



# Massachusetts School of Law at Andover

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## MEMORANDUM

**TO:** All Spring 2021 Comparison Students  
**FROM:** Dean Michael L. Coyne  
**DATE:** January 1, 2021  
**RE:** Evidence Section of Comparison Course begins on 1.20.2021

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. If you watch the PowerPoint and complete the 67 questions and submit it to me electronically prior to the start of the first class on 1.20.2021, then I will give you a 5 on the first quiz.**

You are also required to take the 10 question Evidence Assessment Test before the start of the section with each of the correct answers to those questions worth half a point that will be added to your final section score.

The following schedule will be followed during the evidence section:

### Evidence Comparison Schedule

Wednesday, 1.20.2021 2 <sup>nd</sup> Half of Class	What to expect on MBE Section. Hearsay Questions: 1, 3, 4, 5, 14, 15, 17, 18, 20, 22, 25, 27, 29, 36, 37, 38, 40, 43, 51, 56, 58, 59, 66, 67.
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Saturday, 1.23.2021

ZOOM 8-11 a.m.

Hearsay continued, Privilege Questions: 7, 21, 34, 39, 41, 48, 62 and Presentation of Evidence: 8, 13, 23, 24, 26, 30, 45, 46, 53, 64, 68, 69.

Monday, 1.25.2021

Character, Habit and Impeachment Questions: 2, 6, 9, 10, 20, 28, 31, 32, 33, 35, 42, 47, 49, 50, 57, 60, 61, 63, 70, 65 and go to miscellaneous areas of inquiry questions: Misc. Questions: 11, 12, 16, 44, 52, 54, 55.

Wednesday, 1.27.2021

Evidence Final Exam at 6:00 p.m.

Thursday, 1.28.2021

Begin study for next section and take Criminal Assessment Test before Monday

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 electronically by Wednesday, 1.20.21, you will receive credit for a 5 on this the first quiz. Also, you should be able to complete the Hearsay sheet attached to this Memo.

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.

**EVIDENCE**  
**Professor Michael L. Coyne**

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)**

<b>U</b>	Rule 804 <b>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 (Forfeiture by wrongdoing)</li> </ol>
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**Spontaneous Exceptions F.R.E. 803**

<b>S</b>	Rule 803 <b>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>	Rule 803	<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 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.

**EVIDENCE**  
**Professor Michael L. Coyne**

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.
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- “*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.

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Myfiles/Evidence/SpousalTestimony

**EVIDENCE**  
**Professor Coyne**  
**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.

**Professor Coyne's Evidence Questions Spring 2021**

**ID No.:** \_\_\_\_\_ **Date:** \_\_\_\_\_

1. Hearsay is

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2. It's not hearsay if:

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3. Who can make hearsay statements \_\_\_\_\_

4. You offer hearsay through \_\_\_\_\_

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5. Inconsistent statements \_\_\_\_\_

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6. In Massachusetts what are admissible as hearsay exceptions? \_\_\_\_\_

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7. There are \_\_\_\_\_ hearsay exceptions.

8. What makes some unavailable? \_\_\_\_\_

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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

You should be able to fully complete this sheet from memory. If you cannot then save the \$1,000 on the bar.

Any, Any, Any \_\_\_\_\_

\_\_\_\_\_

Unless

\_\_\_\_\_

\_\_\_\_\_

Or

\_\_\_\_\_

\_\_\_\_\_

Or

\_\_\_\_\_ which is \_\_\_\_\_

\_\_\_\_\_

Or it's a prior

\_\_\_\_\_

Or it is

\_\_\_\_\_

\_\_\_\_\_

And it is

\_\_\_\_\_

\_\_\_\_\_

A.

\_\_\_\_\_

\_\_\_\_\_

B.

\_\_\_\_\_

\_\_\_\_\_

C.

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_