Fundamentals of Criminal Practice:
EVIDENCE & OBJECTIONS

Chairs: Luke A. Nebush, Esq., ***Assistant Public Defender, Major Crimes Section***
Oneida County Public Defender, Criminal Division
And
Elizabeth M. Cesari, Esq., ***Assistant Public Defender, City Courts Section***
Oneida County Public Defender, Criminal Division

Presented by: ***Oneida County Bar Association***
Oneida County Public Defender, Criminal Division
Oneida County District Attorney's Office
New York State Defenders Association, Inc.

Speakers: **Hon. Joseph E. Fahey,** ***Onondaga County Judge***
Acting Supreme Court Justice
Adjunct Professor of Law, Syracuse Law School

Prof. Sanjay K. Chhablani
Associate Professor of Law
Syracuse University College of Law

Saturday, May 14, 2011

Mohawk Valley Community College
IT Room 225
1101 Sherman Avenue
Utica, New York 13501

9 A.M. – 12 P.M.

MCLE Credits: (2) Skills and (1) Professional Practice

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8:30 a.m. – 9:00 a.m.	**REGISTRATION**
9:00 a.m. – 10:00 a.m.	**Objections in Criminal Trials** **Hon. Joseph E. Fahey** ***Onondaga County Judge*** ***Acting Supreme Court Justice*** ***Adjunct Professor of Law, Syracuse Law School***
10:00 a.m. – 10:15 a.m.	**BREAK**
10:15 a.m. – 12:00 p.m.	**Evidence in Criminal Trials** **Prof. Sanjay K. Chhablani** ***Associate Professor of Law*** ***Syracuse University College of Law***

MCLE Credits: (2) Skills + (1) Professional Practice

Speakers

Hon. Joseph E. Fahey, *Onondaga County Judge; Acting Supreme Court Justice; Adjunct Professor of Law, Syracuse University College of Law*

Judge Fahey received an Associate of Arts Degree from Onondaga Community College before receiving a Bachelor of Science from the University of Tennessee in 1971. After earning his Juris Doctor from Syracuse University College of Law in 1975, he received his LL.M. in Criminal Law from the University of Buffalo Law School in 2003. He began his career in the law as a Senior Staff Attorney with the Frank H. Hiscock Legal Aid Society in Syracuse from 1976 until 1979 when he became a partner in Wiles & Fahey, Esqs.

Judge Fahey has served as Chairman of the Criminal Law Committee and the Judiciary Committee of the Onondaga Bar Association, lectured at the *Trial Practice Seminar* for the Assigned Counsel Program of the Onondaga Bar Association as well as the NYS Division of Criminal Justice Services *Annual Basic Course for Prosecutors*. In 1995, Judge Fahey received the *Presidential Award of Special Recognition* from the New York State Association of Criminal Defense Lawyers.

His community activities include serving as President and Commissioner of the Board of Education for the City of Syracuse and chaired the Conference of Large City Boards of Education in 1990.

Judge Fahey was elected an Onondaga County Judge in 1996. Since ascending to the judiciary, he was appointed by former Chief Judge Judith Kaye to the *Grand Jury Reform Project for New York State* and the *Committee to Study the Future of Indigent Services in the State of New York*. In 2001, he was designated an Acting Supreme Court Justice.

Among his numerous publications are:
Death Penalty Jurisprudence in New York 1995 to the Present: How Far Have We Come? Where Are We Headed, 24 Pace L.R. No.1, 1-105 (2003)*;*

The Elusive Promise: Northern Ireland and the Quest for Peace: An Examination of the Peace Process, http://law.bepress.com/expresso/eps/922;

Death Penalty Jurisprudence in New York and the Supremacy Clause of the United States Constitution: How Supreme Is It?, 27 Pace L.R. No. 3 1-15 (2007)

Discretionary Persistent Felony Offender Sentencing in New York: Can It Survive Apprendi?, http://works.bepress.com/joseph_fahey/1

Throwing Away The Key: An Examination of New York's Sex Offender Commitment Law, http://works.bepress.com/joseph_fahey/2

Short of the Goal: New York's Legislation to Compel HIV Testing From Accused Sex Offenders, http://works.bepress.com/joseph_fahey/6

Judge Fahey also wrote the *Annual Survey of Criminal Law in New York* for the Syracuse Law Review from 2006 to 2009.

Judge Fahey has been listed in "Who's Who in American Politics," "Who's Who in American Law" and "Best Lawyers in America" (Editions 2 – 12).

Judge Lahey teaches Trial Practice at Syracuse Law School where he has been an Adjunct Professor of Law for a number of years.

Prof. Sanjay K. Chhoblani, *Associate Professor of Law, Syracuse University College of Law*

Professor Chhablani received his Bachelor in Arts degree from the University of Chicago and his Juris Doctor from Yale Law School. He joined the Syracuse University College of Law after having spent several years representing indigent persons on death row. He began his legal career at a private law firm where, in addition to litigating commercial disputes, he represented, *pro bono*, persons incarcerated on Illinois' death row. After receiving an ABA Death Penalty Representation Project Fellowship, Professor Chhablani joined the Southern Center for Human Rights in Atlanta and represented clients in Georgia and Alabama on direct appeal and in state and federal post-conviction proceedings.

Professor Chhablani's scholarship focuses on issues of constitutional criminal procedure and the death penalty. He currently teaches courses in criminal law, criminal procedure, capital punishment, evidence and forensic evidence. He received Syracuse University's Meredith Teaching Recognition Award in 2007 for excellence in teaching. The graduating class of 2006 selected Professor Chhablani for the *Res Ipsa Loquitur* award in recognition for his excellence in teaching.

His publications include:

Disentangling the Sixth Amendment, 11 U.Pa.J.Const.L. 487 (2008);

Chronically Stricken: A Continuing Legacy of Ineffective Assistance of Counsel, 28 St.Louis U.Pub.L.Rev. 351, (2009);

Disentangling the Right to Effective Assistance of Counsel, 60 Syracuse L.Rev. 1 (2009);

His forthcoming work *Reframing the Fair Cross Section Requirement*, is to be published in the University of Pennsylvania Journal of Constitutional Law.

Professor Chhablani is a member of the Illinois, Georgia (inactive) and Alabama state bars and has been admitted to practice before several federal and state courts, including the United States Supreme Court.

EVIDENTIARY ISSUES AND TRIAL OBJECTIONS

Hon. Joseph E. Fahey

Although this is not a course in evidence, trial counsel, during the course of the proceedings, must be prepared to both make objections and respond to objections made to opposing counsel during the witness' testimony. Like any other decision during trial whether to make an objection is a strategic one. While an attorney may be technically correct in objection is a strategic one. While an attorney may be technically correct in objecting to opposing counsel's questions, a slavish adherence to rules of evidence, particularly during preliminary questioning or on matters which not important, may result in alienating the jury and lead them to the mistaken belief that you are somehow trying to hide the evidence from them. Balanced against that, is the need to protect the record for appellate purposes on matters which may have importance during appellate review. A failure to preserve an error for review can sometimes lead to a determination of incompetence and ineffective assistance of counsel which is a nightmarish situation for any trial lawyer. Counsel, therefore, needs to listen to the question carefully, and at the point where opposing counsel begins to examine on an area of importance must be vigilant in asserting an objection at the earliest possible time lest it be considered waived for later review.

Another strategic determination is one where counsel might choose not to object to material which might otherwise be inadmissible because it may have some value in developing the facts of the case. In this regard, counsel needs to be fully prepared for the possible introduction of such evidence at the time trial proceedings begin and have an understanding about how it might be exploited on cross-examination or otherwise utilized by counsel in the overall strategy in presenting the party's case.

There are two types of objections which counsel may make during the course of the witness' testimony. They are general objections or specific objections.

A general objection is one which cites no specific reason or specific evidentiary rule. It is interposed simply by counsel saying, "I object." In response to such an objection, the court may invite counsel to state a ground or specific reason for the objection in which case it becomes a specific objection. However, if no specific reason is stated, invited or sought by the court, a ruling may nevertheless be made and it remains a general objection.

If a general objection is made and the court overrules it allowing the answer, there is no issue preserved for appellate review unless there is absolutely no theory under which the evidence could have been admitted for any apparent reason.

If a general objection is sustained and the answer is disallowed, it will be upheld on appeal if there was any ground upon which the evidence was inadmissible.

By contrast, a specific objection is one in which the objecting party states a specific basis or rule of evidence for the exclusion of the evidence or the answer being sought. Counsel makes a specific objection by stating, "I object upon the ground that…." – finishing the sentence with the specific reason why the testimony or evidence is inadmissible.

A specific objection may be ruled upon for the specified reason only. If a specific objection is overruled and evidence is admitted, there is no ground for appeal because the

objection had another valid basis to exclude the evidence which went unstated. However, where a specific objection is sustained and evidence is excluded for an erroneous reason, a sufficient issue is presented for appeal, even if there was some other basis for the exclusion of the evidence.

Where an objection goes to the substance of a witness' testimony rather than to a form of a question and it has been sustained, counsel may request to make an offer of proof outside the presence of the jury. An offer of proof is a short conference generally held at side bar between opposing counsel, the court and the court reporter in which the attorney offering the testimony will recite for the record what the witness' testimony would be and why it should be admitted, at the conclusion of which the court may rule on it. An alternative form to this offer of proof is actually taking testimony from the witness in question and answer form outside the presence of the jury with the court ruling on the admissibility of the evidence at the conclusion of the examination.

As noted earlier, objections may go either to the form of the question posed or the substance of the testimony to be elicited.

The most common objections to the form of question are:

a) Leading during the direct examination of one's own witness;
b) Vague/confusing/ambiguous questions;
c) Compound questions (one which assumes two facts);
d) Argumentative, which usually occurs during cross-examination.

An objection which is sustained for any of the foregoing reasons leaves the questioner free to rephrase or reformulate the question in order to eliminate the particular flaw in the form of the question.

Objections which go to the substance of a question which are most commonly encountered during trial are:

a) The witness is incompetent;
b) The question calls for a conclusion;
c) The question calls for an opinion (by one not qualified to render it);
d) The question calls for hearsay testimony;
e) The question has previously been asked and answered (it is repetitious);
f) The question is beyond the scope of the previous examination'
g) The question calls for irrelevant testimony;
h) The question for immaterial testimony;
i) The question assumes facts not in evidence;
j) The answer would be speculative;
k) The question calls for privileged information;
l) The question improperly characterizes prior facts or testimony;
m) The question misstate the evidence or the witness' testimony;
n) The question would violate the best evidence rules;
o) The question calls for narrative testimony;
p) Testimony would be cumulative;
q) The question constitutes improper impeachment'
r) No foundation has been laid for either the testimony or the introduction of the exhibit.

While almost all of the basis of the foregoing objections are self-evident, a few merit further discussion here.

THE WITNESS IS INCOMPETENT

An objection which goes to the competency of a witness traditionally is one which is based upon the age of the witness, the contention that the witness is of unsound mind. In general, most jurisdictions require only that a witness understand the nature and extent of an oath and that the witness have personal knowledge of the facts about to be testified to in order to be deemed competent to testify.

Frequently, this particular objection is used by trial lawyers to suggest either that a witness is unqualified to state a conclusion or an opinion on the particular subject mater of the witness' testimony. In reality, this latter objection which goes to qualification is one which is more appropriately made where an expert is being testified without proper qualification or is about to testify on a subject beyond the area of expertise.

In those instances where an objection to testimony is made on the grounds that the witness is incompetent and the witness otherwise appears to understand the oath, has personal knowledge about the subject matter of the testimony and is of sound mind, counsel should might the adversary to articulate whether the objection really goes to the nature of expert qualifications.

QUESTIONS BEYOND THE SCOPE OF THE PREVIOUS EXAMINATION

The general rule in all jurisdictions is that trial counsel may not examine a witness on a subject which was not covered on the previous examination. For example, a witness may not be cross-examined about a subject not covered on direction examination nor may a witness be redirected on new matter not covered on cross-examination.

While this rule is generally accepted and enforced, if counsel is imaginative, it is possible to take the witness into a new subject area which arguably tangentially relates to a subject covered on the previous examination by arguing that counsel has "opened the door" to this particular subject. Moreover, this is an argument that is frequently heard where one attorney wishes to inquire into a subject matter that has otherwise been proscribed by a ruling on a pretrial motion in limine. Where a motion in limine has been granted e.g. on a subject such as a witness' record of prior convictions or bad acts, the attorney offering that witness should be extremely careful to stay away from any questioning which might even remotely touch upon the witness' prior convictions or bad acts lest it be ruled that 'the door has been opened' to cross-examination on that subject.

FOUNDATION NECESSARY FOR THE INTRODUCTION OF TESTIMONY OR AN EXHIBIT

Perhaps the most vexing area of courtroom testimony for the new trial practitioner is laying the proper foundation for the introduction of either a witness' testimony or an exhibit. There is nothing more frustrating than trying to introduce critical testimony on a particular subject or to put an exhibit before a jury only to have objections to the introduction repeatedly sustained because a sufficient foundation for the testimony or the exhibit is lacking. Quite often, a new trial attorney will become so frustrated that she or

he will abandon a particular line of inquiry or withdraw an important exhibit because the attempt to introduce it unsuccessfully, repeatedly in highly-charged courtroom setting has temporarily paralyzed the attorney's thought processes.

This experience can be avoided by remembering a few, simple, common sense concepts about what constitute a proper foundation.

In laying the foundation for testimony about a subject which is admissible as an exception to the hearsay rule, the basic journalism rules followed by cub reporters concerning "who, what, where and when?" will provide a sufficient foundation.

For example:

QUESTION: Mrs. Jones, did there come a time on January 9, 1995 when you and the defendant had a conversation about the death of his mother?

ANSWER: Yes.

Q: Where did that take place?
A: At my home.
Q: Where is that located?
A: 110 Main Street
Q: Who was present?
A: Just the defendant and me.
Q: Can you tell us what he said on that subject?
A: He told me he poisoned her.

The statement "he poisoned her" is obviously an admission on the part of the defendant which is an exception to the hearsay rule, a proper foundation has been laid for its admission by simply recounting the circumstances of the conversation – i.e. who was present, where it occurred and the date on which it happened.

The foundation for the introduction of an exhibit follows the same type of common sense inquiry. For example, the introduction of a photograph may be accomplished by the following exchange:

Q: I show you Exhibit A. Can you tell me what it is?
A: It is a photograph.
Q: What does it show?
A: It shows the body of Mrs. Jones.
Q: Is that the way she looked on January 9, 1995?
A: Yes.

COUNSEL: I offer Exhibit A.

Some courts might require counsel to ask the witness, "Does Exhibit A fairly and accurately depict the way Mrs. Jones looked on January 9, 1995?

Strict adherence to what new lawyers sometimes view as "magic incantations" necessary for the admission of this type of exhibit are really unnecessary. A simple recitation of what is contained in the photograph and the fact that it looks the same way as the witness saw it is enough to satisfy the requirement of an adequate foundation, should satisfy a trial court and will most certainly satisfy an appellate court should appellate review become necessary.

One of the most common mistaken beliefs among young lawyers on this subject is that a proper foundation for the introduction of a photograph requires that the photographer be called. At no time is it necessary to call the photographer if a photograph of the event or condition in question is being offered unless, of course, you are seeking to recreate or "stage" an event, occurrence or condition at a later date. If that is the case, then it may be necessary to call the photographer for purposes of laying the foundation about how the recreation occurred, but even in that case, it need not be done unless your adversary has successfully objected to the introduction of the photograph during your initial offer.

Another "magic incantation" which proves troublesome to new trial lawyers is the foundational questions which are required for the introduction of a business record. Once again, simple common sense is all that is required to satisfy this requirement. The three essential requirements for the introduction of a business record are: (1) The identity of the record itself; (2) That it was made in the regular course of business – in other words, that it was made during a routine transaction; and (3) That it was the regular course of business to make it – i.e. that it is not something specially made particularly for litigation purposes. The following exchange will satisfy this foundational requirement:

Q: Mrs. Jones, I show you Exhibit B. Can you identify it?
A: Yes. It is a receipt for arsenic that we sold the defendant on January 9, 1995.
Q: Is that receipt something that you prepare as part of your regular pharmaceutical business?
A: Ye, it is.
Q: Was it part of your routine duties in making this sale to prepare it?
A: Yes, it was.
Q: I will offer Exhibit B.

In satisfying the business record foundation, it is important to remember that only those records which are routinely made as part of business transactions are admissible, thus investigative reports of a police agency, statements or confessions of a defendant, statements of a witness, arrest records or "rap sheets". Or any other material which by its nature is prepared for litigation or court proceedings is not admissible under this section.

In addition to objections to questions, objections to answers are frequently made. The most frequent objections to an answer given by an adversary is that the answer is: (a) unresponsive; (b) narrative; (c) conclusory; (d) an opinion; (e) irrelevant; (f) immaterial; (g) privileged; (h) hearsay.

In making an objection to an answer given by a witness, counsel need simply state, "I object that the answer is _____, and ask that it be stricken."

In asking the court to strike and answer, counsel is requesting that the information contained in the answer not be included in the record. While this may be of some value for appellate purposes, it should be remembered that once a jury has heard and answer,

particularly an inflammatory one, an objection and request that it be stricken is like putting toothpaste back into a tube. Counsel is, therefore, better advised to be poised on the edge of the chair listening very carefully to the question, contemplating the possible answer and making an objection to the question before the answer is elicited rather than requesting that some damaging answer be stricken. Unfortunately, even the most skilled examiner and vigilant adversary cannot always predict what a witness might say in the course of giving an answer which is why objections to an answer rather that a question sometimes become necessary. Where an answer not only contains inadmissible information but highly inflammatory and prejudicial information, a simple request that it be stricken may not be remedial enough. Counsel may wish to go a step further and have the court instruct the jury that the answer was improper and that the testimony may not be considered by them in arriving at a verdict. This curative instruction unfortunately has a Hobbsian quality to it for while it cautions the jury not to consider the prejudicial information elicited, it also has the subconscious effect of magnifying the prejudicial nature of the information that the jury is being requested to disregard. When this situation occurs, counsel may want to request a few minutes to determine what the best course of action is and whether to request a curative instruction along these lines.

In some instances, an answer may inadvertently contain material so damaging and prejudicial that no curative instruction can possibly remedy the damage done. In that instance, counsel should request that the jury be excused and then move for a mistrial setting forth in as much detail as possible why the particular answer is prejudicial, how it may affect the client's case being considered and the manner in which it will be impossible for a jury to erase it from its memory individually or collectively. The advantage to this course of action is that it permits counsel to lay out in great detail the nature and extent of the prejudicial information that has now been put before the jury so that should the need arise, it may be an additional ground for appellate review. The disadvantage is that if the motion is granted, it may require counsel to start a trial all over again, and if the conduct occurred late in the trial which has been successful up to that point, your adversary has now obtained almost a complete dress rehearsal of your case. While counsel may be tempted to gamble on the outcome of a case that up to that point has been successful, the better practice is to protect the record by moving for a mistrial setting forth in as much detail as possible why the damage is irreparable so that in the event of an adverse verdict, the client's interests have been fully protected.

Like objections to testimony, objections to exhibits are often made. The most frequent objections to the admission of an exhibit is that: (a) there is no foundation; (b) the exhibit is irrelevant; (c) the exhibit is immaterial; (d) the exhibit contains inadmissible, prejudicial material.

Whether an exhibit is irrelevant or immaterial will, of course, depend upon the peculiar facts of the case and the issues presented, and objections on these two bases should be addressed accordingly. The objections concerning foundation should be addressed in the same way objections to testimony as previously discussed in the foregoing.

Quite often, an exhibit, particularly a writing of some sort, will contain information which is admissible as well as information which is inadmissible, and in some cases highly prejudicial. In these instances, the appropriate remedy is for counsel offering the exhibit to suggest that the exhibit be redacted by excising or cutting out the offending

material. In deciding to utilize a redacted exhibit, it is important to consider whether the exhibit has bee redacted so much as to invite the jury to speculate about the nature of the material which has been removed. It is only human nature for a juror to wonder what material is being withheld from a two-page report in which all but a sentence on each page has been whited out. In that kind of a situation, counsel may want to weigh whether the use of the exhibit is truly worth it, and if it is, you may request that the court preliminarily instruct the jury that the information has been removed by the consent of both counsel and that it should not speculate about what the material is or why it has been removed.

Naturally when eliciting testimony about an exhibit which has been redacted, counsel has to be extremely careful not to "open the door' to the disclosure of the material which has been excised.

While a picture may be worth a thousand words, it is equally important that it not be so graphic or inflammatory that its introduction prejudices the fair consideration of your client's case. Quite often in homicide cases or personal injury cases involving physical injury or wrongful death, one party will seek to introduce photographs depicting the homicide victim, the decedent or the particular limb or body part which is the subject of an injury. Traditionally, all such photographs are admitted into evidence upon the theory that the jury was entitled to see the particular fact or condition in issue. In more modern time, particularly in criminal cases, courts have struck a balancing test in allowing the least offensive or inflammatory photographs into evidence and excluding the most prejudicial, as well as limiting the number the jury may view.

When counsel is confronted by an opponent who seeks to introduce pictures of this nature, it is important to make a motion in limine prior to the court trial proceedings requesting a ruling on exactly which photographs will be allowed and how many will be allowed for the juries viewing.

Back to Square One?:
The Impact of *Michigan v. Bryant* on the
Role of the Sixth Amendment's Confrontation Clause
In Limiting the Use of Hearsay Statements in Criminal Cases

By Sanjay K. Chhablani
Associate Professor of Law
Syracuse University College of Law

I. The Road to Michigan v. Bryant

A. The Supreme Court's Hearsay Jurisprudence Prior to 2003

B. Crawford v. Washington: A Textual Construction of the Sixth Amendment's Right of Confrontation

C. Crawford's Progeny: Explicating what is Testimonial

II. Deconstructing Michigan v. Bryant

A. The Primary Purpose of the Statement

B. An Ongoing Emergency

C. The Formal Circumstances in Which the Statement is Elicited

D. The *Res Gestae* Doctrine

III. The Path Ahead

A. The Resurrection of Reliability

B. Federal and State Decisions Applying Michigan v. Bryant

C. A State Constitutional Alternative?

THE CONFRONTATION CLAUSE'S LIMITATION ON THE USE OF HEARSAY IN CRIMINAL CASES