

THE EFFECTIVE USE OF WAR STORIES IN TEACHING EVIDENCE

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I. INTRODUCTION

Deans and Associate Deans for Academic Affairs get them all the time: letters from usually very successful senior practitioners, often alumni of the law school, seeking either a full time tenure-track teaching position or offering to teach a course or two as an adjunct. The former letters are normally dismissed out of hand: those of us who toil in academia are not keen on the perception, demonstrated by these applicants, that law teaching is a profession into which one decides to “retire.” Usually, by discussing the scholarship requirements expected of full time faculty members and the pressures of acquiring tenure, it is not a difficult task to dissuade these (often burnt-out) practitioners that the teaching profession is not exactly what they had in mind for their senior years. On the other hand, offers by experienced lawyers to share their wealth of knowledge with law students by teaching an adjunct course in their field of expertise are far more intriguing. If the subject matter is an area of interest to the school and is not already being taught by existing faculty, these offers often get a hard look. After all, adjuncts are never in it for the money, and thus good ones can add a great deal of value to the curriculum for little cost. They also provide an excellent bridge between academia and the practicing bar.

The main worry about hiring an experienced attorney as an adjunct professor is the fear that the adjunct will rely too heavily on “war stories” to teach.¹ Whether correct or not, law school administrators do not consider a class consisting primarily of the reminiscences of a successful lawyer about “the glory days” to be a worthwhile pedagogical experience. Although a bit of this concern may stem from academic snobbery, most law faculty would agree that effective teaching requires students to be engaged as active learners both inside the classroom and out. Listening to story after story—some perhaps not

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1. For purposes of this Essay, my definition of a “war story” is quite simple. It is the retelling of an event from the teacher’s experience as a practicing lawyer to illustrate a point in the classroom. The uses of war stories range from the minimal—a few sentence recitation by the professor—to the extensive—requiring students to read documents from the professor’s practice prior to class to set up a lengthy classroom discussion covering a wide range of issues.

even particularly relevant to the topic at hand—is the polar opposite of active learning. Even though a practitioner might not initially decide to teach through the “war story method,” she might be tempted to do so after realizing the difficulty of the Socratic method. Especially for a new teacher, anything resembling Socratic teaching requires many hours of preparation for each hour of class, along with significant pedagogical skill in the classroom itself. Storytelling is so much easier. And besides, she was hired to share her accumulated wisdom and knowledge with the students, was she not?

Thus, the telling of war stories has garnered something of a bad name in academia.² It is right down there with “lecturing” and “spoon-feeding”—simply not the way American law professors are expected to teach. Although I agree with the general skepticism toward non-Socratic methods of law teaching, I have nevertheless come to believe that, in the right classes and at the right times, the judicious use of war stories by a professor can be a highly valuable pedagogical tool.³ Done well, an effective war story can add to a professor’s credibility in class; it can drive a point home in a way that almost no other teaching technique can achieve. War stories, told at key moments and for good reason, can provide students with a sense of what it feels like to be a lawyer in the real world. They can also be used to expand upon the application of doctrine already taught, or to add an ethical dimension to the study of law in any substantive class.⁴

Of course, there are certain prerequisites to the use of war stories in teaching. First, the professor must, of course, have some experience in the practice of law upon which to draw.⁵ My own experience stems from ten years

2. See Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 781–82 (1998) (noting that many in the academy scorn “‘war stories’ and for good reason. Used improperly, they can waste time and take the place of hard thinking by both professor and student.”).

3. I also agree with Professor John Kip Cornwell that “spoon-feeding” is a pejorative label placed on good teaching when used under appropriate circumstances. See John Kip Cornwell, *Teaching Criminal Law*, 48 ST. LOUIS U. L.J. 1167, 1167 (2004) (“Clarity of explanation, described by some commentators as the most important requisite of effective teaching, is sometimes mislabeled ‘spoon-feeding’ by some law faculty who dismiss it accordingly. Nothing could be further from the truth.”).

4. Professor Schiltz agrees with my ultimate assessment as to the utility of war stories, when properly employed. See Schiltz, *supra* note 2, at 782 (explaining that, if used carefully, war stories can be “marvelous teaching tools”).

5. Actually, even this seemingly obvious point is not altogether true. Sometimes, a teacher can borrow the war story of another. One of my colleagues who also teaches Evidence uses my *Scarfo* memo, filed in the jury trial of the case *United States v. Scarfo*, 711 F. Supp. 1315 (E.D. Pa. 1989), see *infra* note 13 and accompanying text, to teach relevance and prejudice in the same way that I do, attributing the materials and stories to me, of course. He (and a number of his students) have reported to me how much they enjoy making use of this connection to the personal experience of another member of the faculty.

as a federal prosecutor, the first five (prior to teaching) spent trying organized crime cases in Philadelphia, and the second five (after achieving tenure as a law professor and taking a leave of absence) spent as the First Assistant United States Attorney for the Middle District of Florida. Second, the course must be one that lends itself to the integration of theory and doctrine with the practical application thereof. For example, in my first semester Criminal Law course I almost never use war stories; the course is too focused on the basics of reading cases, learning doctrine, and developing the analytical skills to “think like a lawyer.” In that class, telling stories from my prosecutor days would be an indulgent waste of time: the students are not yet ready to benefit from forays into the practical aspects of lawyering.⁶ I’m sure that war stories are inappropriate in many other courses as well. For example, they are probably of limited use in Constitutional Law, where the concepts and doctrinal intricacies of Supreme Court precedent are of critical importance, and stories about the practical application of such doctrine would amount to little more than pontificating about appellate practice.

Evidence, however, is a subject in which the judicious use of war stories by an experienced litigator can truly bring the class to life. Evidence is the “law of the courtroom”; by its very nature, it is a truly practical subject. The theory behind the rules of evidence—obtaining accurate verdicts, accommodating for the use of an adversary system and lay jury, attempting to achieve outcomes based on rational thinking as opposed to prejudice and emotion, and pragmatic considerations such as not wanting to waste time—are very straightforward and easily grasped by students. The difficult parts of the law of evidence are twofold: (1) the very complex theoretical issue of what constitutes hearsay; and (2) the use of and interrelationship among the multitude of evidentiary rules in the practical setting of an adversarial proceeding, typically conceived of as a jury trial. It is in this latter realm that war stories can be extremely helpful; if done well, they draw students mentally into the courtroom where critical evidentiary decisions are made. By providing context, they can make an incomprehensible rule relevant and clear.⁷

Moreover, faculty without real war stories to tell can make up stories to suit their pedagogical needs. One Evidence professor has gone so far as to develop extensive narratives about the life of John Henry Wigmore—based, at least in part, on historical fact—to assist in teaching the subject. See, e.g., Beryl Blaustone, *Teaching Evidence: Storytelling in the Classroom*, 41 AM. U. L. REV. 453 (1992). Similarly, a Criminal Law professor describes how he uses stuffed animals to create memorable scenes in the classroom to drive home important doctrinal points. See Cornwell, *supra* note 3, at 1173.

6. Cf. Joshua Dressler, *Criminal Law, Moral Theory, and Feminism: Some Reflections on the Subject and on the Fun (and Value) of Courting Controversy*, 48 ST. LOUIS U. L.J. 1143, 1150 (2004) (“Teachers of 1L courses know that a primary goal of any first-year class is to teach lawyering skills (‘thinking like a lawyer’).”).

7. An earlier symposium on Evidence teaching a few years back led to an interesting exchange of articles between Judge and Senior Lecturer Richard A. Posner and Professors Roger

Thus, this Essay defends and discusses the use of war stories in the Evidence classroom.⁸ It sets out a series of “guidelines” for the effective use

C. Park and Richard D. Friedman on the optimal pedagogical methodology for an Evidence course. See e.g., Richard A. Posner, *Clinical and Theoretical Approaches to the Teaching of Evidence and Trial Advocacy*, 21 QUINNIPIAC L. REV. 731 (2003); Roger C. Park, *Posner on Teaching Evidence*, 21 QUINNIPIAC L. REV. 741 (2003); Richard D. Friedman, *A Resident of Evidenceland Defends His Turf*, 21 QUINNIPIAC L. REV. 753 (2003). In his essay, Posner describes and promotes as ideal an Evidence class he teaches to a maximum of 30 students using NITA materials and trial simulation “because I was persuaded that the subject could not be taught successfully by the usual method of law teaching . . .” Posner, *supra*, at 732. “I think (no stronger word is possible) the students get a better grounding in the law of evidence than they would if they studied it as a soon-to-be forgotten typical upper-class law school offering . . . [w]hat they need to know is not the rules as such but, precisely, what goes on in a courtroom . . .” *Id.* at 734. Posner even analogizes knowing the rules of evidence and using them as akin to knowing the rules of physics and riding a bicycle. *Id.* at 731.

Park disagrees with Posner and points out some of the obvious fallacies with Posner’s position. Park notes that, in the absence of in-class review of the pertinent cases and rules of evidence, students are even more apt than usual to resort to canned outlines and other outside materials to teach themselves the subject. Park, *supra*, at 742–43. Moreover, even if a simulation course can be made to work for 30 students, the reality is that the basic Evidence class at most schools has an enrollment of 100 students or more. A successful simulation-based course of this size is nearly impossible. *Id.* at 746–47. Park points out that a case- or problem-method class, with occasional variations in teaching style, is the method that he prefers. *Id.* at 746–50.

Professor Friedman states that Judge Posner’s course sounds less like “Evidence” and more like “Trial Practice for Students Who Have Not Taken Evidence.” Friedman, *supra*, at 753. Ironically, Friedman’s main disagreement with Posner’s approach is that, by teaching the rules of evidence in too specific a context; rather than explicating all of the intricacies and policies underlying a rule, “it is not always clear whether [the students] ha[ve] learned anything but a war story.” *Id.* at 754–55. Friedman’s position is that Evidence should be taken first, followed by a trial advocacy course for students interested in litigation. *Id.* at 754.

I agree with all of Professors Park’s and Friedman’s arguments refuting the wisdom of Judge Posner’s suggestion that the basic Evidence course be taught as a simulation. Indeed, I would go further and say that the pedagogical move suggested by Posner would be downright counterproductive. The flaws in Judge Posner’s own bicycle analogy illustrate the absurdity of his position. A child learning to ride a bicycle *need never know anything* about the law of physics; balancing is an innate human ability once practiced. On the contrary, trial lawyers *must* know the ins and outs of the rules of evidence in order to put them into practice. The best trial lawyers are virtuosos in manipulating these rules. I agree with Friedman that teaching the rules first, then teaching their practical use through a trial advocacy course, is the best way to provide a proper foundation for a future trial lawyer.

That said, my argument about war stories to some degree bridges the gap between Posner on the one hand and Park and Friedman on the other. When an Evidence professor tells a war story following the guidelines set out herein, he can occasionally transport his students, at least mentally, from classroom to courtroom—providing some of the practical elements Judge Posner argues are missing from the typical Evidence course without sacrificing the depth of learning advocated by Park and Friedman.

8. There is some debate among Evidence professors over whether the case or problem method is the most efficacious way to teach the subject. See Calvin William Sharpe, *Nuts and Bolts for the New and Occasional Evidence Teacher*, 21 QUINNIPIAC L. REV. 993, 994–95 (2003)

of war stories, and in illustrating these guidelines, makes use of some of the stories I tell every time I teach my Evidence course. Though the discussion is not grounded in science—empirical or otherwise—it is based on my decade-plus of experience teaching the course. And though I certainly make no claim that I do everything right, I can safely represent that the most ubiquitous comment on my teaching evaluations throughout the years has been something akin to: “Great stories! Wish there were more!”⁹

II. GUIDELINES FOR TELLING WAR STORIES

A. *Use War Stories Sparingly and Only When Relevant*

Any teaching technique that is overused loses its effectiveness. Telling war stories certainly falls under this principle. Not every trivial point of evidence needs to be illustrated with a story from practice; in most cases, the result would be tedium due to the repetition inherent in storytelling and re-telling. Moreover, the judicious use of war stories is necessary if only because such recitation takes time, and overuse of this technique would certainly cut into the ability to cover the material essential to a typical three- or four-credit Evidence course. Finally, one must be certain that when a story is employed, it directly illustrates the matter being taught. An off-point story is not only a waste of time, but it can be confusing, as students work to make a connection that doesn't exist.

B. *Use War Stories to Set Up a Problem or to Illustrate a Point AFTER the Class Has Struggled with the Interpretation and Application of the Pertinent Doctrine or Rule*

Most law professors agree that the most effective method of teaching legal analysis and doctrine is by forcing students to grapple with the raw materials—statutes, cases, rules, and regulations—on their own, discerning the answers (or coming to the conclusion that there is no “correct” answer) to questions posed to them by the teaching materials and by the professor in class.¹⁰ The use of

(surveying Evidence teachers and concluding that about half of them use the problem method, a third use the case method, and the remainder do something else). I personally use the problem method, but it is my contention that war stories can be effective in enhancing either a case- or problem-oriented course.

9. I certainly do not want to suggest that Evidence cannot be successfully taught *without* war stories; I am simply defending the view that *if* a law professor has practical experience, he should make use of it in teaching Evidence, but use it wisely as discussed herein.

10. See Rogelio Lasso, *From the Paper Chase to the Digital Chase: Technology and the Challenge of Teaching 21st Century Law Students*, 43 SANTA CLARA L. REV. 1, 14 (2002) (“Most law school professors use a methodology that consists of the teacher attempting to convey a legal concept, including its doctrinal rules and legal analysis, by assigning students readings from certain sections of a casebook. Professors expect students to learn from the readings and

war stories should not circumvent this process. Instead, the stories should either be set up as problems for the students to help solve, or as illustrations of points the students have already encountered.

My first extended use of a war story in Evidence exemplifies this guideline.¹¹ Like most Evidence professors, I begin the course by teaching basic relevance under Federal Rules of Evidence (FRE) 401 and 402, and then follow this by introducing the students to the concept of prejudice, and the need to balance probative value versus prejudice as set out in FRE 403. Using the Mueller and Kirkpatrick casebook,¹² we grapple with cases, problems, and text illustrating the basic meaning of relevance, the standard of logical relevance, inductive logic, and the construction and use of inferences and evidential hypotheses in articulating and arguing about basic relevance. Then we engage FRE 403, examining the many reasons why even probative evidence may be excluded: unfair prejudice (and what, exactly, that means), confusion of the issues, and waste of time. Finally, we tackle the problems of completeness (FRE 106) and conditional relevancy (FRE 104(b)).

It is only at this point, about a week into the course, that I assign the students to read a Memorandum of Law filed during the 1988 jury trial of the case *United States v. Scarfo*,¹³ along with a list of questions to consider.¹⁴ One of the questions informs the students that the memorandum was ghost-written in the middle of the night by a very junior organized crime prosecutor who was not a member of the *Scarfo* trial team, and it asks them to identify the ghost writer. Of course, they all quickly realize that it was me.¹⁵

Scarfo was a huge, multi-defendant mafia racketeering case prosecuted by the Philadelphia Organized Crime Strike Force during my tenure there. One of the racketeering counts alleged that Nicodemo Scarfo, who had gone on to become the “boss” of the Philadelphia family of La Cosa Nostra, and another

demonstrate their grasp of doctrinal rules and critical analysis by engaging in some form of pseudo-Socratic dialogue with the professor.”).

11. I am compelled at this point to remind the reader that, because my personal courtroom practice extended from 1985–90, most of the war stories I tell my class and that I recount in this Essay are at least fifteen years old. I am certain that I have mis-remembered some of the details of these incidents over the years. But the essence of every war story I tell is true, and the details are simply not important to the impact the stories have on the class. I have *not* gone back for purposes of writing this Essay to ensure that every detail of every story is perfectly accurate and I apologize in advance for any inaccuracies contained herein.

12. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES (5th ed. 2004).

13. 711 F. Supp. 1315 (E.D. Pa. 1989).

14. The full text of the memorandum and assignment is attached to this Essay as an appendix, starting on page 1214.

15. I am lucky in that many of my trial experiences involved organized crime prosecutions. The mafia connection never fails to garner the full attention of the vast majority of my students, adding to the efficacy of the war stories I tell.

defendant named Nicholas Virgilio, murdered a federal judge named Edwin Helfant.¹⁶ The murder weapon was recovered. In the early days of what turned out to be a very long (multi-month) trial, the prosecution offered the testimony of one Kenneth McNair. McNair testified that he recognized the murder weapon: he once had owned it, and he had given it to a friend of his named Joseph Palumbo. The defense vigorously objected to McNair's testimony on the grounds of relevance and prejudice. The prosecution responded with a proffer outside the hearing of the jury: it would later prove that Joseph Palumbo's brother was John Palumbo, and that John Palumbo was a mafia "associate" of Nicodemo Scarfo. McNair would also testify that, once the F.B.I. started inquiring about the gun, Joe Palumbo asked him to lie about whom he had given it to, a request with which McNair initially complied. On the basis of this proffer, the judge allowed McNair to testify over the defense's FRE 401 and 403 objections.¹⁷

McNair was a hostile witness for the prosecution. Although he testified about giving the gun to Joe Palumbo, he contradicted the prosecution's proffer about Palumbo asking him to lie—claiming, instead, that it was his own idea. At this point, the defense renewed its relevance and prejudice objections to all of McNair's testimony. The judge immediately struck the testimony concerning the lie, and took the renewed motion regarding the remainder of McNair's testimony under advisement. He then recessed court for the day, stating that he would issue a further ruling in the morning. He was clearly upset with the prosecution for promising one thing and delivering another.

The trial team (composed of five prosecutors) came back to the office that day very agitated. They wanted to file a written memorandum to justify keeping McNair's testimony about the gun in the record. (They were willing to concede the lack of relevance concerning the "lie," given McNair's courtroom testimony.) But they also had a multitude of tasks to perform to get ready for the next court day. They looked around the office for someone to write the necessary memorandum. I do not recall if I volunteered or if my boss volunteered me. In any event, I worked through the night, ultimately

16. I use this opportunity to explain to the students that, consistent with their portrayal in the media, members of the American La Cosa Nostra usually do not kill judges and prosecutors because it is not "rational" in a cost-benefit sense: prosecutors and judges are replaceable, making their elimination fruitless. I foreshadow the hearsay rule by explaining to the students that the same is not the case for critical witnesses, which is why there is a Witness Protection Program. Judge Helfant was murdered because he allegedly agreed to fix a case at the request of the mafia and then failed to follow through on his corrupt promise. *U.S. v. Pungitore*, 910 F.2d 1084, 1100 (3d Cir. 1990).

17. Thus, the telling of the war story has the added benefit of providing me an opportunity to introduce the students to the procedure, countenanced by FRE 104(b) and 611, of allowing testimony into evidence subject to later "tying up" based upon an attorney's proffer outside the presence of the jury.

producing the assigned memorandum on FREs 401 and 403.¹⁸ The legal discussion in the memorandum is composed primarily of boilerplate language about the low threshold of FRE 401's logical relevance test, along with essentially bald assertions that the gun testimony was relevant and not unduly prejudicial.¹⁹ In fact, the relative shallowness of the memorandum's advocacy increases its effectiveness as a teaching tool, because it does not address the difficult questions posed by the situation the prosecutors faced. Thus, I can call upon the students to do the heavy lifting in class.

The first thing I ask the students to do is articulate the evidential hypothesis supporting the prosecution's position that McNair's gun testimony is relevant. It turns out that this is not an easy task, and they spend significant time struggling with this issue of simple relevance. Eventually, we establish that the hypothesis is something like the following: "People connected to a murder weapon are more likely to have committed the murder than people who are not connected to the murder weapon. McNair's testimony 'connected' Scarfo to the murder weapon. Therefore, McNair's testimony had some (slight!) tendency to increase the probability that Scarfo was the murderer compared to those others."

I then ask the students to help me chart on the board the chain of inferences necessary to support this evidential hypothesis. This exercise drives home the point that the word "connection" in the hypothesis actually covers up significant weaknesses in the prosecution's theory of relevance. To make the relevant connection, the jury is being asked to infer that Joe Palumbo gave the gun to his brother John, and that John Palumbo gave the gun to his "associate" Scarfo. I note that there will be no specific evidence presented on these points. This allows me to steer the class to make the counter-relevancy arguments. It also provides me with the opportunity to inquire whether the defense could have used a different tactic to attack McNair's testimony. A sharp student usually realizes that the defense, employing conditional relevancy under FRE 104(b), could have chosen to appear "eminently reasonable" by conceding that McNair's testimony would be relevant *if* the prosecution were to meet the condition(s) of proving that Joe gave the gun to John and that John gave it to Scarfo. Since, as the defense well knew, the prosecution could not meet either of these conditions, this tactic would have been an alternative route to the exclusion of McNair's evidence. This discussion enables me to demonstrate the strategic use of the elusive concept of conditional relevancy in real life.

18. I think this part of the story comforts my students, who know that they will soon be the most junior lawyer in whatever setting they choose for practice. Everyone—even their professors—started at the same place. If I could survive a surprise all-nighter as a novice attorney, so too will they.

19. Again, *see infra* the appendix starting on page 1214.

Next, I ask the students to articulate the “unfair prejudice” of McNair’s testimony claimed by the defense. Once again, it turns out that my war story expands upon what the students have already learned, for it illustrates a more subtle notion of prejudice than they have previously encountered. The prejudice—if there is any—stems from the low probative value of the evidence in the first place; the argument is that the jury will be confused and think, months later in the jury room, that the connection between Scarfo and the murder weapon *must* be stronger than it actually is. Through this example, the students learn that any close FRE 401 question can be converted into a FRE 403 issue as well.

Finally, I direct the students’ attention to footnote one in the memorandum. This footnote sets out a lengthy explanation of the factual basis for the prosecution’s proffer concerning McNair’s lying at Joe Palumbo’s request, and it contends that McNair’s hostility to the government was the likely reason for his surprise backpedaling on the witness stand. I remind the students that the prosecution is not asking the court to reverse its ruling excluding McNair’s testimony about the lying.²⁰ Then I pose this question: given the prosecution’s position, what is the purpose of the footnote? I go so far as to tell them that, in reality, footnote one is the main reason why the memorandum was written and filed in the first place.

Usually, the class is stumped. This provides me with the opportunity to take what I call a “Professional Responsibility” moment in the classroom—the first of many to come.²¹ I explain to the students that a lawyer’s credibility is his or her most important asset in the courtroom. A lot of evidentiary rulings will be close calls, and a ruling in either direction will be well within the discretion of the trial court. When a lawyer has credibility—when he has always accurately represented the facts and law to the judge and has conceded points that he cannot or should not win—the judge will be inclined to listen carefully to that lawyer when a close call needs to be made. On the other hand, if a judge feels that she has been misled or betrayed by a lawyer, the judge will not be willing to trust that lawyer’s representations in the future. Proffers are a critical part of this equation. Judges especially count on lawyers’ evidentiary proffers to be accurate; if they are not, the result could be a mistrial. In this case, the prosecutors were extremely concerned that, only days into a very long trial, they had lost significant credibility with the judge by misstating the substance of McNair’s testimony. They wanted to explain to the judge exactly

20. Actually, I usually ask the students to state the evidential hypothesis underlying the relevancy of Palumbo’s asking McNair to lie about the recipient of the gun. Then I ask them to examine the relevance of McNair’s actual courtroom testimony—that he lied of his own accord. We conclude as a class that the relevance of the first story is very thin, and the relevance of the latter is virtually non-existent.

21. Cf. Schiltz, *supra* note 2, at 779–80 (discussing the use of war stories in the pervasive method of teaching ethics).

what had happened so that he would not lose faith in them. That was the essential purpose of footnote one.

Thus, my nearly infinitesimal role in the prosecution of Nicodemo Scarfo provides the quintessential war story: one that recaps a week of learning in an interesting and practical setting, and stretches the students' understanding of evidentiary concepts already introduced.

C. Use War Stories to Keep the Doctrine Anchored in Reality

Sometimes a cold reading of the rules, even when supplemented by problems and cases, can leave students with a misimpression about the trial process. I find that this occurs early in the course when the students first grapple with FRE 403. In teaching FRE 403, I talk about the fact-finding process in the courtroom as one designed to be a "pseudoscientific enterprise" in which rational thought is supposed to supplant emotion, passion, and prejudice. This is, of course, true, but it does not present an accurate and robust picture of our adversary system. In reality, a trial is in large part a battle for the sympathy of the jury, and all good trial lawyers work very hard, within the boundaries set up by the rules, to capture the hearts and minds of the jurors every step of the way.

I illustrate this point with a war story from a racketeering homicide case I co-tried as a young prosecutor. One of the homicide victims was an alleged drug dealer—not the most sympathetic victim to have in a murder case.²² Early in the trial, we needed to authenticate the handwriting of this victim on an important note he wrote shortly before he was killed. I explain to the class that anyone who recognizes a person's handwriting can authenticate it. I then pose the question: whom do you think we called to the witness stand to make the identification? Usually, one or more students shout out the right answer: Mom. I explain to the class that, by calling the victim's mother to the witness stand we made a powerful emotional statement and turned our drug dealer victim into a real person—a loving mother's son—but, because she was a perfectly acceptable authentication witness, there was nothing objectionable about it.

D. Use War Stories to Expand upon the Doctrine Covered by Other Materials in the Course

While students are desperately attempting to master "the law" as though it were written in stone, many law professors see their role as prodding students to understand law as an amorphous mass of existing doctrine that, subject to experience and argument, is prone to constant and eternal growth, development, and change. We try to challenge our students to apply "the law"

22. Even worse, the other murder victim was himself an alleged murderer and member of the mafia.

in new and unusual contexts, and sometimes to go even further: to imagine what the law might look like if a shift in society's values took place. One effective use of war stories can be to help students understand that the best lawyers are creative, not complacent. This can be accomplished by describing moments in one's practice when, hit with sudden (and rare) inspiration, the teacher used the law in a new or, at least unusual, way.

Two examples from my teaching help illustrate this point. The biggest and most notorious case I co-tried as an organized crime prosecutor was *United States v. Gambino*,²³ a Sicilian mafia heroin and cocaine smuggling case, and a successor to the "Pizza Connection" case²⁴ originally tried in the 1980s by future F.B.I. Director Louis Freeh. This seventeen-defendant prosecution resulted in two jury trials lasting a total of about three months. The facts of the case are nicely summarized in the district court opinion, cited above, denying Francesco Gambino's motion for a judgment of acquittal, which I assign as reading midway through the course.²⁵ Not surprisingly, a number of my war stories throughout the semester arise out of this case, resulting in continuity through the course that students appear to appreciate.

The first time I reference the *Gambino* prosecution is after the class has studied FRE 801(d)(1)(C), the provision that exempts prior out-of-court identifications from exclusion by the hearsay rule. The basic reason for the exemption is not difficult to grasp: in-court identifications are usually not very probative, while a properly conducted out-of-court identification, such as one made during a line-up or photo-spread, is.²⁶ Once the students understand the contours of the exemption, I posit a situation I faced during the second *Gambino* trial when a Sicilian witness named Salvatore Allegra testified (through an interpreter) to the identification of an unindicted co-conspirator he knew only as "Il Pachionello"—in English, "The Little Fat Guy." Out of court, shown a photo-spread, Allegra told an F.B.I. agent that Il Pachionello was a courier onto whom Allegra had strapped kilogram quantities of heroin for transport, via commercial airliner, from Sicily to the United States. Allegra stated that he was certain that the person in the picture was the heroin courier. This was a critical identification for my case, because other witnesses would positively identify Il Pachionello as a person who delivered heroin in the

23. 728 F. Supp. 1150 (E.D. Pa. 1989).

24. See generally *U.S. v. Casamento*, 887 F.2d 1141 (2d Cir. 1989).

25. Fortuitously, Judge Bechtel's opinion dealt very directly and very well with the interpretation of *Bourjaily v. United States*, 483 U.S. 171 (1987). See *Gambino*, 728 F. Supp. at 1152-58. I thus assign the *Gambino* opinion in lieu of *Bourjaily* itself.

26. Of course, this is much truer when the case has only one defendant who can easily be picked out by where he is sitting in the courtroom. The in-court identification is much more valid (and much hairier for the prosecution) in a multi-defendant case, especially when many of the defendants are related, or at least are of the same ethnic heritage, and share some similarities in appearance.

United States to co-conspirators of Francesco Gambino. Thus, through Allegra, Il Pachionello connected certain important conspirators in the United States to others in Sicily.

Like Kenneth McNair before him, Allegra was a relatively uncooperative witness; he was unhappy with his treatment under witness protection. One way he showed his discontent was by providing a tepid in-court identification of (the picture of) Il Pachionello. Allegra stubbornly refused to say that the man in the picture was the person to whom he gave heroin for transport; rather, he testified that the person in the photograph “looked like” Il Pachionello, but he could not be sure. When pressed, he said that the two had the same body shape, i.e., both were little fat guys, which made him think they were one and the same, but claimed to be uncertain.

At this point, I tell the students that I was extremely worried about the weakness of Allegra’s identification testimony and ask the students what options I had to solidify it. Invariably, a student will volunteer that, pursuant to FRE 801(d)(1)(C), I could have asked Allegra about his unambiguous out-of-court identification of Il Pachionello. I agree with the student that this was an option, but one with serious flaws. Through this discussion, I introduce the concept of impeaching one’s own witness (which is, in effect, what I’d be doing), and I note the reality that Allegra was likely to dig in his heels and deny the certainty of his earlier identification, making matters even worse. Thus, I tell the students, I rejected this option and Allegra was excused from the witness stand.

I prompt the students for other suggestions. I urge them to parse FRE 801(d)(1)(C) as they ponder the problem. Usually, the students are confounded. If so, I ask them whether I could call to the stand the F.B.I. agent who had witnessed Allegra’s out of identification to testify to Allegra’s stated certainty at the time. Many students react by saying no, the agent’s testimony would be classic hearsay: it would amount to a repetition of Allegra’s out-of-court statement offered to prove the truth of the matter asserted. I then ask a student to tick off the requirements of FRE 801(d)(1)(C) and compare them to my situation. The requirements are: (1) “the declarant testifies at the hearing or trial”—which Allegra did; (2) the declarant “is subject to cross-examination concerning the statement”—which Allegra was; and (3) “the statement is one of identification of a person made after perceiving the person”—which Allegra’s statement was as well.²⁷ The students realize that, because of the passive voice used in its final phrase, the rule does not appear to limit testimony about an out-of-court identification to that of the declarant himself, as long as the declarant does testify at some point.

I tell the students that although I had no cases at my disposal to support my view, Judge Bechtel agreed with my interpretation of FRE 801(d)(1)(C) and

27. See FED. R. EVID. 801(d)(1)(C).

allowed the F.B.I. agent to testify. Later precedent supports this outcome.²⁸ Indeed, as I point out to my students, this very situation is hypothesized—and the answer is provided—in the notes regarding FRE 801(d)(1)(C) in the Mueller and Kirkpatrick casebook.²⁹ The significance of the note is overlooked—until the war story has been told.

Through this exercise, the students learn not only about an unusual interpretation of a hearsay exemption, but also about (1) the importance of going back to the original source of law for definitive guidance on its meaning; (2) the importance of reading legal texts with extreme care rather than taking for granted what they say; and (3) the importance to creative and successful lawyering of thinking “outside the box.”

The second example of how I use a war story to challenge the students to think creatively comes toward the end of the course when we are discussing witness rehabilitation. In this regard, I am compelled to make two confessions up front: first, this is my all-time favorite war story, as it reflects one of my finest “seat of the pants” moments in the courtroom; and second, I set the story up by stressing to the students, when we are covering FRE 608(a)—the rule that permits a party to call a character witness to testify to the truthful character of an earlier witness whose credibility has been attacked “by opinion or reputation evidence or otherwise”³⁰—that FRE 608(a) is almost never used in real life. At least in my experience, most attorneys do not believe that calling a “good character witness” is likely to be of much assistance in restoring the credibility of a witness who has been attacked; correctly, in my opinion, they believe that this would simply cause the case to devolve into a hopeless swearing contest. I tell the students that, in my five years of active trial practice, I had never seen FRE 608(a) invoked.

Later, after we’ve covered the case in the book dealing with FRE 608(a),³¹ I end the unit on rehabilitation with this war story. The very last trial of my career in Philadelphia was a tax case involving a husband and wife, Richard and Suzanne C.³² who owned a company that manufactured the steak meat used in “Philly cheese steaks.” I had indicted Richard and Suzanne for tax

28. See *State v. Chinn*, 709 N.E. 2d 1166, 1178–79 (Ohio 1999).

29. MUELLER & KIRKPATRICK, *supra* note 12, at 182.

30. FED. R. EVID. 608(a).

31. MUELLER & KIRKPATRICK, *supra* note 12, at 582–89 (reprinting *United States v. Medical Therapy Sciences*, 583 F.2d 36 (2d Cir. 1978)). The casebook utilizes *United States v. Medical Therapy Sciences* to demonstrate the lines of cross-examination that constitute a sufficient attack on the credibility of a witness such that the party calling the witness may call a rehabilitative witness under FRE 608(a). *Id.*

32. I have chosen in this case and in some others to protect the full identity of the defendants, based upon their crimes and, in some cases, what I say about them. Cf. Graham Brown, *Should Law Professors Practice What They Teach?*, 42 S. TEX. L. REV. 316, 340–41 (2005) (discussing when a teacher might feel compelled to use pseudonyms or initials in telling war stories to avoid embarrassing or upsetting the individuals involved).

fraud; the theory of the case was that they had siphoned nearly a million dollars in cash out of their business over a three year period without paying taxes on it. My main witness in the case was Gary S., Suzanne's brother and the general manager of the company during the time in question. Gary testified under a grant of immunity that he assisted Richard and Suzanne in doctoring the books and was rewarded with a relatively small amount of unreported cash for his efforts.

The prosecution's case rested heavily on Gary's credibility, a fact of which the defense was keenly aware. The defense's theory of the case—and a very plausible one, at that—was that Gary had in fact stolen the entire million dollars from the company himself and was now shifting the blame to his sister and brother-in-law to cover up his crime and obtain immunity. I knew that this was a case that I could lose, particularly in light of the “reasonable doubt” standard.

As is common in white collar cases, Richard and Suzanne were upstanding citizens of their community with no prior criminal records. Thus, the main tactic during the defense case-in-chief was to line up dozens of witnesses to testify to their honest characters pursuant to FRE 404(a). I describe to the students how painful it was to sit through this testimony. I had no cross-examination with which to counter it—aside from being alleged tax cheats, Richard and Suzanne *were* upstanding citizens. Of course, by this time the class has already studied character evidence, so they can relate to what I was facing in court.

Then I tell the students that, as I was sitting in the courtroom, I realized that the character witnesses who knew Richard and Suzanne well enough to testify on their behalf must also know Gary. I thought to myself that these witnesses might very well have something good to say about Gary, too. I describe to the students how, while the second or third character witness was testifying, I started flipping furiously through my evidence rulebook trying to find the rule—which I could only vaguely recall—that would allow me to ask these people about Gary. Of course, I came across FRE 608(a).

By this time, we have studied cross-examination, including the “rule” that you should never ask a question on cross examination to which you do not already know the answer. I did not know who the defense character witnesses were, let alone what they would say about Gary. I ask the students what they think my course of action should have been. This is a very practical question, and even after some discussion, the students are usually unable to come up with a good answer. I then tell them what I, in fact, did: whispering at counsel table, I asked the IRS case agent to go out into the hall and conduct quick interviews of all of the character witnesses lined up to testify. I instructed him to ask them (1) if they knew Gary S.; (2) how well; and (3) what opinion they had regarding his character for truthfulness. The agent dutifully undertook this inquiry.

A witnesses or two later, the agent came back in to the courtroom and whispered to me that all of the witnesses outside knew Gary well, liked him, and thought that he was an honest person. After all, most of them had dealt directly with Gary in his role as general manager more than they had ever dealt with either Richard or Suzanne. Armed with this information, my plan was set.

After the next character witness testified to Richard and Suzanne's good citizenship, I asked to inquire on cross-examination. I asked the witness if he knew Gary S. The witness answered affirmatively. I asked the witness how he knew Gary. At this point, the defense vociferously objected, and the judge called us to side bar.

Recognizing the obscurity of FRE 608(a), I describe to the students how I approached side-bar armed with my rulebook opened to the right page. When the defense objected to my line of questioning, I handed the judge the book, pointed to the rule and argued that, since they had forcefully attacked Gary's credibility on cross examination, I was allowed to rehabilitate his character for truthfulness through good character witnesses. When the judge started to nod his approval, the defense responded (with admirable agility) that my inquiry about Gary's character was outside the scope of direct examination, which had been limited to the character of Richard and Suzanne. The judge turned to me for a response. At this point, I consult with the class. We agree that this "outside the scope" objection is technically accurate.

By this time, the students are riding this doctrinal roller-coaster with me. We've already studied FRE 611. I ask them to turn to the rule while I provide them with my response to the objection. "Your honor," I said, "Counsel is correct that my examination is outside the scope. However, you have the discretion under FRE 611 to control the order of the witnesses to 'avoid needless waste of time' and protect witnesses from 'harassment.' Of course, we could excuse all of these witnesses today and then drag them all back in to testify as character witnesses for Gary during the prosecution's rebuttal case. But they're here, now. Why inconvenience these fine citizens for no good reason? While they're already on the stand, let them complete their testimony and go home."

With a gleam in his eye (or at least that's how I remember it), the judge ruled in my favor. The next two or three character witnesses all vouched for Gary's truthfulness on cross-examination. I stress to the class how devastating it was to the defendants to have their own witnesses bolstering the credibility of the main witness against them. I recall for the students how, after a few witnesses had testified this way, the defense—completely shaken—asked for a recess for the remainder of the court day, even though it was only about 4 in the afternoon.

The war story does not end there. When court convened the next morning, some of the same character witnesses were waiting in the hall to be called. I

thought this was odd considering the events of the prior afternoon. In any case, the first of these witnesses took the stand and testified for Richard and Suzanne. Then I proceeded to cross. When I asked the witness whether he knew Gary, his answer was equivocal. When I asked if he had an opinion about Gary's character for truthfulness, he replied that no, he really did not have an opinion one way or the other. Then I started down the path of impeachment based on witness preparation—a topic the class has already studied. I asked the witness if he recalled speaking to the IRS agent sitting next to me in the hall the day before. He answered affirmatively. I asked if he remembered telling the agent that he believed Gary to be a truthful person. He admitted so stating. Then I asked the question that put an end to any more character witnesses taking the stand for the defense: "Isn't it true, sir, that what caused you to change your view of Gary between yesterday afternoon and this morning was a meeting you had with defense counsel in which he suggested that you not be helpful to me on cross-examination?" I don't recall the witness's answer, but the point was made.

Through this story, I firm up the class' understanding of impeachment and rehabilitation. They also learn a lesson about how, in trying to fix a mistake, trial lawyers sometimes make matters much worse.

E. Use Unfavorable War Stories: Ones in Which You Made a Mistake, Were One-upped by the Other Side, or Fell Flat on Your Face

Nobody likes a braggart, including law students. If a professor only tells stories about his moments of glory, the students may learn, but they'll probably also learn not to like the storyteller very much. Nothing is more powerful in terms of preserving humility, humanity, and credibility in front of the classroom than using illustrations from practice in which you made a mistake—small, large, or in-between. Indeed, the saying goes that we learn the most from our mistakes; a corollary is that others can learn a lot from our mistakes as well.

In teaching Evidence, I employ at least three stories from my experience in which I made a costly mistake. The first one is quite simple, but it drives home an important point. It stems from my role as lead counsel in *United States v. Theodoropoulos*,³³ a prosecution targeting a cocaine distribution ring allegedly involving members of the "Greek Mafia" in Philadelphia. The story comes up after we have studied FRE 404(a), the prohibition against use of character evidence for the propensity inference and its exceptions for criminal cases, FRE 404(a)(1) & (2). The students have learned that the "key" to the character evidence "door" rests with the defendant; he can choose to unlock the door and put his character in issue, or to keep character out of the case altogether. Often, at some point in this discussion, a student will ask

33. 866 F.2d 587 (3d. Cir. 1989).

something along the lines of, “What’s the big deal? Surely this kind of evidence is of marginal use to criminal defendants.”³⁴

That’s when I tell my *Theodoropoulos* story. As a young prosecutor, I, too, thought that good character evidence was a basic waste of time—until my experience in *Theodoropoulos*. The prosecution culminated in a multi-week trial against six or seven defendants. The main evidence consisted of wire-taps during which the various defendants made arrangements to buy and sell cocaine, using a very unsophisticated code. One defendant, “John,” was caught on tape on numerous occasions participating in these conversations, and co-conspirators also talked about John’s participation in the business. My case against John was as strong as my case against any of the other “secondary” players in the conspiracy.

John owned a coffee shop in downtown Philadelphia. Prior to the defense case, counsel for John told me that a Philadelphia police officer who had frequented John’s coffee shop for years was prepared to testify as a character witness for John. He asked me whether I would stipulate to the police officer’s good character testimony “to avoid the inconvenience of having to subpoena a cop during his shift.” I considered the offer, and decided that I did not want a police officer, likely dressed in full uniform, to testify to a defendant’s good character. Thus, I agreed to the stipulation. The jury was told of the parties’ agreement that, if called as a witness, Police Officer “So and So” would testify that John was a law-abiding citizen.

When the verdict came back, most of the other defendants were convicted—except John. I concluded that John’s acquittal had to have resulted from the character evidence, because that was the only thing setting him apart from his convicted counterparts. I also concluded that I was likely duped: who knows whether, if I had refused the stipulation, a Philadelphia police officer would actually have shown up in federal court to vouch for an accused drug dealer. From this experience, students learn (1) that character witnesses can turn the tide in a close case and (2) one should be reasonable but also very careful about agreeing to stipulations proposed by the other side.

My second tale of courtroom disaster comes after we have studied impeachment and rehabilitation, including impeachment based upon witness preparation.³⁵ I pause at this point for a “Professional Responsibility Moment,” reviewing witness preparation that is considered ethical (but always subject to inquiry on impeachment) and witness preparation that is unethical. I preach to the students that they should always stay on the right side of this line and, equally important, always tell their witnesses that they are playing by the rules. Thus, if a witness is asked on cross-examination whether she met with Mr. Seigel to review her testimony prior to trial, she should know that in this

34. If a student fails to raise the issue, of course, I do it myself.

35. See, e.g., *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138 (D. Del. 1982).

instance, as in all others, she should tell the truth, and the truthful answer is “yes.”

To drive the point home, I resort to a war story involving another Sicilian witness from the *Gambino* trial whom I will refer to as “FR.” A lifelong heroin dealer, and who knows what else, FR was one of the most sleazy individuals I ever had to prepare for the witness stand. He simply did not understand what it meant to play by the rules and appeared to assume, always, that our “surreptitious” meetings to prepare his testimony were our little secret. I drove home to him, over and over again, that everything I was doing was above board and that he should answer all questions, including questions about our meetings, as truthfully as he could based on his recollection.

At trial, FR testified on direct and then cross, and far exceeded my expectations as a witness. All of my work preparing him had paid tremendous dividends. And then I was handed what I thought to be a gift from the litigation gods: FR’s cross-examination was completed at the end of a court day. He was turned back over to me for redirect in the morning. I would thus have a chance to prepare a redirect examination; a rare luxury in trial practice.

The next morning I met with FR and an agent in a room next to the courtroom. I told FR that I had three questions for him, and depending upon what his answers were, I might or might not ask him these questions on the witness stand. I asked my questions and was satisfied with the answers. Thus, I told FR that I would call him back to the stand for a very brief redirect examination.

I asked my three questions in the courtroom and FR gave his answers. By how smoothly this redirect went (e.g., I did not need to lead my witness, a common problem in redirect examinations), lead defense counsel essentially knew that it had been prepared. With tremendous theatrical flair, summoning up horrendously accusatory tones in his voice, defense counsel asked FR whether he had met with me to review his testimony since his appearance in the courtroom the previous afternoon. FR was fooled into thinking that he (we!) had done something terribly wrong, and flat out denied meeting with me. Thus, I now had a witness on the stand that I knew to be committing perjury.

After a few more questions, defense counsel leaned over to me and, in a stage whisper asked, “He’s lying, isn’t he?” Mortified, I nodded yes. Defense counsel said, “Do something about it.” Luckily, I had the presence of mind to know that standing up in front of the jury and declaring my witness to be a liar was not the only option I had to rectify his perjury. So, I whispered back to my opponent, “When you’re done with him, I’ll fix it.”

After an excruciatingly painful re-cross-examination, I stood up for re-redirect. At this time, I proceeded to impeach my own witness, getting him to admit that we had, in fact, met that very morning to review my questions and his answers. I’ll never forget the look on his face while I was questioning him;

it communicated something like, “You idiot, I just saved your career by covering for you, and now you’re ruining it.”

Thus, through this disaster, I teach my students about the importance of *always* playing by the rules; of the need for constant repetition when conducting witness interviews and preparation; of how to rectify perjury without destroying one’s case; and how, sometimes, it’s just better to quit while you’re ahead.

I employ yet a third negative personal experience when teaching about the use of expert witnesses pursuant to FREs 702, 703, 704, and 705. In this instance, my role was not as litigator but as the expert—so my tale is told from the perspective of the (lawyer) witness. The experience provides the students with a number of useful insights into the use of experts at trial.

As with most of the previously described war stories, I do not tell this one until the students have grappled with the expert witness rules a bit on their own. Then I tell them about my one and only experience as a testifying expert. The case was a civil lawsuit against a small town outside of Gainesville, Florida, and its police chief, brought by an individual who had spent several months in jail for a murder (which had taken place twelve years prior to his arrest) that he claimed he did not commit. The defendant’s accuser was his ex-wife, who claimed just prior to a child custody hearing that he had confessed to the murder many years earlier. Based on the ex-wife’s statement (and essentially nothing else), the defendant was arrested. Plaintiff’s claim was false arrest—that he was arrested without probable cause. Indeed, as soon as the prosecutor learned of the custody dispute and the wife’s use of her ex-husband’s arrest as the basis for her claim to custody of their children, he dismissed the murder charges.

In his defense, the police chief claimed that the prosecutor had duly authorized the original arrest warrant. I was hired as an expert “on the relationship between the police and prosecution” and was prepared to state my opinion that this defense was flawed because the police chief had failed to tell the prosecutor about the child custody dispute when initially presenting the ex-wife’s statement as the basis for probable cause. I was also prepared to state my opinion that, in light of that dispute and the absence of any other evidence, no probable cause existed for the arrest.

I explain to the students how the process of expert testimony works: first, plaintiff’s counsel put me on the stand, asked me about my qualifications, and then tendered me as an expert under FRE 702.³⁶ The judge asked the defense if it had any objection. The defense asked to inquire and was granted the opportunity to conduct a *voir dire* regarding my qualifications. This is where the story gets interesting.

36. Actually, it was a state case, so the rules used were Florida’s equivalents to the Federal Rules of Evidence.

On the one hand, my qualifications as an expert were impeccable: Harvard Law School, Harvard Law Review, federal organized crime prosecutor, law professor at the flagship law school in the state. But the defense came prepared. Through their voir dire, they established that (1) I had never prosecuted a murder case;³⁷ (2) I had never prosecuted a case of any kind in Florida; (3) I was not even a member of the Florida Bar; (4) I had never consulted with any police agencies on any matters, including matters regarding arrest and probable cause; and (5) I had never set foot in the town in question. In short, they painted me as an “egg-head” Ivy League interloper who was daring to second guess the judgment of their own long-standing, hard-working chief of police, who truly understood the terrain on which he toiled. At the end of this excruciating voir dire, the defense announced that it had no objection to me as an expert witness in the area for which I had been tendered.

It was a brilliant bit of lawyering. From it, the students learn that true facts are often what lawyers make of them; they learn that what is seen as a tremendous advantage (e.g., my Harvard degree) can be turned into a tremendous disadvantage; and more specifically, they learn that voir dire can be used to discredit an expert witness *before* that witness has had a chance to testify about his opinions. By the time the defense in this case had completed their voir dire, the remainder of my direct testimony was essentially worthless. Finally, the students learn a bit of strategy: by not objecting to me as an expert, the defense scored its points during voir dire without suffering the certain overruling of an objection (I was without doubt technically qualified), which would have at least partially undermined the effectiveness of their voir dire attack.

F. When Appropriate, Use Humor and Be Theatrical When Telling a War Story

Evidence classes tend to be quite large—at my school they range from 95 to 115 students. In classes of this size, it takes a great deal of energy on the part of the teacher to keep the students consistently engaged in the material. A dry, monotonous performance is likely to lose a lot of students to sleep and boredom. A good war story, told in a theatrical manner, can literally shake the class up and bring the students back to life. This is especially true, I think, if the story involves humor and if the students, with their newly learned doctrine, find themselves in on the joke.³⁸

37. I had only prosecuted one federal racketeering case that included homicide among the various racketeering acts. *See supra* note 22 and accompanying text.

38. One must take great care, however, to ensure that the humor is good-natured and does not come at the expense of individuals or audience members. After recounting a conference luncheon speaker who told a humorous but extremely inappropriate war story, Professor Eileen Scallen reports that she was “reminded, in a concrete and visceral way, that what helps my

Perhaps the best example of this phenomenon from my teaching occurs during the class's discussion of cross-examination. Although I warn my students that an in-depth study of the "art of cross-examination" is beyond the scope of our Evidence course, I also tell them that I will clue them into some of the fundamentals of a good cross-examination. We talk about the basic "rules" of cross, such as (1) use leading questions (unless you don't care what the answer is); (2) don't ask for explanations; (3) don't ask a question to which you don't already know the answer (and are prepared to impeach the witness to get him to "fess up" the truth); and (4) don't ask "one question too many." With our discussion of these rules complete, I tell the story of the worst (and funniest) cross-examination I ever witnessed.

Once again, the case is *Gambino*.³⁹ The witness was a bank teller who was so minor to the case that I did not prepare his testimony until the morning of trial and I do not remember his name. His evidence was relevant to a money laundering charge that we had brought against Simone Zito and Tony, Grace, and Salvatore Mannino. The basis of the charge was our tracing of some portion of \$25,000 that we (the government) had paid to the defendants for heroin, through the bank account of Tony's Pizza, and then to the down payment on a condominium. The teller was merely a custodial witness; he testified on direct that \$16,000 in cash deposits were made into the bank account of Tony's Pizza on a particular day, which happened to be a day or two after the heroin transaction.

Salvatore Mannino's counsel, whom I shall refer to only as EF, got up to conduct the cross-examination for the defense. Clearly, this was a "seat-of-the-pants" cross: EF, a very experienced (and generally very good) trial lawyer had not thought about it until the witness was testifying on direct. Nevertheless, the beginning of the cross went well enough. Through the witness, EF established that pizzerias are cash businesses and that the majority of the deposits made into the Tony's Pizza bank account over the years had been cash deposits. He further established that some of these deposits had been quite large. At this point, I tell my class, EF should have sat down. He had done what he could on cross: negate the unfavorable inferences the government was trying to draw from the \$16,000 cash deposit made on that particular day.

But EF was on a roll—or so he thought. He asked, "So there was nothing unusual then, about this \$16,000 deposit, was there?" Immediately, many

students become better at the use of [e]vidence is to teach them to think—to think carefully not only about what they say, but also what they should say and how they should say it." Eileen A. Scallen, *Evidence Law as Pragmatic Legal Rhetoric: Reconnecting Legal Scholarship, Teaching and Ethics*, 21 QUINNIPIAC L. REV. 813, 886 (2003).

39. See *supra* notes 23–29 and accompanying text for my first reference to *United States v. Gambino*, 728 F. Supp. 1150 (E.D. Pa. 1989).

students recognize this as the classic one question too many. The witness answered, "Oh no, Mr. F, this was a very unusual deposit for Tony's Pizza." Now I ask the students, what should EF have done at this point? They shout out, nearly unanimously, "Sit down!"⁴⁰ But EF did not sit down. Instead, curiosity got the better of him, and he could not imagine getting outsmarted by a lowly bank teller. So, he asked, "Well tell us, [Mr. Bank Teller], what was so unusual about this particular deposit?"

The students start to laugh as they realize that EF had just violated two more rules of cross examination: he'd asked for an explanation, and he'd asked a question to which he did not know the answer. Then, I recall the answer. "Well, Mr. F, I don't know about you, but I sure don't pay for my pizzas with \$100 bills. But most of this \$16,000 deposit was in \$100 bills." This was stated in all innocence—and was something I had not thought to ask about on direct examination!

At this point, I make a swinging motion with my fist toward my face, indicating that EF had just been sucker-punched. I begin staggering around the front of the classroom. EF had dug himself into a hole too deep to stay in, so he began looking for a way to climb out. The testimony continued approximately as follows:

EF (with venom): Well, Mr. Bank Teller, you never bothered to report this so-called unusual transaction to the supervisor at your bank, did you?

BT (pure innocence): As a matter of fact, I did. We had a policy that all cash transactions over a certain amount had to be reported, and I certainly reported this one to my supervisor.

EF: Well, Mr. Bank Teller, you didn't make a paper record of this supposed report, did you?

BT: As a matter of fact, I did. According to bank policy, such a written report was required, and I filled one out.

EF: Well, Mr. Bank Teller, you didn't bring this report to the courtroom here today so that the jurors could see it for themselves, did you?

BT: As a matter of fact, Mr. F, I did. (Witness reaches down to briefcase he has brought with him to the

40. In fact, I explain to the students that he should have retreated to safe territory with a question such as, "But cash deposits for the pizzeria were not unusual, as you already testified, correct?" And *then* he should have sat down.

witness stand, opens it up and pulls out a piece of paper. He leans toward EF.) Here it is.

EF: No further questions, your honor.

By this time, the class is roaring with laughter. I assure them that this is a true story, that I had no idea there was a written report, but that I was sure to introduce it into evidence on re-direct examination.

III. CONCLUSION

There are many ways to teach any law course successfully, including Evidence. It can be approached from a very theoretical perspective or a very practical one. Some professors still use the tried and true case method, while others have moved more toward a problem-oriented approach. Others use movie clips to illustrate important points. A minority of professors have even adopted a NITA approach, essentially teaching Evidence through Trial Practice. This Essay does not advocate any particular method for teaching Evidence. It does take the position, however, that if an Evidence professor has some practical experience, he or she would be well advised to make use of that experience in the classroom. Done well—following the guidelines set out above—the use of war stories permits the integration of theory with practice that, in my experience, creates an excellent opportunity for enthusiastic classroom learning.

APPENDIX

EVIDENCE
PROFESSOR SEIGEL

SUPPLEMENTAL ASSIGNMENT:

United States of America v. Nicodemo Scarfo

Background: In 1988, Nicodemo Scarfo and sixteen other individuals were indicted in Philadelphia on charges of racketeering, 18 U.S.C. § 1961-63. Scarfo, alleged to be the "Boss" of the Philadelphia family of "La Costra Nostra," was accused in one of the racketeering acts of participating in the murder of a federal judge (Edwin Helfant).

The Memorandum: The memorandum that follows was prepared during the first week of what turned out to be a four-month trial. It was written in response to what had occurred in court that day. Kenneth McNair was called as a witness by the government and testified as outlined in the memorandum. The defense objected to the testimony on the grounds of relevancy and asked that it be stricken from the record. The judge struck part of McNair's testimony immediately; he then recessed the trial and said that he would rule the next morning on whether the remainder of the testimony would be stricken as well. The memorandum was written during the night and presented to the judge before the trial was reconvened the next morning.

Questions: After you read the memorandum, ask yourself the following questions:

(1) What is the government's theory that McNair's testimony about the gun is relevant?

-- What is the "fact of consequence" which McNair's testimony makes more or less probable?

-- How would you chart the chain of inferences implicitly relied upon by the government to get from McNair's testimony about the gun to the fact of consequence?

(2) Are you convinced that the government's argument passes the hurdle of FRE 401?

(3) Could you make an argument that the relevancy of McNair's testimony is conditional upon proof of some other fact (under FRE 104(b))? Would a 104(b) argument be a good strategy for the defense?

(4) What about the 403 issue? If you were defense counsel, how would argue that the testimony concerning the gun amounted to unfair prejudice?

(5) What do you suppose was the government's original theory that McNair's testimony about his earlier lies was relevant (see footnote 1)? How did the change in McNair's testimony affect the relevancy of the prior lies? Was the court's decision to strike the testimony correct?

(6) Note that the government does not ask the judge to reconsider its earlier ruling regarding McNair's lies. So what was the point of writing footnote 1?

(7) The memorandum was ghost-written by an attorney who was not a member of the team prosecuting the case. Who was the ghost?

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :

v. : Crim. No. 88-00003

NICODEMO SCARFO, et al. :

GOVERNMENT'S MEMORANDUM OF LAW ON RELEVANCE
OF TESTIMONY OF KENNETH McNAIR

On Friday, September 30, 1988, the government called Kenneth McNair to the witness stand. McNair testified that Government Exhibit No. 2, a Smith and Wesson .38 caliber Airweight Revolver, serial number J238283 -- identified as the murder weapon in the slaying of Judge Edwin Helfant (Racketeering Act One in the Indictment) -- was at one time in his possession. He testified that he traded the gun to Jerome Palumbo in approximately 1975, and that he knew Jerome Palumbo had a brother named John. He further stated that, when he was questioned by the police about the gun shortly after the Helfant murder, he lied in order to protect Palumbo. McNair testified that he believed that Palumbo knew he lied, but he answered "no" when asked if Palumbo had asked him to lie. On

motion of the defense, McNair's testimony regarding the motivation for his lying was stricken from the record.¹

The government's evidence will show that Jerome Palumbo's brother John was a close associate of defendant NICODEMO SCARFO

¹During the course of a side-bar proffer as to this witness's testimony, the government represented that he would state that Jerome Palumbo had asked him to lie to the police. The government's representation was fully supported by McNair's previous statements, including a sworn statement he gave to the New Jersey State Police on January 29, 1987 (relevant portions of which are attached hereto as Exhibit A). On that occasion McNair testified that he had lied to the police because he "was mostly covering up for the guy that I sold it to." Ex. A at 16. He further stated that he had spoken to Jerome Palumbo prior to talking to the police and had assured him that "I got a line for them." Ex. A at 17. Palumbo was "shook up" and was going off the "bad end." He told McNair "something like be cool, be cool or something like that there." Ex. A at 32-33. Palumbo accompanied McNair to the police barracks. Ex. A at 21-22. McNair told the police that he had sold the gun to Randy Frison because Frison was dead and "a dead man can't talk." During a pre-trial interview with a prosecutor, McNair answered in the affirmative when asked if Palumbo had asked that he cover for him.

McNair was ultimately prosecuted in connection with his possession of this gun, see Ex. A at 28-29, and he is a close friend of the Palumbo family. See Ex. A at 16. It is thus not surprising that, at trial, he retreated from his previous testimony regarding Palumbo's involvement in McNair's initial mistruths.

The government notes that McNair is not the only potentially hostile witness likely to be called during the course of the government's case. A hostile witness may be asked leading questions, see Fed. R. Evid. 611(c), and may even be impeached by the party calling the witness. See Fed. R. Evid. 607.

In the instant case, the government chose not to impeach McNair regarding his prior inconsistent statements because the participation or knowledge of Jerome Palumbo regarding McNair's prior lies is not necessary to establish the relevance of McNair's testimony regarding the gun. See text.

and other members of LA COSA NOSTRA, the alleged RICO enterprise.

The defense has vigorously challenged the relevancy of McNair's testimony and future evidence concerning John Palumbo. For the reasons stated below, the government submits that this evidence is relevant and should be admitted.

The starting point for any discussion of relevancy in the federal courts is Fed. R. Evid. 401, which states:

"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 than it would be without the evidence.

(Emphasis added.) This is a "'rather liberal standard' Under Rule 401, evidence is relevant if it has the slightest bit of probative worth; only evidence that has no value as proof of a consequential fact is irrelevant." 22 C. Wright & K. Graham, Jr., Federal Practice and Procedure § 5165 at 49 (1978 & Supp. 1987) (emphasis added).

In McQueeney v. Wilmington Trust Company, 779 F.2d 916 (3d Cir. 1985), the Third Circuit examined the parameters of Rule 401 at some length. The court noted that the rule defines as relevant "evidence that has 'any tendency' to make a difference in the case." Id. at 922. It stated: "The plain meaning of the Rule demonstrates that the scope of relevant evidence is intended to be broad, and the authorities support such a broad reading. See United States v. Clifford, 704 F.2d 86, 90 (3d Cir. 1983); United States v. Steele, [685 F.2d 793, 808 (3d Cir.), cert. denied, 459 U.S. 908 (1982)]; Carter v. Hewitt,

617 F.2d 961, 966 (3d Cir. 1980) ('[t]he standard of relevance established by the Federal Rules of Evidence is not high')."

Id.

Careful analysis leads to the inevitable conclusion that the proffered evidence in this case is relevant under the standard set forth in Rule 401. Government Exhibit 2, a .38 caliber Smith and Wesson revolver, has been identified as the murder weapon in the Helfant slaying. The government has alleged (in Racketeering Act One) that this gun was used by defendants NICODEMO SCARFO and NICHOLAS VIRGILIO to commit the murder. Kenneth McNair testified that he gave this very gun to Jerome Palumbo prior to the Helfant murder, and that Jerome Palumbo is the brother of John Palumbo. The government's evidence will show that, contemporaneous with the Helfant murder, John Palumbo was an associate of NICODEMO SCARFO and other members of LA COSA NOSTRA. This evidence certainly has a "tendency" to make "more probable" the allegation in the indictment. It therefore passes the Rule 401 test. Cf. United States v. Arnott, 704 F.2d 322, 325-26 (6th Cir. 1983) (weapons seized from co-conspirator's residence, in light of evidence that defendant visited this residence, relevant to distribution of cocaine charge as "tools of trade"); United States v. Stewart, 579 F.2d 356, 358 (5th Cir.) (shotgun found in stolen car used in bank robbery relevant even without proof that it was same as one used in robbery and seen in possession of defendant), cert. denied, 439 U.S. 936 (1978).

The defense argument is that this evidence is too remotely circumstantial to be admissible. This is not, in reality, an argument as to the relevance of the evidence; it is an argument that the evidence does not (or should not) carry much weight. "[T]he judge may not consider the weight of the evidence in determining relevance . . . the weight of the evidence is for the jury to determine. . . ." 22 C. Wright & K. Graham, Jr., Federal Practice and Procedure § 5165 at 50 (1978 & Supp. 1987).

Of course, not all relevant evidence is admissible. Pursuant to Fed. R. Evid. 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Id. The government submits that the probative value of the proffered evidence is not outweighed by any of the factors enumerated in Rule 403. The defense may attempt to characterize this evidence as "prejudicial"; such an argument should be rejected. The evidence is "prejudicial" -- i.e., it harms defendants' case -- precisely because it is relevant. "'[U]nfair prejudice' as used in Rule 403 is not to be equated with testimony simply adverse to the opposing party. Virtually all evidence is prejudicial or it isn't material. The prejudice must be 'unfair.'" Dollar v. Long Mfg., N.C. Inc., 561 F.2d 613, 618 (5th Cir. 1977); see McQueeney, 779 F.2d at 923. There


is nothing unfair about the evidence the government proposes to introduce, and thus it should be admitted during trial.

Respectfully submitted,

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September 30, 1988