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SECTION OF LITIGATION | AMERICAN BAR ASSOCIATION  
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## The Open Door to Inadmissible Evidence: Curative Admissibility

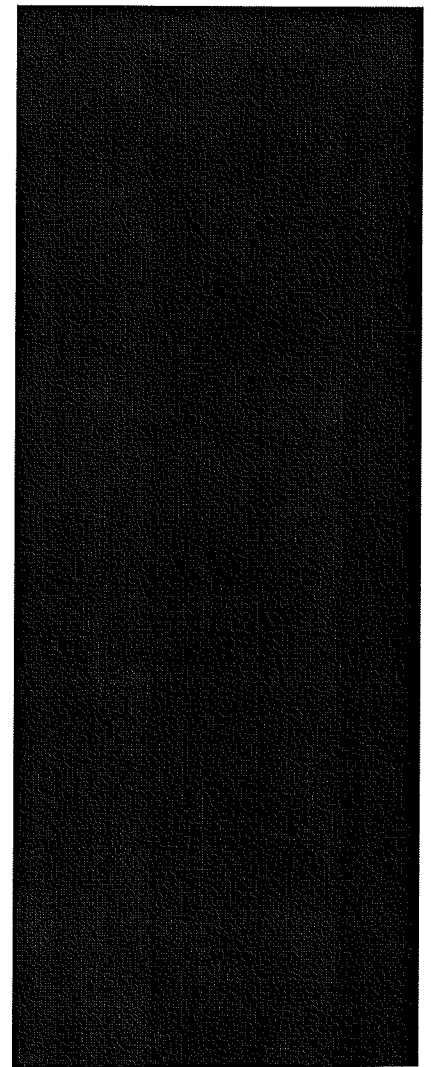
By John P. McCahey

**E**vidence that would be otherwise inadmissible at a federal trial may be admitted into evidence under the curative admissibility doctrine (sometimes referred to as “opening the door” or “invited error”).<sup>1</sup> This doctrine allows for the admission of inadmissible evidence by a party after an opposing party has “opened the door” to it by first introducing inadmissible evidence at trial.<sup>2</sup> Evidence is admitted under

the doctrine when deemed necessary to counter the evidence that opened the door.<sup>3</sup> Whether or not to allow such curative evidence is at the trial court’s discretion at both civil and criminal trials.<sup>4</sup>

Curative admissibility is not codified in the Federal Rules of Evidence. It is a common law evidentiary rule that calls for the exercise of judicial discretion at jury trials and its “soundness” has been described as depending

*Continued on page 8*



# The Open Door to Inadmissible Evidence

Continued from page 1

upon the particular facts to which it is applied.<sup>5</sup> While a trial court's discretion under the doctrine is broad, a body of case law exists to guide it in the exercise of that discretion.

## What Is Curative Admissibility?

Curative admissibility is a discretionary rule intended to neutralize or cure any unfair prejudice or false impression that results from the earlier use at trial of inadmissible evidence.<sup>6</sup> It follows from the premise that one party's introduction of inadmissible evidence on an issue may open the door to otherwise inadmissible evidence from an opposing party on the same issue.<sup>7</sup> The doctrine thus provides the trial court with the discretion to permit a party to offer inadmissible evidence to rebut or explain inadmissible evidence that was introduced earlier by its adversary.<sup>8</sup>

The doctrine rests "upon the necessity of removing prejudice in the interests of fairness."<sup>9</sup> It is sometimes justified on the grounds that a party who opens the door by availing itself of inadmissible evidence has waived its rights to complain if an opposing party is thereafter permitted to respond with evidence of a like character.<sup>10</sup> Curative admissibility, however, is considered a "shield, not a sword,"<sup>11</sup> and courts stress that otherwise inadmissible evidence may be admitted under its cover only to the extent necessary to rebut or clarify the earlier evidence.<sup>12</sup>

Curative evidence allowed may take different forms depending upon the objectionable evidence that opens the door and the appropriate manner to respond to any ensuing prejudice or false impression. A party may be permitted to engage in otherwise improper examination of a witness to address objectionable testimony earlier elicited from that witness by an opposing party. In some cases, the introduced objectionable evidence, be it testimonial or documentary, may support the curative admissibility of otherwise objectionable rebuttal testimony or documentary evidence. Curative admissibility may allow the admission of evidence that had been excluded by the trial court before the door to its admission was opened.

The admission of evidence under the doctrine lies within the trial court's discretion.<sup>13</sup> The exercise of that discretion will be reviewed on appeal by the abuse of discretion standard.<sup>14</sup> A trial court's ruling to admit or exclude curative evidence, even if found on appeal to be an abuse of discretion, will not warrant a reversal if the error was harmless.<sup>15</sup>

The party seeking to introduce otherwise inadmissible evidence under the cover of curative admissibility will ordinarily need to lay a foundation showing that (a) an opposing party has introduced inadmissible evidence at trial on an issue and (b)

further inadmissible evidence relevant to that issue is necessary to rebut any unfair prejudice or clarify any false impression created by that earlier evidence.<sup>16</sup> In considering whether to allow a proponent's curative evidence, the trial court will then need to determine both if the door to its admission was earlier opened and if it may pass through that door under the shield of curative admissibility.<sup>17</sup>

## What Opens the Door

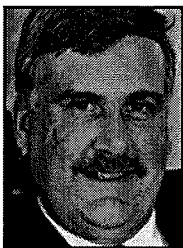
Courts are in agreement that one party's introduction at trial of inadmissible evidence "opens the door" to the curative admissibility of an opposing party's inadmissible evidence.<sup>18</sup> Most courts agree also that only the earlier admission of inadmissible evidence may open the door to responsive inadmissible evidence and that curative admissibility is not available to respond to evidence that was properly admitted.<sup>19</sup> At least one court, however, has suggested that curative admissibility may be appropriate when necessary to respond to another party's properly admitted evidence that created a false impression.<sup>20</sup> The party that first opens the door is not permitted to introduce further inadmissible evidence through that door.<sup>21</sup>

The case law offers little discussion as to whether a party offering curative evidence is required to have earlier objected to the inadmissible evidence that opened the door. One court has permitted a party's curative evidence notwithstanding that party's earlier failure to object.<sup>22</sup> That court observed that "while perhaps the lack of objection" by a party could give a trial court "a reason to exercise its discretion not to allow" that party's curative evidence, "the single failure to object does not foreclose, as a matter of law, the [trial] court's use of its broad discretion on questions of evidence."<sup>23</sup>

While properly admitted evidence does not open the door to curative admissibility, some courts have suggested that otherwise inadmissible evidence may be admitted by a party in response to another party's evidence when appropriate under the "rule of completeness."<sup>24</sup> That rule, partially codified in Federal Rule of Evidence 106, has been broadly described as permitting the full disclosure of information where one party has made a partial disclosure of information, and full disclosure would avoid unfairness to the other party.<sup>25</sup> There is not, however, general agreement among the courts that the rule of completeness allows the admission of otherwise inadmissible evidence.<sup>26</sup>

## What Gets Through the Door

Even after one party opens the door to inadmissible evidence, it is still within the trial court's discretion to determine what, if any, inadmissible evidence an opposing party may be permitted to



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introduce. Allowing evidence under the shield of curative admissibility is tempered by the need to place reasonable limits upon the amount and type of rebuttal evidence allowed to come in through an open door.<sup>27</sup> Courts have stressed that the “Federal Rules of Evidence do not simply evaporate when one party opens the door to an issue,”<sup>28</sup> and that the range of otherwise inadmissible evidence that may be “squeezed through an open door is limited.”<sup>29</sup> Curative admissibility does not provide an aggrieved party with an “unbridled license” to introduce otherwise inadmissible evidence, nor does it justify the receipt of such evidence merely because it is in the same category of the evidence that opened the door.<sup>30</sup>

Inadmissible evidence is admitted under the shield of curative admissibility only to the extent necessary to address any unfair prejudice or false impression which might have ensued from the evidence that opened the door.<sup>31</sup> It is excluded when it is irrelevant to the initial evidence or relates to a different issue.<sup>32</sup> Moreover, if the proffered evidence does not directly contradict the initial evidence or goes beyond the necessity of removing prejudice in the interests of fairness, it is within the trial court’s discretion to deny its admission.<sup>33</sup>

In considering whether to allow curative admissibility in a particular case, the trial court must carefully weigh the unfairness of allowing one party’s objectionable evidence to remain unanswered against the danger of compounding the problem it created with further inadmissible evidence.<sup>34</sup> The need for and value of the curative evidence has to be balanced against its potential for undue delay, confusion, and prejudice.<sup>35</sup> Before allowing curative evidence, trial courts often consider whether any prejudice or false impression that resulted from the initial inadmissible evidence may be sufficiently addressed by a curative instruction to the jury, thereby obviating the need of further inadmissible evidence of opposing party.<sup>36</sup>


### Illustrative Cases

In a civil rights suit brought against public servants, *Lawson v. Trowbridge*,<sup>37</sup> two of the defendants testified at length on their direct examination as to their limited financial resources. The trial court thereafter refused to allow the plaintiff to offer as curative evidence the defendants’ statutory entitlement to indemnification from their employer. The jury ultimately found against the two defendants, but awarded plaintiff only two dollars in damages. That verdict was overturned on appeal and the case remanded on the grounds that the trial court abused its discretion in refusing to allow the plaintiff’s curative evidence. The defendants’ testimony as to their financial resources was found to have created a false impression for the jury that defendants

would ultimately pay any judgment against them, and thus opened the door to otherwise inadmissible evidence of their entitlement to indemnification to rebut that impression.<sup>38</sup>

In a medical malpractice action, *Henderson v. George Washington University*,<sup>39</sup> the defendants were successful in excluding a surgical report offered by the plaintiff concerning the defendants’ treatment of another patient. That report had been relied upon by the plaintiff’s expert in reaching his opinion in support of the plaintiff’s claim. The defendants thereafter exploited the absence of the excluded report in their cross-examination of the plaintiff’s expert to “destroy” his credibility, and the trial court refused plaintiff’s later efforts to introduce the report as curative evidence. That refusal was later found on appeal to have been an abuse of discretion sufficient to overturn the jury’s verdict for the defendants. The excluded report should have been admitted as curative evidence to rebut the prejudice that resulted from the defendants’ “sandbagging” of plaintiff’s expert during cross-examination.<sup>40</sup>

The trial court was found to have properly exercised its discretion in excluding the plaintiff’s curative evidence in a discrimination action brought against a municipality.<sup>41</sup> The defendant elicited testimony from the plaintiff’s supervisor that he never discriminated against any employee under his supervision. In response, the plaintiff sought to offer curative evidence concerning discrimination allegations made by others against the supervisor, but the court declined to allow such evidence. It instead instructed the jury to ignore the supervisor’s testimony. The eventual jury verdict for the defendant was affirmed on appeal. The appeal court found that while the supervisor’s testimony opened the door to the plaintiff’s curative evidence, the trial court properly exercised its discretion in addressing the supervisor’s testimony by a curative instruction. Allowing plaintiff’s curative evidence would have risked potential prejudice, undue delay, and juror confusion in “mini-trials” of other alleged instances of discrimination.<sup>42</sup>

Reviewing federal appellate decisions addressing curative admissibility leads to three conclusions. First, trial courts sometimes allow one party’s inadmissible evidence at trial. Second, curative admissibility in some cases may provide a means to address the adverse consequences of such evidence upon an opposing party. Finally, the “soundness” of using curative admissibility to address those consequences turns on the particular circumstances presented by each case. 

### Endnotes

1. See *United States v. Martinez*, 988 F.2d 685, 702 (7th

Cir.), *cert. denied*, 510 U.S. 814 (1993); *Government of Virgin Islands v. Archibald*, 987 F.2d 180, 187 (3rd Cir. 1993).

2. See *Bearint v. Dorel Juvenile Group*, 389 F.3d 1339, 1349 (11th Cir. 2004); *United States v. Whitworth*, 856 F.2d 1268, 1285 (9th Cir. 1988); *cert. denied*, 489 U.S. 1084 (1989).

3. See *Archibald*, 987 F.2d at 187; *United States v. Hall*, 653 F.2d 1002, 1007 (5th Cir. 1981).

4. See *Henderson v. George Washington Univ.*, 449 F.3d 127, 140-41 (D.C. Cir.), *reh'g denied*, 2006 U.S. App. LEXIS 22456 (D.C. Cir. 2006); *United States v. Forrester*, 60 F.3d 52, 60-61 (2nd Cir. 1995).

5. See *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 177n.2 (1988) (Rehnquist, J., dissenting).

6. See *Martinez*, 988 F.2d at 702.

7. See *Henderson*, 449 F.3d 127 at 140-41; *United States v. Brown*, 921 F.2d 1304, 1307 (D.C. Cir. 1990).

8. See *Bearint*, 389 F.3d at 1339; *Whitworth*, 856 F.2d at 1285.

9. See *Crawford v. United States*, 198 F.2d 976, 978-79 (D.C. Cir. 1952).

10. See *Manuel v. City of Chicago*, 335 F.3d 592, 597 (7th Cir. 2003); *Hall*, 653 F.2d at 1007.

11. See *United States v. Brown*, 921 F.2d at 1307.

12. See *Martinez*, 988 F.2d at 702; *Whitworth*, 856 F.2d at 1285; *California Ins. Co. v. Allen*, 235 F.2d 178, 180 (5th Cir. 1956).

13. See *In re Air Disaster at Lockerbie Scot.*, 37 F.3d 804, 817 (2nd Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *United States v. Segines*, 17 F.3d 847, 856 (6th Cir. 1994); *cert. denied*, 519 U.S. 908 (1996).

14. See *United States v. Chance*, 306 F.3d 356, 385 (6th Cir. 2002).

15. See *United States v. Rosa*, 11 F.3d 315, 335 (2nd Cir. 1993), *cert. denied*, 511 U.S. 1042 (1994).

16. See *Paolitto v. John Brown E. & C. Inc.*, 151 F.3d 60, 66 (2nd Cir. 1998); *Whitworth*, 856 F.2d at 1285.

17. See *Bearint*, 389 F.3d at 1349; *Allen*, 235 F.2d at 180.

18. See *Jerden v. Amstutz*, 430 F.3d 1231, 1239n.9 (9th Cir.

2005), *reh'g denied*, 2006 U.S. App. LEXIS 673 (9th Cir. 2006); *United States v. Rea*, 958 F.2d 1206, 1225 (2nd Cir. 1992); *Brown*, 921 F.2d at 1307.

19. See *Forrester*, 60 F.3d at 52; *Archibald*, 987 F.2d at 187; *Brown*, 921 F.2d at 1307.

20. See *Henderson*, 449 F.3d at 140-41.

21. See *United States v. Rosa*, 11 F.3d at 335.

22. See *Nguyen v. Southwest Leasing and Rental, Inc.*, 282 F.3d 1061, 1068 (9th Cir. 2002).

23. See *Nguyen*, 282 F.2d at 1068.

24. See *United States v. Awon*, 135 F.3d 96, 101 (1st Cir. 1998); *United States v. Davis*, 183 F.3d 231, 256 (3rd Cir. 1999), *amended*, 197 F.3d 662 (3rd Cir. 1999).

25. See *Awon*, 135 F.3d at 101; *Archibald*, 987 F.2d at 187-88; *Fed. R. Evid.* 106.

26. See *Echo Acceptance Corp. v. Household Retail Services, Inc.*, 267 F.3d 1068, 1089n.12 (10th Cir. 2001).

27. See *Martinez*, 988 F.2d at 702.

28. See *United States v. Bursey*, 85 F.3d 293, 296 (7th Cir. 1996).

29. See *Brown*, 921 F.2d at 1307.

30. See *Martinez*, 988 F.2d at 702.

31. See *Bearint*, 389 F.3d at 1349; *United States v. Winston*, 447 F.2d 1236, 1240 (D.C. Cir. 1971).

32. See *Nguyen*, 282 F.3d at 1068; *Whitworth*, 856 F.2d at 1286.

33. See *Manuel*, 335 F.3d at 597; *Martinez*, 988 F.2d at 702.

34. See *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 102 (1st Cir. 1997).

35. See *Bearint*, 389 F.3d at 1349.

36. See *Manuel*, 335 F.3d at 597; *Ryan v. Board of Police Commissioners*, 96 F.3d 1076, 1082n.1 (8th Cir. 1996).

37. See *Lawson v. Trowbridge*, 153 F.3d 368 (7th Cir. 1998).

38. See *Lawson* at 153 F.3d at 379-80.

39. See *Henderson*, 449 F.3d 127.

40. See *Henderson*, 449 F.3d at 130-41.

41. See *Manuel*, 335 F.3d 592.


42. See *Manuel*, 335 F.3d at 594-97.

## Message from the Chairs

*Continued from page 2*

two programs at the ABA Annual Meeting in San Francisco (August 9-12): "The Next Frontier-Admissibility of Electronic Evidence" and "An Argument By Any Other Name—How to 'Argue' Permissibly in Opening Statements."

The summer months are also when we plan our committee activity for the next ABA year. We are always looking for volunteers who have ideas for

projects, articles, or programs, or who just want to get involved but don't have a specific idea for where they can best help the committee. If you fall into any of these categories, please contact us. We hope you have had a great summer. 

Linda L. Listrom and Richard L. Horwitz  
Cochairs, Trial Evidence Committee