

NEW YORK STATE BAR ASSOCIATION
Young Lawyers Section – Trial Academy 2018

“Evidence, Foundations and Objections”
Episode 7
A Criminal Perspective

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A. INTRODUCTION – GENERAL THOUGHTS

1. CONSIDERATIONS IN PREPARING A CRIMINAL CASE

Convincing a group of 6 or 12 complete strangers to:

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

-or-

b. Unanimously agree that a defendant is not guilty ...

MOST CHALLENGING.....

MOST INTELLECTUALLY ENERGIZING.....

MOST DIFFICULT.....

THING YOU CAN DO IN THE LAW !!!!

c. 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, and
- (5) effective

"All the world is a stage, and all the men and women merely players; they have their exits and their entrances, and one person [person] in [their] time plays many parts ..."

***William Shakespeare
"As You Like It"***

- Throughout the trial, the one constant is that it is **YOUR** courtroom!
- See, e.g., "Ring Gereralship" – The judges favor the fighter who controls the pace of the bout

2. WINNING A CRIMINAL CASE IS A COMBINATION OF:

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

a. PREPARATION

- Know your case forward and backward
- Anticipate your opponent's case
 - Q - How will your opponent attack each material element of your case?
 - Q - How will your opponent attack the theory of your case?
 - Q - How will you challenge your opponent's attack?
- No excuse for not being prepared..... can't "wing it"
- Interview **all** witnesses
- Assume nothing
- No "slam dunk" mentality" – **PLEASE** avoid this

"If I had eight hours to chop down a tree, I'd spend six hours sharpening my ax ..."

Abraham Lincoln

b. ARTICULATION

- Organize your case
- Map out a plan - **Develop a "Theme"**

- Q – What is my case about?**
Q – How do I accomplish this?

"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 - 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?

- Prepare your case in a COMMON SENSE, SIMPLISTIC manner
- **No such thing as a "complicated case" – only lawyers who make a case complicated**
- Jurors know absolutely nothing about your case
- You need to educate and explain
- Articulate your message

MOST IMPORTANTLY - You must articulate a message that the jury is able to understand and accept

Your ultimate goal to have your "theoretical" light bulb turn on

c. PERSONALITY

- You are an advocate with a message
- You must connect with your jury
- Your case becomes much "better" if the jury likes you
- Jury will be more inclined to listen and be receptive to your message"
- Jury will do the right thing provided you give them a reason

d. LUCK!!!!

- Sometimes you win ones that you shouldn't
- Sometimes you lose ones that you shouldn't
- Intangibles
- Direct correlation between "luck" and "preparation"

"I'm a great believer in luck, and I find the harder I work, the more I have of it ..."

Thomas Jefferson

dd. AT ALL TIMES..... **TRY TO REMAIN CALM!!!!!!!!!!!!!!**

ddd. AND REMBER**TO KEEP YOUR COMPOSURE**

3. "CONCEPTUAL" FOUNDATIONS

Think of "foundations," both with witnesses and with tangible evidence, as a concept that you are developing throughout your trial

a. APPROPRIATE TIME FOR LAYING A FOUNDATION

- Should **never** be when the exhibit is marked
- Should **never** be when your witness (expert, cooperating co-defendant, business record witness, etc.) takes the stand and is sworn
- Should **never** be at the time "foundation" questions are asked

b. PREPARE YOUR JURY FOR WHAT'S TO COME!

- Your foundation **begins** during jury selection
 - Your foundation **continues** during your opening statement
 - Your foundation is **completed** when your witness takes the stand and testimony begins
1. Custodian of 2.5 million pages of bank records
 2. Accountant who will testify about those 2.5 pages of bank records
 3. Cooperating co-defendant in murder case receiving plea bargain
 4. Complex DNA testimony
 5. "Negative" forensic evidence
 6. "Star" witness with "issues" (drug or alcohol problems, recanted, etc.)

B. TYPES OF EVIDENCE: THE "BEST" AND THE "WORST"

1. EYEWITNESS

a. Remember its "Quality" not "Quantity"

But always beware:

b. You are absolutely certain that you see your buddy on the other side of the bar. **Example #1: The "Snoggles" Incident**

- c. Eyewitness who transforms himself from solid granite to a pile of mush. **Example #2: "Assault Trial" Incident**

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
- 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 statement
 - Call co-defendant's attorney at witness at trial to "articulate" the plea bargain
 - The jury should **never** find out about a co-operating co-defendant during
 - (1) the defense attorney's opening statement, or
 - (2) the defense attorney's cross examination of the co-operating co-defendant

C.P.L. Section 60.22. Rules of Evidence; corroboration of accomplice testimony:

1. A defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense.

2. An "accomplice" means a witness in a criminal action who, according to evidence adduced in such action, may reasonably be considered to have participated in:

- (a) The offense charged; or**
- (b) An offense based upon the same or some of the same facts or conduct which constitute the offense charged.**

3. A witness who is an accomplice as defined in subdivision two is no less such because a prosecution or conviction of himself would be barred or precluded by some defense or exemption, such as infancy, immunity or previous

prosecution, amounting to a collateral impediment to such a prosecution or conviction, not affecting the conclusion that such witness engaged in the conduct constituting the offense with the mental state required for the commission thereof.

e. CONSIDERATIONS:

- Cannot indict or convict a defendant based solely on the testimony of a co-defendant
- Witness may be deemed an accomplice even if uncharged
- Witness may be deemed an accomplice even if granted immunity
- Witness may be deemed an accomplice even if an infant

3. YOUR MATERIAL WITNESS WITH "ISSUES"

- a. Witness with prior criminal record
- b. Witness with drug or alcohol addictions
- c. Witnesses testifying with pending charges with and without consideration
- d. The jury should never learn about the "issue" for the first time when your witness takes the stand

4. CONFESSIONS

Question to be asked:

Q - Why would someone confess to a crime that they didn't commit?

a. Sliding Scale Theory:

Q – Which ones are better for the prosecution?

Q – Which ones are better for the defense?

- Oral Confession
- Written Confession
- Audio taped Confession
- Video taped Confession

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 to 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 with it several times. I’m very sorry for what I did...”*

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

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 reveals that 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”**

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

7. **“Controlled Calls”**

P.L. Section 250.00. Evesdropping: definitions of terms

1. “Wiretapping” means the intentional overhearing or recording of a telephonic or telegraphic communication by a person other than a sender or receiver thereof, without the consent of either the sender or receiver, by means of any instrument, device or equipment.

A “controlled call” is a telephone call made by one person to another (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.

ELEMENTS:

1. RECORDED TELEPHONE CALL MADE BY WITNESS → DEFENDANT
2. POLICE MONITORING AND RECORDING CONVERSATION
3. WITH CONSENT OF WITNESS / CALLER
4. PRESERVE TAPE AS EVIDENCE

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?

c. Legal Considerations:

C.P.L. Section 710.30. Motion to suppress evidence; notice to defendant of intention to offer evidence:

1. Whenever the people intend to offer at trial (a) evidence of a statement made by a defendant to a public servant, which statement if voluntarily made would render the evidence thereof suppressible upon motion pursuant to subdivision three of section 710.20, or (b) testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, to be given by a witness who has

previously identified him as such, they must serve the defendant a notice of such intention, specifying the evidence intended to be offered.

2. Such notice must be served within fifteen days after arraignment and before trial and upon such service the defendant must be accorded reasonable opportunity to move before trial, pursuant to subdivision one of section 710.40, to suppress the specified evidence...

a. The Preclusion Sanction

Preclusion is the sanction where the People fail to timely serve a valid notice of intent to use a defendant's statements. This is a severe penalty that will deprive the People of the opportunity to use the defendant's incriminating statements during their case in chief because of their procedural default. ***New York Confessions, First Edition, at 267 (Brunetti 2001)***

b. Motions to Preclude, but in the Alternative to Suppress

C.P.L. 710.30 (3) provides, "[I]n the absence of service of notice upon a defendant as prescribed in this section, no evidence of a kind specified in subdivision one may be received against him upon trial unless he has, despite the lack of such notice, moved to suppress such evidence and such motion has been denied and the evidence thereby rendered admissible as prescribed in subdivision two of section 710.70." By the very wording of the statute, it is necessary for the defendant to move to suppress and have "such motion denied," ***People v. Wise, 236 A.D.2d 739, 654 N.Y.S.2d 210 (3d Dep't 1997), lv. den. 89 N.Y.2d 1103, 660 N.Y.S.2d 397 (1997)***, before he is prevented from obtaining a preclusion order because of the People's failure to provide notice in accordance with subdivision one.

The defendant may move to preclude, but in the alternative to suppress, without risk of waiver of the preclusion claim so long as he does not litigate his suppression

claim to final conclusion. If he withdraws his suppression motion before it is determined on its merits, even as late as during his cross-examination at the hearing on that suppression motion, any viable preclusion claim is preserved. ***People v. Marine, 160 A.D.2d 35, 559 N.Y.S.2d 697 (1st Dep't 1990), lv. den., 76 N.Y.2d 990, 563 N.Y.S.2d 779 (1990).*** If he is unsuccessful on his preclusion claim, then a strategic decision must be made whether to forgo the suppression claim with the hope that the preclusion denial will be reserved on appeal or to suppress the suppression motion. The Court of Appeals calls this approach “[e]lecting to preserve for appellate review, his claim that the notice was insufficient” by not pursuing suppression claims to a final decision. ***People v. Lopez, 84 N.Y.2d at 427. New York Confessions, First Edition (Brunetti 2001)***

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, ***People v. Holland, 48 N.Y.2d 281, and C.P.L. Section 60.45. Rules of evidence: admissibility of statements of defendants.***

2. The Court must also consider whether the Defendant was in custody at the time he made the alleged statements, ***People v. Yuki, 25 N.Y.2d 585 (1969), cert. den., 400 U.S. 851 (1970), where the Court refined its statement on the issue of custody in saying that the “test is not what the defendant thought, but rather what a reasonable [person], innocent of any crime would have thought had he been in the defendant’s position.”***

Factors for Determining Custody:

1. Physical location where defendant spent time with the police, ***People v. Pena, 300 A.D.2d 132 (1st Dep't 2002)***
2. Nature and degree of freedom or curtailment of freedom, ***People v. Forbes, 182 A.D.2d 829 (2nd Dep't 1992)***; ***People v. Smith, 234 A.D. 2d 946 (4th Dep't 1996)***
3. Climate of the encounter and whether a weapon was shown, ***People v. Shivers, 21 N.Y.2d 118 (1967)***; ***People v. Perkins, 189 A.D. 2d 830 (2d Dep't 1993)***; ***People v. Johnson, 64 A.D. 2d 907 (2nd Dep't 1978, aff'd. 48 N.Y.2d 674 (1979))***
4. The nature and degree of cooperation, ***See, e.g., People v. Centano, 76 N.Y.2d 837 (1990)***
5. Whether the questioning was "investigatory" or more accusatory
In nature, ***People v. Panek, 305 A.D.2d 1098 (4th Dep't 2003)***; ***People v. Marx, 305 A.D.2d 726 (3rd Dep't 2003)***
6. What if anything the police told the defendant about his freedom to leave their company at any time, ***People v. Kollar, 286 A.D.2d 630 (1st Dep't 2001)***; ***People v. Robbins, 236 A.D. 2d 823 (4th Dep't 1997)***; ***People v. Smith, 193 A.D. 2d 1054 (4th Dep't 1993)***; ***People v. Farkas, 116 A.D.2d 983 (4th Dep't 1986)***; ***People v. Bookles, 120 A.D.2d 950 (4th Dep't 1986)***
7. Whether the police suspected and immediately focused the investigation on the defendant at the time of the interrogation, ***People v. Goodrich, 126 A.D.2d 835 (3rd Dep't 1987)***, and more important whether the police conveyed their suspicions to the suspect, ***Stansbury v. California, 511 U.S. 318 (1994)***; ***People v. Smedman, 184 A.D.2d 600 (2nd Dep't 1992)***
8. Length of time spent in company of the police, ***People v. Bailey, 140 A.D.2d 356 (2nd Dep't 1988)***

4. PHYSICAL EVIDENCE

- a. See, C.P.L. Article 240 - Discovery

b. C.P.L. Section 240.10. Discovery; Definitions of terms:

(3) "Property" means any existing tangible or real property, including, but not limited to, books, records, reports, memoranda, papers, photographs, tapes or other electronic recordings, articles of clothing, fingerprints, blood samples, fingernail scrapings or handwriting specimens, but excluding attorneys' work product.

(4) "At the trial" means as part of the people's or the defendant's direct case.

c. "Pre" Trial Discovery

C.P.L. Section 240.20. Discovery; upon demand of defendant:

1. ... upon a demand to produce by a defendant against whom an indictment, superior court information, prosecutor's information, information, or simplified information charging a misdemeanor is pending, the prosecutor shall disclose to the defendant and make available for inspection, photographing, copying or testing, the following property... (underline added)

d. "At" Trial Discovery

C.P.L. Section 240.45. Discovery; upon trial, of prior statements ancriminal history of witnesses:

1. After the jury has been sworn and before the prosecutor's opening address... the prosecutor shall, subject to a protective order, make available to the defendant...

NOTE: C.P.L. Section 240.45 establishes requirements for both the prosecutor **and** the defendant!!!!!!!

C.P.L. Section 240.45:

2. After presentation of the people's direct case and before the presentation of the defendant's direct case, the defendant shall, subject to a protective order, make available to the prosecutor...

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!

f. Prosecutor's response to Defendant's Omnibus Motion:

"All property within the meaning of C.P.L. Section 240.10(3) is available for inspection, copying and review by the defense upon reasonable notice to the people and at a mutually convenient time."

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

Vincent Gambini: I object to this witness being called at this time. We've been given no prior notice he would testify. No discovery of any tests he's conducted or reports he's prepared. And as the court is aware, the defense is entitled to advance notice of all witnesses who will testify, particularly those who will give scientific evidence, so that we can properly prepare for cross examination, as well as give the defense an opportunity to have his reports reviewed by a defense expert, who might then be in a position to contradict the veracity of his conclusions.

Judge Chamberlain Haller: Mr. Gambini?

Vincent Gambini: Yes Sir?

Judge Chamberlain Haller: That was a lucid, intelligent, well thought - out objection.

Vincent Gambini: Thank you, sir.

Judge Chamberlain Haller: OVERRULED.

"My Cousin Vinny"

Example: The "End Around" Video of Defendant at Trial:

Defendant is the former superintendent of a municipal water filtration facility in a city in upstate New York. He is on trial as a knowing accomplice for discharging filtration sludge into the river which serves as the main drinking source for that municipality and for millions of other citizens downstream to the Atlantic Ocean. During the defendant's case, defendant's attorney calls the defendant's wife as a witness. The wife testifies that she took a video of her husband / defendant at the filtration plant. In the video, the defendant takes the jury on a "tour" of the filtration plant as he attempts to explain how the filtration sludge could not have been discharged according the People's theory. This is the first time that the People are made aware of this video tape. The witness establishes that the video tape is a "fair and accurate" depiction of what the content purports to be.

Q - What foundation must the defense establish to attempt to successfully move this tape into evidence?

A - _____

Q - What are the grounds for the People's objections?

A - _____

Q - Is this tape received? Discus all issues!

A - _____

5. FORENSICS

a. Preconception / Misconceptions

2016 TOP 10 PRIMETIME T.V. SHOWS ACCORDING TO NIELSON:

- 1. The Big Bang Theory..... 19.93 million
- 2. **NCIS**..... 19.88 million
- 4. Walking Dead 18.24 million
- 5. **Bull**..... 17.64 million
- 6. **NCIS: New Orleans**..... 15.61 million
- 10. **Blue Bloods** 14.41million

b. O.J. Simpson / C.S.I. / Criminal Minds “Syndrome”

c. Mistaken belief that all case 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. “My Cousin Vinny”; “Suspect,” starring Cher and Dennis Quaid;

and “The Untouchables,” starring Kevin Costner

d. **EDUCATE** THE JURY during jury selection

e. **EDUCATE** THE JURY in your opening statement

f. **EDUCATE** THE JURY through your experts

6. EXPERT WITNESSES

a. SIMPLIFY

b. ORGANIZE

c. EDUCATE

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

- autopsy
- forensic test
- case investigation, etc.....

6. ULTIMATE 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?

A - Yes I did (**STOP!**)

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

A - Yes I do (**STOP!**)

Q – What is that opinion?

A - The cause was multiple gunshot wounds at the head from close range, and the manner was homicide (**STOP!**)

Q - Doctor, can you explain the basis for your opinion please

Your ultimate goal:

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

Attorney Vincent Gambini

7. **PAPER DOCUMENTS**

- “Loyal puppy”
- They **always** show up on time
- They **never** recant
- You **never** have to apply for a material witness warrant
- They **never** need to have their recollection refreshed
- You **never** have to have them declared “hostile”
- They are **always** laying next to you.....

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

g. C.P.L. Section 60.10. Rules of evidence; in general:

Unless otherwise provided by statute or by judicially established rules of evidence applicable to criminal cases, the rules of evidence applicable to civil cases are, where appropriate, also applicable to criminal cases.

*******See, e.g., New York Civil Practice Law and Rules (C.P.L.R.)***

Q – Can I depose the defendant?

A – No!!!!!! (The 5th Amendment of the United State Constitution would frown upon that)

Consider more "viable" options.....

1. C.P.L.R. Rule 4511. Judicial Notice of Law
2. C.P.L.R. Rule 4518. Business Records
3. C.P.L.R. Rule 4520. Certificate or affidavit of public officer
4. C.P.L.R. 4540. Authentication of official record of court or government office in the United States (“Public Records”)
5. “Business Records” vs. “Public Records”

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

- Public Records – entity keeps and maintains

C.P.L.R. Rule 4540. Authentication of official record of court or government office in the United States:

(a) Copies permitted. An official publication, or a copy attested as correct by an officer or a deputy of an officer having legal custody of an official record of the United States or of any state, territory or jurisdiction of the United States, or of any of its courts, legislature, offices, public bodies or boards is prima facie evidence of such record.

Example: “Septic system” case:

FOUNDATION QUESTIONS FOR PUBLIC RECORDS:

1. Mark / identify documents through witness
2. Are these 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 for 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 C.P.L.R. Rule 4518 and Rule 4540 (a)

Example: *The “Endless number of documents on the CD” case:*

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?

FOUNDATION CONSIDERATIONS:

Q – Is there a certification? (See CPLR Rule 4518)

Q – What does the certification say?

Q – Is the certification self authenticating?

Q – Do you need to call a foundation witness?

Q – If moved and received into evidence, now what?

What is in evidence at this point?

Does that help you?

Do you need additional witnesses?

Q – How do you identify your 6 documents?

Q – How do you explain those 6 documents to your jury?

h. “White Collar” cases

1. Educate jurors regarding inherent issues during jury selection and in your opening statement
2. No “spectacular” or “graphic” testimony
3. Accountants, book keepers and bankers vs. Medical Examiners
4. Documents, charts and graphs vs. Guns or bloody knives
5. “Weapon of Choice” is a pen or a computer and **MOST importantly**
6. Behind the bank, or business, or corporation, there are
PEOPLE who have been victimized!!!!!!!!!!!!

The Keys to Success:

Preparation

Articulation

Personality

and Luck.....

(and always trying to remain calm)

*Thank you,
And Good Luck*

*(and remain
calm.....)*

Amended March 15, 2017
njd

ATTACHMENTS:

To be Distributed at the Lecture