the testimony an absent witness would give were the witness to testify. The parties may then use the stipulated facts as evidence and argue them on summation. Stipulations of fact simplify and expedite proving uncontested factual issues.

Presumptions require the court to draw an inference from a set of facts without requiring the party bearing the burden of proof to produce evidence proving that inference. Under New York Domestic Relations Law § 73, a child born to a married couple is presumed to be the couple's legitimate child, absent a clear demonstration that it was impossible for the husband to be the father. Other common presumptions include the presumption of death, which arises when a person has been absent for a number of years without explanation, and the presumption of innocence. A legal presumption shifts the burden of producing evidence to the party against whom it operates. This shift does not affect the burden of persuasion, which remains on the same party throughout the trial.

A presumption operates only until rebutted. Once your adversary produces evidence contradicting the presumed fact, the presumption loses effect.

The inference drawn by a set of facts can be permissible (rebuttable) or conclusive (irrebuttable). In the first case, your adversary may produce evidence to rebut an inference. When relevant evidence has been destroyed, for example, the court may draw an inference that the evidence was unfavorable to the spoliator. This is a permissible inference. Spoliators may rebut the presumption by introducing evidence that the destroyed evidence favored them. A conclusive inference is a rule of substantive law and cannot be rebutted. An example of a conclusive inference is that a child under age of five cannot commit a crime. The opposing party cannot rebut it even if the child committed the crime.

A pleading party has the burden of producing sufficient evidence to make a *prima facie* case. Then the burden shifts to the other side to produce evidence that rebuts the pleading party's evidence. Another related concept is the standard of proof necessary to prove the facts of a claim or an affirmative defense. In civil cases, a party must prove that the facts of its claim or affirmative defense by the preponderance of the credible evidence. To satisfy this standard, a party must demonstrate with evidence that a proposition is more likely true than untrue.

Mastering the rules of evidence as a litigator is important, not only to introduce evidence correctly, but also to object properly to the admission of your adversary's evidence. If you do not object, you do not have a preserved objection. If you do not object in federal court, you may not raise the matter on appeal unless the error in admitting the unobjected-to evidence affected the court's subject-matter jurisdiction or the admission reflects the court's plain error. In a New York State court, you may not raise an unmade objection on appeal unless the error in admitting the unobjected-to evidence affected the court's subject-matter jurisdiction or a court of intermediate appellate jurisdiction (the Appellate Division or the Appellate Term) considers the issue in the interests of justice.

It is crucial to know when and how to object to the evidence the other party is offering. You should raise an objection before your adversary presents the evidence to the trier of fact. After the evidence has been presented, you may move to strike it, but bells often cannot be rung, even with the court's curative jury instructions.

A judge must rule promptly on evidentiary objections. If the judge overrules the objection, the evidence is admissible. If the judge sustains the objection, the evidence is inadmissible. When you object, you must address the judge, state your objection clearly, and (unless the judge forbids "speaking objections" that might prejudice a jury, in which case you must explain your objection outside the jury's presence, called a sidebar conference) articulate the ground of your objection, as in "Objection, Your Honor. The question calls for hearsay." The grounds for evidentiary objections relate to the content or form of the evidence or to

the form of the question posed to a witness.

Trial evidence is classified into direct and circumstantial evidence. Direct evidence, if believed, directly proves a fact. The recorded presentation of an event can directly establish that the event took place. Testimony based on personal knowledge, photographs, and audio recordings are also direct evidence.

Circumstantial evidence is a collection of facts that, when considered together, can be used to suggest a conclusion about something unknown. Circumstantial evidence supports a theory of a consequence of events. For example: A witness saw the defendant entering a house with a knife. The witness heard a scream from inside the house. The witness did not see the stabbing. These facts do not directly prove a crime, but they allow the trier of fact to conclude that the defendant stabbed the victim inside the house.

The evidence you must present to the trier of fact, whether a judge or a jury, will generally be in one of the following three forms: witness testimony, documentary evidence, and real evidence.

Witness Testimony

Competent witnesses must have personal knowledge of the matter to which they are going to testify and take an oath or affirmation demonstrating an understanding of the obligation to tell the truth and then promise to tell the truth. Competent witnesses may be lay or expert witnesses. Lay opinion testimony is admissible if it is rationally based on the witness's personal knowledge or personal observations and is helpful to the court. Lay witnesses are not allowed to give their personal opinions. They are permitted to testify only about their experience, their knowledge, and what they saw, smelled, heard, tasted, or touched. Lay witnesses may testify about a person's general appearance ("The car driver was tall with short black hair."); weather conditions ("It was windy and cold."); and speed ("The car was going 50 MPH.").

Expert witnesses may testify to an opinion only if (1) their scientific, technical, or specialized knowledge will help the court understand the evidence; (2) the opinion has a proper basis; (3) they are qualified by education or experience to render an opinion; and (4) the opinion is reliable. Experience alone might qualify a witness as an expert. Academic credentials are not always necessary.

For expert-opinion testimony to have a proper basis, it must be based on a reasonable certainty and the expert's personal knowledge; evidence already in the trial record; or facts from outside the record, but only if those facts are of a type on which experts in the particular field reasonably rely. Experts who rely on facts outside the record may generally discuss the bases of their opinion, but the court may not consider those facts as evidence. Those facts are relevant only to assess the expert's credibility. An expert may rely on information not specifically introduced into evidence or which is completely inadmissible.

Before you examine witnesses, you must establish that they have personal knowledge of the facts about which they will testify and how they acquired that knowledge. Ask your witness: “Do you have personal knowledge of the facts in this case?” “What is your relationship with the litigants?”

If, during your examination, your witnesses forgot something they once knew, you may show them a document (or anything else) to refresh their memory. The witness may look at the document and, once their memory is refreshed, testify on the basis of their current recollection. The witness may not read the document to the jury unless it is in evidence. The evidence is the witness’s testimony, not the document.

You may use anything to refresh a witness’ recollection because that material does not become part of the record and, therefore, hearsay and the best-evidence rule do not apply. If you use any material to refresh your witness’ recollection, your adversary has the right to inspect the material, use it during cross-examination, and introduce it into evidence.

While your adversary is examining a witness, be prepared to object to their questions and the testimony opposing counsel is trying to elicit.

Below is a list of the most common objections as to the form of a question:

Leading question: A leading question suggests the answer. Leading question: “Was the victim screaming during the fight?” Non-leading: “Was the victim doing anything during the fight?”

Leading questions are forbidden on direct unless the witness is a child or hostile (such as an adverse party); the question discusses preliminary issues not in dispute; or counsel is laying a foundation. Leading questions are allowed on cross-examination.

Argumentative: An argumentative question makes a statement rather than asks a question. The examiner asks the witness to agree or disagree with a conclusion the examiner draws based on the facts of the case. Argumentative questions may be proper when directed to an adverse party or when the witness has already expressed an opinion on the matter about which the question arises. The judge has broad discretion to allow or forbid an argumentative question. Arguing is reserved for summations, not for fighting with witnesses.

Question assumes facts not in evidence: Facts not in evidence may not be the basis of a question. A court may allow a question subject to connecting it up later, meaning allowing the witness to answer the question on the condition that the examining counsel will introduce to the court the missing evidence later at trial. If your adversary objects to your question on that ground, argue that in the interest of good time management, the court should allow you to introduce the missing fact later.

Ambiguous, confusing, vague question: In its discretion not to allow confusing or ambiguous questions, courts have an incentive to give the parties a fair trial without a witness’s or the jury’s becoming confused. To avoid ambiguities, pose questions clearly and precisely and clarify the information you are seeking. If the court sustains an objection on that ground, you may withdraw the question and rephrase it.

Compound question: A compound question, also called a double question, creates a situation in which if the witness replies “yes” or “no,” confusion will arise about what question the witness answered.

Calls for narrative: The question asks the witness to relate a story rather than state specific facts: “Tell us everything you know about this case.”

Badgering: Counsel asks questions without letting the witness respond or harasses the witness.

Admitted: The basis of this objection is that the objecting party has already conceded the facts to which the evidence is relevant. The scope of this objection is limited. Merely claiming that your client has conceded the evidence is not enough. Your adversary has the right to introduce relevant evidence. To win on this objection, argue that the evidence is cumulative and thus a waste of time.

You may also object to the way the witness answers the questions. Proper grounds for objecting to a witness’s answer are the following:

Narrative: The witness is narrating a story in response to a question that does not call for one.

Non-responsive: The witness’s response answers a question other than the one asked or does not answer the question at all. If the objection is based solely on the answer’s responsiveness, only the examiner may object. If the non-responsive answer violates a rule of evidence beyond its non-responsiveness, either party may object to the answer.

Nothing pending: The witness continues speaking on matters irrelevant to the question.

After proponents examine their own witness, the adversary has the right to cross-examination. While cross-examining your witness, your adversary will try to disprove the facts to which the witness testified, establish affirmative defenses, and impeach the witness’s credibility.

Impeachment is the process of trying to demonstrate that a witness is not credible. The major methods of impeaching a witness’s credibility are by showing the witness’s bad reputation for truthfulness; pointing out that the witness has made prior state-

ments inconsistent with that witness's current testimony; noting that the witnesses in the current testimony offered facts they omitted in their prior and otherwise complete statements; showing the witness's bias in favor of a party or the witness's personal interest in the case; proving the witness's prior criminal convictions; cross-examining the witness about prior bad acts that show the witness's vicious, criminal, or moral turpitude; and showing the witness's sensory deficiencies, such as bad sight, mental illness, or being under the influence of drugs or alcohol during the events at issue or at the time of the testimony.

Under New York law, you may not impeach your own witness. But you may use a prior inconsistent statement to impeach your witness if that statement was made in writing and is signed or it was made during oral testimony under oath. In criminal cases, you may use a prior inconsistent statement for impeachment only if your witness's testimony is affirmatively dangerous for your client, not if there is merely a cloud on the witness's credibility, such as a witness's poor memory. Under federal law, you may impeach any witness, including your own, or direct and cross-examination.

After your adversary has impeached your witness, you may try to repair your witness's credibility through rehabilitation. The most common method of rehabilitation is to offer evidence of the witness's good character for truthfulness. If the opposing party has charged your witness with a recent fabrication or a recently developed motive to lie, you may rehabilitate your witness by using the witness's prior statement that is consistent with the prior testimony if that statement was made before the alleged fabrication arose.

Generally, cross-examination and redirect examination may not exceed the scope of the direct examination. The scope relates to the subject matter covered in the examination. If your adversary asks your witness questions about matter you did not cover on the direct examination, you may object on the ground that the question is beyond the scope.

Hearsay

The most important rule limiting the content of a witness's testimony is hearsay. "Hearsay," according to FRE 801(c), is "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." The key to determine whether a statement is hearsay is to inquire into the purpose for which the evidence is offered. An out-of-court statement offered for a reason other than the truth of the matter asserted is not hearsay and is admissible for one of the reasons discussed below. If the statement is offered to prove the truth of the matter asserted, it is hearsay, but it still might be admissible if a hearsay exception applies. The rationale is that the court cannot test the declarant's credibility and accuracy (perception, memory, honesty) through cross-examination when the declarant is not the witness.

The following statements fall into the "non-hearsay" category and

are always admissible: (1) a prior inconsistent statement made by the declarant under penalty of perjury offered to impeach the witness; (2) a prior consistent statement offered to rebut an accusation for recent fabrication; (3) a party admission — a statement made or adopted by the party against whom is offered or by the party's agent; (4) a witness's prior identification of a person that the witness perceived earlier; and (5) a statement not offered for its truth.

Under federal law, a prior inconsistent statement may be admitted to impeach the witness and as substantive evidence (i.e., to prove the truth of the prior statement) if the witness is currently subject to cross-examination and the prior statement was made orally under oath as part of a formal hearing, proceeding, or deposition. The same rule applies to a prior consistent statement offered to rebut an accusation of recent fabrication.

Under the New York rules, prior inconsistent statements are admissible only to impeach and never as substantive evidence, even if given in formal testimony under oath.

Any other statement offered for its truth is hearsay, but many of these statements might be admitted because the rule has numerous exceptions. The rationale behind those exceptions is the need to admit the evidence because the evidence is relevant but the declarant is unavailable or that the circumstances under which the declarant made the statement are trustworthy — that the declarant had no time, or was not in the appropriate mental state, to lie. There are twenty-four exceptions to the rule; below is a short list of the most important ones.

Some exceptions require the declarant to be unavailable:

Dying declaration: The declarant makes a statement under the belief of certain or impending death and the statement concerns the causes or circumstances of the impending death. It is not necessary that the declarant dies right after the statement, but the declarant must be unavailable when a witness is testifying about the declarant's statement. Under New York law, this exception applies only in homicide cases. Under the FRE, the exception applies in both civil cases and homicide cases.

Declaration against interest: A statement against the declarant's pecuniary, proprietary, or penal interest is admissible if it was against the declarant's interest when made and if a reasonable person would not have made the statement unless the person believed that the statement is true.

Former testimony: A statement made at an earlier trial, hearing, or deposition is admissible if the testimony was under oath, the former proceeding involved the same subject matter, and the party against whom it is offered was a party in the former proceeding and had the opportunity and incentive to examine the declarant.

Exceptions based on the trustworthiness of the statements and the circumstances surrounding them are the following:

Excited utterance: A statement relating to a startling event of

condition, made while the declarant was still under the stress or excitement that cause it: "Oh my God! The car hit the woman!"

Present-sense impression: An unexcited utterance, usually a matter-of-fact statement that describes an event and which occurs concurrently with the event.

State of mind: An out-of-court statement admissible if it is about a current mental, emotional, or physical condition whether or not it is made to a medical professional. In a hit-and-run case, for example, the victim says to the people reaching out to help her: "I can't feel my right leg." "I'm scared." "I'm cold."

Statement made for medical diagnosis or treatment: A statement to a medical professional is admissible if it was made to get a diagnosis or treatment. This statement can also relate to a past condition. For example, after a doctor asks a patient where she hurts, she replies, "My right leg. I couldn't feel my leg right after the car hit me, but now it hurts." The doctor may testify at trial about the patient's statement because it was made for a medical diagnosis.

Public records: Written records are admissible if they were made as part of the regular course of the business's activity and the person who made the record has personal knowledge of the contents or received the information for its entry from someone who has personal knowledge and had a business duty to report it. A police report qualifies as business record if the officer based the report on things personally observed at the accident scene. If the officer based the notes on statements the bystanders made to her about the accident, this will not qualify as a hearsay exception, because the bystanders have no duty to report their observations.

Recorded recollection: When a party cannot refresh its witness's memory, even by showing the witness a writing, the party may introduce that writing into evidence if the writing was made by the witness or adopted by that witness and if the writing was made when the event was fresh in the witness's mind.

After an objection for hearsay, the burden shifts to the proponent of the evidence to prove that a hearsay exception applies or that the statement is not hearsay. Remember that hearsay declarants are also subject to impeachment by one of the methods mentioned above.

Privileges

Another doctrine that bars relevant evidence for policy reasons is privileges. To encourage confidential relations, privileges protect confidential communication by giving a witness the right to refuse to testify about a protected communication. New York law recognizes a great number of privileges, among them the attorney-client privilege, accountant-client privilege, spousal-communications privilege, psychotherapist-patient privilege, clergy-penitent privilege, joint defense or common-legal-interest privilege, and trade secrets.

Generally speaking, the privilege covers only a confidential com-

munication, not the facts underlying that communication. Witnesses may not immunize a relevant fact by discussing it with their attorney. Relevant facts, pre-existing documents, and physical evidence are always discoverable. Only the content of the privileged communication remains sealed.

Only a privilege holder may waive the privilege and testify about the confidential communication. A valid waiver must be voluntary.

Note that in a diversity case, federal courts will apply the FRE and New York law with respect to privileges. Otherwise, in diversity cases, a federal court will apply state law but federal rules of evidence and procedure.

Character Evidence

Another set of rules governing a witness's testimony is character evidence. Generally, character evidence is inadmissible as substantive evidence to show propensity in civil cases unless a person's character is the ultimate issue of a case, such as in defamation, child-custody, or negligent-hiring cases.

In criminal cases, the prosecution may not introduce evidence of the defendant's bad character to show that the defendant probably acted in conformity with that bad character. In criminal cases, the defendant's character is never the ultimate issue of the case. A defendant, however, may present evidence of relevant good character to establish acting in conformity with good character to establish that the defendant did not commit the crime charged. A defendant in New York may introduce good-character evidence only by reputation evidence (e.g., "Defendant has a good reputation for honesty in the community.").

Unlike federal law, New York law does not allow opinion evidence to prove character (e.g., "In my opinion, the defendant is an honest person."). Defendants who introduce evidence of their good character open the door for the prosecution to rebut the defendant's argument. The prosecution may then either cross-examine the reputation witness to challenge the witness's credibility or introduce its own reputation witness to testify about the defendant's bad reputation. In New York, the prosecution may also rebut the defendant's good-character evidence by proving that the defendant was convicted of a crime, but only if that crime reflects adversely on the character trait at issue. During cross-examination, for example, the prosecution may use the defendant's prior conviction for tax evasion in a fraud case but likely not in a murder case, in which the relevant character trait is peacefulness.

Although the prosecution may not use a defendant's convictions and prior bad acts to show propensity, it may use that evidence for other purposes. A defendant's other crimes or bad acts may be admissible during the prosecution's case-in-chief to show the defendant's motive or intent, the absence of a mistake, the defendant's identity (usually when a modus operandi reveals a defendant's identity if it is repetitive and unique enough to identify the perpetrator), or a common scheme or plan.

Judges must weigh the evidence's probative value against its prej-

udicial effect. A judge who admits the evidence must give the jury limiting instruction to consider the evidence only for the above-mentioned specific purposes.

Lawyers must distinguish character evidence from habit. Character evidence refers to a person's general disposition or propensity. Habit is a repetitive response to a particular set of circumstances. For a behavior to qualify as a habit, New York law requires frequency of a conduct, particularity of circumstances, and the person's control over the circumstances. A person's habit or a business organization's routine is admissible as circumstantial evidence of how the person or business acted on the occasion at issue in litigation.

Documentary Evidence and Exhibits

To introduce exhibits into evidence, you must first offer the exhibit to the court for identification — the court will probably name it "Plaintiff's 1" or "Defendant's A." Then you must lay the foundation, the basis for admission. After that, the opponent may conduct a voir dire, or ask the witness questions to show why the evidence should not be admitted. Only then will the court decide whether to admit the evidence.



Laying the foundation means establishing that the evidence you are going to present is relevant, authentic, and admissible. If, as the proponent of evidence, you do not provide that foundation, your adversary can object on the ground of lack of foundation.

A vague objection to lack of foundation is insufficient for a judge to sustain this objection. As an objector, you must state exactly what the party offering the evidence failed to prove and what the party should do to lay a foundation. The way to lay a foundation for exhibits differs depending on the type of evidence you are introducing. Generally, you must use a foundation witness.

Photographs: Ask the foundation witness: "Do you recognize the scene depicted?" "Are you familiar with the scene (object or person) in the photograph?" "Is the photograph a fair representation of the scene it purports to portray as you remember it on the day of the accident?" The witness qualifying a photograph need not be the photographer or have seen the picture taken. The witness need only be able to identify the object or person depicted in the photograph.

Documents: You must establish that the document is in the same condition it was when it was received. You also have to call a foundation witness to demonstrate that the witness knows the author's handwriting and signature. Show the witness the exhibit and ask, "Do you recognize this document?" "Do you recognize the signature at the bottom?" "Have you seen that signature before?"

Business records: You must call as a witness the record custo-

dian or someone familiar with the business's regular method of producing records. While examining the witness, establish that (1) the business requires accurate records; (2) the witness is familiar with the business and how the record was prepared; (3) the records were made when the event happened or within a reasonable time following the event; and (4) the record was kept in the regular (normal) course of business. Documents certified by the government and medical or educational institutions are admissible into evidence directly. A custodian of records must certify by a signed writing or by oral testimony that the document is an accurate and complete copy of the records.

Depositions: To introduce a deposition transcript at trial, you must establish that the witness was under oath, that the other party's attorney and a court reporter were present in the room where the deposition was taken, and that the witness read and signed the transcript after answering the questions (or at least had an opportunity to read the transcript).

Provided that a deposition testimony is relevant and admissible, you may use a deposition of an adverse party or its agent for any purpose, such as to contradict or impeach the testimony the deponent gave as a witness.

Unlike depositions of parties, depositions of nonparties may be used at trial only if one of the following conditions is present: the witness is dead; the witness is unable to attend or testify because of age, illness, or imprisonment; the witness is at a distance greater than 100 miles from the trial court or out of state; the witness is a licensed physician or dentist; the party offering the deposition was unable to subpoena the witness; or exceptional circumstances dictate allowing the deposition.

Best-Evidence Rule

For documentary evidence, keep in mind the best-evidence rule, better understood as the original document rule. When a party seeks to prove the contents of a writing, the party must produce the original or offer an acceptable excuse for its absence. If the court accepts the excuse, the party may then use secondary evidence, such as a copy or oral testimony, to prove the contents of the writing. A writing includes documents, recordings, films, X-rays, and similar items.

The best-evidence rule applies only when a party seeks to prove the contents of a writing. This issue arises in two principal situations (1) when the writing is a legally operative document (i.e., the writing itself creates rights and obligations); and (2) when the witness is testifying to facts learned solely from reading about them in a writing and has no personal knowledge of the document's contents. Under the FRE, both the original and a duplicate qualify as an original writing unless there is a general question about the authenticity of the original or it would be unfair to admit the duplicate because, for example, the original is in color and the duplicate is black. The New York rule, which is stricter, accepts photocopies and other duplicates as substitutes for the

original writing only if the duplicates were made in the regular course of business.

If the original writing is unavailable, the party can use an excuse for not producing the original writing. Available excuses are that the document is lost or cannot be found with due diligence; was destroyed without bad faith (fire, flood); or is beyond court's subpoena power.

If none of these excuses applies, the party may use an "escape" of the obligation to produce the original document. The escapes apply for voluminous records to allow the party to produce a summary of it or a chart; for public records; to produce certified copies; and for collateral documents to allow the production of duplicates. When arguing an escape from the rule, the original documents must be available for examination.

Conclusion

This article aspires to help novice attorneys master the rules of evidence for their first trial. We wish you good luck representing your clients in what, for many, is the most exciting and rewarding part of being a lawyer: being a good trial lawyer.

Endnote

1. Katerina Milonas, a licensed attorney in Greece, is awaiting admission to the New York State Bar. She received her first law degree the Aristotle University of Thessaloniki and her LL.M. from NYU School of Law. She has served as Justice Lebovits's

judicial extern since 2014. Gerald Lebovits is an acting Supreme Court justice in Manhattan and an adjunct professor of law at Columbia, Fordham, NYU, and New York Law School.



Essentials of E-Discovery

By Brian Eddings¹

Introduction

E-Discovery is the process of discovery relating to electronically stored information (ESI). With the continuous expansion of novel uses of technology it should soon become the standard bearer for discovery, as opposed to a special category of it. Amended provisions of civil procedure law² and court rules³ account for this category. The E-Discovery market is expected to reach \$9.9 billion by 2017⁴, and should only continue to grow beyond that point.

E-Discovery, like analog discovery, is a tool of litigation and practitioners are expected to be aware and knowledgeable of the subject. Ethical rules impose upon lawyers a duty to be competent⁵, and in this age this includes competent knowledge of both legal principles and technology. A lawyer handling a case involving aspects of E-Discovery has three options⁶: (1) learn for themselves what E-Discovery is and how to use it; (2) associate with outside counsel who is an expert in E-Discovery; or (3) decline to take on a case that would involve E-Discovery. So what are some

essential principles of E-Discovery?

Essential 1: Have a thorough E-Discovery plan and if necessary rely on experts

Some courts will require parties to enter into discovery protocol agreements. These agreements are hashed out at the preliminary stage in conferences and in some cases will involve the mediation of a referee or special master. Having a solid plan in place to match the discovery agreement will make life easier for litigating parties for a couple reasons. One benefit is that parties will know at an early stage what method of E-Discovery will be relied upon, whether the newer and more efficient predictive coding will be used or the simpler and rudimentary keyword search methods. One other benefit is more accurate billing for services. Courts are likely to use cost shifting in relation to produced materials, and recovering these costs is always very important to litigating parties. Having accurate billing statements regarding E-Discovery services will prevent later obstacles, such as courts reducing cost awards in taxation of costs proceedings.⁷

The plan is especially important where parties rely on E-Discovery.