FEDERAL EVIDENCE REVIEW
HIGHLIGHTING RECENT FEDERAL EVIDENCE CASES & DEVELOPMENTS

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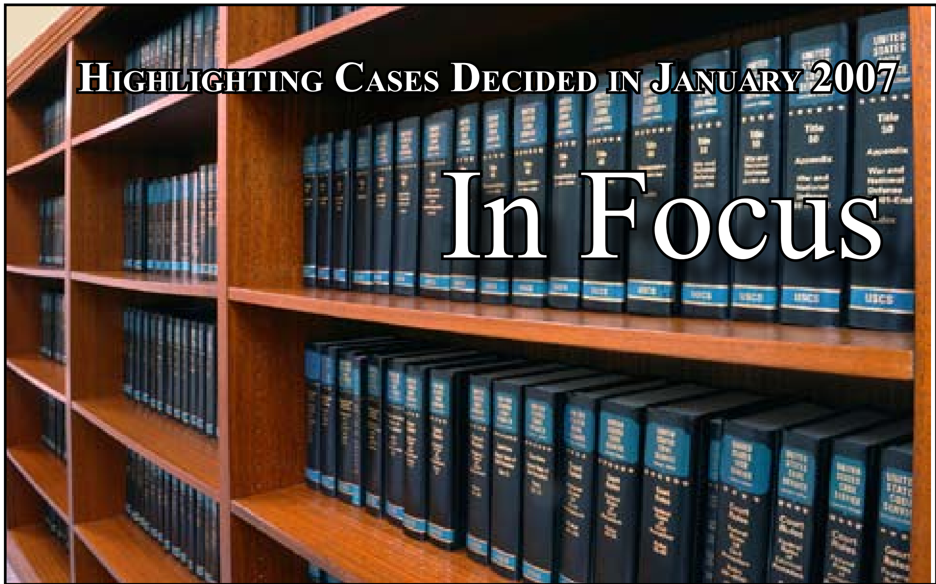

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Lead Story: The "Open Door" Doctrine: Opening The Evidence Door To Otherwise Inadmissible Evidence: Ten Common Questions & Misconceptions

The "open door" doctrine allows a party to admit evidence that may otherwise be irrelevant or inadmissible. The doctrine essentially seeks to cure any unfair advantage one party may obtain by introducing evidence that may provide a misimpression concerning the evidence. The doctrine is "variously known as 'waiver,' 'estoppel,' 'opening the door,' 'fighting fire with fire,' and 'curative admissibility.'" Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 177 n.2 (1988) (Rehnquist, J., dissenting). In this Lead Story, some common questions and misconceptions concerning this important doctrine are reviewed.*

Q1: What Is The "Open Door" Doctrine? What Are Some Examples Of Its Use?

As one court has concisely defined this rule:

"Under the rule of curative admissibility, or the 'opening the door' doctrine, the introduction of inadmissible evidence by one party allows an opponent, in the court's discretion, to introduce evidence on the same issue to rebut any false impression that might have resulted from the earlier admission."

United States v. Whitworth, 856 F.2d 1268, 1285 (9th Cir. 1988) (citation omitted). For other case examples, consider:

❖ *Bearint ex rel. Bearint v. Dorell Juvenile Group, Inc.*, 389 F.3d 1339, 1349 (11th Cir. 2004) (Under the "curative admissibility" doctrine, "when a party offers inadmissible evidence before a jury, the court may in its discretion allow the opposing party to offer otherwise inadmissible evidence on the same matter to rebut any unfair prejudice created.")

❖ *Paolitto v. John Brown E. & C., Inc.*, 151 F.3d 60, 66 (2d Cir. 1998) ("Opening the door" to evidence that has been previously excluded gives the trial court discretion to permit a party to introduce otherwise inadmissible evidence on an issue (a) when the opposing party has introduced inadmissible evidence on the same issue, and (b) when it is needed to rebut a false impression that may have resulted from the opposing party's evidence) (citation and internal quotation marks omitted)

❖ *United States v. Rosa*, 11 F.3d 315, 335 (2d Cir. 1993) ("The rule of 'opening the door,' or 'curative admissibility,' gives the trial court discretion to permit a party to introduce otherwise inadmissible evidence on an issue (a) when the opposing party has introduced inadmissible evidence on the same issue, and (b) when it is needed to rebut a false impression that may have resulted from the opposing party's evidence.") (citations omitted)

❖ *United States v. Hall*, 653 F.2d 1002, 1007 (5th Cir. 1981) (Under the doctrine of "curative admissibility," "evidence that is irrelevant and thus inadmissible nevertheless may be admitted to rebut evidence of a like character.")

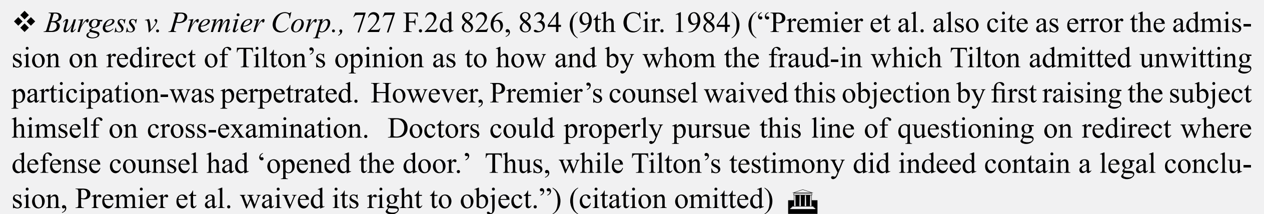
Q2: Can Inadmissible Evidence "Open The Door" To Inadmissible Evidence?

Yes. Under the "Open Door" Doctrine, when a party uses irrelevant or inadmissible evidence, the opposing party may also use inadmissible evidence to explain the circumstances. A few examples illustrate this point.

❖ **Prevent Untruthful Use Of Evidence:** Evidence that is unlawfully seized, is usually suppressed and the jury will never hear about it. However, if the defense

admitted into evidence for its own tactical reasons. Washington now argues on appeal that the conversations between White and Jackson leading up to the sale on April 15 'established an unsavory prejudicial tone which could not but damage [Washington] before the jury.' The tapes were admitted because Washington's trial counsel made a deliberate strategic choice that the tapes should be admitted to establish an unsavory tone, which would damage White, the government's chief witness, before the jury…. This is classic waiver, and we will not even consider the argument.")

❖ *United States v. Mitchell*, 85 F.3d 800, 807-08 (1st Cir. 1996) (because defense counsel affirmatively agreed to government's proposed use of evidence, waiver occurred, and plain error review does not apply)



❖ *Burgess v. Premier Corp.,* 727 F.2d 826, 834 (9th Cir. 1984) ("Premier et al. also cite as error the admission on redirect of Tilton's opinion as to how and by whom the fraud-in which Tilton admitted unwitting participation-was perpetrated. However, Premier's counsel waived this objection by first raising the subject himself on cross-examination. Doctors could properly pursue this line of questioning on redirect where defense counsel had 'opened the door.' Thus, while Tilton's testimony did indeed contain a legal conclusion, Premier et al. waived its right to object.") (citation omitted)

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