

## A DECENT EXPLANATION: APPLYING THE RULES OF EVIDENCE

Judge Gordon Shumaker

A leading physicist has said that science is useful because it provides a “decent explanation” of the world. The idea of searching for a decent explanation is transferable to what we do with the rules and principles of Evidence law. We use them to arrive at decent explanations, or resolutions, of evidentiary problems.

A ***decent explanation*** is one that provides a solution to an evidentiary problem through a plausible connection to at least one rule or principle of Evidence law that is not discounted or negated by some other rule or principle.

A decent explanation begins with the answer to a **WHY QUESTION:** Why should the trier of fact (jury, or judge in a court trial) be allowed to consider a certain item of evidence—testimony, a document, or a tangible thing? The answer to that question lies in an understanding of the critical concept of **FOUNDATION**.

Foundation is a threshold fact or set of facts that makes other facts admissible in evidence. For example, no lay witness may testify to a matter in a case until it has *first* been shown that the witness has personal knowledge of the matter. The process of showing the fact of personal knowledge is called ***laying foundation***. To be admissible, all evidence must be supported by foundation. So, all testimony, whether from a lay witness or an expert, ***must be preceded by*** the laying of foundation for the testimony, although the foundation for expert testimony is different from that for a lay witness. No document or tangible thing is admissible unless there is a threshold showing that the item is what it is purported to be. That showing is the foundation for the item. To borrow (but distort) a concept from chaos theory, all admissible evidence enjoys a ***“sensitive dependence on initial conditions,”*** those conditions being what we call foundation.

In arriving at a decent explanation for an evidentiary problem, we first consider foundation. The existence of foundation gives us the answer to the question of why the trier of fact should even be allowed to consider an item of evidence. If foundation for an item does not exist or is inadequate, the item cannot be received in evidence.

Foundation alone will not complete a decent explanation of any evidentiary problem. It is the starting point. Having answered the why-question, we then consider the **HOW QUESTION**: How does the rule or principle of Evidence law work so as to provide, as fully as possible, a decent explanation to resolve the problem? To answer the how-question, we conduct an analysis, showing with particularity precisely how the rule or principle applies to, or fits, the facts under consideration.

Most often, more than one rule or principle will be involved in our analysis because ***Evidence law operates as a “system.”***

To illustrate with a simple example, suppose the case on trial arose out of a car accident. The plaintiff claims that she was badly injured when her car was struck by the defendant’s car in an intersection. She contends that the defendant drove through a red light and thereby caused the collision. The defendant claims that the light was yellow when he entered the intersection and that he had the right of way until he had passed entirely through. A bystander is called by the plaintiff’s lawyer to testify. Here are some of the questions:

Q. Where were you on April 1, 2011 at about 4:30 in the afternoon?

A. I was at the corner of 8<sup>th</sup> and Main.

Q. Did you witness an automobile accident at that time?

A. No, but I heard he crash while I was in the drug store on that corner and I ran out to see what happened.

[Note that, because he did not see the collision, there is no foundation for him to testify to how the accident happened].

Q. Did you talk to anyone at the scene?

A. Yes, the driver of the black SUV was sitting in his vehicle and I asked him if he was all right.

[The driver of the SUV is the defendant].

Q. What did he say?

A. He said he was fine.

Q. Did he say anything else?

[Opposing lawyer]: I object. That is not admissible.

[Judge]: Overruled. The witness may answer.

A. Yes, he said, "I knew I could not get there before the light turned red."

The evidentiary problem is the admissibility of the defendant's statement. Even though the judge allowed it, the judge might have been wrong. It is a very damaging statement to the defendant and he would prefer that the trier of fact not hear that he made it.

Why does the trier of fact get to hear that last answer? The reason is that the witness has **personal knowledge** of the defendant's statement. That is the foundational requirement. How then is the defendant's statement connected to a rule or principle? There is a rule that provides that **statements of a party**, often called "admissions" in a very broad sense, are admissible in evidence when offered against (not in favor of) that party. There is another rule that states that statements made "out of court" are inadmissible **hearsay**. However, the "admissions" rule defines such party statements as not being hearsay. Then there is a rule that says that, to be admissible, evidence must have some tendency to make it more likely that a fact of consequence is either true or not true than if we did not have that evidence. This is called the **rule of relevancy**. Considering the defendant's "admission," it is more likely true that he entered on the red light than it would be if we did not have that admission. And entry, or not, on the red light is surely a fact of consequence in the case.

I have not given you the rule numbers that apply, but I have illustrated the ***elements of a decent explanation*** of the question of whether the statement is admissible: There is a rule that says it is; no other rule negates admissibility; the fact asserted is one of consequence; and the means of bringing the statement before the trier—testimony—was supported by the witness’s personal knowledge (foundation).

For this course, and in actual practice, it will be important to cite the rules, or principles, that apply in showing why the evidence can be received in the trial and how the cited rules or principles fit the facts so as to give us a decent explanation of the problem.

