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Edward J. Imwinkleried

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# THE PRETRIAL IMPORTANCE AND ADAPTATION OF THE "TRIAL" EVIDENCE RULES

*Edward J. Imwinkelried\**

*In big litigation today, pre-trial is the trial.*<sup>1</sup>

This symposium poses the question, "Does evidence law matter?" The question is an ambiguous one.<sup>2</sup> The diverse interpretations of this topic by the various contributing authors reinforce the wisdom of Voltaire's teaching that if we are to conduct a rational discourse about a potentially ambiguous topic, we must first define our terms.<sup>3</sup>

The first term in need of definition is "evidence law." For the purposes of this paper, "evidence law" is the common-law and statutory exclusionary rules of evidence—rules such as the hearsay and opinion doctrines, which operate to exclude logically relevant evidence. Dean Wigmore points out that our extensive set of exclusionary rules distinguishes Anglo-American evidence law.<sup>4</sup> In this century the English have substantially liberalized their admissibility standards,<sup>5</sup> leaving the United States with the dubious distinction of enforcing "the most complex, restrictive set of [exclusionary] evidentiary rules in the world."<sup>6</sup>

The next term requiring definition is "matter." In the context of this Essay, what do we mean when we say that an exclusionary rule "matters"? The dictionary tells us that when "matter" is used as a verb, its most common meaning is "to be of importance."<sup>7</sup> If we define "evidence law" and "matter" in this fashion, the question then becomes

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\* Professor of Law, University of California, Davis; former Chair, Evidence Section, American Association of Law Schools; B.A., 1967; J.D., 1969, San Francisco.

1. Charles Maher, *Discovery Abuse*, 4 CAL. LAW. 44, 46 (1984) (quoting Professor Geoffrey Hazard, Jr.).

2. See, e.g., Ann Althouse, *Thelma and Louise and the Law*, 25 LOY. L.A. L. REV. 757, 760-62 (1992) (addressing whether rape shield rules matter); Victor J. Gold, *Do the Federal Rules of Evidence Matter*, 25 LOY. L.A. L. REV. 909, 909-10 (1992) (discussing whether witness competency and impeachment rules matter).

3. THE HOME BOOK OF QUOTATIONS: CLASSICAL AND MODERN 428 (Burton Stevenson ed., 10th ed. 1967) ("If you wish to converse with me, define your terms.").

4. CHARLES T. MCCORMICK, EVIDENCE § 244, at 724 (3d ed. 1984).

5. R. A. Clark, *The Changing Face of the Rule Against Hearsay in English Law*, 21 AKRON L. REV. 67, 72 (1987); Di Birch, *The Evidence Provisions*, 1989 THE CRIM. L. REV. 15.

6. RONALD CARLSON ET AL., EVIDENCE IN THE NINETIES 3 (3d ed. 1991).

7. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1394 (1976).

whether the exclusionary evidentiary rules affect the outcome of cases litigated in the United States.

Of course at some stages in the processing of a case, federal evidence law is not designed to "matter." For instance, Rule of Evidence 1101(d)(2) specifically states that the exclusionary doctrines announced by the Federal Rules do not apply to grand jury hearings.<sup>8</sup> Rule 1101(d)(3) is equally explicit and states that the exclusionary rules are inapplicable to "[p]roceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise."<sup>9</sup> Relaxed admissibility standards are permissible at these proceedings because the tribunal stops short of making final judgments on the questions of liability and guilt.

With these exceptions, however, the exclusionary rules set out in the Federal Rules "apply generally to civil actions and proceedings . . . [and] to criminal cases and proceedings."<sup>10</sup> Thus, at trials and pretrial proceedings, the exclusionary rules apply because the tribunal is empowered to make final judgments about the merits of the case. At these proceedings, evidence law is supposed to matter. The issue that naturally arises is whether the exclusionary rules *really* "matter" even at these proceedings. Do the exclusionary rules have a marked impact on the outcome of these proceedings?

The sad truth is that the question cannot be answered absolutely. In 1971—in one of the initial issues of this law review—Professor Kenneth Graham of UCLA Law School bemoaned the lack of hard data on the operative effect of the American exclusionary rules.<sup>11</sup> Two decades later, his UCLA colleague, Professor Paul Bergman reported that the necessary empirical data base remains virtually nonexistent.<sup>12</sup> Worse still, as Bergman noted, there is no realistic likelihood of such a data base in the foreseeable future.<sup>13</sup> In Professor Graham's words, if we attempted to determine the absolute effect of the exclusionary rules, we would perforce rely on "an exchange of anecdotes rather than any intelligent discussion

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8. FED. R. EVID. 1101(d)(2).

9. FED. R. EVID. 1101(d)(3).

10. FED. R. EVID. 1101(b).

11. Kenneth W. Graham, Jr., *California's "Restatement" of Evidence: Some Reflections on Appellate Repair of the Codification Fiasco*, 4 LOY. L.A. L. REV. 279, 280 (1971).

12. Paul Bergman, *Of Bentham, Wigmore, and Little Bo Peep: Where Evidence Lost Its Way, and A Map for Scholars to Find It*, 66 NOTRE DAME L. REV. 949, 958 (1991).

13. *Id.* at 963.

on the effect of the rules in the trial of cases."<sup>14</sup>

Yet we can make some confident generalizations about the relative importance of evidence law at the various stages of legal proceedings. At which stage does evidence law "matter" most? Although we are accustomed to thinking of the exclusionary rules as "trial" evidence doctrines,<sup>15</sup> the thesis of this Essay is that modern evidence law matters most at pretrial stages, such as hearings on summary judgment and *in limine* motions. Accordingly, the first section of this Essay describes the conditions for maximizing the impact of evidence law, that is, the conditions under which the exclusionary rules have their greatest effect. The second section argues that those conditions are present at pretrial proceedings, such as summary judgment motions, to a greater extent than they are at trial. The third section speculates about the possible long-term impact of the emergence of pretrial hearings as the stage of litigation most profoundly affected by evidence law. This emergence may and should lead to a modification of evidence law itself.

## I. THE CONDITIONS FOR MAXIMIZING THE IMPACT OF EVIDENCE LAW

If evidence law is to "matter" at a particular stage in a legal proceeding, it is necessary, but not sufficient, that the exclusionary rules formally apply at that stage. Even if the hearsay rule is technically applicable to a particular stage under Federal Rule 1101(b), the rule may have no significant impact on the outcome of the hearing; the participants—the judge and attorneys—may be unwilling or unable to enforce the rule at that stage. What set of conditions would maximize their motivation and their ability to enforce exclusionary rules such as the hearsay doctrine?

### A. *The Role of the Party Entitled to Invoke the Exclusionary Rule*

Before the exclusionary rule can "matter" at a particular hearing, the party entitled to invoke the exclusionary rule must have both the time and the motivation to voice an objection based on the rule. Some exclusionary objections are difficult to recognize. The common-law Mor-

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14. Graham, *supra* note 11, at 280.

15. The text writers often allude to "trial" evidence law in the very titles of their works. ANTHONY J. BOCCHINO, *TRIAL EVIDENCE: MAKING AND MEETING OBJECTIONS* (1986); EDWIN C. CONRAD, *MODERN TRIAL EVIDENCE* (1956) (2 vols.); MARK A. DOMBROFF, *TRIAL OBJECTIONS* (1985); JOHN C. O'BRIEN & ROGER L. GOLDMAN, *FEDERAL CRIMINAL TRIAL EVIDENCE* (1989); GEORGE B. RICHTER, *EVIDENTIARY TRIAL OBJECTIONS* (1984); CHARLES E. WAGNER, *1 FEDERAL TRIAL EVIDENCE* (rev. ed. 1990).

gan hearsay or "implied assertion" objection is a case in point. Under this doctrine, the hearsay definition includes nonverbal conduct actuated by a belief when the conduct is offered as evidence of the truth of the belief.<sup>16</sup>

In the leading case, *Wright v. Tatham*,<sup>17</sup> the question presented was whether a decedent, John Marsden, was mentally competent when he executed his will. The proponent of the will offered as evidence the fact that some of Marsden's acquaintances sent serious letters to him.<sup>18</sup> Their act of sending the letters was prompted by their belief that Marsden was mentally competent, as they obviously would not have gone to the trouble to send the letters unless they thought he was capable of understanding their content.<sup>19</sup> The proponent reasoned that if Marsden's acquaintances sent him serious letters, their conduct was some evidence of Marsden's competence.<sup>20</sup> The English court held that the evidence was hearsay; the opponent did not have an opportunity to question the acquaintances about their perception and memory.<sup>21</sup>

This decision underscores a longstanding controversy about whether the hearsay definition should reach this far. The drafters of the Federal Rules of Evidence answered the question in the negative.<sup>22</sup> One of the principal arguments against Morgan hearsay is that practitioners have difficulty recognizing the objection. The issue is so subtle that "more often than not [the objection is] simply . . . overlooked."<sup>23</sup> Thus, although the exclusionary rules vary in their complexity, some are so challenging that without time to carefully analyze the evidence, the party entitled to invoke an exclusionary rule may inadvertently waive the objection.

Furthermore, even if the party recognizes the objection, the party may have a disincentive to make the objection. Conventional wisdom mandates that a trial attorney not raise every possible objection,<sup>24</sup> particularly in the presence of a lay juror:

The more often you object, the greater is the risk that you will

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16. MCCORMICK, *supra* note 4, § 250.

17. 112 Eng. Rep. 488, 489 (Ex. Ch. 1837).

18. *Id.* at 501.

19. *See id.*

20. *See id.*

21. *See id.* at 511.

22. FED. R. EVID. 801(a).

23. MCCORMICK, *supra* note 4, at 739-40; *see also* Roger C. Park, "I Didn't Tell Them Anything About You": Implied Assertions as Hearsay Under the Federal Rules of Evidence, 74 MINN. L. REV. 783, 802 (1990) (there are very few reported cases on this question).

24. John C. Conti, *Trial Objections*, 14 LITIG. 16, 17 (1987).

alienate the jury; they may conclude that you are trying to suppress the truth. . . . [S]uppose that the probable answer will do only minimal damage to your case. Here too many veteran trial attorneys forego the objection. They fear that the argument over the question will only highlight the testimony and heighten the damage.<sup>25</sup>

Thus, even when parties realize that they could cite an exclusionary rule to bar the admission of an item of evidence, they often waive the objection on the theory that an argument over the objection would heighten the damaging impact of the testimony.<sup>26</sup> Hence, even if the item of evidence is excludible and its exclusion could affect the outcome of the hearing, the exclusionary rule will often never come into play.

### *B. The Role of the Presiding Officer Obligated to Enforce the Exclusionary Rule*

The presiding officer, like the party entitled to invoke the exclusionary rule, may be disinclined to enforce the rule. Just as the party may need time to recognize the objection, the judge may need time to assess the proponent's theory of admissibility and the opponent's objection.<sup>27</sup> Further, the judge, like the party, may have a disincentive to apply an exclusionary rule. In a judge's case, the disincentive is usually the fear of reversal. Although it is possible, even during trial, for the judge to delay ruling on the objection, a delay can create administrative difficulties. If the judge recesses the trial to scrutinize the evidence more carefully, the recess may inconvenience the attorneys, witnesses, and jurors by prolonging the trial. Further, if the judge admits the evidence conditionally

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25. RONALD L. CARLSON & EDWARD J. IMWINKELRIED, *DYNAMICS OF TRIAL PRACTICE: PROBLEMS AND MATERIALS* 86-87 (1989).

26. See Virginia Cope, *Can Jurors Ignore Inadmissible Evidence*, 24 TRIAL 80, 81 (1988):

A judge's admonishments to a jury to disregard evidence may actually strengthen the evidence's biasing effects, a new study suggests. Psychologist John Carroll of the Massachusetts Institute of Technology recently completed a study . . . [His] preliminary analysis suggests that judicial instructions make matters worse. . . . [J]urors tend to think, 'The evidence must be even more important if they have to tell me to ignore it.'

*Id.*; see also Michael Allen, *When Jurors Are Ordered to Ignore Testimony, They Ignore the Order*, WALL ST. J., Jan. 25, 1988, at B33 (addressing recent studies indicating jurors not able to filter out forbidden information); Paul Marcotte, *The Jury Will Disregard . . .*, 73 A.B.A. J. 34 (1987) (summarizing recent American Bar Foundation research project calling into question ability of lay jurors to disregard evidence).

27. See, e.g., Edward J. Imwinkelried, *The Worst Surprise of All: No Right to Pretrial Discovery of the Prosecution's Uncharged Misconduct Evidence*, 56 FORDHAM L. REVIEW 247, 255-57 (1987) (issue of admissibility of uncharged misconduct under Federal Rule of Evidence 404(b) can be so complex that judge may need substantial time to reach informed decision).

and later decides that the evidence is inadmissible, the judge may have to declare a mistrial because the jury will have been exposed to inadmissible, perhaps prejudicial, evidence.

The Federal Rules of Evidence themselves are perhaps the most important disincentive to enforcing exclusionary rules because they place more pressure than ever before on the presiding officer to resolve any doubt in favor of admitting the evidence. The Federal Rules have a built-in bias in favor of the introduction of relevant evidence. Rules 401 through 403 embody the bias. Rule 401 contains one of the broadest possible definitions of relevance: "'Relevant evidence' means 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."<sup>28</sup> Notably, Federal Rule 401 does not limit the definition to evidence pertinent to "disputed" questions.<sup>29</sup> Rule 402 adds to Rule 401 by declaring that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority."<sup>30</sup> The statute omits any mention of case or decisional law. There is a strong statutory construction argument that the omission is purposeful, manifesting Congress's intent to deprive the courts of the power to enforce uncodified exclusionary rules.<sup>31</sup> Finally, while Rule 403 authorizes the judge to exclude logically relevant evidence when its probative worth "is substantially outweighed" by attendant probative dangers such as prejudice,<sup>32</sup> that statute also reflects a bias in favor of admissibility. Under Rule 403, the party opposing the admission of relevant evidence has the burden of persuading the judge that the probative dangers outstrip the probative value by a wide margin.<sup>33</sup> Under the regime of the

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28. FED. R. EVID. 401.

29. The absence of such a limitation is not consistent with the evidence rules of other jurisdictions. In California, for instance, relevant evidence includes evidence that proves or disproves any disputed fact. CAL. EVID. CODE § 210 (West 1984); see also FED. R. EVID. 401 advisory committee's note (rule limiting admissibility to evidence directed to controversial point would exclude helpful evidence); Edward J. Imwinkelried, *The Right to "Plead Out" Issues and Block the Admission of Prejudicial Evidence: The Differential Treatment of Civil Litigants and the Criminal Accused as a Denial of Equal Protection*, 40 EMORY L.J. 341, 352 n.59 (1991) (facts to which evidence directed need not be in dispute).

30. FED. R. EVID. 402.

31. Edward J. Imwinkelried, *Federal Rule of Evidence 402: The Second Revolution*, 6 REV. LITIG. 129, 130 (1987).

32. FED. R. EVID. 403.

33. Edward J. Imwinkelried, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465, 1473 (1985). Although a proper reading of Rule 403 and its legislative history leads to allocating the burden

Federal Rules, the judge's mindset must be, "when in doubt, admit."<sup>34</sup>

Yet another factor reinforces this mindset. In 1967, the United States Supreme Court held that the Sixth Amendment guarantees an accused the implied right to present relevant, critical evidence—a right which the accused can invoke to override exclusionary doctrines.<sup>35</sup> Defendants have used this constitutional provision to surmount objections based on witness competency rules,<sup>36</sup> restrictions on scientific evidence,<sup>37</sup> limitations on impeachment,<sup>38</sup> rape shield laws,<sup>39</sup> privileges<sup>40</sup> and the hearsay doctrine.<sup>41</sup> Some commentators have further argued that the courts should recognize an analogous right in civil actions under the procedural due process guarantee.<sup>42</sup> These constitutional rights make the presiding officer still more reticent to enforce exclusionary rules. In

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to the opponent resisting the admission of relevant evidence, until recently some courts tended to continue to enforce the common-law approach of assigning the proponent the risk of non-persuasion. See, e.g., *United States v. Cordell*, 912 F.2d 769, 775 (5th Cir. 1990); *Doty v. Sewall*, 908 F.2d 1053, 1058 (1st Cir. 1990); *United States v. Ross*, 886 F.2d 264, 267 (9th Cir. 1989); see also EDWARD J. IMWINKELRIED, *UNCHARGED MISCONDUCT EVIDENCE* § 8:28 (1984) (stating that some courts continue to place burden of persuasion on proponent). However, the Advisory Committee's note to the 1990 amendment to Federal Rule of Evidence 609(a) should end that tendency. As amended, the face of Rule 609(a) refers to two balancing tests, one peculiar to 609(a), the other the residual balancing test under Rule 403. FED. R. EVID. 609(a). The accompanying Advisory Committee's note specifically states that when the 403 balancing test governs, the party opposing the admission of relevant evidence bears the burden. FED. R. EVID. 609(a) advisory committee's note.

34. Edward J. Imwinkelried, *When in Doubt, Admit*, 10 CAL. LAW. 72, 73 (1990).

35. *Washington v. Texas*, 388 U.S. 14, 19, 22-23 (1967); EDWARD J. IMWINKELRIED, *EXCULPATORY EVIDENCE: THE ACCUSED'S CONSTITUTIONAL RIGHT TO INTRODUCE FAVORABLE EVIDENCE* § 2-2 (1990).

36. E.g., *Washington*, 388 U.S. 14; see also IMWINKELRIED, *supra* note 35, § 4-2, at 83-85 (discussing accused's right to attack incompetency doctrine articulated in *Washington*).

37. E.g., *Rock v. Arkansas*, 483 U.S. 44, 62 (1987); see also IMWINKELRIED, *supra* note 35, § 6-4, 6-5 (discussing right of accused to present evidence regarding testimony based on scientific technique).

38. E.g., *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *Davis v. Alaska*, 415 U.S. 308, 315-18 (1974); *Smith v. Illinois*, 390 U.S. 129, 133 (1968); see also IMWINKELRIED, *supra* note 35, §§ 8-2 to 8-9 (discussing right of accused to override traditional limits on impeachment).

39. E.g., *Olden v. Kentucky*, 488 U.S. 227, 231 (1988); *Davis*, 415 U.S. at 320; see also IMWINKELRIED, *supra* note 35, § 9-4 (discussing right of accused to present evidence otherwise barred by rape shield laws).

40. E.g., *Pennsylvania v. Ritchie*, 480 U.S. 39, 52-54 (1987) (psychotherapist-patient privilege); *United States v. Nixon*, 418 U.S. 683, 711-13 (1974) (executive privilege); *Washington*, 388 U.S. at 23 (attorney-client privilege); see also IMWINKELRIED, *supra* note 35, §§ 10-5, 12-2 (discussing right of accused to present privileged evidence).

41. E.g., *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Rosario v. Kuhlman*, 839 F.2d 918, 924 (2d Cir. 1988); see *Green v. Georgia*, 442 U.S. 95, 97 (1979) (implying application of hearsay rule violation of Sixth Amendment Due Process Clause); see also IMWINKELRIED, *supra* note 35, § 14-2 (discussing right of accused to override hearsay doctrine).

42. Edward J. Imwinkelried, *The Case for Recognizing a New Constitutional Entitlement: The Right to Present Favorable Evidence in Civil Cases*, 1990 UTAH L. REV. 1.



short, the fear of reversal, the constitutional right to present critical evidence and the bias of the Federal Rules themselves create a substantial disincentive to apply exclusionary rules. If the evidentiary question arises unexpectedly and the officer has any substantial doubt about the applicability of the exclusionary rule, the sensible course for the officer is to overrule the objection.

## II. THE MAXIMUM IMPACT OF EXCLUSIONARY EVIDENTIARY RULES AT THE POSTPLEADING, PRETRIAL STAGE

Having listed the conditions under which there is a disincentive to apply exclusionary rules, this Essay will now examine the various stages in the litigation process to identify the stage at which these conditions are least present. It will quickly become apparent that the "trial" evidence rules matter most at the postpleading, pretrial stage.

Evidence law matters the least at the prepleading stage. Before the opening pleadings have been filed, the parties may have had little opportunity to gather potential evidence. In this stage there is virtually no opportunity for formal discovery. Although the rules of civil procedure in most jurisdictions authorize prefilings depositions to preserve evidence,<sup>43</sup> they are the only formal discovery device the parties can use before filing, and are rarely employed.<sup>44</sup> Further, even if the parties have collected potential evidence, they may have had little chance to analyze the admissibility of their own evidence, much less that of the opposing party. Consequently, when the parties settle at this stage, the exclusionary rules ordinarily have minimal impact. In fact, the parties may be settling to obviate the necessity of incurring the expense of gathering potential evidence and evaluating its admissibility.

At the pleading stage, the exclusionary doctrines continue to have little effect. For instance, in ruling on a motion to dismiss or a demurrer, the presiding officer must assume the truth of all well-pleaded facts.<sup>45</sup> As a general proposition, the officer must assume that the pleader will ultimately be able to produce admissible evidence to support the allegations in the pleading.<sup>46</sup> The only exception to this proposition is the judicial

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43. EDWARD J. IMWINKELRIED & THEODORE Y. BLUMOFF, *PRETRIAL DISCOVERY: STRATEGY AND TACTICS* § 5:16 (1986).

44. "The use of declaratory judgment actions under Federal Rule of Civil Procedure 57 has reduced the need for prefilings depositions." *Id.*

45. *Jetco Elec. Indus. v. Gardiner*, 325 F. Supp. 80, 84 (S.D. Tex. 1971); *Aragon-Haas v. Family Sec. Ins. Servs.*, 231 Cal. App. 3d 232, 238, 282 Cal. Rptr. 233, 237 (1991).

46. *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 4 (9th Cir. 1963), *cert. denied*, 385 U.S. 976 (1966); *Shapiro v. Royal Indem. Co.*, 100 F. Supp. 801, 802 (W.D. Pa. 1951).

notice doctrine.<sup>47</sup> In upholding a pleading, the presiding officer may assume judicially noticeable facts even if the pleader failed to allege them.<sup>48</sup> Likewise, the officer may invalidate a pleading based on a defect which has not been alleged if the defect is based on judicially noticeable facts.<sup>49</sup> With the exception of the judicial notice doctrine, however, the exclusionary rules are largely irrelevant at the pleading stage.

By the same token, the rules are, for the most part, irrelevant in the discovery phase immediately following pleading. Federal Rule of Civil Procedure 26(b)(1), which defines the scope of permissible discovery, states that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."<sup>50</sup> Thus, in the discovery stage the concept of logical relevance is even broader than it is at trial under Evidence Rule 401. By using the expression, "relevant to the subject matter," Rule 26 manifests an intent that discovery not be confined to the precise allegations of the pleadings.<sup>51</sup> Rule 26 allows discovery to probe an issue as long as the pleadings could be amended to include that issue.<sup>52</sup> The privilege doctrines, therefore, are the only major evidentiary constraints that operate at this stage.

At the trial phase, the exclusionary rules are certainly relevant. But even here, the conditions are far from optimal for maximizing the impact of the rules. As this Essay points out above, the party entitled to invoke the rule at trial may lack the time to recognize an objection resting on a nicety of the exclusionary rules.<sup>53</sup> If the hearing is a jury trial, the jury's presence may also make the party reluctant to raise certain objections. Further, the presiding officer may not aggressively enforce the exclusionary rules at trial.<sup>54</sup> If the issue arises on the spur of the moment and the officer is at all in doubt, Rules 401 through 403 pressure the judge to overrule the objection.<sup>55</sup>

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47. See, e.g., *United States v. Wood*, 925 F.2d 1580, 1582 (7th Cir. 1991); *Nejad v. United States*, 724 F. Supp. 753, 754 n.1 (C.D. Cal. 1989); *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322, 1328 (E.D.N.Y. 1981); *Pitman v. City of Oakland*, 197 Cal. App. 3d 1037, 1041, 243 Cal. Rptr. 306, 308 (1988). Judicial notice is "[t]he act by which a court, . . . of its own motion or on request of a party, and without the production of evidence, recognize[s] the existence and truth of certain facts, having a bearing on the controversy at bar." BLACK'S LAW DICTIONARY 848 (6th ed. 1990).

48. *Gilbert v. State*, 218 Cal. App. 3d 234, 240-41, 266 Cal. Rptr. 891, 894 (1990).

49. *Lazzarone v. Bank of Am.*, 181 Cal. App. 3d 581, 590, 226 Cal. Rptr. 855, 859 (1986).

50. FED. R. CIV. P. 26(b)(1).

51. *IMWINKELRIED & BLUMOFF*, *supra* note 43, § 2:03, at 3.

52. See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

53. See *supra* notes 35-41 and accompanying text.

54. See *supra* notes 35-41 and accompanying text.

55. See FED. R. EVID. 401-403.

By process of elimination, the latter part of the pretrial stage—the stage following both the filing of pleadings and the conduct of discovery—is most affected by the exclusionary rules. At this juncture, the parties can resort to such procedural devices as summary judgment motions and *in limine* motions. This is the stage at which evidence law matters most.

#### A. Summary Judgment Motions

The conditions at this point in the pretrial proceedings are ideal for maximizing the impact of the exclusionary rules. By now the parties have had ample opportunity to conduct formal and informal discovery,<sup>56</sup> and have collected most, if not all, of the potential evidence for trial. When one party files a summary judgment motion, both parties will be afforded the opportunity to reduce relevant evidentiary matter to affidavits or declarations.<sup>57</sup> Both parties can methodically review the affidavits to identify any objectionable evidence, rather than being required to object on a moment's notice at trial. Moreover, both the party entitled to invoke an exclusionary rule and the presiding officer have more incentive to enforce the rules at this stage. There is no jury for the party to antagonize by objecting. If the evidentiary objection is a close call in the officer's mind, the officer can simply take the objection under advisement and rule later, after conducting any necessary legal research and analysis. The administrative pressures which often necessitate an immediate, on-the-spot ruling at trial are absent. The net result is that the exclusionary rules can be carefully considered and rigorously enforced in the context of a summary judgment motion.<sup>58</sup>

Not only are exclusionary rules likely to have a substantial impact in the summary judgment context, summary judgment motions are themselves more likely today than in the past because the United States Supreme Court has revitalized summary judgment procedure within the

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56. *Elvis Presley Ent. v. Elvisly Yours, Inc.*, 936 F.2d 889, 893 (6th Cir. 1991) (party suffering summary judgment must have already had adequate time for discovery); *United States ex rel. Kreindler & Kreindler v. United Tech.*, 777 F. Supp. 195, 201 (N.D.N.Y. 1991).

57. FED. R. CIV. P. 56. On the one hand, it is true that the evidence mentioned in the affidavits and declarations need not be in a form that would be admissible at trial. *Colgan v. Fisher Scientific Co.*, 935 F.2d 1407, 1413 (3d Cir. 1991). On the other hand, it must be clear that the evidence could be reduced to admissible form. *Lawyers Alliance v. Department of Energy*, 766 F. Supp. 318, 323-24 (E.D. Pa. 1991). Consequently, the substantive evidentiary standards apply to affidavits and declarations. *Liesener v. Weslow, Inc.*, 775 F. Supp. 857, 860 (D. Md. 1991); *Neal v. Bently Nevada Corp.*, 771 F. Supp. 1068, 1071 (D. Nev. 1991); *Dean v. McKie Co.*, 771 F. Supp. 466, 468 (D. Mass. 1991).

58. See Steven A. Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 6 REV. LITIG. 263, 279 (1987).

last decade. The tremendous backlog on civil trial calendars in most metropolitan areas of the United States became increasingly clear over the past few decades.<sup>59</sup> These backlogs prompted the Supreme Court to search for new means of terminating cases before trial. Prior to 1986, disposing of a case by summary judgment was disfavored in federal practice.<sup>60</sup> Most appellate courts discouraged trial courts from granting pre-trial summary judgment<sup>61</sup> by decreeing that trial judges were to deny the motion if they had "the slightest doubt" whether summary judgment was appropriate.<sup>62</sup>

In 1986, however, the Court handed down three decisions, *Anderson v. Liberty Lobby, Inc.*,<sup>63</sup> *Celotex Corp. v. Catrett*,<sup>64</sup> and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,<sup>65</sup> which liberalized the test for granting summary judgment. In these cases, the majority evinced a more favorable attitude toward the disposition of cases on summary judgment.<sup>66</sup> Over the long-term, there has been an increase in the percentage of cases in which a summary judgment motion is filed; and the percentage of cases in which the motion is granted is also on the rise.<sup>67</sup> Several respected commentators have predicted that the Supreme Court's 1986

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59. John Watkins, *Remedies to Court Congestion*, in JUSTICE ON TRIAL 162 (Donald Douglas & Philip Noble eds., 1971); see also REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990) (study and recommendations alleviate federal court congestion, delay, expense and expansion); MALCOLM FEELEY, COURT REFORM ON TRIAL 176 (1983) (examining success or failure of major innovations aimed at overcoming court delay); JOHN GOERDT, EXAMINING COURT DELAY: THE PACE OF LITIGATION IN 26 URBAN TRIAL COURTS, 1987, at xiii, xv (1989) (concluding even efficiently managed courts face delay from heavy case loads).

60. Childress, *supra* note 58, at 265-66; see *Griffeth v. Utah Power & Light Co.*, 226 F.2d 661, 669 (9th Cir. 1955) (stating procedure is not substitute for trial by jury).

61. E.g., *Doehler Metal Furniture Co. v. United States*, 149 F.2d 130, 135 (2d Cir. 1945); Childress, *supra* note 58, at 264.

62. *Doehler*, 149 F.2d at 135.

63. 477 U.S. 242 (1986).

64. 477 U.S. 317 (1986).

65. 475 U.S. 574 (1986).

66. *Celotex*, 477 U.S. at 325 (movant has no burden to disprove evidence, but must show absence of evidence supporting non-moving party's case); *Anderson*, 477 U.S. at 252 (Court required plaintiff to meet evidentiary burden necessary at trial); *Matsushita*, 475 U.S. at 587 (Court required non-moving party to supply some evidence of disputed facts to preclude summary judgment); see also *Deepwater Invs. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1113 (10th Cir. 1991) (any uncertainty in law governing summary judgment prior to 1986 resolved by Supreme Court in "now-famous trilogy" of decisions).

67. Joe S. Cecil, *Trends in Summary Judgment Practice: A Summary of Findings*, FEDERAL JUDICIAL CENTER DIRECTIONS, Apr. 1991, at 11, 12-16; see also John E. Kennedy, *Federal Summary Judgment: Reconciling Celotex v. Catrett and Adickes v. Kress and the Evidentiary Problems Under Rule 56*, 6 REV. LITIG. 227, 254 (1987) ("On an overall rounded average of existing studies, one could make a general estimate that the motion is made in five percent of cases; that over 50% are granted; and of those appealed, that over 50% are affirmed.").

decisions will result in yet further increases,<sup>68</sup> and that summary judgment will be granted more readily in the future.<sup>69</sup> A Carnegie Commission report released in late 1991 asserts that "[r]ecent cases in which defendants were awarded summary judgment in toxic tort cases suggest that the granting, and perhaps the incidence of motions for summary judgment has increased in this type of litigation."<sup>70</sup> It would be an overstatement to claim that every published opinion since 1986 is consistent with a trend toward a more liberal grant of summary judgment.<sup>71</sup> As a whole, however, the post-1986 decisions indicate that "many lower courts are getting the message"<sup>72</sup> that the Supreme Court favors expanded use of the summary judgment mechanism.<sup>73</sup> The Civil Rules Committee has proposed amendments to Rule 56 which would further "enhance the utility of the summary judgment procedure as a means to avoid the time and expense of . . . trial";<sup>74</sup> and the President's Council on Competitiveness, chaired by Vice-President Quayle, has recommended "[r]eforming summary judgment" to make such judgment mandatory in certain cases.<sup>75</sup>

### B. In Limine Motions

Like a summary judgment hearing, a hearing on an *in limine* motion to exclude or admit evidence is an ideal setting for enforcing exclusionary rules. As with summary judgment motions, all the conditions for maximizing the impact of the rules are present. The party entitled to invoke the rule and the presiding officer have time to recognize and critically

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68. Childress, *supra* note 58, at 263, 265, 270, 280, 283; Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770, 771, 787 (1988); Kennedy, *supra* note 67, at 251-52, 280.

69. Childress, *supra* note 58, at 283.

70. MARGARET A. BERGER, CARNEGIE COMM. ON SCIENCE, TECHNOLOGY, AND GOVERNMENT, PROCEDURAL AND EVIDENTIARY MECHANISMS FOR DEALING WITH EXPERTS IN TOXIC TORT LITIGATION: A CRITIQUE AND PROPOSAL 43 (1991).

71. *Id.*; see *Rosinski v. Electronic Data Sys. Corp.*, 770 F. Supp. 359, 361 (E.D. Mich. 1990) (asserting summary judgment disfavored).

72. Childress, *supra* note 58, at 281.

73. *Id.* at 265; see *Felders v. Miller*, 776 F. Supp. 424, 426 (N.D. Ind. 1991) (recent Supreme Court cases likely require summary judgment be more readily granted, signaling new era for summary judgment); *Hutton v. General Motors Corp.*, 775 F. Supp. 1373, 1376 (D. Nev. 1991) (summary judgment not disfavored procedural shortcut, but integral part of federal rules as whole); *Witter v. Abell-Howe Co.*, 765 F. Supp. 1144, 1147 (W.D.N.Y. 1991) (courts should not be reluctant to grant summary judgment in appropriate cases); *Allstate Ins. Co. v. Hansten*, 765 F. Supp. 614, 616 (N.D. Cal. 1991) (summary judgment favored method of resolution when appropriate).

74. FED. R. CIV. P. 56 advisory committee's note.

75. J. Danforth Quayle, *Isn't Our Legal System in Need of Reform?*, LEGAL TIMES, Aug. 19, 1991, at 9-10.

evaluate the objection. Furthermore, neither has a significant disincentive to apply the rule. The setting may, in fact, be better than the summary judgment context. In the summary judgment context, the judge must perform two tasks. He or she must first rule on any objections to evidence in the affidavits. The judge must then decide whether any remaining, admissible evidence creates a triable issue of fact. In the *in limine* context, however, the judge's analysis is more focused. His or her sole task is to rule on the admissibility of the proposed evidence. A ruling which excludes the evidence may practically terminate the litigation because losing parties may decide that they cannot survive a directed verdict motion at trial or that they will probably suffer an adverse verdict without the evidence. Nevertheless, the decision to abort the litigation belongs to the losing party; the judge can devote his or her full attention to the analysis of the application of the exclusionary rule.

The parallel between *in limine* motions and summary judgment motions continues because like the summary judgment motion, *in limine* practice has been reinvigorated within recent years. Fifty years ago *in limine* evidentiary motions were uncommon.<sup>76</sup> Their popularity has since been on the rise, however,<sup>77</sup> and their use has expanded dramatically both in civil and criminal cases.<sup>78</sup> The Supreme Court implicitly approved the use of *in limine* motions in criminal prosecutions in *Luce v. United States*,<sup>79</sup> one of its most significant decisions on conviction im-

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76. Tom H. Davis, *The Motion in Limine—A Neglected Trial Technique*, 5 WASHBURN L.J. 232, 233 (1966) (citing *Condra Funeral Home v. Rollin*, 314 S.W.2d 277 (Tex. 1958); *McClintock v. Travelers Ins. Co.*, 393 S.W.2d 421 (Tex. Civ. App., n.r.e., 1965); *Burdick v. York Oil Co.*, 364 S.W.2d 766 (Tex. Civ. App., n.r.e., 1963)); see, e.g., *Hill v. Gerheim*, 214 A.2d 240, 242-43 (Pa. 1965) (reversing decision after evidence found improper, irrelevant and inadmissible); *Olivares v. Travelers*, 442 S.W.2d 793, 796-97 (Tex. Civ. App. 1969) (reversing decision after evidence found improper, irrelevant and inadmissible).

77. MICHAEL H. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* § 103.8 (3d ed. 1991).

78. See RONALD L. CARLSON, *SUCCESSFUL TECHNIQUES FOR CIVIL TRIALS* § 1:1, at 4 (1983) ("[T]he use of the motion in limine is increasing rapidly in civil litigation."); Jay S. Blumenkopf, *The Motion In Limine: An Effective Procedural Device with No Material Downside Risk*, 16 NEW ENG. L. REV. 171, 181-82 (1981); Douglas L. Colbert, *The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial*, 39 STAN. L. REV. 1271, 1280-82 (1987); Tom Davis, *Motions In Limine: Tools for a Fair Trial*, 18 TRIAL, Nov. 1982, at 90, 90; Edna Selan Epstein, *Motions in Limine—a Primer*, LITIG., Spring 1982, at 34, 34; Charles W. Gamble, *The Motion In Limine: A Pretrial Procedure That Has Come of Age*, 33 ALA. L. REV. 1, 3-8 (1981); Steven A. Saltzburg, *Tactics of the Motion in Limine*, LITIG., Summer 1983, at 17, 17; James A. Howell, Comment, *The Use of Motions in Limine in Civil Litigation*, 1977 ARIZ. ST. L.J. 443, 445-46 (1977); Johnny K. Richardson, Comment, *Use of Motions in Limine in Civil Proceedings*, 45 MO. L. REV. 130, 131 n.11 (1980).

79. 469 U.S. 38 (1984).

peachment.<sup>80</sup> Hearings on *in limine* motions are now routinely used in criminal cases to determine the admissibility of pivotal items of evidence such as DNA testimony<sup>81</sup> and testimony about uncharged crimes committed by the accused.<sup>82</sup> In keeping with this increase, the second edition of the *Manual for Complex Litigation* devotes an entire section to the subject of motions *in limine*.<sup>83</sup>

### III. ADAPTING "TRIAL" EVIDENCE RULES TO THE PRETRIAL STAGE WHERE THEY HAVE THE MAXIMUM IMPACT

Section II argued that evidence law now matters most at the post-pleading, pretrial stage. Although the importance of evidentiary rules at the various stages of the litigation process may vary, one would ordinarily assume that the rules themselves are a constant. Whether the judge is applying the hearsay rule at trial or in a pretrial setting, he or she should enforce the same rule in roughly the same manner. However, that assumption is facile. Admittedly, the *Manual for Complex Litigation* does not suggest that there is any need to adapt "trial" evidence rules to pretrial practice. Upon close scrutiny, however, some evidentiary rules are different in the pretrial context, and they should be modified to reflect that difference.

#### A. Some Evidentiary Rules Operate Differently in the Pretrial Setting than at Trial

The Federal Rules of Evidence codify the exclusionary rules in federal practice, and determining the content of the exclusionary rules is an exercise in statutory construction. In construing federal statutes, the courts presume that Congress intends the general body of federal law to

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80. See EDWARD J. IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE § 127 (1987).

81. See, e.g., *United States v. Young*, 754 F. Supp. 739 (D.S.D. 1990) (finding DNA evidence reliable and denying *in limine* motion). Deoxyribonucleic acid, commonly called DNA, is a molecule found in the nucleated cells of every living organism. The differences that exist in certain fragments of the DNA chain, called polymorphisms, are highly variable and give each individual his or her own unique DNA code. Hence, two samples of DNA can be compared to show maternity or paternity. *Id.* at 740; see also Michael Berens, *Pretrial Challenges to Expert Testimony*, 8 LITIG., Summer 1982, at 27, 28-29, 64 (commenting on usefulness of *in limine* motion in cases with complicated scientific evidence).

82. See generally IMWINKELRIED, *supra* note 33, at §§ 9:14-18 (1984 & Supp. 1991) (discussing tactical considerations regarding motions *in limine* to admit or exclude uncharged misconduct evidence).

83. FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION § 21.642 (2d ed. 1986).

be consistent.<sup>84</sup> The courts, therefore, endeavor to harmonize the provisions of the Federal Evidence Rules with those of the Federal Rules of Civil Procedure.

Reconciling apparent inconsistencies between the Federal Evidence Rules and the Federal Rules of Civil Procedure underscores the potentially differing application of evidence rules in the pretrial and the trial settings. Consider, for instance, the interplay between Federal Rules of Evidence 703 and 705, which govern the admissibility of expert opinion testimony, and Federal Rules of Civil Procedure 26 and 56, governing pretrial discovery and summary judgments. Evidence Rule 703 addresses "[t]he facts or data in the particular case upon which an expert bases an opinion or inference."<sup>85</sup> In the typical case, an expert witness reasons syllogistically, usually applying a general scientific theory (a major premise) to the specific factual data of the particular case (the minor premise) to derive an opinion.<sup>86</sup> While Evidence Rule 703 controls the type of information which experts may factor into their minor premise,<sup>87</sup> Rule 705 states that "[t]he expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise."<sup>88</sup> Rules 703 and 705 thus allow experts to state their ultimate opinion on direct examination at trial without revealing the precise content of their minor premise. Rule 705 further provides that the opposing attorney may probe the minor premise on cross-examination. The cross-examiner thus has the burden of exploring the content of the minor premise.<sup>89</sup>

Federal Rule of Civil Procedure 26 relates to pretrial discovery. Rule 26(b)(4) contemplates extensive advance disclosure of opposing experts' opinions and the bases of the opinion.<sup>90</sup> Civil Procedure Rule 56 governs summary judgment.<sup>91</sup> As indicated above, parties submit evidence to the presiding officer at a summary judgment hearing in the form

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84. *Independent Community Bankers Ass'n v. Board of Governors of Fed. Reserve Sys.*, 820 F.2d 428, 436 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

85. FED. R. EVID. 703.

86. See generally Edward J. Imwinkelried, *The "Bases" of Expert Testimony: The Syllogistic Structure of Scientific Testimony*, 67 N.C. L. REV. 1, 2-3 (1988) (documenting failure of courts to distinguish between major and minor premise in expert testimony).

87. *Id.* at 16-19.

88. FED. R. EVID. 705.

89. GRAHAM, *supra* note 73, § 705.1, at 680.

90. FED. R. CIV. P. 26(b)(4)(A)(i) (through interrogatories, party may "require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.").

91. FED. R. CIV. P. 56.



of affidavits. Rule 56(e) sets out the requirements for these affidavits. The pertinent part of the rule provides that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."<sup>92</sup>

These provisions raise the question of whether Evidence Rules 703 and 705 apply to summary judgment affidavits in the same manner in which they apply at trial. On direct examination at trial, experts can withhold the minor premise of their opinion. May attorneys who draft summary judgment affidavits for the experts similarly omit any mention of the experts' minor premise, stating nothing more than the experts' credentials, their major premise, and their ultimate opinion?

Commentators and courts have suggested that the Evidence and Civil Procedure Rules cannot be reconciled unless Rule of Evidence 705 is specially adapted to the pretrial setting.<sup>93</sup> They believe that experts' affidavits cannot create a triable issue of fact at summary judgment hearings unless they state all the essential bases for the experts' opinion, including minor premises.<sup>94</sup> They further argue that without a statement of the experts' minor premise, the affidavit does not "show affirmatively that the affiant is competent to testify to"<sup>95</sup> his or her ultimate opinion.<sup>96</sup>

In 1977, Judge Skelly Wright discussed the interplay between these Federal Rules in *Merit Motors Inc. v. Chrysler Corp.*<sup>97</sup> He refused to construe Rules 703 and 705 to preclude summary judgment when the party resisting the motion submits an expert affidavit asserting a conclusory, favorable opinion.<sup>98</sup> Judge Wright stated that a contrary conclusion "seriously undermines the policies of Rule 56"<sup>99</sup>—policies which the Supreme Court strengthened in its three 1986 decisions on summary

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92. FED. R. CIV. P. 56(e).

93. See *Wilson v. Clark*, 417 N.E.2d 1322, 1327 (Ill.), cert. denied, 454 U.S. 836 (1981); The Hon. Charles Chapman & Robert Robertson, *To Boldly Go Where No One Has Gone Before: The Final Frontier of Illinois Expert Witness Testimony in Medical Malpractice Cases*, 21 LOY. U. CHI. L.J. 757, 793-95 (1990); see also GRAHAM, *supra* note 77, § 705.1, at 655-56 (Rule 705 places heavy burden on cross-examiner who must be sufficiently informed to expose weaknesses in expert's opinion during trial).

94. Chapman & Robertson, *supra* note 93, at 793-95.

95. FED. R. CIV. P. 56(e).

96. Chapman & Robertson, *supra* note 93, at 778.

97. 569 F.2d 666 (D.C. Cir. 1977).

98. *Id.* at 672-73; see also *United States v. Various Slot Machines on Guam*, 658 F.2d 697, 700-01 (9th Cir. 1981) (expert opinion without factual support cannot defeat summary judgment motion).

99. *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 673 (D.C. Cir. 1977).

judgment.<sup>100</sup> One Utah court reached the same conclusion in 1990.<sup>101</sup> The relevant provisions of the Utah Rules of Evidence and Civil Procedure are virtually identical to the Federal Rules.<sup>102</sup> The court ruled that, despite Utah's Evidence Rule 705, a conclusory expert affidavit would not pass muster under Utah's Civil Procedure Rule 56.<sup>103</sup> The court stated that the "explicit requirements" of Rule 56 "control in the summary judgment context over . . . Utah R. Evid. 705."<sup>104</sup>

The *Merit Motors* reasoning may extend beyond Federal Evidence Rules 703 and 705. Rule 705 has the practical impact of assigning the cross-examiner the burden of challenging the propriety of the expert's minor premise.<sup>105</sup> The direct examination's evidentiary foundation no longer requires presenting the facts which constitute the minor premise. There are other provisions of the Federal Rules of Evidence which likewise allocate a burden to the party opposing the admission of relevant testimony.

Federal Evidence Rule 803(8)(C), for example, authorizes the admission of factual findings in official investigative reports "unless the sources of information or other circumstances indicate lack of trustworthiness."<sup>106</sup> The cases construing the Rule have assigned the burden of establishing the existence of "circumstances" demonstrating the untrustworthiness of the record to the party opposing the admission of the record.<sup>107</sup> Article X of the Evidence Rules, the best evidence doctrine, also

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100. See *supra* notes 63-75 and accompanying text; see also *Genmoora Corp. v. Moore Business Forms, Inc.*, 939 F.2d 1149, 1157 (5th Cir. 1991) (expert's testimony will not support verdict if it lacks adequate foundation in facts of case); *Evers v. General Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985) (Federal Rules of Evidence 703 and 705 do not alter requirement of Rule 56(e) that affidavit must set forth specific facts); *Weight-Rite Golf Corp. v. United States Golf Ass'n*, 766 F. Supp. 1104, 1110 (M.D. Fla. 1991) (party may not avoid summary judgment solely on basis of expert's opinion affidavit which does not provide specific facts from record to support conclusions); *Lynch v. J.P. Stevens & Co.*, 758 F. Supp. 976, 1006 (D.N.J. 1991) (factual predicate of opinion of expert must find some support in record; expert opinion which contains no support for factual assertions should be rejected); *Amorello v. Monsanto Corp.*, 463 N.W.2d 487, 491 (Mich. Ct. App. 1990) (summary disposition not precluded simply because party has produced expert to support position); *Omni Aviation v. Perry*, 807 S.W.2d 276, 281 (Tenn. Ct. App. 1990) (Federal Rule 703 not intended to make summary judgment impossible whenever party has produced expert to support position, nor to preclude summary judgment against party who relies solely on expert's opinion which has no bases other than theoretical speculation).

101. *Gaw v. State ex rel. Dept. of Trans.*, 798 P.2d 1130 (Utah App. 1990).

102. Compare UTAH R. CIV. P. 26, 56 and UTAH R. EVID. 703, 705 with FED. R. CIV. P. 26, 56 and FED. R. EVID. 703, 705.

103. *Gaw*, 798 P.2d at 1137 n.10.

104. *Id.*

105. GRAHAM, *supra* note 77, § 705.1, at 655.

106. FED. R. EVID. 803(8)(C).

107. *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 300-01 (4th Cir. 1984); *Melville v.*

contains a provision shifting a burden to the opponent. Rule 1003 states that a duplicate is as admissible as an original "unless (1) a general question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."<sup>108</sup> Under this statute, the party opposing the admission of the duplicate has the burden of persuasion on the lack of authenticity question within the "unless" clause.<sup>109</sup>

In light of *Merit Motors*, if a party relies on a duplicate or a factual finding in an official investigative report at a summary judgment hearing, the accompanying affidavit arguably should address the admissibility facts on which the opposing party would otherwise have the burden. It is true that at trial, the opposing party would have the burden on those issues to negate the admissibility of the evidence. However, in the words of Rule 56 governing summary judgment, without a factual showing with respect to those issues the party relying on the duplicate or official record would have failed to fully show that the facts stated in his or her affidavits and exhibits "would be admissible in evidence."<sup>110</sup> In the case of the best evidence rule, the logic of *Merit Motors* could be extended to require that the affidavits establish both the authenticity of the original and the completeness of the duplicate. Similarly, in the case of official records, Judge Wright's reasoning could justify mandating that the affidavits not only satisfy the express requirements of Rule 803(8)(C) but also set out enough facts to permit the judge to make an informed evaluation of the general trustworthiness of the record.

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American Home Assurance Co., 584 F.2d 1306, 1315-16 (3d Cir. 1978); see also DAVID F. BINDER, *HEARSAY HANDBOOK* § 40.03, at 608-09 (3d ed. 1991) (discussing burden of opposing party to demonstrate untrustworthiness); GRAHAM, *supra* note 77, § 803.8, at 880 n.23 ("The burden is on the party opposing admissibility to demonstrate that the report is not reliable."); 4 DAVID W. LOISELL & CHRISTOPHER B. MUELLER, *FEDERAL EVIDENCE* § 456, at 766 (1980) (opponents to admission of record bear burden of proving record untrustworthy); GLEN WEISSEBERGER, *FEDERAL EVIDENCE* § 803.46, at 439 (1987) ("opponent of such evidence bears the burden of proving the untrustworthiness of the record once its proponents meet the foundational requirements"); James B. Haddad, *The Future of Confrontation Clause Developments: What Will Emerge When the Supreme Court Synthesizes the Diverse Lines of Confrontation Decisions?*, 81 J. CRIM. L. & CRIMINOLOGY 77, 85 (1990) (defendant should be able to demonstrate that business or official records so unreliable they should be excluded under Confrontation Clause).

108. FED. R. EVID. 1003.

109. *People v. Atkins*, 210 Cal. App. 3d 47, 55, 258 Cal. Rptr. 113, 118 (1989) ("Under Federal Rule of Evidence 1003 . . . , the burden is on the opponent to raise a genuine issue as to the authenticity of the original or to show that under the circumstances it would be unfair to use the duplicate in lieu of the original."); EDWARD J. IMWINKELRIED et al., *supra* note 80, § 1506, at 62.

110. FED. R. CIV. P. 56(e).

*B. As a Matter of Policy, Some Evidentiary Standards Should Be Applied Differently in the Pretrial Setting*

Whether evidence is presented at trial or a pretrial summary judgment hearing, the opposing party must be afforded the opportunity to object to its admission. Federal Rule of Evidence 103(a)(1), which regulates evidentiary objections, announces that the party opposing the admission of the evidence must "stat[e] the specific ground of objection, if the specific ground was not apparent from the context."<sup>111</sup>

The rub is the interpretation of the expression, "specific ground of objection." A split of authority has arisen over the proper construction of that expression. The traditional view is that an objection is sufficiently specific if it names the generic evidentiary rule being violated.<sup>112</sup> Thus, to preserve the issue for appeal, it would be satisfactory for the objector to say that a question called for hearsay or that there was inadequate authentication of an exhibit.<sup>113</sup> However, there is a competing view that the objector must be more precise and must name the missing foundational element.<sup>114</sup> For instance, Federal Rule of Evidence 803(6) states that the business entry hearsay exception requires foundational proof that "it was the regular practice of that business . . . to make the [type of] memorandum" in question.<sup>115</sup> Suppose that the proponent offering a business entry neglects to present that element of foundational testimony. Under the minority view, the objector would have to do more than inform the judge that the exhibit is inadmissible hearsay; the objector would have to take the next step and add that there is no proof that the business routinely prepared this type of record.

It makes good sense to adhere to the traditional view to trial objections while simultaneously adopting the minority view as the standard for pretrial practice. It is unrealistic to expect the opposing attorney to designate precisely the missing foundational element in a fast-moving trial setting. At trial, under penalty of waiver, the opposing attorney must voice objections to questions before the witness begins the answer.<sup>116</sup> The gap between the end of the question and the beginning of the answer is usually a matter of a few seconds. It is impractical to de-

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111. FED. R. EVID. 103(a)(1).

112. CARLSON et al., *supra* note 6, at 123.

113. *Id.*

114. *United States v. Fendley*, 522 F.2d 181, 185-86 (5th Cir. 1975); *see also* *People v. Dorsey*, 43 Cal. App. 3d 953, 959-60, 118 Cal. Rptr. 362, 366 (1974) (failure to state specific ground of objection waives appellate review under CAL. EVID. CODE § 353(a)).

115. FED. R. EVID. 803(6).

116. CARLSON et al., *supra* note 6, at 122.

mand that the opposing attorney do much more, in such a short time, than identify the exclusionary rule being violated.

This time problem evaporates, however, in a hearing on a summary judgment or an *in limine* motion. Before the hearing on a summary judgment motion, parties reduce the evidence to affidavit form. The opposing attorney has hours or days—rather than seconds—to carefully review the evidentiary material in the affidavits. Even during hearings on oral *in limine* motions, the time constraint is lacking. The hearing is held pretrial in the jury's absence; there is no jury to excuse from the courtroom or otherwise inconvenience. Consequently, the presiding officer generally gives the party opposing the admission of the proffered evidence ample opportunity to listen to the evidence and critique its admissibility.

The minority view is the preferable standard in the pretrial setting, and it should be adopted for that stage. In the United States and generally in the common-law world, trials are characterized by orality and spontaneity. For the most part, testimony at trial is presented orally, and objections are voiced orally. Even if an evidentiary objection is sustained, the proponent of the evidence can immediately attempt to overcome the objection by laying a better foundation. The oral character of the proceeding thus facilitates impromptu response by the proponent. In contrast, in summary judgment hearings, both evidence and objections are reduced to written form. The documentary character of the proceeding eliminates the proponent's capacity for impromptu response. If the proponent is ignorant of the exact nature of the objection before the hearing and the officer sustains the objection at the hearing, the proponent will be unable to respond immediately. The attorney cannot revise the affiant's sworn affidavit, and the affiant is not present to give live, supplementary testimony. In a pretrial setting, therefore, the minority view is fairer to the proponent.

#### IV. CONCLUSION

As Professor Hazard has pointed out, in substantial litigation today, "pre-trial is *the* trial."<sup>117</sup> Many civil claims are settled before suit is even filed.<sup>118</sup> In the vast majority of jurisdictions, fewer than five percent of the suits filed ever reach trial.<sup>119</sup> The statistics on the criminal side are comparable. Roughly ninety percent of all criminal cases filed in the

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117. Maher, *supra* note 1, at 46 (quoting Professor Geoffrey Hazard, Jr.).

118. Joseph Kelner, *Settlement Techniques—Part One*, TRIAL, Feb. 1980, at 39.

119. David M. Balabanian, *Concept of "Discovery Abuse" Has Been Oversold*, LEGAL TIMES, Nov. 12, 1984, at 14.

United States result in a plea bargain instead of a trial.<sup>120</sup> The advent of pretrial practice as "the center of gravity"<sup>121</sup> in contemporary litigation is changing the face of civil and criminal procedure. Increasingly, the *Manual for Complex Litigation* is becoming a primer on complicated pretrial procedures.

The postpleading, pretrial stage is emerging as a new focal point for evidence law as well because it is the stage at which the exclusionary evidentiary rules matter the most. At the pretrial stage, the participants have both the time and the motivation to give the exclusionary rules their full play and effect. It is no accident that many of the most significant recent evidence decisions were triggered by pretrial rulings.<sup>122</sup> Pretrial hearings are also becoming fora for the modification of evidence law itself. Because the pretrial procedural setting differs markedly from the trial context, evidentiary rules, such as Rules 703 and 705, should be adapted to pretrial practice. Evidence law matters most at the pretrial stage, and it remains to be seen how that development will transform American evidence law.

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120. George Beall, *Negotiating the Disposition of Criminal Charges*, TRIAL, Oct. 1980, at 46.

121. John W. Cooley, *Puncturing Three Myths about Litigation*, 70 A.B.A. J. 75, 76 (1984).

122. *Luce v. United States*, 469 U.S. 38 (1984) (content of witness's trial testimony determines admissibility of prior conviction for impeachment purposes under FED. R. EVID. 609(a)); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1313 (E.D. Pa. 1980), *aff'd in part, rev'd in part*, 723 F.2d 238 (3d Cir. 1983), *rev'd*, 475 U.S. 574 (1986) (expert's reports inadmissible at summary judgment stage where expert's assumptions invaded province of fact finder and based on faulty underlying data).

