



Evidence

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Background

The law of [EVIDENCE](#) governs how parties, judges, and juries offer and then evaluate the various forms of proof at trial. In some ways, evidence is an extension of civil and [CRIMINAL PROCEDURE](#). Generally, evidence law establishes a group of limitations that courts enforce against attorneys in an attempt to control the various events that the trial process presents in an adversarial setting. There are many arguments in favor of evidence law; here are five of the most common ones:

1. To ameliorate pervasive mistrust of juries
2. To further legal or social policies relating to a matter being litigated
3. To further substantive policies unrelated to the matter in suit
4. To create conditions to receive the most accurate facts in trials
5. To manage the scope and duration of trials

In the United States, the federal courts must follow the Federal Rules of Evidence (FRE); state courts generally follow their own rules, which are generally imposed by the various state legislatures upon their respective state courts. The FRE is the most influential body of American evidence law. The FRE encompasses the majority of the laws of evidence in 68 brief sections. Its language is accessible, easy to read, and mostly free of technical jargon and complicated cross-referencing. The FRE has been enormously influential in the development of U. S. evidence law. This influence in part is a result of its brevity and simplicity.

Before 1975, U. S. evidence law was mostly a creature of the [COMMON LAW](#) tradition. The FRE was drafted and proposed by a distinguished advisory committee composed of practitioners, judges, and law professors appointed by the United States Supreme Court. Just 20 years after the FRE was adopted in the federal system, almost three-quarters of the states had adopted codes that closely resemble the FRE.

The FRE applies in all federal courts in both criminal and civil cases. Understanding some of the basic provisions of the FRE will enable most people to figure out what is going on at trial, even if there are deviations between the FRE and applicable state laws of evidence.

Admissibility

Evidence comes in four basic forms:

1. Demonstrative evidence
2. **DOCUMENTARY EVIDENCE**
3. **REAL EVIDENCE**
4. Testimonial evidence

Some rules of evidence apply to all four types and some rules apply to one or two of them. All of these forms of evidence must be [ADMISSIBLE](#), though, before they can be considered as probative of an issue in a trial.

Basically, if evidence is to be admitted at court, it must be relevant, material, and competent. To be considered relevant, it must have some reasonable tendency to help prove or disprove some fact. It need not make the fact certain, but at least it must tend to increase or decrease the likelihood of some fact. Once admitted as relevant evidence, the finder of fact (judge or jury) will determine the appropriate weight to give a particular piece of evidence. A given piece of evidence is considered material if it is offered to prove a fact that is in dispute in a case. Competent evidence is that evidence that accords with certain traditional notions of reliability. Courts are gradually diminishing the competency rules of evidence by making them issues related to the [WEIGHT OF EVIDENCE](#).

Real Evidence

Real evidence is a thing. Its existence or characteristics are considered relevant and material to an issue in a trial. It is usually a thing that was directly involved in some event in the case, such as a murder weapon, the personal effects of a victim, or an artifact like a cigarette or lighter belonging to a suspect. Real evidence must be relevant, material, and competent before a judge will permit its use in a trial. The process whereby a lawyer establishes these basic prerequisites (and any additional ones that may apply), is called laying a foundation. In most cases, the relevance and materiality of real evidence are obvious. A lawyer establishes the evidence's competence by showing that it really is what it is supposed to be. Establishing that real or other evidence is what it purports to be is called [AUTHENTICATION](#).

Demonstrative Evidence

Evidence is considered "demonstrative" if it demonstrates or illustrates the [TESTIMONY](#) of a witness. It is admissible when it fairly and accurately reflects the witness's testimony and is otherwise unobjectionable. Maps, diagrams of a crime scene, charts and graphs that illustrate profits and losses are examples of demonstrative evidence.

Documentary Evidence

Evidence contained in or on documents can be a form of real evidence. For example, a contract offered to prove the terms it contains is both documentary and real evidence. When a party offers a document into evidence, the party must authenticate it the same way as any other real evidence, either by a witness who can identify the document or by witnesses who can establish a chain of [CUSTODY](#) for the document.

When people deal with documentary evidence, it is a good idea to consider these four potential pitfalls:

- Parol evidence
- Best evidence
- Authentication
- **HEARSAY**

The parol evidence rule prohibits the admission of certain evidence concerning the terms of a written agreement. Parol evidence is usually considered an issue of substantive law, rather than a pure evidentiary matter.

A party can authenticate documentary evidence in much the same way as it can authenticate other real evidence. Also, some kinds of documents are essentially self-authenticating under the FRE. Some of these are:

- Acknowledged documents to prove the acknowledgment
- Certain [COMMERCIAL PAPER](#) and related documents
- Certificates of the custodians of business records
- Certified copies of public records
- Newspapers
- Official documents
- Periodicals
- Trade inscriptions

The best evidence rule states that when the contents of a written document are offered in evidence, the court will not accept a copy or other proof of the document's content in place of the original document unless an adequate explanation is offered for the absence of the original. The FRE permits the use of mechanically reproduced documents unless one of the parties has raised a genuine question about the accuracy of the copy or can somehow show that its use would be unfair. Also under the FRE, summaries or compilations of lengthy documents may be received into evidence as long as the other parties have made the originals available for [EXAMINATION](#).

Testimony

Evidence given in the form of testimony is perhaps the most basic type of evidence. Testimonial evidence consists of what a competent witness at the proceeding in question says in court. Generally, witnesses are competent if they meet four broad requirements:

1. The witnesses must take the oath or a substitute and understand the oath,
2. The witnesses must have personal knowledge about the subject of their testimony.
3. The witnesses must recall what was perceived
4. The witnesses must be able to communicate what they perceived

The courts interpret competency quite liberally, which means that testimony based on the competency of a witness is rarely excluded

If at trial witnesses forgets their testimony, the attorney may help to refresh their memory in four ways:

1. First, the attorney can ask the judge for a recess to allow the witnesses time to calm down or otherwise collect themselves.
2. Second, the attorney can ask the witnesses a [LEADING QUESTION](#) to try to refresh their memory.
3. Third, the attorney can attempt to refresh the witness's recollection through a process known as past recollection refreshed. The witnesses must first say that they cannot remember the facts the attorney is trying to elicit from them. Then they must say that the refreshing object might help him them to remember. Almost anything that they says might help them can be used to help refresh their memory such as notes, photographs, an item of clothing, a smell, or some other object of some sort.
4. Fourth, the attorney can offer a writing as a past recollection recorded. The witnesses must first claim that they cannot remember the facts the attorney is trying to elicit from her. Next, the attorney presents the writing or other recording the attorney intended to use for the witness. If the attorney can refresh the witness's memory, they will be allowed to answer the question. If the writing does not refresh their memory, they must then identify the writing as one that they made or saw when they did remember the fact in question and that they knew then that the writing was accurate.

Leading Questions

A leading question actually suggests an answer or substitutes the words of the questioning attorney for those of the witness. Many leading questions call for answers of either "yes" or "no." But not all questions that call for an answer of "yes" or "no" are leading questions.

Judges have discretion to allow leading questions during the [DIRECT EXAMINATION](#) of a witness when the questions have the following traits:

- Deal with simple background issues
- Will help to elicit the testimony of a witness who, due to age, incapacity, or limited intelligence, is having difficulty communicating her evidence
- Are asked of an adverse or hostile witness. Witnesses are considered adverse or hostile when their interests or sympathies may lead them to resist testifying truthfully. In most cases, an adverse party or a witness associated with an adverse party is considered hostile for the purposes of this rule

Questions that call for a narrative answer are more or less the opposite of leading questions. Questions that call for a narrative often produce long speeches that can waste the time of the court and the parties. These kinds of questions are very unpopular with courts and should be avoided.

During [CROSS-EXAMINATION](#), attorneys may only ask about subjects that were raised upon the direct examination of the witness, including [CREDIBILITY](#). If cross-examiners stray into a new topical area, the judge may permit them to do so in the interest of time or efficiency, but harassment of the witness is not permitted under any circumstances.

The Lay Opinion Rule

Witnesses must answer questions in the form of statements of what they saw, heard, felt, tasted, or smelled. Usually they are not permitted to express their opinions or draw conclusions. Under the FRE, a court will permit a person who is not testifying as an expert to [TESTIFY](#) in the form of an opinion if the opinion is both rationally based on his perception and helps to explain the witness's testimony. Additionally, a competent layperson may provide opinions on certain subjects that are specifically permitted by rule, [STATUTE](#), or [CASE LAW](#). Some of these are:

- Another person's identity
- Another person's sanity
- Demeanor, mood, or intent
- Identification of handwriting
- Intoxication or sobriety
- Ownership
- The state of health, sickness, or injury
- Speed, distance, and size
- The value of a witness's own property

Opinion testimony is not necessarily objectionable even if such testimony goes to the ultimate issue to be decided in the trial

Extrinsic evidence is evidence other than the answers of the witness whose testimony is being impeached. It may be offered to prove facts relevant to impeaching a witness. In addition to extrinsic evidence, a party may attack the credibility of another witness by attempting to show that the witness is or has:

1. Bias, prejudice, interest in the issue, or corruption
2. Criminal convictions, or other prior bad acts
3. Prior inconsistent statements
4. An untruthful character

There are some limits to questioning a witness about a prior criminal [CONVICTION](#). However, according to the FRE, a witness may generally be questioned about criminal convictions when the crime was punishable by a sentence of more than a year or involved [FRAUD](#) or a false statement such as [PERJURY](#). Before people attempt to use such evidence in a trial, they need to understand the limits to this kind of evidence.

The FRE allows questions about prior bad acts of a witness to [IMPEACH](#) that witness's credibility where, in the court's discretion, the questions will help get at the truth. Thus, an attorney may ask questions about prior inconsistent statements if the following apply:

- The questioner has a [GOOD FAITH](#) basis for believing that the witness made an inconsistent statement
- The witness needs to be reminded of the time, place, and circumstances of the prior statement
- If the statement is written, a copy of the written statement must be provided to the opposing [COUNSEL](#) upon request

Another way to impeach the testimony of a witness is to show that the witness has a character of untruthfulness. This departure from the basic rule states a party may not provide evidence of a witness's character to show that the witness acted in conformity with that character trait. The FRE permits evidence to prove a witness has a character of untruthfulness in:

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- Testimony of specific instances of untruthfulness
- The opinion of another witness concerning the honesty of another witness's character
- Testimony about the target witness's reputation for truthfulness in the community

It is important to know that a witness whose testimony is used to impeach the truthfulness of another witness may in turn be impeached

Character

Character is a general quality usually attributed to a person. Character cannot be used to show that someone acted on a particular occasion in conformity with a particular character trait. On the other hand, habit can be used that way. A habit is a behavior; it is specific, regular, and consistently repeated. Occasionally, some character traits can be linked with a habit, so the distinction between the two can be hard to make at times.

In civil cases, evidence that a person has a character trait generally cannot be used to prove that the person acted in conformity with that character trait on a particular occasion. Evidence of character may be proved where it is an integral issue in a dispute or where a party puts character in issue. Evidence of character is used frequently in criminal trials during the sentencing stage to show that a convicted [DEFENDANT](#) merits a lesser or greater sentence or other [PENALTY](#).

Hearsay

The rule against hearsay is deceptively simple and full of exceptions. Hearsay is an out of court statement, made in court, to prove the truth of the matter asserted. In other words, hearsay is evidence of a statement that was made other than by a witness while testifying at the [HEARING](#) in question and that is offered to prove the truth of the matter stated. For example, Witness A in a murder trial claimed on the stand: "Witness B (the "declarant") told me that the defendant killed the victim." The definition of hearsay is not too difficult to understand. But the matter can become very confusing when one considers all of the many exceptions to the general rule against hearsay.

Even if a statement meets the requirements for hearsay, the statement may yet be admissible under one of the exceptions to the hearsay rule. The FRE contains nearly thirty of these exceptions. Most of them are generally available, although a few of them are limited to times when the declarant is unavailable.

There are twenty-four exceptions in the federal rules that do not require proof that the person who made the statement is unavailable. These are:

1. Business records, including those of a public agency
2. Certain public records and reports
3. Evidence of a judgment of conviction for certain purposes
4. Evidence of the absence of a business record or entry
5. Excited utterances or spontaneous statements
6. Family records concerning family history
7. Judgments of a court concerning personal history, family history, general history, or [BOUNDARIES](#), where those matters were essential to the judgment
8. Learned treatises used to question an expert witness
9. Market reports, commercial publications, and the like
10. Marriage, baptismal, and similar certificates

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11. Past recollections recorded
12. Recorded documents purporting to affect interests in land
13. Records of religious organizations concerning personal or family history
14. Records of vital statistics
15. Reputation concerning boundaries or general history
16. Reputation concerning family history
17. Reputation of a person's character
18. Statements about the declarant's present sense impressions
19. Statements about the declarant's then existing mental, emotional, or physical condition
20. Statements in authentic ancient documents (at least 20 years old)
21. Statements in other documents purporting to affect interests in land and relevant to the purpose of the document
22. Statements made by the declarant for the purpose of medical diagnosis or treatment
23. Statements of the absence of a public record or entry
24. The "catchall" rule

The last exception, the so-called "catchall" rule, bears some explanation. This rule does not require that the declarant be unavailable to testify. It does say that evidence of a hearsay statement not included in one of the other exceptions may nevertheless be admitted if it meets these following conditions:

- It has sound guarantees of trustworthiness
- It is offered to help prove a material fact
- It is more probative than other equivalent and reasonably obtainable evidence
- Its admission would forward the cause of justice
- The other parties have been notified that it will be offered into evidence

Privileges

In general terms, privileges are rights held by individuals that permit them to refuse to provide evidence or to prevent certain evidence from being offered against them. Privileges exist only to serve specific interests and relationships; courts give them narrow scope.

Privileges are more or less disfavored by the courts because they run contrary to the principle that all relevant evidence should be admitted in a search for truth. Accordingly, the persons or entities whose confidentiality they are meant to shield or protect can waive their privileges. Individuals who possess a privilege are known as "holders" of the privilege. Often, the nonholder who is a party to a privileged communication must assert the privilege on behalf of the holder.

Congress could not agree on how to make laws regarding privileges, so this area was left up to the courts and to state law to define. Thus, under the FRE, when a party offers evidence on a federal claim the applicable privileges are determined by the federal case law. When a party offers evidence on a state claim, the state's law of privilege applies. The federal law of privilege is still developing, and the federal courts are usually less tolerant of parties' claims to privileges than are state courts.

Presumptions

Previously, there was a good deal of controversy among legal professionals and scholars over the effect of presumptions, but these have largely ended, at least in the federal system. Presumptions are just that, a

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presumption that certain evidence is what it is on its face. Sometimes, however, a presumption can be rebutted by other evidence. There are two kinds of rebuttable presumptions: those that affect the burden of producing evidence and those that affect the burden of proof. In most cases, courts interpret presumptions as rebuttable. A list of rebuttable presumptions includes the following:

- That a letter that has been correctly addressed and properly mailed is received by the addressee in the ordinary course of the mail
- That a person who possesses a thing is also the owner of that thing
- That a writing is dated accurately
- That a written obligation that has been surrendered to the **DEBTOR** has been paid by the debtor (and vice versa)
- That some specific ancient documents are authentic
- That statements in the records of a process server are true
- That when a receipt for a payment on an **INSTALLMENT** debt is given, the debtor has paid all previous installment payments
- That the defendant was negligent when the requirements of *res ipsa loquitur* have been proven
- The presumptions that money or property delivered is in fact owed to the recipient

A presumption is not considered evidence. But if an opponent to a presumption puts on no evidence to rebut the presumption, the judge or jury must assume the existence of the presumed fact. On the other hand, if an opponent to a presumption does provide evidence to rebut the presumption, the presumption has no further effect.

Judicial Notice

Sometimes, the need for evidence on an issue in a case can be satisfied through formal admissions, stipulations, and judicial notice. Likewise, under the FRE, a judge may take judicial notice of facts that are not in issue because they are either generally known (e.g. George Washington was the first president of the United States), or they can be accurately and readily determined (e.g. the exact time of sunrise on a particular day). In addition, state and federal courts can take judicial notice of the laws of the states and of the federal system.

Additional Resources

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Organizations

Criminal Justice Section of the American Bar Association (ABA)

740 15th Street, NW, 10th Floor
Washington, DC 20005-1009 USA
Phone: (202) 662-1500
Fax: (202) 662-1501
URL: <http://www.abanet.org/crimjust/home.html>

National Association of Criminal Defense Lawyers (NACDL)

1025 Connecticut Ave. NW, Ste. 901
Washington, DC 20036 USA
Phone: (202) 872-8600
Fax: (202) 872-8690
E-Mail: assist@nacdl.org
URL: www.nacdl.org

National District Attorneys Association

99 Canal Center Plaza, Suite 510
Alexandria, VA 22314 USA
Phone: (703) 549-9222
Fax: (703) 836-3195
URL: <http://www.ndaa.org/index.html>

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