

## **4. RELEVANCE**

### **A. The Relevance Rule**

The most basic rule of evidence is that it must be relevant to the case. Irrelevant evidence should be excluded. If we are trying a bank robbery case, the witnesses should talk about the robbery and not whether the banks are in a conspiracy to make obscene profits on high-risk mortgages and are paying off Hillary Clinton.

1. Rule 401 creates a two-part definition for relevant evidence. It must have a tendency to prove or disprove a fact, and that fact must be of consequence in determining the action. The former is a minimal standard and any evidence that a sane attorney thinks will be helpful presumptively has some probative value. The latter is a legal standard -- if the law of torts holds the owner of a dangerous wild animal to strict liability if the animal escapes, then facts about what safety precautions the owner took are not of any consequence to the determination of liability. In civil cases, the issues that legally disputed are defined in large part by the pleadings, and facts that have been admitted are no longer of consequence to the action.

2. Rule 402 makes irrelevant evidence inadmissible and relevant evidence admissible unless other rules exclude it. We will spend most of the course discussing all those “other rules” that affect the admissibility of evidence.

3. It will turn out that most evidence objected to as irrelevant actually has a little probative value rather than absolutely zero. Such evidence is more properly objected to under Rule 403, which gives the judge discretion to exclude such evidence as a waste of time or distraction to the jury. However, to make an argument under Rule 403, you have to be able to articulate why evidence has little or no probative value, so we will begin by looking just at the relevancy side of the equation.

4. All relevancy arguments boil down to logic and common sense. Will the evidence help the jury in some small way to reach a good decision, either by itself or in conjunction with other evidence.

### **B. Some Common Relevancy Issues**

#### **1. Remoteness in Time or Place**

Remoteness in time or place reduces relevancy. Events taking place at times or locations distant from the event at issue are of little or no relevancy. For example:

- A photo of the defendant with a gun is more relevant if taken the day before a shooting than a year before.
- An act of domestic violence between the victim and her boyfriend is more relevant if two weeks before she was killed than if it were three years before and they had been to

counseling in the meantime.

- It is more relevant if the defendant's car was seen driving slowly down the victim's street than if it had been seen driving slowly down a street a mile away.

## 2. Prior similar events

The similarity of a prior event affects relevancy. Prior events involving different people or objects are of little or no relevancy, e.g.:

- Prior acts of domestic violence between the defendant and victim are more relevant than prior violence between the defendant and a previous girlfriend.
- Previous times when the victim threatened the defendant are more relevant to show the need for self-defense than incidents when the victim threatened other people.
- Other incidents in which Takata airbags failed to inflate in a BMW 3-series involved in head-on collisions are more relevant than other times a Takata airbag failed to inflate in a Chevy Silverado hit from the side.

## 3. Tangential issues

In most cases, not all legal issues are equally contested. Evidence that tends to prove tangential issues is less relevant. E.g.,

- DNA evidence is more relevant if the defendant claims mistaken identify than if he claims self-defense.
- Evidence that there have been over 100 incidents in which Takata airbags failed to inflate is more relevant if Takata is denying that plaintiff's airbag was defective than if it is claiming its defective airbag did not cause this particular plaintiff's injuries.

## 4. Circumstantial evidence

The relevancy of circumstantial evidence depends on the degree of similarity. For example:

- If a bank was robbed of one hundred \$20 bills, it is more relevant if the suspect is found with ninety-eight \$20 bills and a bottle of Jack Daniels than if he is found with six \$20 bills.
- A fingerprint found at the scene with 18 points of similarity to the defendant's print is more relevant than a smeared print with only 5 points of similarity.

## 5. Conditional Relevance

Sometimes the relevancy of evidence depends on a connecting fact being true. For example, evidence that a homicide victim once accused the defendant's brother of child molesting is relevant to prove the defendant's motive only if the defendant knew about the accusation. In these circumstances, the existence of the connecting fact must be proved, usually by a preponderance of evidence. It is within the judge's discretion to admit the evidence before the connecting fact has been proved, upon the attorney's promise to connect it up later. At the time a party offers evidence subject to connecting it up later, the party should make an offer of proof as to exactly what subsequent evidence will show relevance.

## 6. Opening the Door

Evidence of little or no value may become more relevant if the opponent opens the door by raising the issue, especially if doing so may leave the trier of fact with a false or misleading impression. The matter is commonly “placed in issue” by witness testimony. For example, if Bill Cosby’s defense goes beyond denying that he drugged and had sex with the particular victim in the present case, and presents his physician to testify that he never prescribed any quaaludes for Cosby, and calls Cosby’s wife to say there were never any quaaludes in their home, they may have opened the door to testimony from other women that he gave quaaludes to them at his home. Counsel may also open the door to otherwise inadmissible evidence by raising an issue in opening statement. *See Marshall v. State*, 893 N.E.2d 1170, 1176 (Ind. Ct. App. 2008) (defense in opening statement said that a witness had previously accused the defendant of child molestation in Tennessee but then recanted, allowed the prosecutor to show that the defendant had intimidated the witness into recanting).

## 7. Guilty Acts and Incriminating Behavior

(A) *General rule*. Evidence that a person hid or destroyed evidence, tried to avoid capture, or otherwise behaved as if he or she had a guilty conscience, is usually admissible for the negative inference that the person had something incriminating to hide. The rule applies in both criminal and civil cases.

(B) *Flight*. Evidence that a defendant took flight after a crime, attempted to avoid detection, or tried to escape from custody, is admissible to show consciousness of guilt. A foundation is required showing that defendant was under arrest or otherwise knew he was a suspect for the crime. For example:

- Changing appearance.
- Fleeing the state and assuming a false name.
- Escaping from custody.

(C) *Destruction of evidence*. The intentional destruction, spoliation or suppression of evidence by a party is admissible for the inference that the evidence would have been damaging to the party suppressing it. For example:

- Hiding the victim's body.
- Asking wife to burn the clothes he was wearing the night of the crime.

A foundation is required that the party is personally responsible for the destruction of the evidence. In many cases, a defendant's friends and family may try to cover up crime and intimidate witnesses, but that is not admissible unless the state can prove the defendant authorized it.

(D) *Manufacturing evidence*. Proof that a party manufactured exculpatory evidence is

admissible to show consciousness of guilt in a criminal case and consciousness of fault in a civil case. A foundation is required that a party is personally responsible for the creation of the false evidence.

(E) *Threats and intimidation.* Threatening or attempting to intimidate the victim, a witness, or the prosecuting attorney, is admissible if a foundation can be laid showing that the threats were made or authorized by the defendant. Threats may be verbal or physical. *See Connell v. State*, 470 N.E.2d 701, 705 (Ind. 1984) (defendant fired gunshots at home of witness). The rule applies in civil cases also, and threats against potential witnesses are admissible as tending to show consciousness of the weakness of a party's case. However, the conduct must truly constitute a threat to be admissible. *See Cain v. Back*, 889 N.E.2d 1253, 1263-65 (Ind. Ct. App. 2008) (letter written by plaintiff's counsel to two doctors who had formerly treated plaintiff warning them that they were precluded from assisting the defense did not threaten or try to intimidate them and were not admissible).

## 8. Motives.

(a) *Criminal defendants.* It is always relevant for the state to prove that the defendant had a motive for committing a crime.

(b) *Civil defendants.* Evidence of the motive of a civil defendant in an intentional tort case is also admissible, but evidence of motives in negligence cases would not be admissible.

(c) *Victims and accusers.* Criminal defendants should be able to offer evidence of the motives of the alleged victim or third parties accusers to frame or wrongfully accuse the defendant of a crime.

(d) *Police.* Evidence concerning the motives of law enforcement officials, why they conducted the investigation or focused on the defendant, and the course of the investigation is generally irrelevant and prejudicial.

## 9. Mental Condition and Mens Rea

(1) *Insanity defenses.* When a defendant pleads insanity, all evidence casting light on his mental state and the history of his mental condition is relevant and admissible.

(2) *Intoxication defense.* Evidence of intoxication is not relevant to negate mens rea, because voluntary intoxication is not a defense.

(3) *Victim's fear of defendant.* In a homicide or battery case, the victim's state of mind (fear of the defendant) is not relevant unless the defendant places it in issue by specifically claiming he and victim had a good relationship.

(4) *Defendant's fear of victim.* Evidence of the defendant's fear and apprehension of the victim is admissible in a self-defense case. In self-defense cases, testimony by the defendant as to his apprehension that the victim was reaching for a weapon, and corroborating testimony by witnesses that they also thought the victim was reaching for a weapon, are both relevant.

(5) *Defendant's mental state in negligence cases.* Because negligence is measured against a reasonable person standard, whether the particular defendant intended the result, or was

confused, are not relevant.

#### 10. Backgrounds and Relationships Among Parties

(A) *Witness background.* At the beginning of direct examination, the background of the witness and the events leading up to the witness's involvement in the case may be brought out, subject to the rule against bolstering a witness's good character. Unfavorable background facts such as a criminal record may be brought out and explained on direct examination to “take the wind out of the cross-examination.”

(B) *Relationships among parties.* It is generally permissible to describe the prior relationships among the witnesses and parties, even if it involves acts of violence or bad character. *See Smith v. State*, 891 N.E.2d 163, 171-72 (Ind. Ct. App. 2008) (history of domestic violence and abuse between defendant and victim admissible to show the deteriorating relationship between them leading up to murder of wife).

#### 11. Evidence That Someone Else Committed the Crime.

(A) *In general.* The defendant in a criminal case may offer evidence that a third-party committed the crime for which he is charged. Such evidence is relevant because it tends to reduce the likelihood that the defendant committed the act. Defense evidence, like the state's evidence, need only meet the basic test of relevancy -- whether it has “any tendency” to prove or disprove an issue. Although the evidence must show some direct connection between the third person and the crime, there is no enhanced relevancy standard requiring the evidence to be particularly strong, nor is there a relaxed standard favoring the defense.

(B) *Motive.* Evidence that a third party had a motive to commit the crime, standing alone, is too speculative to be admissible. There must be some other evidence connecting that third party with the crime.