



MEMORANDUM

**TO:** All Comparison Students in the Spring 2012  
**FROM:** Professor Michael L. Coyne  
**DATE:** January, 2012  
**RE:** Evidence Section of Comparison Course

Prior to the start of the Evidence section, you should thoroughly review your evidence outline, the strategies and tactics pages for the evidence questions on the MBE and the handouts attached to this memorandum. **THESE HANDOUTS SHOULD BE MEMORIZED, ESPECIALLY MY DEFINITION OF HEARSAY, HEARSAY EXCLUSIONS UNDER 801 AND THE EXCEPTIONS. THE FIRST THREE QUIZZES COME DIRECTLY FROM MY HANDOUTS.**

The following schedule will be followed during the evidence section:

Evidence Comparison Schedule

Wednesday, 1.11.12	Five Part Evidentiary Test and Review of Hearsay. (Lecture also on reserve at library desk.) (Test on hearsay)
Saturday, 1.14.12	DVD review and questions on handouts.
Wednesday, 1.18.12	What to expect on MBE test and review related testing areas. (Test hearsay exceptions)

Hearsay Questions: 1, 4, 7, 8, 9, 10, 15, 16, 19, 22, 24, 28, 30, 31, 34, 36, 38, 39, 41, 42, 48, 51, 52, 54 and 55.

Saturday, 1.21.12

Review handouts on Five Part Test, Character, Habit and Impeachment and Spousal Testimony. (Multiple choice test and test on handouts).

Finish hearsay questions.

Relevance Questions: 6, 20, 29, 33, 37, 43, 45, 49 and 53.

Privilege Questions: 5, 13, 17, 35 and 47.

Monday, 1.23.12

Review questions and discuss Character, Habit and Impeachment in greater detail.

Character, Habit, Impeachment Questions: 2, 3, 11, 14, 18, 25, 26, 27, 40, 44, 46, 50 and 56 and expert testimony questions 12, 21, 23 and 32.

Wednesday, 1.25.12

Miscellaneous evidence provisions lecture.

Saturday, 1.28.12

Civil Procedure Overview and Evidence Examination.

Please review your outlines focusing on memorizing black letter law and go over all questions and answers prior to the start of the first class. I have a two hour review on the computer in the media lab that deals with the attached handouts. It is also available in the bookstore on disk. Memorize the information on the handouts.

A missed quiz must be made up prior to the start of the next class or you will not be allowed to make up that quiz.

[myfiles/comp/m2compstudsmc/spring2012](http://myfiles/comp/m2compstudsmc/spring2012)

## EVIDENCE

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<u>RELEVANCE</u> Rules 401 and 402	Any fact that is of consequence -- does it make the proposition more probable with it than it would without the information.
<u>COMPETENCY</u> Rules 601 and 602	Does the witness have the ability to <i>perceive, understand, remember</i> and <i>communicate</i> the event? Does the witness have any special problems, i.e., infancy or insanity, that would impair their understanding of the event? Although not truly a competency issue, are there any privileges that exist which should preclude the testimony. Attorney/client, Priest/Penitent, Doctor/Patient, Marital Privilege and the like.
<u>FOUNDATION</u> Rules 901, 902, 903	A proper basis for admission of the testimony. The evidence must be authenticated and a basis established that shows it is reliable. <i>Expert</i> testimony needs a foundation showing the expert has sufficient <i>education, training, background</i> and <i>experience</i> . Photographs must depict what they purport to depict. Also keep in mind chain of custody concerns, the Best Evidence rule regarding proving the contents of a writing, recording or other document and the accuracy of electronic records.
<u>HEARSAY</u> Rules 801, 803, 804	<i>Any, any, any</i> out of court statement offered to prove the truth of the matter asserted therein except a party's own statement offered against that party.
<u>RULE 403 PROBLEMS</u>	Authorizes the exclusion of relevant evidence on grounds of prejudice, confusion or waste of time. Is the <i>probative value</i> of the evidence substantially <i>outweighed</i> by the danger of <i>unfair prejudice, confusion</i> and delay.

# EVIDENCE

## Professor Coyne

### CHARACTER - HABIT - IMPEACHMENT OUTLINE

#### Character Evidence

**General rule**, character evidence may **NOT** be introduced:

1. To prove the defendant acted in conformity with a specified character trait.
2. To show that someone has a propensity to act in a certain way.

**Character is an issue** in a criminal case **ONLY**:

1. After the defendant first offers character evidence (by general reputation only), or
2. By testifying, the defendant places his or her character for truthfulness in issue.

The evidence that may be offered is limited to **relevant** character traits -- relevant to the crime charged, i.e., teatotaler for DUI, peaceful person for violent crimes.

Prosecution may ***impeach character witnesses through specific instances of bad character*** (misconduct which is at odds with the general reputation testimony -- "I realize you said he was a teatotaler, but did you know that he was so drunk at the company picnic, that he fell asleep in his own vomit?") The prosecution may also **rebut the defendant's good character evidence by offering evidence again through general reputation witnesses of the defendant's bad character.**

Character evidence is ***never admissible in a civil case*** **except** in cases of malicious prosecution, libel and slander since reputation is relevant to the cause of action.

While one is not permitted to introduce specific instances of conduct to prove character, ***specific instances of conduct may be used*** to prove  **motive, opportunity, intent, common plan, scheme, design, identity or absence of mistake or accident** (mimic rule, signature crimes, serial killers, "brides in the bathtub," etc.).

#### Habit

Habit is defined as a regular and systematic routine and is proved by showing specific instances of conduct.

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Spousal Testimony

There are two different privileges involved in deciding if husbands or wives can testify concerning their partner.

The *common law rule* barred a spouse from testifying if their partner was a party to the action. This rule is absolute disqualification has now been abandoned and replaced with rules which require you to first decide if the proposed testimony either involves a private marital communication between husband and wife or involves an observation made by a spouse.

Private Communication

Either spouse has the right to prevent the other from testifying about *confidential communications* between them *while they were married* -- this is true even if the testimony would occur subsequent to a divorce.

- “*Confidential*” means just that. The communication is not confidential if it is placed on a billboard in Times Square, or if there are people present who could be expected to hear the conversation. *An eavesdropper*, however, *would not destroy* the *confidential nature of the communication* and the privilege may still be claimed.
- “*While they were husband and wife*” excludes conversations which took place prior to the marriage or conversations which occur subsequent to a divorce.

Observations or Transactions of a Spouse

Generally this relates to things other than confidential communications between husband and wife.

Where the husband or wife is the criminal defendant, during the term of a legitimate marriage, his or her spouse:

State Court Rule Generally: May not testify about anything if either the witness or party spouse opposes such testimony.

Federal Court Rule: May testify if he or she voluntarily elects to, , even over the party spouse’s objection, with respect to observations and transactions only.

- These rules can apply to cover testimony which includes observations or transactions and even communications which preceded the marriage.
- There is no similar privilege concerning transactions and observations for civil cases.

## Impeachment

The *scope of cross examination* under the F.R.E. is *bias, credibility* and matters covered on *direct testimony*: BCD. You may impeach any witness by showing that his general reputation for truthfulness is bad, by his prior criminal convictions and his prior bad acts that bear on truthfulness under the F.R.E.

### Bias

**As of right** one can inquire into matters pertaining to bias. This includes family relationships, compensation of a witness, pending criminal charges and anything which would provide the witness with a motive to lie or allow the jury to find that the witness is under an influence to prevaricate.

### Credibility/Prior Convictions

The Court has *no discretion to exclude a conviction for a crime involving a false statement or dishonest act that is less than 10 years old*. This includes felonies and misdemeanors.

All *other felonies are subject to a 403 analysis unless* it is a prior conviction of the criminal defendant and then it is **excluded** if it is more prejudicial than probative (as opposed to the substantially more prejudicial than probative analysis required to exclude convictions of all other witnesses under 403).

To be admissible, *all crimes over 10 years old* (as measured from the date of the last incarceration or conviction whichever is later) require:

- A. Prior notice of the intention to use the crime for impeachment.
- B. A ruling, supported by specific facts and circumstances, that the probative value of the conviction substantially outweighs its prejudicial effect.

### Accused

**Conviction can be excluded if the prejudicial effect is greater than the probative value.**

### Others

Only if the prejudice is *substantially greater* than the probative value can the conviction be excluded.

### Direct -- Matters Covered on Direct Testimony

Cross examination concerning matters covered on direct testimony not only includes matters testified to on direct but any sensory deficiencies applicable to that witness.

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**HEARSAY**

Any out-of-court statement that is offered to prove the truth of the matter asserted therein except a party's own statement offered against that party.

**HEARSAY EXCEPTIONS**

There are a total of 27 exceptions of which the following 16 are utilized fairly often.

- 3 Main Groups      U-5      Unavailability Exceptions  
                             S-5      Spontaneous Exceptions  
                             R-6      Records Exception

**Unavailability Exceptions F.R.E. 804 (2 D=s and 3 F=s)**

<b>U</b>	<b>Rule 804 Declarant Must Be Unavailable</b>	<ol style="list-style-type: none"><li>1. Former Testimony</li><li>2. Declaration Against Interest (penal or pecuniary)</li><li>3. Dying Declaration</li><li>4. Statement of Family History</li><li>5. Forfeiture by Flight of a Witness</li></ol>
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**Spontaneous Exceptions F.R.E. 803**

<b>S</b>	<b>Rule 803 Declarant=s Availability Does Not Matter</b>	<ol style="list-style-type: none"><li>1. Present Physical Condition</li><li>2. Present Mental State</li><li>3. Statement For Treatment or Diagnosis</li><li>4. Excited Utterance</li><li>5. Present Sense Impression</li></ol>
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**Records Exceptions F.R.E. 803**

<b>R</b>	<b>Rule 803</b>	<ol style="list-style-type: none"><li>1. Past Recollection Recorded</li><li>2. Business Records</li><li>3. Public Records</li><li>4. Records of Vital Statistics</li><li>5. Documents Concerning Land</li><li>6. Judgments of Criminal Convictions</li></ol>
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**F.R.E. 801 Defines The Following as non-hearsay:**

“A party's own statement offered against that party.” This covers a broad array of material including:

- (A) His own statement or one which he believes to be true.
- (B) Agent's statement including someone authorized to speak, a servant's statement concerning something within scope of employment made while so employed and a co-conspirator's statement made in course of or in furtherance of the conspiracy.

**OR**

Prior statement of a witness who testifies at the present trial and the statement is:

- (A) inconsistent with present testimony and prior statement was under oath in some judicial proceeding;
- (B) consistent with present testimony and is offered to rebut charge of recent fabrication, improper influence or motive;
- (C) one of identification made after perceiving him.