

## TRIAL ADVOCACY

### GUIDE TO HOW JUDGE LOOKS AT PRE-TRIAL AND OPENING STATEMENTS

#### JUDGE HYSLIP

#### PRETRIAL

1. If a **student/lawyer** calls his client witness to testify at trial but fails to request the court to exclude that client/witness **prior conviction**, would you consider this a **weakness** in that student-lawyer's presentation?

(Check the most appropriate response)

  X   Possibly

       Probably

       Certainly

2. The student/lawyers have been taught in **Basic Evidence (Federal)** that there are several **balancing tests** applicable to **prior convictions**. Will you consider it a **weakness** in the **student-lawyer's** presentation if she/he does not recognize the various tests?

(Check the most appropriate response)

       Possibly

       Probably

  X   Certainly

3. The student/lawyers have been taught in **Basic Evidence (Federal)** that after **Daubert +/Kumho** many courts prefer lawyers to raise issues regarding **expert testimony prior** to trial.

Do you:

**agree** with this approach?

**disagree** with this approach?

(Check the most appropriate response)

4. Consistent with **Federal Rule of Evidence 607** student/lawyers have been taught in **Basic Evidence** that if **they fail to secure the pretrial exclusion of prejudicial** evidence (i.e., prior convictions/bad acts), they may disclose the prejudicial nature of this evidence **before** his/her opponent.

Do you:

**accept** this interpretation/approach?

OR

**reject** this interpretation/approach?

(Check the most appropriate response)

5. Student/lawyers are taught in **Basic Evidence (Federal)** that trial and appellate courts adhere to a “**contemporaneous objection**” rule:

Do you:

**follow** that rule?

OR

**reject** that rule?

(Check the most appropriate response)

6. Student/lawyers are taught in **Basic Evidence (Federal)** that when the judge rules against them they should **make a record** consistent with Federal Rules of Evidence **103**.

Do you:

**follow** that approach?

OR

**reject** that approach?

7. Student/lawyers are taught in **Basic Evidence (Federal)** that a judge may consider **admissible** or **inadmissible** evidence when deciding whether a witness is **qualified to testify** or whether a **privilege** exists.

Do you:

**follow** this principle?

OR

**reject** this principle?

8. Student/lawyers are taught in **Basic Evidence (Federal)** that a judge **may only** consider **admissible** evidence when **determining a relevant matter conditioned on a fact**.

Do you:

**follow** this principle?

OR

**reject** this principle?

## OPENING STATEMENT

1. Consistent with **Federal Rule of Evidence 607**, student/lawyers have been taught in **Basic Evidence** that if **they fail to secure the pretrial exclusion** or prejudicial evidence (i.e., prior convictions, etc.), they **may** disclose that prejudicial evidence during the **opening statement**.

Do you:

  X   **accept** this interpretation/approach?  
(Student/lawyer for prosecution in criminal case may not disclose. [of their own witness pursuant to a plea agreement or otherwise?] - See United States v. Consentino, 844 F.2d 30 (2d Cir. 1988) cert. denied, 488 U.S. 923 (1988).

OR

       **reject** this interpretation/approach?

(Check the most appropriate response)

2. If the student/lawyer presents his/her **opening** in a “**story**” format, will you **evaluate** the “story” format as a “**strong**” point?

  X   **Yes**

OR

       **No**

3. If the student/lawyer **reads** his/her **opening**, will you **evaluate** such an aspect of the presentation as a “**weak**” point?

  X   **Yes**

OR

       **No**

4. If the student/lawyer's opponent **misstates the law** in his/her **opening** statement, will you **evaluate** a student/lawyer's failure to object as a "**weak**" **point**?

    X          **Yes**

OR

                **No**

5. If the student/lawyer "walks" around the courtroom throughout his/her presentation of the **opening**, will you **evaluate** such movement as a "**weak**" **point**?

                **Yes**

OR

    X          **No**