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Twenty Simple Rules For Trying Your Case To A Jury: A Return To Some Of The Basics

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You Are An Important Witness In Your Trial

The trial masters agree: you, the attorney, are an important witness in your case. Every minute you are in the jury's presence, the jurors are watching you and judging you. They are looking to you to give them the truth. When you speak, they expect your words to be truthful and accurate. And, if they determine that you, over all others, are the channel of truth, they will believe what you tell them. Then, *you* will be a powerful witness in the case.

Don't Hedge In Your Opening Statement

This is the corollary to Rule # 1. A good opening statement can win a case before the first witness testifies. If your opening statement is strong and persuasive, you can convince a jury to the point that their attention will be focused only on making sure you *prove* what you just told them.

While attorneys cannot be argumentative in their opening statement, they certainly can be strong and to the point. Consider the following:

> "Good morning ladies and gentlemen. We are here today because on January 2, 2002, that man, the defendant, drove his car through a red light at 4th and Locust and smashed into my client's – Johnny Lydon's – car seriously injuring Johnny and his daughter. I am going to prove to you that on that day the defendant was speeding, was talking on his cell phone, and completely disregarded a red stop light. I am going to prove this to you with the following witnesses and evidence . . . ."

Don't ever say the following, or anything similar, to a jury:

> "What I'm about to tell you is not evidence (the judge has already told them that in her opening instructions – why encourage them to ignore your opening statement?).
>
> "I expect (believe, predict, etc.) the evidence will show . . . . " (if you don't know what the evidence *will* show, you're already in serious trouble.)

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"Opening statement is my chance to tell you what I think the evidence will be in this case."

These statements, or preambles, are weak. As soon as you finish saying "good morning," you should immediately tell the jury what happened and exactly how you're going to prove it.

Pretrial Motions and Motions In Limine

Few things warm a judge's heart more than pretrial motions and motions in limine (especially written). A good trial lawyer does everything possible to warn a judge about a problem before trial. In other words, don't drop a bomb on the court (and your opponent) when the jury is in the box.

If, pretrial, an attorney identifies any issue that is going to require the judge's time and attention, he or she should advise the court as soon as possible. The attorney should summarize these issues in written motions and file them before trial. The attorney should then request a date certain for argument and decision on those motions. Similarly, if an attorney recognizes a significant issue during the trial, whenever possible, he or she should notify the court so the judge can address the matter at a recess.

Presenting serious legal issues to the court in this manner allows the judge time to make a good record and arrive at a better decision. It also prevents a jury from hearing evidence that the court would otherwise rule inadmissible.

Motions in limine can also save counsel from embarrassment in front of a jury. If the attorney receives a preliminary ruling from the court as to the admissibility or inadmissibility of testimony or an item of evidence, counsel does not have to worry about the effect on the jury of an adverse ruling.

A written motion in limine has a second and less recognized role. It can serve as a "preemptive strike" against an objectionable part of your opponent's case, or in furtherance of an aggressive part of your own case. If well done, it presents your side of the argument to the judge first, often causing your opponent to scramble for a response. Used properly, it can be yet another powerful tool in your overall arsenal. "A lawyer's analytic skill and strategic ingenuity alone limit the issues that can be brought before the trial judge in such a motion."[1]

Stipulations

Stipulations shorten trials and make lives easier. If a witness's testimony, or a fact, is not disputed, the parties should so stipulate whenever practical. This requires opposing attorneys to know their cases well and be willing to communicate with one another.

There are two types of stipulations. The first type is a stipulation to a fact. It can be worded as follows.

> The parties stipulate and agree that at 1:00 p.m. on January 2, 2002, the defendant drove his car through a red light at the corner of 4th and Locust.

The second type of stipulation is an agreement as to what a witness would testify if called:

> The parties stipulate and agree that if Glenn Matlock were called to testify, he would state that at 1:00 p.m. on January 2, 2002, he observed the defendant drive his car through a red light at the corner of 4th and Locust.

The first stipulation should end the inquiry on the stated fact. The second stipulation allows either party to introduce evidence supporting or opposing the stipulated testimony.

Don't Lead – But Do Incorporate Favorable Answers In Your Follow-Up Questions

Let your witnesses tell the story. Don't lead, don't put words in their mouth. It's sloppy, objectionable, and unpersuasive. A jury will quickly realize that the witness is not the one testifying, and they may resent it.

It is quite appropriate, however, and very persuasive, to incorporate into your questions favorable answers from your witness. For example:

Q) What did you see when you turned around?
A) I saw the defendant's car go through a red light
Q) After you saw the defendant's car go through a red light, what did you see next?
A) I saw his car smash into the side of Mr. Lydon's car.
Q) After the defendant's car smashed into Mr. Lydon's car, did you see anything else?
A) Yes, I saw Mr. Lydon stagger out of his car.
Q) After you saw Mr. Lydon stagger out of his car, what did you see next?

By forming questions this way, you reinforce the witness's testimony in the juror's minds. Jurors are twice hearing these crucial facts. The above sequence is much better than asking the witness a series of questions such as, "What happened next?", or "Then what did you see?"

Control Your Witness

Whether you're conducting a direct examination or a cross-examination, the person on the stand is your witness. If your witness testifies beyond the scope of the question, and you don't like it, don't just sit there and listen. Move to strike his answer (or just the offending portion) as "non-responsive," ask the court to instruct the jury to disregard the answer, and ask the court to direct the witness to answer the question that you asked. If you do this a few times, the witness will get the message. And so will the jury.

Q) Mr. Smith, did you see the color of the stoplight?
A) Yes, *it was red and your client drove right through it.*

That question calls for a "yes" or "no" answer. The proponent should move the court to strike the non-responsive portion of the answer.

Some witnesses enjoy showing us how smart they are. So, in response to a question that calls for a simple answer, they'll give an answer that shows us how smart they are.

Q) Dr. Jones, did the patient have a head injury?
A) The patient showed indications of trauma to the anterior left portion of the skull area manifested by a contusion to the lobe of the brain and a subdural hematoma.
Q) Is that a yes?

Since the question calls for a "yes" or "no" answer, the attorney could move to strike. If you prefer to pose that follow-up question however, you'll notice that once you've done it a few times the smarty-pants witness – and the jury – will get the picture.

Witnesses: Foundation, Foundation, Foundation (How Does the Witness Know This?)

If you want to build a sturdy house, you must start with a sturdy basement. So too with witnesses.

For at least two reasons, it is a good practice to develop the witness's testimony step-by-step as it leads to the most relevant parts. First, through your witnesses, you're telling the jury a story. You don't want to jump ahead or leave something out. You want the jurors to be able to connect the points that flow through the witness's narrative. Tell the story and let the jurors linger on, and relish, the details. The second reason is that, if the witness is skipping ahead in her testimony, that later testimony may lack foundation. Thus, you may end up with a series of conclusory answers that are out of context, and lacking any basis or support in fact.

Q) Good morning Ms. Smith. Did you see Johnny Lydon after the car crash?
A) Yes.
Q) How did he look?
A) He was very severely injured
Opponent: Objection, your honor, lack of foundation.

At this point, sustained. How does this witness know the individual was injured? How does she know he was *severely* injured? Where was she standing? How close did she come to the crash site? How soon after the crash did she see what she saw? Consider this instead:

Q) Did you see Johnny Lydon after the car crash?
A) Yes.
Q) When did you see him?
A) Right after I heard the collision, I ran to his car as he was staggering out.
Q) After he staggered out of the car, what did you see?
A) His head was covered in blood, he was babbling incoherently, and he collapsed to the ground and stopped moving.
Q) So, although he stopped moving, did he appear injured?
A) Yes, he was *severely* injured.
Q) And how can you state that?
A) Well, I just told you what I saw. Plus, I'm a nurse and I work in a trauma unit.

Okay, the nurse part helps. But, anyway, through this examination you bring the story to the jury detail by detail. And, your opponent has no basis to object to anything.

To be persuasive, and forestall objections, you must always establish the essentials, such as: who, how, why, when, and where.

Exhibits: Foundation, Foundation, Foundation (Why is this Exhibit Reliable?)

People – and attorneys are included – speak of epiphanies, the proverbial light bulb switching on and suddenly clarifying everything. As a young lawyer, my evidentiary epiphany came when I watched a colleague lay a foundation for a tape recording.

Q) Agent Hartman, I'll show you what's been marked for identification as exhibit # 1. Do you recognize it?
A) Yes.
Q) What is it?
A) It's a cassette tape of a telephone conversation I had with the defendant on December 14, 1987.
Q) How do you know that?
A) After I taped the call, I wrote my initials on the cassette, played it once, and then stored it in my evidence locker until today.
Q) Does this tape, exhibit # 1, accurately reflect your phone conversation with the defendant on December 14, 1987?
A) Yes.
Proponent: Your honor, I move exhibit # 1 into evidence and request permission to play it for the jury.
Judge: It is admitted and you can play it for the jury.

The elegance and simplicity of that foundation, regarding what some novices might consider a rather imposing piece of evidence, made evidence clear to me.

In short, the proponent had demonstrated that the tape was *reliable*. The witness had personal knowledge of its contents, had confirmed its accuracy, and had maintained the tape's chain of custody. The tape was an accurate recording of the phone conversation. Reliability is the core element that the proponent must prove as to every item of evidence. Obviously, foundations vary between items of evidence, but the proponent must always be thinking, "How am I going to demonstrate that this item is reliable?"

Lay Your Foundation, and Then Move Your Exhibit Into Evidence

Assuming you've laid the proper foundation for the exhibit, move it into evidence. Too often, judges see attorneys lay a foundation for an exhibit and either move on, or do something inappropriate, such as publishing an object for the jury or asking the witness to read from a document.

Once you've moved your physical exhibit into evidence, with the judge's permission, you can show it the jury. Also, once you've moved your document into evidence, your witness can refer to it and read it out loud.

Effect on the Listener (It Only Sounds Like Hearsay)

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[2] An out-of-court statement not offered to "prove the truth of the matter asserted" is not hearsay. Consider the following:

Q) Officer, what happened on January 2, 2002, at about 1:00 p.m.?

A) My dispatcher called me on my radio and told me to drive to 4th and Locust because there had been a serious auto accident.

Opponent: "Objection, hearsay."

Proponent: "Your honor, I'm not offering it to show that there was a serious accident [the truth of the matter asserted] but rather to show why the officer went to that location."

This is a classic example of a statement that is being introduced for it's "effect on the listener," or, in normal words, to show *why* the person did what he did.[3] If the testimony is offered for this purpose, it's not hearsay, it's actually not even evidence. It's simply foundational for what occurred next.

Another example, a cross-examination:

Q) So, you sent your informant into the house to buy cocaine, right?
A) Yes.
Q) And when she came out of the house did you search her?
A) Yes.
Q) And what did you find?
A) A baggie containing six rocks of crack cocaine.
Q) You didn't search your informant before sending her into the house, did you?
A) No.
Q) Why not, isn't that standard procedure?
A) Yes it is – but my partner told me she searched her.

Opponent: Your honor, her answer contains hearsay. I object and move to strike it as such.

Proponent: Your honor, the answer is not meant to assert the truth of her partner's statement [that her partner searched the informant], but rather to explain why she didn't search the informant.

That objection should be overruled. Plus, this illustrates another important rule: be very careful about asking a question when you don't know the answer.

The biggest danger with this kind of testimony is that it may be a way for an attorney to introduce evidence through the back door. As the opponent of such testimony, take care to ensure that the statement is truly being offered for a non-hearsay purpose, that the statement is relevant to that purpose, and that the statement is not otherwise overly prejudicial. Depending on the significance or prejudicial impact of the statement, a judge may wish to strike the answer or give the jury a limiting instruction explaining their appropriate use of the statement.

Every Document Is Hearsay (Unless It Is Excepted)

Every piece of paper that contains writings or diagrams is hearsay. Feel free to reread that sentence. Of course, there are numerous exceptions to this general rule. Attorneys need to know all those rules and a thorough discussion of them is beyond the purpose of this article.

Whenever I see an attorney with a piece of paper in his hand stand up and start walking toward the witness I think, "Where is he going, and what does he think he is going to do – in *my* courtroom – with that piece of hearsay?" And you, the opponent of the evidence, should too. An alarm should go off in your head, "Oh my god, he's carrying hearsay to the witness stand. I have to stop him." A bigger problem arises when,

without objection, the attorney shows the witness the piece of hearsay and asks the witness to read the hearsay out loud. That should never happen.

Business Records (Records of Regularly Conducted Activities)

Documentary evidence intimidates many attorneys. This type of evidence takes many forms and a discussion of the numerous types of documents and their respective foundations is beyond the purpose of this article. Business records, though, are the most common type of documentary evidence. To introduce business records, the following foundation should satisfy even the most persnickety judge:

1) Ms. Jones, where are you employed?
2) Please explain your duties at that company.
3) Through the course of your duties are you familiar with the books and records of that company, and the system by which they are created and kept?
4) I am showing you what has been marked as exhibit # 1. Do you recognize this document?
5) Is this a record from your company?
6) Is it the routine practice of your company to create such records?
7) Was this document created by an employee of your company?
8) Did the employee have personal knowledge of the facts described in that record?
9) Did the employee have a duty to create that record?
10) Is it the practice of your company that its employees are to create such records at or shortly after the occurrence of the facts or events reflected in the record?
11) Is this document kept and maintained in the record-keeping system of your company?
12) Does your company rely on the accuracy of records such as this one?
13) Are the records accurate?

Now, move that reliable exhibit into evidence. With this foundation, the record or memorandum should be admitted and, unless hearsay within hearsay issues exist, the witness can read the document to the jury and testify to its details.

Obviously, this is an exhaustive foundation. Many judges, appropriately, are satisfied with much less.[4]

Refreshing Your Witness's Memory

Under the doctrine of present recollection refreshed, a witness may look at a document or other item to refresh his memory and then, based on his refreshed memory, may testify in his own words. A key requirement in this doctrine is that the witness had a memory of the events to which he is testifying. To refresh a witness's memory, there must exist a memory to refresh. The risk here is that through this procedure the proponent is "planting" the information into the witness's blank memory.

An attorney can use *anything* to jog the witness's memory. The following colloquy will ensure that you never forget that rule:

Q) Were you at the corner of 4th and Locust at 1:00 p.m on January 2, 2002?
A) Yes.
Q) Did you see something happen?

A) Yes.
Q) Do you recall what you saw?
A) No.
Q) Would anything refresh your memory as to what you saw?
A) Yes.
Q) And what would refresh your memory?
A) The sole of your shoe.

[The attorney takes off his shoe, shows it to opposing counsel, asks the court's permission to approach the witness with the shoe, and then shows it to the witness. The witness examines the bottom of the shoe for a moment and then hands it back to the attorney. The shoe need not be marked as an exhibit.]

Q) Now, does that refresh your memory about what you saw at the corner of 4th and Locust at 1:00 p.m on January 2, 2002?
A) Yes.
Q) What did you see?
A) I saw the defendant drive straight through a red light and slam into your client's car.

Past Recollection Recorded (When Refreshing Your Witness's Memory Didn't Work)

For some reason or another, the bottom of your shoe did not refresh your witness's memory of the event. Let's say the witness also created a memorandum that day recording what he saw. But, although you presented him with that memorandum, it did not refresh his memory to the extent that he could testify *independent* of the document.

The proponent of a document may introduce the item through the witness who authored the document or relayed to another the facts reflected in the document if the witness can no longer recall the events reflected in the document and review of the document does not sufficiently refresh the witness's memory of the events.[5]

There are four elements to establish the admissibility of a document as a past recollection recorded:[6]

1) The witness must once have known about the matter that is recorded in the document;
2) The witness must have insufficient present memory about the event to permit full and accurate disclosure;
3) The document must have been made when the matter was fresh in the witness's mind; and
4) The document must accurately reflect what the witness once knew.

The proponent of the evidence should use this rule to admit the document when refreshing the memory of the witness is insufficient for the witness to then testify. It is erroneous to admit the document if the witness can independently recall the facts or has refreshed his memory (as described above) by reference to the document.[7]

Prior Consistent Statements Are Rarely Admissible

Occasionally, trial court judges hear an attorney who is attempting to introduce a prior consistent statement or prior written report of a witness argue that such evidence is admissible "because the witness is here and is available to be cross-examined" regarding the statement or report. This argument is erroneous. Prior consistent statements or prior reports of the testifying witness, with nothing more, are inadmissible hearsay.[8]

A prior statement or prior written report of a witness is admissible and is outside the hearsay rule under Wis. Stat. § 908.01(4)(a) in three limited circumstances: for impeachment when the prior statement (or report) is *inconsistent* with the testimony of the witness; the prior testimony is *consistent* but is offered to rebut a charge of recent fabrication or improper influence or motive; or, the statement is one of identification of a person made soon after seeing the person.

Opinions

A lay witness can give an opinion that is "rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue."[9] Again, foundation is key. Always think, what is the basis for this person's opinion on the matter? How do they know this? In addition to her observations, the person's life experiences and general knowledge are key considerations here.[10]

Lay testimony must be based upon the person's own perceptions. An individual may not give an opinion that is formed in whole, or even in part, from information outside of her personal observations. So, if a lay witness forms an opinion based in part on what someone told her, or from documents she was shown at trial, that opinion should not be admissible.[11]

"If scientific, technical, or other specialized knowledge will assist" the jury to understand the evidence or an issue, then an expert in the particular area may testify by opinion.[12] The standard here is quite simple: specialized knowledge that will help the jury understand the evidence.[13] As always, foundation is everything. The following is sufficient:[14]

1) The witness is qualified as an expert by knowledge, skill, experience, training, or education in a certain scientific, technical, or other specialized field;
2) The witness is aware of certain facts in the case, either acquired by his own investigation, testing, observations, or otherwise, or made known to him at or before the hearing in which his testimony is offered;
3) On the basis of those facts the witness has formed an opinion; and
4) The expert's opinion will assist the jury to understand the evidence or to determine a fact in issue.

"If of a type reasonably relied upon by experts in the particular field . . . the facts or data need not be admissible in evidence."[15] Thus, even if an expert's opinion is based in whole or in part on inadmissible hearsay, the opinion is admissible.[16] However, despite forming the basis for all or part of the expert's opinion, generally, the hearsay information remains inadmissible.[17]

Impeachment

Countless articles and numerous books have been written about impeachment and cross-examination. The following is meant as a brief summary of the avenues of impeachment and the evidentiary rules that govern them.

There are three main avenues of impeachment that are limited by the scope of the direct examination: 1) the witness's ability to perceive the events to which he has testified; 2) the witness's memory of the events to which he has testified; and 3) the witness's prior inconsistent statements concerning the events to which he has testified.

There are three main avenues of impeachment that are not limited by the scope of the direct examination and which may be proved through extrinsic evidence: 1) the witness's *bias* toward a party, *motive* to fabricate, and *interest* in the outcome; 2) the witness's prior criminal convictions; and 3) the witness's reputation for truthfulness.

As stated, an attorney may attack the credibility of a witness by introducing opinion or reputation testimony concerning the witness's character for truthfulness or untruthfulness.[18] Except for a defendant in a criminal case who testifies in his own behalf, an attorney can introduce evidence of a witness's truthful character only after the witness's character for truthfulness has been already attacked.[19]

Outside of evidence of criminal convictions,[20] an attorney may not present extrinsic evidence of specific bad acts of a witness in order to attack that witness's credibility.[21] If, however, the bad act involved untruthfulness or dishonesty, the attorney may question the witness about the incident. To illustrate the operation of that rule, consider the following:

Q) What color was the light when you drove through it.
A) The light was green. I had the right-of-way.
Q) Fine. Isn't it true sir, that last year you defrauded the IRS by failing to disclose the income from your part-time job on your tax return.
A) No. I disclosed that income on my tax return.

First of all, to ask that question, the attorney must have a good-faith basis that he is correct, that is, that he can prove it. Second, the attorney is stuck with the witness's answer. So, even if you have an IRS agent in the waiting room clutching the false tax return, you cannot call him to the stand. The agent's testimony is collateral to the case – that is, exclusive of impeaching the witness, testimony about the false tax return is not a matter in issue in this auto-accident trial.[22]

Character evidence not relevant to the witness's truthfulness or honesty is generally inadmissible.[23] However, in appropriate circumstances, it may be admissible to prove issues "such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[24] A full discussion of these avenues of admissibility is outside the purpose of this article.

Finally, if your own witness goes south on you, you can impeach him just as you would any other witness.[25]

The Balancing Test

Relevance is always the threshold inquiry when evaluating the admissibility of an item of evidence. Wis. Stat. § 904.01 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Relevant evidence is ordinarily admissible evidence. But not always.

The most important limitation on the use of relevant evidence is set forth in Wis. Stat. § 904.03. That statute, the "balancing test," provides in part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." In *State v. Sullivan*,[26] the supreme court expanded upon the statutory test stating that "unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established proposition in the case."

Attorneys must always be prepared to argue the balancing test. The thoughtful, seasoned attorney – whether the proponent or opponent of the evidence – will always mentally filter the testimony or item of evidence through this test.

Maintain Your Poker Face

Never let the jury see you flustered or rattled. If they see that, you risk losing your credibility, and their respect. Never mind that the judge just sustained your opponent's last five objections, and that you still have no idea how to lay the proper foundation to admit the videotape of the car accident, act like everything is normal and proceeding exactly as you expected. Ignore, as best you can, the voice screaming inside of you.

Treat Everyone With Respect

The jurors are always watching you. Your witness may be fascinating, but still, the juror's are scrutinizing you, the attorney. They want to know that you are a good person. They want to like you. They want to know you are a person they can believe. And, they want to know you are telling them the truth.

At all times, treat the court with respect, treat opposing counsel with respect, and, with rare exceptions (such as when you catch the witness in a lie), treat the witnesses with respect.

A little while ago, a colleague spoke to me about one of his recent jury trials, a termination of parental rights case. The State prevailed, but, he said that the facts were very close, and that the case could have been decided either way. He was impressed, however, by the kind and respectful way the Assistant District Attorney treated the mother during his cross examination and summation. The mother had many, many failings as a parent, but at all times, this attorney treated her with patience and allowed her to maintain her dignity. This judge opined that the State prevailed because this prosecutor was sensitive to the mother's predicament and the events that had brought her to such a sad point in her life.

I know this attorney. He wasn't putting on a show or playing to the jury. He treated the witness in that manner because he is a good person. And the jury sensed that, and then, ultimately, they knew that. So when he stood up in closing argument to tell the jury what the facts were and what their verdict should be, they knew that he, the most credible witness in the trial, was telling them the truth.

So, always be respectful. And, as often as you can, be kind.[27]

Endnotes

1. Edna Selan Epstein, *Motions in Limine – A Primer, in* THE LITIGATION MANUAL 685, 685 (John G. Koeltl ed., 2nd ed. 1989).
2. Wis. Stat. § 908.01(3).
3. Other non-hearsay uses include out-of-court statements to prove state of mind and out-of-court statements that have independent legal significance, such as the words exchanged in reaching a contract.
4. Much more simply, a business record is: 1) a record of events, 2) made at or about the time of the event, 3) by a person with knowledge, 4) who had a duty to record the event, and 5) maintained in the ordinary course of a regularly conducted activity.
5. Wis. Stat. § 908.03(5).
6. *State v. Jenkins*, 168 Wis. 2d 175, 194, 483 N.W. 2d 262 (Ct. App. 1992).
7. *State v. Keith*, 216 Wis. 2d 61, 75, 573 N.W. 2d 888 (Ct. App. 1997).
8. *See State v. Meehan*, 244 Wis. 2d 121, 140, 630 N.W. 2d 722 (Ct. App. 2001) (court committed reversible error in allowing prosecutor to read witness's prior consistent testimony to the jury); *Green v. State*, 75 Wis. 2d 631, 639-40, 250 N.W. 2d 305 (1977) (finding erroneous the admission of the witness's prior consistent statement since it served only to bolster improperly the credibility of the witness). *But see State v. Gershon*, 114 Wis. 2d 8, 11-12, 337 N.W. 2d 460 (Ct. App. 1983) ("Because the challenged testimony was offered on the issue of the child's credibility, it is not hearsay evidence."); MCCORMICK ON EVIDENCE at 120 (Edward Cleary ed., 3rd ed. 1984) (If the attack on the witness's statement is "an imputation of inaccurate memory" then "the consistent statement made when the event was recent and memory was fresh should be received in support. . . . Under a broader viewpoint the judge has at least practical discretion under Rule [904.01] to determine whether any particular circumstances justify admission of consistent statements to rehabilitate the witness."). The thrust of *Gershon* and McCormick on this point is that the prior consistent statement is not being introduced as substantive evidence but rather to rehabilitate the witness.
9. Wis. Stat. § 907.01.
10. *See Patterman v. Patterman*, 173 Wis. 2d 143, 152, 496 N.W. 2d 613, 616 (Ct. App. 1992).
11. *See Ansani v. Cascade Mountain, Inc.*, 223 Wis. 2d 39, 57, 588 N.W. 2d 321 (Ct. App. 1998). *But see United States v. Garcia*, 994 F.2d 1499, 1506-07 (10th Cir. 1993) (Admitting opinion of FBI language specialist who translated ten phone conversations between drug co-conspirators. The phone conversations were admissible and the witness provided his opinion as to the meaning of a reference in one of the conversations. Arguably, since the witness's perception was limited only to what he heard in the conversations, his opinion still falls within the strict limits of the rule.).
12. Wis. Stat. § 907.02.
13. "That a lay witness of ordinary intelligence may also understand the subject matter does not mean that the opinion of the expert" would not help the trier of fact. *State v. Watson*, 227 Wis. 2d 167, 187, 595 N.W. 2d 403 (1999).
14. J. RANDOLPH MANEY, JR.& RUTH E. LUCAS, COURTROOM EVIDENCE 133 (1998).
15. Wis. Stat. § 907.03.
16. *Watson*, 227 Wis. 2d at 195.
17. *State v. Weber*, 174 Wis. 2d 98, 108, 496 N.W. 2d 762 (Ct. App. 1993). For a thorough discussion on this point, including the exceptions to the general rule, see footnote 6 of the *Weber* decision.
18. Wis. Stat. § 906.08(1)(a).
19. Wis. Stat. § 906.08(1)(b).

20. *See* Wis. Stat. § 906.09. If the court allows evidence of a witness's prior convictions, the witness may be asked if they have been convicted of a crime, and, if so, the number of convictions. The impeaching party cannot inquire into the nature of the convictions.
State v. Smith, 203 Wis. 2d 288, 294-95, 553 N.W.2d 824 (Ct. App. 1996).
21. Wis. Stat. § 906.08(2).
22. *See State v. Gulrud*, 140 Wis. 2d 721, 733, 412 N.W. 2d 139 (Ct. App. 1987) (reaffirming Wigmore's analysis that "a matter is collateral if it does not meet the following test: 'Could the fact . . . have been shown in evidence for any purpose independent of the contradiction.'").
23. Wis. Stat. § 904.04(1) & (1)(c).
24. Wis. Stat. § 904.04(2).
25. Wis. Stat. § 906.07 provides that: "The credibility of a witness may be attacked by any party, including the party calling the witness."
26. 216 Wis. 2d 768, 789-90, 576 N.W.2d 30 (1998).
27. "Be kind, for everyone you meet is fighting a hard battle." – Philo
"One thing I've learned: Unexpected kindness is the most powerful, least costly, and most underrated agent of human change. Kindness that catches us by surprise brings out the best in our natures."– Bob Kerrey ■