

Overview of Evidence

Chapter Outline

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■ Introduction: The Nature of Evidence

Most evidentiary experiences are only partially theoretical, normally being planted in the context of trial and litigation. Evidence is the stuff of proof—manifesting truth on particular facts or circumstances. From the Latin “*video*” (“to see”) and its prepositional qualifier, “*e*” (“out of” or “from”), evidence law is the demonstration of reality.

Without evidence, there is no proof; without proof, burdens are not met, and convictions, verdicts, or judgments are an impossibility. Evidence directs

the tribunal, the jury, and the practitioners advocating its content toward actions to be taken. Evidence is what leads us to the truth; it is a piece of life, a fact, a real or tangible thing that elucidates a proposition. Evidence is the key to things as they are. Evidence is what we see, touch, feel, conjecture, and imagine. Evidence is derived from deductive reasoning, logical inference, and supposition. Evidence law is the law's substantive and procedural instruction for the use of evidence.

This text's direct aim is to arm the practitioner and aspiring justice professional with information about evidence, with suggestions about how evidence affects investigation and litigation—whether civil or criminal, and with information about the integral purpose evidence plays in the evaluation of cases.¹

Evidentiary analysis is primarily a product of the mind and the manner in which it relates to the physical world. Evidence analysis deals with possibilities, probabilities, and predictable events and circumstances.²

Because evidence is viewed in such a dynamic and behavioral light, it is not a dull or fatiguing undertaking, even though guided by technical rules of application. Evidence collection, analysis, organization, and delivery are intellectual activities directed toward a specific goal or end, namely, the truth of the matter. "In general, evidence is anything to be submitted to the trier of fact, the court and to the judge for review, inspection and possible ruling."³ "Evidence" takes many forms, including: testimony of a witness; real, tangible, physical and documentary evidence; chattels; microscopic fibers, biological material and open forensic matter; character evidence; intellectual copyrights, trademarks and patents; habits and customs; conviction records; public records; recordings, motion pictures, photographs and videotapes; vital statistics; confessions; personal or professional reputation; mental state or condition; and judicially noticed findings. The evidentiary array is limited only by the reality of the physical world and the legal nuances that impact admission.

Evidence, however, is not always an accurate reflection of reality. Its representation may be tainted or biased by the person inspecting it. Professor Edmund Morgan, an acclaimed academic on evidentiary matters, portrays evidence in its rational context:

Consequently, there must be a recognition at the outset that nicely accurate results cannot be expected; that society and litigants must be content with rather rough approximation of what a scientist might demand. And it must never be forgotten that in a settlement of disputes in a court room, as in all other experiences of individuals in our society, the emotions of the persons involved—litigants, counsel, witnesses, judges, and jurors—will play a part. A trial cannot be a purely intellectual performance.⁴

As such, evidence is the material reflection of things, the amalgam of thought, deed, and action, and the recitation of how the world and its properties fit into a particular set of facts.

■ Justice Practitioners and Evidence Law

For those assigned to investigation, evidence collection and analyses, and pre-trial preparation and trial litigation, the comprehension of evidence and its varied rules and applications is imperative. In fact the entire justice model, in both the civil and criminal contexts, cannot operate or survive without evidentiary analysis; it cannot advocate nor litigate without parameters and benchmarks; and it cannot issue findings or judgments without reliance upon the evidentiary form. Police and law enforcement officers need a fundamental understanding of evidence, its quality and content, and the rules governing its admissibility. The functions of policing are intricately tied to evidence analysis. Law enforcement collects, preserves, and packages evidence and then amasses and coordinates this evidence for prosecutorial staff. Law enforcement conducts field interviews and other investigative surveillance and locates and prepares witnesses for questioning. See **Figure 1–1**⁵ and **Figure 1–2**.

Law enforcement's basic tasks are guided by constitutional prescriptions, which defense counsel knows only too well. During the litigation process, prosecution and defense counsel, with staffs of investigators and legal assistants, evaluate the quality and content of evidence, file pleadings in the form of complaints, motions, admissions, and stipulations, and perpetuate admissibility.



Figure 1–1 Evidence collected through a drug and burglary seizure.

Source: Courtesy of Detective Brian Kohlhepp, Ross Township Police, Pittsburgh, PA.



Figure 1–2 Valuables left at a suspicious death scene are collected for evidence.

Source: Courtesy of Detective Brian Kohlhepp, Ross Township Police, Pittsburgh, PA.



Litigation teams are in dire need of evidentiary understanding. In civil and criminal cases, evidence analysis and trial tactics are closely intertwined. If they are doing their jobs, lawyers and litigation specialists will evaluate evidence by placing themselves in the shoes of the jury or judge. Without evidence, a trier cannot “decide how an event occurred. Time is irreversible, events unique, and any reconstruction of the past, at best, an approximation. As a result of this lack of certainty about what happened, it is inescapable that the trier’s conclusions must be rooted in evidentiary ground.”⁶

The same argument applies to administrative hearings involving social security claims, disability, workers’ compensation, and entitlements. Hearing officers in the administrative realm, the civil service sector, and other tribunals must always be attentive to evidentiary principles.

Understanding not only the various areas of evidence law, but also its actual application, ensures a more competent justice professional. One who understands evidence will perform investigative functions more intelligently, communicate with witnesses more effectively, as well as prepare them for examination and to see flaws in an opponent's case.⁷

■ Suggested Readings on Evidence Law

Treatises, hornbooks, and other scholarly materials are plentiful and signify the centrality of evidence analysis in the justice system. The classic treatise on evidence by Dean John Henry Wigmore, *WIGMORE ON EVIDENCE* (Chadbourne rev. eds. 1972, 1975), is considered the seminal treatise on evidence law. Despite its scholarly approach, it is replete with real-life examples and applied problems. Another publication of significant interest to the justice professional is the *MODEL CODE OF EVIDENCE*, an evidentiary synthesis produced by the legal think tank, the American Law Institute. While the provisions of the *MODEL CODE OF EVIDENCE* are nonbinding and merely suggestive, the influence of the model recommendations is obvious during legislative hearings, advisory input, and other preliminary inquiry when evidence statutes are under construction. The *MODEL CODE OF EVIDENCE*'s hypothetical fact patterns educate readers on complicated evidentiary principles. Other evidentiary treatises with enviable reputations are:

- FEDERAL EVIDENCE (Mueller & Kirkpatrick 3d ed.) (2007–present).
- FEDERAL PRACTICE AND PROCEDURE (Wright & Miller 2d ed.) (1982–present).
- FEDERAL RULES OF EVIDENCE, Volumes 21–33.
- FEDERAL RULES OF EVIDENCE MANUAL (Saltzburg, Martin & Capra 9th ed.) 2006–present.
- HANDBOOK OF FEDERAL EVIDENCE (Graham 6th ed.) (2006–present).
- MCCORMICK ON EVIDENCE, 6th ed. (2006–present).
- WEINSTEIN'S FEDERAL EVIDENCE, 2d ed. (1997–present).
- WHARTON'S CRIMINAL EVIDENCE, 15th ed. (1997–present).
- THE NEW WIGMORE: A TREATISE ON EVIDENCE (2009), by David P. Leonard, et al.

For those laboring on the investigative side, there are many excellent texts, manuals, and policy guides that are relevant to evidence. Some examples include:

- CRIMINAL EVIDENCE FOR POLICE, 4th ed. (Prentice Hall 1994), by Paul B. Weston, Kenneth M. Wells, and Marlene Hertoghe.
- EVIDENCE EXAMPLES & EXPLANATIONS, 6th ed. (Aspen Publishers 2007), by Arthur Best.



AN INTRODUCTION TO CRIMINAL EVIDENCE: CASES AND CONCEPTS (Oxford University Press 2008), by R. Alan Thompson, Lisa S. Nored, John L. Worrall, and Craig Hemmens.

Practical Criminal Evidence (Prentice Hall 2006), by Gregory D. Lee.

On the commercial level, practitioners may subscribe to various statutory services that annotate the state and federal rules of evidence. Publications are available from local bar associations, local and national professional groups, and various agencies providing continuing education in both the for-profit and nonprofit sectors. For example, within the Commonwealth of Pennsylvania, the Pennsylvania Bar Foundation conducts an *Annual Evidence Institute* where practitioners are apprised of recent changes in evidence law.

■ Sources of Evidence Law

Until very recently, most evidentiary determinations were the product of common law tradition. Principles such as *competency*, *relevancy*, *attorney-client* and *priest-penitent privilege*, and *hearsay* are well-established common law principles in Western jurisprudence. Case law analysis of these common law principles adds or detracts to the developing law of evidence. Surprisingly, prior to the twentieth century, the majority of interpretations regarding evidence were nonstatutory. In the American tradition, statutory analysis is a recent phenomenon in the law of evidence. Dean Guido Calabrese proclaims the present era as the “age of statutes” in which much of American law has undergone, using the Dean’s phrase, “statutorification.”⁸

For veterans of the law, this statutory tendency is a trend not fully understood. Presently, practitioners tend to view statutory constructions as the only means to interpret evidence law. Legislatively, the FEDERAL RULES OF EVIDENCE were not adopted until 1975. To the amazement of some, this statutory dominance is yet to be realized in law school curriculum and educational philosophy.⁹

While justice professionals should never neglect the common law heritage, it is mandatory that their approach cling to the statute’s design and be aggressively dependent on the “words” of a statute relating to evidence law. Overreliance on the language of a statute or rule does have a downside. The “textualist,” ever faithful to words, will allow justice to be relegated to secondary status. No code, including evidentiary promulgations, was ever intended to be so rigid that it would have complete inflexibility regardless of the circumstances.¹⁰ Evidentiary reasoning is therefore more textual than traditional. While lawyers are free to ponder novel evidence schemes, they must do so within the confines of the courthouse and the Rules. For example, whether evidence is relevant or not is largely a question of statute, not attorney wisdom.

Within this reality, justice practitioners soon discover that statutes control the ebb and flow of evidence in a typical court case. A majority of states have adopted either significantly identical or modified versions of the widely respected FEDERAL RULES OF EVIDENCE. Adoption at every federal venue is mandatory.

The FEDERAL RULES OF EVIDENCE, promulgated by the U.S. Congress, serve within this text as a guidepost. But keep in mind that state differences do exist. At face value, the FEDERAL RULES OF EVIDENCE provide about as good an evidentiary scheme as can be expected, and its ample description and corresponding analysis are easy to digest and apply. The content of the FEDERAL RULES OF EVIDENCE is outlined at **Figure 1–3**.¹¹



■ The Content and Quality of Good Evidence

Discussed throughout this text will be diverse approaches in the use of evidence during trial. Before going to court, lawyers must be sure that the evidence to be submitted to the trier of fact is “good”—good, meaning that it has substance, relevance, purpose, and can pass the substantive and procedural barriers involving admissibility. A lawyer must also consider whether the evidence is material; whether it tends to a central force or issue in the underlying litigation; and whether it is not so prejudicial that it will ruin its power of proof. Therefore, evidence which is “good” accomplishes two major ends: it will scale any barrier to admissibility, and it is relevant and material without being too inflammatory.¹²

The Nature of Relevancy

Relevant evidence is evidence that tends to prove any matter provable in a civil or criminal action. The MODEL CODE OF EVIDENCE at Rule 1 defines “relevant” evidence as evidence “having any tendency in reason to prove any material matter and includes opinion evidence and hearsay evidence.”¹³ Federal Rule of Evidence 401 portrays a similar picture.

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.¹⁴

To merit its qualification, relevant evidence must have a logical nexus or connection between its inherent value and the proposition it seeks to prove. “In other words, legal relevancy denotes, first of all, something more than a minimum of *probative value*. Each single piece of evidence must have a plus value.”¹⁵

The textual content of Federal Rule of Evidence 402 leads one to the conclusion that irrelevant evidence is not admissible.

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| Article I. General Provisions |
| Rule 101. Scope |
| Rule 102. Purpose and Construction |
| Rule 103. Rulings on Evidence |
| Rule 104. Preliminary Questions |
| Rule 105. Limited Admissibility |
| Rule 106. Remainder of or Related Writings or Recorded Statements |
| Article II. Judicial Notice |
| Rule 201. Judicial Notice of Adjudicative Facts |
| Article III. Presumptions In Civil Actions And Proceedings |
| Rule 301. Presumptions in General Civil Actions and Proceedings |
| Rule 302. Applicability of State Law in Civil Actions and Proceedings |
| Article IV. Relevancy And Its Limits |
| Rule 401. Definition of "Relevant Evidence" |
| Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible |
| Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time |
| Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes |
| Rule 405. Methods of Proving Character |
| Rule 406. Habit; Routine Practice |
| Rule 407. Subsequent Remedial Measures |
| Rule 408. Compromise and Offers to Compromise |
| Rule 409. Payment of Medical and Similar Expenses |
| Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements |
| Rule 411. Liability Insurance |
| Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition |
| Rule 413. Evidence of Similar Crimes in Sexual Assault Cases |
| Rule 414. Evidence of Similar Crimes in Child Molestation Cases |
| Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation |
| Article V. Privileges |
| Rule 501. General Rule |
| Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver |
| Article VI. Witnesses |
| Rule 601. General Rule of Competency |
| Rule 602. Lack of Personal Knowledge |
| Rule 603. Oath or Affirmation |
| Rule 604. Interpreters |
| Rule 605. Competency of Judge as Witness |
| Rule 606. Competency of Juror as Witness |
| Rule 607. Who May Impeach |
| Rule 608. Evidence of Character and Conduct of Witness |
| Rule 609. Impeachment by Evidence of Conviction of Crime |
| Rule 610. Religious Beliefs or Opinions |
| Rule 611. Mode and Order of Interrogation and Presentation |
| Rule 612. Writing Used to Refresh Memory |
| Rule 613. Prior Statements of Witnesses |
| Rule 614. Calling and Interrogation of Witnesses by Court |
| Rule 615. Exclusion of Witnesses |

Figure 1–3 Federal Rules of Evidence table of contents.

Source: Federal Procedure Rules Service, 755–56 (1992).

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.¹⁶

But even irrelevant and minimally probative evidence has a place in the fact finder's menu according to some legal scholarship.¹⁷

The Nature of Materiality

Material evidence is that evidence which addresses a matter, the existence or non-existence of which is provable in an action. Federal Rule of Evidence 401 holds that evidence which has a “tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable”¹⁸ is material. At common law, the terms *material* and *relevant* are often used interchangeably in conjunction with a party's objection to evidence being “irrelevant and immaterial.” “Clarity in this area is, however, fostered by distinguishing between the propriety of the proof offered to establish it.”¹⁹



In the criminal realm, any physical evidence that does the following is material:

- A.** Aids in the solution of the case because it can:
 - (1) Develop *modi operandi* (M.O.s) or show similar M.O.s.
 - (2) Develop or identify suspects.
 - (3) Prove or disprove an alibi.
 - (4) Connect or eliminate suspects.
 - (5) Identify loot or contraband.
 - (6) Provide leads.
- B.** Proves an element of the offense, for example:
 - (1) Safe insulation, glass, or building materials on suspect's clothing may prove entry.
 - (2) Stomach contents, bullets, residue at scene of fire, semen, blood, toolmarks may all prove elements of certain offenses.
 - (3) Safe insulation on tools may be sufficient to prove violation of possession of burglary tools statutes.
- C.** Proves theory of case, for example:
 - (1) Footprints may show how many were at scene.
 - (2) Auto paint on clothing may show that a person was hit by car instead of otherwise injured.²⁰

See **Figure 1–4**.



Figure 1–4 “BRING” from Sebring imprinted on the hood of a wrecked automobile when it rear-ended another vehicle.

Source: Courtesy of Detective Brian Kohlhepp, Ross Township Police, Pittsburgh, PA.

Relevant and Material Yet Inadmissible Evidence

Relevant and *material* evidence may never see the inside of a courtroom.²¹ If the evidence is relevant to a particular fact but is highly prejudicial and inflammatory, its admission will be denied. Federal Rule of Evidence 403 sets out the standard dilemma:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.²²

There is no shortage of examples that typify the prejudicial potency of evidence: *gruesome photographs*, *biased witnesses*, *compensated expert witnesses*, and *witnesses granted total immunity*, to name a few. As for confusion, various forms of novel, scientific evidence can often confuse the court and jury more than aid in its deliberation. If a scientific discipline has scant academic support or is too *avant garde*, admission is unlikely despite its inherent relevance.²³ The traditional

understanding of what probativeness means is certainly under fire by those propounding novel scientific theories.²⁴ While some evidence, at least in a scientific sense, is universally indisputable, some of it seems to unfold over time. If Galileo was condemned at one point in history, his views now appear self-evident. “Much of what is universally accepted as science today was once considered to be outside of the scientific mainstream. And they suggest that judges and juries are fully capable of making the distinction between a legitimate scientific claim and an unfounded one.”²⁵

Finally, repetitious, duplicitous presentations of the same evidentiary content, whether through documentation, testimonial witnesses, experts, or other duplicative efforts, are frowned upon by most courts. Duplicitous evidence may be relevant, but its admission is so cumulative that it harms a case more than assists it.

In general, relevancy is a troublesome inquiry. Even relevant evidence can change into inadmissible evidence. As a rule, be able to address the following queries:

1. For what purpose is the testimony being offered?
2. To what purpose or point will these photographs direct themselves?
3. For what reason would the cross-examiner desire an examination of a victim’s character?
4. What purpose does an examination of a party’s reputation in the community have?
5. What influence, either direct or circumstantial, will a forensic test result have in a criminal case?
6. How influential or, for that matter, prejudicial would the admission of a previous criminal record be?²⁶

More on these issues will be discussed as the text develops.

There is a method to the sometimes obtuse evidentiary road. The federal courts have designed a template for evidence assessment that allows practitioners to prescreen the evidence before seeking admission. **Figure 1–5**²⁷ lays out the methodology.

■ Types and Forms of Evidence

Under the broad rubric of “evidence” exist many types and forms. A summary review follows.

Judicially Noticed Evidence

Most jurisdictions automatically admit judicially noticed facts or conditions without advocacy of foundational requirements, formal identification, or

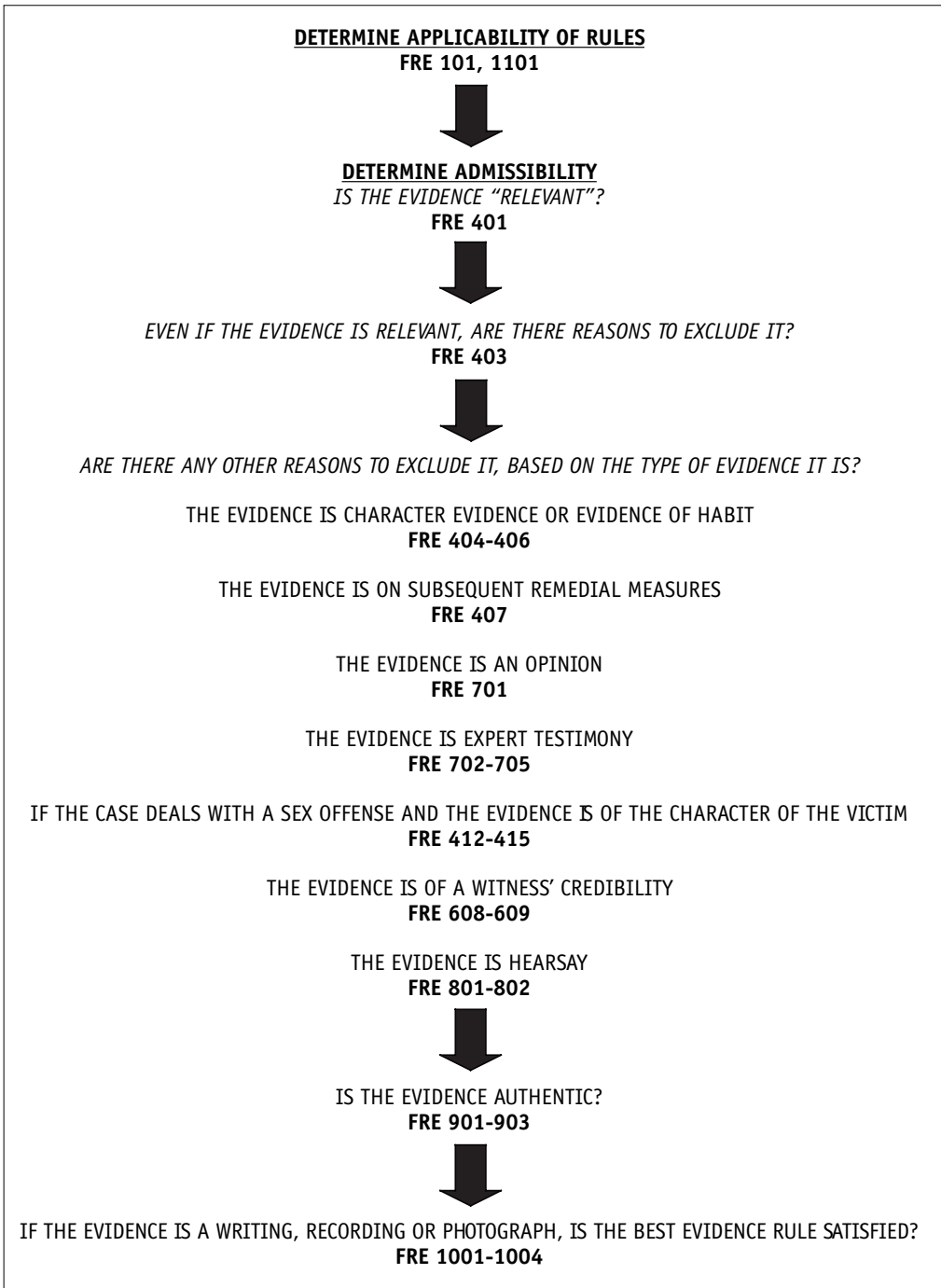


Figure 1-5 Federal Rules of Evidence checklist.

Source: Information retrieved from the Northwestern Student Chapter of ATLA, NwU ATLA, *Outlines*, available at www.law.northwestern.edu/atla/outlines/Evidence-Outline-03.doc

authentication processes. Courts generally accept judicially noticed facts or issues and waive typical procedural requirements. The evidence is additionally deemed reliable enough not to need screening or scrutiny. In this case, such evidence is declared “judicially noticed.” Judicially noticed evidence is information that is “generally known by the community at large or which is so scientifically acceptable and reliable that it is given to be true and accurate.”²⁸ Under Federal Rule of Evidence 201, the idea of judicial notice is defined:

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.²⁹

States generally mirror the federal rules on judicial notice. New Hampshire’s provision is provided at **Figure 1-6**.³⁰

Generally, judicially noticed evidence is a straightforward fact, an indisputable issue, or a bit of common knowledge. That the sun rises and the sun sets is a fact that would be judicially noticed. For residents of Pennsylvania, that the governor is Edward Rendell is commonly understood and thus is a judicially noticed fact. A court can judicially notice that there are twenty-four hours in a day, or that a man is composed of certain chemical elements such as carbon, hydrogen, and oxygen. However, the issue of whether blood plasma was infected with a virus is a matter not commonly known and therefore laden with actual or potential dispute. Facts or findings subject to multiple interpretations and diverse conclusions are not well suited to the realm of judicial notice. The *advisory committee’s* note to Federal Rule of Evidence 201 states that judicially noticed evidence is to be distinguished from other forms of evidence:

The usual method of establishing adjudicative facts is through the introduction of evidence, ordinarily consisting of the testimony of witnesses. If particular facts are outside the area of reasonable controversy, this process is dispensed with as unnecessary. A high degree of indisputability is the essential prerequisite.³¹

The typical categories of judicially noticed evidence are:

- Adjudicative findings of other courts;
- Laws of science;
- Natural principles widely accepted by the community;
- Official records;
- Government publications;

Rule 201. Judicial Notice

- (a) *Kinds of facts.* A court may take judicial notice of a fact. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
- (b) *Kinds of law.* A court may take judicial notice of law. Law includes (1) the decisional, constitutional, and public statutory law, (2) rules of court, (3) regulations of governmental agencies, and (4) ordinances of municipalities and other governmental subdivisions of the United States or of any state, territory or other jurisdiction of the United States.
- (c) *When discretionary.* A court may take judicial notice, whether requested or not.
- (d) *When mandatory.* A court shall take judicial notice if requested by a party and supplied with the necessary information.
- (e) *Opportunity to be heard.* A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
- (f) *Time of taking notice.* Judicial notice may be taken at any stage of the proceeding.
- (g) *Instructing jury.* In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

Figure 1-6 Rules Of Evidence Article II. Judicial Notice.

Source: Information retrieved from the New Hampshire Supreme Court, N.H. RULES OF EVIDENCE Rule 201.

- Legislative facts;
- Judge's personal knowledge;
- Public statutes;
- Natural scientific forces; and,
- Qualities and properties of matter.

A court may judicially notice evidence under either a discretionary or mandatory scheme.³² A party is entitled, upon timely request, to be heard regarding the propriety of taking judicial notice.³³ A request for evidence to be judicially noticed may be taken at any stage of the proceedings.³⁴ Jury instructions should contain a commentary about what evidence has been judicially noticed.³⁵

Legal implications of the doctrine are obvious in that the proponent of the evidence need not prove relevance or other admissibility standards. In a sense, the doctrine of judicial notice promotes efficiency in the analysis of evidence. "The primary purpose of judicial notice is to achieve the maximum of convenience that is consistent with procedural fairness. In doing so, expert testimony with respect to statistics, scientific facts, and other natural phenomena may be avoided."³⁶

Form 1-1³⁷ is a *Notice* that a party intends to request that the court find certain evidence as judicially noticed. **Form 1-2**³⁸ is a *Motion for Judicial Notice* of a sister state statute.

To: _____ [each party] and to the _____ [the attorney of record for each party in the action].

Notice is hereby given that on _____, [20] _____ at _____, _____, m., or as soon there-after as the matter can be heard _____ [at the courtroom of _____ (presiding judge), or in _____ (specify department or division or as the case may be)] of the above-entitled court at _____ [address], in the City of _____, the County of _____, State of _____, _____ [moving party] will request the court at _____ [address], in the City of _____, the County of _____, State of _____ [moving party] will request the court to make judicial notice of _____ [describe matter to be judicially noticed.]

Notice is further given that at the above-mentioned time and place _____ [moving party] will submit to the court information to enable the court to take judicial notice of this matter, as follows: _____ [set forth information relied on to support the request].

_____ [If applicable, add: This request will be based on this notice of request, the attached information to enable the court to grant the request, the attached memorandum of points and authorities, such supplemental memoranda of points and authorities as may be filed subsequently herein, and oral and documentary evidence that may be presented on the hearing of the request.]

Dated _____, 20____.

[Signature]

Form 1-1 Notice

Source: Reprinted from American Jurisprudence Pleading and Practice Forms, Am Jur Pleading and Practice Forms "AJPP", volume 9A (copyright 2005), topic Evidence § 7 with permission of Thomson Reuters/West.

Plaintiff, _____, hereby respectfully moves this court, under the provisions of _____ [cite statute or rule] to take judicial notice of _____ [legislative act of sister state] of the State of _____, _____ [Section _____ Chapter ____ of the act, passed on 19____ and amended in 19____, is entitled “_____” and reads as follows: “_____.”

By a copy hereof the attorneys of record for the defendants are being advised of this request of the plaintiff for this court to take judicial notice of this _____ [designate sister state] statute, notice of plaintiff's intention to invoke such statute having been given in his complaint.

Wherefore, plaintiff requests that the court take judicial notice of _____ [legislative act of sister state] of the State of _____.

Dated _____, 20____

[Signature]

Form 1–2 Motion for Judicial Notice

Source: Reprinted from American Jurisprudence Pleading and Practice Forms, AJPP Evidence § 11 with permission of Thomson Reuters/West.

Direct Evidence

Direct evidence is evidence that proves a fact or proposition directly rather than by secondary deduction or inference. Examples of direct evidence include eyewitness testimony, an oral confession of a defendant, or the victim's firsthand account of a criminal assault. Direct evidence is the foundational support for many cases. The eyewitness testimony regarding an accident scene or a victim's testimony regarding her injuries has a primary quality that encompasses direct evidence. As a general rule, the more direct evidence amassed, the better the advocate's case.

Circumstantial Evidence

Indirect or circumstantial evidence, the bulk of evidentiary proof in most civil and criminal litigation, never speaks directly to innocence or guilt or liability or

harm. A bullet in a murder case is only circumstantial evidence because it does not signify direct agency, although its peripheral power of proof shows an agency connection. In essence, inferences are drawn from circumstances beyond the key action or parties. See **Figure 1–7** and **Figure 1–8**.

Bullets generate secondary conclusions rather than primary ones in a direct sense. A case of recent prominence involving Thomas Capano, the former Delaware Deputy Attorney General, who killed the Governor of Delaware’s secretary, Anne Marie Fahey, is an instructive example of a conviction based solely on circumstantial means. No body (*corpus delicti*) was ever discovered. But motive, opportunity, blood, fibers, and a diary—all of which are circumstantial—were convincing enough for a jury to not only find guilt, but to also issue the death penalty.



Figure 1–7 A bullet in a murder case is only circumstantial evidence without more evidence that a crime has been committed.

Source: Courtesy of Detective Brian Kohlhepp, Ross Township Police, Pittsburgh, PA.



Figure 1–8 A broken window is only circumstantial without additional evidence of criminal activity.
Source: Courtesy of Detective Brian Kohlhepp, Ross Township Police, Pittsburgh, PA.

In a typical charge of homicide, evidentiary sources potentially include blood, fingerprints on a weapon, a ballistics report, bodily fluids, motive, agency, past relationship, an expert's report, or hairs and fibers located at the crime scene—all of which are circumstantial.

Testimonial Evidence

Evidence solicited or provided under oral or written testimony, whether by oath or affirmation, whether at trial or in the discovery processes, is testimonial. Federal Rule of Evidence 601 outlines the *a priori* conditions precedent to the legal admissibility of testimonial evidence: *competency* and *personal knowledge*. There is a presumption that all witnesses about to testify are competent.

Every person is competent to be a witness except as otherwise provided in the Federal Rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, the competency of a witness shall be determined in accordance with state law.³⁹

Personal Knowledge

Another foundational element addressing the quality and integrity of testimonial evidence is in whether the witness, either lay or expert, has some personal knowledge relevant to the case. Federal Rule of Evidence 602 highlights the knowledge requirement.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.⁴⁰

Procedurally, testimony under oath is construed as more reliable than testimony given by other means. An oath or affirmation forces the witness to consider the grave consequences of false testimony. Federal Rule of Evidence 603 imparts the value of oath or affirmation.

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.⁴¹

Opinion Evidence

Opinion testimony by a lay witness is permissible when that witness possesses personal knowledge of the events and conditions that are the subject matter of testimony. Lay witnesses must testify to that within their intellectual domain and refrain from merely opining about things. A more liberal attitude concerning opinion is accorded experts and will be fully covered in Chapter 6. For now, the lay opinion rests restrictively in Federal Rule of Evidence 701.

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.⁴²

As for expert opinions, Federal Rule of Evidence 702 grants the expert liberal latitude "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . ." ⁴³ The opinions of experts are not permissible unless they are based on facts or data perceived by that expert or made known to that expert before the hearing.⁴⁴ Expert opinion will be welcome under the following criteria:

1. if testimony will not assist trier of fact;
2. if scientific evidence is not sufficiently reliable;
3. if particular expert does not have sufficient specialized knowledge to assist jurors.⁴⁵

Expert opinion is not an unlimited right because it is subject to the *Ultimate Issue* doctrine—a rule that frowns on conclusions posed by the expert when relating to innocence or guilt. Federal Rule of Evidence 704 seeks to ensure that experts do not supplant the jury in reaching verdicts.⁴⁶

Character Evidence

When is evidence of a person’s character—either as a victim, defendant, party, or witness—relevant? In many ways, character is central to questions of integrity and credibility. Undermining character is a means of deflating the party that alleges something. A witness whose reputation is in doubt will be less persuasive than the witness with a sterling reputation in the community. Character, in this sense, has both individual and communal qualities.⁴⁷ Put simply, what do others in the community think of the party? What is that person’s reputation for honesty and fair dealing? Why should a person of ill repute or one with a checkered history be believed at all? Character constitutes an effective method to either uplift or tear down a party.

At no place is the character evidence issue more pronounced than in sexual offense cases. While mechanisms to shield sexual offense victims have recently been enacted (commonly known as “rape shield laws”), there is little question that defense counsel hopes to undermine the believability of the victim’s story by pressing character and reputation. To the chagrin of reformers, courts grapple “with the issue of a rape complainant’s previous sexual partners, sexual acts, their style and duration, quantity and quality.”⁴⁸ Federal Rule of Evidence 412 attempts to structure the propriety of evidence dealing with sexual history, practices, and proclivities in crime victims.

- a) Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
 - (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
 - (2) Evidence offered to prove any alleged victim’s sexual predisposition.⁴⁹

At subpart (b) of the same rule, an exception has been carved out, stating the evidence is admissible if:

- (1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

- (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;
 - (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution, and
 - (C) evidence the exclusion of which would violate the constitutional rights of the defendant.
- (2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.⁵⁰

Using character evidence as a means of impeachment in rape litigation has caused a form of double victimization for those alleging the crime. Yet despite this harm, it would be rare to find any criminal defendant who would not want to employ this tactic. Due process, in a way, demands use of all the tools available.⁵¹ Criminal defendants, desiring to impeach the character of the rape complainant, face certain constitutional limitations as to due process and confrontation rights. The U.S. Supreme Court, in an opinion crafted by Justice Sandra Day O'Connor, evaluated the Michigan rape shield statute that forbids victim impeachment unless defendant provides ten days' notice of his intention to do so. In this case, defendant disregarded the ten-day notice and thus was precluded from introducing such evidence. Justice O'Connor appreciated this statute's constitutional dimension, finding:

In light of *Taylor* and *Nobles*, the Michigan Court of Appeals erred in adopting a *per se* rule that Michigan's notice-and-hearing requirement violates the Sixth Amendment in all cases where it is used to preclude evidence of past sexual conduct between a rape victim and a defendant. The Sixth Amendment is not so rigid. The notice-and-hearing requirement serves legitimate state interests in protecting against surprise, harassment, and undue delay. Failure to comply with this requirement may in some cases justify even the severe sanction of preclusion.⁵²

While the rape scenario is legally and socially turbulent, addressing the character evidence as it relates to the credibility and truthfulness of any witness is an evidentiary necessity. Federal Rule of Evidence 608 holds that opinion and reputation evidence of character is admissible under the following circumstances:

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.⁵³

At subsection (b) of the same Rule, specific instances of conduct for the purpose of attacking or supporting the witness's credibility may be admitted if "probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."⁵⁴

As to specific criminal conviction records, the law is restrained yet reasonable. Federal Rule of Evidence 609 states that the credibility of any witness may be attacked if the accused has been convicted of a crime punishable by death or imprisonment in excess of one year and that prejudice does not outweigh probativeness.⁵⁵ Second, the witness may be attacked for crimes involving falsehood. Crimes qualifying under this definitional test would be: embezzlement, larceny, robbery, fraud, computer theft, theft of services, perjury, extortion, and organized crime activities.⁵⁶

Of pertinent interest is Federal Rule of Evidence 404, holding that character evidence is not admissible to prove criminal propensity. This theme is relatively elementary: Consider a convicted criminal with eight rape charges during a rape trial for a ninth charge. Is it permissible for his character to be attacked by plastering his horrid past of previous convictions before a jury? Doesn't this record manifest a propensity or proclivity toward this form of criminal conduct? Under Federal Rule of Evidence 404, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith"⁵⁷ While this general standard is upheld with regularity, 404(b), titled *Other crimes, wrongs, or acts*, molds an exception. The Rule in part states that crimes, criminality, or bad acts or wrongs may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"⁵⁸

Returning to our rapist charged for the ninth time, if the evidence was being admitted to show a *modus operandi*, to show a plan of action that was regular and signatory, to show that the act was hardly one of mere mistake or neglect, the criminal conviction record may be admitted. "Since rule 404 (b) is a specialized rule of evidentiary relevance, the proper test is whether the charged misconduct is relevant, not whether it is similar."⁵⁹

Of corollary interest is Federal Rule of Evidence 405, which states that any opinion of character is permissible if it is not the result of individualized opinion but instead is a community perception.⁶⁰ "Strictly speaking, a witness's per-

sonal opinion of someone's character is unacceptable. The character evidence adduced should also be of the broad type impugned by the charges in the case. Negative character testimony of the type "I have never heard anything ill of the defendant's character" will, however, be admitted."⁶¹

Documentary Evidence

Documentary evidence consists of memorialized writings or other inscriptions such as confessions, pleadings, contracts, memoranda, checks, or fraudulent bank notes. Documents are dealt with at every phase of the justice model—from the investigatory to pretrial phase, from actual trial to appellate phases. Soon to be covered in this text are rules pertinent to documentary forms such as authentication and foundational requirements⁶² and the *Best Evidence Rule* and *Chain of Custody Doctrine*. See Chapters 4 and 2, respectively.

In documentary evidence, preference should always be for the original. Federal Rule of Evidence 1002 summarizes:

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.⁶³

See **Figure 1–9**.



Figure 1–9 Paper money can prove a drug trade by inference.

Source: Courtesy of Detective Brian Kohlhepp, Ross Township Police, Pittsburgh, PA.

Documentary matters involving public records, summaries, interrogatories, and depositions will also be covered.

Hearsay Evidence



Attorneys and legal scholars can spend a lifetime analyzing and deciphering the *Hearsay Rule*. Seasoned practitioners know the hearsay rule as an overrated evidentiary restriction. At its heart, hearsay evidence is an out-of-court declaration or statement, with the person who uttered it being called the “declarant,” unavailable to question or examine.⁶⁴

Additionally, a statement is hearsay because the statement of the declarant is offered to prove the truth of its content. This same statement is being testified to by a second or third party. As a result, the content of said statement cannot be tested or evaluated under traditional cross-examination. Federal Rule of Evidence 801(c) defines hearsay as follows:

“Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.⁶⁵

Therefore, a statement being testified to at a trial or hearing, by a declarant witness other than the original declarant, is hearsay.

The purpose of the statement is a key factor in whether the rule applies or not. It may or may not be hearsay. For what purpose is the out-of-court assertion being offered to the court? Is it being offered to prove the truth of the statement? Is it being offered to prove the truth of the writing or act? An out-of-court assertion that is offered for any purpose other than to prove its truth is not hearsay. An out-of-court assertion that has direct legal significance, regardless of its truth or falsity, is not hearsay. For example, “an out of court assertion that constitutes, an offer or an acceptance, or a defamation, or a representation or a misrepresentation, or a guarantee or a notice, etc. is not hearsay.”⁶⁶

Why can't a witness testify to the statements of an out-of-court declarant when offered to prove the truth of the matter asserted? Foundationally, the exclusion rests on the opposing party's inability to cross-examine the content of the testimony being related. The out-of-court declarant is not available. James McCarthy, in his work, *Making Trial Objections*, gives three principal reasons for the exclusion.

First the declarant being quoted or relied on cannot be examined concerning his ability to perceive or retain the fact; thus, the right of cross-examination is denied. Second, no opportunity is given to the trier of fact to observe the demeanor of the defendant. Third, although the witness is under oath, the declarant is not.⁶⁷

Evaluate, for example, the testimony by an out-of-court declarant that he heard his friend say, “I did not poison my wife.” Is the declaration being offered

to prove guilt? Does the hearsay rule prohibit the use of another person's narrative, as an equivalent to the direct testimony of the declarant? Unless the party who made the assertion testifies in court, in a witness chair, and under oath, where the party may be probed and cross-examined, the statement is hearsay.

Granting the rule's complexity, the underlying basis for the rule is credibility. Firsthand witness testimony is more reliable than testimony further down the chain. Remember how rumors work and stories evolve. Convictions should not rest on what people hear others say, and those who allegedly said it are not available. If the crux of the case is murder, it is a subversion of evidentiary integrity to allow a witness to testify that "I heard from a friend of mine that John heard from someone else, that Bob committed the murder." This multiple hearsay, assuming it is being offered to prove that Bob committed the murder, is hapless, unreliable evidence.

Exceptions to the Hearsay Rule

Some argue that the hearsay rule is much ado about nothing. After viewing the landscape of exceptions under Federal Rule of Evidence 803, we have determined that this is partially correct.⁶⁸ In a long list of exceptions, the availability of the declarant becomes less of an issue. Even when a clearly delineated exception is not mentioned, Federal Rule of Evidence 807 leaves the door wide open for the discretionary admission of hearsay. Under the heading *Residual Exceptions*, the federal courts can admit hearsay under this elasticized provision.

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.⁶⁹

The "interests of justice" standard has plenty of room to grow and expand. To be certain, Federal Rule of Evidence 807 takes the wind out of the hearsay threat. But even within the formal definition of hearsay at Rule 801, certain statements are categorized as non-hearsay.

Prior Statements Under Oath

In analyzing whether hearsay evidence can be admitted, courts look for exceptional circumstances that permit hearsay. Prior statements by a witness who has testified at trial, who has been subject to cross-examination, and whose statement is inconsistent or even consistent with the current testimony, are viewed as hearsay but are an acceptable and tolerable version of hearsay. In the case of a prior

statement by a witness, the evidence offered has already been subject to the gauntlet of cross-examination and other legal scrutiny.

California recently adopted a specific exception to the hearsay rule for domestic violence cases. Similar exceptions already apply in a number of jurisdictions for out-of-court statements by child sexual abuse victims, but California is the first to apply this type of exception to adults. To qualify for admission, a statement must narrate, describe, or explain the infliction or threat of physical injury, and the declarant must be unavailable to testify. The statement also must have been made within at least five years of the infliction of the injury, and must either be written, electronically recorded, or provided to a law enforcement official.⁷⁰ Critics, while condemning the extraordinary pathology of spouse and child abuse, perceive these enactments as exacting too heavy a toll on the traditional hearsay model. Unfortunately, although the California exception seeks to provide the trier of fact with additional, relevant information about a defendant's abusive past, the exception allows potentially unreliable allegations of past physical abuse to be admitted into evidence against a defendant, thereby undermining important procedural safeguards that the hearsay rule provides by removing "safeguards that help to ensure that all defendants, regardless of the charge against them, receive a fair trial."⁷¹

Admission Against Interest

Another example expressly exempted from the exclusionary aspects of the hearsay rule is an admission by a party opponent. The definition of an admission is:

The statement is offered against a party and is

- (A) the party's own statement, in either an individual or representative capacity or
- (B) a statement of which the party has manifested an adoption or believe in its truth, or
- (C) a statement by a person authorized by the party to make a statement concerning the subject, or
- (D) a statement by the party's agent....⁷²

The general principle behind the admission exception is that making statements against one's own interest, something that casts the declarant in a negative light, does not occur naturally or with contrivance. If a person says "I am responsible for what happened," the adverse comment is likely not a fabrication. It would be rare for parties to impute culpability by such statements unless true.

Present Sense Impressions

In civil actions, typically cases of medical malpractice or auto negligence, the theory of a present sense impression finds regular applicability. A party who was an eyewitness to an accident or a doctor's medical negligence, and who made the statement during the actual occurrence, lacks the time frame for fabrication

or falsehood. The statement is considered genuine enough because of its spontaneity, there being no extrinsic opportunity to modify the truth. A party walking up to another who recites, “I’m crazy and I know it” is either doing so in jest or proclaiming it because it is true. Statements for purposes of medical diagnosis or treatment and written statements or communications with a medical professional that describe medical history, past or present symptoms, pain, and ongoing sensations are considered hearsay but a reliable admission and therefore admissible.

Excited Utterances

When individuals witness startling events, catastrophes, and circumstances rife with tension and emotion, the declarations are deemed trustworthy. The spontaneity and unpredictability of the event gives rise to honest reactions rather than deceit. In spontaneous circumstances, people rarely utter untrue statements because the mind lacks the time and space to invent or create the falsehood.⁷³

An excited utterance is admissible if the following elements exist:

1. A startling occurrence sufficient to produce stress or excitement in persons of ordinary sensibilities.
2. The declarant was present at the occurrence, and the utterance came very soon thereafter.
3. The startling occurrence is the subject of the remark.
4. The declarant need not be available to testify.⁷⁴

In a prosecution for sexual assault arising out of the defendant’s assault on a four-year-old boy, the court properly allowed the child’s mother, physician, and the responding police officer to testify as to statements made to each by the child, pursuant to the excited utterance exception to the hearsay rule. These statements were allowed even though they were made on the morning after the alleged assault occurred due to the severity of the trauma.⁷⁵ While contemporaneous reaction is the general rule, events and conditions can be assessed for a longer term depending upon the severity and seriousness of the circumstances.

Dying Declarations

Those near death are very unlikely to tell lies and engage in intentional falsehood. Even if one does not believe in a deity, the average person will play the odds that one might meet his Maker in due course, and lying is not the way to end life’s journey.⁷⁶

While certain individuals are chronic liars, an out-of-court declaration of a dying person is trustworthy enough to overcome the hearsay objection. The deathbed patient who implicates another by the utterance, “It was Sally who did it, not Steve!” is probably telling the truth. One who is soon to meet his ultimate destiny, especially in the spiritual sense, is not inclined to lie. Agreement on the rationale for the exception is far from uniform. Bryan A. Liang’s study, *Shortcuts*

to “Truth”: *The Legal Mythology of Dying Declarations*, exhaustively attacks our historical willingness to tolerate the legal exception. Our justification, he claims, is formed “on the basis of unsubstantiated armchair psychology, religious notions, and a cynical perspective of necessity to emphasize the law’s ability to convict.”⁷⁷ His comprehensive review, while open to debate, quantitatively presents this particular rule—a jurisprudential trend we are likely to see more of.

Recorded Recollections

Recollections are letters, memoranda, or records that can be used by a witness testifying on the stand to refresh memory. Since the content of the recollection is formalized in a written document, the lack of alteration potential makes the hearsay rule less necessary. Federal Rules of Evidence 803(6) and (7) deal with business records, medical and hospital records, and other documentation that is so regularly and automatically kept that alteration or intentional falsehood is only remotely possible.⁷⁸ Laying a proper foundation for this hearsay exception is accomplished by the following type of witness inquiry.

1. Do you presently have any recall of these facts?
2. Did you have personal knowledge of the facts in the past?
3. Was that knowledge recorded contemporaneously in writing?
4. I show you exhibit X; do you recognize it?
5. What is exhibit X?
6. Who prepared exhibit X?
7. When did you first see exhibit X?
8. Is exhibit X an accurate recordation of your knowledge at the time?
9. Your Honor, I offer exhibit X as a past recollection recorded, and I ask permission to read it into the record.⁷⁹

Records/Government Documents/Vital Statistics

Public records, vital statistics, marriage, baptismal, and similar certificates are excepted under traditional hearsay rules. The example of a baptismal certificate, offered into evidence to prove the birth, time, date of baptism, and name and other personal particulars, is clear-cut hearsay since the out-of-court declarant, the author of the certificate, is not available to testify as to its contents. If the courts required that government agents, church authorities, and other institutions provide an attester before admission, the pace of litigation and governmental services would come to a grinding halt. Since government officials who record and create such documents and reports generally have no bias or prejudicial interest, the courts classify these as hearsay but a reliable exception.⁸⁰ It seems unlikely that religious organizations such as churches, nonprofit entities, or genealogical groups affiliated with churches or others would intentionally falsify records.

Matters of Pedigree

Even more fantastic would be the assertion that personal, family histories inscribed within family Bibles, genealogical charts, ring engravings, or family portraits would be likely candidates for falsification. It is reasonable to assume that families will transcribe honest information regarding pedigree.

Miscellaneous Exceptions

Ancient documents, documents that are more than 20 years old, by their longevity are inherently reliable. Market reports and commercial publications, quotations, tabulations, lists, directories, and other published compilations available to the public are hearsay but admitted since their “rote” nature minimizes treachery.

A natural tool of the expert witness, the learned treatise does not require its author to attest to the content. Until recently, the learned treatise exception was a distinct minority view in the United States. However, with the enactment of the Federal Rules and the adoption of evidence codes patterned after the Rules in most states, the exception has gained the status of a majority view. Nevertheless, it must be conceded that the scope of the exception is rather narrow.⁸¹ Other exceptions include statements and documents affecting an interest in property, an individual’s reputation or character, and records of previous convictions.

As a policy matter, the hearsay rule’s best intention is to couple witnesses with assertions. Hearsay forces the practitioner to gauge the quality of not only the testimony, but also the witnesses themselves.

■ The Weight of Evidence

How much weight we accord evidence at trial depends on the type of case or proposition being advocated. “Weight” is largely a term of art, with courts giving some evidence more respect than others. From one extreme, where no weight is attached to evidence, and the evidence is stricken or excluded from trial, to the other end of the evidentiary spectrum, of judicial notice, weight is basically how much something is worth. In the general scheme of things, only “competent” evidence is entitled to weight. Judges instruct juries that only competent evidence is worthy of their evaluation. The jury instruction at **Form 1-3**⁸² assesses the distinction properly.

Another view on the weight of evidence would be whether the evidence is direct or circumstantial. For example, is the evidence sufficient in weight for a charge of murder, when the evidence relied upon is strictly circumstantial? Is a finding of homicide possible when the *corpus delicti* is unavailable, as in the Capano case? Would blood spatters alone prove a victim’s homicide? See **Figure 1-10**.

Is a fingerprint alone sufficient circumstantial evidence in a charge of homicide? In some respects, the weight of any evidence is its sufficiency, whether its



As the sole judges of the facts, you must determine which of the witnesses you believe, what portion of their testimony you accept and what weight you attach to it.

At times during the trial I shall sustain objections to questions asked without permitting the witness to answer or, where an answer has been made, shall instruct that it be stricken from the record and that you disregard it and dismiss it from your minds.

You may not draw any inference from the unanswered question nor may you consider testimony which has been stricken in reaching your decision. The law requires that your decision be made solely upon the competent evidence before you. Such items as I exclude from your considerations will be excluded because they are not legally admissible.

Form 1-3 Jury Instructions Regarding Testimonial Evidence

Source: Reprinted from American Jurisprudence Pleading and Practice Forms, AJPP Evidence § 75 with permission of Thomson Reuters/West.



Figure 1-10 Do blood spatters alone prove criminal activity?

Source: Courtesy of Detective Brian Kohlhepp, Ross Township Police, Pittsburgh, PA.

content meets necessary burdens.⁸³ **Form 1-4**⁸⁴ contains jury instructions on the calculation of evidential weight in circumstantial evidence.

At the center of evidentiary analysis, courts and juries weigh positively or negatively the quality of evidence, accepting or rejecting it either totally or partially, and assessing its overall relevance. To prove this point, examine the influence of testimonial evidence. The impression left by a witness may be one of truthfulness or trickery. When the witness is done, his testimony may fail in the jurors' eyes because the witness exudes falsehood or because the testimony manifests a lack of personal knowledge. Or, the opposite occurs—the trier is so impressed that the witness can do no wrong. Therefore, while evidence may be admitted, relevant, and competent, its quality and the method of presentation either increase or dilute its force and effect.

Some evidence has been introduced in this case which in its nature is circumstantial evidence. You are instructed that circumstantial evidence is proof of certain facts from which you may infer other and connected facts which usually and reasonably follow according to the common experience of mankind. Circumstantial evidence is legal evidence and is not to be disregarded merely because it is circumstantial. Circumstantial evidence may be quite as conclusive in its convincing power as direct and positive evidence of eyewitnesses. When it is strong and satisfactory you will so consider it, neither enlarging nor belittling its force. A fact sought to be proved cannot be said to be established by circumstantial evidence alone unless circumstantially relied on and proved, and are of such a nature and are so related to each other that it is the only conclusion that can reasonably be drawn from them. It is not sufficient that they are merely consistent with the facts sought to be proved. However, circumstantial evidence should have its just and fair weight with you, and if when it is taken as a whole and fairly and candidly weighted, it convinces the guarded judgment, you should give such circumstantial evidence its just and proper weight. You are not to imagine situations and circumstances which do not appear in the evidence, but you are to make those just and reasonable inferences from the circumstances proved which the guarded judgment of a reasonable person would ordinarily make under like circumstances, and you will consider such evidence in connection with all the other evidence, facts and circumstances proved on the trial.

Form 1-4 Jury Instructions Regarding Circumstantial Evidence

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Presumptions

Presumptions exist as rules and accepted conclusions. As an example, there is a presumption that all people are sane. This conclusion holds firm from the outset of litigation until proven otherwise. Presumptions can also be typed as a sort of benchmark—that is, the litigant cannot prevail unless the presumption is overcome. While presumptions are not strictly evidentiary, they are positions or findings on particular questions. “Presumptions have been used to accomplish four distinct ends. They have been used to construct rules of decision to avoid factual impasse at trial; to allocate burdens of persuasion; to instruct the jury on the relationship between facts; and to allocate burdens of production.”⁸⁵ A presumption is a condition, a status that exists without proof in a formal sense. The presumption of innocence in the criminal case is a condition, a status already applied to criminal defendants, in place and concluded, before the litigation ever starts. There are a host of presumptions that can be cited—all of which remain until overcome or replaced by other evidence that makes the presumption less defensible. Some might argue that presumptions are not evidence in a conceptual sense because they may or may not be true.⁸⁶ Presumption is not evidence; “it is merely a label that has been applied to a perceived relationship between facts.”⁸⁷

However, presumptions have a powerful impact on the advocacy of cases. If the presumption, the assumed condition, or fact is not rebutted or attacked, that status or condition remains inviolate. In the case of criminal insanity, the defendant must raise the question of insanity. The prosecution must overcome the presumptuous burden that all people are basically sane. In this context, presumptions force the litigants to either persuade or to attack, to reaffirm or rebut the presumption. In a way, presumptions are baggage that can be attached or thrown away. In the end, the confusion and ambiguity that characterize presumptions are largely a failure to recognize that presumptions are labels applied to the resolution of standard evidentiary problems.⁸⁸

Presumptions tend to be fluid concepts because they shift.⁸⁹ Initially, a presumed fact rests comfortably in a party’s camp. In response, the opposing party produces evidence that rebuts or undermines the integrity of the presumed fact. If successful in rebuttal, the presumption’s influence dissipates. In the alternative, the burden of proving a once-established presumption has shifted to its original owner. The Model Code of Evidence defines a presumption synonymously with a presumed fact:

Presumption means that when a basic fact exists the existence of another fact must be assumed, whether or not the other fact may be rationally found from the basic fact. Presumed fact means the fact which must be assumed.⁹⁰

Child custody cases have long been influenced by the law of presumption. The *Tender Years Doctrine* presumed that child placement with the maternal party made better sense. A variety of states have enacted a presumption against the award of child custody to a spouse abuser.

The theory behind this type of statute is that the batterer should not be rewarded for his cruelty. The presumption statutes also differ greatly from state to state, and the presumption against awarding custody to a spousal abuser may be addressed in either a joint or sole custody statute, or a best interests of the child statute. In some states, the presumption may be rebutted by such evidence as successful completion of a batterer treatment program, or extraordinary circumstances which show there is no risk of continuing violence.⁹¹

That presumptions influence the tenor of litigation is well documented. The existence of the presumed fact or conduct is taken as truth until it is attacked or rebutted. At Rule 704 of the MODEL CODE OF EVIDENCE, the effect is addressed:

Subject to Rule 703, when the basic fact of a presumption has been established in an action, the existence of the presumed fact must be assumed unless and until evidence has been introduced which would support a finding of its non-existence or the basic fact of an inconsistent presumption which has been established.⁹²

At Federal Rule of Evidence 301, presumptions are summarily dealt with:

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.⁹³

Once the presumption has been factually and legally established, its existence is assured unless the opposing party attacks and rebuts its integrity. If successful, the original presumption evaporates; it disappears, but has the potentiality to re-emerge. "Although the presumption may disappear, the facts on which it was based are still in the case, and any inferences arising from them may be considered and argued to the jury. The prudent course, however, is to be prepared with evidence rather than to rely on a presumption, except where proved impossible to attain."⁹⁴

The law of presumptions has long challenged the trial judge. Judge Learned Hand, one of America's finest jurists, keenly portrays the law of presumptions:

Judges have mixed it up until nobody can tell what on earth it means and the important thing is to get something which is workable and which can be understood and I don't care much what it is.⁹⁵

■ Burdens of Proof

Definitionally, the burden of proof is an allocation, distribution, and measure of evidence. In a criminal case, the burden of proof is the prosecutor's solemn responsibility, and our criminal system insists that he or she garner enough evidentiary ammunition to prove the case in chief. In the civil system, the plaintiff, who alleges injury and damages, bears the responsibility of proving his or her case. Before entering the courthouse doors, the attorneys plan a strategy sufficient to meet and exceed the evidentiary burden. When compared to presumptions, burdens are evidentiary obligations and duties. For a prosecutor to secure a conviction, a jury must be satisfied that sufficient evidence exists to convict. How much evidence meets the burden? Do burdens vary depending on the type or style of litigation? Do burdens vary depending upon damage or claim? Do burdens shift? Are burdens quantifiably measurable or are they qualitative judgments?

The justice system constructs its very edifice on the evidentiary measure called a burden. The system asks whether there is enough evidence to convict, to declare a mistrial, to commit, to adjudge insane, and to be declared incompetent. Burdens are the foundational bricks of proof in courthouses across the land.

Types of Burdens

The major classifications of burdens in criminal and civil cases are *beyond a reasonable doubt*, and *by clear and convincing evidence* or by *preponderance of evidence*. Criminal cases at the felony level require the higher, most stringent burden—*beyond a reasonable doubt*. Some criminal cases use the *clear and convincing evidence* standard, but this is rare. Civil law employs only the latter two burdens. In criminal cases, a higher burden rests upon the state, the Commonwealth, the government, to prove its position by the most demanding of burdens, *beyond a reasonable doubt*. Even in civil cases, a plaintiff cannot merely allege harm, but must meet a burden. To win, the evidence is either *clear and convincing* or *preponderantly* better than the opposition's. These burden classifications are a combination of objective and subjective criteria. One might attempt to quantify the burdens numerically. "In order to win, the plaintiff must satisfy his burden of persuasion that fact X is true. In other words, there must be more evidence tending to show that X is truer than evidence against this proposition."⁹⁶

Mathematically stated, the advocate, if expecting to win, should have more than the opposition, but the advocate need not be perfect in overcoming the burden's threshold. Burdens are not infallible rules of evidence, only probable ones. Hart and McNaghten qualify the variable and relative nature of meeting a burden:

The law does not require absolute assurance of the perfect correctness of a particular decision. While it is of course important that the court be right in its determinations of fact, it is also important that the court decide the case when the parties ask for the decision and on the bases of the evidence presented by the parties. A decision must be made now, one way or the other. To require certainty or even near certainty in such a context would be impracticable and undesirable.⁹⁷

Is the demonstration of blood, a victim's clothing, and the actual victim's body sufficient to meet the criminal burden? Are noncriminal explanations possible? See **Figure 1-11** and **Figure 1-12**.



Figure 1-11 Is blood stained clothing proof of criminal conduct?

Source: ©Mikael Karlsson/Alamy Images.



Figure 1-12 Can criminal conduct be inferred from the remnants of cleaning a large amount of blood?

Source: Courtesy of Detective Brian Kohlhepp, Ross Township Police, Pittsburgh, PA.

Absolute truth is not necessarily synonymous with burdens. Factually guilty parties walk free each and every day because prosecutors fail to meet the basic burden requirement. To meet a burden, the advocate must offer up sufficient evidence to cross its threshold. How much evidence is necessary depends on the type of case and its corresponding requirements. In sum, the answer depends on the nature of the litigation. Criminal cases and the applicable burden, *beyond a reasonable doubt*, are admittedly the highest proof standards in the American justice system. But what does the term *beyond a reasonable doubt* mean? There is no controversy or confusion as to the designation, but exactly how and when can we figure that burden has been sufficiently met? John Siffert in his commentary, *Instructing on the Burden of Proof in Reasonable Doubt*, relates precisely the definitional dilemma:

What is surprising is the extent of the disagreement over the definition of the standard

of proof that should be given and, if given what the standard should be. One district court has even suggested a numeric quantification of probability of truth for each of the generally applied standards, with preponderance of evidence being given the requirement greater than fifty percent, clear and convincing evidence, seventy percent clear and convincing calling for eighty percent and beyond reasonable doubt requiring approximately ninety-five percent.⁹⁸

While the formula is instructive, is it measurable?⁹⁹

Does beyond a reasonable doubt mean that only five or ten percent of the overall case is doubtful? Precise definitions for reasonable doubt may be desired but will be fundamentally elusive. For how can such subjective terms be quantitatively and objectively measured? And does it make sense to pine for the specific definition or a more flexible design? “Given the impossibility of establishing with precision the meaning of reasonable doubt, that meaning should be resolved in practice through jury deliberation rather than by judicial fiat, because the reasonable doubt standard in a criminal trial calls for application of the very common sense, or community judgment, for which juries are prized.”¹⁰⁰ Flexibility may simply be wiser in our burden criteria. At best, rough estimates

of burdens appear smarter than rigid, doctrinaire rules. Undoubtedly, there are more conservative jurors and judges who will be very satisfied with possibly 60 or 75 percent of the evidence being damaging to the defendant. These numerical qualifications are helpful but theoretically a dead end. Literal interpretation and construction of the term *reasonable doubt* is probably more helpful. The term *reasonable doubt* manifests its plain meaning. First, there is doubt; second, the doubt is based on reasonable—not irrational—grounds, and is not purely conjectural. Some equate doubt with moral guilt or certainty. In other words, doubt relates not only to particular fact, but to culpability.¹⁰¹ Unquestionably, doubts persist in all types of litigation. Doubt that is reasonable is doubt not residing in triviality but instead in serious substantive concerns. Reasonable doubt is appropriately defined as follows:

It is a doubt that a reasonable person had after carefully weighing all the evidence. It is a doubt which would cause a reasonable person to hesitate to act in a manner of importance in his or her personal life. Proof beyond a reasonable doubt must, therefore, be proof of such convincing character that a reasonable person would not hesitate to rely and act upon it in the most important matters of his own affairs.¹⁰²

Whether a criminal or a civil case, burdens are best left to discretionary principles rather than rigid fixations. Burdens fit better in a world where something is more or less true.

The same inquiry applies in the standards applicable in civil litigation, by *clear and convincing evidence* and by *preponderance of evidence*. Here, too, the problem of definition and quantification is obvious.

Mathematical theory and the fundamental maxims of probability calculus cannot accurately do justice to legal burden analysis. Two statements are said to be mutually exclusive if they cannot be true at the same time. Under all traditional definitions of probability, the probability that one of two mutually exclusive statements will be true is equal to the sum of their individual probabilities. That is if A and B are mutually exclusive, then $P(A \text{ or } B) = P(A) + P(B)$.¹⁰³

In an age of jurimetrics, when applied computer software and statistical analysis is elevated above human reason, attraction to these formulas is understandable. By contrast, subjective, nonscientific, determinations at least have a human edge. The term *preponderance of evidence* means in lay English, something more likely than not. The advocate of a civil case, the person who alleges negligence, must show that the evidence shows more rather than less that an erroneous act

occurred. In the final analysis, the idea of burden will always imply a mix of the objective with the subjective—something resting very comfortably in the world of judge and jury.

In cases where a jury instruction on burdens is needed, **Form 1-5**¹⁰⁴ outlines a useful design. Within the instruction, *preponderance of evidence* is synonymous with the “greater weight of evidence.” The term “weight” means, just as if on a scale, that the party saddled with the burden tips the scale in its favor.

If legal scholars and practitioners have difficulty determining the measurability of *beyond a reasonable doubt* and *by a preponderance of evidence*, how does the burden *by clear and convincing evidence* fit in the discussion? What is *clear* and what is *convincing*? How does one measure these descriptive standards? Subjectively, the preponderance standard, or for that matter, the clear and convincing evidence standard, calls for a jury to arrive at actual, though not infallible, beliefs. “The concept of *actual belief* being explored is obviously not a probabilistic or statistical concept. It is essentially a cultural or psychological question of when an individual is prepared, short or absolute certainty, to turn his innermost thoughts into a statement of ‘I believe’ on which others may judge both that of which he speaks as well as him personally.”¹⁰⁵

At ground level, burdens, however imprecise, should force an advocate and support staff to amass enough evidence to meet these subjective and objective

You are instructed that the terms “preponderance of evidence” and “greater weight of evidence” are terms of practically the same meaning. When it is said that the burden rests on a party to establish any particular fact or proposition by a preponderance or greater weight of evidence, it is meant that the evidence offered and introduced in support of such fact or proposition to entitle such party to a verdict, should, when fully and fairly considered, be more convincing as worthy of belief when weighed against the evidence introduced in opposition to it. Such preponderance is not always to be determined by the number of witnesses on the respective sides, although it may be thus determined, all other things being equal, but from the character of the evidence, the character of the witnesses, their intelligence, means of knowledge, and strength of memory, their interest and want of interest in the result of the suit, the probability or improbability of their statements, and all facts and circumstances in evidence affecting the question as a whole.

Form 1-5 Jury Instructions on Burden of Proof

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criteria. “To meet the burden of proof, the advocate’s cause of action or charge must be satisfactorily demonstrated to a jury or justice. If the jury rules in favor of a plaintiff, it can be stated that the burden has been met, at least from a factual perspective.”¹⁰⁶ By way of analysis, remember these issues:

1. Has a prosecutor met the burden of *beyond a reasonable doubt* when the entire case in a charge of murder rests upon circumstantial evidence?
2. Has the plaintiff met the burden of *clear and convincing evidence* in a case of medical malpractice when the actions of the medical professional were allegedly negligent, where an array of experts produced at trial concurred in a judgment of negligence?
3. Has a plaintiff/victim injured in an automobile accident met the burden of proof, proving by *clear and convincing evidence* that the gas tanks were negligently installed and designed, resulting in a foreseeable explosion?

Whether a civil or criminal case, burden analysis forces the advocate to erect an evidentiary plan of proof. “Counsel must therefore consider the order of proof not only in the light of the law governing presumptions, inferences, *res ipsa loquitur*, etc., but also according to the standard or quantum of proof required in a particular case, and the rules determining which party has the affirmative of the issues.”¹⁰⁷



Criminal Justice on the Web

For an up-to-date list of web links, go to the *Law and Evidence: A Primer for Criminal Justice, Criminology, Law, and Legal Studies* catalog at www.jbpub.com. These links will introduce you to some of the most important sites for finding law and evidence information on the Internet.

SUMMARY

This chapter's primary emphasis is in the introduction of evidentiary concepts and definitions. What evidence is, and how it is grouped and classified is initially analyzed. What qualities constitute good evidence, and whether it is competent, relevant, material, and probative course through the entire chapter. Forms of evidence—from direct to documentary—are analyzed. Additionally, the influence of the hearsay rule and its many exceptions is posed, as well as other evidentiary policies involving presumptions, burdens, and the concept of legal weight.

NOTES

1. Professors David Schum and Peter Tiller, in their creative article, *Marshaling Evidence for Adversary Litigation*, advise practitioners to use their imaginations when corralling and marshaling in as much evidence as possible in the litigation process. In their view, the quality and content of evidence is directly correlated to one's level of imagination and creative thought. They state in part

Our study of investigative discovery puts great stress on the role of imagination. Few investigative problems in law (or else) spring forth in well-posed form in which specific possibilities are immediately obvious and all relevant evidence is readily available. Hypotheses or possibilities and relevant evidential tests of those hypotheses and possibilities have to be constructed. In short, because the investigative discovery depends on the imaginative skills of investigators, imaginative reasoning plays a crucial role in investigative discovery. Despite its obvious importance, imaginative reasoning is not well-understood.

David Schum & Peter Tiller, *Marshaling Evidence for Adversary Litigation*, 13 *CARDOZO L. REV.* 657, 659 (1991).

2. Evidence practice is a tough road to conquer. Schum and Tiller state, "Organizing evidence is one matter, but using it as a basis for one's choices or to persuade others is quite another." *Id.* at 678.
3. CHARLES P. NEMETH, *LITIGATION, PLEADINGS AND ARBITRATION*, 523 (2d ed., 1990).
4. EDMUND M. MORGAN, *Forward* to *MODEL CODE OF EVIDENCE 4* (1941).
5. Courtesy of Detective Brian Kohlhepp, Ross Township Police, Pittsburgh, PA.
6. JOHN M. MCGUIRE ET AL., *EVIDENCE, CASES AND MATERIALS 1* (1973).
7. CHARLES P. NEMETH, *THE PARALEGAL RESOURCE MANUAL* 320–45 (2008).
8. GUIDO CALABRESE, *COMMON LAW FOR THE AGE OF STATUTES* (1982).
9. Imwinkelried states the dilemma precisely.

The first year classes at the typical law school usually do a superb job of promoting the students' development of the fact- and case analysis skills required of a practitioner in a common-law system. Although statutes have become the dominant source of law in the United States, the time and intellectual energy most law schools devote to jurisprudence pale in comparison with that still committed to common law processes. Law schools claim to be engaged in professional education; but if they are to fulfill their responsibilities to prepare graduates to practice law, they must devote far more resources and time to jurisprudence.

Ed Imwinkelried, *Evidence Pedagogy in the Age of Statutes*, J. LEGAL EDUC. 227, 241 (1991).

10. *Carlisle v. United States*, 517 U.S. 1460 (1996).
11. Federal Procedure Rules Service, 755–56 (1992).
12. For a new look at old evidentiary concepts, see WILLIAM TWINING, *RETHINKING EVIDENCE: EXPLORATORY ESSAYS* (2006).
13. MODEL RULES OF EVIDENCE Rule 1(12).
14. FED. R. EVID. 401.
15. 1 JOHN H. WIGMORE, *EVIDENCE* 410 (1940).
16. FED. R. EVID. 402.
17. Richard D Friedman, *Anchors and Flotsam: Is Evidence Law “Adrift?”*, 107 YALE L.J. 921 (1998) (reviewing MIRJAN R. DAMASKA, *EVIDENCE LAW ADRIFT* (1997)). The U.S. Supreme Court allowed the admission of a *Battered Child Syndrome* defense in the prosecution of a second degree murder case. Holding the evidence relevant, the Court remarked

Thus, evidence demonstrating battered child syndrome helps to prove that the child died at the hands of another and not by falling off a couch, for example; it also tends to establish that the “other,” whoever it may be, inflicted the injuries intentionally. When offered to show that certain injuries are a product of child abuse, rather than accident, evidence of prior injuries is relevant even though it does not purport to prove the identity of the person who might have inflicted those injuries. *People v. Jackson*, 18 Cal. App. 2d 504, 506-08, 95 Cal. Rptr. 919, 921-22; *People v. Bledsoe*, 36 Cal. 3d 236, 249, 203 Cal. Rptr. 450, 458, 681 P.2d, 291, 299.

Estelle v. McGuire, 502 U.S. 62, 68 (1991).

18. FED. R. EVID. 401.
19. MICHAEL GRAHAM, *EVIDENCE, TEXT, RULES, ILLUSTRATIONS AND PROBLEMS* 13 (1983).
20. U.S. DEPARTMENT OF JUSTICE, *HANDBOOK OF FORENSIC SCIENCE* 1–2 (1999; 2007).
21. Paul Rothstein, *Teaching Evidence*, 50 ST. LOUIS L.J. 999 (2006).

22. FED. R. EVID. 403.
23. Indeed, the polygraph continues to befuddle its proponents as it is locked out of courtrooms. The decision to ban polygraph results is based on continuing disagreement about the accuracy of the polygraph technique. *United States v. Scheffer*, 896 F.2d 842 (4th Cir. 1990).
24. “In the realm of novelty, special challenges are presented. The risk of admitting as ‘explanatory’ a palpably untrustworthy opinion is deemed unacceptably high where the jury can be misled with an aura of certainty, glossed by a diploma and the facade of superior knowledge, to overestimate its probative value and obscure its merely conjectural nature. Lay jurors tend to give considerable weight to novel ‘scientific’ evidence when presented by ‘experts with impressive credentials. In any case, unreliable evidence does not satisfy the definition of relevancy.” Dominic R. Massaro, *Novelty in the Courts: Groping for Consensus in Science and the Law*, 65 N.Y. St. B. J. 46, (May/June 1993).
25. Mark Hansen, *Believe It or Not*, 79 A.B.A. J. 64, 67 (1993).
26. NEMETH, *supra* note 3, at 526-527.
27. Northwestern Student Chapter of ATLA, NwU ATLA, *Outlines*, available at www.law.northwestern.edu/atla/outlines/Evidence-Outline-03.doc.
28. NEMETH, *supra* note 3, at 402.
29. FED. R. EVID. 201(b) & (c).
30. N.H. RULES OF EVIDENCE Rule 201.
31. FED. R. EVID. 201 advisory committee’s notes.
32. *See* FED. R. EVID. 201 (c) & (d).
33. *See* FED. R. EVID. 201(e).
34. *See* FED. R. EVID. 201(f).
35. *See* FED. R. EVID. 201(g).
36. PENNSYLVANIA BAR INSTITUTE, *EVIDENCE: A STATEWIDE INSTITUTE*, 23 (1990).
37. 9A AM. JUR. PL. & PR. FORMS *Evidence* § 7 (2005).
38. *Id.* at *Evidence* § 11.
39. FED. R. EVID. 601.
40. Fed. R. Evid. 602.
41. FED. R. EVID. 603.
42. Fed. R. Evid. 701.
43. FED. R. EVID. 702.
44. Fed. R. Evid. 703.
45. *Petruzzi’s IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc.*, 988 F.2d 1224 (3d Cir. 1993).
46. *See* FED. R. EVID. 704.
47. “Keep these factors in mind when setting out to address character evidence.

1. Have 'good faith' basis for questions relative to specific acts.
2. Question witness's familiarity with people where witness lives, works, and spends his or her time.
3. Question witness's familiarity with the reputation of those people.
4. Ask specifically where, when, and from whom witness learned of the reputation.
5. Show any bias on part of witness.
6. Show any bias on part of those upon whom the reputation is based ('only black living in white neighborhood').
7. Question witness's familiarity with reputation personally (investigator not allowed to testify as to what people told him).
8. If you know of improper basis for reputation, PURSUE IT. 'Johnny was unpopular because he refused to perjure himself when the others were caught stealing, isn't that right?'
9. If you know witness is concealing good character traits, PURSUE IT. 'Didn't you tell John everyone liked him and couldn't believe this about him?'
10. Inquire about specific instances. 'Were you aware that he admitted . . . ?'
11. Avoid arguing with witness. 'Would you change your mind if you assumed the defendant is guilty of this?'
12. Argue importance of special instance if 403 argument advanced.
13. Attack factual basis of an opinion.
14. Limit cross-examination to character trait covered on direct examination.
15. Where character is in issue, pursue the specific instances (opposing counsel is given thorough opportunity because of importance of character issue, so you should cross-examine with same thoroughness).
16. Witness giving opinion should be required to comply with Rule 701 if lay witness (perception) and if expert, then with Rule 702 (based on what experts in the particular field reasonably rely upon).
17. Ask witness about statements made by party. 'Didn't defendant tell you he was involved in counterfeiting? (Held proper—'other crime' admissible to show intent, etc.
18. Avoid testimony that can cause mistrial. 'Where were you when defendant told you that?' 'We were in prison.'"

EDWARD T. WRIGHT, *EVIDENCE: HOW AND WHEN TO USE THE RULES TO WIN CASES* 61–62 (1990).

48. CHARLES P. NEMETH, *LITIGATION, PLEADINGS AND ARBITRATION* 402 (1990); See also Oriana Mazza, *Re-Examining Motions To Compel Psychological Evaluations Of Sexual Assault Victims*, 82 ST. JOHN'S L. REV. 763 (2008).
49. FED. R. EVID. 412(a).
50. FED. R. EVID. 412(b).

51. See Charles P. Nemeth, *Character Evidence in Rape Trials in Nineteenth Century New York: Chastity and the Admissibility of Specific Acts*, 6 WOMEN'S RTS. L. REP. 3 (1980); Charles P. Nemeth, *An Evaluation of New Jersey's Sexual Offense Statute: Judicial and Prosecutorial Perceptions in Rape Reform*; N.J. L.J. (1983); Aviva Orenstein, *Special Issues Raised by Rape Trials*, in *Ethics and Evidence Symposium*, 76 FORDHAM L. REV. 1585 (2007).
52. *Michigan v. Lucas*, 500 U.S. 145,152 (1991). Professor Toni Lester's fascinating study on sexual harassment delves into how the entire legal system weighs accusations based on gender differences. Professor Lester uses rape law as a fitting analogy in her demonstration of the distinct evidence standard in cases that involve women.

A close examination of rape law reveals that judges who apply the reasonable person test have often focused to an unusually high degree on the actions, reactions, motives, and inadequacies of the victim . . . [as opposed to] those of the defendant. Support for this conclusion can be found in the following list of situations in which women were deemed to have given their consent:

1. The woman did not physically resist the unarmed rapist;
2. The woman assumed the risk of being raped by placing herself in what was deemed to be an obviously dangerous situation;
3. The woman had the type of sexual fantasies and/or sexual life that demonstrated to the court that she had a propensity to want to have sex with the alleged rapist;
4. The woman wore the type of clothing that demonstrated to the court the rapist was justified in finding her sexually provocative; or
5. The woman's credibility was questioned because she failed to report the rape immediately after it occurred.

Toni Lester, *The Reasonable Woman Test in Sexual Harassment Law—Will It Really Make a Difference?* 26 IND. L. REV. 227, 234 (1993); See also Elissa L. Perry, Carol T. Kulik, and Anne C. Bourhis, *The Reasonable Woman Standard: Effects on Sexual Harassment Court Decisions*, 28 L. & HUM. BEHAV. (2004).

53. FED. R. EVID. 608(a).
54. FED. R. EVID. 608(b).
55. Fed. R. Evid. 609(a)(1).
56. FED. R. EVID. 609(a)(2).
57. Fed. R. EVID. 404(a).
58. FED. R. EVID. 404(b).
59. Jeffery Cole, *Bad Acts Evidence Under Rule 404 (b)*, 14 LITIG. 8, 9 (Spring 1988); See also David M. Scheffler, *Specific Act Propensity Evidence In Self-Defense Cases: A Two-Way Street Or A Dead End?* 48 B.C. L. REV. 471 (2007).

60. See FED. R. EVID. 405.
61. R v Rowton (1865) Le & CA 520; R v Redgrave 74 (1982) Cr App R 10.
62. See FED. R. EVID. 901 & 902.
63. FED. R. EVID. 1002.
64. How the Sixth Amendment's confrontation clause entangles itself in hearsay problems is keenly critiqued in Ellen Liang Yee, *Confronting the "Ongoing Emergency": A Pragmatic Approach to Hearsay Evidence in the Context of the Sixth Amendment*, 35 FLA. ST. U. L. REV. 729 (2008).
65. FED. R. EVID. 801(c).
66. PA BAR INSTITUTE, *supra* note 32, at 118.
67. JAMES MCCARTHY, MAKING TRIAL OBJECTIONS, 4–30 (1986).
68. Challenges to the hearsay rule are continuous and ongoing. See Jeff Papa, *Recent Developments in Indiana Evidence Law*, 41 IND. L. REV. 997 (2008).
69. FED. R. EVID. 807.
70. David M Gersten, *Evidentiary Trends in Domestic Violence*, FLA. B. J., July–August 1998, at 68 n.7.
71. *Evidence Law—Hearsay Rule—California Adopts Hearsay Exception Making Written Statements by Unavailable Witnesses that Describe Past Physical Abuse Admissible in Civil and Criminal Cases*, 110 HARV. L. REV. 805 (1997).
72. FED. R. EVID. 801(d)(2).
73. A 1992 U.S. Supreme Court decision reaffirmed the traditional rationale for this hearsay exception.

We note first that the evidentiary rationale for permitting hearsay testimony regarding spontaneous declarations and statements made in the course of receiving medical care is that such out-of-court declarations are made in contexts that provide substantial guarantees of their trustworthiness. But those same factors that contribute to the statements' reliability cannot be recaptured even by later in-court testimony. A statement that has been offered in a moment of excitement—without the opportunity to reflect on the consequences of one's exclamation—may justifiably carry more weight with a trier of fact than a similar statement offered in the relative calm of the courtroom.

White v. Illinois, 502 U.S. 346, 355–56 (1992) (footnote omitted).

74. KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 272, at 260–61 (6th ed. 2006).
75. *People v. Ortega*, 672 P.2d 215 (Colo. App. 1983). See also 2 AM. JUR. *Trials* 53 (Supp. 1993).
76. For a fascinating look at how the rule may be interpreted by the atheist or non-believer, see Paul W. Kaufman, *Disbelieving Nonbelievers: Atheism, Competence*,

- and Credibility in the Turn of the Century American Courtroom*, 15 YALE J.L. & HUMAN. 395 (2003).
77. Bryan A. Liang, *Shortcuts to "Truth: The Legal Mythology of Dying Declarations*, 35 AM. CRIM. L. REV., 229, 277 (1998); see also Michael J. Polelle, *The Death of Dying Declarations in a Post-Crawford World*, 71 MO. L. REV. 285 (2006).
 78. See FED. R. EVID. 803(6) & (7).
 79. KENT SINCLAIR, TRIAL HANDBOOK 75 (2d ed. 1992).
 80. FED. R. EVID. 803(11) & (12).
 81. Edward J. Imwinkelried, *Forensic Science: Role of the Hearsay Doctrine in Litigating Frye Challenges to the Admissibility of Scientific Evidence*, 29 CRIM. L. BULL. 158, 165–66 (1993).
 82. 9A AM. JUR., *supra* note 37, at Evidence § 75.
 83. *Pope v. Shalala*, 998 F.2d 473 (7th Cir. 1993).
 84. 9A AM. JUR., *supra* note 37, at Evidence § 165.
 85. Ronald Allen, *Presumption in Civil Actions Reconsidered*, 66 IOWA L. REV. 843, 845 (1981). Every court and state judicial system recognizes presumptions at some level. In New York, by way of example, the following presumptions exist. *Presumption of a defendant's sanity*: *People v. Silver*, 33 N.Y.2d 475, 354 N.Y.S.2d 915 (1974); *People v. Morales*, 125 A.D.2d 605, 509 N.Y.S.2d 658 (2d Dept. 1986); GARY MULDOON, HANDLING A CRIMINAL CASE IN NEW YORK § 15:44 (West Group 2009). *Presumption of defendant's competency to stand trial*: *People v. Vega*, 73 Misc. 2d 857, 342 N.Y.S.2d 693 (N.Y. Crim. Ct. 1973); MULDOON, § 15:55. *Presumption of validity that attaches to a search warrant*: *People v. Castillo*, 80 N.Y.2d 578, 592 N.Y.S.2d 945 (1992); *People v. Ortiz*, 234 A.D.2d 74, 650 N.Y.S.2d 223 (1st Dept. 1996); MULDOON, § 9:118. *Presumption of innocence*: *People v. Guzman*, 164 A.D.2d 828, 559 N.Y.S.2d 550 (1st Dept. 1990); 1 CRIM. JUST. INST. (N.Y.) 3.05, 6.10; MULDOON, § 18:430. *Presumption that an indictment is based on legal and sufficient evidence*: *People v. Howell*, 3 N.Y.2d 672, 171 N.Y.S.2d 801 (1958); *People v. Bergerson*, 17 N.Y.2d 398, 271 N.Y.S.2d 236 (1966); *People v. Grant*, 215 A.D.2d 114, 626 N.Y.S.2d 87 (1st Dept. 1995); MULDOON, § 6:37. *Presumption of regularity that attaches to judgments of conviction*: *People v. Williams*, 237 A.D.2d 644, 654 N.Y.S.2d 846 (3d Dept. 1997); MULDOON, § 23:39. *Presumption that defense counsel rendered effective assistance*: *People v. Finch*, 199 A.D.2d 278, 604 N.Y.S.2d 222 (2d Dept. 1993) (trial); *People v. DeLaHoz*, 131 A.D.2d 154, 520 N.Y.S.2d 386 (1st Dept. 1987) (appeals); MULDOON, §§ 2:79, 23:95. *Presumption of a statute's constitutionality*: *People v. Davis*, 43 N.Y.2d 17, 400 N.Y.S.2d 735 (1977); MULDOON § 15:141. *Presumption against waiver of constitutional rights*: *People v. Howard*, 50 N.Y.2d 583, 430 N.Y.S.2d 578 (1980).
 86. See Morgan and Maguire, *Instructing the Jury upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 78 (1933).
 87. Allen, *supra* note 85, at 857.

88. *Id.* at 868.
89. Presumptions are not ethereal concepts. In a criminal case, a “person when first charged with a crime is entitled to a presumption of innocence, and may insist that his guilt be established beyond reasonable doubt. . . . Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears.” *Herrera v. Collins*, 506 U.S. 390, 398–90 (1993) (citations omitted).
90. MODEL CODE OF EVIDENCE Rule 701 (1942).
91. Lynne R. Kurtz, *Protecting New York’s Children: An argument for the creation of a rebuttable presumption against awarding a spouse abuser custody of a child*, ALB. L. REV. (1997).
92. MODEL CODE OF EVIDENCE Rule 704 (1942).
93. FED. R. EVID. 301.
94. Donald Lay, *Mapping the Trial—Order of Proof*, 5 AM. JUR. TRIALS 505 (1991).
95. Learned Hand, 13 A.L.I. PROC. 217 (1941).
96. James Brook, *Inevitable Errors: The Preponderance of Evidence Standard and Civil Litigation*, 18 TULSA L.J., 79, 81 (1982).
97. HART & MCNAGHTEN, EVIDENCE AND INFERENCE 53 (1959).
98. John Siffert, *Instructing on the Burden of Proof in Reasonable Doubt*, 8 BRIDGEPORT L. REV. 356, 366 (1987).
99. Chris William Sanchirico, *A Primary-Activity Approach to Proof Burdens*, 37 J. LEGAL STUD. 273 (2008).
100. Note, *Reasonable Doubt: An Argument against Definition*, 108 HARV. L. REV. 1955 (1995).
101. Rolando V. Del Carmen, Craig Hemmens, & Kathryn E. Scarborough, *Grave Doubts about “Reasonable Doubt”: Confusion in State and Federal Courts*, 25 J. CRIM. JUST. 231–54 (1997).
102. L. SAND & JOHN SIFFERT, MODERN FEDERAL JURY INSTRUCTION 401 (1984).
103. Brook, *supra* note 96, at 81–82.
104. 9A AM. JUR., *supra* note 37, at Evidence § 130.
105. Brook, *supra* note 96, at 96. In federal cases, like bankruptcy, there is a presumption in corporate cases that decisions are decided according to the preponderance of evidence rather than a clear and concise standard. In *Grogan v. Garner*, the U.S. Supreme Court stated, “The preponderance standard is presumed to be applicable in civil actions between private parties unless particularly important individual interests or rights are at stake, and, in the context of the discharge exemption provisions, a debtor’s interest in discharge is insufficient to require a heightened standard.” *Grogan v. Garner*, 498 U.S. 279, 287 (1991).
106. NEMETH, *supra* note 48, at 422.
107. 5 AM. JUR. TRIALS § 42 (1966).

