Chapter 1

Evaluating Admissibility of Evidence—Fundamental Concepts and Perspectives

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§ 1:1 Introduction

There are several fundamental concepts and perspectives that the trial attorney should always have firmly in mind when analyzing the admissibility of evidence. These are the very same concepts trial judges utilize when determining the admissibility of evidence. You might want to think of them as commandments, themes, and “frames of mind” for evaluating whether particular evidence is admissible. Understanding and mastering these concepts is the essential first step for being an effective advocate on evidentiary issues. The purpose of this first chapter is to describe these concepts.

§ 1:2 Evidence Must Navigate a Journey from Proponent to Trier of Fact

§ 1:2.1 Overview

It is helpful to think of an item of evidence (whether it is oral testimony, a document, or a physical object (that is, “real and demonstrate evidence”)) when navigating a journey from the proponent of the evidence to the trier of fact. The proponent seeks to introduce the evidence before the trier of fact, while the opposing party seeks
to have the evidence excluded. As in other fields of law, evidence law has a language that attorneys must be able to master and comprehend. For the sake of convenience, we will normally refer to the “trier of fact” as the “jury,” understanding full well that in bench trials the judge is the trier of fact.

Journeys, of course, are not always smooth and to be successful, obstacles have to be overcome. The opposing party may impose obstacles by raising objections to the admissibility of the evidence. In some instances, the trial judge may impose an obstacle by raising an objection on his or her own motion. For the proponent’s evidentiary journey to be successful, the proponent must overcome these various obstacles, barriers, or hoops (call them what you choose).

§ 1:2.2 Relevance, Fed. R. Evid. 403, and Exclusionary Rules Hoops

All evidence must pass through the relevance hoop. One of the relatively few absolute rules in the law of evidence is that “[i]rrelevant evidence is not admissible.”

Almost all evidence must pass the Federal Rule of Evidence (“FED. R. EVID.”) 403 hoop (or its state law analogue), which authorizes the trial judge to exclude relevant evidence if its probative value is substantially outweighed by factors such as the dangers of causing a party unfair prejudice, confusing or misleading the trier of fact, or causing undue delay.

Other hoops or barriers that the proponent’s evidence may have to overcome include the various exclusionary rules premised on policy considerations, such as FED. R. EVID. 407 (the rule generally barring the admission of evidence of subsequent remedial measures), the rule against hearsay, and authentication. In fact, exclusionary rules constitute the bulk of the law of evidence. So, it is not surprising that the great majority of the material in this book consists of analyses and illustrations of the various exclusionary rules.

1. FED. R. EVID. 402.
2. For a discussion of relevance and FED. R. EVID. 403, see infra chapter 5.
3. See infra chapter 7.
4. See infra chapter 9.
5. See infra chapters 16 and 17.
§ 1:3.2 TRIAL EVIDENCE BROUGHT TO LIFE

To stress the essential point, any particular item of evidence may have to overcome several evidentiary obstacles and, therefore, may implicate multiple evidentiary issues. Evidentiary journeys vary greatly in their complexities and obstacles. Some evidentiary journeys are clear sailing, or close to it. Some journeys have to overcome numerous evidentiary obstacles in order to reach the trier of fact. And for some, the obstacle(s) may turn out to be insurmountable, and the evidence never arrives at its intended final destination, the trier of fact.

FIGURE 1-1
Evidentiary Obstacles

Proponent — Relevance — Fed. R. Evid. 403 — Hearsay — Jury

§ 1:3 Consider Limited Admissibility

§ 1:3.1 Overview

In evaluating the admissibility of evidence, it is important not to limit the analysis to evidence either being admissible or inadmissible. It is frequently the case that the admissibility of particular evidence is not an “all or nothing” matter. Firmly entrenched in the law of evidence is the concept of “limited admissibility,” that is, that evidence may be admissible for one purpose, although not for another purpose; or in favor or against one party, although not another party.

§ 1:3.2 Limiting Instructions

When evidence is admissible for one purpose, but not another; or in favor or against one party, but not another, Fed. R. Evid. 105 provides that “the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.” Limiting instructions pervade the law of evidence. We will have much more to say about limited admissibility and limiting instruction later.
on, and, indeed, throughout the book. The important point presently is that you, the trial lawyer, think about the possibility of limited admissibility, and to not fall into the “all or nothing” admissibility trap.

§ 1:4 Do Not Fall Into the “Does Not Necessarily Prove” Trap

§ 1:4.1 Overview

The admissibility of evidence does not depend on whether the evidence necessarily proves a fact of consequence to the determination. Attorneys frequently argue, “but judge, the evidence doesn’t necessarily prove fact X.” That is a fallacious argument. The pertinent issue is not whether an item of evidence necessarily proves a fact of consequence, but whether the trier of fact should be permitted to consider the evidence.

§ 1:4.2 Direct and Circumstantial Evidence

To meet the test of relevance, under Fed. R. Evid. 401, evidence need only have “any tendency to make a fact [of consequence] more or less probable than it would be without the evidence.” This is a very lenient standard. Trial judges universally understand that a party seeking to prove a fact of consequence may well have to weave together several pieces of circumstantial evidence in order to prove the fact. Direct evidence is not always available to the parties to the case. Direct evidence refers to evidence that proves a principle fact at issue by itself; neither other evidence nor the drawing of inferences is necessary. If the evidence is oral testimony, then the only question is whether the witness’s testimony is believable. If the evidence is a document or a physical object, then the only question is whether it is authentic. For example, in a homicide prosecution, a witness’s testimony that she saw the defendant stab the victim to death would be direct evidence.

Circumstantial evidence is the opposite of direct evidence. It does not prove a principal fact at issue by itself, but requires additional evidence of the fact, the drawing of inferences, or both. For example, in the hypothetical homicide prosecution mentioned in the above paragraph, a witness’s testimony that she saw the defendant holding
§ 1.4.3 Trial Evidence Brought to Life

a bloody knife at the time of the alleged killing would be circumstantial evidence that the defendant committed the alleged crime, but would be direct evidence of the defendant’s possession of a weapon. Thus, evidence may be direct evidence on one issue, and circumstantial evidence on another issue.

Although lawyers frequently argue to the court and jury that “the evidence is only circumstantial,” the law of evidence generally does not favor direct evidence over circumstantial evidence. In fact, there may be situations in which circumstantial evidence may be more persuasive than direct testimony, especially when various pieces of circumstantial evidence are considered in conjunction with each other.

The essential point is that the admissibility of evidence does not depend upon whether it “necessarily” proves a fact of consequence. There is no requirement that every witness must hit a home run, and it is understood that a “‘brick is not a wall.’”

§ 1.4.3 Admissibility versus Weight

In the same vein, it is vital to distinguish the admissibility of evidence, which is an issue of law for the court, and the weight to be given to admissible evidence, which is a question for the jury. Of course, in a bench trial the trial judge determines both admissibility and weight. Courts often respond to objections to the admissibility of evidence (for example, deficiencies in an expert’s qualifications) by reminding the opposing party that the objection goes to weight, not admissibility. In other words, let’s allow the jury to hear the evidence and determine how much weight, if any, to give to it.

6. Advisory Committee Note to Fed. R. Evid. 401. Unless otherwise indicated, a reference in this volume to an advisory committee note means the original 1975 committee note.
§ 1:5 Critical Factor: Purpose for Introducing Evidence

§ 1:5.1 Overview

Trial judges are constantly focused on the proponent’s purpose for introducing evidence. This is not only logical, the major evidentiary rules require consideration of the purpose of the evidence in question. Attorneys, therefore, must also stay focused on the purpose for introducing each item of evidence. When evidentiary disputes arise, trial judges frequently ask the proponent’s attorney why she is seeking to introduce the evidence in question, and counsel would be wise to be ready to respond.

§ 1:5.2 Under the Evidence Rules

Whether evidence is relevant depends upon whether it is proffered for the purpose of proving one or more facts of consequence to a determination of the action. Purpose is also critical in the FED. R. EVID. 403 evaluation of whether the probative value of evidence is substantially outweighed by the dangers that the evidence may, for example, cause unfair prejudice, or mislead or confuse the jury.

Evidentiary exclusionary rules typically provide that evidence subject to the rule must be excluded when proffered for a particular purpose, but may be admissible when offered for another purpose. Consider, for example, the exclusionary rule that prohibits the introduction of “other act evidence” when offered for the purpose of proving a party’s character or disposition, but which provides that the evidence may be admissible when proffered for some other relevant purpose, such as to prove a person’s motive, intent, knowledge or identity.\(^8\)

The rule against hearsay requires the exclusion of out-of-court statements when offered for the purpose of proving the truth of the fact asserted.\(^9\) Therefore, an out-of-court statement not offered to

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8. FED. R. EVID. 404(b).
9. FED. R. EVID. 801(c) and 802.
prove the truth of the fact asserted, and offered only for the purpose of proving that the statement was made, is not hearsay.\textsuperscript{10} Of course, the mere making of the statement would have to be relevant, which would bring the inquiry back to the purpose for introducing the evidence.

\section*{§ 1:6.2 \textbf{TRIAL EVIDENCE BROUGHT TO LIFE}}

\section*{§ 1:5.3 \textbf{Evidentiary Advocacy}}

The proponent’s identification of the purpose or purposes for introducing the evidence in question is a critical aspect of advocacy before the trial judge. For example, if the opposing party objects on relevance grounds, the trial judge will expect the proponent to identify the relevant purpose for proferring the evidence. If the proponent responds to a hearsay objection by arguing that the out-of-court statement is offered only to prove that the statement was made, the trial judge will expect the proponent to identify the relevant purpose of the mere making of the statement, apart from the truth of the statement.

\section*{§ 1:6 \textbf{Rationales Behind the Evidence Rule: Evidence Law Is “Behavioral”}}

\section*{§ 1:6.1 \textbf{Overview}}

One of the special attributes about the law of evidence is that there is almost always a rationale for an evidence rule. In some instances, a codified rule may be based on legislative compromise. Evidentiary rules are seldom the product of mere fiat or historical accident. So, if you know the rationale behind a rule of evidence, then you may be able to use it to make persuasive arguments in favor or against the application of such a rule in the particular circumstances.

\section*{§ 1:6.2 \textbf{Rationales Behind Exclusionary Rules}}

A very high percentage of evidentiary rules are exclusionary rules. By its nature, an exclusionary rule prevents evidence from coming to the jury’s attention based on the assumption that if the jury considered the evidence, then the jury would use the evidence

\begin{footnote}{\textsuperscript{10}}\textit{See infra} chapter 9.\end{footnote}
in a manner that the law of evidence seeks to prevent. For example, if a prosecutor were allowed to introduce evidence of a criminal defendant’s other criminal acts to prove the defendant’s character or disposition, the law of evidence is fearful that the jury may use the evidence to convict the defendant because of the type of person he is, rather than because he engaged in the particular criminal conduct charged in the indictment. In this sense, the law of evidence is behavioral, it is based upon assumptions about how people behave (in this example, how jurors are likely to respond to the evidence). Of course, this likelihood is a prognostication as to how jurors who are allowed to consider a certain type of evidence are likely to respond to the evidence. But because it is a prognostication about human behavior, one can never be too certain as to how a juror would utilize the evidence.

The following is another “behavioral” example. The rule of evidence that excludes evidence of a “subsequent remedial measure” when offered to prove negligence is based on the assumption that if the evidence were admissible, then defendants in negligence cases would be deterred from making repairs and engaging in other remedial measures. Because the law of evidence seeks, as a policy matter, to encourage and not discourage remedial measures, it applies the exclusionary rule. But again, the rule is behavioral, based on the assumption that, without the exclusionary rule, negligent defendants would be deterred from carrying out remedial measures. But is this behavioral assumption correct? If so, in what percentage of the cases and under what circumstances? As we are dealing with prognosticated human behavior, we can never be too sure of the answer.

11. FED. R. EVID. 407.
§ 1:7 High Percentage of Evidentiary Disputes Finally Resolved in Trial Court

§ 1:7.1 Overview

The trial attorney must fully understand that, overwhelmingly, the prime battlefield for the resolution of evidentiary disputes is the trial court. From both a practical and a legal standpoint, trial court is where a very high percentage of evidentiary disputes are finally resolved. Yes, appellate review is usually available, but appellate review of evidentiary errors typically affords substantial deference to the judgment of the trial judge.

§ 1:7.2 Appellate Deference to Trial Court Decisions

Appellate courts typically give great deference to trial court evidentiary rulings, and for good reasons. For starters, the trial judge is on the front line, observing the witnesses, considering the evidence that has been introduced, as well as the evidence expected to be introduced. The trial judge’s evidentiary rulings must be made in the context of the specific legal claims and defenses raised by the parties, as well as the specific evidence introduced and expected to be introduced. In other words, the trial judge is in the best position to make the admissibility determinations. By contrast, an appeals court evaluates evidentiary issues from the perspective of hindsight review of a “cold record.” Federal District Court Judge William G. Young (District of Massachusetts) is fond of describing how appellate judges come down from the mountain only after the battles have been fought and the dust has settled.

Appellate courts understand that trial judges frequently have to make “on-the-spot” evidentiary rulings, some of which are difficult, and that a high percentage of these decisions involve the exercise of discretion.

This is not free-wielding discretion, but discretion that is within the confines of a particular evidentiary rule. In other words, it is not unfettered discretion, but cabined discretion. For example, FED. R. EVID. 403 gives federal trial judges authority to exclude relevant evidence when its probative value is substantially outweighed by the danger of, inter alia, unfair prejudice. The trial judge has great discretion in evaluating the probative value of evidence, its potential for
causing unfair prejudice, and whether its probative value is substantially outweighed by the danger of unfair prejudice. Because the trial judge is in the best position to make these determinations, the appeals court will defer greatly to the trial judge’s exercise of her discretion and, assuming that the trial judge applied the correct legal principles, will reverse only when the trial judge clearly abused her discretion.

The trial lawyer, therefore, should make her most persuasive evidentiary arguments in the trial court. Not only are the great majority of trial court evidentiary rulings affirmed on appeal, but even those that are overturned are, in the great majority of cases, found to be harmless error. Given these realities, it would be a grave mistake for counsel to hold back her most persuasive evidentiary argument for appeal.

§ 1:8 Importance of Making Proper Evidentiary Objections at Trial

Section 1:7 above focuses on the great discretion trial judges typically have in determining admissibility of evidence. As a result, the great majority of trial court evidentiary rulings are affirmed on appeal, and, even when an appeals court finds evidentiary error, it is very frequently found to be harmless error. This section focuses on the vital importance of making proper objections at trial.

Although a great percentage of evidentiary errors are found, on appeal, to be harmless, there are cases in which an appellate court not only finds evidentiary error, but holds that it is prejudicial error. To preserve an evidentiary argument for appeal, the appellant must have lodged a proper objection at trial.\textsuperscript{12} The essential point is that whether an objection is to a ruling that finds evidence admissible or inadmissible (whether it is a ruling on a motion in limine or a ruling made during the trial), failure to make a proper objection, or offer of proof, as the case may be, can have dire consequences down the road for the appellant.

\textsuperscript{12} For coverage of the specific procedural rules and mechanics for making proper objections, see \textit{infra} chapter 3.
§ 1:9.1  TRIAL EVIDENCE BROUGHT TO LIFE

For one thing, when a proper objection was not made at trial, appellate review is limited to “plain error” review, that is, review of an error that is clear, obvious, and significant in that it affected a substantial right of the appellant. Courts commonly add that they will find plain error only if failure to correct the error would be a miscarriage of justice. Clearly, appeals courts do not look kindly on plain error review, with the result that an appellant saddled with plain error review faces an even greater burden than when a proper objection was made in the trial court. Appeals courts operate from the strong premise that, for the adversarial process to operate effectively and efficiently, proper evidentiary objections must be made at trial at a time when opposing counsel can respond to them, the trial court can rule on them, and the proponent is afforded an opportunity to take corrective action. In addition, when an appeals court concludes that failure to object at trial was intentional, the appeals court may deem the issue waived and refuse to engage even in plain error review.

It is true that even when a proper objection is not made at trial the trial judge may exclude inadmissible evidence on her own.13 A party, however, cannot depend on the trial judge to take action on her own initiative. If the trial judge fails to exclude inadmissible evidence, appellant on appeal will be left with, at best, the dreaded plain error review, and in some cases even no review, based on a determination that the issue was waived at trial. The lesson should thus be clear: it is imperative that proper evidentiary objections be made in the trial court.

§ 1:9  Evidence Rules That Facilitate Proof of Facts

§ 1:9.1  Overview

Trial work can be, on the one hand, exhilarating, but also, on the other hand, a grueling experience. Both trial preparation and the conduct of a trial can be a highly intense and tremendously time-consuming experience. Some evidence rules are specifically designed

13. See, e.g., Bellard v. Gautreaux, 675 F.3d 454, 461 (5th Cir. 2012) (proponent does not have right to introduce unobjected-to hearsay evidence).
to (or, at least, effectively) facilitate the admissibility of evidence.\textsuperscript{14} (Federal Rules of Evidence “should be construed” to, \textit{inter alia}, “eliminate unjustifiable expense and delay.”). It behooves the trial attorney to pay attention and consider the utilization of these evidence rules. They can enhance the quality of the trial lawyer’s life.

\section*{§ 1:9.2 Rules That Facilitate the Admissibility of Evidence}

\subsection*{[A] Judicial Notice}

\textsc{Fed. R. Evid.} 201(b) provides that “[t]he court may judicially notice a fact that it is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”\textsuperscript{15} Judicial notice is thus a judicial shortcut, an economy measure. It dispenses with the need for evidence to prove a fact that is not reasonably subject to dispute.

\subsection*{[B] Witnesses Having Difficulty Remembering}

You’ve called an important witness to the stand. Even though you spent a good deal of time helping her prepare for her testimony, for whatever reasons, she is having difficulty remembering important facts. Fortunately, the law of evidence provides a number of mechanisms to possibly alleviate this predicament.\textsuperscript{16} \textsc{Fed. R. Evid.} 611(c), which generally prohibits the use of leading questions on direct examination, provides an exception that allows the use of leading questions on direct “as necessary to develop the witness’s testimony.” Thus, for example, the trial judge may allow leading questions to be used on the direct examination of a timid or frightened witness, a witness with language difficulties, or a witness having difficulty recalling the facts.\textsuperscript{17}

\textsc{Fed. R. Evid.} 612 allows the proponent to use a “writing” to refresh a witness’s recollection. If the writing does not succeed in refreshing the witness’s recollection, the \textsc{Fed. R. Evid.} 803(5) hearsay exception

\begin{footnotesize}
\begin{enumerate}
\item See \textsc{Fed. R. Evid.} 102.
\item See \textit{infra} chapter 4.
\item See \textit{infra} chapter 12.
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
§ 1.9.2  TRIAL EVIDENCE BROUGHT TO LIFE

For “past recollections recorded” may, if the writing satisfies all of the FED. R. EVID. 803(5) elements, allow the proponent to read it to the jury.\(^\text{18}\)

[C] Proving the Non-Existence of a Fact

Proving a negative, that is, that a certain event did not occur, can be a daunting task. For example, how would a party prove that United Air Lines did not, on June 1, 2011, issue a first class ticket to Jane Smith to fly from New York’s JFK International Airport to Los Angeles International Airport.

FED. R. EVID. 803(7) offers a fairly convenient way to prove this “non-event.” It provides that evidence that an event did not occur may be proved by showing that there is no entry for the event in a regularly kept business record that meets the requirements of the FED. R. EVID. 803(6) business record hearsay exception for a record “regularly kept for a matter of that kind.”\(^\text{19}\) In other words, it is the type of event that, if it occurred, would normally be expected to appear in the record. The Advisory Committee Note to FED. R. EVID. 803(7) states that “[f]ailure of a record to mention a matter which would ordinarily be mentioned is satisfactory evidence of its nonexistence.” FED. R. EVID. 803(9) contains a similar provision that facilitates proof of the non-occurrence of an event relating to public records.\(^\text{20}\)

[D] Business Records

Prior to the 2000 amendment to FED. R. EVID. 803(6), the proponent of a business record who claimed that the record satisfied the FED. R. EVID. 803(6) business records hearsay exception had to lay a proper foundation demonstrating satisfaction of the rule’s hearsay elements through the testimony of the custodian of the records or other qualified witness who had knowledge about the creation and maintenance of the records.\(^\text{21}\) The 2000 amendment to FED. R. EVID. 803(6) facilitated the introduction of business records by allowing the

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18. Id.
20. Id.
21. Id.
Foundation requirements to be demonstrated through a “self-authenticating” certification of the custodian or other qualified person pursuant to Fed. R. Evid. 902(11) (or Fed. R. Evid. 902(12) for “Certified Foreign Records of a Regularly Conducted Activity”). To take advantage of these provisions, the proponent, pre-trial, “must give the opposing party reasonable written notice of the intent to offer the record—and must make the record and certification available for inspection—so that the party has a fair opportunity to challenge them.”

The Advisory Committee Note to the 2000 amendment explicitly states that the amendment “provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses.”

[E] Authentication and Identification: Self-Authenticating Documents

Article IX of the Federal Rules of Evidence governs the related subjects of authentication and identification. Fed. R. Evid. 901 provides a very helpful listing of illustrative methods for satisfying a proponent’s authentication and identification burdens. This listing itself helps to ease litigation burdens by setting forth various methods for identifying or authenticating various types of evidence. For the most part, these various methods are not especially rigorous.

Furthermore, Fed. R. Evid. 902 provides a fairly lengthy twelve-subdivision listing of “self-authenticating” items of evidence that “require no extrinsic evidence of authenticity to be admitted.” The listing includes, inter alia, “Certified Copies of Public Records,” “Official Publications,” “Newspapers and Periodicals,” “Trade Inscriptions and the Like,” “Commercial Paper and Related Documents,” and “Certified Domestic Records of Regularly Conducted Activity.” The rationale is that the likelihood that a document falling within Fed. R. Evid. 902 is not authentic is sufficiently low to justify dispensing with the proponent’s normal burden of introducing sufficient proof of authenticity.

22. Fed. R. Evid. 902(11) and (12).
23. See infra chapters 15 and 16.
§ 1.9.2  TRIAL EVIDENCE BROUGHT TO LIFE

[F] "Best Evidence Rule"

The common law “best evidence rule” provides that when the contents of the writing are in issue, the proponent must generally introduce the original of the writing. Under this common law rule, neither oral testimony nor a duplicate of the writing may be introduced to prove its contents. The Advisory Committee Note to FED. R. EVID. 1001 refers to “the misleading[ly] named ‘best evidence rule.’” It is misleading because there is no rule of evidence requiring the proponent to introduce the best evidence in the sense of the most persuasive or probative evidence. A better phrase would be the “original document rule.”

Article X of the Federal Rules of Evidence makes important modifications to the common law best evidence rule, some of which have the potential for making life easier for the litigator.\(^\text{24}\) The Federal Rule of Evidence original document rule applies when the contents “of a writing, recording, or photograph is in issue.”\(^\text{25}\) The federal rules sensibly recognize that there may be more than one original when there is a counterpart to the original “intended to have the same effect [as the original] by the person who executed or issued it.”\(^\text{26}\) The common law version of the rule generally prohibited the introduction of a copy to prove the contents of a writing. This was because the rule originated during an era in which duplication processes were not sufficiently reliable. Of course, that is no longer the case, and FED. R. EVID. 1003 sensibly provides that “[a] duplicate is admissible to the same extent as an original unless a genuine question is raised about the original’s authenticity or the circumstances make it unfair to admit the duplicate.” “Duplicate” is defined in FED. R. EVID. 1001(e) as “a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.”

FED. R. EVID. 1004 provides grounds for lifting the original document altogether, namely, “originals lost or destroyed, not obtainable by legal process, the original is in the possession of the opponent, and for collateral matters.” Further, FED. R. EVID. 1005 provides a

\(^{24}\) See infra chapter 17.

\(^{25}\) FED. R. EVID. 1002.

\(^{26}\) FED. R. EVID. 1001(d).
special rule that facilitates satisfaction of the original document rule for public records. The rule dispenses with the requirement for introducing the original because of the “serious inconvenience to the public and to the custodian,” and allows the proponent to introduce either a certified or compared copy or, “[i]f no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.”

[G] Summaries

Federal court decisional law allows counsel in appropriate circumstances to use, likely during summation, a chart that summarizes evidence as a pedagogical device. This type of chart is typically allowed to be used when the evidence, facts, or both, are complex (for example, in a major organized crime case). Unlike a Federal Rule of Evidence 1006 summary, a trial court may allow the use of a pedagogical chart pursuant to her authority under Federal Rule of Evidence 611(a) to “exercise reasonable control over the mode and order of examining witnesses and presenting evidence . . . .” Unlike a Federal Rule of Evidence 1006 chart, a Federal Rule of Evidence 611(a) chart is not itself evidence, but is a pedagogical device to help counsel explain the evidence to the jury. Like a Federal Rule of Evidence 1006 chart, a Federal Rule of Evidence 611(a) chart can help facilitate the litigation life of the trial lawyer.

27. Advisory Committee Note to Federal Rule of Evidence 1005.
28. E.g., oral testimony.
29. See infra chapter 16.
30. Id.
§ 1:10 Nature of Evidence Law; Focus on Federal Rules of Evidence

§ 1:10.1 Overview

Each state has its own body of evidence law that governs admissibility of evidence in the particular jurisdiction. The Federal Rules of Evidence govern the admissibility of evidence in the federal courts. Approximately forty-five states have adopted a version of the Federal Rules of Evidence. When a state adopts the Federal Rules of Evidence, it need not adopt the rules in toto. It can choose to adopt the entire federal evidence code or may adopt the code with modifications. New York, however, has not adopted an evidence code, with the result that its evidence law is primarily common law, with some statutory evidentiary provisions.

§ 1:10.2 Constitutional Concerns

For the most part, each jurisdiction is free to formulate its own rules of evidence free of federal constitutional constraints. In some instances, however, the U.S. Constitution plays a role by imposing limitations on a jurisdiction’s authority to formulate evidence rules, as with the Sixth Amendment’s Confrontation Clause, the Sixth Amendment’s Compulsory Process Clause, and the criminal defendant’s right guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments to present a defense. Of course, a criminal defendant’s right to present evidence is not absolute. “Judges may exclude marginally relevant evidence and evidence posing an undue


33. See chapter 10.

risk of confusion of the issues without offending a defendant’s constitutional rights.”

§ 1:10.3 Focus on Federal Rules of Evidence

The materials in this book focus on the Federal Rules of Evidence and its decisional law. There are a number of good reasons for this. To begin with, working from an evidence code is helpful because the code provides a vital structure for analyzing evidentiary issues. In addition, the federal rules reflect a modern view of the law of evidence. FED. R. EVID. 102 provides, in part, that the federal evidence “rules should be construed so as to . . . promote the development of evidence law . . . .” Then, too, since approximately forty-five states have adopted a version of the Federal Rules of Evidence, the federal rules represent prevailing American evidence law.

On December 1, 2011, the restyled Federal Rules of Evidence took effect. The purpose of the restyling was to promote clarity. The restyling was not intended to work any substantive changes in the law.

35. United States v. Alayeto, 628 F.3d 917, 922 (7th Cir. 2010) (citing Holmes, 547 U.S. 319, 326–27 (2006)).