# Evidence Outline

## I. Presentation of Evidence

### A. Applicability of the Federal Rules of Evidence (FRE)

- The FRE apply to federal court proceedings, including civil and criminal trials, bankruptcy, and Court of Federal Claims cases.
- Exceptions: grand jury proceedings, preliminary hearings, warrant applications, bail, sentencing, probation, and summary contempt.
- Also excluded are preliminary questions of fact determined by the judge (e.g., witness competency).

### B. Introduction of Evidence

1. **Personal Knowledge:** Witnesses must have personal knowledge of the subject matter.
2. **Refreshing Recollection:** If a witness's memory fails, a document can be used to refresh it. The witness cannot read from the document while testifying. The opposing party has the right to inspect the document, cross-examine the witness about it, and introduce relevant portions into evidence. Pretrial review of documents to refresh recollection is generally not discoverable, but the judge has discretion to order production.
3. **Objections and Offers of Proof:**
    - Objections must be timely and specific to preserve the issue for appeal. A general objection ("I object") is insufficient.
    - Offers of proof are required when evidence is excluded to explain its substance, relevance, and admissibility for appeal unless apparent from the context.
4. **Lay Opinions:** Lay witnesses can offer opinions based on their perceptions that are helpful to the jury and not based on scientific, technical, or specialized knowledge. This differs from the stricter common law rule.
5. **Competency of Witnesses:** Everyone is presumed competent. Grounds for impeachment, not competency, address witness credibility. State law governs competency in diversity cases. Judges and jurors are generally incompetent to testify in the same trial.
6. **Judicial Notice:** A court may take judicial notice of indisputable facts that are generally known or readily verifiable. The judge decides admissibility. The jury determines authentication and credibility.
7. **Mode and Order:** Cross-examination is limited to the scope of direct examination and credibility. Leading questions are generally allowed on cross and limited on direct. Courts control the mode and order of presenting evidence.
8. **Exclusion of Witnesses:** Upon request, the court must exclude witnesses so they cannot hear other testimony. Exceptions include natural person parties, representatives of non-natural persons, essential persons, and those statutorily permitted (e.g., victims).

9. **Impeachment:** Any party can impeach a witness, even their own. Impeachment can be through bias, prior inconsistent statements, or character for truthfulness (reputation or opinion). Specific instances of conduct are generally only allowed on cross-examination. Prior convictions involving dishonesty are always admissible, while felonies not involving dishonesty are subject to balancing and a 10-year limit.
10. **Burdens of Proof:** The plaintiff in civil cases and the prosecution in criminal cases have the burden of proof (persuasion). This involves burdens of production (establishing a prima facie case) and persuasion (convincing the trier of fact). Civil cases generally use a preponderance of the evidence standard, while criminal cases require proof beyond a reasonable doubt. Presumptions shift the burden of production.

## II. Relevancy and Reasons for Excluding Relevant Evidence

### A. General Considerations

1. **Definition:** Evidence is relevant if it makes a fact of consequence more or less probable. It must be both probative (tending to prove something) and material (related to a fact of consequence).
2. **Direct vs. Circumstantial Evidence:** Direct evidence proves a fact directly, while circumstantial evidence requires an inference. Both are admissible.
3. **FRE 403 Balancing Test:** Relevant evidence can be excluded if its probative value is substantially outweighed by:
    - Unfair prejudice
    - Confusing the issues
    - Misleading the jury
    - Undue delay
    - Wasting time
    - Needlessly presenting cumulative evidence
4. **Conditional Relevance:** Evidence whose relevance depends on another fact can be admitted conditionally, subject to later proof of the other fact.
5. **Curative Admission:** Inadmissible evidence can sometimes be admitted to rebut other inadmissible evidence, preventing unfair prejudice.
6. **Rule of Completeness:** If part of a writing or recorded statement is introduced, the adverse party can require the introduction of any other part that should be considered at the same time.

### B. Specific Applications of Relevance Rules

1. **Character Evidence:**
    - Generally inadmissible to prove conformity with character.
    - Exceptions in criminal cases: defendant can offer evidence of their pertinent trait; prosecution can rebut. If defendant offers victim's character evidence, prosecution can offer defendant's same trait. In homicide cases, prosecution can offer victim's peacefulness if defendant claims self-defense.
    - Methods of proving character: reputation or opinion. On cross-examination, specific instances can be inquired into.

    - In civil cases, character evidence is generally inadmissible except when character is an essential element (e.g., defamation).
2. **Habit Evidence:** Evidence of a person's habit or an organization's routine practice is admissible to prove conduct in conformity with the habit. Look for words like "always," "automatically," "regularly," not "usually," "often," "frequently."
3. **Prior Bad Acts (Other Crimes, Wrongs, or Acts):** Generally inadmissible to prove character. Admissible for other purposes (MIMIC), such as motive, intent, absence of mistake, identity, or common plan. In sexual assault cases, evidence of prior sexual assaults is admissible.
4. **Subsequent Remedial Measures:** Inadmissible to prove negligence, culpable conduct, product defect, or need for warning. Admissible for other purposes, such as proving ownership, control, or feasibility of precaution if disputed.
5. **Compromise Offers and Negotiations:** Evidence of offers to compromise or statements made during negotiations is inadmissible to prove or disprove a disputed claim or impeach by prior inconsistent statement. May be admissible to show bias, prejudice, or other relevant facts not dealing with liability.
6. **Payment of Medical and Similar Expenses:** Offers to pay medical, hospital, or similar expenses are inadmissible to prove liability. Accompanying admissions of fact are admissible.
7. **Plea Discussions and Related Statements:** Inadmissible against the defendant who made the plea or participated in discussions.
8. **Liability Insurance:** Inadmissible to prove negligence or wrongful conduct. Admissible to show agency, ownership, control, or witness bias/prejudice.
9. **Authentication and Identification**: Evidence must be authenticated, meaning the proponent must show it is what they claim. Methods include testimony, distinctive characteristics, chain of custody, and self-authentication. Certain documents are self-authenticating. The jury decides ultimate authenticity.
10. **Best Evidence Rule**: Original documents must be used to prove content when content is at issue. Duplicates usually admissible, but not handwritten copies. Exceptions include when the original is unavailable through no fault of the proponent. Summaries allowed for voluminous records if originals made available.

## III. Privileges

### A. General Principles

- Privileges protect confidential communications from disclosure in court. The holder of the privilege can prevent disclosure and waive the privilege.
- Federal courts recognize several privileges: attorney-client, spousal, psychotherapist-patient, and clergy-penitent.
- Most states also recognize a physician-patient privilege, but this is not recognized under federal law.
- Privilege issues often arise in discovery disputes, as well as at trial.

### B. Attorney-Client Privilege

1. **Elements:**
    - Confidential communication: The communication must be intended to be confidential and not made in the presence of unnecessary third parties.
    - Between an attorney and client (or their representatives): This includes prospective clients.
    - For the purpose of seeking or providing legal advice.
2. **Exceptions:**
    - Communications in furtherance of a future crime or fraud.
    - Disputes between the attorney and client.
    - Disputes among multiple clients who shared the same attorney.
    - Wills contests involving communications with the attorney who drafted the will.

**C. Spousal Privileges**

1. **Spousal Immunity (Testimonial Privilege):**
    - Applies only in criminal cases.
    - Held by the witness-spouse, who can choose whether to testify against their spouse.
    - Requires a valid marriage at the time of trial.
    - Does not apply in cases of domestic violence or incest against family members.
2. **Confidential Marital Communications Privilege:**
    - Applies in both civil and criminal cases.
    - Held by both spouses.
    - Protects confidential communications made during the marriage.
    - Survives the termination of the marriage.

**D. Psychotherapist-Patient Privilege**

- Protects confidential communications between a patient and a psychotherapist for the purpose of diagnosis or treatment.
- Recognized in federal courts.

**E. Clergy-Penitent Privilege**

- Protects confidential communications made to a clergy member in a spiritual context.

**F. Work Product Doctrine**

1. **Definition:** Protects materials prepared by an attorney (or their representatives) in anticipation of litigation from discovery.
2. **Types:**
    - **Qualified Work Product:** Discoverable upon a showing of substantial need and undue hardship.
    - **Absolute Work Product (Mental Impressions):** Never discoverable, as it reflects the attorney's strategic thinking. This includes the attorney's thoughts, legal theories, opinions, and recollections of witness statements.

**G. Waiver of Privilege**

- Privileges can be waived by voluntary disclosure of the privileged information.
- Inadvertent disclosure may constitute a waiver if the privilege holder failed to take reasonable steps to prevent the disclosure or rectify the error.

**IV. Other Policy Exclusions**

These rules exclude certain types of evidence for policy reasons, even if relevant.

**A. Subsequent Remedial Measures**

- **Rule:** Evidence of measures taken after an injury or harm to prevent future harm is inadmissible to prove negligence, culpable conduct, product defect, or a need for a warning.
- **Rationale:** Encourage remedial measures to improve safety.
- **Exceptions:** Admissible to prove ownership, control, or the feasibility of a precaution if disputed.

**B. Compromise Offers and Negotiations**

- **Rule:** Evidence of offers to compromise or statements made during settlement negotiations is inadmissible to prove liability or the amount of a claim.
- **Rationale:** Encourage settlements.
- **Exceptions:** Admissible to prove bias, prejudice, or other issues besides liability.

**C. Payment of Medical and Similar Expenses**

- **Rule:** Evidence of offers to pay medical, hospital, or similar expenses is inadmissible to prove liability.
- **Rationale:** Encourage humanitarian gestures.
- **Distinguish:** Accompanying admissions of fact are admissible.

**D. Plea Discussions and Related Statements**

- **Rule:** Statements made during plea discussions are generally inadmissible against the defendant who made the plea or participated in the discussions.

**E. Liability Insurance**

- **Rule:** Evidence of liability insurance is inadmissible to prove negligence or wrongful conduct.
- **Rationale:** Prevent jury prejudice.
- **Exceptions:** Admissible to prove agency, ownership, control, or witness bias/prejudice.

**V. Writings, Recordings, and Photographs**

This section addresses the rules governing the admissibility of writings, recordings, and photographs.

### A. Best Evidence Rule (Original Document Rule)

1. **Purpose:** To ensure the accuracy and reliability of evidence presented to prove the contents of a writing, recording, or photograph.
2. **Rule:** When seeking to prove the content of a writing, recording, or photograph, the original must be produced unless it is unavailable through no fault of the proponent.
3. **Applicability:** The rule applies when the content of the writing, recording, or photograph is at issue. Examples include contracts, wills, deeds, or when a witness relies on the content of a document to testify.
4. **Duplicates:** Duplicates are generally admissible to the same extent as originals, unless there is a question about the authenticity of the original or fairness requires the original. This includes photocopies, but not handwritten copies.
5. **Exceptions (When Originals Are Not Required):**
    - Lost or destroyed originals (not in bad faith).
    - Original unobtainable by judicial process.
    - Opponent has the original and fails to produce it after notice.
    - Content is not closely related to a controlling issue (collateral matter).
    - Admission by a party opponent of the content.

### B. Summaries

- **Rule:** Summaries of voluminous writings, recordings, or photographs are admissible if the originals or duplicates are made available to the other party.
- **Requirements:** The summary must accurately reflect the underlying evidence, and a witness familiar with both the evidence and the summary must testify to its accuracy.

### C. Authentication

1. **Requirement:** All evidence must be authenticated, meaning the proponent must establish that it is what it is claimed to be.
2. **Methods:**
    - Witness testimony with personal knowledge.
    - Distinctive characteristics.
    - Chain of custody.
    - Self-authentication.
3. **Photographs:** Anyone with personal knowledge of the scene can authenticate a photograph.

### D. Public Records

- Copies of public records are admissible if they are certified as correct or a witness testifies to their accuracy.

### E. Learned Treatises

- **Rule:** Statements from learned treatises can be read into evidence if established as reliable authority by an expert witness or judicial notice.

- **Limitations:** The treatise itself cannot be admitted as an exhibit, only statements read into evidence.

**F. Refreshing Recollection vs. Past Recollection Recorded**

1. **Refreshing Recollection:** When a witness's memory fails, a document can be used to refresh it. The document is not evidence; the witness's refreshed testimony is.
2. **Past Recollection Recorded:** A record of a witness's past knowledge can be read into evidence if the witness has insufficient memory to testify, and the record meets specific requirements. The record itself is not admitted as an exhibit unless offered by the adverse party.

**I. Hearsay: Definition and Rationale**

**A. Definition**

Hearsay is defined as: (1) an out-of-court statement; (2) offered for the truth of the matter asserted. This seemingly simple definition is deceptively complex.

- **"Statement"**: Any oral assertion, written assertion, or nonverbal conduct intended as an assertion. This includes texts, emails, gestures, and even silence if intended to communicate.
- **"Out-of-Court"**: Made outside of the current trial or proceeding. Depositions from other cases are considered out-of-court statements.
- **"Offered for Its Truth"**: Crucially, the statement is being used to prove what it asserts. If used for another purpose, it might not be hearsay.

**B. Rationale for Exclusion**

The hearsay rule seeks to ensure the reliability and trustworthiness of evidence admitted at trial. Hearsay statements lack traditional safeguards:

- **Lack of Cross-Examination:** The declarant is not subject to cross-examination, which is crucial for testing credibility and exposing inconsistencies.
- **Lack of Oath:** Out-of-court declarants are not under oath, which lessens the solemnity and encourages truthfulness.
- **Lack of Demeanor Observation:** The trier of fact cannot observe the declarant's demeanor, which can reveal sincerity or deception.

Because of these concerns, hearsay is generally inadmissible unless an exception or exemption applies.

**II. Statements Not Considered Hearsay (Exemptions)**

These statements fit the technical definition of hearsay but are specifically excluded from the rule.

**A. Prior Statements by a Witness (FRE 801(d)(1))**

A prior statement by a testifying witness who is subject to cross-examination is not considered hearsay if it falls into these categories:

1. **Prior Inconsistent Statement Under Oath:** A prior statement made under oath at a trial, hearing, or deposition that is inconsistent with the witness's current testimony is admissible for both impeachment and as substantive evidence.
2. **Prior Consistent Statement Offered to Rebut:** Admissible to rehabilitate a witness whose credibility has been attacked. This statement must have been made before the motive to fabricate arose.
3. **Prior Statement of Identification:** A statement identifying a person the witness perceived earlier is admissible.

**B. Statements Attributable to a Party Opponent (FRE 801(d)(2))**

These statements are offered against a party and are considered admissions:

1. **Party's Own Statement:** Any statement made by the party is admissible against them.
2. **Adoptive Admission:** A statement made by another that the party expressly or impliedly adopts as their own. Silence can be an adoptive admission if a reasonable person would have responded.
3. **Statement by Authorized Person:** A statement made by a person authorized by the party to speak on the subject is admissible.
4. **Statement by Agent or Employee:** A statement made within the scope of the agency or employment relationship is admissible.
5. **Statement by Co-Conspirator:** A statement made by a co-conspirator during and in furtherance of the conspiracy is admissible.

**III. Exceptions to the Hearsay Rule**

These statements are considered hearsay but are admissible because they fall under specific exceptions. There are two categories: exceptions where the declarant's availability is immaterial (FRE 803) and exceptions that require the declarant to be unavailable (FRE 804).

**A. Exceptions Where Declarant's Availability Is Immaterial (FRE 803)**

1. **Present Sense Impression:** A statement describing or explaining an event or condition made while or immediately after the declarant perceived it.
2. **Excited Utterance:** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event. Look for exclamation points!
3. **Statement of Then-Existing Mental, Emotional, or Physical Condition:** Admissible to prove the declarant's state of mind at the time, but not to prove the truth of the matter asserted. Includes statements of intent, plan, motive, design, mental state (e.g., "I'm scared") or physical sensation (e.g., "My back hurts").
4. **Statements for Medical Diagnosis or Treatment:** Statements made for, and reasonably pertinent to, medical diagnosis or treatment are admissible. This includes statements about medical history, symptoms, pain, or the cause of the injury, even if

made to a physician consulted solely for litigation purposes. Statements about fault are generally inadmissible.

5. **Recorded Recollection:** A record about a matter the witness once knew but now cannot recall well enough to testify fully and accurately. Requirements include: witness had firsthand knowledge, the record was made or adopted when the matter was fresh, the record accurately reflects the witness's knowledge, and the witness testifies to the record's accuracy.
    - **Distinguish:** Unlike refreshing recollection, the record itself is read into evidence but not admitted as an exhibit unless offered by the adverse party.
6. **Business Records:** Records made at or near the time by a person with knowledge, if kept in the regular course of business, and it was the regular practice of the business to make the record.
7. **Public Records and Reports:** Similar to business records, but covers records and reports of public agencies or officials. Police reports are generally inadmissible in criminal cases.
8. **Ancient Documents:** Statements in documents at least 20 years old whose authenticity is established are admissible.
9. **Learned Treatises:** Statements from reliable treatises, periodicals, or pamphlets used in conjunction with expert testimony. They can be read into evidence but not admitted as exhibits.
10. **Reputation Evidence:** Admissible to prove reputation about character, familial relations, land boundaries, or community history, if reputation is directly at issue.
11. **Judgment of Previous Conviction:** Admissible to prove any fact essential to the judgment.
12. **Other Exceptions:** Various other specific exceptions exist for things like vital statistics records, records of religious organizations, family records, market reports, and commercial publications.

**B. Exceptions Requiring Declarant Unavailability (FRE 804)**

1. **Definition of Unavailability:** A declarant is unavailable if they are exempt from testifying due to privilege, refuse to testify despite a court order, testify to lack of memory, are dead or too ill, or are absent and the proponent cannot procure their attendance.
    - **Procuring Unavailability:** If a party wrongfully caused the declarant's unavailability to prevent their testimony, the hearsay exceptions do not apply.
2. **Former Testimony:** Testimony given under oath at a prior trial, hearing, or deposition, offered against a party who had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. In civil cases, the party against whom the testimony is offered need not be identical, just a predecessor in interest.
3. **Dying Declaration:** A statement made under the belief of imminent death, concerning the cause or circumstances of what the declarant believed to be impending death. Admissible only in homicide prosecutions and civil actions.
4. **Statement Against Interest:** A statement so contrary to the declarant's pecuniary or proprietary interest, or subject them to civil or criminal liability, that a reasonable person would not have made it unless they believed it true.

5. **Statement of Personal or Family History:** A statement concerning the declarant's own birth, adoption, legitimacy, ancestry, marriage, etc., even if the declarant had no personal knowledge.
6. **Forfeiture by Wrongdoing:** If a party wrongfully caused the declarant's unavailability with the intent to prevent them from testifying, the hearsay rule does not apply to statements offered against that party.

**C. Residual Exception (Catch-All Exception) (FRE 807)**

Hearsay statements not covered by a specific exception may be admitted if:

1. The statement has equivalent circumstantial guarantees of trustworthiness.
2. It is offered as evidence of a material fact.
3. It is more probative on the point than any other evidence the proponent can reasonably obtain.
4. Admitting it will best serve the purposes of the rules and the interests of justice.

The proponent must give the opponent reasonable notice of their intent to offer the statement.

**IV. Hearsay Within Hearsay (Multiple Hearsay)**

When a hearsay statement contains another hearsay statement, each level of hearsay must have an exception or exemption for the entire statement to be admissible. For example, a business record containing an employee's statement about an accident would need both a business records exception for the record itself and another exception for the employee's statement.

**V. Confrontation Clause Considerations**

The Sixth Amendment Confrontation Clause gives criminal defendants the right to confront witnesses against them.

- **Testimonial Statements:** Out-of-court statements considered "testimonial" are inadmissible against a criminal defendant unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine them. Examples include statements made during police interrogations, grand jury testimony, and prior trial testimony.
- **Non-Testimonial Statements:** Statements made for purposes other than litigation, such as 911 calls or statements to medical personnel for treatment, are generally considered non-testimonial and may be admissible.

**VI. Additional Considerations**

- **Judges determine the admissibility of evidence, including preliminary questions of fact related to hearsay exceptions**.
- **Hearsay evidence can be used for impeachment even if inadmissible for its truth**.
- **The Rule of Completeness (FRE 106) allows a party to introduce other portions of a written or recorded statement if fairness requires it to be considered in context**.

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