



MEMORANDUM

TO: All Comparison Students in the Spring 2019
FROM: Professor Michael L. Coyne
DATE: December 2018
RE: Evidence Section of Comparison Course begins on 1.14.19

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 THE DEFINITION OF HEARSAY, HEARSAY EXCLUSIONS UNDER 801 AND THE EXCEPTIONS. YOU MUST MASTER HEARSAY IN ORDER TO PASS THE BAR EXAMINATION.**

The following schedule will be followed during the evidence section:

Evidence Comparison Schedule

Monday, 1.14.19	What to expect on MBE Section. Hearsay Questions: 2, 5, 8, 11, 13, 14, 15, 17, 22, 23, 24, 26, 29, 33, 37, 56, and 57.
Wednesday, 1.16.19 (Day Class starts at 1:30 today only)	Hearsay continued, Experts and Privilege Questions: 38, 42, 44, 45, 46, 49, 51, 53, and 54.
Saturday, 1.19.19 8:00-10:00 a.m.	Presentation of Evidence, Character, Habit, and Impeachment Questions. Questions: 3, 4, 6, 7, 12, 18, 19, 28, 35, 36, 43, 47, 48, 50, 52, and 58.

Wednesday, 1.23.19 Finish review of questions. Miscellaneous Areas of Inquiry.
Questions: 1, 9, 10, 16, 20, 21, 25, 27, 30, 31, 32, 34, 39, 40
and 55.

Please review your outlines while memorizing black letter law and go over all the Evidence questions and answers in all areas prior to the start of the first class. I have a two-hour review online that deals with the attached handouts. There is a 67-question outline that goes along with it. If you answer the 67 questions and submit that to me by the start of class on Monday, 1.14.19, you will receive credit for a 5 on a quiz. Also, if prior to our class on Monday, 1.14.19, you handwrite 25 pages of the Hearsay sheet attached to this Memo you will also get a 5 on another quiz. Memorize the information on the handouts.

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

m2compstudentsMLCSpring2019/coyne/evidence

EVIDENCE

Professor Michael L. Coyne

<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</i> , confusion and delay.

EVIDENCE
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myfiles/Evidence/HearsayExceptions

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 **U**navailability Exceptions
 S-5 **S**pontaneous Exceptions
 R-6 **R**ecords Exception

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

U	Rule 804 Declarant Must Be Unavailable	<ol style="list-style-type: none">1. Former Testimony2. Declaration Against Interest (penal or pecuniary)3. Dying Declaration4. Statement of Family History5. Forfeiture by Flight of a Witness (Forfeiture by wrongdoing)
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Spontaneous Exceptions F.R.E. 803

S	Rule 803 Declarant's Availability Does Not Matter	<ol style="list-style-type: none">1. Present Physical Condition2. Present Mental State3. Statement For Treatment or Diagnosis4. Excited Utterance5. Present Sense Impression
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Records Exceptions F.R.E. 803

R	Rule 803	<ol style="list-style-type: none">1. Past Recollection Recorded2. Business Records3. Public Records4. Records of Vital Statistics5. Documents Concerning Land6. Judgments of Criminal Convictions
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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 and 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 someone.

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Spousal Testimony

There are two different privileges involved in deciding if partners to a valid marriage can testify concerning their spouse or if any witness can testify concerning communications between spouses.

The *common law rule* barred a spouse from testifying if their partner was a party to the action. This rule of absolute disqualification has now been abandoned and replaced with rules which require you to first decide if the proposed testimony either involves a confidential marital communication between partners to the marriage or involves testimony concerning anything else—what we call the observation rule.

Confidential Marital Communication

Either spouse has the right to prevent the other and anyone else who surreptitiously heard it 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 unknown eavesdropper*, however, *would not destroy* the *confidential nature of the communication* and the privilege may still be claimed.

“*While they were married*” excludes conversations which took place prior to the marriage or conversations which occur subsequent to a divorce.

Anything other than a confidential marital communication is treated as an observation, transaction or any other information one spouse may have about the other.

For all matters other than confidential communications between partners to a valid marriage there are two preconditions to any claim of privilege:

- The spouse must be the criminal defendant.
- The proposed testimony will occur during a legitimate marriage.

If both preconditions are met then use--

SEFW

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

Federal Court Rule: Witness spouse may testify if he or she voluntarily elects to, even over the party spouse’s objection, with respect to observations and transactions but not confidential marital communications.

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

EVIDENCE
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CHARACTER - HABIT - IMPEACHMENT OUTLINE

Character Evidence

Character evidence is a pattern of any type of personal behavior whether it involves an issue of morality or not.

General rule, character evidence may **NOT be introduced** to prove the defendant acted in conformity with a specified character trait or to show that someone has a propensity to act in a certain way. It is almost exclusively found in criminal cases as there are few civil cases where character is relevant e.g. defamation, negligent entrustment or parenting activities.

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

1. After the defendant first offers character evidence (by calling witnesses to testify to their general reputation), or
2. By testifying, the defendant places his or her character for truthfulness in issue, just as every witness who testifies in every case places his or her character for truthfulness in issue.

The evidence that defendant may offer 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 rare cases such as libel and slander or negligent entrustment cases since a person's reputation is relevant to those causes 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," rule).

The Rape Shield Rule prevents a victim's prior sexual activity from being admitted unless it goes to source of rape trauma or signs of rape or prior sexual activity with the defendant.

In sex offense cases, with prior notice, the prosecution or plaintiff may introduce evidence that the defendant previously committed other sexual assaults or child molestation offenses.

Habit

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

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.

as of these handwritten

ID No: _____

Any, Any, Any _____

Unless _____

Or _____

Or _____

Or it's a prior _____

And it is _____

A. _____

B. _____

C. _____

Under what circumstances can one use the unavailability exceptions?

1. _____

2. _____

3. _____

4. _____

What are the unavailability exceptions to the hearsay rule?

1. _____

2. _____

3. _____

4. _____

5. _____

Professor Coyne's Evidence Questions Spring 2019

Name: _____ **Date:** _____

1. Hearsay is

2. It's not hearsay if:

3. Who can make hearsay statements _____

4. You offer hearsay through _____

5. Inconsistent statements _____

6. In Massachusetts what are admissible as hearsay exceptions? _____

7. There are _____ hearsay exceptions.

8. What makes some unavailable? _____

9. The three main groups of hearsay exceptions are _____,
_____, _____.

10. The 3 d's & 2 f's of unavailability are _____
_____.

11. What are the spontaneous exceptions _____

_____.

12. What is the Hillman Doctrine? _____

_____.

13. With Present Sense Impression, the statement can be about any _____
_____ as long as the statement is made _____.

14. _____ must be a startling event; and made while under the stress or
excitement caused by the event or condition.

15. _____ is the only hearsay exception that requires availability.

16. What can be used to Recollection Refreshed? _____

17. What Federal rules pertain to Hearsay, _____

18. A statement can be _____
_____.

19. Legally operative facts _____ hearsay, because _____
_____.

20. A co-conspirator's statement is not hearsay, if _____

21. What was the common law rule for spousal testimony _____

22. Which spouse has the right to prevent the other from testifying about confidential communications between them while they were married? _____
23. What is a "Confidential Communication," _____

24. An eavesdropper _____ destroys the confidential nature of the communication.
25. Conversations that took place before marriage, _____ excluded under Marital Communication rule.
26. Marital Communication Privilege for marital communications _____ lost after a divorce.
27. The Observation Rule is used in _____ cases.
28. Observations or transactions of a spouse relates to things other than _____
_____ between husband and wife.
29. What is the test used in for observations or transactions of a spouse _____

30. If the observations or transactions of a spouse does apply what is the acronym to use? _____
31. In State court (generally), _____

32. In Federal Court, _____

33. In Federal Court while witness spouse may elect to testify about observations, _____

34. Post Divorce, the rule followed by most state courts in criminal cases is _____

35. Subsequent to a divorce, either spouse has the right _____

36. General rule is that character evidence may *NOT* be introduced, _____
_____ or _____

37. What type of case is character evidence offered in (generally)? _____

38. And only after _____ first offers character evidence (by general reputation only),
or by testifying, _____ places his or her character for truthfulness in issue.

39. Which types of offenses is character is relevant to damages? _____

40. The criminal defendant may offer _____ evidence of their character.

41. The character evidence that may be offered is limited to _____ character traits –
_____ to the crime charged.

42. Once the _____ makes character an issue, then _____ character can be attacked by _____.

43. Prosecution may impeach character witnesses through _____

44. The prosecution may also rebut the defendant's good character evidence by offering evidence, again _____

45. The _____ of every witness -- in a civil or criminal case can be attacked.

46. When respect to Character For Truthfulness, a witness can be impeached by _____

47. Habit is proven _____

48. Habit is generally used in _____ cases.

49. Habit is defined _____

50. Character is an issue in a criminal case only _____, or _____

51. The scope of impeachment is _____, _____, _____

52. You may impeach any witness by _____, _____, _____

53. Witnesses may be impeached through the use of their _____

54. The court has no discretion to exclude _____

55. All other felonies are subject to a _____, unless it is a prior conviction of the criminal defendant and then it is excluded if it is more _____

56. When prior convictions are too similar to the present charge, they are likely to be _____ by the jury, and there is greater reason therefore for the judge to _____

57. No discretion to exclude a _____ if it is less than 10 years old when it used to impeach the witness.

58. Government can impeach a character witness with _____

59. To be admissible, all crimes over 10 years old, _____ and _____

60. Mimic rule (what Irving calls *Brides in the Bathtub*), allows _____

61. The mimic rule are not used for _____, the prior acts are used to show the person committed.

62. Who can be called to offer a hearsay statement? _____

63. An agent's statement is not hearsay if _____

64. Prior statements of identification come in as _____.

65. Prior consistent statement of a witness testifying at the present trial is excluded unless _____

66. Forfeiture by Flight of a Witness is _____

67. _____

to prove the truth of the matter asserted therein except a party's own statement offered
against that party