

EVIDENCE
21 & 22 January 1998

3 Major Topics of Evidence Law for the Bar Exam

- 1. Relevance**
 - 2. Witnesses Testimony**
 - 3. Hearsay**
- For MBE, presume that the FEDERAL RULES of EVIDENCE govern
 - For MA, if the case is in Federal Court, then the Federal Rules apply, if the case is in the Supreme Judicial Court, the Massachusetts Rules of Evidence Apply. However, most MA rules are identical to the Federal Rules

I: RELEVANCE

- The Starting point for any Analysis of Evidence
- A. LOGICAL v DISCRETIONARY RELEVANCE**
- 1. Logical Relevance**
 - Easier Standard of Admissibility
 - Evidence is RELEVANT if it has **any tendency** to make a **material fact** more likely or less likely than it would be without the Evidence (FRE 401)
 - WARNING: Evidence may not be logically relevant if it is in regards to ANOTHER time, Another event, or Another person
 - However, most evidence is Logically Relevant
 - 2. Discretionary Relevance**
 - A Stricter Standard: Even if evidence is Logically relevant, that Evidence's PROBATIVE VALUE may be OUTWEIGHED by (FRE 403)
 1. *Unfair Prejudice*
 2. *Confusion of Issues*
 3. *Misleading the Jury*
 4. *Undue Delay*
 5. *Waste of Time*
 6. *Cumulative Evidence*
 - MBE: What is NOT included in FRE 403 is UNFAIR SURPRISE
 - **Unfair surprise is not a basis for the exclusion of relevant evidence** (thus, it is likely to be the proper answer only if the question asks "What is the LEAST likely basis for excluding relevant evidence?")
 - 3. Recurring Fact Patterns Giving Rise to Rules of Relevance**

A: Logical Relevance:

- The only time one is worried about Logical Relevance is if the Evidence is in REGARD to ANOTHER TIME, EVENT or PERSON
- However, sometimes, even if the evidence is in regard to another time, event, or person, it will still be ADMISSABLE as LOGICALLY RELEVANT
- There are 8 Special Situations
 - a.) **To Prove Complicated Issues of CAUSATION**
 - *For Example:* A person Eats at McDonald's and gets sick. He thinks that the meat caused it and sues McDonald's. He MAY INTRODUCE evidence of OTHER people getting sick as proof of CAUSATION

b.) Prior ACCIDENTS or CLAIMS

1. The Situation Where the DEFENDANT wants to Show PRIOR ACCIDENTS or CLAIMS of the PLAINTIFF are GENERALLY NOT ADMISSABLE to infer Conduct on the occasion giving rise to this particular claim
 - Exceptions:
 - a.) If the DEFENDANT can show the PRIOR CLAIMS of the PLAINTIFF were FRAUDULENT, then the DEFENDANT may introduce the FRAUDULENT PRIOR CLAIMS to SHOW A COMMON PLAN or SCHEME
 - b.) The PRIOR CLAIMS may be ADMISSABLE as RELEVANT to show the IMPACT on DAMAGES to the PLAINTIFF
2. The Situation where the PLAINTIFF wants to show Accidents of the SAME INSTRUMENTALITY (like Defendant City's Bridge) are GENERALLY NOT ADMISSABLE
 - Exception:
 - a.) PRIOR ACCIDENTS involving the SAME INSTRUMENTALITY may be ADMISSABLE as RELEVANT to show that the DEFENDANT was on NOTICE of the DANGEROUS CONDITION

c.) Where INTENT or STATE of Mind of Party is at Issue

- One way to PROVE INTENT is Through CONDUCT which may involve OTHER times, events, or People
- For Example, one way to show DISCRIMINATORY intent is to introduce as Relevant, prior acts regarding other times, events, or people

d.) To REBUT the Claim or Defense of IMPOSSIBILITY

- Although NOT relevant in the Case-in-Chief, may be Admissible as Relevant when the OPPONENT opens the Door (Such as when Defendant opens the door by introducing the defense of Impossibility)
- *For Example;* A person gets a can of Coke, but the Coke from the Machine has a mouse in it. The person sues Coke. During the Case in Chief, evidence of OTHER people who got Cokes with mice in them is Inadmissible as IRRELEVANT. However, when Coke raises the Defense of Impossibility, this Opens the Door for the introduction of Rebuttal Evidence of OTHER times, events or people who got cans of Coke with Mice in them

e.) COMPARABLE SALES to Establish VALUE

- At ISSUE is the Value of Chattel or a Parcel of Real Property
- Here, one may INTRODUCE evidence (i.e., it will be admissible as relevant) of Sales of OTHER, but similar, sales of Chattel or Real Property to Show the VALUE of the Chattel or Real Property at Issue

f.) **HABIT Evidence**

- Habit of a Person is ADMISSIBLE to INFER that at the TIME of the EVENT in Question, the Person ACTED in CONFORMITY with HIS HABIT. However, be WARY of types of Habit.
 1. ***Disposition***
 - The Disposition of Persons is NOT ADMISSABLE to Show that at the TIME of the EVENT, the person acted in a way to which he was PREDISPOSED
 - Disposition includes, “He was Neat”, “He was Messy”
 2. ***Prior Acts***
 - Evidence that a Person Acted in a Certain Way before is NOT ADMISSIBLE to prove Conduct at the time in question
 3. ***Habit***
 - Habit is Admissible; see above
- Difference Between HABIT & DISPOSITION?
 - **Habit** is a Function of 2 Things:
 1. *Specificity (Detailed)*
 2. *Recurrence*
 - MBE will use the magic words: ‘always’, ‘invariably’, ‘automatically’, ‘instinctively’
 - MA: DOES NOT ADMIT Habit Evidence

g.) **INDUSTRIAL or BUSINESS ROUTINE**

- Commercial Version of the HABIT analysis
- Business Routine is Admissible to INFER that on the Occasion in Question, the business acted in Conformity with their Business Routine
- MA: Business Routine is Admissible (whereas Habit is not admissible)

h.) **INDUSTRIAL CUSTOM to Show Standard of Care**

- ≠ Business Routine
- This focuses NOT on the Party’s actions in the past, but looks to the rest of the industry to find a Standard of Care
- This may not be conclusive, but it is Relevant and Admissible

B: Discretionary Relevance: 3 Basic MBE Rules

a.) Liability Insurance

- Rule: Evidence of Liability Insurance is NOT ADMISSIBLE to Show either CARELESSNESS or ABILITY TO PAY (nor would evidence of the absence of liability insurance be relevant or admissible to show the opposite)
- Exceptions: If the Evidence is Relevant as to another part of the case, it may be admissible, at judicial discretion. Other parts of the case include:
 - 1.) *To Prove OWNERSHIP or CONTROL, in cases where that is In DISPUTE*
 - 2.) *To IMPEACH the Credibility of a Witness to Show INTEREST, BIAS, MOTIVE*
- MBE: Take the Category which is Inadmissible, then ask about an exception, like impeachment

b.) Subsequent Remedial Measures

- Rule: Evidence of Subsequent Remedial Measures is NOT ADMISSIBLE to show NEGLIGENCE or CULPABLE CONDUCT. (Why? The Policy is to Encourage the Defendant to Act Well post-accident without fear that the good conduct would harm his case)
- Exceptions:
 - 1.) *To Prove Ownership/Control if in Dispute*
 - 2.) *To Rebut, or Impeach, in order to Show the FEASIBILITY of a Precautionary Measure when its feasibility is Controverted (i.e., the Defendant claims IMPOSSIBLE to be safer than it was on the day in question, but after the day in question, they take a subsequent remedial measure, evidence of the subsequent remedial measure is relevant, but admissible ONLY to show the FEASIBILITY of the subsequent remedial measure)*
 - 3.) *To Authenticate a Photograph (if there were changes between the accident and the photograph)*

c.) Settlements

- Rule: Evidence of a Settlement, or Settlement Negotiations, are NOT ADMISSIBLE to show FAULT or DAMAGES (includes Civil & Criminal Settlements, Pleas, & negotiations)
- Admission of Fact or Liability Made in the COURSE of an OFFER to Compromise is NOT ADMISSIBLE
- BUT: an OFFER to Pay HOSPITAL or MEDICAL EXPENSES is NOT ADMISSIBLE (deemed irrelevant).
- However: if admit FAULT or admit to a Fact in the COURSE of a **naked settlement** Offer (“I’ll pay your hospital bill because it was my fault”) will be Relevant and ADMISSIBLE
- This is ADMISSIBLE when the ADMISSION is ATTACHED to a NAKED OFFER to pay for Hospital or Medical Bills

B. USE OF CHARACTER AS SUBSTANTIVE EVIDENCE TO PROVE A MATERIAL ELEMENT OF THE CASE

- Remember, there are **4** things upon which these Rules depend
 1. *Purpose for Which the Character Evidence is to be Used*
 - a.) Character as **DIRECT** Evidence (at Issue)
 - b.) Character as **CIRCUMSTANTIAL** Evidence to Infer Conduct
 - c.) Character to **IMPEACH** the Credibility of a Witness (Not Substantive)
 2. *Method/Technique to Prove Character*
 - a.) **SPECIFIC ACTS** of Conduct
 - b.) **OPINION** Testimony
 - c.) **REPUTATION** Evidence
 3. *Type of Case: Civil v Criminal*
 4. *Character of Which Trait?*
 - Must be Specific, **NOT GENERAL**: depends on the Nature of the Case
 - Larceny -> Honesty, Assault -> Violence, Perjury -> Truthfulness

A: Character Evidence in Civil Cases

- **Rule**: No Character Evidence is Admissible in Civil Cases (in General)
 - Cannot Use Character as **CIRCUMSTANTIAL** Evidence to infer Conduct in Civil Cases
- **Exception**: Certain Times when Character Evid. Is Admissible in Civil Cases:
 - a.) *Character is at Issue (Character as DIRECT EVIDENCE)*
 - This pretty much applies only in **Defamation** cases (where Truth was a Defense)
 - Character is Directly relevant to the Issue in the Case (Not past Evidence to Infer Current Incident Behavior)
 - Ways to **INTRODUCE** Character Evidence in a Civil Trial:
 1. **SPECIFIC ACTS**
 2. **OPINION TESTIMONY**
 3. **REPUTATION EVIDENCE**

B: Character Evidence in Criminal Cases

- Very **RARE** for Character to be **DIRECTLY** at Issue in a Criminal Case
- More often, Character Evidence is used as **CIRCUMSTANTIAL** Evidence to Infer Conduct
- When is Character Evidence Permitted to be Introduced to Infer Conduct?
- **Rule**: **NO** Bad Character Evidence may be Introduced by the **prosecution** *if* the prosecution is trying to show a **general criminal disposition** ***unless/until*** the **defendant** opens the door by introducing evidence of Good Character
- Hence, the Defendant may show good character to infer conduct on the occasion; then, and only then, may the Prosecution introduce Bad Character Evidence
- **Ways** Defendant may **INTRODUCE** Character Evidence:
 - **NOT** Specific Acts of Conduct
 - **OPINION Testimony** regarding the pertinent trait of Character
 - **REPUTATION** Evidence (most Common)

- **Ways** Prosecution may REBUT
 1. Prosecution is Entitled to **Cross-examine** the Witness Offering the Good Character Testimony by **inquiring** as to **any SPECIFIC ACTS** which would tarnish the **reputation** of the Defendant **or** would **affect** the **opinion** of the Witness offering the Testimony
 - Rationale: All the Prosecutor is doing is TESTING the witness's knowledge of the Reputation (not to show that the Specific Act occurred, only if witness knew about the general knowledge regarding the Defendant)
 - Magic Words: Historically, only Reputation Evidence was permitted to be used in the Cross Examination, so the Prosecution would ask "**Have You Heard....**", but now, Witness can Give Opinion Testimony, so the prosecution may ALSO ask, "**Do You Know....**"
 - The Prosecutor's Inquiry is limited to the Answer of the Witness (i.e., He may NOT impeach the answer of the witness)
 2. Prosecution can **call** own Bad Reputation/Bad Opinion **witness** (to rebut the good reputation / good opinion witness: **MAY NOT introduce any Specific Acts**)
- Hence, NO Character Evidence is Admissible to Infer the Conduct in Question in either a Criminal or Civil Case; except, in a criminal case, the Defendant may introduce Good Character Evidence and the Prosecution may Rebut that evidence with Bad Character Evidence

C: Character Evidence of Victim in a Criminal Trial

- *For Example*; The Defendant is charged with Murder and the Defendant Pleads Self-Defense. Is Character Evidence Admissible as Circumstantial Evidence to infer the Conduct of the VICTIM? YES
- Permit **Reputation** or **Opinion** (not Specific Acts) to be Admissible
- All the Prosecution may do is REBUT with GOOD Character Evidence of the VICTIM (either OPINION or REPUTATION, not Specific Acts)
- NO Specific Acts Evidence is Permitted unless the Specific Acts of the Victim were **known** to the **defendant** at the time of the incident -> Goes to State of Mind of the Defendant
- Rape & Sex Cases:
 - Rape Shield Statutes Prevent Evidence of the Victim's Sexual Character
 - BUT, the Prosecution may introduce Character Evidence of the Defendant (not to infer Criminal Disposition, but for other purposes; like motive or opportunity)

D: Admissible INDEPENDENTLY RELEVANT Categories (for Prior Bad Acts)

- In a Criminal case, although the Defendant has not opened any doors by introducing evidence of his OWN good character, nonetheless, certain character evidence of the defendant may be admitted for an independently Relevant purpose; These Include **MIMIC**
MOTIVE
INTENT/STATE OF MIND (AT ISSUE)
IDENTITY (AT ISSUE)
MODUS OPERANDI (Signature of crime: distinctive & unusual)
COMMON PLAN/SCHEME
- MIMIC Also Applies to Civil Cases as well as criminal
- FRE 403 Still Applies, though. Although the Evidence may be PROBATIVE, the Trial Judge Still has Discretion to say that the Probative Value is OUTWEIGHED by (unfair prejudice, confusion, undue delay, etc.)
- **Sexual Assault/Child Molestation Cases (Prior Acts)**
 - Applies in Either Civil or Criminal
 - Evidence of the Defendant's prior Acts of Sexual Assault or Child Molestation are Admissible (whether the Defendant has opened the door or not, or whether it was at the initiative of the Prosecution) this evidence MAY be used to show DISPOSITION

REVIEW of CHARACTER EVIDENCE for MBE Purposes

- *For Example*; Defendant is charged with Assault. Defendant admits to the assault, but claims self-defense (he claims the victim was drunk and belligerent after a football game).
 1. As Part of the Prosecution's Case-in-Chief, the DA calls a Witness to testify that the Defendant had a Bad Reputation. Is this Admissible? **NO** (Prosecution may not introduce non-independently relevant testimony as to defendant's character during its case-in-chief)
 2. Now, the Defendant calls his Employer to the Stand to Testify as to the Defendant's Peaceful Reputation. Is this Admissible? **YES** (Defendant may introduce Reputation evidence of his good character)
 3. On Cross-Examination of the Defendant's Employer, DA asks whether the Employer had ever heard of Defendant's 3 Previous Bar Fights. Is this Permissible? **YES** (Prosecution is permitted to Rebut the Good Character Evidence of the Defendant by Inquiring as to specific acts which would tarnish the reputation of the defendant in the mind of the witness)
 4. As Part of the Prosecution's Case-in-chief, DA seeks to prove that 30 minutes before the fight, the defendant stole a hot dog. Is this permissible? **NO** (not independently relevant)

C. WRITINGS & DOCUMENTARY EVIDENCE

- This Involves Authentication, & the Best Evidence Rule

1. Authentication

- Rule: A Writing is NOT Admissible **until** it is **Authenticated**
 - Authentication is the process of establishing that the writing is genuine, what it purports to be
 - Court presumes a Writing is a Forgery until a proper foundation is laid by Testimonial Evidence showing that the Writing is Authentic & Genuine (This means that Writings are NOT Self-authenticating, in general)
 - Ways to Authenticate: either Direct or Circumstantial
- **a.) Direct**
 - Direct Authentication of a Document could come from either
 - 1.) **an admission by the defendant,**
 - 2.) **testimony from a witness as to its authenticity,**
 - 3.) **proof of the signature**
 - Jury decides the genuineness of a writing
 - The QUANTUM of Proof to authenticate is **sufficient evidence so that a reasonable jury COULD find it genuine**
 - Ways to PROVE a Signature include:
 - 1.) *Recognition of A Signature by a Lay Witness*
 - 2.) *Handwriting Expert with Comparison*
 - 3.) *Jury Comparison*
 - MBE asks what is NOT permissible to Identify a Writing? The correct answer to that query would be; A Lay witness with no knowledge of the signature nor a lay witness who became familiar with the signature only through the process of litigation
- **b.) Circumstantial**
 - Ancient Document Rule: If the Writing is:
 1. **20 or More (Fed), 30 or more (MA) years old, and witnesses to its execution are UNAVIALABLE**
 2. **the Document is Regular on its Face**
 3. **the Document was found in its place of Natural Custody**

Then, that writing is PRIMA FACIE admissible (it is self-authenticated)
 - Solicited Reply Doctrine
 - If the Disputed writing comes in response to a previously Authenticated Writing, then, the response is PRESUMPTIVELY authentic

c.) Self-Authenticating Writings (6)

1. *Certified Copies of **Public Records***
2. *Official Publications Purporting to be Issued by Public Authorities*
3. *Newspapers or Periodicals*
4. *Trade Inscriptions or Labels (indicating ownership/control)*
5. *Acknowledged Documents (contains 2 signatures:*
6. *Signatures on Commercial Paper (UCC)*

d.) Photographs

- General: Need not call the photographer to authenticate the photo
- Instead, any witness can authenticate a Photograph by saying the Magic Words, “**fair & accurate description/representation of the scene as I saw it on the date in question**”

2. Best Evidence Rule

- This is really a mis-nomer; the doctrine does not require the best available evidence
- The Rule applies ONLY to WRITINGS (Documents, films, photos, X-rays, Recordings) AND Only express a **preference** for the original (If the excuse for not having the original is REASONABLE, the copy or oral testimony may be admitted to prove its contents)
- The Party **seeking to prove** the content of a WRITING must either:
 1. *Produce the Original Writing; or*
 2. *Satisfactorily Explain its Absence*
- *For Example*; Must know really only when it does or does not apply

A: Application of the Best Evidence Rule:

1. **when the writing is a LEGALLY OPERATIVE DOCUMENT** (that means that it creates or destroys a legal relationship, i.e., a deed to real property, a divorce decree, will, a written contract which is the subject of litigation, a license to practice law or medicine)
2. **when the writing is the SOLE SOURCE of the Witness’s Knowledge**

- Whenever there is a writing objection, should look for the Following Issues

- a.) Authentication
- b.) Best Evidence
- c.) Hearsay
- d.) Exceptions (Admissions, Recorded Recollection, Business Records)

B: Inapplicability of the Best Evidence Rule

1. By Definition

- When the fact to be proved has an existence INDEPENDENT of a writing, the best evidence rule does not apply
 - *For Example:* Can prove a birth without a birth certificate. The document does NOT create a legal relationship; it merely describes the event and any person with independent knowledge of the event can testify to it; Applies to payments, births, deaths, etc.

2. Collateral Document

- Best Evidence Rule Does NOT apply to MINOR Documents in the proceeding (i.e., those documents which are not the subject of the Controversy)

C: Modifications to the Best Evidence Rule

1. Public Record

- Custodian of Public Records can give a Certified Copy in place of the original (no oral testimony, though)

2. Voluminous Documents

- Some Documents are so voluminous that they would fill the entire court room. Therefore, the court will allow a summary, or chart, or calculation which summarizes the voluminous originals **so long as:**
 - a.) *The Voluminous Documents would be Independently Admissible*
 - b.) *The Opponent has Access to the Originals*

D: Definition of Original for Purposes of Best Evidence Rule

- At Common Law, only the original could be an original
- Now, under FRE, **duplicates** can be deemed originals. If the Counterpart of the original was Produced by a process that *avoids casual errors, every copy is a valid duplicate (as good as an original) except* for Hand-written copies
- FRE: Duplicates are admissible as originals unless
 1. *A genuine question is raised as to the Authenticity of the Original*
 2. *It would be Unfair to Admit the Duplicate in place of the original*
- The Doctrine of Duplicates is NOT Totally Adopted in MA; rather, MA has the **Uniform Business & Public Records as Evidence Act**; For copies kept or made in the ordinary course of business, they may be accepted as originals.

II: WITNESSES & TESTIMONIAL EVIDENCE

A. COMPETENCY OF A WITNESS

- Rule: To be Competent to take the Witness Stand, the Witness must have:
 1. *PERSONAL KNOWLEDGE*
 2. *MANIFESTATION to TELL the TRUTH (Swear an Oath)*
- It's virtually automatic to get witness Competence.
- Unlike under the COMMON LAW, today, there is no automatic disqualification for such things as:
 - Lack of Religious Belief
 - Infancy
 - Judicially Declared Incompetent
 - Conviction of a Crime
 - Interest
- However, there is the **Deadman Statute** (in 1/2 States)
 - There is NO Federal, and NO MA Dead Man Statutes
 - **DMS**: An **interested survivor** CANNOT testify for His/her **interest** against the **decedent** (or the representative of the Decedent) regarding a **communication or transaction** with the decedent in a **civil case** **unless** there is a **waiver**.
 - Rationale: If 1 party is dead, he can't testify, and there is no adequate representation of that party, so declare the other party incompetent via the Dead Man Statute. Fear Perjury; This rule presumes that the survivor would lie.
 - Since there are so many requirements, ought to assume Dead Man Statute will be a Wrong Answer on the Exam since the **Dead Man Statute Requires**:
 1. *Interested Witness*
 2. *Interested Witness Testifying FOR his own interest*
 3. *Interested Witness Testifying AGAINST the Decedent's interest*
 4. *The Subject Matter is Either a TRANSACTION or a COMMUNICATION involving the Decedent*
 5. *Strictly Applicable to CIVIL cases (does not apply to criminal law)*
 6. *There is NO WAIVER*

B: FORM OF WITNESS EXAMINATION

- This Area is Largely within judicial discretion
- In General: Want the Witness, and not the Lawyer to Testify
- For the Questioning to be Proper, the Questions must be *Interrogative* and not *Narrative* in nature
- Leading Questions are OK on Cross-examination, but never on Direct (except leading questions involving preliminary matters, a handicapped witness, or a hostile witness)
- Improper to Ask Questions that are **misleading/argumentative/compound**; these questions may assume as true something that is still in dispute

C: USE OF WRITINGS TO AID WITNESS IN ORAL TESTIMONY

- Rule; Witnesses are Not supposed to read in court (that is hearsay); prefer to have the witness testify from his own independent recollection. HOWEVER, there are 2 situations in which is permissible to have the witness refer to a writing:
 1. Refreshing Recollection
 - This Requires that upon questioning, the witness says, “**I forget**”
 - The writing used to refresh recollection need not be reliable (or even admissible)
 - The writing is not being placed in evidence, it is only used to aid the memory of a witness
 - Thus, the writing need not be *Authentic, Best Evidence*, can be *Hearsay*; All the party needs to do is show it to the Opposing Counsel
 - The Opposing Counsel may use it in cross and/or place it into evidence
 2. Recorded Recollection
 - Here, the writing is ADMITTED into Evidence in Place of Testimony
 - Therefore, since it is evidentiary, it Requires **Foundation**: To lay the Foundation, the party must Establish
 1. *Witness once had PERSONAL knowledge of the Contents of the Writing*
 2. *Writing was MADE BY, or UNDER SUPERVISION OF, or ADOPTED BY, the Witness*
 3. *Writing was TIMELY MADE*
 4. *Writing is RELIABLE (accurate)*
 5. *NECESSITY (Witness unable to remember All or Part of the Transaction/Event)*
 - To Get INTO Evidence, the RECORDED Recollection must be **Published** (that is, it must be READ to the Jury, the jury just can’t get a chance to read or look at the writing on its own during deliberations)

D: OPINION TESTIMONY

- Lay Opinion
 - Will be Admissible if:
 1. *The Opinion is RATIONALLY based on the PERCEPTION of the Witness (that is, the witness has Personal Knowledge)*
 2. *The Opinion is Helpful to the Trier of Fact (Can’t be an opinion as to a legal conclusion, though)*
- Expert Witness
 - To be Admissible:
 1. *The SUBJECT MATTER must be Appropriate for Expert Testimony*
 2. *The Expert must be QUALIFIED*
 - Qualification Need NOT be academic or formal, but may rather be based on skill & experience
 3. *The Expert must Possess REASONABLE CERTAINTY or PROBABILITY regarding the opinion*

- The Opinion must be more than a Mere Guess or Conjecture, “Do you have an opinion based upon Reasonable Certainty regarding the issue”
- 4. *Opinion must be SUPPORTED by a Proper FACTUAL BASIS*
 - Upon what kinds of facts can the Opinion be based? **3 acceptable bases**
 - a.) Facts within the Personal Knowledge of the Expert
 - b.) Facts which, though not within the Personal Knowledge of the Expert, are supplied to the expert in court by the Evidence, usually through the Hypothetical Question
 - c.) Facts which, although Inadmissible, are of the type that Experts in that Field would reasonably rely upon in making an out-of-court professional judgment (Reliability of Facts > Admissibility)

MA; Does not go as far as the Feds; Facts UPON which the Expert Opinion is Based need NOT be in Evidence, but Must be ADMISSIBLE

E: LEARNED TEXT, TREATISE, AUTHORITATIVE ARTICLE

- The Basic Problem, here, is the Hearsay Rule. Traditionally, this type of evidence could be used to Impeach or Rebut the Opponent’s Expert (not to prove the truth, but to show that not all the authorities agreed with the expert)
- So, after the opponent expert messes up, can get in the Authoritative Text or Learned Treatise into Evidence in 1 of 4 Ways (This Means that Counsel can READ from the Authoritative Work if AUTHENTICATE it in one of the following ways):
 1. **Opponent Expert Relied on Text or Treatise**
 2. **By Eliciting an Admission in a Cross-examination**
 3. **By Bringing in a Rebuttal Witness to Testify about the Authoritativeness and Reliability of the Text or Treatise**
 4. **Judicial Notice**
- Now, the rule has been Liberalized. Under FRE, need not Wait for the Opponent Expert to Open the Door, but Can Use the LEARNED TEXT in support of OWN Expert Witness
- This is the Learned Text Exception to the Hearsay Rule: (Contents are Entered for Truth)
- MA: Content of Learned Treatise Enters Evidence for TRUTH, but ONLY on the Cross-Examination of the Opponent Expert (Can’t use the Learned Treatise Exception to the Hearsay Rule to Support Own Expert in Massachusetts). But still, on cross, can use for TRUTH and not just Impeachment (sort of a hybrid)
- FRE Limitations:
 1. *Must be Filtered through an Expert Witness (expert must be on stand)*
 2. *(like recorded recollection), the Learned treatise does not go to the jury, the content is admitted only through a reading*

F: CROSS-EXAM & IMPEACHMENT

- There are **2 steps** to impeachment
 1. *Cross Examinations*
 2. *(if permissible) Extrinsic Evidence (to be used later, not while on stand)*
- **Permissible Topics for Cross Examination:**
 - **FRE:** Cross-examination is LIMITED to the Scope of the Direct Examination (i.e., opponent may cross-examine the witness about ANY issues that were treated either Expressly or Impliedly under the Direct Examination)
 - **MA:** Wide-open. Opponent may cross-examine about ANY RELEVANT MATTER

G: CREDIBILITY & IMPEACHMENT & RE-HABILITATION

- Here, change the emphasis from proving/disproving the substance of the case to focus on the CREDIBILITY of a Witness
1. **Own Witness**
 - May Party Counsel Bolster the CREDIBILITY of a Witness before that credibility is ATTACKED or IMPEACHED? **NO**
 - **Rule:** Party Counsel may NOT Bolster the Credibility of a Witness **unless/until** that witness is IMPEACHED or ATTACKED
 - That means that Party Counsel may use Neither other witnesses, nor prior Consistent Statements to Bolster that witness's Credibility BEFORE/UNTIL he is Attacked or Impeached (that is inadmissible hearsay)
 - **But;** There is **1** type of prior Witness Statement which is **not subject to hearsay** and that is a **prior statement of identification** which is admissible for its TRUTH. The Elements of Admissibility of a PRIOR Statement of Identification:
 - a.) *Witness Testifies, "That's Him"*. That is, he makes an In-court identification and also may say, *"I picked him out of a line-up before"*
 - b.) *In Court Identification*. Cop takes the stand and says he saw a witness make a Prior Consistent Identification (that is admissible and not hearsay)
 - c.) *There is no In-court Identification, but the cop tells the story of a prior out of court identification*
 - d.) *Witness is unavailable, the cop testifies about the out of court prior identification; prior statement is made by an unavailable declarant and that is NOT Admissible? Check the outline here*
 2. **Prior Inconsistent Statement**
 - **Rule:** "**Prior inconsistent statements**" are NOT Admissible for TRUTH (may be admissible ONLY for impeachment purposes) This is NOT substantive evidence
 - **Unless:** (FRE): if the prior inconsistent statement was GIVEN UNDER OATH and PART of a FORMAL proceeding (subject to the pains & penalties of perjury), it may enter not only to impeach or rebut, but for its TRUTH
 - **MA:** if the prior Inconsistent **grand jury** statement was given by a witness under Appropriate Circumstances and **corroborated by other evidence**, it enters not only to impeach, but also for TRUTH

- Extrinsic Evidence? Yes, can prove the inconsistent statement by extrinsic evidence
 - Must Lay FOUNDATION
 - **FRE:** The TARGET Witness must have an Opportunity to Explain or DENY the making of the inconsistent statement (however, it need not be given 1st. i.e., party can offer extrinsic evidence and then target can take the stand to explain or deny)
 - **MA:** NO requirement to lay the foundation UNLESS impeaching own witness (i.e., give an opportunity to admit or deny making the prior inconsistent statement)
 - A Prior Inconsistent Statement by a PARTY is similar to an ADMISSION, therefore it is Admissible for its TRUTH and need not lay any foundation (nor even call the opponent: Admissions are EXEMPT from the Hearsay Rules)
- 3. **Showing an Interest, Bias, Motive to Misrepresent**
 - May be PROVED by EXTRINSIC Evidence AFTER a Foundation is Laid
 - For the MBE, this is a Good way to Admit Evidence
 - Here, may even ask about SETTLEMENTS to show an interest (and impeach credibility)
 - May even talk about criminal deals
- 4. **Prior Convictions of Crimes**
 - Most jurisdictions allow impeachment via Criminal Convictions
 - **MBE/FRE:**
 - a.) *Any Crime (a felony or misdemeanor) involving DISHONESTY or FALSE Statement is Usable to IMPEACH (FRE 403 gives the trial judge NO DISCRETION) (Robbery is NOT dishonesty)*
 - b.) *Felony, which is Not Deceitful, is Usable to Impeach, but the Judge has DISCRETION under FRE 403*
 - c.) *Whatever the Crime, it CANNOT be TOO REMOTE (generally, if more than 10 years have elapsed from the date of the release from prison post-conviction, it is too remote)*
 - Extrinsic Evidence?: YES, can use a Certificate of Conviction
 - Need not lay a foundation: it can be proven either by a certificate or Eliciting an Admission on Cross
 - **MA:** Complex. May need to look at the outline
 - *Any Crime can be used*
 - *Judge has Discretion*
 - *Remoteness: 10 years for felony, 5 years for misdemeanor*

5. Bad Act Impeachment

- Specific Acts of Deceit or Lying MAY be Inquired into on CROSS-EXAM of the Target Witness
- Ask, “Did you do it?”, NOT “Were you convicted”
- Requires a *Reasonable Basis* for Asking a Question
 - A good faith reasonable basis for Believing Act of Deceit/Lying
 - This is the ONLY Impeachment technique where there is NO EXTRINSIC EVIDENCE Permitted
 - MA: does not permit Bad Act impeachment at all

6. Bad Reputation for Truth/Veracity

- May use Extrinsic Evidence
- Call the town Gossip to the stand to state that the Target Witness has a Bad Reputation for Veracity or Truth
- Under **FRE**, but NOT **MA**, can give an opinion

7. Rehabilitation of a Witness

- Only 2 ways to Rehabilitate a Witness: (1) Good Reputation for Truth or Veracity, (2) Prior Consistent Statements
 - a.) *Good Reputation*
 - Usable ONLY when:
 - witness has been IMPEACHED via Prior Conviction, Bad Acts, or Bad Reputation (NOT prior inconsistent statement nor bias/interest)
 - b.) *Prior Consistent Statement*
 - Usable ONLY when:
 - After Appropriate Impeachment/Attack of witness credibility
 - CANNOT use a Prior Consistent Statement to Rebut a Prior Inconsistent Statement
 - FRE: can rebut a charge of RECENT Fabrication or IMPROPER motive. Then, the prior consistent statement will Enter for its TRUTH (as well as rehabilitation)
 - The Prior Consistent Statement need not be under oath or part of a formal proceeding in that case

8. Privileges

a.) *Attorney-Client*

- CONFIDENTIAL COMMUNICATIONS between an ATTORNEY and a CLIENT during PROFESSIONAL LEGAL CONSULTATION are privileged **unless** WAIVED
- *3 Situations Destroy Professional Privilege*
 - 1.) Future Crime or Fraud (the privilege may not facilitate these)
 - 2.) At-Issue (if Client Affirmatively puts the Communication at-issue, he waives the privilege)
 - 3.) Professional Defense or FEE action (derivative of at-issue)

b.) *Physician-Patient*

- The Patient has a Privilege against the disclosure of Confidential Communications or Information acquired by the Physician in a professional relationship entered into for the purpose of obtaining treatment
- MA: NO physician-patient privilege, only a Psychiatrist-patient privilege, also there is the *Patient Litigation Exception*: Put at-issue

c.) *Husband-Wife*

- Neither of these privileges apply to any INTRA-family injury case
- 1. *Spousal Immunity*;
 - 1 Spouse CANNOT be forced to give adverse testimony against the other in a CRIMINAL Case
 - must be married at the time of **trial**
 - However, if the spouse wishes to testify he may (this **holder** of the privilege is the testifying WITNESS SPOUSE: if the defendant spouse doesn't want the witness spouse to testify, too bad)
- 2. *Confidential Marital Communication*:
 - Applies only to CONFIDENTIAL conversations, not All testimony
 - The parties must be married at the time of the **communication**
 - Applies to BOTH Civil & Criminal Cases
 - The HOLDER is EITHER Spouse (i.e., if 1 spouse wishes to testify against another at trial, the defendant spouse may invoke the privilege)
- 3. MA: *Child Privilege*
 - An UNEMANCIPATED MINOR living with the parent is FORBIDDEN to testify against the parent in a CRIMINAL proceeding as long as the victim is NOT a member of the FAMILY living in the Household

III: HEARSAY

- There are 2 Parts: Definition & Exceptions, Exclusions

A: DEFINITION OF HEARSAY

- Hearsay is an **out-of-court statement** which is **offered** for the purpose of establishing the **truth** of the matter contained in the statement
- *3 Parts*
 1. *Out of Court*
 2. *Statement Subject Matter*
 3. *Purpose of the Statement*
- Parties to the Hearsay Rule
 - Declarant: Makes an out of court statement
 - Witness: Hears the out of court statement
 - Writing: reports what the declarant said
- Not Hearsay Defined: 3 Categories of Hearsay are defined as Not Hearsay
 1. ***Legally Operative Fact***
 - A verbal Act where the Substantive Law breathes Significance into the Spoken or Written Words
 - “I Accept the Offer” is heard by the witness. This is NOT HEARSAY
 - Whether some words have legal significance depends on the substantive law
 2. ***Out of Court Statement offered to show EFFECT on person who heard it***
 - Not to show the truth of what was asserted, but to show the effect that statement had on the person who heard/read it
 3. ***Out of Court Statement offered to show the RELEVANT STATE of MIND of the Declarant***
 - Not offered to show the truth, but to show circumstantial evidence of the declarant’s state of mind
- A witness’s Own Prior Statement, if offered to show the truth, unless otherwise EXEMPTED is Inadmissible hearsay (but there is non-hearsay and hearsay exceptions)
- Not hearsay; but prior witness’s statement offered for truth (3 situations)
 1. *Prior Inconsistent Statement, given under oath as part of a formal proceeding*
 2. *Prior Consistent Statement to Rebut a charge of Current Fabrication or Improper Motive*
 3. *Prior Statement of identification*

B: EXCEPTIONS TO THE HEARSAY RULE (6)

1. Party Admissions
2. Former Testimony
3. Statement Against Interest
4. Dying Declaration
5. Res Gest
 - Declaration or Existing State of Mind (at issue)
 - Declaration of Intent (future)
 - Excited Utterance
 - Present Sense Impression
 - Present Sense Physical Condition
 - Past Sense Physical Condition
6. Business Records

1. Party Admission

- Declaration of **Party** offered Against the Party
- It is Usually inconsistent with the party's present position at the time of trial (though not always)
- There is NO Special Reliability about a Party Admission
- Admissions DO NOT require PERSONAL KNOWLEDGE
- ADMISSIONS can be in the FORM of Legal Conclusions
- FRE: Admissions are defined as NON-HEARSAY
- MA: Similar to a Vicarious Admission. Employee statements of admission
 - Under the Old Common Law, which relied on agency, an employee was NOT authorized to speak for the employer
 - But now, there is vicarious admission, where a statement made by an employee concerning a matter within his scope of employment is admissible against the employer if they were made DURING the employment relation

2. Former Testimony

- There is Special Reliability here (since was subject to cross on the 1st testimony)
- There are ALWAYS 2 proceedings; essentially the same issues, same parties, but a Witness from the 1st proceeding is UNAVAILABLE at the 2nd proceeding. In that case, the former testimony from the 1st proceeding will be admissible if meet the following requirements:
 - a.) *There was MEANINGFUL opportunity to CROSS-EXAMINE or Develop testimony in the 1st Proceeding when the Witness testified live*
 - In a Criminal case, the party in the 2nd is the same party against whom offered in the 1st case
 - In a Civil Case, the party in the 2nd case must have had PRIVACY, at least, with the party in the 1st case
 - b.) *The Witness is UNAVAILABLE at the 2nd Proceeding*
 - Unavailability is usually due to DEATH or ABSENCE from the Jurisdiction, but may also include Refusals to answer or Failure of Memory

3. Statement Against Interest

- The Statement was against the interest of the declarant/party at the TIME it was MADE
- It is a Declaration of a person who is now **unavailable** as a witness, against that declarant's PECUNIARY or PROPRIETARY or PENAL interest at the time the statement was made
- Do not confuse this with an Admission (Admission ≠ statement against interest)
- *4 Key Difference between Admissions and Statements Against Interest*
 - a.) Statement was against interest at TIME Made (≠ admission which can come at any time)
 - b.) Admission is by a PARTY in the case, but a statement against interest can be made by NON-PARTIES
 - c.) Statement Against Interest REQUIRES PERSONAL Knowledge (an admission does not require personal knowledge)
 - d.) Statement Against Interest REQUIRES UNAVAILABILITY (if the declarant is AVAILABLE, there can be no hearsay exception of statement against interest)

4. Dying Declaration

- A Statement Made UNDER sense of IMPENDING DEATH
- Rationale: a person about to die won't lie
- REQUIREMENT:
 - a.) State of Mind: Declarant must be **aware** of the approaching death. It is a Settled, hopeless Expectation of Death
 - b.) Declarant need not Actually DIE (under FRE) as long as the Declarant is UNAVAILABLE at the time of trial (MA: requires Death)
 - c.) MA & Common Law: Admissible in cases of **homicide only**, although the FRE allows dying declarations in cases of Homicide, or ANY CIVIL case
 - d.) Content/Subject matter Limitation: The Dying Declaration is limited to the CAUSE or CIRCUMSTANCES of the Impending Death

5. Res Gest

- Either Available or Unavailable Declarant
- Law presumes the Declarant's words/writings at the time of the event are more reliable than current testimony. There are **6 Types**
 - a.) Declaration of Existing State of Mind (at Issue)
 - b.) Declaration of Intent to do Something in Near Future (admissible to INFER that intended future act was done)
 - c.) Excited Utterance
 - 3 Requirements
 - Startling Event
 - Statement Made under STRESS of the event
 - Statement concerns Facts of the event
 - d.) Present Sense Impression
 - MA: Does NOT Recognize this Exception
 - MBE: Precise Contemporaneousness required. The declarant describes something at the MOMENT it happens. There is No Time Lapse
 - e.) Declaration of Present Physical Condition
 - Admissible by anybody that is hurt
 - Sort of like a present sense impression
 - f.) Declaration of Past Physical Condition
 - Admissible if Made to a Medical Personnel for Purpose of EITHER Treatment or Diagnosis (even if the diagnosis is only for the testimony of the medical personnel)

6. Business Records

- 2 Big Issues:
 - a.) Special Reliability
 - Theory, if it is done in the regular course of business, there is an incentive to keep good records of things observed, reported & recorded
 - b.) Function of Exception
 - Allows the Record to SUBSTITUTE for live employee testimony, but it can't give OPINIONS or HEARSAY
 - It is just a substitute for live testimony (if objectionable by a live witness, so to with the business records) ergo: a limited function
- Applicability
 - Is the Entry GERMANE to the business? If yes, the exception applies, otherwise the exception does not apply
 - If an outsider Reports FACTS, which is germane to the business, and the business records it, that is NOT a business record, and it is not within the exception (that is the hearsay within hearsay problem)

MBE Doctrine Questions; no specific hearsay exception, but nonetheless, hearsay may be admissible

- 1.) Admissibility of Evidence Frequently depends on a **preliminary fact** to be decided by the judge (FRE 106), but in making that determination, the judge is not bound by the rules of evidence (i.e., judge can consider hearsay in making her determination of a preliminary fact)
- 2.) Hearsay gets into evidence through certain exceptions, the opponent may impeach the credibility of the hearsay declarant (even if he is unavailable) with an Inconsistent Statement
- 3.) Best Evidence Problem: When seek to prove the contents of a writing (including recordings), may either produce the writing or explain its absence