RULES OF EVIDENCE

Basic Introduction to the Evidence Book

Goals of this Evidence class (Lofty version)

- What is evidence
- Purpose of a trial
- General principles of evidence
- Learn how to use the Montana Rules of Evidence book

Goals of this Evidence class (Real life version)

- Learn or refresh your knowledge of evidence
- Know evidence law so you will have confidence in your trial skills, run a professional court and be respected as a competent judge.

At the end of this class you will be:

- In the habit of keeping the evidence book on the bench
- Familiar with the evidence book
- Fearless of objections
- Eager to learn more about evidence
- Well known in your community as a judge who:
  - Knows the Rules of Evidence
  - Correctly applies the Rules of Evidence

This class will cover:

- Montana Rules of Evidence (MRE) book
  - Note-MRE does **not** mean Meals Ready To Eat
- Structure of the MRE
- General evidence concepts
- A typical trial pattern and how the MRE book is used
- High points of each Article in the MRE
- Practice what we know by **Questions** and **Trial Exercises**

Trials need evidence

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- A trial is a legal proceeding built out of evidence.
- Everything that can be legitimately considered must be presented in the form of admissible evidence
- Evidence is the way the truth of the existence or nonexistence of facts are proved or disproved
- Remember—"Proof" is not evidence, it is the result of evidence

Types of evidence

Evidence is basically four types:

- Testimonial – oral, is used to establish foundation for other types of evidence
- Documentary – mainly writings, but grown to include microfilm and computer data
- Real – actual physical object
- Demonstrative – presentation designed to clarify one of the preceding types of evidence

Questions

- Interspaced through the lesson are questions designed to help you get familiar with using the MRE book and at the same time learn the Rules of Evidence.
- The question is a statement of a Rule.
- **Your job is to find the Rule which matches the statement.**
- Questions are multiple choice.
- The correct answers are posted at the end of the entire lesson.

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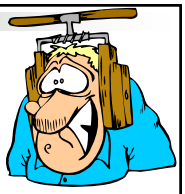
Law of evidence leads to: **The Rules of Evidence**

- Law of evidence—the rules and procedures that govern the way facts are used at a trial
- Montana Rules of Evidence (MRE) contain the evidence rules and procedures for Montana and are modeled after the Federal Rules of Evidence. Most states have similar rules of evidence.

Montana Rules of Evidence--MRE



- They are written in reasonably clear language and have been extensively interpreted by federal and state courts.
- They are structured in a reasonably logical fashion which follows the order in which legal proceedings develop.
- They are considered by many as a reasonably refined form of torture.

Montana Rules of Evidence

- The Montana Rules of Evidence are contained Title 26, Chapter 10 of the MCA
- Chapter 10 is divided into Articles I—X
- Each Article contains one or more Rules of Evidence
- After each Rule of Evidence are the annotations (Complier's Comments, Case Notes Index and Case Notes)

Get to know the Montana Rules of Evidence (MRE) book

- You should have a copy of the Montana Rules of Evidence, with annotations, in a binder that is designed to be used while on the bench. **Keep it on your bench!**
- Use the Rules of Evidence book as a reference on all evidence issues
- When an evidence issue arises, you will:
  - Locate the correct Rule--Read it--Apply it

Let's meet your new best friend- The MRE book

- Open your MRE book to the center index
- The MRE book likes to lay flat on your bench so it is handy for you to use

MRE book on the bench open to center index

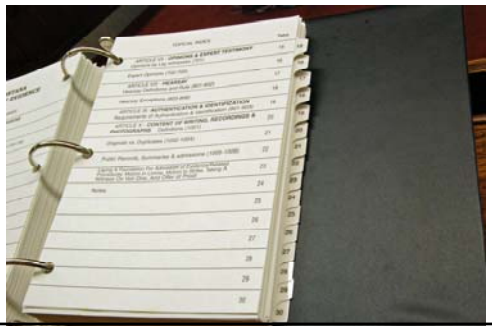
Rules of Evidence book--Index

- Two search tools:
  Table of Contents in front-detailed
  Center index—speedy
- Central index is best way to find a rule
  - Good overview of topics
  - Black print – groups the major subjects
- Special note--Tab 23—Has information on Motion in limine, Motion to strike, Taking a witness on voir dire and Offer of proof

MRE -- Tabs

- The MRE book has tabs that correspond with the subjects in the center index
- The Rule is on the pages which follow the tab
  - Under the tab on the right side of the index
  - On top of the tab on the left side of the index
- You flip to the Rule you want to look at by inserting your finger
  - under the tab on the right side, or
  - over the tab on the left side
- And then flipping the pages over the center index
- Try it-Volia! There is the Rule and annotations

MRE book—tabs to each subject



Structure of the MRE--1

- The MRE are structured so that they begin with rules that apply to pretrial and early trial issues
  - **Article I, II & III**: General provisions, judicial notice and presumptions
- The most fundamental evidence rule is that evidence must be relevant
  - **Article IV**: Relevancy
- Witnesses that know some of the facts of the case are called to testify
  - **Article V &VI**: Privileges and witnesses

Structure of the MRE--2

- Some witnesses may be allowed to give an opinion
  - **Article VII**: Opinions & experts
- But, there are limitations on what a witness can tell about what other persons have said
  - **Article VIII**: Hearsay
- In all situations the evidence must be what it is claimed to be
  - **Article IX**: Authentication and identification
- Certain objects act as substitutes for the courtroom testimony
  - **Article X**: Content of writings, recordings and photographs

What we know so far:

- The Montana Rules of Evidence (MRE) govern how evidence is presented in court
- The MRE are contained in the MRE book
- The MRE book should be on the judge's bench at all times
- The MRE book is used by the judge to help answers about evidence
  - Let's look in the MRE book to see exactly what is available and learn how to use the MRE book

Each Rule of Evidence Has:
The Big Three

- 1. The Rule—This is the law
- 2. Commission Comment—The Comments by the Montana Supreme Court Commission on Evidence are helpful to determine the intent and scope of a Rule
- 3. Case Notes—Montana Supreme Court cases interpreting the particular Rule are controlling precedent

The Big Three—An Exercise

Let's work through a problem to learn **The Big Three**

First, some background:

1.--A witness can testify only about what the person have seen or heard. This witness is known as a "lay witness.

2.--But, an "expert witness" is allowed to give an opinion because the witness has special skill on the subject.

3.--But, there are times when a "lay" witness is allowed to give an opinion which is related to what was actually seen or heard by the "lay" witness. A MRE covers the situations involving a "lay" witness.

Use the MRE book to answer these questions--

What is the authority for a lay witness to give an opinion about:

	Rule	Comm. Comment	Case Note
The nature of alcohol?	____	_____	____
Speed of an automobile?	____	_____	____
Landowner's value of property?	____	_____	____

Finding the answer:

- Check the central index for a heading entitled something like--Opinions by Lay witnesses
- Article VII—Tab 15
- Read the general discussion
- Read the Rule, Comments & Notes
- Answer is:
  - Alcohol: Rule 701-Comment-State v. Trueman
  - Speed: Rule 701-Comment-Herzig v. Sandberg
  - Value: Rule 701-Note-Zugg v. Ramage

Question #1

- *A witness who is not an expert is allowed to give an opinion about everyday things (such as speed of an automobile, intoxication, distance, etc.) if helpful to the determination of a fact in issue and rationally based on the perception of the witness.*

- *Rule 702*
- *Rule 703*
- *Rule 701*

We know the Big Three in the MRE book--lets get started on a court proceeding and tie the parts of the trial to the MRE

- First, do the MRE even apply to the case we are about to hear?
- Open your MRE to center index
- Top of left page—Application of rules
- Flip to tab 1—Read Rule 101-Scope

When do the MRE apply –Rule 101

- All proceedings unless a specific exception
- Exceptions –
  - When the judge decides questions of fact preliminary to admissibility of evidence
  - Preliminary exams
  - Bail
  - Sentencing
  - Revoking probation
  - Issuance of warrants for arrest and search warrants

Trial Exercise

- At the time of his sentencing Defendant objects to the judge considering evidence that he claims was improperly before the court.
- What Rule applies and is there case authority?
- Rule No. 101 and St. v. Smith, 232 M 156
- Note -- Even though the MRE do not apply to sentencing hearings, the sentence must not be based on materially false information. State v. Mason, 2003 MT 371
- Note – Revocation hearings: must be fundamentally fair and the minimum requirements of due process apply. State v. Pedersen, 2003 MT 315

Lets start on a trial—

Wait-Don't we need to be clear about who makes the decisions about evidence and how the trial is conducted?

Types of evidence

Evidence is basically four types:

- Testimonial – oral, is used to establish foundation for other types of evidence
- Documentary – mainly writings, but grown to include microfilm and computer data
- Real – actual physical object
- Demonstrative – presentation designed to clarify one of the preceding types of evidence

Who controls how evidence is presented, i.e. *the mode of interrogation*

- Rule 611 -- The trial judge has the authority to control the order and mode of interrogating witnesses and presenting evidence so as to make the presentation effective for the ascertainment of the truth, avoid needless consumption of time, and protect witnesses from harassment or undue embarrassment.

Question #2

- ***The trial judge has the authority to control the order and mode of interrogating witnesses and presenting evidence so as to make the presentation effective for the ascertainment of the truth, avoid needless consumption of time, and protect witnesses from harassment or undue embarrassment.***
  - ***(A) Rule 100***
  - ***(B) Rule 611***
  - ***(C) Rule 601***

The MRE comes to your rescue

- You are the judge and you know the MRE apply to the proceeding you are about to start.
- Your MRE book is on the bench.
- The MRE book is open to the center index.
- You are ready
- Bring it on!!!!

- What's this? A motion?
- Already? I just got here!!!
  - **Motion to Exclude Witnesses**
  - No problem, you have the MRE to help you

Motion to exclude witnesses-1

- Rule 615 -- When a party moves to exclude witnesses, all persons who are expected to be witnesses are excluded except for a party who is a natural person, an officer or employee of a party that is not a natural person designated as its representative, or a person shown to be essential to the presentation of the party's case.

Motion to exclude witnesses-2

- Can't circumvent the rule by a party or other persons telling witnesses, out in the hall, what has been said by prior witnesses.
- If the motion to exclude is made after many witnesses have testified, can deny the motion.
- If party is aware that witness is still in court, witness cannot testify.
- If party is not aware that witness is still in court, cite witness for contempt and allow witness to testify.
- Judge needs to watch contact between people in court and the party for signs that party knew witness was in court

Question #3

- ***When a party moves to exclude witnesses, all persons who are expected to be witnesses are excluded except for a party who is a natural person, an officer or employee of a party that is not a natural person designated as its representative, or a person shown to be essential to the presentation of the party's case.***

- ***Rule 615***
- ***Rule 401***
- ***Rule 103***

What, another motion?

- Request for the court to take **judicial notice** of the fact that there is an Air Force base near Great Falls, Montana.

- What's this **judicial notice** about?

- Voila` – The MRE to the rescue!!

Judicial Notice

- Rule 201-Fact Rule 202-Law
- Judicial notice is an alternative to the presentation of formal evidence. The judge takes judicial notice of a fact, or law, and informs the jury of its existence.
- Judge can do it without request. Must give party a chance to protest. Can do it anytime. Criminal-jury may accept as conclusive. Civil-jury must accept as conclusive.

Judicial Notice-Kinds of facts

- Fact is a matter of common knowledge within the court's territorial jurisdiction-what a well informed person within the district would know (Great Falls is north of Yellowstone Park) -not what the judge knows from personal experience, or
- Fact is readily verifiable by unimpeachable sources--includes things like maps and calendars-- not a good idea to rely on Wikipedia, the encyclopedia where anyone can add data

Judicial Notice-Kinds of law

- Statutes, court decisions, regulations of government agencies, court records, court rules, etc.
- Judge can do it without request. Must give party a chance to protest. Can do it anytime.

Trial Exercise

- At the defendant's criminal trial, the prosecution asks the court to:
  - (1)take judicial notice of the fact that Montana State University is located in Bozeman, and
  - (2) instruct the jury that they must conclusively find this fact to be true.
- Defendant objects
- Decision?
- Ruling-The judge can take judicial notice the MSU is in Bozeman but **cannot** tell the jury that they **must** conclusively find this fact to be true since is a criminal trial. Jury **may** find it to be true.

Question #4

- *The court can take judicial notice of a fact not subject to reasonable dispute because it is either known to the court or capable of accurate and ready determination.*

- *Rule 201*
- *Rule 202*
- *Rule 301*

Evidence Must Meet Certain Requirements, i.e. Be Admitted

- In order to be used to prove something, evidence must be:
  - Relevant-pertain to an event, place or people
  - Based on a proper foundation-competent and authentic
  - In proper form -question correctly phrased
  - No exceptions apply-privileges, public policy or hearsay

Types of evidence

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Evidence need a **Foundation**

- Before evidence can be considered, it must be based on a foundation
- Evidence — Foundation
  - Testimonial……....Knowledge
  - Documentary……..Authenticity
  - Real……..Identity
  - Demonstrative……Clarification

The most important Rule: **Relevance**

- Rule 401—Take a look at it
- Evidence is relevant if it has "any tendency to make the existence of a (material fact)…more probable or less probable than it would be without the evidence."
- Generally, but with some BIG exceptions, relevant evidence is admissible in legal proceedings.
- Relevant evidence may include evidence bearing on credibility of a witness.

What happened to "materiality"?

- Remember those old trial objections of—
  - "I object--incompetent, irrelevant and immaterial."
  - Sorry, materiality is ancient history. The MRE make no mention of materiality because it is merged into relevancy. (See comment to Rule 401)

Relevance--Logical

- Relevance is divided into **two parts**:
  - 1. **Logical** relevance—Whether the item of evidence has any tendency whatsoever in reason to affect the balance of probabilities of the existence of a fact of consequence. Rule 401
    - Absolute requirement for admissibility but does not guarantee admissibility.

Question #5

- ***Relevant evidence is evidence having any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence.***
- ***Rule 401***
- ***Rule 402***
- ***Rule 403***

Relevance--Legal

- 2. **Legal** relevance—Probative value must outweigh any attendant probative dangers. Rule 403
  - A. Jury decide case on improper basis
  - B. Confuse or mislead the jury
  - C. Unduly time-consuming (delay, waste of time or cumulative)

Relevance—Logical
Role of the judge-1

- The determination of **Logical** relevance is a two-step process by the judge.
- **Step 1**-Identify all the consequential facts in the case.
  - Start by reviewing:
    - Substantive law
    - Pleadings
    - Evidence already admitted

Relevance—Logical
Role of the judge-2

- Then identify the facts of consequence. These can include:
  - Elements of all claims
  - Defenses to the claims
  - Witness credibility issues
  - Facts improperly injected, if any, and if proposed evidence is a response (opened the door)

Relevance—Logical
Role of the judge-3

- **Step 2**-Decide whether the proposed evidence bears a logical relation to any fact of consequence in the case.
- McCormick (evidence guru) suggests:
  - "Does the evidence offered render the desired inference more probable than it would be without the evidence?"
  - Let's be clear about using an inference

Direct or Circumstantial

- Direct Evidence – proves a particular fact without an inference or presumption. (Saw the dog chewing the shoe)
- Circumstantial Evidence – tends to establish a particular fact by proving another fact which, if true, affords an inference or presumption that the particular fact is true. (Saw the dog with a shoelace in his mouth, the shoe between his paws and tooth marks on the shoe-----Note: my dog says that it doesn't prove a doggone thing but my other dog disagrees-i.e. home is just like court)

Relevance—Legal Role of the judge-1

- The determination of **Legal** relevance is a three-step process by the judge.
- **Step 1**–Assess the evidence's probative value.
  - Remote in time?
  - If bears on a related issue, how remote?
  - Cumulative?
  - Other evidence available to prove same point?

Relevance—Legal Role of the judge-2

- **Step 2**—Identify probative dangers
  - Importance of the fact of consequence for which the evidence is offered.
  - Length of chain of inferences necessary to establish the fact of consequence.
  - Availability of alternative means of proof.
  - Is the fact of consequence being disputed.
  - Effectiveness of a limiting instruction.

Relevance—Legal
Role of the judge-3

- **Step 3**—Balance probative **value** against probative **dangers**.
- The judge's balancing process is very discretionary and subjective.
- Many cases annotated under Rule 403.
- Hint—Rule 403 is worded in favor of admissibility because must exclude evidence only when probative value is "substantially outweighed" by probative dangers.

Relevance--Mandatory Exclusion of Evidence

- Rule 407-11
- Must exclude evidence of:
  - Subsequent remedial measures
  - Liability insurance
  - Settlement offers and discussions
  - Offers to pay hospital or medical expense
  - Offers to plead guilty
  - But note-there are exceptions

Relevance—Making a decision
Helpful tools for the judge

- Have party make an offer of proof of what are going to show outside presence of jury.
- Vary order of proof-require that setup evidence be shown first.
- Delay ruling until hear more-judge only trial.
- Admit evidence subject to connection.
- Have party clearly state the inference the jury has to make.
- Ask how the evidence will be used in final argument-my favorite. This will often reveal that the evidence is going to be used for an unstated and wrong purpose.

Wait, lets stop for a moment and see how Relevance leads to: Authentication

- Relevance—the evidence is relevant to a fact in issue, BUT is it **Authentic**, i.e. genuine?
- Judge decides if proponent has presented sufficient evidence to support a permissive inference that the evidence is genuine
- Opponent presents contrary evidence and jury decides if the evidence is authentic

Authentication

- Rule 901
- Covers physical objects
- This rule annotates "chain of custody" cases when the item is not readily identifiable
- Cases give some general illustrations:
  - Distinctive characteristics-something unique
  - Nonexpert on handwriting-familiar
  - Voice identification-familiar

Question #6

- ***The identity of "real evidence," that is tangible objects, is established by either a "chain of custody" or if the object is "readily identifiable." Even if a "chain of custody" is not established, if the witness is able to testify that he previously observed the characteristic of the evidence and presently recalls the characteristic, the court can conclude that sufficient identification has been established. Only when the item of evidence is so commonplace as to be undistinguishable or not unique is it necessary to lay a chain of custody foundation.***
- ***Rule 404 (case annotated)***
- ***Rule 701 (case annotated)***
- ***Rule 901 (case annotated)***

More authentication-- "Best Evidence Rule"-authenticate the content of writing, recording or photo

- Rule 1001-definitions of writing, photograph, original, duplicate and copies of entries
- Rule 1002-To prove the content, the original is required unless otherwise provided by statute
- Rule 1003-**But** a duplicate is OK unless serious question as to the authenticity of original or it would be unfair to admit the duplicate
- Rule 1004-Original not required if:
  - Original lost, not obtainable, opponent has it or is not closely related to a controlling issue

Question #7

- *What is commonly known as the "best evidence rule" requires that to prove the content of a writing, recording, or photograph, the original is required except as otherwise provided by statute.*
- *Rule 1001*
- *Rule 1002*
- *Rule 1005*

Question #8

- ***Evidence must be relevant and authentic. To establish that a videotape is authentic, the person that took the videotape does not need to be present in court as long as the videotape shows a true representation of the scene at the time in question or any difference is explained. The witness does not need to be the maker of the videotape to introduce it.***
- ***Rule 201 (case annotated)***
- ***Article X (case annotated)***
- ***Rule 1001 (case annotated)***

Enough of the general stuff—

Let's call a witness to the stand and rule on some objections

- After all, that's what we do best since we have the MRE close at hand

Competency of Witness to Testify

- **Rule 601**
- Every person is competent to be a witness except as otherwise provided in the MRE
- A person is <u>disqualified</u> to be a witness if the court finds that:

  (1) the witness is incapable of expression concerning the matter so as to be understood by the judge and jury either directly or through interpretation by one who can understand the witness, or

  (2) the witness is incapable of understanding the duty to tell the truth.

Oath or affirmation.

- **Rule 603**
- 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 testify truthfully.

Question #9

- ***A witness that is a child cannot testify if the child is incapable of understanding the duty of a witness to tell the truth.***

- ***Rule 601***
- ***Rule 611***
- ***Rule 411***

Direct examination

- The judge controls the method of examination of witnesses under Rule 611: ascertainment of truth, needless consumption of time & protect witnesses
- Two methods:
  - Free narrative-danger is that will include hearsay or incompetent evidence
  - Specific questions
- What happens when a witness forgets what happened and needs memory refreshed?

Refreshing memory

- Rule 612
- Witness has forgotten
- Memory will be refreshed by looking at a writing
- Witness then testifies independent of the writing
- Witness memory is the evidence, not the writing
- Is OK to take the writing away from the witness after has looked at it and had memory refreshed
- Adverse party can introduce parts of the writing into evidence which relate to the testimony

Get ready---because now!!
Here come the Objections

- The witness has taken the oath
- The first questions are asked
- The other party objects
- You examine the MRE book
- You find the Rule
- You say:
  - Objection **overruled**, or
  - Objection **sustained,** or
  - **Please rephrase your question**
    (You need time to find the Rule)

Types of Objections

- Objections can be made to the:
  1) Form of the question to a witness
  2) Substance of the question
  3) Substance of the answer sought
  4) Incompetence of the witness to answer a specific question
  5) Failure to lay proper foundation for introduction of evidence
  6) Impropriety of a proposed exhibit

Objections-A brief overview-1

- An objection is an in-court statement of opposition to the introduction of evidence or asking of a question
- Making objections:
  - Not automatic: Evidence is generally not excluded unless an objection is made.
  - An objection must be made to preserve the right to appeal the admission of the objected material into evidence

Objections-A brief overview-2

- Timeliness required: Objections must be made in a timely fashion.
  - Questions: An objection to a question is timely if made before the witness answers the question.
  - Other evidence: An objection to the admission of any other evidence is timely if the objection is made at the time the evidence is submitted for admission.
  - If objectionable material arrives unexpectedly, as when the witness blurts it out, a late objection is OK and the jury should be admonished to disregard the evidence.

Objections-A brief overview-3

- Rule 103
- Specificity required: An objection should state the grounds upon which it is based, unless it is apparent from the context, or it will be considered a general objection. It is not error for the court to overrule an objection that is too broad. (See Rule 103 annotations)
- "An objection, to be good, must point out the specific ground of the objection" State v. Birthmark, 253 Mont. 526, (1992)

Objections-A brief overview-4

- **Responding to objections**:
- If an objection is sustained, the proponent must make an offer of proof to preserve the right to appeal
  - An offer of proof consists of a statement as to why the question or evidence is valid
  - Offer of proof can be in question and answer form
  - Offer of proof done outside the presence of the jury—usually at a recess of the trial

Objectionable Questions:

- Calls for a narrative –
  - "Tell me what you know about this case."
- Compound questions –
  - "Did you see the shooter, and if you did, what did he look like?"
- Harassing the witness –
  - "Why didn't you see the shooter? Answer me, are you blind?"
- Hearsay –
  - "What did she say to you?"

More Objectionable Questions:

- Irrelevant –
  - "What did you eat for lunch today?"
- Argumentative –
  - "Have you stopped beating your husband?"
- Asked and answered -
  - Q: 'Did you see the shooter?'
  - A: 'No.'
  - Q: 'Are you sure?'
- Assumes facts not in evidence -
  - (First question to first witness) "In which hand did the shooter hold the gun?"

Still More Objectionable Questions:

- Calls for speculation –
  - "How angry was the shooter?"
- Repetitive
  - "Tell us again what you saw."
- Ambiguous or compound
  - "Do you know him or see the car?"
- Leading –
  - "Isn't it true that you saw the shooter?"

Objection to form of the question: Leading

- Rule 611
- A leading question is one which suggests to the witness the answer desired by the examiner Answer desired is usually "yes" or "no".
- Not allowed on the direct examination of a witness except to develop testimony. OK on cross-examination or when call a hostile witness, an adverse party, or a witness identified with an adverse party
- Other exceptions: child witness, adult with communication problems and undisputed preliminary matters

Cross-examination

- Rule 611
- Cross-examination is limited to the subject matter of the direct examination and matters affecting credibility of the witness (impeachment)
- Upon request, the court may allow examination into additional matters as if on direct examination, i.e. no leading questions unless is a hostile witness
- Evidence developed on cross-examination may be considered as proof of any fact in issue

Witness—Impeachment--1

- Rule 607
- OK to impeach your own witness if show surprise and prejudice or witness is hostile
- Usual methods to show witness is not credible:
  - bias
  - interest in outcome
  - motive to testify falsely
  - lack of capacity to perceive-recollect-communicate
  - prior inconsistent statement

Question #10

- ***Impeachment of a witness may be shown by evidence of bias, interest in the outcome of the case, motive to testify falsely, or lack of capacity of the witness to perceive, to recollect, or to communicate any matter about which the witness testifies.***
- ***Rule 611 (Commission Comments)***
- ***Rule 607 (Commission Comments)***
- ***Rule 613 (Commission Comments)***

Witness—Impeachment--2

- Rule 613
- Prior statement of witnesses
- Don't need to show the statement to the witness but on request must be shown to opposing counsel
- Extrinsic evidence of prior inconsistent statement: can't introduce extrinsic (outside) evidence until witness is allowed to explain and opposite party allowed to examine. This limitation not apply to party-opponent

Witness—Impeachment--3

- Rule 608
- Character and conduct of witness
- Only in the form of <u>opinion</u> or <u>reputation</u>
- Only refer to truthfulness or untruthfulness
- Can show <u>truthfulness only if attacked</u>
- Specific instances of conduct relating to credibility can't be shown by extrinsic evidence-(exception: can inquire on cross-examination if relate to truthfulness)

Question #11

- ***Since the credibility of a witness may be attacked by showing that the witness has a bad character for truthfulness, the judge should allow evidence of truthful character of the witness only after the character of the witness for untruthfulness has been attacked.***
- ***Rule 608***
- ***Rule 609***
- ***Rule 610***

Witness—Impeachment--4

- Rule 609--can't show conviction of crime
- Rule 610—can't show religious belief to impair or enhance credibility

Witness—Impeachment--5

- Reminder—No preemptive bolstering of witness' credibility until credibility has been attacked
- Another reminder--Since impeaching evidence is offered to show witness is not credible and not for the truth of the evidence as it bears on an issue in the case, impeaching evidence does not violate the hearsay rule
- P.S.-except prior statements which can be used as substantive evidence of what is said in the statement (don't you just love the exceptions to the exceptions-we'll get to this later)

Hearsay

- There is a hearsay rule because:
  - the declarant making the out-of-court statement is not under oath,
  - the jurors can't observe the demeanor of the declarant and
  - can't cross-examine the declarant

Hearsay

- Rule 801
- 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**
- Declarant—the person who makes the statement
- Statement—
  - (1) oral or written assertion or
  - (2) nonverbal conduct of the person intended to be an assertion (pointing or nodding the head)

Question #12

- ***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.***
- ***Rule 803***
- ***Rule 802***
- ***Rule 801***

Question #13

- ***A hearsay statement can be either (1) an oral or written assertion, or (2) nonverbal conduct of a person, if it is intended by the person to be an assertion.***
- ***Rule 801***
- ***Rule 803***
- ***Rule 802***

Statements "Not Hearsay"--1

A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

- (A) inconsistent with the declarant's testimony, or
- (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of subsequent fabrication, improper influence or motive, or
- (C) one of identification of a person made after perceiving the person;

Statements "Not Hearsay"--2

- When a witness is questioned about a prior statement the witness made, the reasons for not allowing hearsay (not under oath, can't observe demeanor and no cross-examination) are not present.
- Therefore, prior statements are admitted as substantive evidence and can be used to prove facts in the case.
- Applies to both inconsistent and consistent statements. (See annotations to Rule 801)

Question #14

- ***When a witness is cross-examined about a prior statement, the prior statement may be used to impeach the witness and as substantive evidence to prove what is said in the prior statement.***

- ***Rule 802 (Commission Comments)***
- ***Rule 801 (Commission Comments)***
- ***Rule 803 (Commission Comments)***

Statements "Not Hearsay"--3

- (2) Admission by party-opponent. The statement is offered against a party and is:
  - (A) the party's own statement, in either an individual or a representative capacity, or
  - (B) a statement of which the party has manifested an adoption or belief 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 or servant concerning a matter within the scope of the agency or employment, made during the existence of that relationship, or
  - (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Question #15

- ***If a party makes a prior out-of-court statement that the opposing party wants to use against the party that made the statement, the objection is often made (by the party who made the statement) that the prior out-of-court statement is hearsay. The response is that the prior out-of-court statement is an "admission by a party-opponent" and therefore is an exception to the hearsay rule. What rule best solves this problem?***

- ***Rule 801(d)(2)—an admission by a party-opponent is not hearsay.***
- ***Rule 803(24)—an admission by a party-opponent is reliable enough to be covered by the 'other exceptions' exception.***
- ***Rule 804(b)(3)—an admission by the party-opponent is a statement against interest.***

Hearsay within Hearsay

- **Rule 805**
- **Double hearsay**: When an out-of-court statement offered as evidence contains another out-of-court statement, both layers of hearsay must be found separately admissible
  - **Example**: If a witness wants to testify that: "Cheney told me that George W. said…" then both Cheney's and George W.'s statements are hearsay. A separate ground for admissibility must be found for each statement before the witness can testify.

Hearsay Exceptions-1

- Over the years the courts have found that the probative value of hearsay often outweighs the danger that it will mislead the jury.
- Hence, there are so many exceptions to the hearsay rule that the exceptions are as important as the hearsay rule itself.
- The exceptions are based on:
  - A need to receive the evidence
  - Some degree of reliability that substitutes for cross-examination

Hearsay Exceptions-2

- There are two basic divisions of exceptions to the hearsay:
  - Exceptions which **do not** require the declarant to be unavailable for the evidence to be admitted for its truth
  - Exceptions which **do** require the declarant to be unavailable at trial for the evidence to be admitted for its truth

EXCEPTIONS: AVAILABILITY OF DECLARANT IMMATERIAL-1

- **Rule 803**
- **1. Present sense impression**: A spontaneous statement made by a declarant that describes an event at the time it is happening, or immediately thereafter,
- **2. Excited utterance**: An out-of-court statement made by a declarant while under the stress of an exciting or startling event relating to that event is admissible,
  - **Note**: The amount of time between the event and the statement is a key factor in determining whether the declarant was still under the stress of the event.

EXCEPTIONS: AVAILABILITY OF DECLARANT IMMATERIAL-2

- **3. Present state of mind, intent:** A declaration of a present state of mind, or intent to do something in the not-so-distant future.
- **4. Declaration of physical condition:**
  - **Present bodily condition**-spontaneous statement regarding bodily condition
  - **Past bodily condition-**Statements of past pain, suffering, or medical history including the external cause if made for the purpose of medical diagnosis treatment.

EXCEPTIONS: AVAILABILITY OF DECLARANT IMMATERIAL-3

- **5. Recorded recollection**: A writing by the witness, made prior to testifying, is admissible to prove the contents of the writing if the witness cannot remember the facts contained therein, and the writing was made while the facts were still fresh in the witness' memory. Can read the writing into evidence but not introduce as an exhibit unless offered by an adverse party.
  - Note-be sure to distinguish the recorded recollection, which allows reading the writing aloud in court to the jury, from the writing used to refresh the witness' memory (Rule 612) which cannot be read to the jury.

EXCEPTIONS: AVAILABILITY OF DECLARANT IMMATERIAL-4

- **6. Records of regularly conducted activity**:
  - Acts, events, conditions, opinions or diagnosis
  - Made in the regular course of activity (activity includes about anything & burden is on opponent to show lack of knowledge of maker;
  - Made contemporaneous to the event to which the record refers.
    - Absence of records is admissible: The absence of a record where one would normally exist is admissible to prove the nonoccurrence of an event or nonexistence of a fact.

EXCEPTIONS: AVAILABILITY OF DECLARANT IMMATERIAL-5

- Crime lab reports
  - Can be admitted if:
    - State has provided notice to court and defendant in enough time so defendant can:
      - Take the deposition of the report maker, or
      - Subpoena the report maker to the trial.

EXCEPTIONS: AVAILABILITY OF DECLARANT IMMATERIAL-6

- **7. Public records:**
  - Public records complied in the regular course of duties required by law or factual findings resulting from an investigation authorized by law.
  - <u>But **not** included are:</u>
  - Reports from law enforcement
  - Factual findings from investigation of complaint or incident

EXCEPTIONS: AVAILABILITY OF DECLARANT IMMATERIAL-7

- **8. Misc. records:**
  - Religious organizations,
  - Birth, baptismal and similar certificates,
  - Family records-bibles, ring inscriptions, etc.,
  - Documents affecting an interest in property if is a record in a public office,
  - Ancient documents-over 20 years old
  - Learned treatises-expert did or could use it, is reliable and only read to jury

EXCEPTIONS: AVAILABILITY OF DECLARANT IMMATERIAL-8

- **9. Residual exception**: A statement not covered by any of the forgoing exceptions but having comparable circumstantial guarantees of trustworthiness.

Exceptions: Declarant's Unavailability Required-1

- Rule 804
- The exceptions require the declarant to be unavailable at trial.
- **Unavailability** is defined as a declarant who, through no malfeasance of the proponent of the evidence, cannot testify because of:
  - **Privilege:** The declarant is exempted from testifying on the grounds of privilege on the subject matter of the statement.
  - **Refusal:** The declarant refuses to testify despite a court order.

Exceptions: Declarant's Unavailability Required-2

- **Memory loss:** The declarant is unable to recall information that he or she once knew.
- **Death/illness:** The declarant is deceased or too ill (physically or mentally) to testify.
- **Other reasonable absence**: The declarant is absent for other reasonable grounds.

Exceptions: Declarant's Unavailability Required-3

- **The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.**
- **1. Former sworn testimony**: When a now-unavailable declarant testified in a former trial, the testimony is admissible:
  - Civil action-was full chance to examine by person with same interest and motive as current action.
  - Criminal action-current defendant had full opportunity and motive to examine.

Exceptions: Declarant's Unavailability Required-4

- **2. Dying declaration**: Statements made while a declarant was under a settled expectation of impending death (whether or not he or she actually died) about the cause or circumstances that gave rise to the expectation.
- **3. Statements against interest:** A declaration that was against that person's pecuniary, penal, or proprietary interests at the time of the statement.
- 4. **Statements of personal or family history**: Statements of own or family member's history—birth, adoption, marriage, divorce, etc. even though the declarant had no means of acquiring the personal knowledge of the matter stated.

Exceptions: Declarant's Unavailability Required-5

- **5. Other exceptions:** A statement having comparable circumstantial guarantees of trustworthiness.

Expert witness

- Rule 702 and 703
- A witness qualified as an expert can give an opinion
- Expert can rely on inadmissible evidence
- Judge determines if expert should give opinion-complex area of law

Tab 23—Helpful trial aids

- Laying a foundation
- Motion in limine
- Objections
- Motion to strike
- Taking a witness on voir dire
- Offer of proof

Beginning of The End

- Lawyers starting to practice law soon discover that the two most important subjects are procedure and evidence.
- An attorney is a craftsman; and the rules of procedure and evidence are tools of the craft, the devices the attorney uses to achieve the results for the client.
- Even the attorneys who never go to court must know the rules of evidence so that there can be an accurate prediction of the legal consequences of historical events and as will as the advice given by the attorney.

The End

- The judge's most important tool of the craft is the Rules of Evidence.
- Judge Weinstein, former professor at Columbia Law School and author of Basic Problems of State and Federal Evidence, advised lawyers that "..it will be essential for you to have the Rules physically before you at a trial…**Having the Rules of Evidence before you would appear to be a minimum indication of trial competency.**"
- ***Be a competent judge.*** ***Keep the Montana Rules of Evidence close at hand.***

Answers—Page 1 of 2

- #1—Rule 701
- #2—Rule 611
- #3—Rule 615
- #4—Rule 201
- #5—Rule 401
- #6—Rule 901 (case annotated)
- #7—1002
- #8—Article X (case annotated)

Answers—Page 2 of 2

- # 9—Rule 601
- #10—Rule 607 (commission Comment)
- #11—Rule 608
- #12—Rule 801
- #13—Rule 801
- #14—Rule 801
- #15—Rule 801(d)(2)