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ARTICLES

Ethics, Evidence, and the Modern Adversary Trial

DANIEL D. BLINKA*

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I soon discovered that knowing the rules of evidence and applying them are two very different things, and that in fact you can learn them only by applying them, and not by studying them (just as you can learn to ride a bicycle only by doing it, and not by studying the pertinent rules of physics), because their meaning and significance emerge only in the context of a trial.

Judge Richard A. Posner,
U.S. Court of Appeals for the Seventh Circuit¹

“I had a right, if I could, indirectly to convey observations to the fact; and whatever other people may say, I shall certainly take the liberty of doing it; for what the law of England will not permit me to do *directly*, I will do *indirectly*, where I can.” (Translation: I will do anything I can get away with.)

Attorney William Garrow (c. 1800),
“translated” by John Langbein²

Unless lawyers abide the rules because they are devoted to our truth-seeking processes, those processes are not likely to survive.

Judge James C. Hill, Senior Judge,
U.S. Court of Appeals for the Eleventh Circuit³

I. INTRODUCTION

What ethic governs the modern adversarial trial? We know (or at least are told) that a trial’s primary objective is to determine “the truth” in a “just” manner.⁴ We also know that trials are peculiarly shaped by phalanxes of evidentiary and procedural rules that channel parties’ presentation of proof. Yet there are serious gaps in our understanding. First, how do lawyers actually use these rules at trial? As we will quickly learn, lawyers who look to evidence rules as a guide to trial conduct will be left wanting. Second, how should lawyers apply evidence rules at trial? What normative force do the rules have, or should they have, in governing trial conduct? Are lawyers who ignore evidentiary rules behaving “unethically” in any sense?

Consider four short scenarios:

Scenario #1: On direct examination, proponent asks a question that calls for hearsay evidence for which there is no readily apparent exception. Opposing counsel immediately grasps the issue but elects not to object. Should opposing

1. Richard A. Posner, *Clinical and Theoretical Approaches to the Teaching of Evidence and Trial Advocacy*, 21 QUINNIPIAC L. REV. 731, 731-32 (2003).

2. JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 307 (2003).

3. James C. Hill, *A Comment on “Streetwise Litigation”—Unwise Advice for Trial Lawyers*, 30 LITIGATION 3, 74 (Summer 2004).

4. See FED. R. EVID. 102 (“These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”).

counsel have objected?⁵

Scenario #2: Proponent questions a witness about hearsay. Opposing counsel knows of at least three different ways to admit the hearsay but believes that proponent lacks the skill and knowledge to identify, or even stumble over, any of them. Opposing counsel objects on hearsay grounds and proponent “folds.” Was the objection proper? Should opposing counsel have educated the court about the other theories?⁶

Scenario #3: Direct examination of an expert witness. The expert witness has relied on written and oral reports by non-testifying experts, as is her custom; however, they do not fall within any apparent hearsay exception. Proponent nonetheless wants the jury to hear this information and asks the witness to describe it. Proponent is convinced that opposing counsel will not object either because he fails to grasp the hearsay issue or doesn’t want to accentuate the evidence by objecting. The witness describes the hearsay reports without objection and proponent later uses this material in closing argument. Was proponent’s conduct proper?⁷

Scenario #4: Same as #3 except that opposing counsel objects on hearsay grounds. When the judge sustains the objection, proponent asks the judge to admit the same information for the “limited purpose” of assisting the jury to understand the expert’s reasoning. The judge agrees and counsel crafts a limiting instruction to this effect. Proponent is firmly convinced, however, that regardless of the instruction the jury will do “what it wants” with the information (i.e., the jury will likely disregard it). Was proponent’s conduct proper?⁸

The issues are readily familiar to law students and lawyers alike. After enduring the arcane subtleties of an Evidence course, students discover the decidedly uneven application of these rules in a trial practice course. And the reality at trial is that many evidentiary rules are twisted, flaunted, or just ignored.

The three quotations with which this article opens illustrate the diversity of perspectives on the role of the rules of evidence in trial advocacy. Judge James C. Hill espouses the primacy of the rules themselves as the only certain path toward the truth. Professor John Langbein’s quote of William Garrow, one of eighteenth-century Britain’s most famous and effective trial lawyers, reveals a proud, shameless disdain for any rule that impedes the zealous representation of one’s client. And Judge Richard Posner, while expressing his thoughts on teaching evidence to law students, underscores the importance of understanding evidentiary rules in context, that is, how lawyers use them at trial, not as a desiccated corpus of abstract doctrine and rules. Collectively, the quoted statements yield three points: (1) evidentiary rules do not describe in any meaningful way how

5. See *infra* text accompanying notes 151-62.

6. See *infra* text accompanying notes 180-87.

7. See *infra* text accompanying notes 192-98.

8. See *infra* text accompanying notes 272-78.

trials are conducted; (2) this lacunae between the rules and the reality of trial originated with the modern adversary trial itself; and (3) the disjunction between the rules and reality masks a tension about our conception of trials. Judge Hill laments the lacunae, Garrow extolled it, and Judge Posner urges that we better understand it (in particular, the disutility of approaching evidence doctrine as an abstraction apart from its application at trial).

The lacunae is further reflected in the literature written for law students and newly-minted lawyers on professional responsibility, evidence law, and trial practice. As we will see, the field of legal ethics is preoccupied with the difficult problems of perjury and candor while oddly silent on lawyers' fealty to evidentiary rules and trial conduct generally. Predictably, evidence scholars and commentators focus on doctrine, rules, and the policy embodied in the rules. There is an implicit assumption that "rules matter" but an odd reluctance to consider how trial courts actually apply them or the ethics that govern their use at trial. The trial practice literature is uneven and, to a degree, unsettling. Preoccupied with developing trial advocacy skills, much of this literature even downplays evidentiary doctrine and rules. It teaches that lawyers should *not* object when an opponent violates evidence rules, *unless* it somehow benefits the client. More strikingly, it also teaches that objections may be used to intimidate or confuse a lawyer of lesser skill, knowledge, and experience. Garrow would smile approvingly, Judge Hill would be troubled, and Judge Posner would sagely admonish us to better understand the trial process.

The thesis of this article is that the adversary ethic has a dual edge at trial, permeating not only the presentation of "facts," but also governing how lawyers "use" evidence rules themselves. "Evidence law," then, is not a static system of rules and doctrines and should not be analyzed as such. We are, of course, familiar and comfortable with the principle that parties are expected to present their best evidence (i.e., witness testimony and exhibits).⁹ It is, however, more complicated and controversial to contemplate trial lawyers selectively invoking and ignoring rules based primarily on strategic considerations. More precisely, there is a manifest tension about the role of evidentiary rules at trial. Some see the rules as a template that governs the proof process: the truth will be most effectively ascertained if they are followed. Others view the rules as tools that enable lawyers to introduce information favorable to their client's case while blocking or undercutting their opponent's proof. Thus, an objection to evidence that might be admissible is permitted if the opponent lacks the skill to lay the proper foundation. Conversely, absent a proper objection, any relevant evidence is properly admitted into the record regardless of the proponent's own doubts. In short, there are no "evidence police" (as we will see), and it is up to the lawyers to decide which rules to invoke and when. This tension between evidentiary rules as

9. See McCORMICK ON EVIDENCE 2-13 (John W. Strong et al, eds., 5th ed. 1999).

a “template of proof” versus “tools for trials” runs to the very center of the modern law of evidence. And the tension has created considerable incoherence in the law of evidence itself as well as in the ethical expectations of trial lawyers.

Part II of this article surveys the impact of the *Model Rules of Professional Conduct* (“*Model Rules*”) on trial conduct. Although broadly concerned with disclosure, fairness, and candor, the *Model Rules* do not compel trial lawyers to “police” their proof (much less their opponent’s) for fealty to the law of evidence.¹⁰

The contradiction between the “template” and “tools” approaches is explicitly addressed in Part III. In some senses, the tension between the two views is blurred because of ambiguities built into the evidentiary rules and the varying perspectives of appellate courts, trial courts, and trial lawyers. Each of these factors must be separately assessed.

Turning to the modern law of evidence itself, Part IV demonstrates that the tension between the “tools” and “template” models is at the core of the Federal Rules of Evidence. Indeed modern evidence law offers a vastly sophisticated body of doctrine that is intended to enhance the reliability of proof, yet the rules also embrace the very adversary framework from which they emerged.¹¹

More important than the rules themselves is their application in a variety of settings. Appellate courts reflect a similarly Janus-faced approach that mostly assumes a “template” model, while forgiving the myriad lapses at trial through doctrines bearing metaphoric names that in turn betray differing attitudes toward the adversarial use of evidentiary rules: “curative admissibility” (medicinal), “door opening” (more homely), and “fighting-fire-with fire” (the unabashed embrace of the adversarial).¹²

Yet as Judge Posner reminds us, the primary concern must be how the rules are used at trial.¹³ The waiver rule is the doctrinal embodiment of the singular notion that there are no “evidence police”; that is, the rules govern only to the extent that they are invoked or ignored by trial lawyers. Equally critical, the waiver rule accommodates the realities of trial by effectively operating as a “shot clock” that compels lawyers both to recognize evidentiary issues and to decide what to do in an incredibly short period of time. The short shelf life of evidence law recognizes that trials are unscripted, largely extemporaneous proceedings that demand

10. See *infra* text accompanying notes 29-30.

11. See *infra* text accompanying notes 66-102.

12. See *infra* text accompanying notes 103-21.

13. Posner, *supra* note 1. The great evidence scholar, John Maguire, observed that despite its many subtleties, evidence law is preoccupied with a fundamentally “practical query”: “*Shall we let it in?*” JOHN MACARTHUR MAGUIRE, *EVIDENCE: COMMON SENSE AND COMMON LAW* 2 (1947). Maguire trenchantly concluded that “evidence is essentially a matter to be threshed out between counsel and judge in the trial court. The wheat stays there; what goes up in the appellate record seems pretty much chaff.” *Id.*; see Edward D. Ohlbaum, *Jacob’s Voice, Esau’s Hands: Evidence-Speak for Trial Lawyers*, 31 STETSON L. REV. 7, 9 (2001) (asserting that “evidentiary concepts are fundamentally interconnected to trial advocacy principles”).

extraordinary oral, aural, and analytic skills of trial lawyers.¹⁴ (Indeed, the waiver rule's critical function may be to render an unduly complicated body of law useful at trial.)

The trial perspective invites us to consider separately how trial lawyers confront evidence issues. The perspective of opposing counsel raises four critical issues: (1) Is there a duty to object? (2) What ethical issues are raised when counsel misses, or lets pass by, an objection? (3) What factors may be, or are, considered in deciding to object? And (4) is it ethical to object when the sole motive is to take advantage of a less skilled opponent? While fewer in number, the ethical issues confronting the proponent of evidence are more daunting. In particular, we will consider a proponent's reliance on the waiver rule when offering evidence (i.e., the prospect that opposing counsel will miss an objection).¹⁵

In order to lend some concreteness to this discussion, Part V explores how these considerations arise in two fundamental areas of evidence law and trial practice: the admission and exclusion of hearsay and an expert's reliance on inadmissible evidence in forming an opinion.¹⁶

The conclusion sets forth several proposals. First, we need to reconsider the composition of the trial bar in light of the peculiar skill sets demanded by the adversary trial. Second, the rules governing trials, including evidence law, need to be rethought. Specifically, evidence law should account for how its doctrines and rules are used at trial. And any such accounting should be based on a careful and systematic study of trial records and not left to the happenstance of appellate cases and anecdote.

II. THE SOUNDS OF SILENCE: THE *MODEL RULES* AND TRIAL CONDUCT

The *Model Rules of Professional Conduct* include nine provisions pertaining to the lawyer's role as "advocate,"¹⁷ but eschew any pretense of comprehensively regulating trial conduct. Nonetheless, the *Model Rules* govern a broad range of conduct. Rule 3.1 requires that all claims, defenses, and motions have a non-frivolous basis in law and fact. Rule 3.2 mandates reasonable efforts to expedite litigation. The *Model Rules* also ensure the tribunal's impartiality and decorum¹⁸ while limiting trial publicity¹⁹ and specifying the responsibilities of prosecutors²⁰ and lawyers as witnesses.²¹

14. See *infra* text accompanying notes 123-51.

15. See *infra* text accompanying notes 152-215.

16. See *infra* text accompanying notes 216-79.

17. MODEL RULES OF PROF'L CONDUCT R. 3.1-3.9 (2004) [hereinafter MODEL RULES].

18. MODEL RULES R. 3.5.

19. MODEL RULES R. 3.6.

20. MODEL RULES R. 3.8.

21. MODEL RULES R. 3.7.

Several provisions of the *Model Rules* address discrete issues in trial practice, but for the most part, the *Model Rules* surrendered the field to the law of evidence and procedure, providing scant assistance for the lawyer looking for ethical guidance when offering or objecting to evidence. Rules relating to candor toward the tribunal²² and fairness to opposing parties²³ only obliquely touch on evidentiary concerns, and otherwise provide free rein to lawyers opposing one another in an adversary trial. In the interest of candor, Rule 3.3 prohibits a lawyer from “knowingly mak[ing] a false statement . . . of fact or law” (i.e., lying) to the court²⁴ and from knowingly offering false evidence.²⁵ It also compels a lawyer to take “remedial measures” when a person (including a client) uses a court to further a criminal or fraudulent scheme.²⁶

And what of evidence rules? Since Rule 3.3 assumes that lawyers will naturally (indeed gleefully) disclose favorable legal authority, it only compels them to “disclose” contrary authority that originates “in the controlling jurisdiction” and is “directly adverse” to their clients’ position.²⁷ Yet it may always be presumed that the tribunal is “aware” of the rules of evidence, so does Rule 3.3 require something more, such as flagging the court to a specific rule, a missed objection, or an alternative theory of admissibility? Stated differently, does Rule 3.3 compel trial lawyers to disclose applicable evidentiary rules? It would seem that it does not. Lawyers are expected to argue in their client’s favor; they are not compelled “to make a disinterested exposition of law.”²⁸ Rule 3.3(a)(2), then, does not require trial counsel to play the role of evidence law professor in the courtroom, that is, one who objectively assesses all sides of a question of admissibility. Although counsel must disclose controlling case law that is known to be “directly adverse” to her position, she is not obligated to share her thinking (i.e., work product) with respect to how the rules are applied in the case. In sum, Rule 3.3 is principally concerned with assuring the “integrity of the adjudicative

22. MODEL RULES R. 3.3.

23. MODEL RULES R. 3.4.

24. MODEL RULES R. 3.3(a)(1). The rule also mandates that lawyers “correct” prior “false statement[s]” of law or fact when the error comes to light.

25. MODEL RULES R. 3.3(a)(3). The rule also shields lawyers who refuse to offer evidence that they reasonably believe to be false, although an express exception governs testimony by a criminal defendant. *See* MODEL RULES R. 3.3 cmts. 6-7.

26. MODEL RULES R. 3.3(b).

27. MODEL RULES R. 3.3(a)(2).

28. Model Rule 3.3 cmt. 4 states in full:

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

process.”²⁹ It broadly proscribes egregious misconduct (lying, suborning perjury, bribery)³⁰ while requiring disclosure of pertinent legal authority, yet is otherwise tolerant of adversary conduct. “Candor” has its limits.

Model Rule 3.4 extols fairness to one’s opponents, but it too assumes an adversary framework and selectively dwells on several narrow ranges of misconduct. Lawyers are instructed not to “alter, destroy or conceal” evidence “unlawfully.”³¹ Nor may they “unlawfully obstruct” an opponent’s access to evidence.³² Unremarkably, lawyers are enjoined from suborning perjury or bribing witnesses.³³ Another provision inveighs against discovery abuses.³⁴

Two subsections of Rule 3.4 have some bearing on evidentiary objections. Under Rule 3.4(c) a lawyer may not “knowingly disobey an obligation under the rules of a tribunal” absent an express refusal which asserts (in good faith) that no valid obligation exists.³⁵ Conceding the point that the rules of evidence are “rules of a tribunal,”³⁶ we will see that trial lawyers are under no obligation to object on evidentiary grounds.³⁷ Indeed, tactical considerations often motivate lawyers to “look the other way” where, for example, an objection might unduly accentuate damage already done or just waste time on a trivial technical point. And if opposing counsel is under no duty to object, may a proponent offer evidence in the hope that opposing counsel will not object for whatever reason, be it tactical waiver, simple ignorance, or lack of skill? In short, Model Rule 3.4(c) compels us to look at whatever obligations are imposed by the law of evidence.³⁸

Model Rule 3.4(e) also references the law of evidence and trial procedure. Lawyers may not “allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence.”³⁹ Yet, as shown below, the flaccid nature of admissibility and the low threshold for

MODEL RULES R. 3.3 cmt. 4.

29. Once the “legal premises” (e.g., case cites) are supplied to the court, it appears the lawyer’s obligation is fulfilled.

30. MODEL RULES R. 3.3 cmt. 12.

31. MODEL RULES R. 3.4(a).

32. MODEL RULES R. 3.4(a).

33. MODEL RULES R. 3.4(b).

34. MODEL RULES R. 3.4(d). Lawyers are also prohibited from counseling non-clients to not “volunteer” information during the course of informal discovery except under certain narrow circumstances. MODEL RULES R. 3.4(f).

35. MODEL RULES R. 3.4(c).

36. Model Rule 3.4(c) is not restricted to the “trial,” unlike subsection (e). Thus, rules of the tribunal embrace procedural rules and local rules as well.

37. See *infra* text accompanying notes 151-62.

38. See *infra* text accompanying notes 66-102.

39. MODEL RULES R. 3.4(e) (“[I]n trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or 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 an accused.”).

relevance hardly constitute a firewall of any sort,⁴⁰ especially since a reasonable mistake about either proposition excuses the conduct anyway. Moreover, Rule 3.4(e) appears principally concerned with “allusions” and statements by counsel during opening and closing arguments, and not the evidentiary phase of trial. The opening clause’s use of the future tense—“allude to any matter that the lawyer does not reasonably believe is relevant or *that will not be supported* by admissible evidence”—seems oriented toward counsels’ opening statements. And the remainder of Rule 3.4(e) is expressly limited to statements by counsel, which generally occur during the opening or closing arguments.⁴¹

Nothing in the *Model Rules*, then, compels lawyers to act as “evidence police” who must scrupulously enforce the rules of evidence. Opposing counsel is under no duty to object just because a ground for objection is apparent. Nor is the proponent ethically foreclosed from eliciting testimony or offering an exhibit simply because he or she foresees a possible objection and an adverse ruling by the judge. Put differently, the *Model Rules* do not impose the rules of evidence upon lawyers as a comprehensive blueprint for the conduct of trial. Rather, the

40. See *infra* text accompanying notes 70-102.

41. Of course lawyers make “statements” when arguing for or against the admissibility of evidence, yet neither the rule’s text nor its history clearly supports such an expansive construction. The history of Model Rule 3.4(e) strongly suggests that its primary focus is opening and closing statements. According to the comment accompanying the pre-2002 version, Model Rule 3.4(e) “substantially incorporate[d]” Model Code of Professional Responsibility DR 7-106(C)(1)-(4). MODEL RULES OF PROF’L CONDUCT R. 3.4, Model Code Comparison (2001). Model Code DR 7-106(C)(1) was the source of Model Rule 3.4(e)’s opening clause regarding the lawyer’s reasonable belief that statements and “allusions” must be relevant and predicated (“will . . . be supported”) upon admissible evidence. Model Code DR 7-106(C)(3) prohibited lawyers from asserting their “personal knowledge” except as witnesses (again, usually an “argument” problem) and, similarly, Model Code DR 7-106(C)(4) barred lawyers from expressing a “personal opinion” upon the justness of the cause, witnesses’ credibility, and parties’ culpability except as argument predicated upon evidence. MODEL CODE OF PROF’L RESPONSIBILITY DR 7-106(C)(3)-(4) (1983) [hereinafter MODEL CODE].

Of the *Model Code* provisions, only DR 7-106(C)(2) and (7) directly addressed the application of evidentiary rules:

- (c) In appearing in his professional capacity before a tribunal, a lawyer shall not:
 - (2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.
 - ...
 - (7) Intentionally or habitually violate any established rule of procedure or of evidence.

MODEL CODE DR 7-106(C). Although Model Code DR 7-106(C)(2) is “dealt with” in Model Rule 4.4, the bar against intentionally or habitually violating “established” evidence rules found no counterpart in the *Model Rules*. MODEL RULES OF PROF’L CONDUCT R 3.4, Model Code Comparison (2001). Also see Model Code EC 7-25, which nowhere suggests that lawyers are obligated to object on evidentiary grounds or foreclosed from relying on an opponent’s waiver. Moreover, Model Code DR 7-101(B)(1) specifically permitted counsel, “[w]here permissible, [to] exercise his professional judgment to waive or fail to assert a right or position of his client.” MODEL CODE DR 7-101(B)(1); see also CANONS OF PROF’L ETHICS Canon 22 (1908, as amended) (“A lawyer should not offer evidence which he knows the Court should reject in order to get the same before the jury by argument for its admissibility.”). Here, too, the primary concern is the lawyer’s statements before the jury, not fealty to evidence rules outside the jury’s presence. See FED. R. EVID 104(c) (stating that in general, hearings on the admissibility of evidence should be conducted out of the jury’s hearing whenever “the interests of justice require”).

drafters entrusted the area of trial practice, especially the application of evidentiary rules, to the law of evidence itself. And as we will see, the adversarial ethic pervades the conduct of trial and the use of evidentiary rules.

III. TEMPLATE OR TOOLS? EVIDENTIARY RULES AT TRIAL

Over the last thirty years, the “rules of evidence” have become synonymous with variants of the Federal Rules of Evidence. First promulgated by the Supreme Court and later revised by Congress, the Federal Rules took effect in 1975,⁴² and quickly became the dominant model. Over forty states and other jurisdictions (e.g., the military) have crafted evidentiary codes based on the federal model.⁴³

Although comprehensive, the Federal Rules are not exhaustive and fall short of being a complete code that governs all evidentiary issues. For example, the Federal Rules of Evidence include no rule on bias impeachment, easily the most fundamental and effective method of attacking (or supporting) a witness’s credibility. In *United States v. Abel*⁴⁴ the Supreme Court held that the common law of evidence permitted bias impeachment in federal courts despite the absence of a specific rule. *Abel* demonstrates some puzzling lacunas in the federal rules and the Court’s recognition that the common law of evidence remains alive and well. Nevertheless, the Federal Rules of Evidence are reasonably complete overall, and the common law is called upon only to fill the inevitable interstices.

In what sense, though, do these evidentiary rules “govern” the process of proof? Is it expected, or indeed demanded, that lawyers and courts strive to conform all proof to their requirements? Or are the rules used instrumentally to shape the form and content of testimony and exhibits as lawyers see fit?

The answer is both, depending upon one’s perspective. In other words, there is a tension between two very different conceptions of the rules. One approach sees them as a “template” through which proof is filtered for the trier of fact. The other views them as “tools” that lawyers use to shape the evidence as parties see fit.

The tension between these two conceptions is readily familiar, even to law students, as many law schools require a three or four credit course in evidence law that surveys the principle doctrines, rules, and policies with exacting (if not excruciating) detail.⁴⁵ A typical evidence course leaves many students with the

42. See PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE § 1.04 (2003).

43. *Id.* § 1.05. Some jurisdictions have departed in varying ways from the federal rules by adding provisions or modifying others. See, e.g., TEX. R. EVID. 801(c) (departing from the federal rules by defining “matter asserted” for purposes of the hearsay rule). The Federal Rules now comprise the substance of the Uniform Rules of Evidence. GIANNELLI, *supra* note 42, § 1.05.

44. 469 U.S. 45 (1984).

45. A survey of 153 accredited law schools showed that 66, or 43.1%, require an Evidence course. The compilation was prepared by Professor and Associate Dean Peter Rofes, Marquette University Law School. A copy is on file with the author.

impression that trials are rigorous exercises in applied evidence law.⁴⁶ Yet, as influential commentators have observed, in many trial advocacy courses these same “evidentiary principles are mangled or ignored.”⁴⁷ And even in actual cases, one sees a disjunct between the “world of academe and the world of trials.”⁴⁸

Viewed as a “template,” the law of evidence regulates the process of proof. Testimony and exhibits are filtered through the rules, which screen the reliable from the unreliable evidence. Trial lawyers are expected to adhere to the rules, self-consciously refraining from offering testimony that fails to pass muster and objecting when an opponent’s proof offends the rules. The trial judge serves as a gatekeeper writ large who ultimately decides if the proof fails to conform to the evidentiary standard. In short, when viewed as a template, the rules of evidence acquire hegemonic force and are assumed to control the proof process. The fealty of judges and lawyers to the rules is assumed.⁴⁹

When viewed as “tools,” however, evidentiary rules function very differently at trial. The starting point is the principle of “free proof.” Acting as adversaries, lawyers present their most compelling evidence and do what they can to block their opponent’s attempt to do the same. Rules of evidence represent risks and opportunities: the risk that one’s own evidence will be excluded and the opportunity to exclude the opposing party’s proof. Thus, the adversary ethic is inextricably interwoven into the operation of evidentiary rules. The rules apply

46. *But see* Posner, *supra* note 1, at 732-33, (describing Judge Posner’s decision to teach evidence clinically, effectively blending the evidence and trial advocacy courses because “strategic considerations so dominate doctrine in the actual use of the rules of evidence in a trial”).

47. THOMAS A. MAUET & WARREN D. WOLFSON, *TRIAL EVIDENCE* 1 (3d ed. 2005).

48. *Id.* at xx. Another commentator pointedly labeled as “nonsense” what he called the “law school approach” to trial objections and warned that “all too many trial lawyers are oblivious to the folly of bringing law school methodology into the courtroom.” John C. Conti, *Trial Objections*, 14 *LITIGATION* 16 (Fall 1987). These criticisms of an overly “academic” or “law school approach” to evidence use as a foil to what I call the “template” model of evidence. *See id.* at 17 (“The simplistic notion that an objection must be raised to every technical violation of the rules of evidence should be discarded . . .”). Some of this criticism is overwrought, but the tension is nonetheless evident.

49. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* § 1.1 (3d ed. 2003). In the following passage, Mueller and Kirkpatrick nicely convey the essence of the template model yet also express ambivalence about its function at trial:

Evidence law *governs* the process of proof at trial, in effect taking up where rules governing civil and criminal procedure leave off. *For the most part*, evidence law puts into place a set of restraints that courts enforce in an attempt to manage the various risks and opportunities that the trial process presents in an adversary setting.

Id. § 1.1, at 1-2 (emphasis added).

That said, Mueller and Kirkpatrick astutely and explicitly acknowledge that lawyers usually use the rules as “tools” with the tacit blessing of appellate courts. *Id.* § 1.7, at 25 (discussing harmless error, they state: “[t]he message is not to insist on applying rules for their own sake but rather to see them as tools that can help achieve a fair and just result”).

only to the extent that trial lawyers invoke them.⁵⁰

The thesis of this article relates directly to this tension. The template model tends to dominate academic commentary and appellate discussion of evidentiary issues. In this view, the law of evidence governs trials in the form of the Federal Rules of Evidence (or a state equivalent), the case law interpreting those rules, and the commentary explaining them. The nearly three feet of shelf space taken up by one leading treatise vibrantly illustrates the complexity and seeming completeness of modern evidence law.⁵¹ Yet the culture and practice of the nation's courtrooms are quite different. No seasoned trial lawyer or judge would consider attempting to abide by all (or most) of the doctrinal subtleties drawn in the multi-volume treatises. Rather, evidentiary rules function as tools in the courtroom. Lawyers use them as they see fit to best present their cases. The trial practice literature hews far closer to the "tools" conception, the commentators unabashedly embracing an adversarial ethic when it comes to applying evidentiary rules.⁵² The tension between the two views, however, reverberates throughout the legal system. The *Model Rules*, as we have seen, elide the issue and default to evidence law. Evidence doctrine itself is overly refined and occasionally contorted to accommodate the reality of trial. And trial lawyers, especially those starting practice, are often perplexed by the challenge of reconciling their proof with the rules. The root source of the tension is not simply the adversary trial, but that evidence rules themselves are designed for use by adversaries.

IV. WARP AND WOOF: THE ADVERSARY ETHIC AND EVIDENCE RULES

Although one should hardly be surprised that trial lawyers behave as adversaries, the notion that evidence rules themselves resonate "adversariness" requires more explanation. The discussion that follows will provide some historical context before examining the fundamental suppositions of evidence doctrine. The article will then turn to three critical perspectives: the appellate courts, the trial courts, and the trial bar.

A. "I WILL DO ANYTHING I CAN GET AWAY WITH": THE ADVERSARY ETHOS AND THE ORIGINS OF THE MODERN TRIAL

Although rooted in medieval England and displaying a superficially timeless consistency, trial by jury has dramatically and subtly changed in both meaning and conduct over the last two hundred years.⁵³ Trials connote

50. See, e.g., ROGER C. PARK ET AL., EVIDENCE LAW 52 (2d ed. 2004); see also MUELLER & KIRKPATRICK, *supra* note 49.

51. 10-25 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE (2005) (consisting of 16 volumes plus paperback supplements). The treatise occupies about 33 inches of shelf space.

52. See, e.g., MAUET & WOLFSON, *supra* note 47, at 1.

53. See Daniel D. Blinka, "This Germ of Rottedness": *Federal Trials in the New Republic, 1789-1807*, 36 CREIGHTON L. REV. 135 (2003).

contests of some sort, yet the modern trial is characterized by a peculiar “adversary ethos” shaped by lawyers, evidence rules, and a rethinking of the trial’s very purpose. Three coterminous developments are particularly critical to our understanding.

First, the modern trial is marked by the transition from a “lawyer-free” to a “lawyer-dominated” trial.⁵⁴ Beginning in the 1730s, English judges abandoned the old rule forbidding defense counsel in felony cases, and courts welcomed defense counsel as a needed counterweight to prosecuting attorneys and a perceptibly greater risk of perjury.⁵⁵ Once lawyers had breached the bastion of the felony criminal trial, lesser barriers quickly collapsed.⁵⁶ By the nineteenth century, trial counsel routinely represented contending parties in both civil and criminal trials.⁵⁷

Second, the advent of lawyers coincided with the development of the law of evidence. Still in its infancy in the 1790s, rules of evidence evolved at common law to serve the new “faith in the truth-detecting efficacy of cross-examining lawyers.”⁵⁸ The legal historian John Langbein has commented on the “primitive and undertheorized” nature of the law of evidence in the late eighteenth century: “the central concept that underlies the modern law as a system of rules restricting the admissibility of evidence had still not been worked out. Neither the doctrinal basis for exclusion nor the mechanisms to implement and enforce exclusion had been resolved at the end of the eighteenth century.”⁵⁹ Nor were these parallel developments merely serendipitous. While it is true that judges created the law of evidence, “it would turn out to be a bonanza for the lawyers” who soon used them to “dominate” the trial.⁶⁰

Third, lawyers injected an unabashed “adversarial ethos” into the conduct of trial that Langbein crystallized to its essence: “I will do anything I can get away with.”⁶¹ “Lawyerization” of trials converted them into a forum for testing an opponent’s proof. In turn, “[t]his change in the function of trial was reflected in counsel’s growing effectiveness in diminishing or controlling what other

54. LANGBEIN, *supra* note 2, at 2. Langbein’s focus is on the modern adversary criminal trial in Great Britain. Also see J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND, 1660-1800* (1986).

55. LANGBEIN, *supra* note 2, at 106-77.

56. *See id.* at 167-77.

57. *See* LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 303-33 (2d ed. 1985). *But see* LANGBEIN, *supra* note 2, at 314-18 (discussing the plight of the “unrepresented” who lacked any champion in the modern adversary trial).

58. LANGBEIN, *supra* note 2, at 246.

59. *Id.* at 248.

60. *Id.* at 251. Again, Langbein’s focus was on British criminal trials, but his findings apply to civil trials as well and to both sides of the Atlantic.

61. *Id.* at 307. Langbein was “translating” remarks by the great William Garrow, who epitomized “aggressive courtroom behavior.” *Id.* at 306.

participants in the trial said or did.”⁶² Thus, the adversary dynamic radically changed the roles of witnesses and trial jurors. Witnesses increasingly worked from lawyer’s scripts.⁶³ New evidentiary rules filtered their testimony while straining to control juries.⁶⁴ One searching for core principles and consistency in the modern adversary trial, especially the criminal trial, is left with a sobering historical truth: it was never “premised on a coherent theory of truth-seeking.”⁶⁵ And the modern law of evidence still bears this hallmark of incoherence. Like the trial itself, the rules serve as means for testing an opponent’s proof, an objective not always reconcilable with a search for truth.

B. MODERN EVIDENCE RULES AND THE ADVERSARY ETHOS

The tension between evidence law as a template for proof and evidence law as an array of creative tools is embedded in the rules themselves. Indeed, the Federal Rules of Evidence, which dominate modern evidence law,⁶⁶ explicitly embraces both conceptions without attempting to reconcile them.

Several provisions vividly illustrate the template ideal. Rule 101, the very first evidentiary rule, provides without qualification that the Federal Rules “govern proceedings in the courts of the United States.”⁶⁷ And the very last substantive rule, Rule 1101, underscores that “[t]hese rules apply generally to civil actions and proceedings.”⁶⁸ As the alpha and omega of federal evidence law, Rules 101 and 1101 provide scant comfort to lawyers electing to ignore, hedge, or evade the many provisions sandwiched between them. To similar effect are jury instructions that educate jurors about a lawyer’s duty to object to evidence.⁶⁹

More significantly, the template approach is apparent in Rule 402, the core

62. *Id.* at 319. Thus, the modern adversary criminal trial simply “presupposed that truth would somehow emerge when no one was in charge of seeking it.” *Id.* at 333. The “piecemeal” emergence of the modern trial resulted in a “truth deficit.” *Id.*

63. *Id.* at 319.

64. LANGBEIN, *supra* note 2, at 331. For the piecemeal emergence of evidence law from the late seventeenth into the nineteenth century, see *id.* at 178-251. Also see T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499 (1999).

65. LANGBEIN, *supra* note 2, at 333.

66. See *supra* text accompanying note 43.

67. FED. R. EVID. 101 (emphasis added).

68. FED. R. EVID. 1101(b). The last two provisions of the Federal Rules relate to the amendment process and to their formal title. FED. R. EVID. 1102, 1103.

69. Compare KEVIN F. O’MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 101.49 (5th ed. 2000) (“When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the other side thinks it is not permitted by the rules of evidence, that lawyer may object.”), with WIS. JURY INSTRUCTION CIVIL 115 (“The lawyers for the parties in this trial have a duty to object to what they feel [sic] are improper questions asked of the witnesses. You should not draw any conclusions for either side from the fact that an objection was made to any question and that a witness may not have been permitted to answer it.”).

provision of the Federal Rules of Evidence,⁷⁰ which provides: “[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.”⁷¹ The Advisory Committee noted that Rule 402 embodies the legacy of the nineteenth-century legal scholar James B. Thayer: “[t]he provisions that all relevant evidence is admissible, with certain exceptions, and that evidence which is not relevant is not admissible are ‘a presupposition involved in the very conception of a rational system of evidence. . . .’ They constitute the foundation upon which the structure of admission and exclusion rests.”⁷² Without qualification, then, Rule 402 renders irrelevant evidence inadmissible.⁷³ Moreover, it also expressly qualifies the admissibility of even relevant evidence. The Advisory Committee explained that policies embodied in other evidentiary rules (e.g., hearsay) as well as the Rules of Civil and Criminal Procedure “require the exclusion of evidence despite its relevancy.”⁷⁴

Yet Rule 402 is hardly the evidentiary stoplight that it appears to be. First, its function directly depends upon opposing counsel’s ability and willingness to identify when, and explain why, evidence is not admissible. This enormously difficult and complex burden is discussed below.⁷⁵ Second, the Federal Rules created a framework of “assumptive admissibility”⁷⁶ by fusing the concepts of “relevancy” and “limited admissibility” of evidence.

“Assumptive admissibility” is best understood as the principle of *laissez-faire* at work in the courtroom.⁷⁷ Parties are given a veritable free rein in introducing whatever proof they believe helps their case. To extend the metaphor of the stoplight, the evidentiary light remains green unless opposing counsel pushes the button that activates the stop signal. (Yet it is the judge who ultimately decides whether the light goes from yellow to red.) The Federal Rules favor admissibility in the sense that the jury should hear and read all testimony and exhibits that support the parties’ claims. Assumptive admissibility, then, embodies the adversarial ideal.

70. See MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 402.1, at 286 (5th ed. 2001) (“The general rules that all relevant evidence is admissible unless otherwise provided by law states a touchstone of any rational system of justice.”).

71. FED. R. EVID. 402.

72. FED. R. EVID. 402 advisory committee’s note (quoting JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 264 (1898)).

73. “Relevant evidence” is defined by Rule 401 of the Federal Rules of Evidence. See *infra* text accompanying note 78.

74. FED. R. EVID. 402 advisory committee’s note. Other evidentiary policies that (sometimes) compel the exclusion of relevant evidence are summarized in GRAHAM, *supra* note 70, § 402.1, at 286.

75. See *infra* text accompanying notes 163-67.

76. GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 2.4, at 34 (3d ed. 1996). As best I can tell, Professor Lilly coined the phrase “assumptive admissibility.”

77. See *id.* § 2.4, at 34-35.

The definition of “relevance” in Rule 401 effectuates the ideal of assumptive admissibility. Rule 401 provides: “[r]elevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”⁷⁸

The elements of this definition give free play to the adversary dynamic. First, the sum total of consequential propositions is largely determined by the parties’ tactical assessment of the applicable substantive law. They may expand or limit the range of consequential proposition by adding or subtracting claims and parties. For example, a plaintiff may inject a tortfeasor’s subjective intention into a lawsuit by pleading a punitive damages claim as well as a negligence claim, thereby enhancing the relevance and probative value of the tortfeasor’s prior acts of misconduct.⁷⁹ The range of possible examples is limited only by prohibitions against frivolous pleadings.⁸⁰

Second, Rule 401 only requires that evidence have “any tendency” to make the existence of the consequential proposition more or less likely. The tendency may be one rooted in logic, experience, or just “common sense” (i.e., life experiences).⁸¹ The great evidence scholar Thayer, upon whom the Advisory Committee relied, elsewhere observed that “[t]he law furnishes no test of relevancy,”⁸² which only underscores counsel’s creative freedom in offering any proof that “tends” to make his or her case more appealing to the trier of fact. Moreover, the evidence need not be dispositive of the proposition or even particularly compelling: “[a] brick is not a wall.”⁸³ Trial judges are accorded broad discretion when ruling on the relevance of evidence, and in turn judges are expected to accord counsel considerable leeway in proving their cases.⁸⁴

When joined with this broad conception of relevance, the doctrine of limited admissibility gives full play to the principle of assumptive admissibility. Rule 105 provides: “[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct

78. FED. R. EVID. 401.

79. For a discussion of the range of consequential propositions, see GRAHAM, *supra* note 70, § 401.1, at 237.

80. See FED. R. CIV. P. 11. Frivolous pleadings are also proscribed by the *Model Rules*. See MODEL RULES R. 3.1.

81. See GRAHAM, *supra* note 70, § 401.1, at 230. Graham quotes *United States v. McVeigh*, 153 F.3d 1166, 1190 (10th Cir. 1998), *cert. denied* 526 U.S. 1007 (1999), for the proposition that Rule 401 “sets the bar very low.” GRAHAM, *supra* note 70, § 401.1, at 230 n.5.

82. JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 265 (Rothman Reprints, Inc. 1969) (1898). For the Advisory Committee’s debt to Thayer, see FED. R. EVID. 401 advisory committee’s note.

83. *Id.*

84. See GRAHAM, *supra* note 70, § 401.1, at 231-32 (“The court in making its determination, Rule 104(a), must exercise broad discretion in drawing on its own experience in the affairs of mankind in evaluating the probabilities upon which relevancy depends.” (footnotes omitted)).

the jury accordingly.”⁸⁵ The relationship between relevance and limited admissibility is subtle but significant. Most evidence raises multiple inferences. To take a simple example, a witness’s testimony that a bystander to an accident said, “[t]he black car ran the stop sign” has a “tendency” to show a variety of propositions: (1) the bystander believed the black car ran the stop sign; (2) the witness’s belief or knowledge that the black car ran the stop sign; and (3) in fact, the black car ran the stop sign.⁸⁶ So, which one is the evidence being used to prove? The answer may be all three (and any other relevant proposition) unless the evidence is explicitly received for only a limited purpose.⁸⁷ Although a proponent may initially raise the issue and limit the use of evidence, Rule 105 otherwise places the onus on opposing counsel to object and request the restriction.

Limited admissibility assumes great significance in modern evidence law because many so-called exclusionary rules generally proscribe certain uses of evidence yet permit others.⁸⁸ Exclusion turns entirely upon how the proponent uses—or claims to be using—the evidence. Returning to our previous example, the bystander’s statement, “The black car ran the stop sign,” constitutes hearsay only if offered to prove the truth of the matter asserted. If offered to prove only the bystander’s state of mind or even the witness’s belief as to which car ran the stop sign, this out-of-court statement is not hearsay subject to exclusion under Rule 802. And although it is true that these other non-hearsay uses may be “irrelevant” (i.e., it is of no “consequence” what the bystander thought or the witness believed apart from the truth of the assertion), the burden is on opposing counsel to object (“Hearsay!”) and force the proponent to identify either a hearsay exception or to articulate a relevant theory of admissibility.⁸⁹

Despite its ubiquity, limited admissibility is problematic. How does the judge enforce the restricted use of evidence? The manifestly unsatisfactory answer is through a limiting instruction that educates the jury about how it may and may

85. FED. R. EVID. 105.

86. The first proposition represents the declarant’s knowledge or belief, the second proposition is characterized in the case law as “effect on listener or reader,” and the third proposition is the “truth of the matter asserted.” It is only the third use that presents hearsay under Rule 801(c). *See infra* text accompanying notes 220-33.

87. *See* 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5063, at 307 (1977) (“Given the nature of the concept of relevance, it is inevitable that it will raise issues of multiple-admissibility. Relevance is the relationship between an item of proof and the issues in the case; it is not an inherent quality of the evidence.”).

88. Examples pervade the Federal Rules of Evidence. Perhaps the most notorious example is Rule 404(b) which permits other act evidence as proof of motive, opportunity, etc., but not one’s character to prove conduct in conformity therewith—a subtle distinction at best. Later in this article two other examples will be discussed in some depth: hearsay and the bases of expert opinion testimony. *See infra* text accompanying notes 215-78.

89. *See infra* text accompanying notes 228-36. The proponent defeats the objection by simply offering the out-of-court statement for something other than the truth of the matter asserted (e.g., the declarant’s belief). It is then up to the opponent to make a relevancy objection to defeat that use of the evidence.

not use the evidence.⁹⁰ Courts and commentators have belittled the efficacy of such instructions. Proponents may well offer evidence for a limited purpose with the hope and knowledge that the jury will ignore or do whatever it will with the evidence anyway because the judge's instruction is incomprehensible or just inconsistent with human nature. And for that very reason, aggrieved parties frequently forego limiting instructions for fear that they will only emphasize the damaging inference. Indeed, opposing counsel may opt not to object, much less request, a limiting instruction, if she senses that her actions will only underscore the evidence, possibly demonstrate her fear of it, and the judge will permit the testimony anyway.⁹¹

As will be discussed below, trial lawyers are motivated to expose the jury to whatever information helps their case. Limited admissibility allows the proponent to offer evidence ostensibly for a restricted purpose (e.g., the declarant believed the black car ran the stop sign) yet with reasonable confidence that the trier of fact will nonetheless use the evidence as it sees fit (e.g., in fact, the black car ran the stop sign).⁹²

Rule 403, which gives the judge discretion to exclude even relevant evidence, provides only modest relief because it too manifests assumptive admissibility. Rule 403 provides, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."⁹³ Rule 403 is often invoked in the context of limited admissibility, namely, the "unfair prejudice" that inheres where the legitimate probative value of the evidence is overshadowed by the very real risk that the jury will use the evidence for an improper purpose despite a limiting instruction.⁹⁴ Yet the rule clearly "favors the admissibility of relevant evidence."⁹⁵ Total exclusion of evidence is an "extraordinary remedy" that should be used "sparingly."⁹⁶ The burden is placed squarely on the objecting party, and the judge should exclude the proof only when its probative value (for whatever purpose) is substantially outweighed by the danger of unfair prejudice, confusion of issues, or other considerations (e.g., waste of time).⁹⁷

Thus, the core rules of modern evidence law, especially those defining

90. See GRAHAM, *supra* note 70, § 105.1, at 95-96. Despite the futility of limiting instructions, Graham observes "the common practice is to admit evidence for a limited purpose or against less than all parties and instruct the jury accordingly." *Id.* § 105.1, at 103.

91. See *infra* text accompanying notes 151-62.

92. For a discussion of trial tactics and options, see *infra* text accompanying notes 230-33.

93. FED. R. EVID. 403.

94. GRAHAM, *supra* note 70, § 403.1, at 310.

95. *Id.* § 403.1, at 296.

96. *Id.* at 297 (quoting *Wheeler v. John Deere Co.*, 862 F.2d 1404, 1408 (10th Cir. 1988)).

97. *Id.* § 403.1, at 295-97.

relevance and limited admissibility, erect an adversary framework that dilutes, if not eviscerates, the effectiveness of many exclusionary rules that are designed to foster reliability or effect other social policies. And there are two further lacunas in the rules that deserve brief mention.

First, there is the glaring omission of a definition of “evidence” itself. Although jury instructions woodenly and tautologically define “evidence” as “testimony” and “exhibits” that are received into evidence, experienced trial lawyers understand that jury decision-making is influenced by far more than testimony and exhibits.⁹⁸ For example, a criminal defendant may elect not to testify, but seasoned counsel know that juries often look at the defendant’s physical expressions during adverse testimony. Thus, smirks, glares, and even lack of eye contact may influence the verdict. And as we shall see, excessive objections on evidentiary grounds often yield an annoyed, bored jury that suspects the lawyer is hiding behind technicalities because her case is weak.⁹⁹

Second, and related, there is uncertainty over what is meant by “admissibility.” Undefined in the Federal Rules of Evidence, the term “admissibility” is cloaked in an ambiguity that ultimately surrenders to the reality of jury autonomy. Testimony or exhibits received without objection may be used for any “relevant” inference. Although opening and closing arguments are expressly intended to influence the jury’s use of such evidence, the jury is nonetheless free to weigh the evidence as it sees fit during secret deliberations that effectively insulate the jury’s thought processes.¹⁰⁰ Limited admissibility, in theory, restricts the range of permissible use, but limiting instructions are likely ineffective and the secrecy of jury deliberations again shrouds proof of any misuse. Yet there is a more fundamental issue: Does admissibility include anything that occurs in the jury’s presence? The problem is most starkly posed by Rule 703, which permits expert opinions to be based upon certain types of inadmissible evidence.¹⁰¹ As we will see, courts have struggled with the status of inadmissible evidence when the expert describes his or her reasoning. Case law is replete with instances in which courts interchangeably use verb forms of “admit,” “testify,” “reveal,” and “disclose” without carefully considering the implications of “revealing” evidence that is, by definition, “inadmissible.”¹⁰²

98. See Robert M. Krivoshey, *Reflections on Training Law Students To Be Trial Lawyers*, 27 LITIGATION 24, 24-25 (Fall 2000) (discussing “extralegal factors” that influence jury decision-making). For a typical jury instruction defining “evidence,” see O’MALLEY ET AL., *supra* note 69, § 101.40 (“evidence” consists of sworn testimony, “exhibits received into evidence,” facts that were judicially noticed, and parts of deposition that were “received in evidence”).

99. See *infra* text accompanying notes 151-62.

100. The “incompetence” of jurors to testify about their deliberations guarantees that courts will be virtually untroubled by questions about how the jury actually weighed the proof. See FED. R. EVID. 606.

101. The confusion is apparent in both the text of Rule 703 as amended in 2000, and the accompanying advisory committee’s note. See *infra* text accompanying notes 274-78.

102. *E.g.*, *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1270-71 (7th Cir. 1988); see *infra* text accompanying notes 273-78.

Modern evidence law, then, purports to govern trials yet hardly constitutes any kind of self-executing framework for proof. Trial lawyers selectively wield evidentiary rules to block their opponent's proof while revealing whatever information helps their own cause. The core principles of relevance and limited admissibility, Rules 401 to 403 and Rule 105, embrace the adversarial deployment of evidentiary rules without accounting for how this approach may well degrade the varied policies found in the many rules that are ignored, evaded, or forgotten during trial.

C. THE PERSPECTIVE OF THE APPELLATE COURT

The law of evidence is largely a creature of the trial court, its natural habitat.¹⁰³ Appellate courts' discussions of evidence issues, by contrast, remind one of the dissecting tray in a Biology class—dissection exposes the lifeless animal's organs but little about how the creature lived. The appellate court's perspective frankly acknowledges this limitation but puts the best possible face on it.

The template approach to evidence law predominates on appeal, at least ostensibly; that is, case law discussions invariably start on the supposition that the rules of evidence govern trials. Yet the appellate courts' commitment is severely hedged by a host of rules, doctrines, and conventions designed to foster finality of the trial court's rulings. In particular, appellate courts frankly recognize that evidentiary rules operate within a dynamic adversarial environment over which the trial judge must be accorded considerable latitude. There is no inclination to reverse a judgment just because an evidentiary rule may have been broken.

These generalizations are, in part, empirically substantiated. Strikingly few cases are reversed for evidentiary violations. Reviewing over 20,000 cases decided by federal courts in two years, one distinguished commentator found that only 30 cases were reversed for an evidentiary error at trial.¹⁰⁴ The fact that appellate courts reverse less than 1% of judgments for evidentiary errors vividly illustrates the suzerainty of the trial court in matters of evidence.

Appellate doctrine and rules explicitly endorse, foster, and explain this outcome. Federal Rule of Evidence 103, which governs "rulings on evidence," sets forth stringent requirements for raising evidentiary errors on appeal. Counsel must have made not only a timely and specific objection, or sufficient offer of

103. See MAGUIRE, *supra* note 13 at 2 (asserting that the "wheat" remains in the trial court while the "chaff" is grist for appeal).

104. Margaret A. Berger, *When, If Ever, Does Evidentiary Error Constitute Reversible Error?*, 25 LOY. L. REV. 893, 894-95 (1992). Of the 30 cases, 17 were civil and 13 criminal. *Id.* at 895. Professor Berger warned that even the small number of 30 cases might be misleading because on closer scrutiny "(1) that some of the alleged errors are not really evidentiary errors, and (2) that in a number of cases an element other than evidentiary error may have accounted for the appellate court's response despite the court's stated reliance on the erroneous evidentiary ruling." *Id.* at 894-95.

proof, but the error must be “predicated upon a ruling” that affects “a substantial right of the party.”¹⁰⁵ A “substantial right” is generally characterized as error that “material[ly] affect[ed]” or “substantially swayed” the jury.¹⁰⁶ Put differently, “[e]rror not affecting a substantial right is often characterized as harmless.”¹⁰⁷ The “substantial right” standard, bluntly stated, is the appellate court’s way of saying “so what?” even when confronting a blatantly obvious evidentiary error.

Yet in deciding whether there was any error to begin with, appellate courts accede broad authority to the trial judge. Evidentiary rulings are reviewed under an “abuse of discretion” standard. No error occurs unless the trial judge misunderstood the law or unreasonably applied the rule to the facts in deciding upon admissibility.¹⁰⁸ Appellate courts, then, will not second guess trial judges unless their rulings border on the capricious.

Various other appellate doctrines expressly contemplate and generally forgive the use of inadmissible evidence.¹⁰⁹ Case law and commentators recognize, or perhaps just resign themselves to, “invited error,” “door opening,” and “curative admissibility” while disagreeing about the contours, scope, and rationales underlying these doctrines. For present purposes an exhaustive discussion of these disagreements is not in order, but a brief sampling underscores the general point that appellate courts do not grade trial court records like law school Evidence examinations.

In essence, parties may “lose the right to exclude evidence” by their “affirmative strategies.”¹¹⁰ In their treatise, Professors Mueller and Kirkpatrick describe “invited error” as “what happens when a party puts a question to a witness and gets a fair and responsive answer. . . .”¹¹¹ The party may regret the question, but the testimony remains. “Door-opening,” according to Mueller and Kirkpatrick, involves the use of “counterproof” and encompasses both situations in which the invited evidence is admissible (e.g., character of the defendant) and inadmissible (no objection was raised to the initial evidence).¹¹² Door-opening, then, strongly smacks of a “tit-for-tat rule” that is fully justified by the adversarial ethos: “[t]he real concern . . . is that evidence that might affect outcome should

105. FED. R. EVID. 103(a).

106. GRAHAM, *supra* note 70, § 103.1, at 18-19 (quoting *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978) and *Kotteakos v. United States*, 328 U.S. 750, 756 (1946)).

107. GRAHAM, *supra* note 70, § 103.1, at 19-21; *see* MUELLER & KIRKPATRICK, *supra* note 49, § 1.7, at 22 (“The message is not to insist on applying rules for their own sake, but to see them as tools that can help achieve a fair and just result.”).

108. *See* GRAHAM, *supra* note 70, § 103.1, at 12-18 (reviewing and critiquing various formulations of the “abuse of discretion” standard).

109. Although these doctrines may be invoked in the trial court, they receive their fullest treatment in appellate courts.

110. MUELLER & KIRKPATRICK, *supra* note 49, §1.4, at 11.

111. *Id.*

112. *Id.* §1.4, at 11-12.

not be immune from rebuttal.”¹¹³ The doctrines are, however, hardly distinct and clear cut. Rather, they “overlap and converge and even the terms are sometimes used interchangeably.”¹¹⁴ Invited error and door opening are products of “strategic choices” by adversaries at trial:

At the heart of each [i.e., invited error and door-opening] is the notion that a party who broaches a subject in almost any way—by argument, by relying on evidence, by putting questions to witnesses called by others, by calling witnesses and adducing their testimony—is limited by these strategic choices. He can neither object to his own folly nor complain about reasonable countermoves by others.¹¹⁵

Another treatise by Professors Park, Leonard, and Goldberg (“Park”), offers a more refined typology of this idea of “evening up”—that is, when “a party is allowed to do something or to present evidence that ordinarily would be improper only because the other party did it first.”¹¹⁶ In Park’s nomenclature, “curative admissibility,” “fighting fire with fire,” and “opening the door” are distinct but related concepts. “Curative admissibility” occurs when inadmissible evidence is met with inadmissible evidence.¹¹⁷ “Fighting fire with fire” includes curative admissibility but also applies when one party’s “improper action” is met with otherwise improper action.¹¹⁸ And “opening the door” embraces curative admissibility and fighting fire with fire as well as describes what happens when the initiating party offers admissible evidence which in turn permits use of previously inadmissible evidence.¹¹⁹

At stake on appeal, then, is whether the appellate court will even consider a claimed error. A party that “invited error” at trial in effect waives it and will not be permitted to take advantage of the “induced” error on appeal.¹²⁰ By contrast, “fighting fire with fire” seemingly arms an aggrieved party with both trial and appellate remedies: specifically, at trial the aggrieved party may offer inadmissible evidence to counter its opponent’s inadmissible evidence without waiving the right to appeal the initial error.¹²¹

The uncertainty, inconsistency, and confusion hovering about these doctrines is, however, entirely understandable. The appellate courts are left to grapple with

113. *Id.* at 12.

114. *Id.*

115. *Id.*

116. PARK ET AL., *supra* note 50, § 1.10, at 37.

117. *Id.*

118. *Id.*

119. *Id.* The treatise provides illustrations, and the authors observe that case law has been inconsistent in its application of these doctrines. *See id.* at 40-41.

120. GIANNELLI, *supra* note 42, § 6.07, at 78.

121. *Id.* § 6.08, at 79. Professor Giannelli reserves the term “door opening” for situations in which there was “no impermissible conduct,” as where a criminal defendant elects to offer evidence of his (or the victim’s) character trait, thereby enabling the prosecution to attack his character under Rule 404(a). *Id.*

fleeting events at trial that become focal points on appeal. A relatively evanescent oral exchange at trial, usually ad libbed by the judge and lawyers alike, becomes the focus of countless hours of research, lengthy written exegesis, and plodding argument on appeal. Unless the trial judge seriously abused his or her discretion, however, there is little inclination to find error, let alone reverse a judgment. Moreover, as we will see, skilled trial lawyers are trained to make quick decisions in the fluid environment of trial with the foremost objective of winning the case; fidelity to the rules of evidence is never high on the list of priorities. In short, appellate courts assume—in the purest of senses—that the lawyers and trial court understood the pertinent evidentiary rules while struggling to make sense of a trial court record that might well suggest otherwise.

Curative admissibility and related doctrines are special instances of a more general “waiver” doctrine. Indeed, appellate courts often sidestep evidentiary issues by finding that a party waived any error by failing to properly object, if the claimed error involved the admission of evidence, or to make an adequate offer of proof, if it involved the exclusion of evidence. Since the waiver rule, broadly construed, suggests that parties may in effect waive most, if not all, evidence rules, it is necessary to turn our attention to the dynamics of trial to understand the implications of this nihilistic doctrine—a master rule that negates all other rules.

D. INSTITUTIONALIZED NIHILISM: THE TRIAL COURT PERSPECTIVE

There are no “evidence police” at trial to enforce the modern law of evidence; rather, trial “lawyers are ordinarily responsible for rooting out inadmissible evidence.”¹²² Although these insights have produced strikingly little dissent or criticism, they carry staggering implications for ethics as well as the law of evidence. In this section we will discuss the “waiver” rules and their impact on the adversary ethos at trial. Although waiver is traditionally discussed in terms of appeal, the doctrine has its initial and greatest impact at trial, where the parties (i.e., the trial lawyers) largely determine what evidence is admitted, and the judge rules on admissibility only when explicitly invited by the lawyers to do so. The next section will survey what lawyers and law students are taught about when and why to invoke evidentiary rules. As we will see, a scrupulous adherence to the law of evidence is not one of the prime objectives.

The absence of “evidence police” underscores a critical point: there is no impartial neutral whose duty it is to enforce evidentiary rules at trial. The trial judge’s role is to rule only upon whatever objections or proffers are advanced by the parties. Moreover, trial lawyers are under no obligation to object to inadmissible evidence. Thus, the law of evidence is effectively reduced to whatever subset of rules the lawyers choose to adhere to at trial based on their

122. PARK ET AL., *supra* note 50, § 2.01, at 52; *see* MCCORMICK ON EVIDENCE, *supra* note 9, § 52, at 220 (“The burden is placed on the party opponent, not the judge.”).

varying knowledge, skill level, experience, and tactical judgments. The discussion that follows sets forth the principle contours of the waiver rule which support this observation.¹²³

The starting point is Rule 103.¹²⁴ The failure to make a timely and sufficiently specific objection carries two consequences. First, absent “plain error,” a rare eventuality,¹²⁵ the aggrieved party cannot raise the issue on appeal.¹²⁶ Second, “the jury may consider the evidence for whatever probative value it may in their judgment possess.”¹²⁷ A leading treatise succinctly expands upon this second point:

[A] failure to make a sufficient objection to incompetent evidence waives any ground of complaint as to the admission of the evidence. But it has another equally important effect. If the evidence is received without objection, it becomes part of the evidence in the case and is usable as proof to the extent of its rational persuasive power. The fact that it was inadmissible does not prevent its use as proof so far as it has probative value. The incompetent evidence, unobjected to, may be relied on in argument, and alone or in part it can support a verdict or finding. This principle is almost universally accepted. The Federal and Revised Uniform Rules of Evidence are silent on this subject but raise no doubt as to the continued viability of the common law rule. The principle applies to any ground of incompetency under the exclusionary rules.¹²⁸

The net effect of both outcomes is that trial lawyers choose not only what information (“evidence”) to put before the trier of fact, but also which rules will be used to filter or shape the proof.¹²⁹

Moreover, the failure to object may be deliberate, inadvertent, or even

123. For a detailed discussion of the law governing objections, see GRAHAM, *supra* note 70, §§ 103.1-103.6; MCCORMICK ON EVIDENCE, *supra* note 9, at 214-64.

124. FED. R. EVID. 103.

125. GRAHAM, *supra* note 70, § 103.9, at 72-73 (“The adversary system, based on party responsibility is deeply engrained in our jurisprudence, particularly in the field of evidence. This belief in the efficacy of the adversary system together with considerations of judicial economy, underly [sic] the requirement that for potentially reversible error to be considered on appeal it must first have been brought to the attention of the trial court The infrequency with which the doctrine is generally applied precludes deliberate reliance upon it during the trial of a case.”).

126. *Id.* § 103.2, at 32.

127. *Id.* at 40; see GIANNELLI, *supra* note 42, § 6.02, at 68 (discussing the consequences of a failure to object, the author states: “[t]he admitted evidence becomes part of the trial record and may be considered by the jury in its deliberations, by the trial court in ruling on motions (i.e., directed verdicts), and by a reviewing court determining the sufficiency of the evidence”); MUELLER & KIRPATRICK, *supra* note 49, § 1.3, at 7 (“Absent an appropriate objection or motion to strike, evidence that the trial court admits may be considered (to the extent it is relevant) by the trier of fact . . .”).

128. MCCORMICK ON EVIDENCE, *supra* note 9, § 54, at 242 (footnotes omitted).

129. In *Ohler v. United States*, 529 U.S. 753 (2000), the Supreme Court addressed the role of trial counsel’s choices in a case holding that a criminal defendant who elects to introduce her prior criminal convictions before the Government has a chance to do so waives her right to challenge a trial court’s ruling admitting the prior convictions for impeachment purposes:

negligent. Indeed, it may be misleading to speak in terms of a “failure” to object because the word “failure” denotes a breach of duty or substandard performance. To be sure many potential objections are missed because counsel did not react quickly enough or raise the correct issue in a timely manner, yet often times trial lawyers deliberately forego objections for tactical reasons (as we shall see in the next section). Putting to one side tactical waivers, it must be recognized that Rule 103 imposes extraordinary demands upon even the most technically astute trial lawyer. Although rarely discussed in these terms, Rule 103 effectively imposes a “shot clock” on the law of evidence: lawyers who wish to invoke specific rules must do so within an excruciatingly short time period.

A proper objection has two elements. First, the objection must be timely. Objections to a question must ordinarily precede a witness’s answer unless the witness’s rapid fire response makes this unreasonably difficult.¹³⁰ The objecting attorney normally has the precious few seconds (usually less) between the end of the question and the start of the witness’s answer to decide whether to object and on what grounds.¹³¹ The oft-quoted justification for this stringent timing requirement is that counsel should not be permitted to listen to the answer and

Whatever the merits of these contentions, they tend to obscure the fact that both the Government and the defendant in a criminal trial must make choices as the trial progresses. For example, the defendant must decide whether or not to take the stand in her own behalf. If she has an innocent or mitigating explanation for evidence that might otherwise incriminate, acquittal may be more likely if she takes the stand. Here, for example, Ohler testified that she had no knowledge of the marijuana discovered in the van, that the van had been taken to Mexico without her permission, and that she had gone there simply to retrieve the van. But once the defendant testifies, she is subject to cross-examination, including impeachment by prior convictions, and the decision to take the stand may prove damaging instead of helpful. A defendant has a further choice to make if she decides to testify, notwithstanding a prior conviction. The defendant must choose whether to introduce the conviction on direct examination and remove the sting or to take her chances with the prosecutor’s possible elicitation of the conviction on cross-examination.

Id. at 757-58. The Court went on to address the related choices faced by the Government’s lawyers:

The Government, too, in a case such as this, must make a choice. If the defendant testifies, it must choose whether or not to impeach her by use of her prior conviction. Here the trial judge had indicated he would allow its use, but the Government still had to consider whether its use might be deemed reversible error on appeal. This choice is often based on the Government’s appraisal of the apparent effect of the defendant’s testimony. If she has offered a plausible, innocent explanation of the evidence against her, it will be inclined to use the prior conviction; if not, it may decide not to risk possible reversal on appeal from its use.

Id. at 758 (footnote omitted).

130. GRAHAM, *supra* note 70, § 103.3, at 40-42.

131. The exacting demands of this rule can be obviated somewhat by bringing motions *in limine*, but it is impossible to foresee all, or even most, potential objections and judges are under no obligation to rule on such motions anyway. Indeed, the judge may not be in a position to rule on the admissibility of some evidence until the trial is well underway. See MCCORMICK ON EVIDENCE, *supra* note 9, § 52, at 222-23 (“The usual rule is that the judge has a wide discretion to make or refuse to make advance rulings . . .”). For a case acknowledging the growing use of motions *in limine* while forswearing any suggestion that their use is mandatory for “all evidentiary issues that *might* inspire an objection at trial,” see *State v. Wright*, 2003 WI App 252, ¶¶ 38-39.

then move to strike if it is not to his or her liking. Yet neither the rules nor the case law distinguish between the lawyer who makes a calculated, strategic decision to wait and one who is just a bit slow on the draw.¹³² In situations in which the ground for the objection was not apparent until the testimony was given (e.g., the question was proper but the witness's response included inadmissible hearsay or character evidence), counsel may move to strike the improper evidence at the point when the error became "apparent."¹³³ A dilatory motion to strike also results in waiver of any "apparent" objection.¹³⁴ Should the evidence be stricken, the judge may read a curative instruction that directs the jury to disregard the (now) erased evidence. Except in rare situations, the curative instruction is deemed an adequate remedy, notwithstanding its shaky foundation in psychology and common sense.¹³⁵

Second, the objection must state the ground for the evidence's inadmissibility unless it is otherwise clear from the context.¹³⁶ Ordinarily, "objections must reasonably indicate the appropriate rules of evidence relied on as reasons for the objections."¹³⁷ A reasonably specific objection educates both the judge and the adversary about the evidentiary issue. Counsel proffering the evidence may then remedy any perceived defect in the foundation, if she chooses (and can), and the judge will rule on the issue raised. It is enough "to name the generic rule being violated";¹³⁸ objecting counsel is not compelled to spout rule numbers or elaborate further, unless the judge expressly requests such. For example, "Objection, hearsay" suffices where the proponent offers an out-of-court statement. There is no need to cite Rule 802 or the definition of hearsay in Rule 801(c).¹³⁹ And for these same reasons, objecting counsel must identify all grounds of inadmissibility if more than one is implicated (e.g., "Objection, the question is leading, calls for hearsay and lacks proper authentication.").¹⁴⁰ If only part of an exhibit or testimony is objectionable, counsel must specify which part is problematic and on what ground.¹⁴¹

132. See, e.g., GRAHAM, *supra* note 70, § 103.3, at 40 n.1; see also MCCORMICK ON EVIDENCE, *supra* note 9, § 52, at 221 ("[T]he opponent is not allowed to gamble on the possibility of a favorable answer.").

133. See GRAHAM, *supra* note 70, § 103.3, at 40-41.

134. *Id.* at 43.

135. See *id.* On the "timing" of objections, also see MCCORMICK ON EVIDENCE, *supra* note 9, § 52, at 221-22.

136. GRAHAM, *supra* note 70, § 103.2, at 34.

137. MCCORMICK ON EVIDENCE, *supra* note 9, § 52, at 225.

138. *Id.* at 227 (also discussing the "minority view" that opponents should be compelled to identify the "missing foundational element").

139. FED. R. EVID. 802 (general rule excluding hearsay), 801(c) (defining hearsay).

140. GRAHAM, *supra* note 70, § 103.2, at 36 ("A specific objection which is overruled constitutes a waiver of all grounds not stated, or in other words one ground cannot be urged below and another on appeal." (footnote omitted)).

141. *Id.* at 35. Also see MCCORMICK ON EVIDENCE, *supra* note 9, § 52, at 228 (footnotes omitted):

Objections ought to be specific not only with regard to the ground, but also with respect to the particular part of an offer. Suppose that evidence sought to be introduced consists of several

Taken together, the timeliness and specificity requirements demand that trial lawyers apply the entirety of the law of evidence to each question and each answer as they are being spoken in the courtroom! Professor Park effectively captures the challenge:

In a sense, the law of evidence has a very short life, from the time of an objectionable question until the witness answers. If the lawyer does not spot the evidence issue as the question is asked and voice the objection in that brief pause between question and answer, the law of evidence might have no effect.¹⁴²

Put differently, trial lawyers must listen to each question asked by opposing counsel and each answer of the witness, deciding in that instant whether there is ground for an objection and whether it should be raised. Trial testimony is not organized like an Evidence course syllabus, so it is often difficult to anticipate when evidentiary issues will arise. Park poses the daunting challenge for trial lawyers in these terms:

Most evidence issues . . . pop up unexpectedly at trial. They require the trial lawyer to hear the issue in the examiner's question; recognize the applicable evidence law; gain the judge's attention, while quieting the witness; object precisely; and be prepared to argue evidence theory and its applicability to the facts presented—all in less than half a minute.¹⁴³

The pace of trial alone dictates that most potential evidentiary issues will fall by the wayside.

The doctrines governing the timeliness and specificity of objections also effectively delimit the role of the trial judge; that is, the judge must formally rule on the admissibility of evidence only when called upon by trial counsel's objection. Furthermore, the judge need rule only upon the issue identified in the objection. The long-standing hostility toward the oft-maligned "general objection"—"I object, the evidence is irrelevant, immaterial, incompetent, and inadmissible"¹⁴⁴—tacitly recognizes that judges do not serve as law professors and trials are not academic colloquia on evidence law. In short, the judge is not obligated to search out other, "better" grounds for an objection. The judge must

statements or items tendered as a unit in a deposition, letter, conversation, or transcript of testimony. The objection is to the whole of the evidence when parts are subject to the objection made but parts are not. In this situation, the judge will not be held to have erred in overruling the objection. It is not the judge's responsibility to sever the bad parts if some are good. That is the opponent's task. Obviously this rule should not be administered rigidly by the appellate courts but with due concession to the realities of the particular trial situation.

142. See PARK ET AL., *supra* note 50, § 2.05, at 63.

143. *Id.* § 2.01, at 53.

144. GRAHAM, *supra* note 70, § 103.2, at 37 (noting that such an objection "raises only the objection that the evidence fails to meet the test of relevancy specified in Rule 401").

rule only on the stated ground. And absent an objection by trial counsel, the judge has no standing duty to raise *sua sponte* a point of evidence law.¹⁴⁵

Offers of proof are governed by similar rules and considerations.¹⁴⁶ They are implicated whenever the proponent offers evidence, whether testimony or an exhibit, and the trial judge either sustains an objection or manifests a serious reservation about its admissibility. Although an offer of proof is useful in preserving error for appeal, it is most effective in educating the judge about what the proponent wants to introduce and why she should be permitted to do so.¹⁴⁷

A proper offer of proof has two primary facets and almost always occurs outside the jury's presence.¹⁴⁸ First, the proponent must make known to the court the substance of the evidence unless it is readily apparent from the context (e.g., a disallowed leading question on cross-examination). The lawyer may do this herself by paraphrasing the anticipated testimony or by proffering the exhibit. In appropriate cases, the judge may permit or even compel a question-and-answer offer of proof whereby the witness is examined on the disputed point so that there is no uncertainty over the precise tenor of the testimony.¹⁴⁹

The second facet consists of the proponent's theory of admissibility; that is, the reasons why opposing counsel's objections should be denied. A reviewing court will consider only those legal bases stated on the record.¹⁵⁰ More importantly, the proponent's theory of admissibility serves as an oral trial brief that educates the judge as to why the evidence should be formally admitted, and thus necessarily plays off of whatever objections were made to the proffered evidence. The trial judge need rule only on the theories proffered by the proponent. The judge is not obligated to assist counsel in admitting the evidence. Nor is opposing counsel under any obligation to identify ways in which her objections may be surmounted. To take a simple example, if proponent offers hearsay under an exception that does not permit its introduction, neither the judge nor opposing counsel are obliged to alert the proponent to other applicable rules.

In sum, the waiver doctrine recognizes that the modern adversary trial is dominated by lawyers who decide what evidence to present and, more strikingly, which rules of evidence apply and to what degree of rigor. Trial judges do not play the role of "evidence police" and need rule only on those evidentiary issues specifically raised by counsel. Thus, the waiver rules effectively compress and

145. See MCCORMICK ON EVIDENCE, *supra* note 9, § 52, at 220 ("The burden is placed on the party opponent, not the judge."); *id.* § 55, at 248 ("The judge should exercise his discretionary power to intervene only when the evidence is irrelevant, misleading, or prejudicial, as well as inadmissible.").

146. See, e.g., GRAHAM, *supra* note 70, § 103.7, at 55.

147. MCCORMICK ON EVIDENCE, *supra* note 9, § 51, at 216-17.

148. For a full discussion of offers of proof, see GRAHAM, *supra* note 70, § 103.7, at 55-63, and MCCORMICK ON EVIDENCE, *supra* note 9, § 51.

149. GRAHAM, *supra* note 70, § 103.7, at 60-61. The proffered exhibit may itself be made a part of the record for appellate purposes. *Id.* at 61.

150. MCCORMICK ON EVIDENCE, *supra* note 9, § 51, at 219.

simplify the law of evidence. The breathtakingly short timeliness requirement guarantees that many complex, difficult, and technical issues will be missed or just passed by. Nor are these demands costless to parties. Any “un-objected-to” evidence may be used by the trier of fact in reaching its verdict and by the judge in ruling on sufficiency of evidence.

E. THE TRIAL LAWYER’S PERSPECTIVE

The discussion above demonstrates that the adversary ethic has been inculcated into the very fabric of evidentiary rules and doctrines. This section discusses how lawyers are taught to use the rules at trials from the standpoint of both opposing counsel, who holds the option of objecting, and the proponent, whose introduction of evidence is necessarily informed by evidentiary doctrine and rules. Opponents and proponents face very different arrays of issues.

First, are opponents expected to object to evidence that is, or which may be, inadmissible under some rule? Related issues implicate distinctions between “missed” objections and tactical decisions to “pass” on an objection. Finally, assuming a technically proper objection, how should we evaluate objecting counsel’s motives? For example, is it ethically permissible for lawyers with superior skill and experience to intimidate or befuddle one of lesser talent?

Second, to what extent may proponents rely on the evidentiary “shot clock”—the waiver rules—when offering proof? Here too one issue is whether the proponent may take advantage of an opponent’s lack of skill or technical knowledge. Yet the proponent’s overriding concern is to put on a compelling, persuasive case and worry only about those evidentiary issues explicitly raised by opposing counsel’s objections. In short, the adversary imperative impels trial lawyers to place a far greater premium on persuading the trier of fact than it does on adhering to the Byzantine subtleties of evidence doctrine.

The discussion that follows is partly descriptive—how in fact do lawyers employ evidentiary rules at trial—and partly normative—how should they employ the rules. The discussion will draw freely from several leading evidence and trial practice texts without purporting to survey the literature comprehensively.

1. THE TACTICS AND ETHICS OF OBJECTIONS: OPPOSING COUNSEL’S PERSPECTIVE

Four issues arise when assessing how, when, and why trial lawyers object to evidence. The first and most obvious issue is whether lawyers are expected, indeed obligated to object to inadmissible evidence. Second, we will see that a great many objections are simply missed because opposing counsel did not recognize the issue within the time limits demanded by the rules. Third, when a lawyer does spot an objection, what factors are considered in deciding whether or not to press the objection? A related point concerns erroneous objections: even the “dumbest” objections usually receive only the sanction inherent in the word

“Overruled.” Finally, trial evidence literature is rife with advice that objections may be used to confuse and disrupt the other lawyer and even to tip off witnesses, yet is this (pervasive?) practice ethical and professionally responsible?

a. No “Duty” to Object

As to the first question, the trial literature unanimously holds that lawyers are under no duty to object to “inadmissible” evidence. This teaching extends not only to evidence that *may* offend some technical rule, but also that which clearly contravenes evidentiary doctrine because it lacks a proper foundation or is precluded altogether. One evidentiary treatise nicely describes why trial lawyers may deliberately forego an objection:

Information offered by a proponent that does not meet the requirements of the evidence rules usually will be admitted as evidence, unless the opponent objects to it. Often the opponent knows the information is not admissible, but has no tactical or strategic reasons to exclude it. Other times, both parties may have an equal interest in having the information before the jurors.¹⁵¹

The same text advises lawyers to avoid “too many objections.”¹⁵² Another leading commentator on the trial process, Professor Tanford, provides seven reasons why a lawyer may not want to object:

1. An objection may “emphasize harmful evidence.”¹⁵³
2. “The evidence will eventually be admitted anyway.”¹⁵⁴
3. “Speculation” triggered by the objection “is worse than hearing the truth.”¹⁵⁵
4. “Too many objections will cause an unfavorable reaction among jurors.”¹⁵⁶
5. The evidence at issue “may open the door to otherwise inadmissible favorable evidence.”¹⁵⁷
6. There are “[a]lternative means of combating the objectionable evidence.”¹⁵⁸

151. PARK ET AL., *supra* note 50, § 2.01, at 52.

152. *Id.* at 56.

153. J. ALEXANDER TANFORD, *THE TRIAL PROCESS: LAW, TACTICS AND ETHICS* 186 (3d ed. 2002). Here the concern is that an objection will simply “spotlight” the problematic evidence, which may be admitted anyway. *Id.*

154. *Id.* Form objections (e.g., “leading”) simply invite the opponent to rephrase the question. And even substantive objections, such as hearsay, may only motivate opposing counsel to provide a more complete and perhaps persuasive foundation. *Id.*

155. *Id.*

156. *Id.* Tanford asserts that this is a piece of questionable “courthouse folklore” that should not be blindly followed. *Id.*

157. TANFORD, *supra* note 153, at 187; *see supra* text accompanying notes 109-21.

158. TANFORD, *supra* note 153, at 187. Tanford’s examples relate to exposing errors and inaccuracies by other witnesses and even opposing counsel. *Id.*

7. "The objection is petty."¹⁵⁹

A third authority will suffice to make the point. Professor James McElhaney, an influential teacher and writer on this subject, counsels trial lawyers to object "only when it counts," underscoring that "[a] trial is not a law school examination."¹⁶⁰ Switching metaphors from law school to law enforcement, he colorfully explains, "no one is going to give you any extra points for identifying every possible objection. A trial lawyer is not an evidence traffic cop whose sworn duty is to ticket every improper question and answer."¹⁶¹

In short, no respectable authority on trial practice or evidence law suggests that all recognized objections should be raised. Yet it cannot be gainsaid that failing to object, for whatever reason, carries significant consequences: namely, the evidence may be used by the trier of fact for any relevant purpose.¹⁶²

b. "Missed" Objections

Not all passed objections represent tactical waivers that are exercised in a knowing and intelligent manner. Many possible objections are simply "missed," for lack of a better term. How and why does this occur?

Sometimes the opponent will be unaware that the information can be excluded. Occasionally the opponent will not be quick enough with an objection to keep it from the jurors' ears, and not interested in emphasizing the information by asking the judge to strike it and tell the jurors to disregard it.¹⁶³

Although these observations are accurate, they beg for elaboration.

The courtroom is in many respects a harsh, unforgiving, and enormously demanding environment. Its preferred medium is the spoken word; thus, skilled trial lawyers must develop both oral (speaking) and aural (listening) skills. Moreover, at trial the Q&A often proceeds at a fast-paced staccato measure. Counsel must carefully listen to what is said because each "Q" and each "A" must be evaluated on its own terms for possible objections. This task alone is onerous and difficult. Long, stress-filled hours at trials that stretch over days or weeks only increase the physical and mental burden. There are, of course, no scripts for lawyers and witnesses to follow. And since the Q&A is extemporaneous, the decision to object is necessarily made on the fly as well. Finally, the thousands of questions and answers may implicate any of a number of difficult (or easy) evidentiary issues which must be recognized within a dizzyingly short time

159. *Id.*

160. James W. McElhaney, *Effective Objections*, 28 LITIGATION 53, 63 (Summer 2002).

161. *Id.*

162. See *supra* text accompanying notes 87-89.

163. PARK ET AL., *supra* note 50, § 2.01, at 52.

period and articulated with the specificity required by the law of evidence.¹⁶⁴ Regardless of her level of skill and experience, “[n]o lawyer . . . can anticipate every potential piece of damaging, but inadmissible, evidence.”¹⁶⁵ As quoted earlier, Park’s treatise frankly acknowledges that “the law of evidence has a very short life, from the time of an objectionable question until the witness answers.”¹⁶⁶

In sum, the physical and mental demands of trials help explain why many objections, meritorious and otherwise, are not made at the exact right moment. Indeed, one may safely wager that many arcane and abstruse evidentiary doctrines exist only in the world of academic literature and are seldom litigated because they pass by unnoticed or unappreciated in the hurly burly of trial. And as we have seen, absent a proper objection the claimed error is analyzed on appeal under the hugely unforgiving plain error doctrine.¹⁶⁷ No points are awarded for the degree of difficulty presented by the evidence.

c. Deciding Whether to Object

Just as missed objections are fully anticipated, understood, and effectively embraced by the law of evidence, the very same adversary ethos unequivocally permits lawyers to forgo objections that are obvious and recognized. Put differently, counsel may hear questions or answers that she immediately recognizes as violating some technical (e.g., form of the question) or substantive (e.g., hearsay) rule, but deliberately withhold an objection.¹⁶⁸ And why would a lawyer forgo an opportunity for a favorable ruling? The answer typically involves passing over a chance for a fleeting pyrrhic victory in the hope of a greater gain or because even a favorable ruling may carry greater costs. “Most accomplished trial lawyers” object “to evidence only when the question is objectionable *and* the answer will be harmful to the objecting party’s case.”¹⁶⁹ As previously mentioned, counsel often has no “tactical or strategic reasons to exclude” the testimony and it may be that “both parties may have an equal interest in having the information before the jurors.”¹⁷⁰ Tanford writes that lawyers should consider, among other factors, the certainty that the objection will be sustained

164. See *supra* text accompanying notes 128-45.

165. PARK ET AL., *supra* note 50, § 2.03, at 57.

166. *Id.* § 2.05, at 63; see *supra* text accompanying note 143; see also MAUET & WOLFSON, *supra* note 47, at 1 (observing that “[t]rial lawyers and judges are required to hear, listen, and analyze quickly” and lamenting that “many lawyers lack the skills needed to obtain favorable rulings for the right reasons”).

167. See *supra* text accompanying notes 104-08. Missed objections may of course also be raised in legal malpractice actions or in claims of ineffective assistance of counsel in criminal cases.

168. Objections at trial are left to counsel’s discretion because they relate to the “means” of representation. The client controls only the “objectives” of representation. See MODEL RULES R. 1.2.

169. PARK ET AL., *supra* note 50, § 2.03, at 56.

170. *Id.* § 2.01, at 52.

and whether the evidence hurts the objecting lawyer's case.¹⁷¹ McElhaney urges lawyers to object "only when it counts."¹⁷² One recurrent fear is that a jury will view objecting counsel as an obstructionist with a weak case who hides behind technical rules.¹⁷³ In the end the jury's perception is probably governed by what the judge does. If she sustains a flurry of objections, jurors will reasonably conclude that objecting counsel acted correctly and properly. But if the judge overrules the serial objections, the objecting lawyer compounds the obstructionist tag with futility and defeat. Failed objections may only serve to underscore damaging evidence and emphasize counsel's awareness of how much it hurts his or her case.¹⁷⁴

When counsel does object, however, the law of evidence does not ordinarily question the lawyer's motives. Assuming the objection is timely, the judge will sustain or overrule it on the stated grounds. Why the lawyer lodged the objection is immaterial, provided that he or she had at least a good faith belief that it was legally valid.¹⁷⁵

Yet how does one establish counsel's good faith belief in the objection or motion to strike? Usually good faith translates to whether there is a reasonable legal basis for the objection.¹⁷⁶ Sustained objections are, of course, non-problematic (assuming the lawyer's motive is immaterial, as discussed in the next section).¹⁷⁷ When the trial judge overrules the objection, however, the judge signals that it was misplaced or somehow wrong. How wrong must objecting counsel be before bad faith is implicated? Consider several scenarios:

1. The opposing lawyer says "Objection," but cannot articulate why the evidence is inadmissible (e.g., the lawyer fumbles and stammers for some explanation before the judge finally overrules the objection).
2. The opposing lawyer objects but selects a patently erroneous ground.

These scenarios may depict a lawyer with insufficient knowledge of evidence law or trial skill; ordinarily the proper penalty is the overruling of the objection coupled with the embarrassment that accompanies (one hopes) a deficient or

171. TANFORD, *supra* note 153, at 184-85.

172. McElhaney, *supra* note 160, at 63.

173. *See* TANFORD, *supra* note 153, at 186. Tanford is not persuaded by this bit of "folklore," yet many lawyers believe in it. *But see* PARK ET AL., *supra* note 50, § 2.03, at 56 (urging lawyers to avoid "too many objections" lest they appear "obstructionist").

174. PARK ET AL., *supra* note 50, § 2.03, at 56.

175. J. Alexander Tanford, *The Ethics of Evidence*, 25 AM. J. TRIAL ADVOC. 487 (2002).

176. *See id.* at 521-27 (discussing the "good-faith basis principle").

177. Of course, it may be that both objecting counsel and the trial judge are wrong, as occurs whenever an appellate court finds error in a ruling that excludes evidence.

inept performance.¹⁷⁸ The trial judge may request objecting counsel to explain further the bases of an objection when the ground is opaque, but the prime concern is making the record, not determining whether the lawyer acted reasonably in the first place. Custom aside, it would consume inordinate time to make such collateral inquiries. Moreover, evidentiary rulings are entrusted to the judge's discretion; thus, being overruled does not necessarily imply that the lawyer's objection was wrong. Occasionally commentators refer to frivolous objections, which they condemn, but neither the cases nor the rules of evidence exact any penalty beyond the judge's overruling of even the lamest of objections.¹⁷⁹

In sum, trial lawyers regularly withhold objections because the evidence is inconsequential or because objecting might inflict more damage than just remaining silent. Lawyers are under no duty to enforce the law of evidence for its own sake; only when the lawyer perceives some tactical advantage will he or she lodge the objection. When an objection is made, the court will rule on the proffered ground, no matter how misguided or ill-considered. Even the most off-the-wall objection will usually receive only the rebuke inherent in the judge's terse utterance of "Overruled."

d. Objecting to Confuse, Intimidate, or Fluster One's Opponent

Perhaps the most telling sign that we do not expect trial lawyers to serve as "traffic cops," to use McElhaney's phrase, is the practice of using objections to disrupt or over-awe a less-skilled or inexperienced opponent. In other words, the law of evidence does not demand trial lawyers be pure of heart (or even correct) when interposing objections. And nothing better underscores the workings of the adversarial ethos or the insight that the rules of evidence are creatures of the trial courts.

Commentators on trial evidence and advocacy recognize the practice and condone it.¹⁸⁰ One text, written for law students, observes that technical objections "may break the flow of a cross-examiner's effective examination and

178. The point is speculative but nonetheless reasonable. Indeed, it may be that many potential objections are "waived" because counsel lacks the confidence or knowledge to raise the point and risk embarrassment before the jury.

179. See Tanford, *supra* note 175, at 526-27. The sanctions rules governing claims, defenses, etc., such as Rule 11 of the Federal Rules of Civil Procedure and its state analogues, apply only to written submissions. Thus, a written motion *in limine* to admit or exclude evidence may raise Rule 11 concerns, but oral exchanges during trial do not. See STEVEN BAICKER-MCKEE ET AL., FEDERAL CIVIL RULES HANDBOOK 2004, at 287-303 (2004). Of course, the court has "inherent power" to control its proceedings, particularly to control the "mode and order of interrogation." FED. R. EVID. 611. Generally, however, the trial judge is most inclined to use this extraordinary power where a lawyer uses objections to harass or intimidate a witness, a subject addressed in the next section.

180. To eliminate any misunderstanding, I too recognize that lawyers use objections to disrupt and confuse opponents and accept the practice as integral to the adversary trial ("Been there; done it"). In short, I am questioning neither the accuracy of these commentators' observations about trial practice nor their "ethics."

give the direct examiner's friendly witness time to think about what is coming next."¹⁸¹ Similarly, where the direct examiner is "not . . . very adept," well-placed objections may be used with telling effect: "[p]osing technical objections may make it impossible for such an examiner to complete the direct examination, let alone make it persuasive."¹⁸² In their influential handbook on evidence, Professors Mueller and Kirkpatrick join the chorus of those who condemn the much-maligned "general objection" ("Objection, irrelevant, incompetent, and immaterial"), yet observe: "[o]f course lawyers object for reasons other than preserving claims of error (a general objection can interrupt damaging testimony, disrupt the adversary's rhythm, convey an impression of outrage, and help counsel gather his wits and come up with something better) . . ."¹⁸³

With the important caveat that objections must be valid, Professor Tanford too points out that they may be used to "fluster" one's opponent.¹⁸⁴ Tanford places the ethics of objections within a stark adversarial framework:

Objections often are used for reasons other than excluding inadmissible evidence. An attorney may make objections in order to disrupt the opponent's train of thought, tip off a witness to the answer, or distract the jury from damaging evidence. If a valid legal ground underlies the objection, there seems to be nothing wrong with using these secondary purposes as the bases for making tactical decisions about the timing of an objection.¹⁸⁵

In words that may chill law students and novice trial lawyers, he further observes that "[objections] on technical grounds are often used to harass an inexperienced attorney."¹⁸⁶ And what of the fledgling trial lawyer who struggles to lay the proper foundation amidst a flurry of objections? Again, the adversarial ethos harbors scant comfort for the uninitiated and smiles approvingly upon technically skilled lawyers who wield evidentiary rules like a rapier:

Is there any ethical problem with raising a technical objection to evidence you believe will ultimately be admissible because your adversary has failed to lay a complete foundation? The answer appears to be "No." An attorney may make technical objections to disrupt the opponent's train of thought or distract the jury from damaging evidence, as long as a valid legal ground underlies the objection. As long as evidence law requires questions to be in certain forms and foundations to be laid, you have the right to insist that the procedural rules be

181. PARK ET AL., *supra* note 50, § 2.03, at 56.

182. *Id.*

183. MUELLER & KIRKPATRICK, *supra* note 49, § 1.3, at 9.

184. TANFORD, *supra* note 153, at 185.

185. *Id.* at 187. Tanford acknowledges that a "groundless" objection for these or any other purpose would offend Model Rule 3.1. *Id.* Although Tanford speaks of these as "secondary purposes," they are often the primary purpose and nothing really turns on the distinction. *Id.*

186. *Id.* at 188. Tanford defines technical objections as "those that go solely to the procedure, not the substance, of offered evidence." *Id.*

followed, even if the outcome is that your opponent has to abandon a legitimate item of evidence. However, making groundless objections in order to fluster your opponent would clearly be unethical.¹⁸⁷

Thus, hearsay may be admissible under other exceptions known to objecting counsel, but she is entitled to stand on her hearsay objection where the proponent persists in offering the hearsay under the wrong exception. There is no duty to withhold the objection or to alert the proponent to the correct exceptions. The proscription against using groundless objections to harass is of small comfort when the rules of evidence provide an almost limitless number of valid, or at least reasonably valid, grounds.

In short, objections are frequently used to obstruct an opposing party's presentation of its case. Skilled, experienced trial counsel may raise a host of objections that bedevil a less-adept proponent. It is not uncommon to see a lawyer freeze up in the teeth of technical objections (even the most basic) or walk away from evidence because she lacks the skill, knowledge, and experience to overcome the objections. The advantage clearly goes to the lawyer who has mastered the rules of evidence, or who is at least technically proficient in its application. Ultimately, the adversarial ethos governs when and how lawyers use the rules of evidence. They are not enforced for their own sake, but rather because trial counsel sees some advantage in invoking them, whether that benefit consists of blocking harmful evidence or rendering opposing counsel less effective.

2. THE PROPONENT'S PERSPECTIVE: OFFERING EVIDENCE AND THE WAIVER RULES

Proponents¹⁸⁸ face a daunting task. Whenever a lawyer questions witnesses or offers exhibits, she looks squarely into the maw of the law of evidence, uncertain whether or when its jaws may clamp down. More precisely, as the proponent questions a witness, there looms the possibility that opposing counsel may object on any one of innumerable grounds. Sometimes proponents anticipate objections that never materialize. Other times they are surprised, perhaps even taken aback, by an unexpected objection on a ground never carefully considered. In the preceding section we saw that opposing counsel vets (in theory) every "Q" and every "A" for potential objections. Yet does the law obligate proponents to do the same with the goal of avoiding objections and complying with evidence rules? The answer is less straightforward than one might imagine.

Let us begin with the fundamentally different functions of the opponent and proponent in confronting evidence law issues. The opponent must clearly signal there is a problem—"I object"—and immediately articulate what it is (e.g., "Hearsay"). The proponent, however, is under no corresponding duty to flag an

187. *Id.* at 189 (citing MODEL RULES R. 3.1, 3.3).

188. "Proponent" refers to the lawyer's role of "offering evidence," whether it is a motion to admit an exhibit or the questioning of a witness on direct examination or cross-examination.

evidentiary issue. Rather the proponent is expected to question witnesses about the facts without signaling to the judge or opposing counsel that rough waters may lie ahead. At no point does the proponent halt the examination and proclaim, for example, “Judge, I’m now going to elicit hearsay that I fully believe is admissible under the exception for” In a sense, proponents are silent sufferers who may well anticipate evidentiary white water but are expected to say nothing unless and until there is an objection.¹⁸⁹ And even then the obligation is to respond to only the stated ground.

Of course the proponent fretting an inevitable objection regarding a critical piece of evidence may elect to file a motion *in limine* or raise the issue at trial outside the jury’s presence, but strategically it may be unwise to so “school” one’s opponent.¹⁹⁰ Nor is such notice mandated except as otherwise provided in a pretrial order, or more rarely, the odd rule of evidence.¹⁹¹ Moreover, judges are ordinarily happy to decide some motions *in limine* prior to trial (if possible), but there are limits to the court’s forbearance and resources.¹⁹² In particular, judges chafe at long lists of motions *in limine* that comprise nearly every evidentiary issue that counsel imagines might arise during trial. Faced with a plethora of motions *in limine*, the judge may well respond, “that’s why we have trials, counsel.”

We are left, then, with the broad question of what limits, if any, are placed on the proponent’s latitude to ask questions? The *Model Rules of Professional Conduct*, as we have seen, seem only to relinquish the problem to the law of evidence.¹⁹³ And because the law of evidence embodies the adversarial ethos in its doctrines and practices, is the proponent ethically unfettered because the burden of enforcing evidentiary rules is placed on one’s opponent? More precisely, may the proponent rely on the waiver rules, previously discussed, confident that any issue not specifically raised in an objection is thereby waived, thus rendering the evidence admissible for all relevant purposes?¹⁹⁴

Some commentators frankly recognize the adversarial ethic at play and impose the burden on opposing counsel. In short, all relevant evidence is admissible unless opposing counsel timely and properly objects. This approach is endorsed, at least tacitly, by those who point out that there are no evidence police and that

189. Those less sanguine may substitute the term “stealth operators” in the place of “silent sufferers.”

190. See generally PARK ET AL., *supra* note 50, § 2.02, at 54-55.

191. See, e.g., FED. R. EVID. 807 (the so-called “residual” exception, which requires “sufficient” advance notice to the adverse party).

192. See *State v. Wright*, 2003 WI App 252, ¶ 39 (denying an ineffective assistance of counsel challenge based on trial counsel’s omission to file a motion *in limine*; the court held that such decisions are discretionary and expressly rejected any suggestion that lawyers should file such motions “on all evidentiary issues that *might* inspire an objection at trial”).

193. See *supra* text accompanying notes 17-41.

194. See *supra* text accompanying notes 81-89 and 151-62.

“lawyers are ordinarily responsible for rooting out inadmissible evidence.”¹⁹⁵ Except in rare cases of plain error, Rule 103 of the Federal Rules of Evidence “recognizes the importance of the lawyer as the enforcer of evidence law by requiring an objection before admission of evidence can be appealed.”¹⁹⁶ As discussed above, lawyers may forgo objections for a host of very good reasons, including because they also want the evidence introduced, its admission may open the door to other damaging proof, or where it is feared that an objection will only underscore the harm done by the evidence.¹⁹⁷ As succinctly stated by Professors Mueller and Kirkpatrick, “requiring parties to object serves the broader interest of providing a fair but not endless chance to litigate, in effect burdening them with the job of being watchful and alert to prevent infractions of the rules.”¹⁹⁸

Dissenting from the adversarial orthodoxy, Professor Tanford, a respected expert on evidence and trial practice, advocates a more demanding standard, namely, proponents must have a good faith belief that evidence is admissible. Tanford contends that lawyers “may not include evidence that [they] *think* is not admissible.”¹⁹⁹ In his view, “it is not a defense that the opponent might not object or a judge may unexpectedly decide to admit the evidence.”²⁰⁰ Elsewhere, Tanford elaborates on both points. When in doubt (literally), the proponent should ask the judge for a ruling:

A lawyer should not attempt to get before the jury evidence which is improper. In all cases in which a lawyer *has any doubt about the propriety of any disclosure to the jury*, a request should be made for leave to approach the bench and obtain a ruling out of the jury’s hearing, either by propounding the question and obtaining a ruling or by making an offer of proof.²⁰¹

The adversarial ethos, he contends, is fatally deficient:

An argument can be made that it is not the attorney’s duty in the adversary system to anticipate the opponent’s objections and the judge’s rulings. The argument goes like this: Judges are given broad discretion to rule on the admissibility of evidence, so they might allow evidence the attorney thinks is inadmissible. Evidence not objected to is entitled to consideration by the jury, and an attorney does not know if the opponent will object. Therefore, an attorney never knows for sure whether evidence will be ruled admissible or inadmissible. This view may be compatible with the approach that the attorney

195. PARK ET AL., *supra* note 50, § 2.01, at 52.

196. *Id.* § 2.01, at 53; *see* FED. R. EVID. 103; *see also* MUELLER & KIRKPATRICK, *supra* note 49, § 1.3, at 7.

197. *See supra* text accompanying notes 151-62.

198. MUELLER & KIRKPATRICK, *supra* note 49, § 1.3, at 7. Absent an objection, it would seem that there is no “infraction.”

199. TANFORD, *supra* note 153, at 211 (emphasis added).

200. *Id.* at 212.

201. Tanford, *supra* note 175, at 522 (emphasis added).

must do everything possible for a client except present false evidence, but it cannot be squared with the good-faith principle. The attorney is offering evidence without a good-faith basis regardless of whether the opponent is competent enough to object or the judge will rule correctly.²⁰²

Tanford's provocative and compelling argument warrants careful consideration, but on closer analysis it is simply unsupported by modern evidence and ethics law, and ultimately unworkable.

To begin with, the legal authority cited by Tanford provides only modest support for the good faith principle. Model Rule 3.4(c) commands that lawyers shall not "knowingly disobey an obligation under the rules of a tribunal," which may reasonably be construed to include its rules of evidence.²⁰³ Yet Model Rule 1.0(f)'s definition of "knowingly" requires more than a subjective "good faith" belief; "[k]nowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.²⁰⁴ Indeed the *Model Rules* carefully distinguish "knowledge" from "belief," which is defined by Model Rule 1.0(a): "[b]elief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances."²⁰⁵

In short, as Professor Tanford acknowledges, it is difficult to square the "knowingly" standard of Rule 3.4(c) with his contention that a lawyer harboring "any doubt about the propriety of any disclosure" should first take up the matter with the judge (and thereby flag the issue for his or her opponent).²⁰⁶ Model Rule 3.4(e) provides a somewhat firmer basis: a lawyer shall not "in trial allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence."²⁰⁷ Yet as discussed earlier, Rule 3.4(e) appears directed more at opening statements, as Tanford acknowledges, and falls short of a mandate that proponents self-police the evidence rules.²⁰⁸ Finally, the

202. *Id.* at 522-23 (footnotes omitted).

203. MODEL RULES R. 3.4(c).

204. MODEL RULES R. 1.0(f).

205. MODEL RULES R. 1.0(a). Other definitions within the *Model Rules* address "reasonable beliefs" and even "reasonably should know":

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

MODEL RULES R. 1.0(h)-(j).

206. Tanford, *supra* note 175, at 522.

207. MODEL RULES R. 3.4(e). For the definition of "reasonable belief," see *supra* note 205.

208. See *supra* text accompanying notes 39-41. Tanford's use of the *Model Rules* is nuanced, as he couches his Rule 3.4 arguments in terms of what they "would seem" to require. Tanford, *supra* note 175, at 521-22.

case law authority cited by Tanford, *Onstad v. Wright*,²⁰⁹ involved a lawyer who disobeyed a judge's ruling on a motion *in limine*, i.e., an order by a court. Thus *Onstad* did not address the far more pervasive scenarios where opposing counsel does not object and the judge has yet to make any ruling whatsoever on the matter.

There are, however, greater difficulties with Tanford's position than these quibbles with the cited authority. First, the waiver rules are part of the law of evidence; why, therefore, can't lawyers rely on them just as they might any other rule? The waiver rules stand for much more than "the attorney must do everything possible for a client except present false evidence," as argued by Tanford. They are integral features of modern evidence law that impose the burden on opposing counsel to object where legally appropriate and tactically advantageous. The good faith principle tacitly accords evidentiary rules a hegemonic control over the presentation of trial proof that is unsupported by the history and substance of modern evidence law, which is, to the contrary, thoroughly infused with the adversarial ethos.²¹⁰

Second, the good faith principle begs the question of what is meant by the term "admissible." In the passage quoted above, Tanford concedes that his principle is also incompatible with the long-standing rule that evidence admitted without objection may be used for any relevant purpose (and error is thereby waived). Although Tanford concludes that for this reason his good faith principle must win out, the incompatibility simply underscores that the modern trial and its evidentiary rules rest on a far different set of assumptions. The earlier discussion of limited admissibility, multiple admissibility, and the seemingly insoluble ambiguity of the term "admissible" itself only underscore that modern evidence law constitutes a nearly bottomless well from which proponents may draw.²¹¹ Finally, the term "admissible," whatever it means, sweeps within its orbit all evidentiary issues, great and small. As there is no hierarchy among evidentiary rules, the good faith principle fails to distinguish between substantive and technical issues and risks converting trials into the dreaded law school Evidence examination (which no commentator advocates).²¹²

Third, a good faith standard creates a paradox by effectively penalizing skilled

209. Tanford, *supra* note 175, at 522 n.148 (citing *Onstad v. Wright*, 54 S.W.3d 799, 807-08 (Tex. App. 2001)).

210. See *supra* text accompanying notes 66-102.

211. The ambiguity is evident in Tanford's contention that "[a] lawyer should not attempt to get before the jury evidence which is improper" and his remark that lawyers with "any doubt" about a "disclosure" should first bring the matter to the judge's attention. Tanford, *supra* note 175, at 522. The law of evidence is manifestly unclear about distinctions among terms such as "admissible," "improper," "disclose," and even "get before." See *supra* text accompanying note 100-02.

212. Nothing in the Federal Rules of Evidence supports a hierarchy of rules. In appellate cases, "plain error" turns not on the perceived significance of the offended evidentiary doctrine but on the prejudice inherent in the facts of the case.

and experienced lawyers and rewarding the ignorant and inexperienced. Most experienced trial lawyers are wracked with all sorts of “doubts” about the admissibility of evidence, yet Tanford contends that “[i]n all cases in which a lawyer *has any doubt* about the propriety of disclosures to the jury,” the matter should first be brought to the judge for resolution.²¹³ Why should lawyers who have closely studied and mastered evidence law incur the time and expense of identifying all such issues for resolution by the judge? What incentive does this give inexperienced lawyers to learn their craft? Skilled trial lawyers may harbor all sorts of doubts as they attempt to lay a foundation. And what of the proponent who short cuts a foundation because she perceives the evidence is relatively inconsequential (though relevant) and the jury is becoming restive? Must the lawyer okay this with opposing counsel and the trial court, or may she simply rely on opposing counsel to object if there is a perceived problem with the foundation? And what of the lawyer who seldom appears in court or is ignorant of the fundamentals of evidence law? How do we evaluate this lawyer’s comprehension of evidence law in all its complexity?²¹⁴

In sum, reliance on the adversarial ethos, especially as manifested in the waiver rules, accords with substance and history of modern evidence law and does not unduly disadvantage skilled, experienced trial counsel. Indeed, by requiring opposing counsel to invoke the rules, the adversarial ethos provides the lawyer with an incentive to master the rules and develop the necessary skills to apply them in the courtroom. Professor Tanford is surely to be commended for his effective advocacy of the good faith principle, but the idea ultimately founders on the shoals of the adversarial trial.

V. THE ADVERSARIAL ETHOS AT WORK IN THE RULES OF EVIDENCE: SEVERAL ILLUSTRATIONS

The purpose of this section is to illustrate how the adversary ethos is interwoven into modern evidence law. More specifically, many evidentiary rules not only contemplate but depend upon adversarial interplay, that is, their instrumental use by lawyers to block damaging proof and admit helpful evidence. Two commonly encountered evidentiary scenarios are considered: the use of hearsay evidence and expert testimony.

213. Tanford, *supra* note 175, at 522 (emphasis added).

214. Model Rule 1.1 provides: “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” MODEL RULES R. 1.1. The sheer number and variability of evidentiary issues precludes resort to traditional methods of establishing what the “reasonable lawyer” should have known, or done, under the circumstances.

A. HEARSAY

Every trial, civil and criminal, features hearsay evidence. Hearsay abounds because statements made out-of-court are usually needed to prove some fact or other. Trial lawyers must be able to introduce these statements when helpful and block hearsay when it is not. Highly technical and bordering on the arcane, both hearsay's definition and the application of the doctrine's more than forty exceptions and exemptions²¹⁵ inculcate the adversary ethos. Indeed, it may be that the hearsay doctrine's complexity is a direct outgrowth of the rule's evolution in conjunction with the development of the modern adversary trial.²¹⁶

The purpose of this section is to illustrate several ways in which the hearsay rules not only contemplate, but also embody, the adversarial ethos. The very definition of hearsay as well as the application of the rule's many exceptions depends upon the reciprocal interplay of adversaries.

Federal Rule of Evidence 802 provides that hearsay is inadmissible unless otherwise excepted by the Rules of Evidence, various procedural rules (civil and criminal), or statute.²¹⁷ Rule 802 is not, however, self-executing. Innumerable cases hold that hearsay issues are waived unless opposing counsel properly objects.²¹⁸ Moreover, appellate case law largely cedes hearsay rulings to the trial court's domain by generally favoring the status quo (i.e., the party prevailing at trial) and finding no error absent an abuse of discretion.²¹⁹ Yet the hearsay rules embody the adversary ethos in ways more significant than the waiver doctrine and appellate courts' deference to trial judges.

The most commonly used definition of hearsay is that found in the Federal Rules of Evidence. Rule 801(c) provides: "[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."²²⁰ Several critical terms are

215. This figure is based on the exemptions and exceptions set forth in Federal Rules of Evidence 801(d), 803, 804(b), and 807, in addition to the exceptions found outside the Federal Rules of Evidence, such as those governing depositions in the Federal Rules of Civil Procedure. *See, e.g.*, FED. R. CIV. P. 32.

216. *See* Gallanis, *supra* note 64, at 551.

217. FED. R. EVID. 802.

218. *E.g.*, GRAHAM, *supra* note 70, § 802.1, at 228 ("While hearsay is not admissible except as provided, it is nevertheless incumbent upon the party opposing the introduction of an inadmissible hearsay statement to properly object, Rule 103(a). In the absence of an objection to hearsay, 'the jury may consider [hearsay] for whatever value it may have; such evidence is to be given its natural probative effect as if it were in law admissible.'" (note omitted)).

219. *E.g.*, *id.* § 103.1, at 14-17. On appeal the waiver doctrine is applied to both proponents and opponents with an eye toward affirming the trial judge's rulings. If the judge excluded the hearsay, an appellate court will scrutinize only the theory of admissibility advanced by proponent in the trial court record. Absent plain error, it is of no moment that the hearsay was admissible under some exception, exemption, or theory not advanced by proponent at trial. Conversely, if the trial judge admitted the hearsay, the appellate court will sustain the ruling if any theory of admissibility supported its use, and regardless of whether the proponent actually articulated the ground at trial. *See* MCCORMICK ON EVIDENCE, *supra* note 9, § 52, at 229.

220. FED. R. EVID. 801(c).

further defined. A “declarant” is a human being.²²¹ “Statements” are verbal or nonverbal assertions of fact or opinion made “out-of-court,” that is, other than while the declarant is testifying at trial.²²² Yet the linchpin of Rule 801(c), the deceptively simple phrase “offered in evidence to prove the truth of the matter asserted,” was left undefined by the federal rules.²²³ Despite the vigorous debate over the meaning of “the truth of the matter asserted,”²²⁴ the truly critical point is that “hearsay” ultimately turns on what the evidence is being used to prove. And this decision rests squarely with the proponent. Put differently, the proponent of an out-of-court statement determines whether it is hearsay by virtue of how he or she intends to use the evidence. Only when the out-of-court statement is used to prove the truth of the matter asserted is it hearsay. If the out-of-court statement is offered to prove any other proposition, it is not hearsay. (The out-of-court statement’s relevance for any other purpose raises an entirely different objection.)

It is at this juncture that the interplay of adversary counsel is critical. Proponents are neither expected nor required to declare how each item of evidence is being used as it is introduced. As we have seen, trial procedures contemplate that the “Q&A” relate to the substance of the witness’s testimony. Lay witnesses are questioned about their personal knowledge.²²⁵ Experts are questioned about their opinions and underlying reasons.²²⁶ Neither direct nor cross-examination contemplates that the proponent (the lawyer asking questions) also provide a running narrative that addresses how that evidence will be used or assess its conformity to evidence rules.²²⁷

Thus, the onus for identifying hearsay is placed on the opponent, not the proponent. Opposing counsel must object on hearsay grounds to every out-of-court statement not just to preserve error for appeal, but to determine how the proponent intends to use the evidence. Nothing in the evidentiary rules, however, compel opponents to object like Pavlovian automatons to every out-of-court statement, especially since the objection may be self-defeating as where it only underscores damaging evidence or motivates the proponent to lay a more persuasive foundation.²²⁸ And for this very reason proponents, especially, rely on the waiver rules when offering hearsay.²²⁹

221. FED. R. EVID. 801(b) (“A ‘declarant’ is a person who makes a statement.”).

222. FED. R. EVID. 801(a) (defining “statement” as “(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion”).

223. Some states have defined the term “truth of the matter asserted.” *See, e.g.*, TEX. R. EVID. 801(c).

224. *See, e.g.*, Roger C. Park, “I Didn’t Tell Them Anything About You”: *Implied Assertions as Hearsay Under the Federal Rules of Evidence*, 74 MINN. L. REV. 783, 783-84 (1990).

225. FED. R. EVID. 701.

226. *See* FED. R. EVID. 704.

227. Motions *in limine* or even opening statements may provide some guidance, but neither one is intended as some sort of oral “trial brief” that addresses all conceivable evidentiary issues.

228. *See supra* text accompanying notes 188-89.

229. This is not only descriptive of how trials are conducted, but normative in the sense that the rules of evidence compel nothing more.

To illustrate, assume the defendant in a domestic violence case is charged with beating his wife. Although the defendant and his wife reconciled sometime prior to trial, the prosecution will not dismiss charges despite her request. When called as a prosecution witness, the victim testifies that her injury actually occurred when she fell down some steps and, because of her head injury, she does not recall telling neighbors or police that defendant had beaten her. The prosecution's next witness is a neighbor, who will testify that the victim came to her door bruised, bloodied, and in apparent pain. The victim said to the neighbor, "Please call the police, my husband is beating me again and this time he's going to kill me." The neighbor then called the police. Thus, we have an out-of-court statement ("Please call the police, my husband is beating me again and this time he's going to kill me") by the victim/declarant, but what is it being offered to prove? There are a number of possibilities:

- (1) to prove why the neighbor called the police; that is, for its effect on the listener, a non-hearsay use of the statement,²³⁰
- (2) to prove the declarant's state of mind at the time she made the statement; that is, to impeach her testimony that she was injured in an accidental fall down the steps by showing that she once believed differently (also a non-hearsay use of the statement),²³¹ or
- (3) to prove the truth of the matter asserted; namely, that the defendant had in fact beat her that day.²³²

As we know, if opposing counsel does not object to the neighbor's testimony, the victim's out-of-court statement may be used for any or all of the purposes described above. And this holds whether opposing counsel recognizes the hearsay problem or misses it altogether. When asking the neighbor/witness, "What, if anything, did the victim say?" the proponent (the prosecution) is under no duty to pause and inform the court about how it intends to use the statement or why it is admissible under the hearsay rule. Thus, if opposing counsel remains silent when the statement is introduced but later claims that he simply assumed the prosecution was offering the statement to prove only why the neighbor called the police (#1) or to impeach the victim's testimony (#2), and not to prove that in fact the defendant had beaten the victim (#3), the earlier omission to object (or move for a limiting instruction) constitutes a hearsay waiver and necessarily means that all three uses are permissible.

In short, the only way for opposing counsel to determine how the proponent intends to use the statement is to object on grounds of "hearsay" at the moment

230. GIANNELLI, *supra* note 42, § 31.06, at 409; MUELLER & KIRKPATRICK, *supra* note 49, § 8.18, at 732.

231. GIANNELLI, *supra* note 42, § 31.06, at 413; MUELLER & KIRKPATRICK, *supra* note 49, § 8.20, at 736-37.

232. GIANNELLI, *supra* note 42, § 31.06, at 409.

the neighbor is asked to relate the victim's statement.²³³ A hearsay objection compels the proponent to identify how it intends to use the victim's statement. And if the proponent specifies #3, the truth of the matter asserted, it shoulders the additional obligation of laying a foundation under some exception or exemption to the hearsay rule,²³⁴ such as an excited utterance.²³⁵

In our hypothetical it is clear that the proponent most certainly wants the trier of fact to use the statement for the truth of the matter asserted—to show the defendant beat the victim. So what ethical barriers foreclose her “use” of the evidence if she cannot identify an applicable exemption or exception, or perhaps finds one that is a stretch at best (e.g., the residual exception, Rule 807)?²³⁶

More concretely, assume that the proponent (the prosecution) is not confident that she can establish the foundation for an excited utterance, perhaps because the neighbor will testify that the injured victim spoke with a flat affect (i.e., she seemed emotionless).²³⁷ Assuming our proponent is a thoughtful, knowledgeable, and skillful lawyer, she will elicit testimony about the statement anyway. First, there may be a good chance that defense counsel will not object on hearsay grounds for whatever reason.²³⁸ Second, she may nonetheless convince the trial judge that the hearsay is admissible as an excited utterance even over objection. Third, the proponent could offer the statement anyway for its effect on listener (#1) and/or for impeachment purposes (#2) with full knowledge that any limiting instructions are of dubious value and the jury will most likely do what it wishes with the evidence (i.e., use it as evidence that the defendant battered the victim despite the judge's instructions).²³⁹ The bottom line is that the law of evidence enables all of these options.

The ethical barriers in the first instance, then, are rather minimal for proponents of hearsay. The burden is on opposing counsel to object on grounds of hearsay if there is any issue about how the out-court-statement might be used (short of the truth of the matter asserted) or whether an exemption or exception to the hearsay rule permits its use for all relevant purposes.

233. If the neighbor simply recounts the victim's statement in response to an otherwise innocuous question such as, “What happened next?,” opposing counsel should also move to strike the testimony. See GRAHAM, *supra* note 70, § 802.1, at 228.

234. See MAUET & WOLFSON, *supra* note 47, at 181-82 (“When trying to get hearsay admitted in evidence, only one hearsay exception need apply, so trial lawyers think in terms of alternative theories of admissibility.”).

235. FED. R. EVID. 803(2).

236. FED. R. EVID. 807.

237. See FED. R. EVID. 803(2); see also EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS § 10.08, at 454 (5th ed. 2002) (stating the declarant must be in a state of “nervous excitement” for the exception to apply).

238. Tactically, defense counsel may not want to draw attention to the statement, especially since the judge might deem it an excited utterance anyway and, failing that, there is a considerable likelihood that the judge will admit it for the limited purposes of #1 (effect on listener) or #2 (impeachment), subject to largely ineffectual limiting instructions. For these reasons, defense counsel might decide to “handle” it in closing argument by saying something like, “Look, she had a head injury and was confused.”

239. The prosecution cannot, however, use the non-hearsay theories (#1 and #2) if the victim's statement is the only means of establishing a *prima facie* case.

Yet if the opponent faces seemingly harsh consequences for missing or passing by a hearsay objection (i.e., the out-of-court statement's use for any relevant purpose), the adversary system balances the scales by imposing arguably greater demands on the proponent. Once opposing counsel objects on hearsay grounds, the proponent must confront the hearsay rule in all its complexity. Put in perspective, assuming the opponent recognizes a hearsay scenario—testimony about any out-of-court statement—and timely utters the single word “hearsay,” the proponent bears the burden of navigating the technical definition of hearsay and sorting through the thicket of hearsay exceptions and exemptions.²⁴⁰

For example, assume a less skilled and experienced proponent than the one described above. Assume further that in response to the hearsay objection the proponent offers the victim's statement to the neighbor as a prior inconsistent statement under Rule 801(d)(1)(A).²⁴¹ Opposing counsel is obligated to respond only to the theory of admissibility advanced by the proponent. Here, one would expect opposing counsel to concede that the prior statement is inconsistent with the victim's testimony, but argue that the exemption is inapplicable because the statement to the neighbor was not made under oath subject to the penalty for perjury. And for this reason, the judge should deny the prosecution's request to admit the statement under Rule 801(d)(a)(A). As we have seen, neither opposing counsel nor the judge is under any obligation to explore alternative theories of admissibility. Thus, if the proponent fails to raise the excited utterance alternative or offer the statement for a non-hearsay purpose, such as its effect on listener or its impeachment value, the neighbor will not be permitted to testify about the victim's out-of-court statement. And the same consequence follows even where proponent identifies a workable exception but lacks the skills to ask the correct foundational questions.²⁴²

The very definition of hearsay, then, turns on how the proponent intends to use the evidence and whether the opponent makes a proper hearsay objection. Absent a timely objection, the court will not grapple with the hearsay rule. And assuming an objection is made, the proponent bears the burden of navigating the treacherous shoals of the hearsay rule by identifying a (relevant) non-hearsay use

240. See *United States v. Rettenberger*, 344 F.3d 702, 707 (7th Cir. 2003) (holding that, although part of a tape was readily admissible for a non-hearsay purpose, the trial court properly sustained a hearsay objection because the rest of the tape was irrelevant except for the truth of the matters asserted and the proponent made no effort to redact the inadmissible parts). Selecting a proper exception or exemption is hardly straightforward. Long ago, Professor Maguire, stated the “truth of the matter” about the hearsay rule's many exceptions by referring to Professor Eugene Wambaugh's succinct and colorful statement: “[t]he common law exceptions to the hearsay rule are hydra-headed . . . [and] nobody knows how many heads a hydra has, because nobody who is drunk can count them, and nobody while sober ever saw a hydra.” MAGUIRE, *supra* note 13, at 127.

241. FED. R. EVID. 801(d)(1)(A) (“The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.”).

242. See *supra* text accompanying notes 180-87.

of the statement or by laying a technically adequate foundation under an exception. In sum, the complexity of the hearsay rules is predicated upon an interplay of seasoned adversaries who in turn understand and appreciate their reciprocal obligations.

B. THE ALCHEMIST'S STONE AND RULE 703: THE TRANSFORMATION OF "INADMISSIBLE" EVIDENCE INTO "ADMISSIBLE" EVIDENCE

Expert witnesses are a common, almost ubiquitous, feature of civil litigation and are increasingly used in criminal trials as well.²⁴³ Undoubtedly, the advent of the federal rules in the mid-1970s hastened the trend toward greater use of expert testimony.²⁴⁴ Trial lawyers seized the opportunity and a predictable backlash of sorts ensued. From concerns about "junk science" there emerged the *Daubert* reliability standard and "gatekeeper" judges.²⁴⁵

Although expert opinion testimony draws the most interest by courts and commentators, equally significant are concerns about what the expert may rely upon in reaching such opinions and, especially, what the expert may tell the jury about the bases and reasoning underlying the opinion.²⁴⁶ Modern evidence law explicitly permits expert opinion testimony that is based on inadmissible evidence while grappling with what information should be disclosed about such bases. And the stark dilemma created by these rules—namely, an admissible opinion based on inadmissible information—is spared from complete incoherence only by resort to an almost pristine adversary ethos predicated upon a legal fiction.

Testimony about the bases and reasoning underlying an expert's opinion is governed by Rules 705 and 703. Neither rule establishes a meaningful standard of admissibility in the same sense as the Rule 702 reliability standard. Rather, they provide a procedural framework that is predicated upon an adversary ethos.

Rule 705 bears the perplexingly cryptic title, "Disclosure of Facts or Data Underlying Expert Opinion." The rule itself, however, is far less sweeping than its title suggests: "[t]he expert may testify in terms of opinion or inference and give

243. RONALD CARLSON ET AL., EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 261 (5th ed. 2001).

244. Unshackled from common law rules that permitted expert testimony only where "necessary" and when predicated upon "generally accepted" methodologies, the new rules welcomed expert testimony whenever it might "assist" the trier of fact. See GIANNELLI, *supra* note 42, § 24.18, at 336.

245. The Supreme Court famously reined in expert testimony in a trilogy of cases: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). See FED. R. EVID. 702 advisory committee's note.

246. See *United States v. Mamah*, 332 F.3d 475, 478 (7th Cir. 2003) (holding that despite their qualifications, both defense experts on "false confessions" lacked "sufficient facts and data" to support their opinions); Ronald L. Carlson, *Collision Course in Expert Testimony: Limitations on Affirmative Introduction of Underlying Data*, 36 U. FLA. L. REV. 234, 243 (1984); Edward J. Imwinkelried, *The Meaning of "Facts or Data" in Federal Rule of Evidence 703: The Significance of the Supreme Court's Decision to Rely on Federal Rule 702 in Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 54 MD. L. REV. 352 (1995).

reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.”²⁴⁷

Rule 705 thus permits an expert, once properly qualified, to recite her opinion and then explain her reasoning and bases. Cross-examination provides the main vehicle for testing the soundness of the expert’s testimony. This innovation turned the common law on its head. At common law such direct questioning methodology could be used only when the expert relied upon personal knowledge or the underlying facts were undisputed.²⁴⁸ In all other cases, expert opinions could be elicited only after the proponent framed a careful “hypothetical” that identified each factual predicate. And each predicate, in turn, had to rest entirely on “admissible” evidence. Rule 705, then, eliminated the hypothetical question as a necessary requirement for expert opinions in all cases,²⁴⁹ an innovation much applauded at the time. Yet the innovation carries a cost of its own. Absent a pretrial hearing, it may be only after the jury hears an expert’s opinion that problems surface involving her reasoning, methodology, or bases. Rule 705 ultimately places the burden on the cross-examiner to expose weaknesses in an expert’s testimony;²⁵⁰ the common law had placed the burden squarely upon the direct examiner to show its soundness. Of course the court may require otherwise, but this assumes a timely objection to the direct questioning methodology that Rule 705 prefers. Neither the case law nor the commentary suggests that opposing counsel have routinely made such requests.²⁵¹ Moreover, many problems are rooted not so much in the expert’s reasoning or methodology, which raise Rule 702 reliability concerns, but in the case-specific facts on which the opinion is based.

And this takes us to Rule 703, another truly innovative provision. Rule 703 eliminated the common law’s seemingly rigid demand that an expert’s opinion be based only on admissible evidence—a requirement enforced via the hypothetical question.²⁵² Rather, an expert’s opinion may now be predicated even upon *inadmissible* evidence provided it is of a type reasonably relied upon by experts in the field in forming inferences or opinions. Rule 703 presently states:

247. FED. R. EVID. 705.

248. See GIANNELLI, *supra* note 42, § 25.03, at 341; see also Daniel D. Blinka, “Practical Inconvenience” or Conceptual Confusion: The Common-Law Genesis of Federal Rule of Evidence 703, 20 AM. J. TRIAL ADVOC. 467, 487-90 (1997).

249. See FED. R. EVID. 705 advisory committee’s note.

250. See *Logan v. J&D Hauling, Inc.*, 331 F.3d 600, 603 (8th Cir. 2003) (quoting the “general rule” to the effect that “the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination” (citation omitted)).

251. See GRAHAM, *supra* note 70, § 705.1, at 671-75.

252. For one of very few modern federal case-law discussions, see *Toucet v. Maritime Overseas Corp.*, 991 F.2d 5, 10 (1st Cir. 1993) (“While a hypothetical should include only those facts supported by the evidence, the record here indicates that sufficient facts existed to support the challenged hypothetical.” (citation omitted)).

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.²⁵³

Addressing what are now the rule's first two sentences, the Advisory Committee explained that Rule 703 recognizes three distinct sources for the facts or data upon which an expert's opinion is based.²⁵⁴ The first, the expert's personal knowledge, consists of admissible evidence. The second source consists of facts or data made known to the expert at the trial or hearing. More precisely, the expert may sit in court and listen to testimony or glean her facts from a (common law) hypothetical question, either option encompassing purely "admissible" evidence (in theory).

The third source embraces "hearsay"; that is, the presentation of information about the case "outside of court," usually well in advance of trial, through the medium of written (documents) or spoken (interviews) words. When an expert relies on hearsay that is admitted into evidence (e.g., medical records), there is, of course, no problem.²⁵⁵ But Rule 703 explicitly blessed experts' reliance on information that would not be formally introduced at trial. The Advisory Committee designed the rule, in part, "to bring the judicial practices into line with the practice of the experts themselves when not in court."²⁵⁶ It proposes that technical evidentiary rules should not preclude an expert from offering an opinion predicated on the same type of information she would rely upon when practicing her calling outside of court.²⁵⁷ The Advisory Committee confidently asserted that "most" such evidence was probably "admissible" anyway, "but only with the expenditure of substantial time in producing and examining various authenticating witnesses."²⁵⁸ Yet nothing in the text or history of Rule 703 so qualifies the species of "inadmissible" evidence upon which an expert may reasonably rely.²⁵⁹

253. FED. R. EVID. 703.

254. FED. R. EVID. 703 advisory committee's note. The third sentence of present Rule 703 was added in 2000. *See infra* text accompanying notes 275-78.

255. *E.g.*, *Sosna v. Binnington*, 321 F.3d 742, 747 (8th Cir. 2003) (finding pathologist's opinions in an autopsy report were properly admitted under FED. R. EVID. 803(6)).

256. FED. R. EVID. 703 advisory committee's note; *see United States v. LeClair*, 338 F.3d 882, 885 (8th Cir. 2003) (dangerousness hearing in which a government expert properly relied upon inadmissible hearsay reports of the respondent's offense).

257. *See* FED. R. EVID. 703 advisory committee's note (using physicians as an example).

258. *Id.*

259. So long as the judge finds that the inadmissible facts and data were of a type reasonably relied upon by experts in the field, Rule 703 is satisfied. There is no further need to assess whether the proponent may have succeeded in admitting the evidence given enough time, money, and witnesses.

For present purposes, Rule 703 raises two critical questions. First, what is meant by inadmissible facts or data? Second, under what circumstances may inadmissible evidence be disclosed to the jury? The answers are unsatisfactory. Rule 703, like the modern hearsay rule, embraces the adversarial ethos in order to avoid its own doctrinal shortcomings. Before turning to several examples, inadmissibility and disclosure under Rule 703 must briefly be discussed.

An inadmissible basis assumes that opposing counsel timely objected or moved for a limiting instructions on appropriate grounds. Although most frequently invoked to circumvent hearsay objections, Rule 703's reasonable reliance standard extends to any ground of inadmissibility.²⁶⁰ Thus, creative lawyers have also used it, for example, to overcome objections based on character or "other acts" exclusions.²⁶¹ Absent a proper objection, however, testimony about the bases may be used for any relevant purpose.²⁶² And obviously opposing counsel must know what the bases are before she can even ponder whether any are inadmissible under some exclusionary rule. In civil cases discovery and reporting rules simplify the task somewhat by requiring pretrial disclosure of expert opinions and their underlying bases.²⁶³ Criminal prosecutions feature far less discovery and therefore accentuate the challenge confronted by opposing counsel.²⁶⁴ The truly critical point, however, is that the onus is on opposing counsel to identify and move to exclude or limit the questionable facts or data, as with any other item of allegedly inadmissible evidence.

When opposing counsel timely identifies a proper objection, the proponent bears the burden of showing that the expert's reliance on the inadmissible information is nonetheless permissible.²⁶⁵ Rule 703 permits an expert's reliance

260. *But see* GRAHAM, *supra* note 70, § 703.1, at 607-08 (asserting that underlying "[f]acts, data, or opinions" which are inadmissible under certain evidentiary rules, such as Rules 404, 405, 608, 609, and the Rule 403 balancing test, "cannot form part of the bases of an expert's opinion under Rule 703. The adverse party may not be placed on the horns of the dilemma of being unable to require disclosure of facts, data, or opinions underlying the expert's opinion or inference on cross-examination without presenting facts, data, or opinions to the jury banned from consideration by virtue of other rules of evidence"). Although Professor Graham is undeniably correct about the dilemma created by Rule 703, his position, regrettably, does not square with Rule 703's text, history, and its application by the courts. Moreover, the history of the Rule's 2000 amendment reveals no intent to discriminate among grounds for inadmissibility. *See* FED. R. EVID. 703 advisory committee's note.

261. *E.g.*, *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1270-71 & n.11 (7th Cir. 1988) (upholding district court's ruling to disallow the evidence in product liability action; district court ruled that testimony about a different plane crash was inadmissible as "other accident" evidence; the proponent nonetheless argued for its "admission" under Rule 703 because his expert had reasonably relied upon it; held that while the expert's opinion was properly predicated upon the prior crash, the trial judge correctly "disallowed the evidence").

262. *See supra* text accompanying notes 88-91.

263. *E.g.*, *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 756-57 (7th Cir. 2004) (discussing the disclosure requirements of Rule 26(a)(2) of the Federal Rules of Civil Procedure).

264. *See* GRAHAM, *supra* note 70, § 705.1, at 672-75. Opposing counsel may also consider a motion *in limine*, although motions that demand the exclusion of any and all "inadmissible" bases are of little use.

265. Of course, the proponent may elect to overcome the objection, if feasible, and have the "fact" formally admitted into evidence.

on inadmissible facts or data provided they are of a type reasonably relied upon by such experts. Although “reasonable reliance” presents a question for the judge under Rule 104(a), courts are loath to second-guess experts (and build potential error into the record). The expert’s testimony that he “reasonably and customarily” relies on this “type” of evidence normally suffices.²⁶⁶ And depending upon the expert’s field, he or she may “customarily” rely on vast quantities of “facts or data” deemed “inadmissible” by the law of evidence.²⁶⁷ In sum, experts may rely on inadmissible evidence subject only to the low threshold imposed by the reasonable reliance standard.

An expert’s reasonable reliance on inadmissible evidence inevitably raises ill-defined issues of disclosure, that is, “What should we tell the jury about this ‘inadmissible’ basis?” After all, the expert relied upon it in reaching her opinion. Here we must draw a critical distinction between direct and cross-examination.

Cross-examiners have virtually unfettered latitude to inquire into an expert’s bases, regardless of their admissibility, as expressly permitted by Rule 705.²⁶⁸ The adversarial imperative is clearly at work. If an opposing expert relied in part on inadmissible facts or data, the cross-examiner must have the latitude to so inquire, subject to strategic concerns.²⁶⁹ If the facts or data are damaging to the cross-examiner, it is unlikely she will pursue this line of questioning because she stands to gain little or nothing and risks losing more.²⁷⁰ Conversely, if the inadmissible facts or data favor the cross-examiner’s position, case law blesses the cross-examiner’s inquiry in the name of fairness and verbal completeness.²⁷¹

Direct examination presents a very different dynamic. Suppose the proponent, the direct examiner, has favorable evidence A, B, and C that are likely inadmissible (on some ground), assuming a proper objection. Proponent’s expert has relied upon A, B, and C in forming her opinion and will testify that she “customarily” relies on this type of evidence. What are the proponent’s options? Recall the last sentence of Rule 703: “[f]acts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or

266. See *IMWINKELRIED*, *supra* note 237, at 360-61.

267. Psychologists and psychiatrists necessarily rely on information that the law deems not just hearsay, but also (inadmissible) character evidence in the form of the patient’s “history.”

268. FED. R. EVID. 705; see *GRAHAM*, *supra* note 70, § 703.1, at 605; see also FED. R. EVID. 703 advisory committee’s note (“Nothing in this Rule [703] restricts the presentation of underlying expert facts or data when offered by an adverse party. See Rule 705. Of course, an adversary’s attack on an expert’s basis will often open the door to a proponent’s rebuttal with information that was reasonably relied upon by the expert, even if that information would not have been discloseable initially under the balancing test provided by this amendment.”).

269. Indeed, cross-examination may reveal that the expert’s “bases” are wholly speculative or, at least, insufficiently supported by the facts. See, e.g., *Elcock v. Kmart Corp.*, 233 F.3d 734, 747, 751 n.8 (3d Cir. 2000).

270. See *Sosna v. Binnington*, 321 F.3d 742, 746-47 (8th Cir. 2003) (holding that where plaintiff inquired into disputed matters on cross-examination, the defense was entitled to pursue the same subject on re-direct examination).

271. E.g., *Polythane Sys. Inc. v. Marina Ventures Int’l, Ltd.*, 993 F.2d 1201, 1207-08 (5th Cir. 1993); see FED. R. EVID. 703 advisory committee’s note.

inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."²⁷² Added to Rule 703 in 2000, this language attempted to resolve issues raised by the reasonable reliance provision. "Attempted" is, regrettably, the correct word because the amendment's text and its history betrays ambiguity and ambivalence over the core concept of "admissibility." In explaining the 2000 amendment, the Advisory Committee emphasized "that when an expert reasonably relies on *inadmissible* information to form an opinion or inference, the underlying information is not *admissible* simply because the opinion or inference is *admitted*."²⁷³ It immediately clarified, however, that the amended rule did not proscribe any reference to the expert's inadmissible bases, at least during the direct examination. Rather, Rule 703 explicitly creates a new species of "limited admissibility":

When information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating an expert's opinion, a trial court applying this Rule must consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information for substantive purposes on the other. The information may be disclosed to the jury, upon objection, only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect.²⁷⁴

The Advisory Committee, however, failed to grapple with the implications of the 2000 amendment, namely, Rule 703 transforms evidence that is inadmissible into that which is "admissible" for a limited purpose—"assisting the jury"—provided the expert has "reasonably relied" upon it. The purported solution, a balancing test that is weighted against disclosure, requires the judge to consider the adequacy of cure-all limiting instructions without any careful consideration of their content or whether such instructions make any sense whatsoever.²⁷⁵

The dilemma is also captured in the text of Rule 703. Its original text permitted

272. FED. R. EVID. 703.

273. FED. R. EVID. 703 advisory committee's note (emphasis added). For examples of courts' struggles with the disclosure of "inadmissible" bases before the 2000 amendment to Rule 703, see *Nachtsheim v. Beech Aircraft Corp.*, 847 F.3d 1261, 1270-71 (7th Cir. 1988); *Gong v. Hirsch*, 913 F.2d 1269, 1273 (7th Cir. 1990).

274. FED. R. EVID. 703 advisory committee's note.

275. See *id.* ("[I]f the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes. See Rule 105. In determining the appropriate course, the trial court should consider the probable effectiveness or lack of effectiveness of a limiting instruction under the particular circumstances."). Professor Carlson, among others, has ably demonstrated the ineffectiveness of such limiting instruction. See Carlson, *supra* note 246, at 244-45; see also Ronald L. Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577, 589 (1986) (noting that "expert opinion evidence complying with Rule 703 can still pose confusion and prejudice problems under Rule 403").

an expert's reliance on facts or data that are "not . . . admissible" but the 2000 amendment refers to "[f]acts or data that are *otherwise inadmissible*."²⁷⁶ Nonetheless, the Advisory Committee reiterated that neither the limited admissibility ("disclosure") option nor Rule 703's balancing test is even implicated unless opposing counsel objects in the first place.²⁷⁷ The reason is obvious: absent an objection, the evidence is admitted for any relevant purposes thanks to the working of the waiver rule.

Returning to our example above, we can better appreciate how Rule 703 operates within the adversary dynamic. If the expert testifies about facts A, B, and C *without* objection by opposing counsel, the evidence may be used for any relevant purpose (i.e., it is fully "admissible"). Assuming that opposing counsel properly objects, the proponent need only establish the expert's reasonable reliance on the type of facts represented by A, B, and C. Once this simple foundation is proffered, the proponent may ask the court to disclose it for the limited purpose of assisting the jury's understanding of the expert's opinion. In so deciding, the trial judge will weigh the "probable effectiveness" of a limiting instruction. And here's the rub: faced with the very real likelihood that the judge will "admit" the "inadmissible" bases for this limited purpose, subject to a nonsensical limiting instruction, opposing counsel may well opt not to object in the first place.²⁷⁸ Baldly and crudely stated, Rule 703 authorizes the "laundering" of nearly any species of inadmissible evidence through the simple expedient of expert testimony. It is thus rooted in an almost purely adversarial view of the modern trial.

VI. CONCLUSION: ADVERSARIAL ETHICS AND EVIDENCE

The adversarial ethos manifests itself in two different ways at trial. First, and most familiar, trial lawyers elicit evidence that supports their client's theory of the case while attacking their opponents' proof. Ethical problems in this setting chiefly involve the lawyers' responsibility not to mislead the judge and trier of fact. Classic examples include client perjury, the presentation of false evidence, and the propriety of impeaching a witness who is known to be testifying truthfully and accurately.²⁷⁹

276. FED. R. EVID. 703.

277. See FED. R. EVID. 703 advisory committee's note.

278. Jeffrey Cole, *Hearsay, Juries, White Elephants, and Hippopotamuses*, 30 LITIGATION 49, 55 (Winter 2004) (discussing how even after the 2000 amendment counsel must consider "whether the expert testimony is in reality being used as a vehicle to evade the hearsay rule"); e.g., *Turner v. Burlington N. Santa Fe R.R. Co.*, 338 F.3d 1058, 1062 (9th Cir. 2003) ("Here, the [inadmissible] lab report was the only evidence of gasoline in the soil. Howard used the report not as data upon which an expert in his field would reasonably rely in forming an opinion, but rather intended to use it as substantive evidence of his ultimate conclusions that the fire was intentionally created by pouring gasoline into the soil. The lab report was otherwise inadmissible hearsay evidence in the absence of foundation testimony by the laboratory that conducted the testing.").

279. See *supra* text accompanying notes 17-41.

This article addresses a second, less discussed feature, namely, how trial lawyers apply evidence law to further their client's interest in winning.²⁸⁰ On its surface, modern evidence law purports to be a sophisticated template that filters parties' evidence, thereby fostering the presentation of reliable information while (occasionally) furthering other socially worthy goals as well. On this view, trial lawyers are expected to adhere to the rules as they would binding precedent on a substantive issue. Yet, as we have seen, the core of modern evidence law embraces and contemplates the adversary trial. Lawyers are expected to use rules of evidence instrumentally—as tools to augment the presentation of their own case and block that of their opponents.

The culture and form of trial greatly affects this instrumentalism. How effectively lawyers employ evidentiary rules to elicit favorable proof or exclude damaging evidence is a function of how well they have adapted to the trial court environment. At a minimum, it demands excellent speaking skills, equally good listening ability, and the capacity to make quick decisions about when and how to apply the rules. There are no scripts. No matter how thoroughly the witnesses and lawyers prepare, examinations are largely extemporaneous and an opponent's questions or objections difficult to predict with any meaningful precision. In short, the oral culture of trial is highly fluid, fast moving, and constantly changing. The excruciatingly short "shot clock" controlling evidentiary issues is accentuated by the technical intricacies of modern evidence law. One looking to the law of evidence as an objective, self-regulating system for the presentation of reliable proof will be disappointed if not misled.

Several preliminary points emerge from these observations. First, the practice of trial law demands extraordinary skill that is acquired through both specialized experience and study. Second, this in turn strongly suggests that the competence of trial lawyers involves unique considerations.²⁸¹ Third, the modern law of evidence is predicated upon the very adversary ethos from which it emerged. Competent trial lawyers are expected to use—literally—the rules to their client's best advantage. Objections may be used to befuddle, confuse, or intimidate a less skilled adversary. For proponents, the permissible field of admissible evidence is largely determined by an opponent's capacity to articulate a timely and proper objection.

These preliminary considerations foster several further observations and some tentative recommendations. First, the legal profession needs to assess the composition of the trial bar. At present, no jurisdiction places special restrictions on lawyers' ability to try cases in court. Admission to the bar is sufficient, subject to generic competence requirements and post hoc regulation through infrequent

280. The emphasis on winning is, of course, difficult to square with the trial as a search for the truth.

281. See MODEL RULES R. 1.1 ("A lawyer shall provide competent representation.").

legal malpractice actions in cases of truly inept performances.²⁸² At an extreme it may be time to consider placing special restrictions on the trial bar predicated upon a demonstration of mastery (however defined) of procedural and evidentiary law accompanied by actual experience. It is not my purpose to advocate such a program at this time much less to specify its contours. One must, however, give serious attention to the declining number of jury trials described in a recent highly-publicized study along with concerns that inexperienced trial lawyers may be both a cause and effect of the trend.²⁸³

Second, the rules governing trials need to be carefully reconsidered. The problem is not amenable to changes to the *Model Rules of Professional Conduct*. The *Model Rules*, as we have seen, selectively address some notable ethical issues involving candor and the presentation of trustworthy evidence, but for the most part they default to the laws of evidence and procedure. And because the law of evidence itself is predicated upon an adversarial ethos, it is difficult to conceive how the *Model Rules* could fundamentally affect lawyer conduct without substantially changing modern evidence law. Thus, it is the law of evidence and trial procedure that demands fundamental rethinking.

A number of different approaches are possible. For example, if the complexities of evidence law are difficult to digest in the hurried, pell-mell pace of trial, perhaps mandatory pretrial evidence hearings may be considered. Building on summary judgment procedures, such an approach could require that each side disclose, for instance, all out-of-court statements (potential hearsay) that may be offered along with the grounds of admissibility.²⁸⁴ The judge would rule on the admissibility of all such "hearsay" before trial. Such an approach would be akin to mandating the use of motions *in limine*, which are commonly used in more complex litigation anyway. At an extreme, such an approach might require that all expected proofs (testimony and exhibits) be thoroughly vetted for fidelity to the rules of evidence before trial. For the most part only form objections would have to be raised during the trial itself. The drawbacks of mandatory disclosure and pretrial hearings are massive, however. Exceptions would have to be made for unanticipated issues. Judicial resources would be severely taxed as cases would in effect be tried twice: once to the judge before trial and again to the jury. Clients, of course, would largely underwrite the endeavor, no doubt reluctantly, thus precipitating even more settlements. And evidentiary pretrial hearings would assume the shape of the much dreaded final examination in Evidence.

282. See DEBORAH L. RHODE & GEOFFREY C. HAZARD, JR., PROFESSIONAL RESPONSIBILITY AND REGULATION, 54-60 (2002). The authors observe that "[b]ar disciplinary agencies rarely impose sanctions for litigation misconduct," and "judges are generally reluctant to impose sanctions for any but the most egregious instances of litigation misconduct." *Id.* at 57-58.

283. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

284. Some procedural rules already require pre-trial disclosure for expert opinion evidence. See FED. R. CIV. P. 26.

Another approach is to make evidence law less technical and complex while fully accounting for its application at trial. And this leads to a third recommendation: any reconsideration of modern evidence law should be premised upon a thorough study of civil and criminal trials. The study should entail more than appellate cases, trial practice commentary, and anecdotes. Research should be done using trial records and live trials with an eye toward how frequently objections are made, the responses by opponents, and rulings by trial judges. We should systematically study which rules are invoked and how often as well as what rules are routinely waived and why. Moreover, we need to explicitly consider the oral/aural nature of trial and the need for rules that can be intelligently and efficiently applied in such a setting. Reified doctrine suited more for law reviews and treatises and seldom invoked at trial should be reconsidered.

In sum, it is high time that we carefully reconsider how the adversary trial has evolved over the last several hundred years. The modern trial purports to be governed by a menagerie of complex rules designed to foster its search for the truth and promote reliable decision making. Yet the rules cannot effectively regulate the adversary process if we find that those very rules, in both form and function, are themselves thoroughly infused with an adversary ethos. Put differently, complex evidentiary and procedural rules have hardly curbed the impulse experienced by the great Garrow and modern lawyers to do whatever one "can get away with" at trial; rather, they have only enhanced the opportunities to "get away with" even more on behalf of one's client.

