

Law for Medical Students and Physicians:
General Rules of Evidence
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I. Learning Objectives

At the end of the learning session, the student shall know these things:

- 1) What is relevant evidence?
- 2) What is hearsay?
- 3) What are the basic rules of expert testimony?
- 4) What is “best evidence”?
- 5) What are privileges?

II. Pre-Lecture Questions

- 1) The purpose of the rules of evidence is to get the truth, the whole truth, and nothing but the truth before the trier of fact.
- 2) There is nothing that can be withheld from evidence in terms of papers that might be relevant to a lawsuit.
- 3) The way you can tell if your opponent is withholding evidence is by calling the “Evidence Police” who know what evidence everybody has.
- 4) If it is not written down, you cannot get it into evidence.
- 5) Only papers can be evidence, not models, pictures, or clothing.
- 6) Surprise evidence is fine under the Ohio Rules of Evidence 1300, the “Perry Mason” exception. Screaming and yelling is by far the most effective cross-examination technique.
- 7) On direct examination, it is best to act hypothetical questions.
- 8) You can ask a witness about things that have not been brought up before.
- 9) If you think a witness is not telling the truth, you should immediately tell the judge.
- 10) How a witness appears in court has no relevance, so depositions are as good as court-room testimony.
- 11) If a witness is rude to you, the jury admires that.

III. Prologue: Evidence Law

When doctors were still applying leaches; even when they were treffining to let out the evil spirits from epileptics; lawyers were pursuing rules of evidence to get at the truth of a matter in dispute, accurately, but fairly.

Fair dealing is the basis of English law; and torture and secrecy are anathema in English law. This is part of the reason the Patriot Act has come under such fire: the tension between “getting the truth at any cost” versus “maintaining fair play, no matter what” has not been more intense than it is now, since the 1950’s.

Many physicians have a feeling that they can do things better than anyone else; and they often want to testify to the truth as they see it. They feel courts should listen especially attentively to what they think.

This is not how the courts see things: doctors, professors, and various other educated elite may help the jury figure out complex things that would otherwise make the truth hard to understand; but the educated elite are not the finders of fact. The jury, or, in a bench trial, the judge, finds the facts true or not true, and decides the conflict.

There are always movements to get the jury out of the fact-finding business. In one article in *Journal of the American Academy of Psychiatry and the Law* in 2004, several major heavyweight authors co-authored a paper that essentially shows no insight at all into the ancient common law underpinnings of the current law of evidence. Without realizing it, these authors put forward an elitist view: “Why doesn’t the judge let us, the experts, tell the jury what the truth is?” The reason is that English law distrusts the elite.

Like it or not, common law is the law of the common person; and is judged and resolved with reference to the common perceptions.

But how, then, can complex scientific and moral situations be entrusted to the masses to decide? Answer: educate them. The mechanism for such education is in expert testimony; not to mention the internet, the press, and compulsory universal education.

You may have feelings about this; and this class is the place to bring them up; because this may be the last time someone reminds you that the law of evidence is older than modern scientific medicine, and is set up to provide protections against various elites telling the people what the “truth” is.

It also turns out that most doctors will at some time testify in a court or other tribunal. For this reason I will give you twelve evidence rules (OREv 401, 402, 403, 501, 601, 602, 701, 702, 703, 801, 802, and 1002) to learn. This will give you a feeling for common law evidence rules in Ohio, and this will help prepare you for the day when you may be involved in testimony.

IV. Twelve “Rules” of evidence

A trial is a play, of sorts, in which the audience, the jury (or judge) vote at the end of the play as to who was right and who was wrong. The rules of evidence limit

the amount of extraneous material which can be brought into this play (so that it ends some time, and does not continue forever). The twelve rules of evidence which we discussed last time are a condensation of some evidence rules which you can use in the following exercises, as you play plaintiff's lawyer, defendant's lawyer, or witness.

The following are twelve rules of evidence which I have made up to help specifically you, the medical student or doctor, to remember and understand evidence. These are not real rules of evidence, and this is not how a law student would learn evidence rules. But these rules focus on medical evidence matters, and may be easier to learn for physicians and medical students than the traditional evidence rules.

- 1) Evidence which is relevant may be used. (Evidence which is not may not).
- 2) Evidence which is too shocking, or too repetitive, is excluded.
- 3) Anyone person can be a witness.
- 4) Privileged matter may not be used as evidence.
- 5) The witness, unless an expert, must have personal knowledge of the event about which she testifies.
- 6) Non-experts may testify as to common-sense opinions.
- 7) An expert may testify as to her opinions, and based on other than her personal observations, where to do so would help the court with a technical or scientific question.
- 8) Hearsay is a statement made out of court but used to prove the truth of the matter asserted.
- 9) Hearsay is not permissible as evidence.
- 10) A business record is an exception to hearsay, and is allowed as evidence.
- 11) A business record, made for self examination, such as an incident report, is not admissible because it is privileged.
- 12) Copies will do, unless the original would be more reliable.

V. Reliable, Probative and Substantial

Do you remember *Henry's Café*? In that case, the appeals court said that a court would not overrule the decision of a governmental regulatory board, if that board had acted consequent to reliable, probative, and substantial evidence.

Reliable means that the evidence is of the type that may be heard, and weighed as to whether it is true. This sentence has two parts:

- 1) "May be heard": Evidence may be heard only if it is relevant to the case at hand; and the judge decides that. It also may not be heard if it

is too prejudicial to a party to be fair; or if it is of the type to be deemed too unreliable to be worth listening too.

- 2) “Weighed as to whether it is true.”: Once the evidence is allowed to be heard, it need not necessarily be believed. The finder of fact (the jury, or, if no jury, the judge) weighs the evidence, and decides if they believe it or not.

Probative means evidence that tends to make a fact at issue more or less likely. For that to occur, the evidence must be relevant.

Substantial means the evidence must be the type of utterance or paper that is likely to be believable: not gossip, not rank opinion unbiased on facts, not speculation.

There is one other aspect to *Henry’s Café*: if the administrative tribunal has acted in a prejudiced or unfair manner (even though it had reliable, substantial, and probative evidence, it acted unfairly in spite of the evidence).

VI. Relevance: Rule 401, 402, and 403

Whether a piece of evidence may even be brought into a case depends on it being relevant to the issue to be decided. This relevance is decided by the judge, even in a jury trial. Relevance is decided along common sense lines; and courts are broadly permissive as to relevancy.

Here is an example from my own experience. A patient came to the hospital, on an “emergency petition”, after she was dangerous to her father, because of her delusions. She was very convinced that the police, the hospital staff, and most other people, were out to get her. In a few days it became time to seek commitment; which I did.

The patient had been assigned a lawyer, but she fired him, and represented herself. She questioned me along these lines: “Did I tell you that my brother is a drug addict? Did I tell you that I was abused by my father?” In each case, my answer was, “Yes” but the judge stopped the patient, gently asking what this had to do with whether she had a mental illness and was dangerous to self or others.

This was a classic demonstration of excluding evidence (in this case, direct examination) from the case because of its irrelevance. In this example, we see the judge making the exclusion.

Now, as a psychiatrist, I could see where such questions might be relevant: the patient was abused, and that was why she was angry at her father, and so, in her mind, that excused it; her brother was the one who filed an affidavit on her, saying she was ill, and he is a drug addict, so he may have lied. If the patient had

“laid a foundation”, showing why these seemingly random questions might be relevant, the judge would have heard them.

Rule 401: “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.

Of course, the weasel-word, where the wiggle room is, is the word “consequence”. My patient would say, that her father’s meanness to her, is of great consequence, because this is why she acts like she does. Note, that whether this would be a defense (get her out of trouble for doing what she did) is not the issue: it may be relevant, but not a valid defense.

The other wiggle-word is “any”. Under some readings of causation, a butterfly flapping its wings in Chile has some relevance to weather patterns in Ohio. In this context, “any” does not mean “any”, but rather “substantial enough to be worth worrying about”. That is not quantifiable.

Rule 402: All relevant evidence is admissible, except [laundry list of policy prohibitions] ... Evidence which is not relevant is not admissible. So to keep evidence out, even if it is relevant, it must be on the laundry list. In your list of twelve evidence rules, your laundry list consists of five items:

- 1) Shocking things; or needlessly boring things. (403)
- 2) Privileged matter (501)
- 3) Phony expertise (702)
- 4) Hearsay (802).
- 5) Phony documents(1002)

Shocking things. Rule 401 has to do with attention. **Exclusion of relevant evidence on Grounds of Prejudice, Confusion, or Undue Delay:**

- (A) **Exclusion mandatory: although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.**
- (B) **Exclusion discretionary: Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.**

The typical 403(A) exclusion is the gory photo of the murder or medical malpractice victim, which is sought to be admitted to “inflame the passions of the jury” and make them lose objectivity, and vote for the victim unreasonably. If that is so, why did Johnny Cochrane let in the bloody glove, in the OJ case?

The typical 403(B) exclusion would be truckloads of reduplicative documents serving only to obfuscate the issue.

Privileged matters. The privileges are either longstanding common-law or actual statutory rules that say such and such a piece of data may not be used as evidence for policy reasons. Ohio, by statute, has a doctor-patient, a therapist-client, “Tarassof”, and a “hospital incident report” privilege. None of these was a common-law privilege.

ORC 2317.02(A): This is the attorney client privilege. When a person (or a company) seeks legal advice from an attorney, that information cannot be revealed in evidence unless the client consents. This privilege survives the death of the client. A closely related doctrine, the **work-product** doctrine, states that materials prepared for a particular litigation may not be revealed into evidence unless the attorney waives his privilege over them.

Example: a patient falls off a gurney in a hospital radiology department. The hospital consults with a lawyer about any possible lawsuits arising out of this case. Such consultation is attorney-client privilege, but is not work products (no particular lawsuit yet).

ORC 2317.02(B): This is the doctor-patient privilege. Under it, no doctor (or dentist) may testify as to what a patient said, if that information was obtained in the usual course of diagnosing or treating the patient. An example to be protected: Doctor, I became nervous after I helped out in a robbery.” This admission is reasonably related to the cause of the nervousness, and is necessary for its diagnosis, and helpful in its treatment. Example not to be excluded: “Doctor, I have a pain in my foot from stepping on a nail. I stepped on the nail, running from a robbery.” Here, the fact of the robbery is not necessary for diagnosis or treatment.

Exceptions to the doctor-patient privilege are drug tests, reportable diseases, and trauma likely to be from violent acts. Another exception is the duty to report child abuse, elder abuse, or a credible threat against an identified other.

This latter is the “Tarasoff” privilege, but it is a privilege exception: if you warn a victim, you won’t get in trouble for violating the doctor-patient privilege. **ORC 2305.51**

Hospital incident reports are protected by a statute, **ORC 2305.251** for the policy reason of encouraging self-review in cases of untoward occurrences. An exception to that privilege is found in *Johnson v. University Hospital of Cleveland* (2002) 150 Ohio App. 3d 256, where the record had no evidence of the incident.

Phony expertise is a huge topic, which we have already dealt with in our “Torts” lecture. Rule 702 states, in its entirety: **“Testimony by Experts”**: a witness may testify as an expert if all of the following apply:

- (a) The witness’ testimony either relates to matters beyond the knowledge or experience possessed by laypersons or dispels a misconception common among laypersons;
- (b) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
- (c) The witness’ testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:
 - i. The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;
 - ii. The design of the procedure , test, or experiment reliably implements the theory;
 - iii. The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

The above is a restatement of two rules: the Ohio stance on the usefulness of experts ONLY where the matter is beyond the knowledge of the average layperson AND where expert testimony would help explain it; and *Daubert* rules of what kind of expert is OK.

Hearsay is not allowed as evidence (every late-night TV fan knows that); except that there are many, many exceptions to that rule. So what is hearsay, and why is it so bad?

Hearsay is any out of court statement used to prove the truth of the matter asserted. It is bad because you can’t cross-examine the one who made the statement, and show the jury whether he was lying or not.

Examples of hearsay, to be excluded: “The patient’s mother told me, that he was dangerous and armed.” If this statement is used to prove that he was indeed armed and dangerous, it would be impermissible. An exception would be, when an expert psychiatrist uses such a statement to prove a case for commitment, if it is usual for psychiatrists to rely on such statements (Rule 703).

The most important exception to hearsay in medical jurisprudence (that is, it is hearsay, but you can use it as evidence) is the business records exception. The pre-eminent business record is the medical record. Public policy and tradition

have ruled that records kept by someone who has a positive duty to keep them (and to keep them truthfully) are probably reliable.

The last exception to relevancy is the “best evidence” rule: if the original is available, get it. There are many, many ramifications to this rule, especially electronic records. The bottom line is, that in the age of photocopying, if one “copy” is not exactly like another “copy”, you WILL be asked to produce the original.

VII. Competence

Competence is the quality of being able to do a task. At law, certain people are deemed “unable” by statute to be witnesses:

- 1) Someone who lacks personal knowledge of the matter (Rule 601)
- 2) People of unsound mind (601 A)
- 3) Children under ten years old (but may examine said child and reverse this presumption of incompetence) (601 A).
- 4) A spouse testifying against their spouse who was charged.(601 B)
- 5) A less-than-50% clinical doctor in a med-mal case with regard to testimony on the standard of care.
- 6) An expert who cannot be “qualified” under 702.

VIII. Hypotheticals

The following are some hypothetical cases which you should be able to solve – in your copious spare time – using the twelve rules I have given you above. These hypothetical cases will form the basis of the essay questions in your final exam.

Hypothetical # 1: The Fall An elderly lady who is a resident in a nursing home, and who is combative, demented, and was personality disordered, falls in a nursing home after refusing help from staff to toilet herself. Her son, who is her guardian, has been very intrusive in the care of the woman, and now sues, saying the fall was called by the negligence of the nursing home in not having potty-railings.

The hospital does a QA based on the incident of the fall, before the case comes on to trial but after it had been filed, and the committee finds that all potties should have railings; but that it is unclear whether in this case the accident would have been prevented by a railing, it is likely that a railing would have ameliorated the fall or prevented it.

The hospital responds to the lawsuit saying it was not negligent, and if it was, that its negligence was not the proximate cause of the fall or the injuries

caused by the fall; but rather, that the resident had assumed the risk by acting unreasonably in refusing help.

Dramatis Personae:

a) Plaintiff's lawyer must prove negligence: that there is a standard of care, that nursing home breached it, and that plaintiff old lady was injured by that breach.

b) Plaintiff's expert, a nurse, claims that all potty chairs in nursing homes should have rails; that not to have rails is not acceptable practice; that the lack of rails in this case caused the fall of the patient.

c) Defendant's expert must discredit the testimony of the expert, and also keep out the QA committee's findings.

Hypothetical # 2: The incident report on the unreported incident. You are an intern at Big U Hospital, and are working late at night, as usual, as the attendings and residents are out gambling on the nearby riverboat casino. You accidentally give the wrong medicine to a patient: you give 1,000 mg IV of valium to a patient, who should have received 1,000 mg PO of valproic acid. The patient stops breathing, and, unnoticed to the staff dies. You actually don't record this mistake; although you make a great note on the code which, alas, did not resuscitate the patient.

The hospital, before the lawsuit is filed, makes an incident report, which is reviewed by QA committee, who find: i) it is completely unreasonable to give anyone 1,000 mg of valium; ii) therefore, to do so was a mistake; iii) this mistake caused the death of the patient; v) it didn't help that no one observed the death, and that there was no flumazenil given; but at any rate, the hospital was wrong in several areas. The report then went on to elaborate procedures to fix this problem.

Dramatic Personae:

- a) Plaintiff's lawyer. You want to get that report, because it makes your case. You are interviewing the head of the QA committee, and want to get him to admit the contents of the report.
- b) Defendant's lawyer. You do not want the intern interviewed at all.
- c) Intern: you don't know what to do.
- d) Head of QA: On advice of counsel, you are saying nothing.

Hypothetical # 3: The cold-blooded killer. It has already been proved that your client, Killer, killed Bugsy because Bugsy ratted your client out. Your client says, though, at the sentencing phase (in a death-penalty state) that he "Just

couldn't control himself" and that "everything went black" and that "he doesn't remember killing Bugsy."

There is a witness who saw Bugsy running away from Killer, but the witness did not see the killing. The witness did see that Bugsy looked terrified, and also saw that Killer did not look angry.

Dramatis Personae:

- a) Prosecution lawyer: examines witness, to show that Killer was not passionate or angry immediately prior to the killing.
- b) Witness, who wears glasses.
- c) Defense lawyer, who seeks to keep witness out as irrelevant; or if that doesn't work, to discredit witness.

Hypothetical # 4: The Innocent Driver-doctor. A doctor is driving his car, and it has already been proved that Larry Lunatic, the driver of the other car, was negligent and ran into Innocent; but now we are at the phase of trial where we show how badly Innocent was hurt.

Doctor Innocent, a pathologist, testifies as to the cause and mechanism of his injuries, appearing as an expert in his own case. Innocent is loveable and believable.

Dramatis Personae:

- a) Larry Lunatic testifies that he asked Innocent if he was OK, and Innocent said, "Yeah. I think so" (and then collapsed).
- b) Doctor Innocent wants to testify as his own expert, that the steering wheel hurt his chest and cracked his ribs.
- c) Defense lawyer wants to get Larry's testimony in to show that the doctor was confused at the time just after the accident, so his testimony is of doubtful weight. Defense lawyer also wants to keep Innocent from being his own expert, saying it is not permitted.
- d) Plaintiff's lawyer: wants Larry's testimony out, wants Innocent's testimony in.

Hypothetical # 5: The dying words. A guy, Sheldon, has just been shot, and as it turns out, he dies within minutes, and he knew he was dying. But before he does, a lawyer and a doctor walk up and talk to the guy.

The lawyer says, "I see you have been shot. I can represent your family in a wrongful death suit, because surely, you shall not survive this injury. Would you like me to do so?"

Sheldon says to the lawyer, "Yes, I want you to sue Wicked Willy, because he is the one that did this to me. Also, he has lots of money. By the way, I am dying."

The doctor walks up, and says, "I see you have been shot. I am a doctor, duly licensed in this state. Can I help you? And Sheldon says, "Yes, doc, please help me; I am dying; by the way, is this confidential? Because if it is I gotta tell you something: Stupid Sam shot me, even though I told the lawyer that Wicked Willie did it. Don't tell anyone, OK?" The doctor agrees to keep his confidence.

Dramatis Personae:

- a) Doctor, on advice of counsel, won't reveal Sheldon's dying words to him, as privileged by doctor patient privilege.
- b) Lawyer, even though he is representing Sheldon's estate, wants to testify in the criminal trial that Wicked Willy did it.
- c) Prosecutor wants lawyer's testimony to convict Willy.
- d) Defendant Willy's lawyer wants Doctor's testimony to rebut.

Hypothetical # 6: The Drunk Doctor: Frieda Frightful has surgery. Doctor Careless performs this surgery, intending to remove the gallbladder, but instead, removing the spleen, and leaving several golf-clubs inside Frieda. Careless sews her up, tells her nothing about anything, and buys a new set of clubs.

Frieda does not feel well, even though Careless reassures her that "your iron level is low, that's all ... here, take these pills." Frieda goes to Dr. Wonderful, and she finds the golf clubs on X-ray. Frieda says, "Careless was drunk when he did my surgery. I smelled it on his breath, just before I went to sleep."

Dramatis Personae:

- a) Frieda wants to tell that Careless was drunk at surgery, but is not a good witness, neither loveable, nor believable.
- b) Careless: does not want Frieda to tell he was drunk, and says that Wonderful can't tell either.
- c) Wonderful, on advice of counsel (a golfing buddy of Careless') will not say what Frieda told him, as it is privileged.
- d) Plaintiff's lawyer wants only Wonderful to testify as to Careless intoxication.
- e) Defendant's lawyer wants Frieda to testify, but not Wonderful.

Hypothetical # 7: Smoking Pictures. Dr. Zeb is treating a patient who then stops her medicine and burns herself to death in an apparent suicide. The plaintiff's lawyer (for the estate of the dead person) wants to show the photo of the smoking corpse, taken by the sheriff, to the jury. He wants to use this photo to prove pain and suffering damages. The defense lawyer does not want the photo in, as it is unnecessary and will inflame the passions of the jury.

- a) Plaintiff argues to judge that he needs the photo.

- b) Defendant argues that the photo is too shocking and should be excluded.
- c) Judge does what?
- d) Appellate judge reverses the trial judge. Why?

Hypothetical # 8: Tara-terry-Tarasoff. Tara is a therapist, who has been seeing Terry for two years now; finally, after not talking at all about his childhood abuse, Terry has started to talk about it; but he gets mad while he does, and tells Tara that he intends to kill Tina (his mother) because she abused him sexually. One day he comes to therapy and says, "Tara today is the day. I have a gun (he shows her a big gun) "and I am going straight to Tina's house, right after this session, to kill her."

Tara calls the police, who catch Terry, and bring him to a hospital, where he is locked up, involuntarily under lock and key. He can't get out. He is unable to escape. He is completely locked up.

After drinking wine for several days, Tara awakens from her stupor, and immediately calls her lawyer, which is you, and wonders: should I call Tina and warn her that Terry wants to kill her?

Dramatis Personae:

- a) You, the lawyer who told Tara what to do.
- b) Them, the lawyer disciplinary board, who feel that whatever you did was wrong.

Hypothetical # 9: Best Evidence, no catchy title. Dr. Fluster, an intern, is very busy, because the residents and attendings are still spending all of their time gambling on the riverboat; in his exhaustion and delirium, he gives Mabel strychnine. She dies a most unpleasant death. He meticulously notes all of the attendant details in the chart, both before he gave the medicine, why he gave it, and the details of her death.

The chart then disappears, is "edited" and your meticulous notes "disappear". The new "edited" chart says that Fluster gave her "string beans" not "strychnine" and how could string beans possibly hurt anyone?

Immediately prior to her death, Dr Brilliant was called to consult on the case; requested a full set of records; and received the unedited version, which he still retains. Plaintiff has seen the unedited version.

Dramatis Personae:

- a) Dr. Fluster says the therapy was appropriate; and although in retrospect the patient died, under professional judgment, he cannot

be blamed for making one of several appropriate choices for her therapy.

- b) Plaintiff's lawyer wants the original record, not a copy.
- c) Hospital's lawyer says a copy is fine.
- d) Fluster's lawyer wants BOTH the copy and the original, and to get Fluster on the stand to talk about what he originally wrote in the record.

Hypothetical # 10: The expert lie-detectors. Billy is accused of raping Jenny while she was drunk. Billy denies that he did this or, if he did, that Jenny said it was OK.

Four rabbi's and seven forensic psychiatrists all testify that a) Billy is telling the truth and b) that Jenny is lying.

Dramatis Personae:

- a) One of the ten experts is examined.
- b) Billy's lawyer shows that, since his client is telling the truth, according to the experts, thus he is not guilty.
- c) The prosecutor says the experts are incompetent.
- d) The judge says: ????

IX. Post-Lecture Questions: True or False?

- 1) Declarative (yes – no) questions are used in direct examination.
- 2) Leading questions may be used in cross examination.
- 3) A soft answer not only turneth away wrath, but pleaseth the jury.
- 4) Rule one of being a witness: Tell the truth.
- 5) Rule two of being a witness: Answer the question (and only the question).
- 6) Rule three of being a witness: You are not in charge. The law of evidence is an ancient system for finding the truth
- 7) The law of evidence is all about what you may not introduce into evidence, or exceptions to those prohibitions
- 8) Hospital incident reports, and materials used to prepare for a law suit, may not be used as evidence (usually).
- 9) Where a husband has been accused of a crime, the wife may not be forced to testify against him, but she may if she wants to.
- 10) Experts are the only witnesses that can testify about something they have not actually seen or heard.
- 11) Hearsay is an out of court statement, used to prove the truth of that statement.