

Slide 1

Evidence, Legal Discourse and Interpretation




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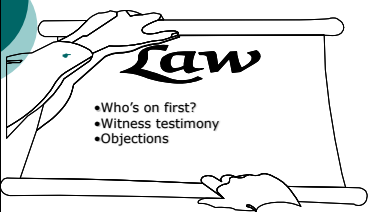
Slide 2

Overview

- What is a trial
- What are the discourse rules
- Cultural issues with discourse style



Slide 3



- Who's on first?
- Witness testimony
- Objections

Slide 4

Narrative

- Direct Exam
Tell us what happened?

Open-ended

- Direct Exam
Why?

Closed

- Direct & Cross
What color was the car?

Leading

- Cross Exam
- Tag questions
- Coercive
- On-direct for foundation

Slide 5

Interpreting Implications (Hosell)

- Narrative weaving
- Discourse framing
- Couching
- Comparing
- Exemplifying

Slide 6

Direct examination

- Goal – story supports theme
- Bolster credibility
- Prepared witness, yet stressful
- Objections to Q & A
- Interpreting considerations
 - Primarily English to ASL
 - Consecutive for Deaf witnesses
 - Chunking
 - Note taking

Slide 7

Sample Direct Examination

- Q: How long have you worked there?
- A: Twenty-three years, I started as a draftsman, and rose to chief field engineer. Then I was in the bus wreck and my knees got all smashed up and now I'm back working as a draftsman again.

Slide 8

Sample Direct Examination

- Q: Let's start at the beginning. Where did you go to school?
- A: In 1972, I graduated from Englewood High School and entered Illinois Institute of Technology to study design engineering. I did some graduate work at M.I.T., and then got a job with Finderson Engineering in 1979.

Slide 9

Sample Direct Examination

- Q: Doing what?
- A: I started as a draftsman. That's the usual entry level position. You do final drawings of other people's construction plans.
- Q: How was your health back then?
- A: It was fine. Except for the flu, I had never really been sick. I had no problems as far as I know.

Slide 10

Cross Examination

- Unfriendly witness
- No preparation, only prior statements (proffers, interrogations, etc.)
- Goal to impeach or discredit
- Leading questions
- Declaratory statement with tag question (turns a statement into a question)
- Coercive and controlling
- Used to confirm information the attorney already knows is true

Slide 11

Cross Examination Questions

- Impeach with convictions, bias, or other credibility evidence
- Impeach with inconsistent statements
- Test accuracy of observation/recollection
- Never ask for a narrative response
- Don't ask why or are you sure?
- Interpreting considerations
 - Focus on English to ASL
 - Interpreted responses, yes/no

Slide 12

Sample cross examination

- o Q: Now, you said you thought Mr. Roberts might have appeared drunk.
- o Did you go out of your house after this accident occurred?
- o A: No.
- o Q: Of course, from where you were, with the window between you and the man out in the street, you could not smell his breath?
- o A: Of course not.
- o Q: And you could not hear the driver say anything, could you?
- o A: No.
- o Q: Nor see whether his eyes were bloodshot?
- o A: No.
- o Q: Your statement then that he might have been drunk is simply your conclusion, not based on anything specific that you saw, heard, or smelled?
- o A: Yes.

Slide 13

You be the lawyer: draft cross questions

- The evidence technician in charge of collecting evidence after novelist Michael Peterson's wife was found dead was relatively inexperienced, had little sleep and missed things that could have helped blood spatter experts, the defense brought out through cross-examination Tuesday.

Slide 14

Summary: Examination of Witnesses


- Court controls, prods and order
- Interviewing witnesses & presenting evidence

Slide 15

Summary: Limited Scope of Cross

- Matters raised on direct
- Matters affecting credibility


Slide 16



Summary: Leading Questions

- Permitted on cross
- Not permitted on direct, unless.....


Slide 17



Summary: Impeachment

- ROTC factors
- Bias/interest in outcome or motive to lie

Slide 18




Activity – Common Objections

- o Small groups (3 to 4)
- o Review handout
- o Pick one concept from each category
- o Prepare context
- o Prepare interpretation
- o Share with class

Slide 19

The Process of Objecting



Q → Objection → Ruling
Q → Witness begins → Objection → Ruling
Q → Witness finishes → Objection → Ruling

Slide 20

Q → Objection → Ruling
(To the form of the question)

Examiner: Is it **conceivable** that the accident could have happened that way?

Opposing counsel: I object. Counsel is asking the witness to speculate about what might have happened. The question is improper because it seeks speculative opinion testimony.

Judge: Sustained.

Slide 21

Contemporaneous Objection Rule
FRE Rule 103 (a)(1)

A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, a party, on the record:

- (A) timely objects or moves to strike; and
- (B) states the specific ground, unless it was apparent from the context; or

Slide 22

Contemporaneous Objection Rule

Examiner: Is it **conceivable**
Opposing counsel: Objection.

Examiner: Is it **conceivable** that the accident could have happened that way?
Opposing counsel: Objection.

Examiner: Is it **conceivable** that the accident could have happened that way?
Witness: Yes
Opposing counsel: Objection.

Slide 23


Curing Objections to the Question

Examiner: Is it possible the other driver did not stop?
Opposing counsel: Objection. Counsel is asking the witness to speculate.
Judge: Sustained

Examiner: Did you see the car approach the stop sign?
Witness: Yes
Examiner: Describe what the car did.
Witness: It slowed but did not stop.

Slide 24

To the form of the witness' answer



Q → Witness begins → Objection → Ruling
Q → Witness finish → Objection → Ruling

Slide 25

Example

Witness: And then the boy told me he was high on drugs.

Counsel: Objection, your Honor, to the hearsay answer.

Judge: Objection sustained.

Counsel: Your Honor, may we have the answer stricken and the jury instructed to disregard the improper answer.

Judge: The answer is stricken. The jury is instructed to disregard it.

Slide 26


Offer of proof
FRE Rule 103 (a)(2)

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

Slide 27

Offer of Proof

Your Honor, if we were allowed to pursue this line of questioning, the witness would testify that one week after the robbery, defendant tried to sell her a watch taken during the robbery.



Slide 28

Interpreting Objections

Examiner: Did you accept an offer of employment?

Witness: The check I worked for?

Examiner: No. Did you accept the offer to work at IBM?

Opposing counsel: Objection. I'm sorry, I'll let him (interpreter) finish.

Witness: Not it was not for a job.

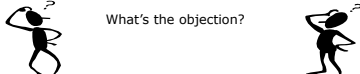
Slide 29

Interpreting Objections

Judge: Wait. If there is an objection – go ahead and translate the question.

Or maybe we should have the objection before the question is translated, but before there is an answer, we'll take the objection.

What's the objection?



Slide 30

Commonly heard objections


- ▶ Ambiguous
- ▶ Argumentative
- ▶ Assuming facts not in evidence
- ▶ Improper conclusions
- ▶ Compound questions
- ▶ Misstating evidence/misquoting witness
- ▶ Narratives
- ▶ Non-responsive answers
- ▶ Scope
- ▶ Speculative
- ▶ Leading
- ▶ Personal knowledge
- ▶ Hearsay
- ▶ Relevance

Slide 31

FRE Rule 701
Lay witness opinions/conclusions

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:


- (a) Rationally based on the witness's perception;
- (b) Helpful to clear understanding the witness's testimony or to determining a fact in issue; and
- (c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702



Slide 32

FRE Rule 611(b)
Scope


Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow the inquiry into additional matters as if on direct examination.



Slide 33

FRE Rule 611 (c)
Leading Questions

Leading questions should not be used on direct examination except as necessary to develop the witness's testimony.




Slide 34

FRE Rule 611(c) Cont.
Leading Questions

Ordinarily court should allow leading questions:


(1) on cross examination; and,
(2) When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.



Slide 35

FRE Rule 602
Personal Knowledge

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.




Slide 36

Examples


Counsel: He paid you properly for the work that you did, didn't he?

Opposing counsel: I object to the form of the question.



Slide 37

Examples



Since you were 80 feet away, it was raining and dark, and the whole robbery took only a few seconds, you couldn't have had a good opportunity to see the robber's face, could you?

Slide 38


Examples

Counsel: Good morning, your name for the record please?

Counsel: Now you were standing more than 50 feet from the skid marks, weren't you?

Slide 39


Examples



- Describe what he looked like?
- He was as drunk as a skunk.
- What's the next thing he did?
- He just quit trying.
- Describe how the work was done?
- None of it was done competently.

Slide 40

Examples




- Did you go to Smith's Tavern on the 13th and to Frank's Tavern two days later?
- Did you go to Smith's store on the 13th and if so, did you buy anything?

Slide 41

Examples

- You were scared, weren't you?
- Immediately after the robbery, did the victim scream?
- Did he or did he not look both ways before stepping off of the curb into the street?




Slide 42

Examples

Counsel: You hit the man didn't you?

Witness: Yes.

Counsel: After attacking the man, you ran didn't you?




Slide 43

Examples

Tell the jury **everything that happened** that day.

Tell us **what you know** about the plaintiff.



Slide 44

FRE Rule 604

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

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Slide 45

FRE Rule 603 -- Oath

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

Slide 46

FRE Rule 702 – Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise, if:

- (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand evidence or to determine a fact in issue;
- (b) The testimony is based on sufficient facts or data;
- (c) The testimony is the product of reliable principles and methods; and
- (d) The expert has reliably applied the principles and methods to the facts of the case.

Slide 47

**Hearsay defined
FRE Rule 801(c)(1-2)**

Hearsay means a statement that:

- (1)The declarant does not make while testifying at the current trial or hearing; and
- (2)A party offers in evidence to prove the truth of the matter asserted in the statement.

Slide 48

**FRE Rule 801 (d)(2)(D)
Not hearsay**


A statement that meets the following conditions is **not** hearsay:

The statement is offered against an opposing party and: was made by the party's **agent** or employee on a matter **within the scope** of that relationship and while it existed.....

Slide 49

Hearsay & Interpreters

- State view
 - Joint Agency Theory
 - Officer's testimony = hearsay
 - Nazemian factors determine
 - Interpreter Must Testify
- Federal view
 - Confrontation clause issues
 - Nazemian means judge decides admissibility
 - Interpreter doesn't testify under Nazemian
 - Under confrontation clause analysis interpreter testifies as declarant



Slide 50

FRE Rule 401--Relevance

Evidence is relevant if:

- (a) It has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) The fact is of consequence in determining the action.


Slide 51

FRE Rule 402 Duh!!!

Relevant evidence is admissible unless any of the following provides otherwise:

- The United States Constitution;
- A federal statute;
- These rules; or
- Other rules prescribed by the Supreme Court.


Irrelevant evidence is not admissible.



Slide 52

FRE's Most Excellent Rule 403


The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusion of the issues, or misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.



Slide 53

Impeachment -- you lying dawg!

- Character to Prove Conduct
- Prior Bad Acts (404b)
- Habit; Routine Practice (406)
- Witness Character for Truthfulness (608)
- Prior Crimes (609)




Slide 54

Putting it together

- o Review exercises 2, 7 & 8
- o Discuss for meaning
- o Analyze from evidence perspective
- o Create necessary context
- o Interpret

Slide 55



Closing and next steps

- o Final remarks
- o PIE LITI Staff
