

**New Jersey Continuing Legal Education
Services Presents:**

A CLE Seminar:

**New Jersey Trial
Objections**

New Jersey Trial Objections

Lesson Plan

Part I Introduction

1. Right and Duty to Object – Rule 1:7-2

For the purpose of reserving questions for review or appeal relating to rulings or orders of the court or instructions to the jury, a party, at the time the ruling or order is made or sought, shall make known to the court specifically the action which the party desires the court to take or the party's objection to the action taken and the grounds therefor. Except as otherwise provided by R. 1:7-5 and R. 2:10-2 (plain error), no party may urge as error any portion of the charge to the jury or omissions there from unless objections are made thereto before the jury retires to consider its verdict, but opportunity shall be given to make the objection in open court, in the absence of the jury. A party shall only be prejudiced by the absence of an objection if there was an opportunity to object to a ruling, order or charge.

2. Plain Error

When no objection is made, the appellate standard by which the contested evidence is judged is under the plain error rule. Under that standard, the issue is whether the comments had the "clear capacity for producing an unjust result."

3. Rule 2:10-2

Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice,

notice plain error not brought to the attention of the trial or appellate court.

4. Making Objections during Trial

a. Timing- Following Completion of Question but before the Witness' Answer

b. Following the Witness' Answer (Motion to Strike)

c. Speaking Objections

d. Arguing Objections

5. Sustained Objection – Making a Record

If an objection to a question propounded to a witness is sustained by the court, the examining attorney may, out of the hearing of the jury (if there is a jury), make a specific offer of what is expected to be proved by the answer of the witness, and the court may add such other and further statement as clearly shows the character of the evidence, the form in which it was offered, and the ruling thereon. In actions tried without a jury the court shall upon request permit the evidence and any cross-examination relating thereto or evidence in rebuttal thereof to be taken down by the court reporter in full, or otherwise preserved, unless it clearly appears to the court that the evidence is not admissible on any ground or that the witness is privileged or unless the interest of justice otherwise requires. In actions tried with a jury the court may, in its discretion and in the absence of the jury, permit such taking and preservation of the excluded evidence.

Part II – General Rules of Evidence

1. RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

(a) **Control by court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) **Scope of cross-examination.** Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) **Leading questions.** Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls an adverse party or a witness identified with an adverse party, or when a witness demonstrates hostility or unresponsiveness, interrogation may be by leading questions, subject to the discretion of the court.

2. RULE 401. DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action.

3. RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE

Except as otherwise provided in these rules or by law, all relevant evidence is admissible.

4. RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Except as otherwise provided by these rules or other law, relevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence.

Argumentative

Objection – The question is argumentative

Objection – Counsel is arguing with the witness

Response – The question was properly framed in order to elicit relevant evidence from the witness.

Supporting Legal Argument

A question that has been propounded to a witness can be deemed to be argumentative in two ways. First, a question may be argumentative in the sense that it is intended to make a legal or factual argument to the jury as opposed to eliciting relevant testimony. The question is argumentative because it includes legal argument that is properly communicated to the fact finder during summation. This objection will most commonly occur during cross-examination.

A question may also be deemed to be argumentative if the tone or subject of the question is asked in the context of an ongoing disagreement with the witness. Typically, this type of witness examination is characterized by questions (and answers) that are tinged with sarcasm, anger or disdain. This objection may occur during either direct or cross examination.

The legal basis for an objection based upon a question that is argumentative is based upon N.J.R.E. 611 and N.J.R.E. 401. Under N.J.R.E. 611, the trial judge is responsible for maintaining reasonable control over the mode of interrogating witnesses. Logically, an argumentative question is not designed to elicit relevant evidence. Accordingly, the question is objectionable under N.J.R.E. 401 in that the response from the witness will not result in relevant evidence.

Asked and Answered

Objection – The question has been asked and answered.

Objection – The question is repetitive,

Response – The question has not been previously asked of this witness.

Response – The witness has yet to answer the question.

Supporting Legal Argument

Frequently, during the course of trial, counsel will propound a question that was previously asked, especially when he is not satisfied with the initial response from the witness. Conversely, counsel may wish to repeat a question during the examination of the witness in an effort to either underscore the previous answer for the fact finder or in an effort to receive a completely different answer and thereby affect the witness' credibility.

A question that has been propounded to a witness and has been answered by him will provide testimonial evidence for consideration by the fact finder. Logically, however, once a question has been asked by counsel and answered by the witness, nothing of additional evidentiary value can be offered to the fact finder by repeatedly propounding the same question to the same witness. The result is a waste of time and the likely introduction of cumulative evidence.

N.J.R.E. 401 provides that all relevant evidence is admissible. However, relevant evidence may be excluded at trial under N.J.R.E. 403, either when its admissibility would constitute information that is cumulative or the process of eliciting the evidence would constitute a waste of time. Similarly, N.J.R.E. 611(a) also vests the authority in trial judges to exclude the presentation of evidence that would needlessly waste time. Thus, technically, the evidence to be elicited from a witness based upon a question that has previously been asked may be relevant. However, since the answer has already been submitted in evidence, it is properly excluded as either cumulative or a waste of time.

Assuming Facts Not In Evidence

Objection – The question assumes facts not in evidence.

Response – The question is preliminary and does not require the establishment of foundational facts.

Response – I will establish the foundational facts in subsequent testimony.

Supporting Legal Argument

In order to avoid a waste of time or confusion of the issues, the presentation of testimonial evidence should normally follow a logical progression with the establishment of foundational facts serving as support for the introduction of additional evidence.

As example, the preliminary question to a witness, “What did you have for breakfast this morning?” is objectionable since counsel has not established that the witness had breakfast this morning. In this sense, the question assumes facts not in evidence. One way to avoid this objection is to frame the question, “What, if anything, did you have for breakfast this morning?”

Often, this type of objection is waived when the question deals with preliminary matters, issues of no consequence or facts that are not in dispute. In addition, when dealing with preliminary issues, experienced counsel will often establish the foundational evidence for subsequent questions by leading the witness. For example, a preliminary question might take the form, “Officer Lippincott, you are a police officer employed by the Lawrence Township Police Department and were so employed on April 30th of this year. Is that correct?” The witness’ answer will establish the logical foundation for the next series of questions related to the witness’ police activities on April 30th.

On occasion, the presentation of foundational proofs to support a line of questioning may have to be deferred. Trial judges maintain the discretion under N.J.R.E. 611(a) to permit this procedure. Typically, such evidence is conditionally admissible, subject to the proponent’s obligation to satisfy the foundational proofs. Under N.J.R.E. 104(b), if the proponent subsequently fails to establish the conditions of admissibility, the fact finder will be ordered by the judge to ignore the conditionally admitted evidence.

Authentication

Objection – The exhibit has not been properly authenticated.

Response – Evidence has been previously introduced that adequately authenticates this evidence.

Supporting Legal Argument

Pursuant to N.J.R.E. 901, the requirement of evidence authentication imposes upon the proponent of a piece of evidence the obligation to prove that the proposed evidence is what he says it is. This process is necessary to assure that trials will be decided upon accurate, reliable and relevant evidence as opposed to speculation and guesswork. Evidence that has not been authenticated is inadmissible.

Authentication applies to all evidence except for facts that are presented by way of stipulation or judicial notice. Thus, the testimony of a fact witness must be authenticated to the extent that the proponent of the witness must demonstrate that the witness has personal knowledge and a present recollection of the facts to which he will testify. An expert witness must be authenticated by showing he has developed a relevant opinion on a particular issue based upon his training, skill, experience or specialized knowledge.

Documentary evidence must also be authenticated by the proponent. Typically this can be accomplished by the testimony of a person who is familiar with the document, by way of an affidavit of a person who has knowledge of the document. Normally, public documents under seal and official records filed with a governmental agency are considered to be self-authenticating under N.J.R.E. 902.

Both real evidence and demonstrative evidence must be authenticated. This can be accomplished either through the testimony of a person who is familiar with the exhibit or by other extrinsic evidence. For example, a photograph can be authenticated by asking a witness who is familiar with what it purports to show if the photograph “fairly and accurately depicts” the scene at a time that is relevant to the case. In a like manner, a witness may be able to authenticate a weapon that was recovered at the crime scene by referring to some type of marking he placed on the evidence when it was recovered so as to distinguish it from similar types of weapons.

Since the authentication of evidence is a foundational requirement of its admissibility, the process for satisfying the foundational conditions occurs during a N.J.R.E. 104(a) hearing. During such a hearing, the Rules of Evidence do not apply other than a valid claim of privilege or the raising of issues that needlessly waste time. Thus, during an N.J.R.E. 104(a) hearing, the presentation of reliable extrinsic evidence through affidavits is perfectly proper in an effort to authenticate documentary, demonstrative or real evidence.

Best Evidence Rule

Objection – The document is not the best evidence of the contract between the parties. Moreover, no adequate reason has been advanced by counsel for the failure to produce the original.

Response – The contents of the document are not in controversy.

Response – We have presented sufficiently adequate evidence to show that the duplicate document is entirely reliable.

Supporting Legal Argument

The Best Evidence Rule is a preference for documentary originals. It is codified under N.J.R.E. 1002 which requires that, “[t]o prove the content of a writing or photograph, the original writing or photograph is required except as otherwise provided in these rules or by statute.” The original of a document is defined under N.J.R.E. 1001(d) to be “[t]he writing itself or any counterpart intended by the person or persons executing or issuing it to have the same effect.”

This Rule is intended to avoid challenges to documentary evidence based upon claims of forgery, fraud and manipulation. Although these concerns have always justified the Rule in the many decades it has existed, it is arguably more important than ever these days, given the capabilities of modern computers, printers and digital technology.

Limitation to writings and documents

The Best Evidence Rule is normally confined to writings and documents. Under the N.J.R.E. 801(e), a writing is broadly defined to include “letters, words, numbers, data compilations, pictures, drawings, photographs, symbols, sounds, or combinations thereof or their equivalent, set down or recorded by handwriting, typewriting, printing, photo-stating, photographing, magnetic impulse, mechanical or electronic recording, or by any other means, and preserved in a perceptible form, and their duplicates as defined by Rule 1001(d).” Under N.J.R.E. 1001(b), a writing

also includes photographs, X-rays, videotape recordings, films and other such media.

Admissibility of duplicates

In the absence of a genuine question as to the bona fides of a duplicate or some legitimate issue of unfairness, N.J.R.E. 1003 provides that a duplicate of an original document is admissible in evidence to the same extent as the original. In the absence of bad faith, normally a party will also be excused from producing an original document if it has been lost, destroyed, unattainable or in possession of the adverse party as detailed under N.J.R.E. 1004.

Business and public records

Duplicates of business and public records are routinely admitted into evidence. Rule 1:7-6 provides that when the original of a non-public business record has been produced at trial and a clear copy thereof is certified and offered to the court, the court, except for good cause shown, shall permit the copy to be marked into evidence and the original to be returned to its custodian. The parties may also stipulate in advance as to the admissibility of such copy. In a similar manner, under N.J.R.E. 1005, a public record may be proved by a copy, certified as correct in accordance with N.J.R.E. 902, or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, other evidence of the contents may be admitted.

See Also -

1:7-6. Non-public Business Records

Where the original of a non-public business record has been produced at trial and a clear copy thereof is certified and offered to the court, the court, except for good cause shown, shall permit the copy to be marked into evidence and the original to be returned to its custodian. The parties may stipulate in advance as to the admissibility of such copy.

Beyond the Scope of Direct Examination

Objection – The question is beyond the scope of direct examination

Response – The question raises issues that were covered during the direct examination

Response – The question is related to issues of (credibility/bias/interest).

Response – The question is intended to test the (memory/perception) of the witness.

Supporting Legal Argument

N.J.R.E. 611(b) provides that the scope of cross-examination should normally be limited to matters that were raised during the direct examination or matters related to credibility. An expansion of this general Rule is also permitted to allow inquiry into questions related to the witness' memory, perception, bias, interest in the outcome of the case, or any other area or any other topic which, in the discretion of the judge, is appropriate.

Special Rules for Criminal Defendants

Special Rules apply to the scope of cross-examination of the defendant in a criminal trial. Generally speaking, when a criminal defendant elects to testify during the defense case, he may be cross-examined on any aspect of the State's case. Such a cross-examination will typically go far beyond the scope of the defendant's exculpatory testimony in his initial direct examination. Conversely, when the defendant in a criminal trial elects to testify during a preliminary hearing, such as in a motion to suppress evidence, N.J.R.E. 104(d) limits the scope of cross-examination

Chain of Custody

Objection – The exhibit has not been properly authenticated as there is no satisfactory proof that this object is the same one at issue in the case.

Objection – The exhibit has not been properly authenticated as there is no satisfactory proof that this object has not been tamper with or contaminated.

Response – We have met our burden by accounting for this exhibit at every stage since it became relevant to this case. Moreover we have demonstrated that there has been no tampering with the exhibit.

Response – To the extent that there is a defect in the chain of custody, such a defect goes to the weight of the evidence and not its admissibility.

Supporting Legal Argument

The requirement that proponent of an exhibit demonstrate the chain of custody associate with the exhibit prior to the time of trial is a rule of both authentication and relevance. It is intended to assure the fact finder that the exhibit offered in evidence is the precise object that is relevant to the case. Moreover, establishing the chain of custody will have the additional benefit of demonstrating to the fact finder that the exhibit has not been tampered with, altered, contaminated or adulterated since it came into the possession of the proponent.

Proof at Trial

In New Jersey, the establishment of the chain of custody goes to the weight of the evidence, not its admissibility. It is not always necessary that every detailed step in the chain of custody be demonstrated in court. Under N.J.R.E. 901 authentication of an exhibit need only be satisfied by evidence sufficient to support a finding that the matter is what its proponent claims.

Since the establishment of the chain of custody is generally considered to be a preliminary matter, it may be proved during the course of an N.J.R.E. 104(a) hearing during which time the Rules of Evidence do not apply. Accordingly, affidavits and other types of reliable hearsay evidence may be considered by the judge to prove the chain of custody.

Forensic Evidence

Certain types of fungible evidence will require enhanced proof for chain of custody issues. This is especially true when the exhibit has been subject to forensic testing. Thus, for example, in a case where the exhibit is the result of a laboratory test of a blood sample, the chain of custody should account for the sample from the time it was taken from the body of the subject at or near a time relevant to the materials issues in the case until the moment it was forensically tested, with additional evidence introduced to assure the fact finder that there was no tampering, adulteration or contamination of the sample. Thus, when the fact finder considers the findings in the laboratory report, it will have an adequate foundation to conclude that the results of the test came from an unadulterated blood sample taken from the subject at or near a time that was relevant to the case. Similar procedures should be filed when the laboratory testing is related to DNA samples, hair and fibers, controlled dangerous substances and other types of forensic evidence.

Physical Evidence

The chain of custody of physical evidence seized from a crime scene or accident scene begins with placing some type of unique marking on the evidence, segregating the exhibit at the scene and recording both its existence and seizure. Thereafter, each step in the chain of custody of the seized exhibit should be recorded with an accounting for every person who came in contact with the exhibit. The record should extend up to the day of court. In this manner, the fact finder will have an adequate foundation to believe that the exhibit that was seized is precisely the same exhibit that has been offered in evidence in the court room.

Character Evidence

Objection – The question is improper since the character of the (plaintiff/defendant) is not at issue and has not been placed in issue.

Response – The (defendant/plaintiff) has placed his character in issue and we are entitled to contest that issue.

Response – This character trait is an element of the claim (defense) and is therefore a material fact for which character evidence is admissible.

Supporting Legal Argument

Generally speaking, N.J.R.E. 404(a) forbids the introduction of character evidence. This prohibition is intended to prevent evidentiary excursions into spurious, time-consuming or unduly prejudicial issues. It is meant to ensure that trials be decided by competent, relevant evidence as opposed to emotion or the purported (and often unreliable) reputation of a party to the action. Simply put, the fact that a party maintains that he always acts with a certain level of skill or care is entirely self-serving and may not be utilized to raise an inference that he acted in conformity with that level of skill or care on a particular occasion.

Exceptions – Character at Issue in the Case

By contrast, evidence of a person's character trait is relevant and admissible under N.J.R.E. 403(c) when that particular trait is an element of the claim at issue or the defense that has been raised. For example, this will occur in claims for slander or libel where a monetary claim of harm to reputation is at issue or in a personal injury case where the plaintiff claims that his industriousness has been curtailed due to the injuries he suffered as a result of the defendant's negligence.

Exceptions – Criminal Defendant’s Good Character

Under New Jersey law, a defendant in a criminal action may not be prohibited from introducing evidence of his own good character. Essentially, this type of evidence (honestly, passivity, etc.) is intended to permit the fact finder to infer that he is not the type of person who would ever commit this type of offense. This type of evidence is not deemed to be cumulative under N.J.R.E. 403(a)(1). Thus, any number of defense witnesses may testify to the same character trait of the defendant in a criminal trial.

Exceptions – Victim of Crime

Under N.J.R.E. 403(a)(2), the character of the victim of a criminal act is admissible when offered by the defendant. Such traits might include greed, aggressiveness, untruthfulness and the like. Once this type of character evidence has been put in play by the defense, it may be rebutted with other character evidence of the victim by the State. The State may also introduce character evidence related to the peacefulness of the victim in a homicide case in order to rebut the inference raised by the defense that the victim was the aggressor in the assault that resulted in the victim’s death.

Exceptions – Credibility of a Witness

Under N.J.R.E. 608, the credibility of a witness may be attacked by evidence in the form of opinion or reputation, provided that the evidence relate only to the witness' character for untruthfulness. Once an attack by reputation, opinion or other evidence has been made upon a witness' character for untruthfulness, rebuttal evidence in the form of reputation or opinion for the witness' truthfulness may be introduced. Proof of a character trait such as truthfulness or untruthfulness in this circumstance may only be proved by opinion or reputation and not by purported specific instances of past conduct, unless the conduct involved the commission of a crime as detailed in N.J.R.E. 609.

Closing Argument

Objection – The remarks by counsel are improper as they constitute a (personal belief as to a witnesses credibility; a gross misstatement of law; a complete mischaracterization of the evidence; argument that is flagrantly inflammatory and prejudicial). I hereby move for (a cautionary instruction; mistrial.

Response – Your Honor, my argument constitutes advocacy. It is fairly based upon the legitimate inferences which can be draw from the evidence that was admitted by Your Honor during this trial. The ultimate determination of the facts is left for the fact finder.

Response – My statement of the law is entirely correct and in any event, the fact finder will be bound by the Court’s instruction as to the law.

Supporting Legal Argument

As a matter of courtesy, normally New Jersey trial attorneys are hesitant to interpose objections during opening and closing argument. However, in cases where there is a serious question as to be appropriateness of argument, it is vital to object in order to prevent misinformation from reaching the fact finder and to preserve a record for appeal.

New Jersey attorneys are allowed broad latitude in summation and counsel may argue that the fact finder draw conclusions even if the inferences are improbable, perhaps illogical, erroneous or even absurd. Although wide latitude is permitted, counsel's comments “must be restrained within the facts shown or reasonably suggested by the evidence adduced. When the party challenging comments in summation does not object, the remarks will be reviewed on appeal under the **plain error** standard. Then, the only issue for the appellate court to decide becomes whether counsel's comments during closing were “clearly capable of producing an unjust result.” *R. 2:10-2*.

Typically, objection during closing argument are related to perceived misstatements of law or fact. The counter to such an objection is that the ultimate recollection as to the facts of the case is vested in the fact finder and counsel’s

comments are simply advocacy. The same is true when the objection relates to a supposed misstatement of law. Ultimately, the law to be applied by the fact finder will be provided by the trial judge.

Rules of Professional Responsibility

The New Jersey Rules of Professional Responsibility provide limitations on closing arguments by mandating that an attorney in trial may not state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of the accused. Thus, unprofessional tactics during summation, including citing a personal belief in the credibility of a witness or vouching for the *bona fides* of a litigant on occasion may result in the imposition of attorney discipline.

Special Rules for Public Prosecutors

Special rules exist for summations in criminal trials given by public prosecutors. Criminal trials can be emotionally charged proceedings. Prosecutors in these cases are expected to make vigorous and forceful closing arguments to juries. A prosecutor is not required to conduct himself in a manner appropriate to a lecture hall. He is entitled to be forceful and graphic in his summation to the jury, so long as he confines himself to fair comments on the evidence presented. Thus, although it is well-established that prosecuting attorneys, within reasonable limitations, are afforded considerable leeway in making opening statements and summations, the defendant's right to a fair trial mandates certain limitations on these presentations to the fact finder. Although the Supreme Court has often criticized rhetorical excess by prosecutors during summations, such incidents, with rare exceptions, never result in reversal of the conviction, let alone the imposition of attorney discipline.

Competence to Testify

Objection – The witness is not competent to testify because he (has no present recollection; has no personal knowledge of any relevant facts related to this case; has no capacity to understand the requirement to speak to truth; cannot adequately communicate with the fact finder.)

Response – Your Honor, all witness in New Jersey are presumed to be competent to testify. There has been finding by this court that the witness lacks (personal knowledge, capacity to understand the requirements of the oath; no present recollection; no ability to communicate his testimony to the fact finder.)

Supporting Legal Argument

New Jersey does not recognize any type of statutory disqualification for witnesses based upon a conviction for crimes involving dishonesty. In fact, just the opposite is the case. Under N.J.R.E. 601, every person is presumed to be competent to be a fact witness at trial. This presumption can be overcome by a showing that the proposed witness is incapable of expressing himself in a way that can be understood by the judge and jury either directly or through interpretation. A witness will also be disqualified if the judge finds that he is incapable of understanding his duty to speak the truth. By law, neither a judge nor a juror may testify as a fact witness during the trial.

Typically, the competence of a person to testify at trial is considered to be a preliminary question and is resolved by way of a hearing under N.J.R.E. 104(a). The decision of the trial judge in these matters will be reversed only upon a showing of an abuse of discretion.

Oath or Affirmation

The requirement of an oath or affirmation as a prerequisite to trial testimony is set forth under N.J.R.E. 603. Issues related to the ability of the witness to understand the legal obligation under the oath to speak the truth generally arise in cases where the proposed witness is a young child or a mentally subnormal person. The

two issues for the court in these cases are whether the proposed witness understands the concept of speaking the truth and that punishment of some kind will result if he does not speak the truth. In addressing the first issue, it is necessary that the court be satisfied that the proposed witness be able to discern the difference between facts and fantasy and be able to relate only the truth. With regard to wording of the oath, no particular words or phrases are necessary. It is sufficient that the proposed witness acknowledge that he will be subject to some measure of punishment if he fails to speak the truth.

Personal Knowledge

Under N.J.R.E. 602, a fact witness may not testify to a matter unless foundational evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. If the fact witness has no personal knowledge, he is not qualified to be a witness.

No Present Recollection

If the witness maintains that he has no present recollection of the facts, he will have no relevant evidence to communicate to the fact finder. However, when this assertion is made by a fact witness, the examining attorney has two options available. First, the attorney may attempt to refresh the witness' recollection by showing him some object or writing that is intended to jog his memory. If the witness' memory is thus revived, he may continue and provide testimony based upon a present recollection. As an alternative, in those cases where the witness' recollection is dead and cannot be refreshed, the proponent of the witness may utilize a recorded statement in a reliable form that was made by the witness at a time in the past when he did have a recollection. In this instance, the witness is excused and the recorded statement is read to the fact finder.

Relating Testimony to Fact Finder

A fact witness must be able to communicate his testimony to the judge and fact finder in a meaningful way. In rare instances, disease or profound injury will render the witness incapable of conventional communication. However, such a person may be permitted to testify through the use of a reliable interpreter or mechanical device that will relate his testimony in a meaningful way during the trial. More frequently, the communication issues are related to foreign language issues, hearing impairment and the like. The obstacles are easily overcome through the use of

interpreters. The qualification of a person to adequately interpret trial testimony is a question for the trial judge.

Compound Question

Objection – Compound Question

Response – I will withdraw the question and rephrase.

Supporting Legal Argument

A compound question contains two independent questions within a single sentence, the answer to which may engender confusion for both the witness and the fact finder. For example, the question, “Did you call the police from the scene of the accident and then later visit your insurance agent?” An affirmative response to the question would have to be based upon the truthfulness of both parts of the question. A negative answer, however, might mean that the witness performed one of the actions in the question but not the other or neither of the actions. Such a question does little to advance the purpose of presenting evidence designed to ascertain the truth.

N.J.R.E. 611(a) authorizes the trial judge to control the mode of witness interrogation with an eye toward eliminating needless consumption of time and promoting the ascertainment of truth. For this reason, the Rule permits the trial judge to sustain an objection to any question that will waste time and not promote the fact finding process. A compound question is properly excludable under this Rule of Evidence.

Continuing Objection

Objection – Your Honor, for the record, please note our continuing objection to the admission of this exhibit and all the questions propounded to this witness related to the exhibit.

Supporting Legal Argument

When an exhibit has been admitted over an objection or where an objection to a line of inquiry has been overruled, counsel may preserve the record by use of a continuing objection. The use of this technique avoids the need for counsel to interpose an objection to every succeeding question that is propounded to the witness.

When interposing a continuing objection, it is important the counsel set forth on the record the parameters of the objection so that a reviewing court can be assured that subsequent questions fall within the ambit of the continuing objection. This is required under Rule 1:7-2 for the benefit of the reviewing court on appeal.

Cumulative

Objection – Your Honor, the testimony (exhibit) is needlessly cumulative in that several other witnesses have testified to the issue and no new relevant evidence can be expected from this witness (exhibit).

Response – The testimony (exhibit) will add important new details and relevant evidence that was not previously disclosed.

Response – The testimony is not cumulative in that it is needed to corroborate testimony that has been previously introduced.

Supporting Legal Argument

Under N.J.R.E. 402, all relevant evidence is admissible. However, under N.J.R.E. 403 even relevant evidence can be excluded from consideration by the fact finder under certain circumstances. One instance where otherwise relevant evidence can be excluded under N.J.R.E. 403(b) occurs when the proposed evidence is needlessly cumulative. Cumulative evidence is needless in the sense that it constitutes proposed testimony or exhibits intended to prove facts or raise inferences that have previously been established in the trial by other witnesses. For example, in a criminal trial for simple assault by a pillow, the defendant calls a witness who testifies that being gently struck on the head by a particular feather pillow does not cause any pain or discomfort. Thereafter, the defendant wishes to offer three other witnesses who have had similar experiences with the same feather pillow, all of whom wish to testify in the same manner. At some point, the judge would determine to restrict the additional testimony under both N.J.R.E. 611(a) and N.J.R.E. 403(b) on the basis that the evidence would be needlessly cumulative. The additional testimony from the next three witnesses would add nothing new to the evidence going to the fact finder inasmuch as the point had already been established by the first witness.

On the other hand, there may be occasions where the presentation of cumulative evidence is not needless. For example, when there has been a substantial attack on the credibility of a witness' testimony as to a particular issue, evidence that might otherwise be considered cumulative should be admissible to buttress or corroborate the previously admitted evidence.

Curative (Cautionary) Instructions

Objection – Your Honor, I move to strike the answer on the following grounds (note specific grounds). I further request that the Court instruct the jury to disregard the testimony and caution them not to consider it for any purpose in this case.

Supporting Legal Argument

One of the more common complaints one hears in New Jersey from New Jersey lawyers following the some type of inappropriate, inadmissible or prejudicial testimony from a witness is, “Judge, you cannot un-ring a bell.” By this, counsel usually means that the jury has already heard the offending testimony and has been poisoned by exposure to it. Trial judges confronted with this situation generally have two options available: the extreme option of declaring a mistrial and the more common option of giving an immediate curative instruction to the jury.

A **curative instruction** is intended to ameliorate potential prejudice arising from the jury's exposure to inadmissible evidence. As the United States Supreme Court has explained, “Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently.” Thus, the determination of whether “inadmissible evidence is of such a nature as to be susceptible of being cured by a cautionary or limiting instruction, or instead requires the more severe response of a mistrial, is one that is peculiarly within the competence of the trial judge, who has the feel of the case and is best equipped to gauge the effect of a prejudicial comment on the jury in the overall setting. “The adequacy of a **curative instruction** necessarily focuses on the capacity of the offending evidence to lead to a verdict that could not otherwise be justly reached.” Typically, a reviewing court will afford great deference to trial judges in providing curative instructions and will reverse such decisions only cases of an abuse of discretion. This is especially true when the instruction is given immediately and in clear, unmistakable language. The adequacy of a **curative instruction** necessarily focuses on the capacity of the offending evidence to lead to a verdict that could not otherwise be justly reached.

Discovery

Objection – My adversary did not disclose the existence of this evidence (witness/line of testimony) in pretrial discovery despite our demand for all evidence that would be used at trial.

Response – At the time the discovery request was made, this evidence was not within our custody and control.

Response – At the time the discovery request was made, this evidence was not materially related to any relevant issues in the case.

Supporting Legal Argument

The Rules of Court control the procedures for the exchange of discovery and provides the trial judge with a wide variety of powers to enforce discovery orders. In criminal matters, Rule 3:13 controls the exchange of discovery. In the municipal court, a similar procedure is outlined in Rule 7:7-7. When disputes arise during the course of trial, the judge may order the offending party to permit the discovery or inspection of materials not previously disclosed, grant a continuance or delay during trial, or prohibit the party from introducing in evidence the material not disclosed, or enter any other order as it deems appropriate.

Just like the New Jersey Rules of Evidence, the rules of discovery are designed to accomplish fairness. A defendant is entitled to know the State's case against him within reasonable time to permit the preparation of a defense. Indeed, the principal purpose of the discovery rules is to assure the parties every legitimate avenue of inquiry prior to trial to enhance the search for the truth.

In the civil context, discovery is controlled by Rule 4:10-1 through Rule 4:10-4. The judge in these cases maintains plenary power to control the exchange of discovery among or between the parties and to take appropriate action at trial when relevant evidence has been properly demanded and not exchanged.

Expert Witness – Competence to Testify

Objection – The witness has offered an opinion that is not rationally based upon his perception. Such testimony is inadmissible in the absence of a finding by the court that he witness is qualified as an expert.

Response – As a foundation for this testimony, I have established that the witness has sufficient (skill, knowledge, education, experience, or training) to qualify as an expert witness. Accordingly, I request that he be permitted to offer his opinion.

Supporting Legal Argument

In New Jersey, there are but three basic requirements for the admission of expert testimony:

- (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror;**
- (2) the field testified to must be at a state of the art that such an expert's testimony could be sufficiently reliable; and**
- (3) the witness must have sufficient expertise to offer the intended testimony.**

N.J.R.E. 702 provides that an expert may qualify by demonstrating a particularized skill, knowledge, experience, education or training in an area where the fact finder cannot be expected to have specialized knowledge. The point of permitting expert testimony is to aid the fact finder in understanding technical evidence.

The threshold for establishing a witness' expertise in a particular area is relatively low. Admittance as an expert simply requires a showing to the satisfaction of the court during an N.J.R.E. 104(a) hearing of an enhanced level of knowledge that will help the fact finder understand the evidence. Trial judges are afforded wide latitude in making these determinations and normally will be reversed for a clear abuse of discretion.

Specialized Lay Witness

New Jersey recognizes a type of hybrid expert that is known as a specialized lay witness. Typically, an expert witness played no part in the underlying facts and circumstances that gave rise to the controversy at trial. By contrast, a specialized lay witness can be thought of as an expert who participated in the as it was occurring and is able to use his training and experience to provide an explanation to the fact finder on some technical aspect of the case that the witness observed in real time. Often, the specialized lay witness will be a police officer who responds to the scene of some event and can provide the fact finder with information that will help explain technical issues.

Expert Witness – Ultimate Issue

Objection – I move to strike this answer. The witness' opinion is unduly prejudicial. Any residual value in this evidence is clearly outweighed by its prejudicial impact.

Response –The witness' opinion goes to the ultimate issue in the case and is admissible under N.J.R.E. 704.

Supporting Legal Argument

N.J.R.E. 704 provides that an expert witness may express an opinion that subsumes the ultimate issue to be decided by the fact finder, provided that the opinion is otherwise admissible under N.J.R.E. 702 and 703. Notwithstanding the fact that such an opinion might be relevant and probative on a particular issue, it is still subject to exclusion under N.J.R.E. if its probative value is substantially outweighed by the risk of prejudice to the fact finder. For example, an opinion from an expert which amounts to little more than an expression of his belief as to how the case should be decided, or as to the amount of damages which should be given, or as to the credibility of certain testimony, is improper as it has a tendency to substantially outweigh whatever slight probative value the opinion might have.

Form of the Question

Objection – I object to the form of the question.

Response – The question is correct as to form and will be readily understood by the witness, the fact-finder and the court.

Response – I’ll rephrase the question.

Supporting Legal Argument

This objection is appropriate where the form of the question is likely to confuse or mislead the witness, the fact finder, the court or all three. Typical examples are compound questions, those that are a double (or even triple) questions posed to a witness at one time. For example, the question, “Officer did you investigate an accident on June 10th and did you see the defendant there?” has the capacity to mislead the fact-finder if the witness responds “yes”. Does that mean he investigated the accident, saw the defendant or both? This question is also objectionable in that it may assume facts not in evidence, such as the identity of the defendant.

Once this objection has been sustained, the attorney propounding the question should simply rephrase it and break the question down into small pieces or logical bits.

Habit and Routine

Objection – The witness has failed to establish that the purported conduct constitutes a habit or routine under N.J.R.E. 406. The testimony supports a finding of mere character as opposed to habit.

Response – We have that the consistent pattern of conduct is sufficient to satisfy the requirements of a habit or routine.

Supporting Legal Argument

Use of N.J.R.E. 406 related to evidence of habit or routine must be distinguished from character evidence. While evidence of a person's character is generally prohibited at trial under N.J.R.E. 404(a), evidence that a witness acted on a particular occasion in conformity with a well-established, personal habit or routine is admissible under N.J.R.E. 406. Evidence of habit may thus support an inference that on a specific occasion a person acted in conformity with that habit. By contrast, evidence of a person's character or a character trait, including care or skill or lack thereof, is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion.

It is the degree of specificity that distinguishes habit from character evidence. Thus, habit evidence depicts, with specificity, a routine practice in a particular situation. It involves a regular practice of responding to a particular kind of situation with a specific type of conduct. Before a court may admit evidence of habit, the offering party must establish the degree of specificity and frequency of uniform response that ensures more than a mere tendency to act in a given manner, but rather, conduct that is semi-automatic in nature. Habit may be shown by evidence of a sufficient number of specific instances of conduct.

By way example, in a dog bite case, evidence that the defendant is by nature a cautious person in the care of the dog would be inadmissible as character evidence. However, evidence that the defendant has owned the dog for a number of years and routinely locks the gate where the dog is kept every time the dog is returned from a walk should be admissible as evidence of habit or routine.

The party offering this type of evidence must establish the habitual nature of the alleged practice during an N.J.R.E. 104(a) hearing. Although there are no precise standards for determining whether a behavior pattern [such as bounding down stairs two or three at a time] has matured into a habit, two factors are considered controlling as a rule: adequacy of sampling and uniformity of response. Simply put, it is the specificity of the conduct that is the main distinguishing feature between

conduct that is born of habit as opposed to character. Under N.J.R.E. 406, evidence intended to establish specific instances of conduct to prove a habit need not be corroborated, although instances of past conduct may be introduced to support a finding that the conduct occurred as a result of habit.

Hearsay

Objection – The question, in its present form would require a response from the witness that would constitute hearsay not within any exception.

Objection – Hearsay. I move that the answer be stricken and the fact finder instructed that it not be considered for any purpose.

Response – The statement is not being offered for the truth of the matter asserted, but is offered

[as circumstantial proof of the speaker’s state of mind (malice, hatred, notice, knowledge, plan, premeditation.)];

[to demonstrate the effect the statement had on the listener];

[to impeach the witness as a prior inconsistent statement];

[because the statement constitutes an operative fact such as a contractual offer, a contractual acceptance or defamatory words that establish slander.]

Pursuant to N.J.R.E. 802, hearsay evidence is not admissible in trials in New Jersey unless it falls within one of the well-delineated exceptions provided by the Rules of Evidence or other law. It is defined under N.J.R.E. 801(c) as a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. The concept of a statement as expressed in the Rule is broadly defined under N.J.R.E. 801(a) to include written and verbal assertions as well as non-verbal conduct by a person if it intended by him to constitute an assertion.

Policy reasons for excluding hearsay evidence are rooted in assuring that the factual determinations made at trials will be based upon the freshest, most reliable information available. A witness who communicates the statement of a hearsay declarant acts merely as a human tape recorder, parroting back his version of the hearsay declarant’s out-of-court statement. There is no effective opportunity to explore the declarant’s memory, opportunity to perceive, motive to lie and other

issues related to reliability. Beyond the reliability issues, in a criminal case, hearsay testimony proffered by the State precludes the defendant from confronting the witness against him in open court.

By definition, a statement that does not constitute an assertion or one that is not offered for the truth of the matter asserted is not hearsay. For example, a witness who testifies at trial that he saw a doctor at the scene of a mass catastrophe placing some victims into ambulances and others into hearses would not be offering hearsay testimony. By his conduct, the doctor was not making an assertion intended to be statement within the meaning of N.J.R.E. 801(a). Rather than intending to communicate which people were dead and which were alive, such a doctor was merely be doing his job at the accident scene.

Other examples of assertions that do not generally constitute statements include questions, greetings or epithets. In addition, words that formulate the operative facts surrounding the controversy at trial do not constitute hearsay. These include expressions of offer or acceptance in a contracts case or the words that are purported to constitute defamation in a slander case.

Hearsay – Admissions – In General

Objection – The question calls for hearsay.

Objection – Hearsay. I move that the answer be stricken and the fact finder instructed that it not be considered for any purpose.

Response – The statement constitutes an admission and is admissible as an exception to the hearsay rule under N.J.R.E. 803(b)(1).

Supporting Legal Argument

Unlike the Federal Rules of Evidence, New Jersey follows the common law tradition in our Rules of Evidence by treating the admissions of a party as an exception to the hearsay rule. This is codified under N.J.R.E. 801(b)(1). Part of the underlying rationale for this exception is the inherent reliability such statements will normally carry, coupled with the idea that parties to litigation are responsible for their own statements. This is especially true when the statement was made as part of a judicial proceeding. Thus, by way of example, in the absence of a civil reservation, a party's plea of guilty in a criminal or quasi-criminal proceeding will be regarded as an admission in a subsequent civil trial.

The hearsay exception for admissions under N.J.R.E. 801(b)(1) is not dependent upon the availability of the declarant. Moreover, the admission need not necessarily be against the interest of the declarant at the time it is made. Indeed, in both the civil and criminal contexts, anything a party says can and will be used against him.

Exclusion of Admissions from Evidence

In criminal prosecutions, the voluntariness of an admission must be established by the State beyond a reasonable doubt. Procedurally, a defendant must first challenge the voluntariness of the admission, frequently in the form of a confession, under a special hearing conducted under N.J.R.E. 104(c). During such a hearing, the Rules of Evidence apply and the burden of production of the issue of voluntariness is on the State. The State's burden of proof on this issue is beyond a reasonable doubt.

In addition to voluntariness issues, admissions in a criminal case may also be excluded as a result of issues associated with a valid claim of privilege, improper administration of *Miranda* warnings or *Bruton* problems at trial. Finally, an

admission may be excluded at trial under the balancing test associated with N.J.R.E. 403 in those rare circumstances where the probative value of the admission is substantially outweighed by its prejudicial impact.

Hearsay Exceptions

Adoptive Admissions – NJRE 803(b)(2)

***Crawford* – Crawford v. Washington, 541 U.S. 36 (2004)**

Present Sense Impression (N.J.R.E. 803(c)(1))

Excited Utterance (N.J.R.E. 803(c)(2))

State of Mind (N.J.R.E. 803(c)(3))

Past Recollection Recorded (N.J.R.E. 803(c)(5))

Business Records (N.J.R.E. 803(c)(6))

Absence of a Business Records (N.J.R.E. 803(c)(7))

Public Records (N.J.R.E. 803(c)(8))

Learned Treatise (N.J.R.E. 803(c)(18))

Declaration against interest (N.J.R.E. 803(c)(25))

Tender years exception (N.J.R.E. 803(c)(27))

Immaterial (N.J.R.E. 401 and 403)

Objection – The question calls for information that is immaterial.

Response – The answer is both relevant and material in that it will help prove (disprove) a fact that is important to the contested issues in the case.

Supporting Legal Argument

Generally speaking, the New Jersey Rules of Evidence have dispensed with the concept of materiality in favor a simplified standard involving a determination as to whether the proposed evidence relates to something that is important to the case. Specifically, N.J.R.E. 401 defines relevant evidence as evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action. The “fact of consequence to the action” represents the materiality requirement.

From the foregoing, one can see that the answer to a propounded question may elicit relevant evidence, but when the nature of the evidence is only marginally related to a fact of consequence in the case, the answer would be immaterial and excludable under N.J.R.E. 403.

Irrelevant (N.J.R.E. 401)

Objection – The question calls for irrelevant information.

Response – The answer is relevant in that it will help prove (disprove) a fact that is important to the case.

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Supporting Legal Argument

From a logical perspective, the Rule regarding relevance is intended to bring a measure of logic and focus to the trial process. Simply put, without a Rule limiting the trial of cases to a consideration of relevant evidence, no trial would ever end. Relevant evidence is defined under N.J.R.E. to constitute evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action. Except as otherwise provided by the Rule of Evidence, all relevant evidence is admissible.

By contrast, there are occasions when relevant evidence may be lawfully excluded. This will generally occur when if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence. Thus, evidence including autopsy photographs of a child homicide victim, evidence of the defendant's prior criminal record or multiple witnesses all testifying to the same fact are all examples where otherwise relevant evidence may be excluded due to undue prejudice, waste of time or misleading the fact-finder.

Lack of personal knowledge (N.J.R.E. 602)

Objection – There has been no foundation established to demonstrate that the witness is testifying from personal knowledge.

Response – The witness has established through previous testimony that he is testifying from his personal knowledge.

Supporting Legal Argument

With the exception of experts, witnesses at a trial must base their testimony upon their own personal knowledge. This requirement provides a certain degree of freshness and reliability to the evidence.

In order to meet this requirement, the proponent of a witness must establish a foundation that the information being communicated from the witness to the fact-finder comes from the witness' personal knowledge. A typical line of foundational questions will establish when and where the witness was and what he subsequently perceived.

Lay opinion (N.J.R.E. 701)

Objection – The question calls for an opinion.

Response – The opinion expressed by the witness was rationally based upon his perception and is not of the kind that normally requires expert testimony.

Supporting Legal Argument

Under N.J.R.E. 701, a lay witness may offer testimony in the form of an opinion if the opinion is rationally based upon the witness' perception and will assist in understanding the witness' testimony or in determining a fact in issue. Typically, the lay opinion will involve areas of human experience that do not require any specialized training skill or knowledge. Typical examples of lay opinion may concern the following:

Intoxication by alcohol

Anger/Rage

Insanity

Fatigue

Approximate speed of motor vehicles

Injury

Note that with injury, a lay opinion that the victim's leg was broken based upon a compound fracture seen by the witness would likely be ruled as admissible. However, in the absence of a compound fracture, the diagnosis of a broken leg must normally be made through the analysis of x-rays, a subject that is properly within the realm of experts.

Leading Question (N.J.R.E. 611)

Objection –Leading question.

Response – The question is not leading in that it does not suggest the answer.

Response – I have previously sought and have been granted leave by the court to ask this witness leading question due to (hostility/adverse interest/extreme youth/inability to express himself).

Supporting Legal Argument

A leading question is one that suggests the answer. Under normal circumstances, leading questions are not permitted during the direct examination of a witness, except as necessary to develop a witness' testimony. For example, preliminary foundational issues that are not open to dispute are often handled by way of leading questions. For example, the proponent of a police officer who investigated a motor vehicle accident may properly ask the question, "Officer, isn't true that you are a sworn police officer with the XYZ Police Department?"

Other exceptions to this rule can occur by leave of the court under N.J.R.E. 611(a) when the witness is deemed to be adverse to the proponent of the witness, is hostile or unresponsive on the witness stand. Leading questions may also be permitted in the discretion of the trial judge in cases where the witness has difficulty testifying, such as in the case of a small child or a mentally sub-normal person.

Leading questions are permitted on cross-examination although the use of this mode of interrogation may be limited by the trial judge under N.J.R.E. 611(a) in an effort to avoid needless consumption of time, and protect witnesses from harassment or undue embarrassment.

Motion to strike

Objection – I move to strike the witness’s answer because it was (unresponsive, incompetent, hearsay, unduly prejudicial). I further ask for a curative (limiting) instruction to the fact-finder to disregard the answer.

Response –The witness’ answer was entirely proper and the fact-finder is entitled to consider or reject it as evidence.

Supporting Legal Argument

This application is properly made when a witness has provided an improper answer to an otherwise proper question. The legal issue is not whether opposing counsel liked or agreed with the answer, but rather the answer was legally improper, typically because it contained inadmissible evidence such as hearsay, privileged communications, unduly prejudicial data or irrelevant, extraneous information. Whenever this occurs, the proper response is to immediately (and certainly before the next question is asked by counsel) move before the court to strike the answer and caution the fact-finder to ignore the answer it has just heard.

Not in Evidence

Objection – There is no foundation for that question.

Objection – There question calls for facts not in evidence.

Objection – The argument of counsel cites facts that are not in evidence.

Response – I withdraw the question and will not establish a foundation.

Response – I have previously established this point through testimonial (documentary) evidence. It is the fact-finder’s function to use his own recollection in order to determine what facts have been proven.

Supporting Legal Argument

The trial of a case should proceed in a logical progression with one fact building upon another. On occasion, counsel will propound a question for which a factual foundation has not been set. For example, the question, “Officer, after you stopped the vehicle, what did you say to the defendant?” would be objectionable unless a foundation had been laid that the witness in fact saw the defendant, learned his identity and then spoke to him. The proper way to lay a foundation for this question would be to ask several short preliminary questions:

Officer, after you stopped the vehicle, did you see anyone inside?

Did you learn the identity of that person?

Is that person in court here today?

Can you please point out that person here in court?

Now, did you have any conversation with the defendant immediately after you stopped the vehicle?

What did he tell you at that time?

The objection is also appropriate during closing argument when counsel makes reference to facts that were not placed in evidence during the trial. The trial judge will normally give a cautionary instruction and strike legal argument related to evidence that was clearly not admitted or was excluded. If a dispute arises as to whether the questioned evidence (usually testimonial) was admitted, the proper argument is that it is the sole function of the jury (fact-finder) to recall, weigh and evaluate the evidence admitted at trial.

Prejudice (Unduly prejudicial) (N.J.R.E. 403)

Objection – The question calls for testimony that is unduly prejudicial.

Response – All the evidence I am attempting to introduce is prejudicial to my adversary. The question is whether it is unduly prejudicial and the evidence that will be produced by this question is clearly not unduly prejudicial.

Supporting Legal Argument

The burden counsel must overcome in order to exclude otherwise relevant evidence on the grounds of prejudice is high. Under N.J.R.E. 403, the trial judge must find that the anticipated evidence has a probative value that will be substantially outweighed by the risk of undue prejudice. The key factors to keep in mind when raising this objection is that the probative value must be “substantially” outweighed by the risk of “undue” prejudice.

To buttress the argument here, one of the arguments that can be advanced is that the prejudicial nature of the evidence will inflame the passions of the jury or divert their attention from evidence. Put another way, the unduly prejudicial evidence may influence the jury to decide the case based upon irrelevant emotion factors as opposed to the admissible evidence and the law as instructed by the trial judge.

Unresponsive

Objection – I move to strike the answer as unresponsive to the question. Moreover, I seek an instruction from the Court ordering the witness to properly and fully respond to Counsel’s question.

Response – I’ll rephrase the question.

Response – It is apparent that the witness has answered the question to the best of his ability.

Supporting Legal Argument

When a question propounded by counsel produces an unresponsive answer from the witness, the proper course is for counsel to move to strike the answer (such as it is) as unresponsive and seek an instruction from trial judge.

Unresponsive answers may be the result of a wide array of reasons, including idiotic or confusing questions, or factors such as hostility, stupidity, fatigue, distraction, fear, reluctance and the like on the part of the witness.

Unresponsive answers can change the entire dynamic of a criminal trial in the sense that a failure by a prosecution witness to provide responsive answers during cross-examination may result in a striking of his direct testimony. Such conduct runs afoul of the confrontation clause in that it deprives the defendant of a fully, fair opportunity to confront his accuser. In a sense, a witness who persists in giving unresponsive questions during direct or cross-examination in a criminal trial is the functional equivalent of a witness who simply refuses to testify at all.

Finally, it is critical to note that multiple instances of unresponsiveness by a witness who is permitted to testify may be a critically important factor for purposes of closing argument and should be pointed out and stressed to the jury in appropriate instances.

