Direct & Cross Examination Exercises

Cleveland-Marshall College of Law, Cleveland State University

Direct Examination Exercises

When conducting a direct examination, what is the first thing you say to a witness after she is sworn in?

“Please state your name for the record.”*

* Before trial, you should give the court reporter a list of all your witnesses, with correct spellings of their names, so that it isn’t necessary to slow down their testimony with laborious spelling exercises.

Leading Questions

Rule 611(c)

What is a "leading question"?

Essentially, a leading question is a factual assertion followed by the words, "isn't that true?" For example: "You attended the March 17 meeting in Baltimore, isn't that true?" The same question, phrased in a non-leading form, would be: "Did you attend the March 17 meeting in Baltimore?"

Leading is allowed when cross-examining a witness, but it's sharply restricted on direct:

In performing these direct examination exercises, be careful about your use of leading questions. Under Rule 611(c) leading is permissible on cross-examination, but it is largely forbidden on direct. Leading questions may only be used during direct examination in the following situations...

Leading Questions Are Allowed on Direct Only...

1	on preliminary matters;
2	as a transition from one subject of inquiry to another, or as a connective, linking up earlier testimony;
3	when confronted with an adverse or hostile witness;
4	when your own witness gives a "surprise" answer;
5	when dealing with a witness of diminished capacity; or
6	when the witness's memory is exhausted.

How to Introduce Exhibits…

1.

Hand the exhibit to the court reporter and say, "Please mark this."

[Not necessary if pre-marked before trial, as is usually the practice in federal court.]

2.

Show the exhibit to opposing counsel.

[Not necessary if pre-marked copies of all your exhibits were given to the court and to opposing counsel before trial, as is usually the practice in federal court.]

3.

Ask: “Your Honor, may I approach the witness?”

4.

Then say to the witness:
"I'm handing you what's been marked for identification as Plaintiff's Exhibit B. Do you recognize it? [Yes.] What is it? [Witness explains.] How do you know?"

5.

If the witness recognizes the exhibit, you can proceed to lay the requisite foundation.

What is a "foundation"?

A foundation is a set of preliminary questions that must be asked of a witness in order to set the stage for eliciting particular testimony or introducing an exhibit.

Foundations:

What is the source in the Rules of Evidence for the requirement of laying a foundation?

Foundations:

Rule 602: The Personal Knowledge Requirement

Rule 901: The Authentication Requirement

Many rules—the various hearsay exceptions, for example—have their own specific requirements.

Exercise 1:

Laying the Foundation for Eyewitness Testimony

EYEWITNESS TESTIMONY

(requisite foundation):

(a) Witness was present
(b) and in a position
(c) to observe the relevant facts.

Exercise 1:

This is a bank robbery prosecution and you are the prosecutor. I am your star witness. I was in the bank when the robbery occurred. It was the Key Bank on Chagrin Boulevard in Beachwood. The robbery took place at noon on March 1, 2017. Call me as your witness and lay the foundation for asking me what I saw in the bank that day. Then get me to identify the robber in the courtroom.

The Testimony:

My name is Al Stromberg and I am prepared to testify as follows. At noon on March 1, 2017, I was waiting in line at the Key Bank on Chagrin Boulevard in Beachwood, Ohio, when a young white man burst through the front door holding a gun. He ordered the tellers to freeze. He commanded all of the customers to drop to our knees, discard our cell phones, and display our empty hands in front of us. He strode forward, threw an empty sack to the tellers, and ordered them to fill it with cash. He then stood between the line of customers and the long countertop of the tellers, shifting his gaze back and forth to keep an eye on all of us. He was about six-feet, three-inches tall, with red hair and a red beard, and no mask or hat disguising his appearance. He wore a long black raincoat and black trousers. He came within four feet of me and remained in that spot for roughly two minutes. The light was bright, there was nothing blocking my view of him, and I got a good look at his face. When the sack was full of money, he grabbed it and ran out the front door. Suddenly, a loud continuous bell began ringing inside the bank. Police arrived within five minutes.

Exercise 2:

Laying the Foundation for Eyewitness Testimony

EYEWITNESS TESTIMONY

(requisite foundation):

(a) Witness was present
(b) and in a position
(c) to observe the relevant facts.

Exercise 2:

Same bank robbery trial as Exercise #1, but this time I did not see the robbery. Instead, I was having a drink at the bar at Night Town (in Cleveland Heights) on the evening of February 27, 2017 when I overheard the Defendant in conversation with another man. During that conversation, I heard the Defendant say that he was planning to rob the Key Bank in Beachwood at noon on March 1, 2017. Lay the foundation for eliciting my testimony recounting that conversation—and be prepared to respond to a hearsay objection.* At some point in your direct examination (you decide when it would be best), ask me whether the man whom I over-heard is present in the courtroom.

* I will ask one student to assert a hearsay objection at the moment when you first ask me to recount what the Defendant said. In responding to the objection, you can invoke two different hearsay exceptions: It's a "state of mind" declaration under Rule 803(3); it's also an "admission by a party opponent" under Rule 801(d)(2)(A).

The Testimony:

My name is Kevin O'Neill and I am prepared to testify as follows. At 7:30 on the evening of February 27, 2017, I sat down at the bar at Night Town in Cleveland Heights, Ohio, and ordered a single malt scotch. About two minutes later, I saw a tall white man—about six-feet, three-inches tall, with red hair and a red beard—enter the premises with a male companion. They took a seat at a table immediately behind me, only four feet away. I could see this man's reflection in the mirror behind the bar, so I could look at him without turning around, and I could hear his voice behind me due to his proximity. Night Town sometimes features live jazz performances, but there was no live music that night, only recorded music playing at a subdued level. Most of the tables were full, and there was plenty of ambient noise, but the red-bearded man was so close to me that I could hear every word he said. I could also see his lips move because of a light situated directly over his table. I distinctly heard him say that he was planning to rob the Key Bank on Chagrin Boulevard in Beachwood, Ohio, at noon on March 1.

Exercise 3:

Laying the Foundation for a Tangible Object That Is Readily Identifiable

STEPS FOR QUALIFYING ITEMS OF TANGIBLE EVIDENCE

1. Marking for identification. [Not necessary if pre-marked before trial.]
2. Laying the necessary foundation.
3. Offering the exhibit into evidence.
4. Securing an express ruling on the record.
5. Showing or reading the exhibit to the jury.

Requisite Foundation for TANGIBLE OBJECTS That Are Readily Identifiable:

(a) Exhibit is relevant.

(b) Exhibit can be identified visually or through other senses.

(c) Witness recognizes the exhibit.

(d) Witness knows what the exhibit looked like on the relevant date.

(e) Exhibit is now in the same or substantially the same condition as when the witness saw it on the relevant date.

Exercise 3:

Same bank robbery prosecution, but now I'm a witness who saw the Defendant run out of the bank and drop a gun as he hurried away. It was a .357 Magnum, which I picked up and later delivered to police. Use me as the sponsoring witness for getting that gun admitted into evidence. Lay the foundation necessary for asking me to identify the gun. Be prepared to move for its admission into evidence after I authenticate it.

The Testimony:

My name is Rob Goldblatt and I am prepared to testify as follows. At a few minutes past noon on March 1, 2017, I parked my car in the parking lot of the Key Bank on Chagrin Boulevard in Beachwood, Ohio, and began walking toward the bank's front door. When I had approached to within 15 feet of the door, it suddenly burst open and a tall white man came running out. He appeared to drop something as he flew by, but he kept on running at a very high rate of speed and was out of my sight in less than 15 seconds. When I could no longer see him, I turned my attention to the item he had dropped. It was a large gun. By now, a loud bell was ringing inside the bank, and I could already hear police sirens in the distance. I stepped closer to the gun and gently picked it up, holding it with the hem of my raincoat so as not to get my fingerprints on it. And then I just stood there, looking closely at the gun, as a light mist of rain fell and the police sirens grew closer and closer. I don't know what type of gun it was, but it had a silver barrel about eight inches long, and a wooden handle with a long diagonal crack extending from the very top to the very bottom of the handle. Etched into the barrel were the words, "Python 357." When the police arrived, they directed me to slip the gun off of my raincoat and into an evidence bag.

Exercise 4:

Laying the Foundation for a Tangible Object That Is Readily Identifiable

STEPS FOR QUALIFYING ITEMS OF TANGIBLE EVIDENCE

1. Marking for identification. [Not necessary if pre-marked before trial.]
2. Laying the necessary foundation.
3. Offering the exhibit into evidence.
4. Securing an express ruling on the record.
5. Showing or reading the exhibit to the jury.

Requisite Foundation for TANGIBLE OBJECTS That Are Readily Identifiable:

(a) Exhibit is relevant.

(b) Exhibit can be identified visually or through other senses.

(c) Witness recognizes the exhibit.

(d) Witness knows what the exhibit looked like on the relevant date.

(e) Exhibit is now in the same or substantially the same condition as when the witness saw it on the relevant date.

Exercise 4:

In this criminal case, the defendant is being prosecuted for attempting to steal a priceless artifact from the Cleveland Museum of Art: the so-called "Fitzsimmons Buddha," a two-thousand-year-old marble sculpture discovered by Sir Colin Fitzsimmons in southern India in 1816. On May 13, 2017, the defendant smashed a display case that housed the Buddha, grabbed it like a football, and ran for the nearest exit. Eluding 7 security guards, he bounded down the front steps of the Museum and began running along the East Boulevard lagoon—where he was tackled by an intrepid librarian who sprang from a park bench upon hearing the cries of the pursuing security guards. That librarian, Kevin O'Neill, is your witness. (He works across the street at CWRU and often spends his lunch break beside the lagoon.) After tackling the defendant, he recovered the Buddha and carried it back to the Museum. Use O'Neill as the sponsoring witness in getting the Buddha admitted into evidence.

The Testimony:

My name is Kevin O'Neill and I am prepared to testify as follows. I'm a librarian employed by Case Western Reserve University. In good weather, I spend my lunch break on a park bench beside the lagoon in front of the Art Museum. Shortly after noon on May 13, 2017, I saw a man run out of the Museum pursued by seven security guards. The man was carrying a small object tucked under his arm. He was running at high speed, and the security guards were losing ground on him. Scrambling down an embankment, the man reached the far side of the lagoon and leaped onto a paved walkway heading straight toward me. I remained seated on my park bench until just before the man was about to run past me. Then I jumped forward into his path, getting down on all fours, and he tripped over me, tumbling to the ground and crying out in pain. The object he was carrying popped out and landed softly on the grass. As the security guards pounced on the man, I went over to see the object that he dropped. It was a marble sculpture of the Buddha, about five inches in length, depicting just his head and neck. The marble had a greenish tint. There was a crack under the Buddha's left eye. What I remember most about the sculpture is the strange way the Buddha's hair is depicted—using only one design motif, a crescent moon shape, repeated over and over again. I got a good look at the Buddha because the security guards allowed me to carry it as we all trouped back to the Museum, a span of ten minutes. Once we got inside the Museum, I gave the Buddha to a curator.

Exercise 5:

Chain-of-Custody Foundation for a Tangible Object That Is Not Readily Identifiable

STEPS FOR QUALIFYING ITEMS OF TANGIBLE EVIDENCE

1. Marking for identification. [Not necessary if pre-marked before trial.]
2. Laying the necessary foundation.
3. Offering the exhibit into evidence.
4. Securing an express ruling on the record.
5. Showing or reading the exhibit to the jury.

Chain-of-Custody Foundation for TANGIBLE OBJECTS That Are Not Readily Identifiable:

(a) The witness initially received the object at a certain time or place.
(b) The witness safeguarded the object, under circumstances making it unlikely that substitution or tampering occurred.
(c) The witness either transferred the object to another person or has retained possession of it until now.
(d) As best the witness can tell, the exhibit is the same object that she previously handled.
(e) As best the witness can tell, the exhibit is in the same condition as it was when she initially received it.

Practice Tips on Chain of Custody

1. A noted authority on evidence law (Edward J. Imwinkelried, Evidentiary Foundations § 4.08[1] at 138-39 (8th ed. 2012)) observes that the chain-of-custody foundation entails calling each "link" in the chain — each person who handled the object, from the person who first received it to the person who brought it to the courthouse...

Practice Tips on Chain of Custody

2. Who are "links" in the chain? Only the people who actually handled the object; not everyone who merely had access to it.

3. How does the lawyer account for the object's journey to the courthouse? The lawyer must show each link's initial receipt of the object, what they ultimately did with the object, and how they safeguarded it while it was in their possession...

Practice Tips on Chain of Custody

4. As to methods of "safeguarding" the object, it is extremely persuasive (but NOT mandatory) to show: (a) that the object was sealed in a tamper-proof container and marked at the time it was acquired or tested; (b) the still-sealed container is produced in the courtroom; and (c) the person who did the sealing testifies. If the object was not sealed in a tamper-proof container, the foundation can be satisfied by showing that: (a) the object was marked and then stored by locking it in a safe or an evidence locker or a test samples cabinet to which access was tightly restricted; (b) every instance in which the object was removed from the locked container is accounted for; and (c) the person who stored the object testifies...

Practice Tips on Chain of Custody

5. Ideally, the lawyer should call each link to the witness stand in the sequence in which they handled the object. The lawyer would mark the object for identification, hand it to the first link, and get that witness to identify it. The lawyer would also hand it to every intermediate link in the chain, getting each of those witnesses likewise to identify it. But the lawyer does NOT formally tender the exhibit into evidence until the last link's testimony—only then is the foundation complete.

Exercise 5:

This is a criminal case involving the illegal distribution of cocaine. You play the role of the prosecutor. Your job is to lay the foundation and move the admission of a bag of cocaine. The cocaine inside that bag is merely a sample of a much larger shipment that police confiscated from the defendant when they arrested him. The bag was then conveyed to a forensic chemist who performed a test confirming that the substance is indeed cocaine. The bag has since then remained in the custody of the chemist, who brought it to the courthouse this morning and gave it to you....

Exercise 5:

In this exercise, you will perform the direct examinations of TWO DIFFERENT WITNESSES, both of them links in the chain of custody: (1) the police officer who seized the cocaine; and (2) the forensic chemist who analyzed it, stored it, and brought it to the courthouse. These two witnesses are the only links in the chain—be sure to call them in the same sequence in which they handled the cocaine. Do NOT move for admission during the OFFICER'S testimony; wait until you have completed the foundation during the CHEMIST'S testimony...

Exercise 5:

To save time, we will begin the officer's testimony MIDWAY THROUGH his direct examination, picking up AFTER he testifies about arresting the defendant and confiscating the white powder he was carrying. Your first question should be: "What did you do with the white powder?" [NOTE: You can't call it cocaine until after the forensic chemist testifies that his testing confirmed that the powder was cocaine. If you call it cocaine before that moment, your opponent can object: "Assumes facts not in evidence."] Have the officer describe every step that he followed up to and including the moment when he handed the bag to the chemist. At that point, turn to the judge and say: "No further questions." Your opponent would then be permitted to cross-examine the officer, of course, but we will skip over that, permitting you to call the chemist to the stand. You don't need to delve deeply into the chemist's analysis of the cocaine; just take him chronologically through every step he took in handling the cocaine, from the moment he received it from the officer until this very morning, when he carried it into the courtroom and handed it to you. At that point, you can formally move for its admission into evidence...

The Testimony:

Here are the basic facts in the chain of custody (though feel free to press your witnesses for additional details). Officer Tony Cuda is a detective in the narcotics division of the Cleveland Police Department. He engineered a major drug bust on October 4, 2016, intercepting a shipment of cocaine immediately after it had been delivered into the hands of Defendant Don Thomas. The cocaine was hidden inside a large cooler bearing a Gatorade logo. Officer Cuda poured a sample from the cooler into a plastic evidence bag and marked the bag with the Defendant's name, adding the date, the time, and his own last name. He then conveyed both the bag and the Gatorade cooler to the Department's Third District headquarters, placing the cooler in a large evidence locker and personally handing the evidence bag to a forensic chemist, Mike Tobin. Obeying the Department's chain-of-custody procedures, Tobin marked the bag with a unique I.D. number and then, immediately below Cuda's notations, Tobin wrote the date, the time, and his own last name. Tobin then performed a chemical analysis of a small sample taken from the evidence bag, which he re-sealed immediately, taking care to mark the seal with the date, the time, and his last name. He then placed the bag in a locked "samples cabinet," whose only key belongs to him. He then typed up a report on his test findings, labeling it with the same unique I.D. number that he had written onto the evidence bag. The bag remained in the locked samples cabinet until 20 days prior to this trial, when Tobin removed the bag so that it could be shown to you (the prosecutor). Tobin then returned the bag to the samples cabinet, where it remained until the morning of this trial. Tobin brought the bag directly to the courthouse and handed it to you.

Exercise 6:

Laying the Foundation for a Demonstrative Exhibit

STEPS FOR QUALIFYING ITEMS OF TANGIBLE EVIDENCE

1. Marking for identification. [Not necessary if pre-marked before trial.]
2. Laying the necessary foundation.
3. Offering the exhibit into evidence.
4. Securing an express ruling on the record.
5. Showing or reading the exhibit to the jury.

Requisite Foundation for a

DEMONSTRATIVE EXHIBIT

— specifically, a DIAGRAM:

(a) The diagram depicts a certain area or object.
(b) The witness is familiar with that area or object.
(c) The witness explains the basis for her familiarity with the area or object.
(d) In the witness's opinion, the diagram is a fair and accurate depiction of that area or object.

Requisite Foundation for a DEMONSTRATIVE EXHIBIT — specifically, a PHOTOGRAPH:

(a) The witness is familiar with the object or scene.
(b) The witness explains the basis for her familiarity with the object or scene.
(c) The witness recognizes the object or scene in the photograph.
(d) The photograph is a "fair," "accurate," "true," or "good" depiction of the object or scene at the relevant time.

Requisite Foundation for a

DEMONSTRATIVE EXHIBIT

— specifically, a MODEL:

(a) The witness needs the model to explain her testimony.
(b) The model depicts a certain scene or object.
(c) The witness is familiar with that scene or object.
(d) The witness explains the basis for her familiarity with the scene or object.
(e) In the witness's opinion, the model is a "true," "accurate," "good," or "fair" depiction of the scene or object.

Exercise 6:

This is a personal injury action in which the plaintiff, while riding a bicycle, was struck by a car that the defendant was driving. The accident took place on July 1, 2017 at a busy intersection in Cleveland Heights—where Fairmount Boulevard branches off from Cedar Road. You represent the plaintiff and you want to make sure that the jury can understand the testimony about how the accident occurred. To assist their understanding, you have created a diagram that shows the layout of the intersection. The sponsoring witness through whom you will lay the requisite foundation is Tim Eckley, who has lived for five years in an apartment that overlooks the intersection. Eckley is actually an eyewitness to the accident, but he did not view the crash from his apartment; instead, he was walking down Cedar Road when it all took place 50 feet in front of him. In this exercise, it is not your job to cover the details of the accident—you would certainly do that with this witness, but only after getting the diagram admitted into evidence. (Then, of course, the witness could refer to the diagram while testifying.) In this exercise, simply call Eckley to the stand, use him to lay the foundation for your diagram, move the judge to admit it, and stop right there.

The Testimony:

My name is Tim Eckley and I am prepared to testify as follows. For five years, I have lived in an apartment that overlooks the intersection of Fairmount Boulevard and Cedar Road in Cleveland Heights. [BEFORE SHOWING ECKLEY THE DIAGRAM, ASK HIM TO DESCRIBE THE INTERSECTION.] The Cedar-Fairmount intersection is not a typical four-way intersection with all 90-degree angles. It's actually a three-way intersection with no 90-degree angles. Cedar is a major east-west artery. Fairmount does not extend north of Cedar; nor does it head due south. Instead, Fairmount branches out of Cedar at a gradual angle, heading off to the southeast. [THEN ELICIT TESTIMONY FROM ECKLEY SHOWING HOW FAMILIAR HE IS WITH THE INTERSECTION.] I am very familiar with this intersection because I walk through it and drive through it every single day. My grocery store is located at this intersection. My drug store is located there. So is my dry cleaner. So is my bank. And so is my favorite restaurant, Aladdin's. [NOW YOU CAN PRESENT THE EXHIBIT TO ECKLEY AND HAVE HIM CONFIRM ITS ACCURACY AS AN ILLUSTRATION OF THE INTERSECTION.]

Practice Tips on Demonstrative Exhibits

Since demonstrative exhibits are merely illustrative, having no actual connection to the parties or the events in the case, SOME COURTS DO NOT FORMALLY ADMIT THEM INTO EVIDENCE; instead, the judges only allow them to be used as illustrations. This distinction makes little difference, however, since the exhibits need to be part of the record for appeal. Thus, you must mark and identify them, and the court must decide if they can be used. The key difference is that, after laying the requisite foundation, you do NOT offer the exhibit into evidence. At or before the final pretrial conference, you'll want to find out how your judge normally deals with demonstrative exhibits. *See* MICHAEL R. FONTHAM, TRIAL TECHNIQUE AND EVIDENCE 385-86 (3d ed. 2008) (National Institute for Trial Advocacy). If your judge does receive them into evidence, you can improve your chances of a favorable ruling by stating that you are offering your exhibit only as an illustration—e.g., "Your Honor, I'm now offering Plaintiff's Exhibit #1 as an accurate illustration of the intersection of Cedar Road and Fairmount Boulevard." *See* FONTHAM at 386.

After we cover this Problem in class, I will show you

A FILM CLIP FROM

People v. Vasquez

SHOWING THE USE OF A DEMONSTRATIVE EXHIBIT (AN ANATOMICAL DIAGRAM) THAT ACCOMPANIES THE TESTIMONY OF A MEDICAL EXAMINER AS HE DESCRIBES HIS AUTOPSY OF THE MURDER VICTIM

LITIGATION SUPPORT SERVICES

Before trial, you can hire a litigation support company to create a custom-made demonstrative exhibit. Here in Cleveland we have an excellent firm, Visual Evidence, that creates charts, diagrams, three-dimensional models, computer animations, and "Day in the Life" videos that are quite compelling. Nationally, there are many such firms, including a company that specializes in animation.

Exercise 7:

Laying the Foundation for Nonhearsay Use of a Document

STEPS FOR QUALIFYING ITEMS OF TANGIBLE EVIDENCE

1. Marking for identification. [Not necessary if pre-marked before trial.]
2. Laying the necessary foundation.
3. Offering the exhibit into evidence.
4. Securing an express ruling on the record.
5. Showing or reading the exhibit to the jury.

Requisite Foundation for TANGIBLE OBJECTS That Are Readily Identifiable:

(a) Exhibit is relevant.

(b) Exhibit can be identified visually or through other senses.

(c) Witness recognizes the exhibit.

(d) Witness knows what the exhibit looked like on the relevant date.

(e) Exhibit is now in the same or substantially the same condition as when the witness saw it on the relevant date.

STATEMENTS OFFERED TO SHOW THEIR

EFFECT

ON THE PERSON HEARING/READING THEM

Not hearsay because offered merely to prove that the statement was communicated to an individual — to prove that he was notified or apprised…

Exercise 7:

Dylan is on trial for the murder of his wife, Kate. The killing took place at their palatial home on South Park Boulevard in Shaker Heights. It all happened shortly after 8:00 p.m. on the evening of March 15, 2017. James O'Grady, a Shaker Heights police officer, is an eyewitness to the killing. Officer O'Grady will testify as follows...

The Testimony:

I am Officer James O'Grady of the Shaker Heights Police Department and I'm prepared to testify as follows. At 8:00 p.m. on the evening of March 15, 2017, I was sent by our dispatcher to one of the mansions on South Park Boulevard in response to a 9-1-1 call. Upon my arrival, I was greeted by a middle-aged woman (who later turned out to be a tutor employed by the Defendant to teach piano lessons to his children). The tutor frantically directed me to the rear of the house, where, looking through some large glass doors, I saw the Defendant on the back lawn, arguing with his wife. Suddenly, the Defendant drew a pistol from his coat pocket and shot his wife. I tackled the Defendant, handcuffed him, and searched him. In the back pocket of Defendant's trousers, I found a letter from an anonymous "friend." The letter contained a one-sentence statement…

[Opened letter found in Defendant's pocket immediately after the killing:]

"KATE IS HAVING
AN AFFAIR
WITH MR. MINTZ."

Exercise 7:

You are the prosecutor. Your witness is the arresting officer. Perform a direct examination of the officer that takes us in chronological fashion through his apprehension and arrest of Dylan, his search of Dylan's pockets, and his discovery of the foregoing note, which he found in Dylan's back pocket—inside a previously-opened envelope bearing the words, "From a Friend." Introduce the envelope and the note as State's Exhibits 3-A and 3-B just after the officer testifies about the handwritten words they bear. Be prepared to respond to a hearsay objection when you elicit testimony about the contents of the note.* Remember to move for admission of the exhibits into evidence.

* The statement in the note is not hearsay because it is offered for its effect upon Dylan, not for its truth. You are not trying to prove that Kate was having an affair with Mr. Mintz. Regardless of its truth, the note appears to have thrown Dylan into a jealous rage, and that's what you're trying to prove.

Exercise 8:

Laying the Foundation for Nonhearsay Use of a Signed Writing

STEPS FOR QUALIFYING ITEMS OF TANGIBLE EVIDENCE

1. Marking for identification. [Not necessary if pre-marked before trial.]
2. Laying the necessary foundation.
3. Offering the exhibit into evidence.
4. Securing an express ruling on the record.
5. Showing or reading the exhibit to the jury.

Requisite Foundation for TANGIBLE OBJECTS That Are Readily Identifiable:

(a) Exhibit is relevant.

(b) Exhibit can be identified visually or through other senses.

(c) Witness recognizes the exhibit.

(d) Witness knows what the exhibit looked like on the relevant date.

(e) Exhibit is now in the same or substantially the same condition as when the witness saw it on the relevant date.

If the writing is a signed instrument, you can authenticate it by:

a.
Calling a witness who saw the party place his signature on the document;

b.
Calling a witness who is familiar with the party's signature and can identify it;

c.
Calling the signing party to admit the signature as being his; OR

d.
Calling a handwriting expert who can testify that, based on handwriting comparisons, the signature was made by the party.

If the writing is a signed instrument, you can authenticate it by:

a.

Calling a witness who saw the party place his signature on the document;

b.

Calling a witness who is familiar with the party's signature and can identify it;

c.

Calling the signing party to admit the signature as being his; OR

d.

Calling a handwriting expert who can testify that, based on handwriting comparisons, the signature was made by the party.

Exercise 8:

Here I'm the Plaintiff in a breach of contract case. The Defendant is Excelsior Bar Review Company, which contracted with me to deliver a bar review lecture on the First Amendment and then refused to honor the contract. (I delivered the lecture at the appointed time and place—the Moot Court Room at Cleveland-Marshall College of Law on Feb. 16, 2017—but Excelsior's president refused to pay me the $2,000 contract price, offering me $100 as "payment in full.") Use me as the sponsoring witness for getting the contract admitted into evidence. When performing the direct examination, don't introduce the contract until you've questioned me on all of the background facts. Once I've authenticated the contract, move for its admission into evidence. Note that the contract is a nonhearsay verbal act, so it is not necessary for you to lay an additional foundation for an applicable hearsay exception. But remember that most writings require two separate foundations for their admissibility: (1) authentication; and (2) a hearsay exception.

The Testimony:

My name is Kevin O'Neill and I am prepared to testify as follows. I'm a law professor at Cleveland-Marshall College of Law at Cleveland State University. For the past nine years, I have also worked as a bar review lecturer for Excelsior Bar Review, giving First Amendment lectures twice a year (in February and July). Each of these lectures was covered by a separate contract signed by me and by Richard Nathanson, Excelsior's President. We always signed these contracts in Mr. Nathanson's office and in every contract my fee was always the same: $2,000. After every one of these lectures, I always visited Mr. Nathanson's office and he always presented me with a check in the agreed amount. Our relationship proceeded smoothly until February 16, 2017. On that day, I delivered my lecture at the appointed time and place—but afterward, when I visited Mr. Nathanson, he refused to pay me the $2,000 contract price, offering me $100 as "payment in full." I refused to accept the smaller payment and brought this lawsuit in response. I remember signing the contract in Mr. Nathanson's office on November 15, 2016 and I remember watching Mr. Nathanson sign it as well. I also remember giving my lecture on February 16, 2017. I delivered the lecture at the required location (the Moot Court Room at Cleveland-Marshall College of Law), covering all the usual topics and speaking for the usual period of time (four hours). There is no question that I performed my end of the bargain.

Exercise 9:

Laying the Foundation for Rule 803(5) Past Recollection Recorded

Requisite Foundation for TANGIBLE OBJECTS That Are Readily Identifiable:

(a) Exhibit is relevant.

(b) Exhibit can be identified visually or through other senses.

(c) Witness recognizes the exhibit.

(d) Witness knows what the exhibit looked like on the relevant date.

(e) Exhibit is now in the same or substantially the same condition as when the witness saw it on the relevant date.

The Hearsay Exception for

Past Recollection Recorded

[Rule 803(5)]

FOUNDATIONAL ELEMENTS:

a. The witness once had personal knowledge of the relevant facts or events;

b. But now she cannot recall them fully and accurately;

c. She previously recounted them accurately in a record or memorandum;

d. At a time when they were still fresh in her memory.

Exercise 9:

This is a replevin action by a French restaurant ("La Maisonette") against its former chef, seeking the return of 44 bottles of wine that the chef allegedly stole from the restaurant's wine cellar within minutes after he was fired on the evening of March 1, 2017. To prove its case, the restaurant must identify each bottle that was stolen by the chef. François Truffaut is the witness whom you will call to the stand to identify the stolen bottles. Truffaut is the restaurant's wine captain ("sommelier"). [Truffaut's last name is pronounced: "TROO-FOE."]

The Testimony:

My name is François Truffaut and I'm prepared to testify as follows. I am the wine captain or "sommelier" at La Maisonette, a French restaurant in Cleveland. I was working at the restaurant on the evening of March 1, 2017 when, less than one hour before we opened for dinner, the owner fired our head chef. There was a great deal of shouting and cursing and throwing of plates, and for awhile the restaurant was plunged into chaos. Thirty minutes after the chef's angry departure, I entered the wine cellar looking for a certain Bordeaux. I noticed immediately that many of the best bottles were missing, so I went from bin to bin, writing down the name and year of each missing bottle on a long sheet of notebook paper. I can't remember all of those missing wines today, so you want to invoke Rule 803(5) in order to have me read my list aloud to the jury. Call me to the witness stand, lay the requisite foundation, and then ask the judge to let me read my list.

Exercise 10:

Laying the Foundation for Rule 612 Present Recollection Refreshed

Practice Tips on Rule 612

1. Many witnesses find it terrifying to appear in court—and this fear can cause them to FORGET some details of their testimony that they had no trouble remembering when you were prepping them back in your office.

2. Before trial, explain to your witness that there is nothing wrong with failing to remember something—and that, in order to jog his memory, it's O.K. for him to read SILENTLY from a document while on the witness stand.

3. Rule 612 provides a PROCESS for jogging a witness's memory when he becomes forgetful on the stand. Invariably, this takes place during the direct examination of your own witness; it almost never happens on cross.

Practice Tips on Rule 612

4. Any writing, made at any time, may be used to jog the witness's memory. In fact, the "memory-refreshing" object need not even BE a writing. Most commonly, the object is some sort of document—a report, a letter, a deposition transcript—but photographs are also used for this purpose.

5. Before trial, work with your witness to identify one or more writings to be used in court for this purpose. IMPORTANT POINT: The writing need NOT have been authored by your witness.

Practice Tips on Rule 612

6. If there is ONE PARTICULAR DOCUMENT that your witness wants to use for this purpose, then you can employ the following questions in laying your foundation:

"Is there anything that would help to refresh your recollection?"

"Yes."

"What would that be?"

Now the witness specifically mentions the document—e.g., "The incident report that I wrote."

Obviously, you'll want to bring that document to court. Note that it need NOT be listed among your trial exhibits.

Present Recollection Refreshed

[Rule 612]

FOUNDATIONAL ELEMENTS:

a. The witness is UNABLE TO RECALL something while testifying.

b. If the examining lawyer is unable to jog the witness's memory through questioning, the lawyer presents the witness with a writing in an effort to refresh his memory.

c. Counsel should have the writing marked for identification, show it to opposing counsel, and then show it to the witness, asking him to read it SILENTLY. The witness is NOT allowed, under the guise of refreshed recollection, to testify to the CONTENTS of the writing.

d. If the witness testifies that he now recalls the matter INDEPENDENTLY of the writing, counsel should retrieve the writing, place it behind her back, and ask him to testify WITHOUT RELIANCE upon it.

e. The witness's recollection is deemed to have been "refreshed."

f. The writing is NOT received into evidence.

Rules 612 and 803(5): Key Differences in What They LOOK LIKE IN THE COURTROOM

(a) If successful, the 803(5) foundation culminates with the witness READING ALOUD from the document, which is strictly forbidden under 612.

(b) Under the 803(5) foundation, the witness must describe HOW she CREATED the document, which does not happen under 612.

(c) Under the 803(5) foundation, the witness must AUTHENTICATE the document, which does not happen under 612.

(d) Under the 612 foundation, the witness must confirm that reading the document has REFRESHED HER MEMORY. Under the 803(5) foundation, the witness must confirm that reading the document has FAILED to refresh her memory.

Exercise 10

NOTE TO STUDENTS:

I have created two different fact patterns for this exercise, but I will ask you to perform only one of them. Why did I create two fact patterns? To remind you that under Rule 612, the memory-refreshing document CAN be something that the witness herself authored, but it doesn't have to be. So in Exercise 10(b), the memory-refreshing document WAS authored by the witness, while in Exercise 10(a) it was NOT.

Exercise 10(a):

(Rule 612 Use of a Document that Was NOT Written by Your Witness)

This is a shareholder derivative suit against XYZ Corp.'s board of directors, alleging that they breached their fiduciary duty to the corporation when they awarded a $75 million "golden parachute" severance package to the company's former CEO, Mark Chaplin, after he was forced to resign for engaging in repeated acts of sexual harassment. The decision to award the severance package was made at a September 15, 2016 board meeting. You are plaintiffs' counsel. Your witness, Kevin O'Neill, is the XYZ Corp. employee who investigated the sexual harassment allegations and reported them to the board at the September 15 meeting. When you ask him to identify all of the board members who were present at that meeting, he identifies all but one—forgetting to include David Schorr. When his memory falters, use the minutes of the board meeting to refresh his recollection.

The Testimony:

My name is Kevin O'Neill and I am prepared to testify as follows. I am employed by XYZ Corporation. I work as an investigator in the Human Resources Department. When an XYZ Corp. employee is accused of misconduct, it's my job to investigate that misconduct and prepare a report of my findings. I was asked to investigate allegations of sexual harassment by our former CEO, Mark Chaplin. I was summoned to a September 15, 2016 board meeting to report my findings to XYZ Corp.'s Board of Directors. All five board members were present at that meeting: Steve Miller, Don Thomas, Barry Belkin, Tony Cuda, and David Schorr.

Exercise 10(b):

(Rule 612 Use of a Document that WAS Written by Your Witness)

This is an armed robbery prosecution. You are the prosecutor. Your witness, Kevin O'Neill, is the Cleveland police officer who arrested the defendant. The arrest took place on September 15, 2016 in the parking lot at Edgewater Park, where O'Neill spotted a white Escalade with license plates that matched the defendant's vehicle registration information. In performing the arrest, O'Neill recovered a gun that was used in the armed robbery. (Don't worry about linking the gun to the robbery—that will take place later in the trial when a different witness is on the stand. And don't worry about presenting the gun to O'Neill and getting him to authenticate it—that will take place later in his testimony. It's not part of this exercise.) All you need to accomplish is to get O'Neill to testify about arresting the defendant, searching the Escalade, and recovering the gun. But when you ask him what kind of gun it was, his memory falters. Use his arrest report to refresh his recollection.

The Testimony:

My name is Kevin O'Neill and I am prepared to testify as follows. I am employed as a police officer by the City of Cleveland. On the afternoon of September 15, 2016, in response to a reported armed robbery, the dispatcher directed me to search for a white Escalade with specific license plates. Several minutes later, I discovered a matching vehicle in the parking lot at Edgewater Park. I parked my cruiser behind the Escalade to prevent it from backing out and escaping. I then arrested the lone occupant of the Escalade, handcuffed him, and placed him in the back seat of my cruiser. Obeying a specific directive from the dispatcher, I then searched the Escalade for weapons. I found a .357 Magnum in the glove compartment and recorded that information in my arrest report.

A FILM CLIP FROM

The Rainmaker

SHOWING THE ABUSE
OF RULE 612

Exercises 11 & 12:

Laying the Foundation for the Rule 803(6) Business Records Exception

Exercises 11 & 12:

This is a murder prosecution. It is undisputed that the victim was killed in Cleveland, Ohio on the morning of October 2, 2016. You are the defense attorney. Your client, Richard Nathanson, has an alibi. He checked into a hotel in Santa Fe, New Mexico (The Inn of the Governors) on the evening of October 1, paid for three nights, and checked out on the morning of October 4. To establish this alibi, you need to introduce business records of the hotel reflecting Mr. Nathanson's stay there. Defense Exhibit A (Exercise #11) is the hotel's "check-in record" for Mr. Nathanson, recording the date and time of his arrival (October 1 at 7:30 p.m.), the documentation he used to confirm his identity (an Ohio driver's license), the credit card he presented to secure his room (an American Express card), and the number of nights he booked (a three-night stay). Defense Exhibit B (Exercise #12) is the hotel's room service record for Mr. Nathanson's stay, reflecting a variety of charges, from dinner on October 1 to breakfast on October 4. To get these exhibits admitted into evidence, you call to the witness stand the hotel's business manager, who, among his other duties, serves as the records custodian for the hotel. As to each exhibit, he can testify to all of the elements of the business records foundation. Exhibit A reflects an encounter between Mr. Nathanson and the hotel's front desk clerk. Exhibit B reflects room service charges that were contemporaneously recorded by the hotel's kitchen staff as those orders were filled.

The Testimony:

My name is Gabriel García Márquez and I am prepared to testify as follows. I am the business manager at The Inn of the Governors, a hotel in Santa Fe, New Mexico. I am in charge of all of the hotel's day-to-day operations, including the hiring, firing, and supervision of the staff. I am also the records custodian for the hotel. We routinely generate two types of business records that are relevant to this litigation—check-in records and room service records—and I have personally trained our staff always to follow very specific procedures in generating those records. A check-in record is generated every time a guest checks into our hotel, with no exceptions, and the record is created while the guest is standing at our front desk. I have trained our front desk staff always to punch the following information into our system while processing each check-in. We obtain proof of the guest's identity by asking for a passport or driver's license. We obtain a credit card for payment. We confirm how many nights the guest will be staying with us. And we confirm the nightly "rate" (or price) of the room. In generating room service records, we also follow a specific procedure. The guest orders room service by pressing a specific button on the room telephone. Those calls come to one particular telephone, which is mounted next to a computer in our kitchen. I have trained our room service staff to punch the food and beverage orders right into the computer while the guest is still on the phone, and then to read back the entire order to confirm its accuracy. Our check-in and room service records always reflect the date and time when they were generated and the name of the staff person who recorded the information. In response to a subpoena, I have printed out the check-in and room service records of a guest, Richard Nathanson, who stayed at our hotel in October 2016. I can authenticate those records.

Requisite Foundation for TANGIBLE OBJECTS That Are Readily Identifiable:

(a) Exhibit is relevant.

(b) Exhibit can be identified visually or through other senses.

(c) Witness recognizes the exhibit.

(d) Witness knows what the exhibit looked like on the relevant date.

(e) Exhibit is now in the same or substantially the same condition as when the witness saw it on the relevant date.

The Hearsay Exception for
Business Records
[Rule 803(6)]

Elements/Foundation:

(a) The record was made and kept in the course of a regularly conducted business activity.

(b) It was the regular practice of the business activity to make the record.

(c) The record was made at or near the time of the event that it records.

(d) The record was made by, or from information transmitted by, a person with knowledge acting in the regular course of business.

The Hearsay Exception for Business Records [Rule 803(6)]

Who May Serve as the "Sponsoring" Witness?

(a) Normally, the records "custodian."

(b) The sponsoring witness need not have personal knowledge of the entries in the records.

(c) What matters is that the witness have personal knowledge of the procedures under which the records were created.

Exercise 13:

Laying the Foundation for a Photograph

Requisite Foundation for a DEMONSTRATIVE EXHIBIT — specifically, a PHOTOGRAPH:

(a) The witness is familiar with the object or scene.
(b) The witness explains the basis for her familiarity with the object or scene.
(c) The witness recognizes the object or scene in the photograph.
(d) The photograph is a "fair," "accurate," "true," or "good" depiction of the object or scene at the relevant time.

Exercise 13:

This is a homicide prosecution. The defendant, Rex Humbard, owns a home that borders upon a golf course—and over the years, his house has been struck repeatedly by errant tee shots. Humbard is accused of shooting and killing a golfer after the golfer's tee shot shattered a large window of Humbard's home. Allegedly, Humbard killed the golfer without ever exiting his home—by firing a high-powered rifle through the open gap in the shattered window. Humbard vehemently denies that he fired at the golfer, asserting that he does not own a rifle and doesn't even know how to operate one. In response, the prosecutor will call a private investigator, Ron Gleisser, to the witness stand. Three months before the killing, Gleisser covertly photographed Humbard shooting a rifle at a firing range. (Gleisser had been hired by a law firm to follow and photograph Humbard on an unrelated matter—a personal injury suit in which Humbard is claiming to have suffered a back injury so severe that he cannot raise his arms above his waist.) You are the prosecutor. Call Ron Gleisser to the stand and lay the requisite foundation for getting his photograph into evidence.

The Testimony:

My name is Ron Gleisser and I am prepared to testify as follows. For the past 20 years, I have been employed as a private investigator. I am often hired to take surreptitious photographs of specific individuals. In May of 2017, I was hired to follow and photograph a man named Rex Humbard. After doing some research on Mr. Humbard—confirming the location of his home and learning to recognize his physical appearance—I staked out his house and waited for him to come out. He exited his house in an SUV, driving alone, and I followed him at a discreet distance. After driving roughly 10 miles, Mr. Humbard pulled off the road at a firing range. He took a rifle out of his vehicle and walked up to a small shed, where he spoke to an attendant and paid a fee. Then he took his place along the firing line and began shooting his rifle at a distant target. I parked and began walking up and down the firing line about 20 feet behind the shooters. Using a tiny camera mounted in my lapel, I shot about 60 photos, and I was back in my car driving away before Mr. Humbard ever turned around. There is one particular photograph I shot that day which best captures the location and the event. Mr. Humbard is in the very middle of the frame, flanked by the other shooters; he is looking straight down the barrel of his rifle, taking careful aim. This photograph is a very accurate depiction of the scene I witnessed that day at the firing range.

Remember what we learned in connection with Exercise 6:

Practice Tips on Demonstrative Exhibits

Since demonstrative exhibits are merely illustrative, having no actual connection to the parties or the events in the case, SOME COURTS DO NOT FORMALLY ADMIT THEM INTO EVIDENCE; instead, the judges only allow them to be used as illustrations. This distinction makes little difference, however, since the exhibits need to be part of the record for appeal. Thus, you must mark and identify them, and the court must decide if they can be used. The key difference is that, after laying the requisite foundation, you do NOT offer the exhibit into evidence. At or before the final pretrial conference, you'll want to find out how your judge normally deals with demonstrative exhibits. *See* MICHAEL R. FONTHAM, TRIAL TECHNIQUE AND EVIDENCE 385-86 (3d ed. 2008) (National Institute for Trial Advocacy).

Exercise 14:

Eliciting Opinion Testimony by a Character Witness Under Rule 405(a)

Opinion Testimony by a Character Witness

[Rule 405(a)]

Foundation:

(1) Establish that the witness is familiar with the target, taking care to show how she acquired that familiarity.

(2) Ask: "Do you have an opinion regarding [the target's] character for [belligerence, recklessness, etc.]."

(3) If the witness says "Yes," then ask her to state her opinion to the jury.

(4) You may NOT inquire about specific acts by the target that exemplify the character trait.

Exercise 14:

This is a murder prosecution. You are the defense attorney. Your client, the alleged murderer, is Paul Ruth. The prosecution's case-in-chief has just concluded and you are about to begin the defense case-in-chief. You have called to the stand a character witness, Scott Wegener, who will offer opinion testimony that the defendant is an extremely gentle, peaceful, and non-violent person. Perform a direct examination of Mr. Wegener. Lay the requisite foundation for, and then elicit, the favorable opinion testimony that he is prepared to offer.

The Testimony:

My name is Scott Wegener and I am prepared to testify as follows. I have known the defendant, Paul Ruth, for 15 years. We are neighbors. Mr. Ruth and his family live in the house directly across the street from us. Our sons have grown up together. Three summers ago, Mr. Ruth and I co-managed the same little league baseball team. It was a way for our sons to play on the same team, and I got to know Mr. Ruth very well that summer. With three games and one practice every week for two months, we wound up spending a lot of time together. Several times a year since then, at social events and block parties in our neighborhood, I've had the chance to share a drink with Mr. Ruth and chat with him. Based on all of these contacts I've had with Mr. Ruth, I have formed an opinion regarding his character for peacefulness. In my opinion, Paul Ruth is the most gentle, peaceful, non-aggressive person I've ever met.

Exercise 15:

Qualifying an Expert Witness Under Rule 702

Qualifying an

Expert Witness

[Rule 702]

(a) Before an expert witness may offer her opinion, the proponent of her testimony must demonstrate that she is qualified as an expert in her field.

(b) This is done by performing a direct examination of the witness showing that she acquired her expertise through experience, training, and/or education.

(c) The proponent must then turn to the judge and move that the witness be permitted to testify as an expert in her given field.

Steps to be Followed in "Qualifying" Your Expert

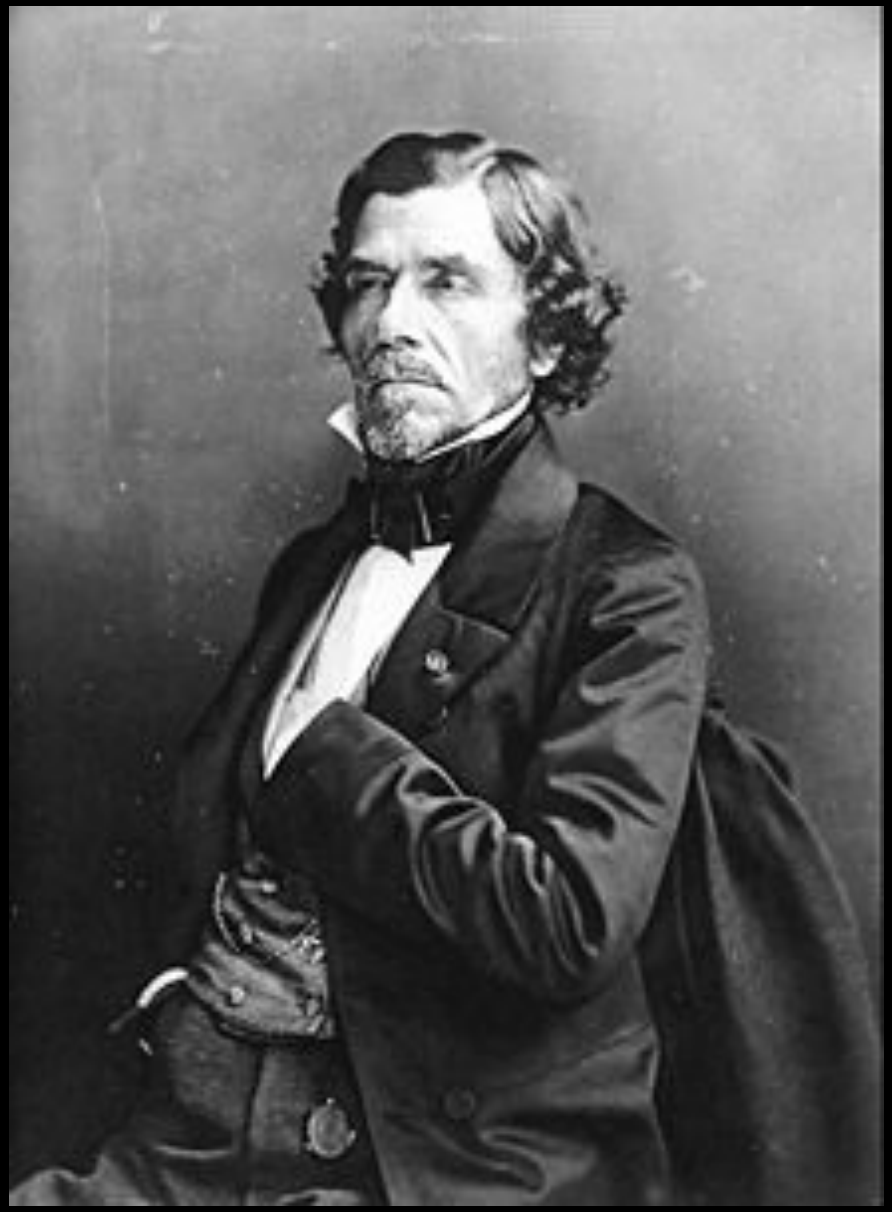
1. Lay foundation (education/experience).
2. Then tender the witness.
3. Opposing counsel may voir dire the witness.
4. Judge rules on whether witness qualifies.
5. Witness now states opinions/conclusions.

When performing this exercise in the classroom, you will only do steps 1 and 2.

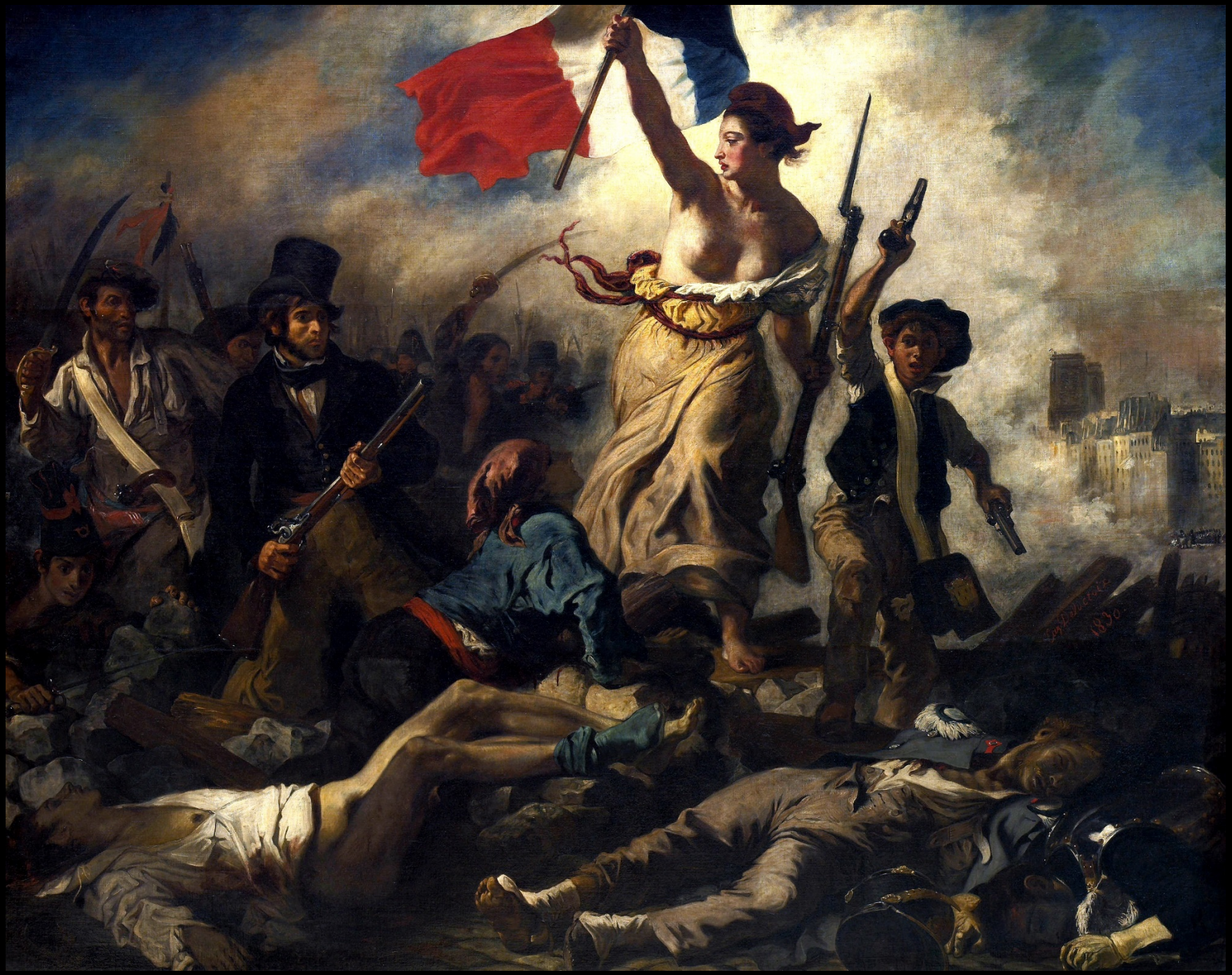
Exercise 15:

This is a civil fraud suit by the Cleveland Museum of Art alleging that the defendant, Nicolas Poussin, an international art dealer, knowingly sold a forgery to the Museum. The sale took place on October 4, 2016. Poussin contends that the canvas is a genuine original by Eugène Delacroix,* a 19th century titan of French painting. In its effort to prove that the painting is a forgery, the Museum will rely upon expert testimony from Professor Miguel Diloné of Princeton University. Your job is to call Professor Diloné, qualify him, and then tender him to the court as an expert on the art of Eugène Delacroix. At that point, the exercise will end. You will not be asked to elicit any of his opinions or conclusions. Though you won't be conducting the opinion phase of his testimony, you should know that Professor Diloné is prepared to testify that, after a careful examination of the painting, he believes it to be a forgery, painted long after Delacroix's death.

* Pronounced: "YOO-JHENN DELLA-KWAH."



Eugène Delacroix



Liberty Leading the People (1830)

The Testimony:

My name is Miguel Diloné and I'm prepared to testify as follows. I am a professor of art history at Princeton University. I have studied the work of Eugène Delacroix for 20 years. My book, A Storm of Color: The Art of Eugène Delacroix (Cambridge University Press 2012), is currently regarded as the leading treatise on Delacroix. At Princeton, I teach several courses in art history, most of them focusing on European painting of the 19th century and one of them devoted solely to Delacroix. In 2013, I served as a special consultant to the Metropolitan Museum of Art (in New York City) for the staging of a major exhibition of Delacroix's paintings, and I wrote the catalogue for that show. In addition to my treatise on Delacroix, I have published more than 15 scholarly articles on various aspects of Delacroix's art. I spent one year (2009) as a guest curator at the Musée du Louvre in Paris, where I was able to study Delacroix's most famous paintings at first hand. I received a B.A. in art history from Columbia University, graduating magna cum laude, and then, focusing on 19th century European painting, I earned a Ph.D. from Columbia.

Exercise 16:

Authenticating an Incoming Telephone Call Under Rule 901(b)(5)

Three Different Ways to Authenticate a Telephone Conversation

TYPE OF CALL	METHOD
Outgoing or Incoming	901(b)(5) Voice Identification
Outgoing	901(b)(6) Dialed Phone Number
Outgoing or Incoming	901(b)(4) Unique Characteristics

Exercise 16:

This is a promissory estoppel case in which the promise was made during a May 9, 2017 telephone conversation. You are plaintiff's counsel and your witness is the plaintiff, Kevin O'Neill. Mr. O'Neill will recount how, during the course of this telephone conversation, the defendant, David Schorr, promised him a new job if O'Neill would immediately quit his job in Cleveland and move to California. Schorr was starting up a new magazine in San Diego (called *North County Living*) and he promised O'Neill a job as the magazine's film critic. But when O'Neill arrived in California, Schorr reneged on his promise. To win this promissory estoppel case, you must get O'Neill not only to recount what was said during his telephone conversation with Schorr, but to AUTHENTICATE the conversation by establishing that it was SCHORR on the other end of the line. O'Neill can authenticate the conversation under 901(b)(5) because he and Schorr became closely acquainted during the four years they attended college together.

VOICE IDENTIFICATION: RULE 901(b)(5) FOUNDATION

(1) At a specific time and place, the witness heard a voice.

(2) Witness recognized the voice as that of a certain person.

(3) Witness is familiar with that person's voice.

(4) Witness explains the basis for her familiarity with that person's voice.

(5) That person made a statement during the conversation.

The Testimony:

My name is Kevin O'Neill and I'm prepared to testify as follows. Though I'm currently unemployed, I used to be a film critic for *The Cleveland Plain Dealer*. On May 9, 2017, I was at my desk in the *Plain Dealer's* newsroom when I received a telephone call from David Schorr, an old friend of mine from college. David was calling from San Diego, where he was starting up a new magazine called *North County Living*. He was in the process of hiring the editorial staff and was specifically looking for a film critic. David said to me: "Quit your job at the *Plain Dealer*, move out to San Diego, and the job is yours—you'll be my new film critic." I readily agreed. Immediately after we hung up, I quit my job at the *Plain Dealer* and moved out to San Diego. But when I arrived in California, David reneged on his promise. He refused to meet with me and wouldn't return my calls. I am absolutely certain that David was the person who telephoned me on May 9, 2017. I am familiar with his voice because we roomed together for four years in college and we've stayed in touch by phone ever since. Without exaggeration, I have heard David's voice thousands of times. Back in college, we spoke every day. In the intervening years since college, we've spoken by phone two or three times each year. David's voice has a gravelly quality that is instantly recognizable to me.

Exercise 17:

Authenticating an Outgoing Telephone Call Under Rule 901(b)(6)

Three Different Ways to Authenticate a Telephone Conversation

TYPE OF CALL	METHOD
Outgoing or Incoming	901(b)(5) Voice Identification
Outgoing	901(b)(6) Dialed Phone Number
Outgoing or Incoming	901(b)(4) Unique Characteristics

DIALED TELEPHONE NUMBER: RULE 901(b)(6) FOUNDATION

(1)The telephone directory assigns a certain number to the person.

(2)The witness called that number.

(3)The witness asked for the person to whom the number is assigned.

(4)The person answering identified himself as the person to whom the number is assigned.

(5)Any other circumstances indicating that the person who answered was the person to whom the number is assigned.

Exercise 17:

Same basic fact pattern as Exercise #16—Kevin O'Neill has brought a promissory estoppel action against David Schorr and O'Neill must authenticate the telephone conversation in which Schorr made his promise of employment—except here O'Neill has no familiarity with Schorr's voice. They did not attend college together. The only time they ever spoke was during this one telephone conversation. (Upon O'Neill's arrival in California, Schorr completely refused to converse or meet with him.) Thus, you must try to authenticate this conversation using the dialed telephone number method under Rule 901(b)(6). For this problem, you may assume that the San Diego telephone directory has several sub-listings for *North County Living*, including a direct-dial number for "David Schorr, Editor-in-Chief." You should also assume that O'Neill submitted a résumé and cover letter that prompted an e-mail message from Schorr's secretary urging O'Neill to call Schorr directly and immediately. Finally, you should assume that O'Neill used a current San Diego telephone directory that was available on the Internet.

The Testimony:

My name is Kevin O'Neill and I'm prepared to testify as follows. Though I'm currently unemployed, I used to be a film critic for *The Cleveland Plain Dealer*. On May 2, 2017, responding to an advertisement in *Daily Variety* (a film industry trade publication), I applied for the film critic job at a new magazine in San Diego called *North County Living*. As required by the ad, I mailed my résumé, a cover letter, and a few of my published film reviews to "David Schorr, Editor-in-Chief" at *North County Living*. A week later, I received an e-mail from Mr. Schorr's secretary urging me to call Mr. Schorr immediately and giving me a direct-dial telephone number to call. Before calling that number, I checked its accuracy by consulting a current San Diego telephone directory available on the Internet. The directory had several sub-listings for *North County Living*, including a direct-dial number for "David Schorr, Editor-in-Chief" that matched the number furnished by his secretary. On May 9, 2017, I called that number. Answering the phone, a man's voice said: "David Schorr, Editor-in-Chief." I introduced myself and he immediately recognized my name, expressing praise for my résumé and the sample reviews I enclosed. I know that he was referring to *my* application because he specifically mentioned the *titles* of the films I reviewed in those samples. At the end of our conversation, Mr. Schorr said to me: "Quit your job at the *Plain Dealer*, move out to San Diego, and the job is yours—you'll be my new film critic." I readily agreed. Immediately after we hung up, I quit my job at the *Plain Dealer* and moved out to San Diego. But when I arrived in California, Mr. Schorr reneged on his promise. He refused to meet with me and wouldn't return my calls.

Exercise 18:

Laying the Foundation for Habit Testimony Under Rule 406

Requisite Foundation for HABIT Testimony under Rule 406:

(a) The witness is familiar with the person who has the relevant habit.
(b) The witness has been familiar with that person for a substantial period of time.
(c) In the witness's opinion, the person has a habit, a specific behavioral pattern.
(d) The witness has observed the person act in conformity with that habit on numerous occasions.

Exercise 18:

This case involves a murder that took place in the middle of the night at a 24-hour bowling alley—a vast complex with restaurants, pool tables, and 200 lanes. Walter "No Neck" Williams is accused of killing Jay Bernstein on the night of Feb. 27, 2017, at some point between 2:00 and 5:00 a.m. There were very few people inside the bowling alley that night and there are no eyewitnesses to the killing—but Williams and Bernstein were both present at 2:00 a.m., bowling alone in adjacent lanes. At that time of night, the bowling alley is staffed by only a handful of employees, and none of the people on duty that night saw anything happen. But when the cleaning crew arrived at 5:00 a.m. they found Bernstein lying dead in lane #79, apparently bludgeoned to death by his own bowling ball, which was found nearby, smeared with blood. Williams was gone...

Exercise 18:

You are the prosecutor. Among the witnesses you've subpoenaed to testify is Bob Shook, the defendant's long-time bowling partner. Mr. Shook has bowled with the defendant on hundreds of occasions, often as teammates in league competitions, spanning the past ten years. Mr. Shook is prepared to testify that the defendant has a peculiar habit—he becomes wildly belligerent and physically violent if anyone *touches* his bowling ball, which he constantly polishes to a brilliant sheen. In presenting your case to the jury, your theory is that Mr. Bernstein must have touched the defendant's bowling ball, triggering a violent and fatal response. Mr. Shook will testify that he and other team-mates always grabbed and restrained the defendant on every other occasion when someone touched his bowling ball. Your theory of the case is that nobody was present to restrain the defendant on the night in question. In this exercise, call Mr. Shook to the witness stand, lay the foundation for habit evidence under Rule 406, and elicit testimony about the defendant's peculiar habit. NOTE: Since Mr. Shook was not present on the night of the killing, he may not offer any testimony about that event; he may only testify about the *habit*.

The Testimony:

My name is Bob Shook and I'm prepared to testify as follows. The defendant in this case, Walter "No Neck" Williams, is a good friend of mine. We have been bowling partners for the past ten years, participating as teammates in a number of different bowling leagues. Each year we bowl roughly 100 games together. Over a ten-year time span, that's a thousand games—so I'm very familiar with Walter's behavior in bowling alleys. Most of the time, Walter is a cheerful, mild-mannered person, but he's a bit obsessive about his bowling ball. He spends a lot of time vigorously polishing that ball—and he goes absolutely crazy if anyone *touches* his ball. Whenever that happens, Walter is seized by a wild impulse to *hurt* the person who touched his ball. Over the past ten years, I have personally seen this happen about 40 times. I have never seen Walter *fail* to respond violently when someone has touched his bowling ball. Fortunately, I have always been able to restrain Walter (with the aid of our teammates) from hurting anyone in this situation. We hold him down for a few minutes and soon he regains his sanity. There is one particular situation where this problem most frequently occurs: it's when strangers are bowling in the adjacent lane, such that their balls are mingled with our balls in the ball return. If one of these bowlers, reaching for his own ball, innocently brushes Walter's ball out of the way, that will be enough to trigger Walter's reaction.

Exercise 19:

Laying an Excited Utterance Foundation Under Rule 803(2)

The Hearsay Exception for
Excited Utterances
[Rule 803(2)]

FOUNDATIONAL ELEMENTS:

(a) An event occurred.
(b) The event was startling, or at least stressful.
(c) The declarant had personal knowledge of the event, either as a participant or an observer.
(d) The declarant made a statement about the event.
(e) The declarant made the statement while he or she was in a state of nervous excitement.

Exercise 19:

This is a homicide prosecution. Bill Fox is accused of intentionally killing his estranged wife by dropping a tuba from the window of his fifth-floor apartment as she passed beneath him on the sidewalk below. This grisly event took place on a busy street in Chicago—but of all the witnesses who saw the tuba land, only one witness saw the tuba being dropped from the fifth-story window. That lone witness, Mrs. Barbara Drexler, was standing across the street with her husband, waiting to be picked up by their daughter. Her husband, Dr. Milton Drexler, was reading a magazine as he stood beside her. Mrs. Drexler happened to be looking up when the tuba emerged from the window, and she got a good look at the man who was holding it. He was wearing a bright red baseball cap. As it dawned on her that the man was going to drop the tuba, Mrs. Drexler cried: "No! No! Don't!" And immediately after the tuba came crashing down on the victim, she exclaimed: "It was a man in a red baseball cap! A man in a red baseball cap dropped that tuba from a window!" Five minutes later, Bill Fox was apprehended while fleeing the scene. He was wearing a red baseball cap...

Exercise 19:

You are the prosecutor. In an ideal world, you would be calling Mrs. Drexler to the witness stand—but she died of pneumonia two months ago. You want the jury to hear the words she cried out at that fateful moment on the street, so you're calling Dr. Milton Drexler to the stand for the purpose of recounting what his wife said. Since you're offering those words to prove their truth—that the tuba *was* dropped from a window by a man wearing a red baseball cap—you'll need to invoke an exception to the hearsay rule. Before asking Dr. Drexler to recount those words, lay the necessary foundation for an excited utterance under Rule 803(2). Since Dr. Drexler was reading a magazine at the time, he did not see the man in the red cap and he did not see the tuba strike the victim—but he heard his wife loud and clear. Finally, here are a few background details. Dr. Drexler and his wife were standing right in front of their apartment building, at 3555 North Michigan Avenue, at 10:00 a.m. The tuba was dropped from a window of the apartment building directly across the street, at 3556 North Michigan Avenue. The incident took place on August 17, 2016.

The Testimony:

My name is Dr. Milton Drexler and I'm prepared to testify as follows. At 10:00 a.m. on August 17, 2016, I was standing on the sidewalk in front of my apartment building (3555 North Michigan Avenue in Chicago), facing the street. My wife, Barbara, was standing right next to me. We were waiting to be picked up by our daughter. I was reading a magazine; Barbara was watching the street. Suddenly, Barbara grabbed my arm, clutching it very tightly, and in a loud, agitated voice, she shouted: "No! No! Don't!" I looked up from my magazine to see Barbara staring intently at something directly across the street. Then I heard a terrible metallic crash coming from the same direction. Immediately Barbara shouted: "It was a man in a red baseball cap! A man in a red baseball cap dropped that tuba from a window!" In 30 years of marriage, I have never heard her voice in such a state of excitement and hysteria. Then, yanking me by the arm, she jumped off the curb and pulled me across the street. Now, for the first time, I saw what Barbara was so excited about. It was a young woman, lying face down on the sidewalk, bleeding profusely from her head and neck—with a bent, bloody tuba three feet away. Five minutes later, paramedics arrived and pronounced the young woman dead. Barbara wanted to testify in this case, but she died of pneumonia two months ago.

Exercise 20:

Laying a Dying Declaration Foundation Under Rule 804(b)(2)

The Hearsay Exception for
Dying Declarations
[Rule 804(b)(2)]

FOUNDATIONAL ELEMENTS:

(a) The declarant made a statement.
(b) She made the statement while believing that her own death was imminent.
(c) Her statement concerned the cause or circumstances of her own impending death.
(d) The declarant is now dead or otherwise unavailable to testify.
(e) The instant proceeding is either a homicide prosecution or a civil action.

Exercise 20:

Same basic fact pattern as Exercise 19. This is a homicide prosecution. Defendant Bill Fox is accused of intentionally killing his estranged wife, Penelope Fox, by dropping a tuba from the window of his fifth-floor apartment as she passed beneath him on the sidewalk below. Once again, the incident takes place on a busy street in Chicago, directly in front of the apartment building at 3556 North Michigan Avenue. Your witness is Kent Barcus, the doorman who guards the front entrance of that apartment building. During his seven years of service as the doorman at the building, Mr. Barcus has come to know both Bill and Penelope Fox. Before their divorce six months ago, Mr. and Mrs. Fox had lived together in the apartment for more than two years. Accordingly, Mr. Barcus is familiar with both of them. He knows that Mr. Fox played the tuba for the Chicago Philharmonic and that Mrs. Fox was a reporter for the Chicago Tribune. On the morning of August 17, 2016 (the day that Penelope Fox was killed), Mr. Barcus was on duty, standing outside on the sidewalk by the building's front door. At 9:45 he saw Mrs. Fox enter the building. (Notwithstanding their divorce, she retained a key to the apartment.) At 10:05 she stormed out of the building in a rage, turned sharply to her right, and began walking east along the sidewalk. Suddenly, a tuba fell out of the sky and knocked her to the ground with a tremendous crash. Mr. Barcus rushed to her side...

Exercise 20:

Blood was pouring from her head and neck. She was badly stunned but still conscious. Mr. Barcus could see that she was horrified by how much blood she was losing. She declared [admissible under 803(3)]: "I'm losing too much blood! I'm not going to survive this." Then, noticing the dented tuba nearby, she said [admissible under 804(b)(2)]: "My husband has killed me! THAT is his tuba!" Three minutes later she was dead. You are the prosecutor. You want the jury to hear those words, so you're calling Mr. Barcus to the witness stand. Since you're offering the words to prove their truth—that it was *Mr. Fox* who had tried to kill her—you'll need to invoke an exception to the hearsay rule. Before asking Mr. Barcus to recount those words, lay the necessary foundation for a dying declaration under Rule 804(b)(2). You *won't* need to lay a foundation for her state-of-mind declaration because the statement itself satisfies the requirements of Rule 803(3).

The Testimony:

My name is Kent Barcus and I'm prepared to testify as follows. For the last seven years, I have worked as a doorman at an apartment building in Chicago (3556 North Michigan Ave.). To perform my job, I must memorize the name and face of every resident in our building. Accordingly, I am familiar with Bill and Penelope Fox, who moved into our building three years ago and shared the same apartment until their divorce six months ago. Even after their divorce, Mrs. Fox retained a key to the apartment and was free to come and go as she wished. Their apartment was on the fifth floor, with windows situated directly above the public sidewalk that lines the front of our building. Mrs. Fox was a reporter for the Chicago Tribune. Mr. Fox played the tuba for the Chicago Philharmonic. Almost every day, I would see Mr. Fox carrying his tuba when entering and exiting our building. Shortly after 10:00 a.m. on August 17, 2016, Mrs. Fox suffered injury and death on the sidewalk in front of our building. I was on duty that morning, standing on the sidewalk beside the front door, and I saw the whole thing. At 9:45 a.m., I saw Mrs. Fox enter the building. Twenty minutes later (at 10:05 a.m.), she stormed out of the building in a rage, turned sharply to her right, and began walking east along the sidewalk. Suddenly, a tuba fell out of the sky and knocked her to the ground with a tremendous crash. I rushed over and knelt down beside her. Blood was pouring from her head and neck. She was badly stunned but still conscious. I could see that she was horrified by how much blood she was losing. She declared: "I'm losing too much blood! I'm not going to survive this." Then, noticing the dented tuba nearby, she said, "My husband has killed me! THAT is his tuba!" I took off my coat and tried using it to stanch the flow of blood, but it was useless. Three minutes later, paramedics arrived and pronounced her dead.

CROSS-Examination Exercise:

Using a Judgment of Conviction to Expose a Witness's Prior Crimes

THE CROSS-EXAMINER CANNOT EXPOSE THE UNDERLYING DETAILS OF THE PRIOR CRIMINAL CONVICTION

When cross-examining a witness about his prior criminal conviction, you can only cover the information that appears on the judgment of conviction — the date, the crime, and the punishment imposed — NOT the underlying factual details. Some judges even forbid revealing the location of the court where the conviction occurred.

Case No. 11-CR-002491

The State of Ohio	)	**In the Common Pleas Court of Cuyahoga County, Ohio**
—vs—	)	
Kevin O'Neill	)	

JUDGMENT OF CONVICTION BY JURY

Date Judgment Entered: October 4, 2011

Defendant was Convicted of Violating Ohio Revised Code § 2911.11

AGGRAVATED BURGLARY

Degree of Offense: First Degree Felony

Plea to Offense: Not Guilty — Jury Verdict: Guilty

PUNISHMENT:
Three Years in Prison

Place of Confinement:
Chillicothe Correctional Center, Chillicothe, Ohio

Case No. 14-CR-002491

The State of Ohio	)	**In the Common**
	)	**Pleas Court of**
—vs—	)	**Cuyahoga County,**
	)	**Ohio**
Kevin O'Neill	)	

JUDGMENT OF CONVICTION BY JURY

Date Judgment Entered: December 6, 2014

Defendant was Convicted of Violating Ohio Revised Code § 2913.31

FORGERY

Degree of Offense: Fifth Degree Felony

Plea to Offense: Not Guilty — Jury Verdict: Guilty

PUNISHMENT:
Seven Months in Prison

Place of Confinement:
Allen-Oakwood Correctional Center,
Lima, Ohio

Case No. 13-CR-002491

The State of Ohio	)	**In the Common**
	)	**Pleas Court of**
—vs—	)	**Cuyahoga County,**
	)	**Ohio**
Kevin O'Neill	)	

JUDGMENT OF CONVICTION BY JURY

Date Judgment Entered: August 23, 2013

Defendant was Convicted of Violating Ohio Revised Code § 2911.31

SAFECRACKING

Degree of Offense: Fourth Degree Felony

Plea to Offense: Not Guilty — Jury Verdict: Guilty

PUNISHMENT:
One Year in Prison

Place of Confinement:
Southeastern Correctional Complex,
Lancaster, Ohio

Direct & Cross Examination Exercises

Cleveland-Marshall College of Law, Cleveland State University