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[LETTER to a young trial lawyer]

THE INS AND OUTS OF EXCLUDING EVIDENCE

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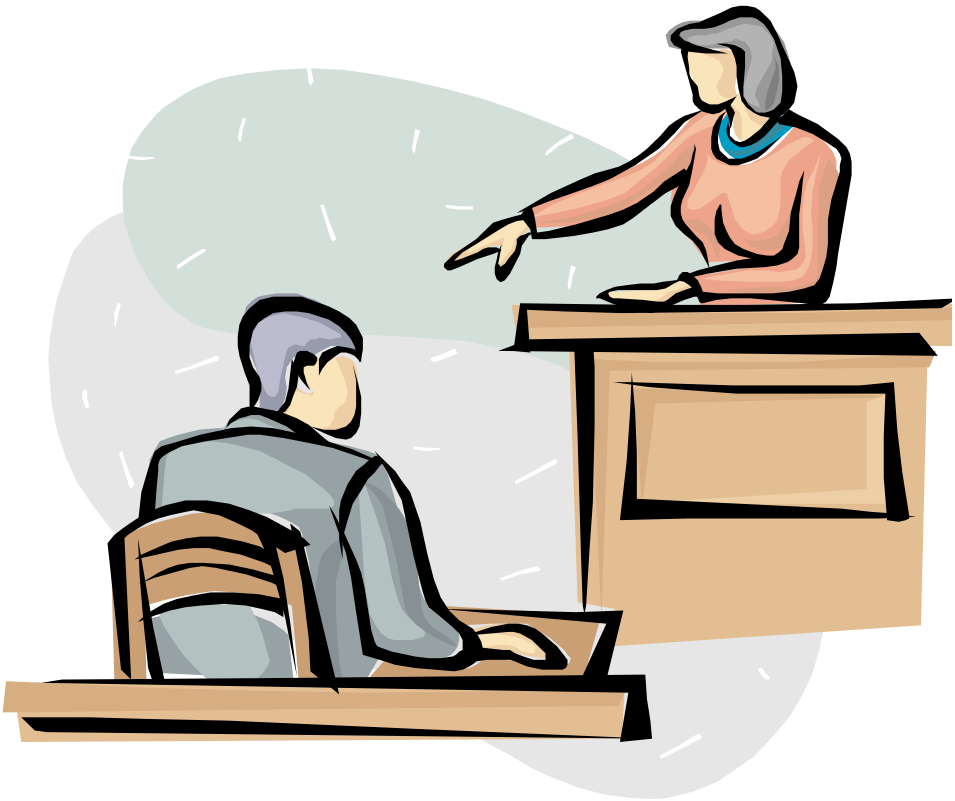

Civil litigators often overestimate the amount of evidence courts will exclude. Fewer trials mean that litigators focus more on the technical rules of exclusion than on the exceptions, which in many instances threaten to swallow the rules. Sitting at their desks with large stacks of e-mail evidence, litigators imagine every possible ground of exclusion. The billable hour tends to encourage many litigators to undertake this analysis with zeal.

But as litigators prepare for trial, they should consider at least three principles. First, courts tend to construe the rules of evidence in favor of admission and against exclusion. Second, the dynamics of trial practice tend to lead to admission of evidence through compromise rulings, so-called "opening the door" by the opponent and court-encouraged evidence-bargaining. Third, once the trial court has admitted the evidence, the losing party faces an even higher standard to obtain a reversal on appeal.

• *Wide-open rules of evidence?* Many courts have expansive interpretations of the rules of evidence. Take, for example, the hearsay rule. Many experts contend, with reason, that in the hands of trial courts, the so-called residual hearsay exception (for example, Federal Rule of Evidence 807) has swallowed the rule. That was not the original intent of the drafters. The Senate Committee Note to Rule 807 states:

> It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The Committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions. . . . The residual exceptions are not meant to authorize major judicial revisions to the hearsay rule.

But many courts have ignored this piece of legislative history. As evidence scholar Faust Rossi observed nearly 20 years ago in his article "The Silent Revolution" in the *American Bar Association Litigation Journal*, under the residual hearsay exception, "hearsay does not seep in. It floods in."

Technology adds to the flood. Xerox

machines, e-mail and other advances in information technology exponentially have multiplied the hearsay that parties may offer. For example, courts often admit out-of-court e-mail statements as "nonhearsay" when the party offers the e-mail to show the declarant's state of mind, such as notice of an act or the declarant's motive for taking a particular action. Courts often appear loath to exclude hearsay in important e-mails, even if application of the residual exception seems tenuous.

• *More leniency in civil cases.* Any lawyer who has briefed a motion *in limine* knows that a large number of evidence cases come from criminal matters. In many instances, civil litigators give more weight to evidentiary rulings in criminal cases than judges do. As Judge Jack Weinstein of the Eastern District of New York observed in his treatise "Federal Evidence," the rules of exclusion of hearsay in criminal matters are "suffused with constitutional hues and, therefore, applied more stringently than in civil cases."

The U.S. Supreme Court confirmed Weinstein's view in its landmark decision *Crawford v. Washington* (2004), in which the high court applied the confrontation clause of the Sixth Amendment to limit the use in a criminal case of out-of-court statements of a declarant not subject to cross-examination. By contrast, litigants in civil cases have no Sixth Amendment right to confront accusers. Civil litigants should be mindful of this distinction.

• *Compromise, door-opening and courtroom dynamics.* The dynamics of courtroom practice encourage further admission of evidence. Courts often will overrule both sides' hearsay objections on the grounds that each party offered hearsay and, rather than exclude all the documents, the court may admit all the documents under the residual hearsay exclusion. That result should hardly come as a surprise because each party arguably opened the door to such out-of-court statements.

Indeed, some courts may encourage parties to bargain with one another and thereby further insulate themselves from successful appellate challenges (which typically are not likely, as discussed below). The Solomonic dynamics of the courtroom often trump the strict letter of the rules.

• *The eye of a needle.* The appellate standards encourage these dynamics. Even if the trial court commits error in admitting hearsay or other inadmissible evidence, that is not enough. Rule 103(a) of the Federal Rules of Evidence requires a showing of abuse and that the rule affected "a substantial right of the party." This is a difficult standard.

Moreover, apart from Rule 103(a), appellate standards presume a valid verdict. For example, according to the 5th U.S. Circuit Court of Appeals' opinion in *Liberty Mutual Insurance Co. v. Falgoust* (1967), "The jury is, of course, the traditional finder of the facts, and its verdict must stand unless the appellant can show there is no substantial evidence to support it." In applying this standard, the court will consider "the evidence in the light most favorable to appellees, and clothing it with all reasonable inferences to be deduced therefrom."

As Judge William J. Bauer of the 7th U.S. Circuit Court of Appeals observed in *United States v. Glieser* (1991), "Appellants who challenge evidentiary rulings of the district court are like rich men who wish to enter the Kingdom; their prospects compare with those of camels who wish to pass through the eye of a needle. See Matthew 19:24."

In short, lawyers who count on the court excluding evidence should proceed with some caution. Once a case goes to trial, many forces are at work that tend to bring evidence in rather than keep it out.

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