Trial Notebook

Common Evidentiary Problems at Trial

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Introduction

> *You are in the middle of a hotly contested trial. You are attempting to introduce a critical piece of evidence. Your opponent suddenly screams, "**Hearsay!**" You know you can get it into evidence. After all, it falls under an exception to the hearsay rule, right? It's a recorded recollection, isn't it? . . . or is it a present recollection refreshed? Is there a difference?*

This article is intended to be a "quick read" reference outline for trial practitioners to put in their trial notebooks or in the dog-eared Code of Evidence pamphlet they bring to trial. It contains a list of the main evidentiary problems that frequently arise at trial, an explanation of the doctrine in the Louisiana Code of Evidence, the foundation which must be laid to get the evidence in, and, in most cases, a recent Louisiana case interpreting or applying the rule. It also points out the **major** differences between the Louisiana Code of Evidence and the Federal Rules of Evidence.

Three Things to Remember in Every Evidentiary Skirmish

Make a contemporaneous objection using the proper grounds

If you want to keep the evidence out, you must make a **proper**, contemporaneous objection stating the correct grounds for exclusion of the evidence. The evidence may be objectionable, but you must use the right objection to keep it out.

In *Tartar v. Hymes*, 94-758 (La. App. 5th Cir. 5/30/95); 656 So.2d 756, 758, *writ denied,* 95-1640 (La.10/6/95), 661 So.2d 475, the court held that where a trial objection to the admission of medical expense evidence in a personal injury case was on the grounds of relevancy, the objecting party's contention in the court of appeal that the evidence was hearsay would not be addressed.

The 403/401 Balancing Test

If you are losing the evidentiary battle, and if the evidence is particularly harmful to your case, try objecting under Code of Evidence Article 403 which provides that even though the evidence may be relevant under Article 401, and otherwise admissible, it may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury or by considerations of undue delay or waste of time.

Jones v. Peyton Place, Inc., 95-0574 (La. App. 4 Cir. 5/22/96), 675 So.2d 754 involved a fall in which the plaintiff tripped over some carpet and was injured. The defendant attempted to introduce evidence that subsequent to the accident the plaintiff had pled guilty to two felony counts of possession with intent to distribute cocaine. The court held that even assuming, as the defendant argues, that the plaintiff's incarceration would be in some way relevant to the physical and mental pain and suffering from his injuries, whatever probative value this evidence has is extremely low when weighed against its

potential prejudice.

Proffer

If you are attempting to introduce a piece of evidence and the court incorrectly excludes it, you must "proffer" the evidence if you wish to preserve the issue of its exclusion for appellate purposes.

La. C. E. art. 103(A) provides that error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and, when the ruling is one excluding evidence, the substance of the evidence was made known to the court by counsel.

The courts have interpreted this to mean that when evidence has been excluded by the trial court, a party has a legal right to make an offer of proof outside the presence of the jury of what the attorney expected to prove. The purpose of a proffer is to preserve evidence excluded by the trial court so that the evidence is available for appellate review. *McLean v. Hunter*, 495 So.2d 1298 (La.1986).

La. C. C. P. art. 1636 states that "when the court rules against the admissibility of any evidence, it shall either permit the party offering such evidence to make a complete record thereof, or permit the party to make a statement setting forth the nature of the evidence."

If you do not make a proper proffer of the evidence, the appellate court will not be able to consider the issue on appeal.

Evidentiary Issues

Admissions - La. C. E. art. 801(D)(1)(2)

An admission is not hearsay.

Hearsay is 1) an assertive statement; 2) made out of court; 3) offered in court to prove the truth of the matter stated.

An admission is a party's own statement, either in an individual, adoptive or representative capacity.

The foundation: 1) A statement; 2) made by a party opponent; 3) in an individual or representative capacity; or 4) a statement of which he has manifested his adoption or belief; or 5) a statement made by a person authorized by him to make a statement concerning the subject; and 6) offered against that party.

The court in *Hoffman v. Schwegmann Giant Super Markets, Inc*., 572 So.2d 825 (La. App. 4th Cir.1990) admitted a statement of an individual identified only as "Mike" who came to a shopper's aid where there was evidence that he was a store employee and the statement concerned a matter within scope of his employment and was made during the existence of the employment relationship.

Declaration Against Interest - La. C. E. art. 804(b)(3)

An exception to the hearsay rule is a statement which was, at the time of its making, so contrary to the declarant's pecuniary or proprietary interest that a reasonable man in his position would not have made the statement unless he believed it to be true. The declarant, however, must be unavailable at trial.

The foundation: 1) The declarant believed that the statement was contrary to his interest; 2) it was contrary to a pecuniary or proprietary interest; 3) the declarant is unavailable at trial.

In *Malloy v. Vanwinkle*, 94-2060 (La. App. 4 Cir. 9/28/95); 662 So.2d 96 the court held that a letter from a vehicle owner stating that he was uninsured was a statement against interest and thus admissible.

Admission v. declaration against interest: An admission is a statement of an adverse party. The declaration against

interest need not be that of a party - any person can make a declaration against interest. An admission is admissible even it was highly self-serving when made. Declarations against interest are admissible only if, at the time of the statement, the declarant believed the statement was contrary to his interest. Declarations against interest are admissible only if the declarant is unavailable at trial.

Dying Declaration - La. C. E. art. 804(B)(2)

Another hearsay exception is a statement made by a declarant while believing that his death is imminent. The declarant must be unavailable at trial.

The foundation: 1) At the time of the statement, the declarant had a sense of impending death; 2) had abandoned all hope; 3) had concluded that certain death was imminent; and 4) the statement concerned the cause or circumstances of what he believed to be his impending death.

State v. Bell, 97-896 La. App. 5 Cir. 10/14/98, 721 So.2d 38 allowed a statement by a murder victim, twenty minutes before his death, that "they stole my money." A paramedic testified that when he arrived he observed the victim on his hands and knees, crying, "Help me. Help me." He stated that he and his partner were moving very rapidly and that the victim could have gathered from their actions and their conversations the seriousness of his condition.

Recorded Recollection - La. C. E. art. 803(5)

A recorded recollection is a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately. The record must have been made by the witness when the matter was fresh in his memory and must reflect his memory correctly. If admitted, the memorandum or record may be read into evidence and received as an exhibit but may not be taken into the jury room.

The foundation: 1) The witness had knowledge of the fact or event; 2) the witness prepared a record of the fact; 3) the witness prepared the record while the events were still fresh in his memory; 4) the witness can testify that when prepared the record was accurate; 5) at trial the witness cannot completely and accurately recall the facts even after reviewing the document; 6) the witness then reads from the document, but the document may not be received as an exhibit.

In *Southern v. Lyons*, 97-19 (La. App. 3d Cir. 5/28/97), 696 So.2d 128, *writ denied* 97-1729 (La.10/13/97), 703 So.2d 617, the court allowed an accident investigator to testify from his statement at trial. He testified that he did not have direct recollection on that issue, so he referred to his statement which was taken two days after the incident.

Present Recollection Refreshed - La. C. E. art. 612

If a witness states that he cannot recall a fact, but a certain writing or object could help refresh his memory, the witness can look at the document and then testify from his revived memory. The real evidence is the witness' oral testimony and the exhibit only serves a memory aid.

The foundation: 1) The witness states that he cannot recall a fact; 2) the witness states that a writing or object could help refresh his memory; 3) the writing is shown to the witness; 4) the witness reads the writing or views the object; 5) the witness states that after reviewing the document or looking at the object, his memory has been refreshed; 6) the witness testifies from his revived memory.

In *Talamo v. Shad*, 92-1085, 92-1086 (La. App. 4 Cir.1993), 619 So.2d 699

the court held that when the witness has been permitted to consult a writing and it has not refreshed his memory to the extent that he now has an independent recollection of the event in question, La. C. E. art. 612 does not authorize the witness to read the writing into evidence, nor does it authorize the introduction of the writing itself because the purpose of the rule is to give a witness an opportunity to jog his memory so that he may then testify from his memory.

Subsequent Remedial Measures - La. C. E. art. 407

In a tort case, when, after an event occurs, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measure is not admissible to prove negligence or culpable conduct. The article does not require the exclusion of the evidence when offered for another purpose such as proving ownership, control, feasibility of precautionary measures, or for attacking credibility. Note, however, that Federal Rule of Evidence 407, requires that the "feasibility of precautionary measures" be "controverted."

The foundation: 1) The person or entity took the subsequent remedial action, 2) the action was as a safety measure, 3) the action was taken after the accident that gave rise to the suit.

In *Patterson v. City of New Orleans,* 96-CA-0367, 96-CA-0843 (La. App. 4th Cir. 12/18/96), 686 So.2d 87, the court held that, in an action against the sewerage and water board in connection with an accident caused by algae growth on a railroad underpass due to water seepage, testimony regarding interim measures taken by the city to remedy the clogged condition of the pipes was admissible for the limited purpose of showing the city's control over the pipes in question.

Lay Opinion - La. C. E. art. 701

A lay witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of his testimony or the determination of a fact in issue. It must be a matter about which a lay person can form an opinion. Courts have allowed lay opinion that a person was drunk, afraid, excited, or nervous, or that a vehicle was speeding.

The foundation: 1) The witness was in a position to observe; 2) the witness in fact observed; 3) the witness observed enough data to form a reliable opinion; and 4) the witness states the opinion.

The court in *Griffin v. Tenneco Oil Co.*, 625 So.2d 1090 (La. App. 4 Cir.1993), *writ denied*, 93-2710 (La.1/7/94); 631 So.2d 449 allowed defendant oil company's safety and loss control director to give an opinion on the issue of safety based on his experience in the refining industry as a lay witness because he possessed suitable information, experience and training in the field to provide lay opinion on subject.

State of Mind - La. C. E. art. 803(3)

A statement is not hearsay if it is a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or future action.

The foundation: State of mind must be relevant and the proponent must prove: 1) where the statement was made; 2) when the statement was made; 3) who was present; 4) who made the statement; and 5) the tenor of the statement.

Buckbee v. United Gas Pipeline Co., Inc., 561 So.2d 76 (La.1990) held that an out-of-court statement may be admissible to prove the impact and effect that the out-of-court statement had upon the state of mind

of the listener or to illustrate the state of mind of the speaker.

Present Sense Impression - La. C. E. art. 803(1)

A present sense impression is a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

The foundation: 1) An event occurred; 2) the declarant had personal knowledge of the event; 3) the declarant made the statement during or shortly after the event; 4) the statement relates to the event.

In *Carbon v. Allstate Ins. Co.*, 96-2109 (La. App. 1 Cir 9/23/97); 701 So.2d 462, *writ granted,* 97-3085 (La.3/27/98), 716 So.2d 365, the court held that the critical factor is whether the statement was made while the individual was perceiving the event or immediately thereafter, allowing only for the time needed for translating the observation into speech.

Excited Utterance - La. C. E. art. 803(2)

An excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. The rationale is that the occurrence of the event caused the observer to become excited and to make a spontaneous statement about the event, thus giving it credibility.

The foundation: 1) there was an event; 2) the event was startling; 3) the witness had knowledge of the event as either a participant or a direct observer of the event; 4) the witness made a statement about the event; 5) the witness made the statement while he was in a state of nervous excitement caused by the event.

In *Evans v. Olinde*, 609 So.2d 299, 304-305 (La. App. 3 Cir.1992), *writ denied*, 616 So.2d 697 (La.1993), *reconsideration denied,* 617 So.2d 923 (La.1993), the defendant was involved in a high speed chase which resulted in an accident which killed his passenger. The court allowed a statement 25 minutes after the accident made to his father that "they messed up . . .they ran into him." The court held that, given the excitement of the accident and the relatively short amount of time after the accident, he was still under the stress of the accident when he made the statement to his father.

Habit - La. C. E. art. 406

Evidence of the habit of a person or of the routine practice of an organization is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with that habit or routine practice.

The foundation: 1) The witness is familiar with the person or business; 2) the witness has been familiar with the person or business for a significant period of time; 3) in the witness' opinion, the person or business has a habit or a specific behavioral pattern; 4) the witness has observed the person or business act in conformity with the habit on numerous occasions.

In *Corbello v. Southern Pacific Transp. Co.,* 586 So.2d 1383 (La. App 3d Cir. 1991), a railroad accident case, the court allowed as "habit" evidence the testimony of a number of residents who lived near the accident scene that the crews operating defendant's trains did not customarily sound the whistle when approaching the crossing.

But see *Stapleton v. Great Lakes Chemical Corp*., 627 So.2d 1358 (La.1993) in which the court excluded a defendant truck driver's testimony about his two million miles of safe driving and awards from the National Safety Council.

Business Records - La. C. E. art. 803(6)

Records of regularly conducted

business activity are an exception to the hearsay rule.

The foundation: The foundation must be established by the testimony of the custodian of the record or other similarly qualified witness that: 1) the record was made and kept in the course of a regularly conducted business activity; 2) the information in the record was furnished by a person with knowledge of the facts or events reported; 3) the recorded information was furnished to the business either by a person who was routinely acting for the business in reporting the information or in circumstances under which the statement would not be excluded by the hearsay rule; 4) the record was prepared contemporaneously with the event; 5) it was the regular practice of the business to make and keep such a record; and 6) the report was reduced to written form.

In *Cole Oil & Tire Co., Inc. v. Davis*, 567 So.2d 122, 129 (La. App. 2 Cir.1990), the court held that the witness laying the foundation for admissibility of business records need not have been the preparer of the records. The person who keeps the books and records and makes the entries need not testify if a person who is in a position to attest to the authenticity of the records is present to testify.

Exception: Under La. C. E. 803(8)(b) the following are not included as exceptions to the hearsay rule: 1) investigative reports by police and other law enforcement personnel; 2) investigative reports prepared by or for any government, public office or public agency when offered by that government, public office or agency in any case in which it is a party; 3) factual findings offered by the prosecution in a criminal case; 4) factual findings resulting from investigation of a particular complaint, case or incident, including an investigation into the facts and circumstances on which the present proceeding is based or an investigation into a similar occurrence or occurrences.

Learned Treatise - La. C. E. art. 803 (18)

To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice are admissible. If admitted the statement may be read into evidence, but may not be received as an exhibit and may not be taken into the jury room.

The foundation: 1) the statement is called to the attention of an expert witness; 2) it is contained in a published treatise, periodical or pamphlet; 3) on a subject of history, medicine, science or art; and 4) it is established as a reliable authority by the testimony of the witness or other testimony or by judicial notice.

Statements for Medical Treatment - La. C. E. art. 803(4)

A statement is not hearsay if it was made for purposes of medical treatment and medical diagnosis in connection with treatment and describing medical history or past or present symptoms, pain or sensations reasonably pertinent to the treatment and diagnosis.

The foundation: 1) Where the statement was made; 2) when the statement was made; 3) who was present; 4) who made the statement; 5) to whom was the statement made (it can be made to a lay person or a physician); 6) the statement describes medical history or past or present symptoms, pain, or sensations; and 7) the declarant made the statement for purposes of medical treatment or medical diagnosis in connection with treatment.

In *State In Interest of D.S.*, 96-1820, (La.App. 1st Cir.9/24/96); 694 So.2d 327, *writ denied*, 96-2395 (La.12/6/96); 684 So.2d 930, a doctor examined a patient to

determine whether she had been sexually abused, but did not treat her. The doctor was asked to relate the patient's statements concerning sexual molestation, abuse and drinking on the part of one of the parents. The court held that since the examination also supplied the doctor with critical information so that the doctor might recommend various types of treatment for the victim, the doctor's testimony was admissible.

Convictions and Arrests in Civil Cases - La. C. E. art. 609

If the witness has been convicted of a crime, that conviction tends to affect his credibility - it creates an inference that the witness has no problem disobeying the law, which leads to the inference that he could easily violate another rule of our society and lie under oath.

Generally evidence of a conviction is limited to the name of the crime and the date of conviction, but not the details of the crime. The evidence is admissible if the conviction occurred in the last ten years and the crime was punishable by imprisonment in excess of six months or involved dishonesty or a false statement, regardless of the punishment.

Federal Rule - Evidence that a witness has been convicted of a crime shall be admitted if the crime was punishable by imprisonment in excess of one year, while evidence of a crime involving dishonesty is admissible regardless of punishment. The federal rule allows convictions older than 10 years if the proponent gives the adverse party advance notice.

Arrests are not Convictions

Arrests may not be used to impeach.

La. Code of Evidence art. 609 states that evidence of the arrest, indictment, or prosecution of a witness is not admissible for the purpose of attacking his credibility, but it may be used to show bias. *Michelli v. Michelli,* 93-2128 (La. App. 1 Cir. 1995), 655 So.2d.

If All Else Fails

The Residual Exception - La. C. E. art. 804(B)(6)

The rules of evidence allow a trial judge to admit hearsay that falls outside of any of the enumerated exceptions. In a civil case, if a statement is not specifically covered by another exception, and if the declarant is unavailable, and if the statement is trustworthy, the judge may admit the evidence if the proponent of the evidence 1) has adduced or made a reasonable effort to adduce all other admissible evidence to establish the fact to which the proffered statement relates, and 2) has made known in writing his intention to offer the statement, and the particulars of it, to the adverse party and to the court sufficiently in advance of trial.

Federal Rules of Evidence rule 807

A statement is not excluded if 1) the statement has equivalent circumstantial guarantees of trustworthiness; 2) the statement is evidence of a material fact and is more probative on the point than other evidence with the proponent can procure through reasonable means; 3) the general purposes of the evidence rules and the interest of justice will be best served by introduction of the statement; and 4) the opponent is provided with fair notice and an opportunity to meet the evidence.