

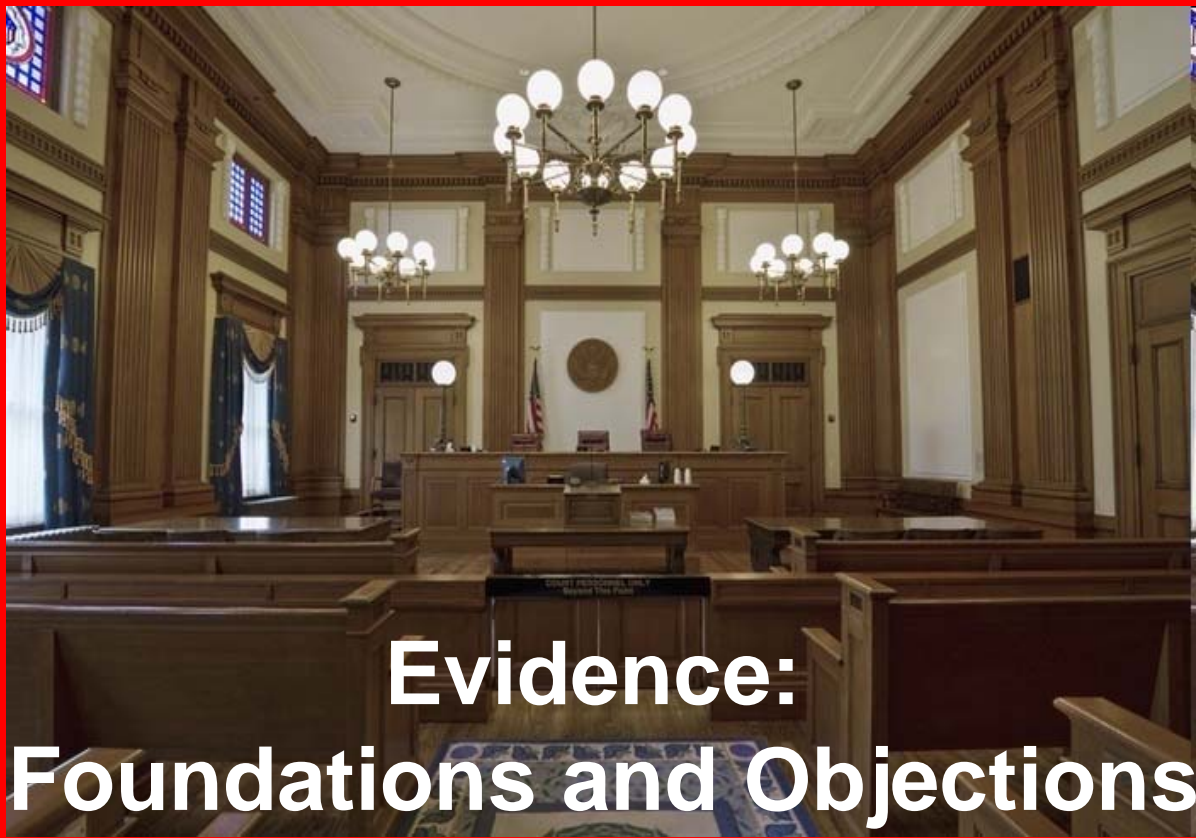
**NEW YORK STATE BAR ASSOCIATION**

**Young Lawyers Section  
Trial Academy 2019  
Cornell University Law School**

*“Evidence, Foundations and  
Objections” - Episode 9*

**A Criminal Perspective**

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**Evidence:  
Foundations and Objections**

A. INTRODUCTION – GENERAL  
THOUGHTS

..... A Typical  
Italian Family  
Enjoying Dinner



## **A. INTRODUCTION – GENERAL THOUGHTS**

### **1. PREPARING A CRIMINAL CASE**

a. Convincing a group of 6 or 12 complete strangers to:

Unanimously agree that a defendant is guilty “Beyond a Reasonable Doubt”

- or -

Unanimously agree that a defendant is not guilty...

# IS POSSIBLY THE:

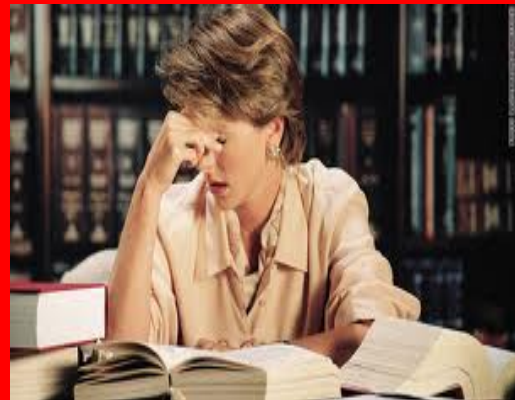
MOST CHALLENGING

MOST INTELLECTUALLY  
ENERGIZING

EMOTIONALL DRAINING

MOST DIFFICULT

MOST STRESSFUL .....



THING YOU CAN DO IN THE LAW !!!!

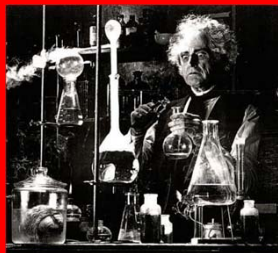
**YOU PLAY**

**TO WIN THE GAME!**

memegenerator.net

**b. Both a “SCIENCE” and an “ART”**

Science – Must be aware of legal principles and mechanics



Art – Must take command of your courtroom, while at all times remaining:

- (1) respectful
- (2) personable
- (3) professional
- (4) assertive
- (5) effective



Throughout the trial, the  
one constant is that it is

YOUR  
courtroom!

See, e.g., "Ring Generalship" - The judges favor the fighter  
who controls the pace and style of the bout

## **2. WINNING A CRIMINAL CASE IS A COMBINATION OF**

- PREPARATION,**
- ARTICULATION,**
- PERSONALITY, and**
- LUCK**

## a. PREPARATION

1. Know your case forward and backward
2. Anticipate your opponent's case
3. No excuse for not being prepared (can't "wing it"!!!)
4. Interview all witnesses
5. Assume nothing
6. No "slam dunk" mentality



## b. ARTICULATION

1. Organize your case
2. Map out a plan:

### *Develop a “Theme”*

3. **Q** - What is my case about?
4. **Q** - How do I accomplish this?

## Develop a “Theme”

*“This is a case about...”*

- Q – What is my goal?
- Q – What **evidence** do I have to accomplish my goal?
- Q – What **evidence** will I use?
- Q – Which witness(es) will I call to testify?
- Q – In which order will I call them?
- Q – How do I establish the proper **foundation** for each witness or piece of **evidence**?
- Q – How do I use each witness or piece of **evidence** to achieve my goal?

## **ARTICULATION (continued)**

Prepare your case in a **COMMON SENSE, SIMPLISTIC** manner

### **Always Remember:**

There is no such thing as a  
“complicated case” – only  
lawyers who make a case  
complicated

## **ARTICULATION (continued)**

- Jurors know absolutely nothing about your case
- You need to **educate** and **explain**
- **Articulate** your message

## **ARTICULATE YOUR MESSAGE**

Articulate a message that the jury is able to:

**1. Understand**

and

**2. Accept**

(You need both)

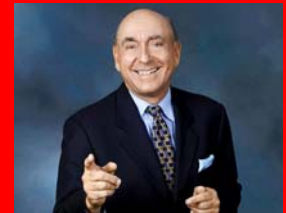


# **YOUR ULTIMATE GOAL**



## C. PERSONALITY

1. You are an advocate with a message
2. You must connect with your jury
3. Your case becomes much “better” if the jury likes you
4. Jury will be more inclined to listen and be receptive to your message
5. Jury will do the right thing provided you give them a reason *and* a road map



## **c. PERSONALITY**

**Jurors will consciously or  
subconsciously start picking sides the  
minute you walk into the courtroom**

**and**

**The minute you open your mouth !!!!**

**= “Likability Factor”**

## d. LUCK

1. Sometimes you win ones that you shouldn't
2. Sometimes you lose ones that you shouldn't
3. Intangibles (?)



**...AND AT ALL TIMES...**



**TRY TO REMAIN CALM!!!!!!**

**...AND REMEMBER...**



**TO ALWAYS KEEP YOUR COMPOSURE!!!!**

### 3. “CONTEPT” FOUNDATIONS

People Who Talk To Themselves Aren't Crazy, They're Actually Geniuses

SHARE     Like 1.2M 1m SHARES



Dominique Felicity

### 3. “CONCEPT” FOUNDATIONS

Think of “foundations”  
as a **concept** that you  
are developing  
throughout your trial



### **3. CONCEPT FOUNDATIONS**

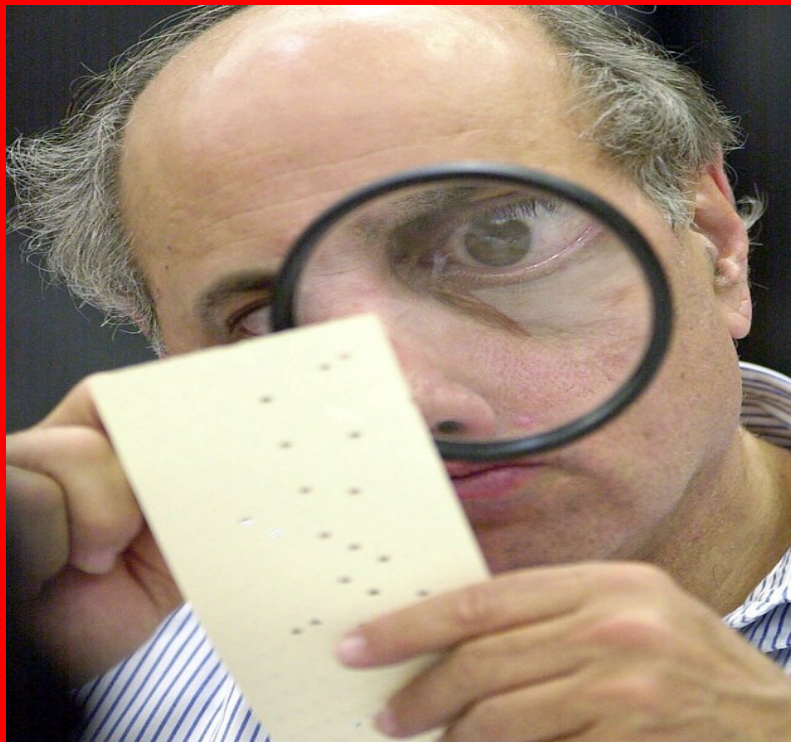
#### **KEEP THIS THEORY IN MIND:**

- **APPROPRIATE TIME FOR LAYING A FOUNDATION**
- **PREPARE YOUR JURY FOR WHAT'S TO COME!**

**B. TYPES OF EVIDENCE:**  
**The “BEST” and The “WORST”**

1. Eyewitness
2. Cooperating Co-Defendants
3. Star Witness with “Issues”
4. Confessions
5. Physical Evidence
6. Forensics
7. Experts
8. Paper/Documents

# 1. EYEWITNESSES



# 1. Eyewitness

## Example #1:

### *The “Snoggles” Incident*

You are absolutely certain that you see your buddy on the other side of the bar.

## Example #2:

### *The “Assault Trial” Incident*

Eyewitness who transforms him/herself from solid granite to a pile of mush.

## **2. COOPERATING CO-DEFENDANTS**



## 2. COOPERATING CO-DEFENDANTS

- a. For a prosecutor, sometimes that's all you have.
- b. Jurors generally dislike co-defendants who receive "deals."
- c. Defense attorneys love to cross-examine them.
  - Attack the general "concept"
  - Attack co-defendant's credibility
  - Attack inconsistencies from prior testimony

## 2. COOPERATING CO-DEFENDANTS

d. Prosecutors must prepare that witness for all or the above

- Must address this issue in **jury selection**
- Must amplify and explain in the **opening**
- Call Co-Defendant's attorney as witness at trial to "articulate" the plea bargain.
- Jury should **NEVER** find out about a cooperating co-defendant during:
  1. Defense attorney's opening statement, or
  2. Defense attorney's cross exam of cooperating co-defendant.

### **3. YOUR MATERIAL WITNESS WITH “ISSUES”**

- a. Prior Criminal Records**
- b. Drug or Alcohol Addictions**
- c. Testifying with Pending Charges with  
*and without* consideration**
- d. Multiple versions of the event**

**The Jury should never learn about the  
“issue” for the first time when your  
witness takes the stand!**



## 4. CONFESSIONS



## 4. CONFESSIONS

**Q** – Why would someone confess to a crime that they did not commit?

## 4. CONFESSIONS

### b. “Categories” of Confessions:

Q – Which ones are better for the prosecution?

Q – Which ones are better for the defense?

#### 1. “Just Right” Confession:

statement conforms with the proof  
(generally never happens) .....

#### 2. “Too Vague” Confession:

(one paragraph)

**Example:** *“I was walking down the street. I picked up a baseball bat and hit the victim over the head several times. I’m very sorry for what I did...”*

**Example:** See attachments “A” and “A1”

## **4. CONFESSIONS**

b. **“Categories”** of Confessions (continued):

**3. “Inconsistent with the Evidence” Confession**

*Example: Defendant confesses to shooting victim in the back of the head using a .22 calibre rifle that he then threw into Onondaga Lake. The forensics reveal the victim was shot in the right side of the head with a .38 calibre handgun.*

**4. “Too Consistent and Too Detailed” Confession**

**Example: See Attachment “B”**

**5. “Cathartic” Confession**

**Example: See Attachment “C”**

## 4. CONFESSIONS

### 6. “I Just Want You to Leave Me Alone” Confession .....



## 4. CONFESSIONS

### 7. “Controlled” Calls



## **4. CONFESSIONS**

### **Distinguish from “Wiretapping”**

(See, N.Y.S. Penal Law Article 250, supra)

P.L. Section 250 (1) – “Wiretapping” means the intentional over hearing or recording of a telephonic or telegraphic communication by a person other than the sender or receiver thereof, without the consent of either the sender or receiver, by means of any instrument, device or equipment.

## 4. CONFESSIONS

### “Controlled Call”

A telephone call made by one person (witness / “cooperator”) to another person (defendant / “target”) which is monitored and recorded by law enforcement with the consent of the caller.

**Note:** New York follows a rule commonly referred to as “one – party consent,” meaning that you do not need consent from both parties, but you do need consent from at least one.



## 4. CONFESSIONS

WITNESS  telephone  DEFENDANT

(Co-operator)

call

(target)

|

|

POLICE

|

Monitoring and recording  
conversation with consent  
of Witness / Caller

EVIDENCE  
(audiotape)

## **4. CONFESSIONS**

### **FOUNDATION / ADMISSIBILITY CONSIDERATIONS:**

1. Is conversation recorded from beginning to conclusion?
2. Is audiotape a “fair and accurate” recording?
3. Do calling parties identify themselves?
4. Do police identify phone number called?
5. Does “target” identify himself / herself?
6. Does / can caller identify target’s voice?
7. Is there a proper chain of custody?

## **4. CONFESSIONS**

**C.P.L. Section 710.30 – Notice to  
Defendant of Intention to Offer  
Evidence (Statements / Identification)**

**Preclusion**

**vs.**

**Suppression**

## 4. CONFESSIONS

**Q – Have I waived Preclusion?**

**See: Example 2 c. on pages  
10 and 11 of Outline**



## 4. CONFESSIONS

### c. Legal Considerations (continued)

**CPL sec. 710.30** - Motion to Suppress Evidence;  
Notice to Defendant of Intention to Offer Evidence:

#### **c) Admissibility of Statement**

1. The People have the burden of proving beyond a reasonable doubt that the defendant's statement(s) was made voluntarily

2. The Court must also consider whether the defendant was in custody at the time he made the alleged statements.

## **4. CONFESSIONS**

### **Factors for Determining “Custody”:**

1. Physical Location where defendant spent time with police
2. Nature and degree of freedom or curtailment of freedom
3. Climate of the encounter and whether a weapon was shown
4. The nature and degree of cooperation
5. Whether the questioning was “investigatory” or more accusatory in nature
6. What if anything the police told the defendant about his freedom to leave their company at any time
7. Whether the police suspected and immediately focused the investigation on the defendant at the time of interrogation
8. Length of time spent in the company of the police

## 5. PHYSICAL EVIDENCE



## 5. PHYSICAL EVIDENCE

### d. “At-Trial” Discovery

C.P.L. Sec. 240.45 Discovery; upon trial, any prior written or recorded statements and judgment of conviction of witnesses

1. After the jury has been sworn and before the prosecutor’s opening statement ... “the prosecutor shall ...”
- \*\*\* 2. After the people’s direct case and before the defendant’s direct case ... “the **defendant** shall ...”



## 5. PHYSICAL EVIDENCE

- e. ***People v. Rosario, 9 N.Y.2d 286 (1961)***

*“...a defendant ‘is entitled to inspect’ any statements made by the Government’s witnesses which bears on the subject matter of the witness’ testimony.”*

**NOTE: When in doubt, turn it over!!!!**

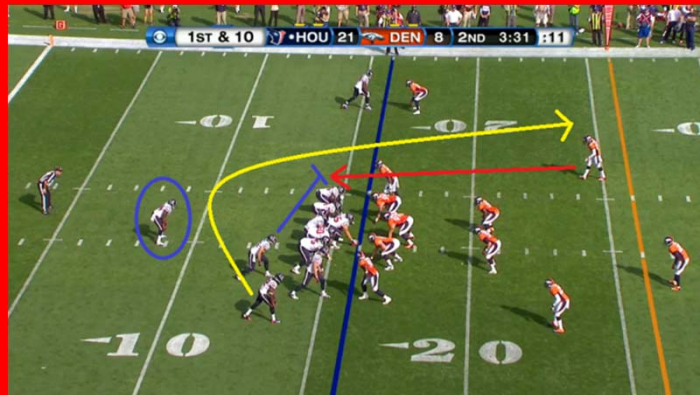
## **5. PHYSICAL EVIDENCE**

### **f. Prosecutor's response to Defendant's Omnibus Motion**

NOTE: This avoids an unprepared defense attorney's dramatic courtroom trial objection!

# EXAMPLE:

## ***THE “END AROUND” VIDEO OF THE DEFENDANT AT TRIAL***



**See pages 14 - 15 of Outline**

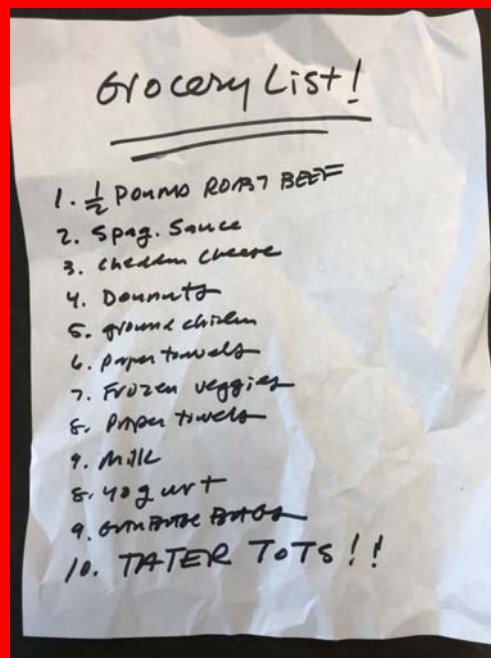
## **5. PHYSICAL EVIDENCE**

### **g. PROTECT YOUR EVIDENCE WITH YOUR LIFE !!!!!**

1. Separate your originals
2. Make working copies
3. Photograph your exhibits
4. Create a **“Working File”**

***Example: The “Tater Tot” Incident***

## 5. PHYSICAL EVIDENCE



## **5. PHYSICAL EVIDENCE**

### **h. The “Courtroom Demonstration”**



## **5. PHYSICAL EVIDENCE**

**Q – When should you consider using a Courtroom Demonstration?**

## 5. PHYSICAL EVIDENCE

**A – NEVER !!!!!!!!!!!**



The “*Ripped Screen*” Example



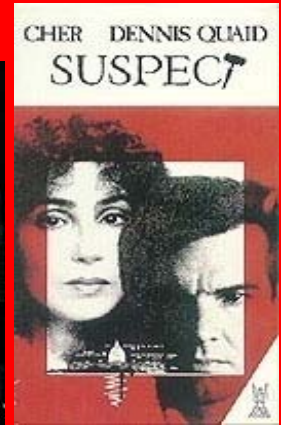
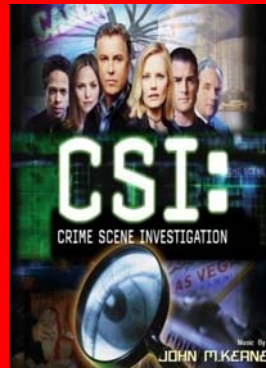
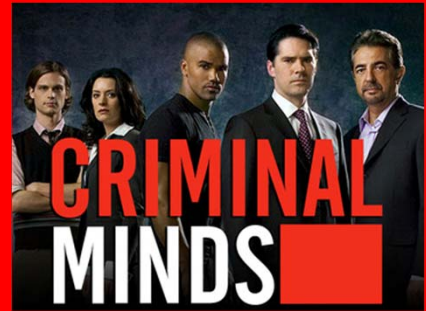
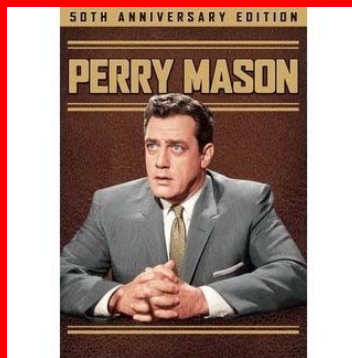
## 6. FORENSICS



## 6. FORENSICS

- a. Preconception / Misconception
- b. O.J. Simpson / C.S.I. Syndrome
- c. Mistaken belief that all cases are solved by:
  - Forensics
  - Fibers
  - DNA
  - Strobe Light Analysis ( Huh?)
  - Fingerprints
  - Bloody Gloves
  - Sequential Numbers
  - Mediums
  - Chances are very good that no one will break down on the stand and confess!!! See e.g. Perry Mason; Petrocelli; Ben Matlock.

# This is what you may be up against...





... Any Lifetime Movie “Suspense Thriller”

**I can hack into anything!!!!!!!!!!**



**TOP PRIMETIME T.V. SHOWS ACCORDING TO  
NIELSON: JANUARY 28 – FEBRUARY 3, 2019**

1. Super Bowl .....	98.0 million
8. Blue Bloods .....	9.1 million
12. Hawaii 5-O .....	7.8 million
16. MacGyver .....	6.9 million
17. N.C.I.S. ....	6.5 million
22. Magnum P.I. ....	5.6million
23. S.W.A.T. ....	5.6 million

## 6. FORENSICS

- d. EDUCATE THE JURY during jury selection
- e. EDUCATE THE JURY in your opening statement
- f. EDUCATE THE JURY through your experts

## 7. EXPERT WITNESSES





## **7. EXPERT WITNESSES**

**a. SIMPLIFY**

**b. ORGANIZE**

**c. EDUCATE**

## **7. EXPERT WITNESSES**

### **d. EXPERT ROADMAP:**

1. Job Duties / Responsibilities
2. Educational Background and Training
3. Explanation of Relevant Terms
4. Explanation of “hands on” actual  
experience
5. Explanation of case familiarity
6. OPINION ...

## 7. EXPERT WITNESSES

### 6. OPINION – questions: (SLOWLY!!!!)

**Q** – At the completion of your autopsy, did you make a determination as to the cause and manner of Joe Doe’s death? **STOP!!!!!!!!!!**

**Q** – Based on your educational background, your experience and training and the autopsy conducted, do you have an opinion to a reasonable degree of professional certainty as to the cause and manner of Joe Doe’s death? **STOP!!!!!!!!!!**

**Q** – What is your opinion? **EXPLAIN!**

*“Thank you Ms. Vito. No more questions.  
Thank you very, very much.  
You have been a lovely, lovely witness!”*



## 8. PAPER DOCUMENTS



## 8. PAPER DOCUMENTS



## 8. PAPER DOCUMENTS

- a. “Loyal Puppy”
- b. They always show up on time
- c. They never recant
- d. You never have to apply for a material witness warrant
- e. They never need to have their recollection refreshed
- f. You never have to have them declared “hostile”
- g. They are always laying next to you .....

*“They’ll never let you down...” - Elizabeth DeMartino*

## **8. PAPER DOCUMENTS**

- g. CPL Sec. 60.10 Rules of Evidence; in general:**
- h. \*\*\*See, e.g., NY Civil Practice Law and Rules (CPLR)**

**Q – Can the Prosecutor depose the defendant before trial?**

**A – No. (The 5<sup>th</sup> Amendment of the U.S. Constitution would frown upon that)**

**But....**



## **8. PAPER DOCUMENTS**

- 1. CPLR rule 4511.** Judicial Notice of Law
- 2. CPLR rule 4518.** Business Records
- 3. CPLR rule 4520.** Certificate of affidavit of public officer
- 4. CPLR rule 4540.** Authentication of official record of court or government office in the U.S. (“Public Records”)

## 8. PAPER DOCUMENTS

### 5. “Business Records vs. “Public Records”

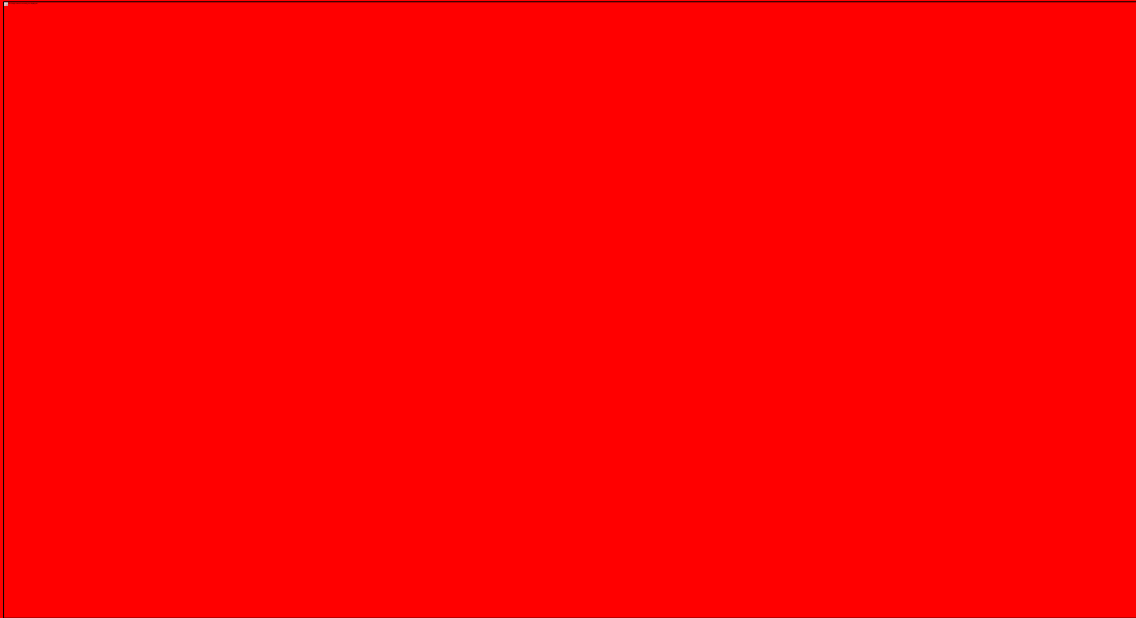
-Business Records – a business, creates, keeps and maintains

-Public Records – entity keeps and maintains

See, CPLR rule 4540

Example: “*Septic System*” Case

## 8. PAPER DOCUMENTS



## 8. PAPER DOCUMENTS

### FOUNDATION QUESTIONS FOR PUBLIC RECORDS:

1. Mark / Identify documents through witness
2. Are these the original files?
3. Do you know who made the copies?
4. Are these documents fair and accurate copies of the originals?
5. Are the documents contained within each file kept and maintained in the ordinary course of business of the Town of Bedrock?
6. Is it part of your job duties and responsibilities as Clerk to the Assessors and Codes Office of the Town of Bedrock to accept these documents?
7. Is it part of your job duties and responsibilities to keep and maintain legal custody of these documents?
8. Offer Exhibit pursuant to **CPLR Rule 4518** and **Rule 4540(a)**.

## **8. PAPER DOCUMENTS**

### **FACT PATTERN:**

**In response to a subpoena duces tecum served upon a bank, you are provided with a CD consisting of 42 separate files, containing a total of 8,564 pages of documents. Of those 8,564 pages, you want to introduce 6 pages at trial.**

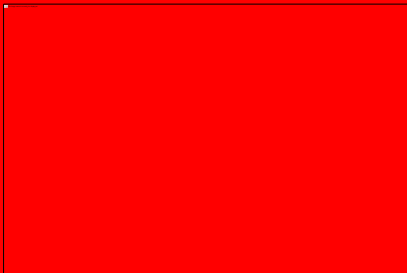
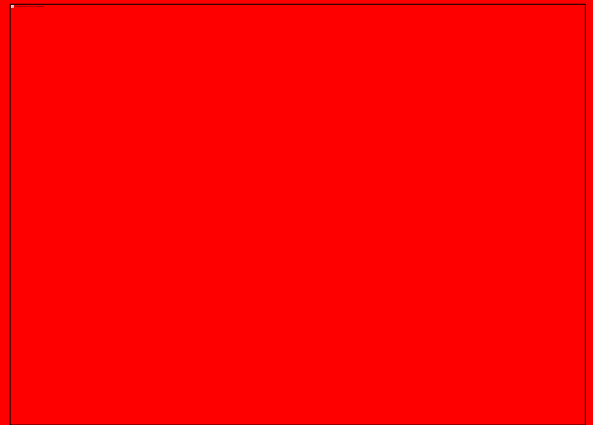
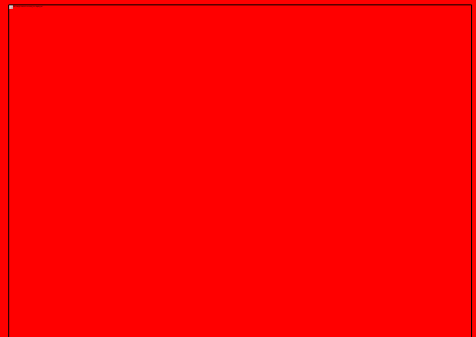
**Q – How do you successfully move those documents into evidence?**

# 8. PAPER DOCUMENTS

## FOUNDATION CONSIDERATIONS

1. Is there a certification? (See CPLR Rule 4518)
2. What does certification say?
3. Is the certification self authenticating?
4. Do you need to call a foundation witness?
5. If moved and received into evidence, now what?
  - What is in evidence at this point?
  - Does that help you?
  - Do you need additional witnesses?
6. How do you identify your 6 documents?
7. How do you explain those 6 documents to your jury?

**Preparation,**  
**Articulation,**  
**Personality, and**  
**LUCK.....**



# **THANK YOU**

**CONTACT INFORMATION:**

Please feel free to call any time

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*Amended: March 15, 2019*



