



# MOCK RULES

- Unfair Extrapolation
- Witness Bound by Statements
- Re-Direct / Re-Cross

# FORM OF QUESTION

- THE FORM OF THE QUESTION ITSELF IS IMPROPER.
  - Leading
  - Argumentative
  - Lack of Foundation
  - Assumes Facts Not in Evidence
  - Calls for Narrative
  - Non-Responsive
  - Repetition

# RELEVANCE

- General Rule – THE GATEKEEPER
- Character Evidence
- Legal Relevance

# EVIDENCE PRESENTATION

- Lay Witness
  - Personal Knowledge
  - Opinion Generally Inadmissible
- Expert Witness
  - Can Give Opinion
    - Must be qualified
  - Cannot Give Opinion on Ultimate Issue

# HEARSAY

- Hearsay Definition
  - Truth
  - Against Party
  - Consistency / Inconsistency
- Hearsay Exceptions

# Relevance

## The Gatekeeper

MUST PASS THE RELEVANCE TEST FIRST

- **IF NOT RELEVANT IT IS EXCLUDED**
- If it is then the rest of the FRE's come into play
  - Is it lack of personal knowledge
  - Is it opinion
  - Is it Hearsay

# Rule 401

- DEFINITION OF RELEVANT EVIDENCE

- Relevant evidence is evidence which makes a fact of consequence more probable or less probable



- Bob is on trial for murder.
  - The murder weapon was an uzi.
  - Prosecution asks if Bob owns a handgun.
  - RELEVANT?
  
- Sally is on trial for distribution of cocaine.
  - Prosecution presents evidence that over 500 pounds of prescription drugs were found in Sally's home.
  - RELEVANT?

# Rule 402

- RELEVANT EVIDENCE GENERALLY ADMISSABLE; IRRELEVANT EVIDENCE INADMISSABLE.
  - Relevant evidence is admissible. Irrelevant evidence is not admissible

# Rule 403

- EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME.
  - Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, if it confuses the issues, or if it causes undue delay, wastes time, or is a needless presentation of cumulative evidence.

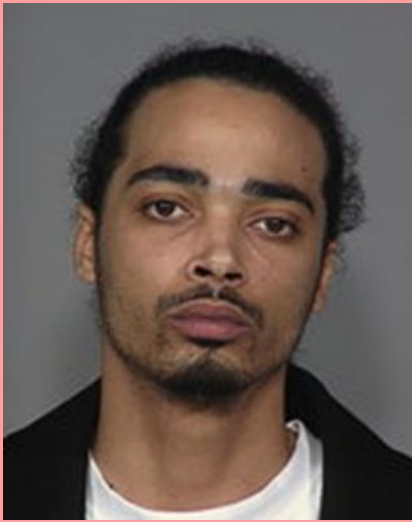
# Rule 403

- PREJUDICE

- NOT: The person hates a particular group.
- ANY information that would cause the jury to PRE-JUDGE the accused.

- What inferences will the jury develop from the evidence?

- *“I’m going to break your arm, I belong to a cult that worships violence.”*
  - *Allowable Inference – juror believes words would scare a reasonable person = defendant guilty of assault*
  - *Forbidden Inference – juror disgust at defendant belonging to cult = juror punishes defendant for cult status.*



- Lashawn Anthony McIntyre (a.k.a. Mac Shawn) is on trial for promoting prostitution. The prosecution moves to enter two videos – “Turn This up” and “Pimp’n (All I Know) - into evidence. Defendant appears in both videos and in each describes his involvement in the prostitution trade. Should the videos be admissible?

- Plaintiff's deceased was a passenger in a car that was hit from behind. The gas tank exploded, killing the deceased. Plaintiff brings a products liability action against the manufacturer for negligence in design of the car. The person who caused the accident pleaded guilty to involuntary manslaughter, and has admitted to going about 68 mph while texting on the freeway. Should evidence of the faulty driver's guilty plea be admissible in the civil action?

# Rule 404

- CHARACTER EVIDENCE NOT ADMISSABLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES
  - (a) Evidence of a person's character or character trait, is not admissible to prove action regarding a particular occasion, except:
    - (1) Character of accused - evidence of a pertinent character trait offered by an accused or by the prosecution to rebut same
    - (2) Character of victim - evidence of a pertinent character trait of the victim of the crime offered by an accused, or by the prosecution to rebut
    - (3) Character of witness - Evidence of the character of a witness as provided in Rules 607, 608, and 609.

- *Character Evidence - Part A*
- Meet Lucy.
  - Lucy cheats on her husband
  - Lucy is an alcoholic
  - Lucy has 12 kids – 10 different fathers
  - Lucy buys large amounts of pornography
  - Lucy has two convictions for assault
  - Lucy has eight drug possession convictions
  - Lucy is on trial for murder
  - None of these actions should be used to prove action



- Reason:
  - Inference drawn from character evidence may be wrong.
    - *Because Joe sold drugs three years ago does not provide proof that he sold drugs this time.*
  - Unfair Prejudice

- Propensity - a natural inclination or tendency.
  - Example: a propensity to drink too much.

- (1) Character of accused - evidence of a pertinent character trait offered by an accused or by the prosecution to rebut same
  - Defense can offer evidence of non-violent character (cannot offer specific acts):
    - “Lucy has a reputation in the community for being very peaceful.
  - Prosecution rebuts:
    - “Did you know that Lucy beat up an eleven year old and a puppy on the same day.”

- (2) Character of victim - evidence of a pertinent character trait of the victim of the crime offered by an accused, or by the prosecution to rebut
  - Defense claims self-defense and offers character evidence = Victim has propensity to be violent.
    - “The victim has a reputation for getting into violent bar fights”
  - Prosecution rebuts
    - “George has never harmed a soul. He is in my bar three or four times a week and has never been in a fight.”

– (b) Other crimes, wrongs, or acts. - Evidence of other crimes, wrongs, or acts is not admissible to prove character of a person in order to show an action conforms to character. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

# M O I P P K I A A

Motive

Opportunity

Intent

Preparation

Plan

Knowledge

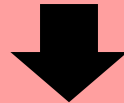
Identity

Absence of Mistake or

Accident

- Bad Acts – Not Allowed

- Defendant has been convicted in the past of manufacturing drugs



- Inference = Defendant is a bad druggie



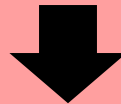
- Juror concludes defendant manufactured drugs in this case

- Bad Acts – Allowed

- Defendant claims they were innocently carrying out some science experiments and did not know resulted in drugs.



- Evidence of past drug manufacturing convictions is entered.



- Juror inference = knowledge and absence of mistake



- Juror decides guilty of manufacturing drugs in this case



- Character Evidence – Part b

Motive

Accused of Murder / P. introduces long history of illegal gambling

Opportunity

Intent

Accused of distribution / P. uses past drug sales as proof intended to sell drugs.

Preparation

Plan

Knowledge

Identity

Absence Mistake/Plan:

Accused of Arson / P. offers several insurance fraud convictions.

# Rule 405

- **METHODS OF PROVING CHARACTER**
  - (a) If character is admissible proof can be in the form of testimony about reputation or opinion
  - (b) proof may also be specific acts of past conduct IF character or character evidence is an essential element of a charge, claim or defense

- Example 405(b)
  - Defamation Case
  - To prove defamation must show the person was knowingly spreading false statements which harmed (defamed) the defendant.
  - Lying is an element of the crime and evidence establishing lying would be allowable.

# Rule 407

- **SUBSEQUENT REMEDIAL MEASURES**
  - Actions taken after an event, which would have made the event less likely, cannot be used to prove negligence.

# Rule 408

- **COMPROMISE AND OFFERS TO COMPROMISE**

- Offering or promising a compromise to settle a dispute cannot be used to prove liability

# Rule 409

- PAYMENT OF MEDICAL OR SIMILAR EXPENSES
  - Offering or promising to pay someone's medical expenses cannot be used to prove liability

# Rule 601

- GENERAL RULE OF COMPETENCY
  - Everyone is competent to be a witness

# Rule 602

- LACK OF PERSONAL KNOWLEDGE
  - Witness may not testify unless they have personal knowledge of the matter



# Rule 607

- WHO MAY IMPEACH

- Credibility of a witness can be attacked by any party.

# Rule 608

- EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS
  - (a) The credibility of a witness may be attacked through opinion or reputation, but subject to limitations
    - (1) evidence must refer to truthfulness or untruthfulness
    - (2) evidence of truthful character is admissible only after character of truthfulness has been attacked
  - (b) Specific instances of past conduct may be used to:
    - (1) show witness' truthfulness or untruthfulness
    - (2) Concerning truthfulness/untruthfulness of another witness the witness being cross examined has testified about

# Rule 609

- **IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME**
  - (1) Evidence that a witness other than the accused has been convicted of a crime shall be admitted subject to rule 403, if the crime was punishable by death or imprisonment in excess of one year
  - (2) Evidence that any witness has been convicted of crime shall be admitted regardless of the punishment if the elements of the crime require proof of dishonesty or false statements.

# Rule 611

- **MODE AND ORDER OF INTERROGATION AND PRESENTATION**
  - (a) Court controls all questioning of witnesses
  - (b) Scope of cross is NOT limited to scope of direct.
  - (c) Leading questions are not permitted on direct
  - (d) Redirect/Recross are allowed
    - Redirect is limited to matters brought up in cross
    - Recross is limited to matters brought up in redirect
    - Redirect and recross are limited to TWO questions

# Fixing Your Leading Questions

- Generally, you can fix the question by adding “whether or not”.
- Example
  - The light was green, right?
  - Can you tell me whether or not the light was green?
- Good prep will lead to not having this problem to begin with!!!

# Rule 701

- **OPINION TESTIMONY BY LAY WITNESS**

- Lay witness (non expert) testimony is limited to
  - (a) rationally based perceptions
  - (b) helpful to clear understanding of the testimony or the determination of a fact

# Rule 702

- TESTIMONY BY EXPERTS
  - A witness qualified by knowledge, skill, experience, training, or education may testify in the form of an opinion

# Rule 703

- BASES OF OPINION TESTIMONY BY EXPERTS
  - Experts may base their opinions on facts which they have read in texts, records, or other document used by those in their field



# Rule 704

- OPINION ON ULTIMATE ISSUE
  - (a) opinion is not objectionable if it embraces an issue to be decided
  - (b) expert witness cannot testify as to guilt or innocence

# Mock Rule 3

- WITNESS BOUND BY STATEMENTS
  - Each witness is bound to his/her own witness statement.
  - Fair extrapolations may be made based on reasonable inference and must be neutral.

Q. Ms. Monroe, George Monroe hit you with an ashtray.

A. He sure did, he hit me so hard my glasses flew across the room. Later I suffered a heart attack because of the beating.

Q. Ms. Monroe, George Monroe hit you with an ashtray.

A. He sure did, I was in a lot of pain.

# Mock Rule 4

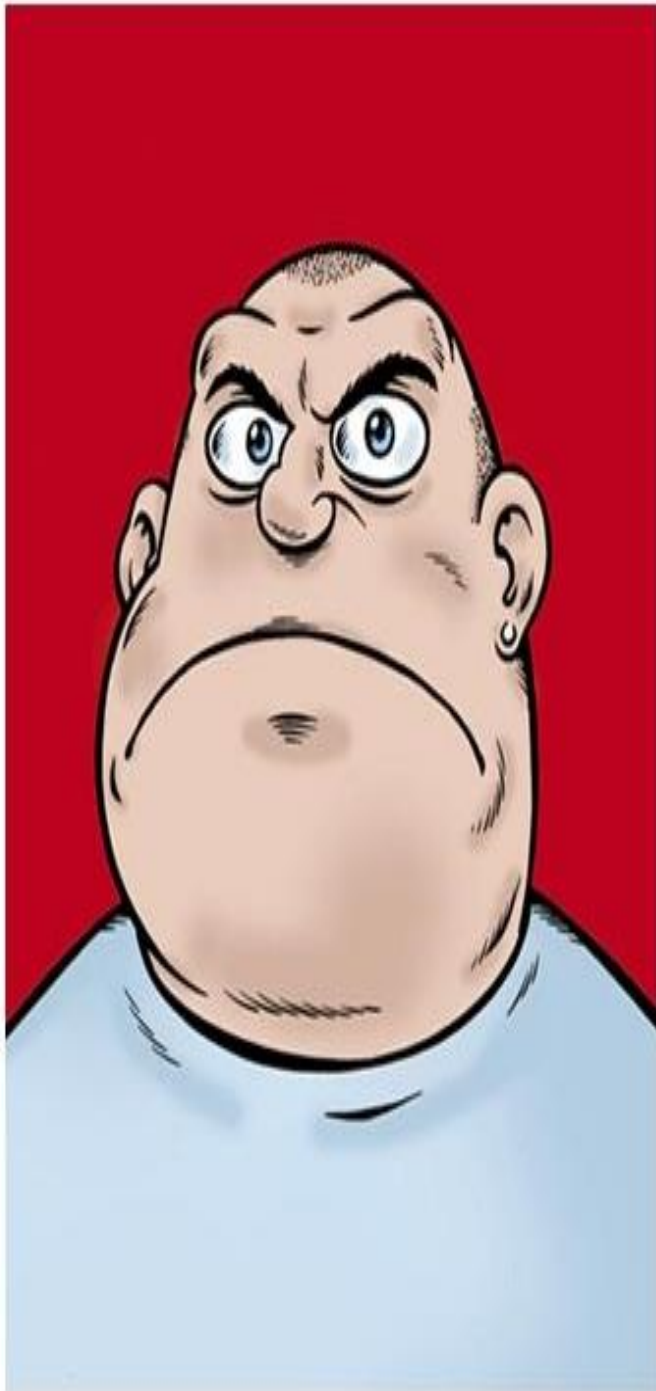
- UNFAIR EXTRAPOLATION

- Testimony outside the witnesses statement which is not based on reasonable inference and is not neutral

- Unfair Extrapolation is a QUESTION that asks the witness something which is not in their witness statement.
- *Q. Ms. Monroe, your husband was a member of the Klu Klux Klan.*

# Mock Rule 38 (1)

- ARGUMENTATIVE QUESTIONS
  - An attorney shall not ask argumentative questions. (*An argumentative question does not seek information but rather makes an argument to the jury in the guise of a question*).



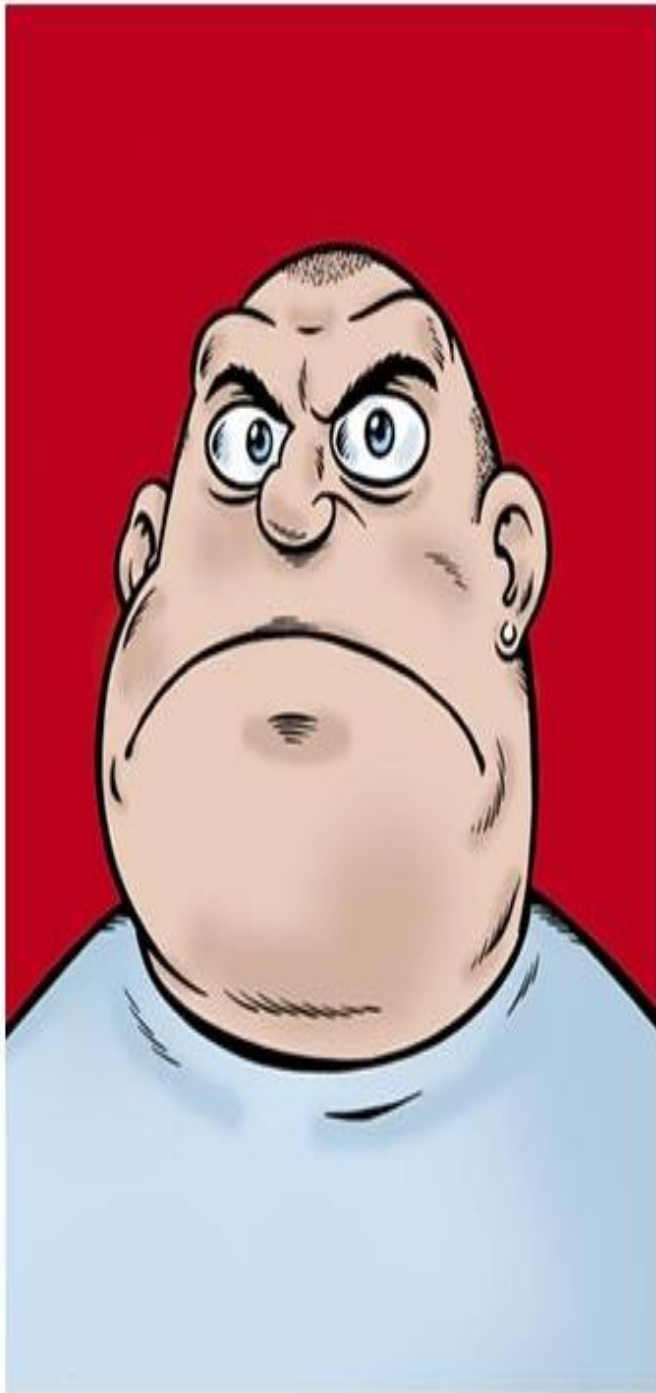
Q. Mr. Stephens, how can you expect the judge to believe that?

- OBJECTION
- Does not elicit information.

# Mock Rule 38 (2)

- LACK OF PROPER FOUNDATION
  - Attorneys must lay a proper foundation prior to moving the admission of evidence.





Q. Mr. Stephens, What did you see?

- OBJECTION
- Must lay a foundation showing that this witness was in a position to have knowledge of the event.

# Getting out of a 38(2) Objection (testimony)

- THINK – What fact are you trying to elicit with the question
- How does this witness have knowledge of this fact
- Show how they have knowledge with a short series of questions
- Writing a good examination will help you avoid this problem!!!

# Foundations for Testimonial Evidence

Personal Knowledge	Testimony by all witnesses (except experts) must be shown to be based on personal knowledge
Conversations	Must include when and where the conversation took place, a listing of parties present and in telephone calls – how the other person's voice was authenticated.
Prior Identification	Must include circumstances under which that identification was originally made
Habit and Routine	Must be shown to be based on personal knowledge of a consistently repeated activity
Character and Reputation	Must be admissible and include the specifics of how that information was learned and why it is reliable
Hearsay	Must be shown to be non-hearsay or fit into an exception to the hearsay rule

# Mock Rule 38 (3)

- ASSUMING FACTS NOT IN EVIDENCE
  - Attorneys may not ask a question that assumes unproven facts.



Q. Mr. Stephens, When did you start beating your wife?

- OBJECTION
- Assumes he beat his wife which has not been proven.

# BUILDING YOUR DIRECT

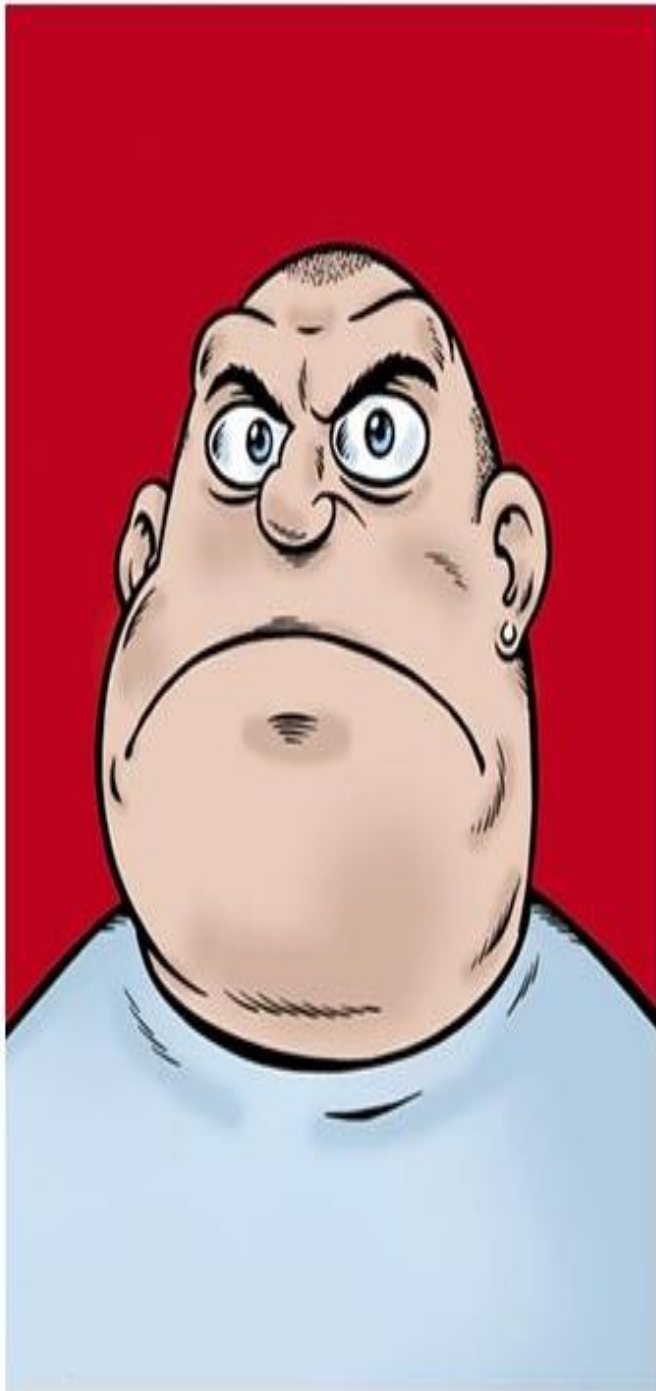
- Want to avoid assuming facts and leading – use witness responses to open the door for your next question.

Q. How was your relationship with Ms. Stephens?  
– Great until I started beating her.

Q. Mr. Stephens, When did you start beating your wife?  
– Just days after we got married.

# Mock Rule 38 (4)

- QUESTIONS CALLING FOR A NARRATIVE OR GENERAL ANSWER
  - Questions must be stated so as to call for a specific answer.



Q. Mr. Simple, how long have you been married, where do you live and how many children do you have?

A. Well, let me tell ya, the wife and I got married 25 years ago. We ended up living over on Hill Street and had us 14 kids, most of were mine.

**QUESTIONS SHOULD ELICIT ONE POINT/FACT.**



# Mock Rule 38 (5)

- **NON-RESPONSIVE ANSWER**
  - A witness's answer is objectionable if it fails to respond to the question. The non-responsive objection is used by the questioning counsel.

# Mock Rule 38 (6)

- REPETITION

- Questions designed to elicit the same testimony or evidence previously presented in its entirety are improper.

# Rule 801

- **DEFINITIONS**

- (a) Statement is an oral, written or nonverbal conduct intended as an assertion
- (b) Declarant is a person who makes a statement
- (c) Hearsay is a statement made by one other than the declarant offered to prove the truth of the matter asserted

- George Monroe said “ Martha, I’m going to mess you up.”
- Not offered to prove the truth of the matter asserted
  - Offered to show effect on listener
  - To show knowledge
  - Notice or warning

- (d) Statements which are not hearsay
  - (1) Prior statement by witness
    - (A) inconsistent with the declarants testimony
    - (B) consistent with the declarants testimony and used to rebut charge of fabrication
    - (C) One of identification
  - (2) Admission by party opponent
    - The statement is offered against a party and is the party's own statement

- Consistent / Inconsistent
  - Generally offered for purposes of impeachment
  - Officer Smith, You said the defendant ran a red light.
  - “The insurance adjuster told you “The defendant had the green light.”

- Admission Party Opponent

- ANY STATEMENT OF A PARTY OFFERED AGAINST THAT PARTY

- Martha Monroe told me she was furious
    - Martha Monroe said “ I’m so darn mad, I gonna kill ya.”

# Rule 802

- HEARSAY RULE
  - Hearsay is not admissible



# Rule 803

- HEARSAY EXCEPTIONS, AVAILABILITY OF DECLARANT IMMATERIAL
  - (1) Present sense impression – description of an event while the speaker observed that event or immediately after.
  - (2) Excited utterance – statement relating to a startling event while the speaker was under the stress of the event
  - (3) Then existing mental, emotional, or physical condition
  - (4) Statements for the purpose of medical diagnosis or treatment

# Rule 805

- HEARSAY WITHIN HEARSAY

- Hearsay within hearsay is not excluded if both parts fall under an exception

- Hearsay Tricks

- Attorneys can sneak “hearsay” evidence into the record by skillfully crafting their questions

- EXAMPLE OF CLEAR HEARSAY (NO SKILL)

- Q. Did you talk to Ms. Thomas?

- » A. Yes

- Q. Did Ms. Thomas tell you the date of the meeting?

- » A. Yes

- Q. What did she tell you?

- » A. The meeting was on the fifth.

- EXAMPLE OF PERHAPS SNEAKING IT IN
  - Q. Did you talk with Ms. Thomas about the subject of the meeting?
    - A. Yes
  - Q. What did you do after that?
    - A. I wrote down the date May 5<sup>th</sup>

OR

- Q. Did you talk with Ms. Thomas about the subject of the meeting?
  - A. Yes
- What did you learn?
  - It was held on May 5<sup>th</sup>

- Henry Handler was driving south on High Street. As he was approaching the light at 24th and High, Wally Witness, who was driving in the car next to Henry, observed Henry talking on his cell phone, drinking coffee, and looking down at his CD player in the car. Two minutes later, at 12th and High, Henry turned right on green, accidentally striking Paula Peddler on her bike.
- Paula sues Henry for negligence. Paula's attorney wants to call Wally to testify as to Henry's behavior at 24th and High. Is this evidence relevant?
- YES / NO
- Which rule(s) applies
- Explain – Use the language of the RULES



Under Rule 401, for evidence to be deemed relevant and therefore admissible, it only has to make a fact 'of consequence' 'more or less probable.' Under this low threshold, Henry's multitasking at 24th and High makes it a little more probable that he was multitasking during the accident two minutes later, and tends to show him to be an inattentive and careless driver, both of which are 'facts of consequence.'