

gilbert

LAW SUMMARIES

EVIDENCE

John Kaplan, Jon R. Waltz & Roger C. Park

law \ 'lo' \ n, often attrib [ME, fr. OE *lagu*, of Scand origin; akin to ON *lagu* law; akin to OE *liegan* to lie — more at LIE] **1 a** (1) : a binding custom or practice of a community : a rule of conduct or action prescribed or formally recognized as binding or enforced by a controlling authority (2) : the whole body of such customs, practices, or rules : **COMMON LAW** **b** (1) : the controlling principle of such law (2) : the action of a court of law **also** : LITIGATION (3) : the act of a court or order that it is advisable for a person to do or order that it is advisable for people with or enforceable **cap** : the revelation of truth **the first part of the Jewish Law, A, PROPHETS** **3** : a rule or principle relating to one subject or branch of knowledge : JURISPRUDENCE **a** : a statement of an ordinance or principle that is invariable under the given conditions **b** : a relation of proportionality **c** : the mathematical expression of a principle **LAW, RULE, REGULATION** : a principle governing action or conduct by a sovereign authority or the authority; **RULE** a principle



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Sixteenth Edition

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approach to exams

Although evidence questions can cover many different issues, most questions generally come down to whether the evidence is admissible. Some exam questions ask you just that—is this evidence admissible? Others bring out specific issues of admissibility, asking (although not in so many words) is this relevant, is this hearsay, has a proper foundation been laid, etc.? In constructing your answer to evidence questions, use some or all of the following framework (depending on your question). And be sure to review the detailed chapter approach sections at the beginning of each chapter.

1. **Is There a Timely and Specific OBJECTION?** Unless there is, the trial court can admit almost any kind of evidence. (*See* §29)
2. **Is There a Proper FOUNDATION?** Is there a showing that the evidence comes from a **source** that is legally competent?
 - a. **Oral testimony:** Is the witness **competent** to testify? (§§798 *et seq.*) (Remember that the witness almost always is competent.)
 - b. **Documentary evidence:** Is the document **authenticated** (proper foundation laid)? (§§1134-1164)
 - c. **Real evidence:** Is the item properly identified and its **authenticity** established? (§§1103-1114)
 - d. **Scientific evidence:** Is the experiment or test **reliable**? (§§1199-1230)
 - e. **Procedure:** Has the judge made a determination as to proper foundation (or other preliminary fact) prior to admitting the evidence? (§§56 *et seq.*)
3. **Is the Evidence Presented in Proper FORM?**
 - a. **Form of questions:** Is the question misleading, argumentative, conclusionary, etc.? (§§927 *et seq.*) Consider the limits on use of **leading questions** with “one’s own” witness.
 - b. **Form of answers:** Does the answer state an **opinion or conclusion** of the witness? (§933)
 - (1) Are the requirements for admissibility of **expert opinion** evidence met? Consider the expert’s qualifications, basis of opinion, and helpfulness to jury. (§§879-926)
 - (2) Are the requirements for admissibility of **lay opinion** evidence met? Consider whether the evidence is based on personal observation and helpful to jury. (§§861-878)
 - c. **Contents of documents:** Where the **contents** of a document are in issue, will the **“best evidence rule”** require that the “original writing” be produced? Consider whether the

document is admissible under an exception to the rule, or whether nonproduction of the original is justified. (§§1165-1188)

- d. **Qualification:** Keep in mind that evidence in **any** form may be used **to “refresh” a witness’s memory**, even though the evidence itself is not admissible. (§§952-961)

4. **Is the Evidence RELEVANT?** Does it have **probative value**?

- a. **Purpose of evidence:** Determine the purpose for which the evidence is offered. (§§71-73)

- (1) **As affirmative proof:** Does it **tend to prove** any fact in issue under the pleadings, or explain or clarify such facts? (§74)

- (2) **To impeach:** Does it reflect on the **credibility** of a witness? (§§999 *et seq.*) Consider:

- (a) **Grounds** for impeachment (conviction of crime, bias, prior inconsistent statement, etc.) (§§1003-1071);

- (b) Permissible **methods** of impeachment (cross-examination vs. extrinsic evidence) (§§994-1000);

- (c) Evidentiary **effect** of impeachment evidence (whether also admissible as substantive proof) (§§1090-1091); and

- (d) **Limitations** on impeachment (“collateral” matters; “one’s own” witness) (§§940-949, 1072-1073).

- (3) **To rehabilitate:** If a witness is impeached, does the evidence **restore** credibility? (§§1074-1091)

- b. **Doctrine of limited admissibility:** Is the evidence admissible for one purpose but not another? (§§81-84) If so, the jury must be **instructed** (upon request) to consider it only for the relevant purpose.

5. **Even if Relevant, Is the Evidence Subject to Some EXCLUSIONARY RULE?** Are there countervailing factors (some mandatory, others discretionary) that **outweigh** the probative value of the evidence, and require its exclusion?

- a. **Mandatory rules of exclusion**

- (1) **Rules of PRIVILEGE:** Is the probative value of the evidence outweighed by policies favoring protection of particular relationships (husband-wife, attorney-client, etc.) or interests (against self-incrimination)? (§§546 *et seq.*) Consider:

- (a) Who is the **holder** of the privilege (*i.e.*, who may assert)? (§§555-558)

- (b) What is the **scope** of the privilege (assertable in what types of proceedings, covers what kinds of evidence)?
 - (c) Are there any indications of **waiver** (by consent, failure to object)? (§§563-569)
 - (2) **HEARSAY rule:** Does the evidence consist of statements or conduct **outside** of court, or documentary evidence, so that the opportunity for cross-examination was precluded? (§§211 *et seq.*) If so, consider:
 - (a) Is the evidence being offered to prove the **truth of the assertion** (or the declarant's belief in its truth)? (§§222-238)
 - (b) If the evidence is hearsay, are there recognized factors establishing its "**trustworthiness**," and sufficient "**necessity**" for its use so as to justify an **exception** to the hearsay rule? (§§257 *et seq.*) Consider also whether other requirements of the exception are met (availability or unavailability of declarant, personal knowledge, etc.).
 - (3) **PAROL EVIDENCE rule:** Does the strong policy of the law to uphold written instruments over conflicting oral testimony render otherwise relevant oral testimony **inadmissible**? (§§1320-1321) Consider:
 - (a) Is there an **integrated** written agreement? (§§1329-1335)
 - (b) Is the parol testimony in **conflict** with that agreement—or is the testimony merely collateral thereto, or explanatory thereof? (§§1337-1351)
 - (c) Is the parol admissible under an **exception** to the rule (to show fraud, condition precedent, etc.)? (§§1352-1361)
 - (4) **EXTRINSIC POLICIES:** Is there some other policy of the law that precludes admission of the evidence (policy of encouraging settlements, insurance coverage, repairs, etc.)? (§§189-209)
 - (5) **ILLEGALLY OBTAINED evidence:** Is the evidence the product of an unconstitutional search and seizure? (§1116 *and see* Criminal Procedure Summary)
 - b. **Discretionary grounds:** Is there a risk of undue prejudice, delay, confusion of issues, or lack of trustworthiness that **outweighs** the probative value of the evidence? This is an important means of excluding evidence. (§§85-89)
6. **What is the EFFECT of the Evidence?** Once particular evidence is held admissible, its evidentiary effect (weight) is usually up to the trier of fact, with the following qualifications:
- a. **Evidence meeting burden of proof:** Is the evidence admitted legally sufficient to prove each element of the party's case, thus shifting the "**burden of going forward**" to the adversary? (§§1264-1285)

- b. **Substitutes for evidence:** If evidence of some fact is lacking, are there any *substitutes* for formal proof—*presumptions* or *judicial notice*?
 - (1) **If the evidence creates a presumption:** Is the presumption “conclusive” or “rebuttable”? (§§1296-1319)
 - (a) If “rebuttable,” is there *any* counterevidence? If so, consider whether the presumption is entitled to any further evidentiary effect.
 - (2) **Judicial notice:** Is judicial notice on the matter mandatory or permissive? (§§1231-1253)
- 7. **Policy Factors:** Close cases may often be resolved by considering the major purposes of the rules of evidence: *i.e.*, “[t]o secure *fairness* in the administration (of justice), *elimination of unjustifiable expense and delay*, and promotion of growth and development of the law of evidence to the end that the *truth* may be ascertained and proceedings justly determined.” [Fed. R. Evid. 102]

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capsule summary

evidence

I. INTRODUCTION TO EVIDENCE

A. BACKGROUND—DEVELOPMENT OF EVIDENCE CODES

1. **Early Codifications:** Nearly all evidentiary rules were derived from common law until the Uniform Rules of Evidence was published in 1954. Although influential, few jurisdictions adopted the Rules [1]
2. **Present Codes:** Some states, such as California, have adopted their own evidence codes, and the U.S. Supreme Court has developed rules of evidence (adopted by Congress) for use in the federal courts (Federal Rules of Evidence). Using the federal code as a model, many states have now adopted evidence codes [2]
3. **Comment:** Evidentiary rules are basically attempts to codify common law. For this reason and because jurisdictions without codes are still governed by case law, a knowledge of evidence case law is essential to an understanding of evidentiary principles. [3]

B. EVIDENCE AND THE LITIGATION PROCESS

1. **Fact Questions and Law Propositions:** The outcome of trials is determined by questions of fact and propositions of law. *Examples:* [4]
 - a. **Fact question:** Did D deliberately and with premeditation stab V in the chest with a knife in an effort to kill him?
 - b. **Law proposition:** Stabbing a person to death intentionally and with premeditation constitutes the crime of first degree murder.
2. **Role of Evidence in Resolving Fact Questions:** Fact questions are often more influential than propositions of law on the outcome of litigation. Evidence is the material offered to persuade the trier of fact about fact questions, and rules of evidence govern which of this material the trier of fact may consider [5]
 - a. **"Evidence" defined:** Evidence is the material from which inferences may be drawn as the basis for proof of the truth or falsity of a disputed fact. . . [6]
 - b. **Rules governing admissibility and use of evidence:** Not all evidence is admissible. Analysis focuses on: [9]
 - (1) What material should be **admitted** at trial?
 - (2) What **use** may then be made of the admitted material?

II. TYPES AND FORMS OF EVIDENCE

A. TWO BASIC TYPES OF EVIDENCE

1. **Direct Evidence:** Evidence that proves a proposition without relying on any inference is direct evidence [15]
2. **Indirect or Circumstantial Evidence:** This is evidence of a **subsidiary** fact from which the existence of an ultimate fact may be inferred [16]
3. **Rules of Admissibility:** Direct evidence is almost always admissible. Circumstantial evidence is more often subject to the exclusionary rules of evidence and rules on relevancy [17]

B. THREE BASIC FORMS OF EVIDENCE

1. **Testimonial Evidence:** This is **oral testimony** given by a witness in court or in a pretrial deposition [18]
2. **Tangible Evidence:** This is evidence in the form of **exhibits** and is either real or demonstrative evidence [19]

- a. **Real evidence:** This is the **real thing** at issue in the case—e.g., the murder weapon, contract in dispute, etc. [20]
- b. **Demonstrative evidence:** This is **not** the real item involved in the case. Rather, it is a visual or audiovisual **aid** for the fact finder [21]
- 3. **Tangible-Testimonial Evidence:** This is a **hybrid** of the above two forms of evidence—e.g., a transcribed deposition [22]
- 4. **Compare—Judicial Notice:** This is matter that, because it is common knowledge or may be readily verified, need not be proven [23]
 - a. **Note:** There is disagreement as to whether judicially noticed material is “evidence,” but most courts recognize it as a substitute for evidence [24]

III. PROCEDURE FOR ADMITTING OR EXCLUDING EVIDENCE

A. INTRODUCTION

Questions about admissibility arise when a party's offer of evidence draws an **objection** from another party. If the judge **sustains** the objection, the evidence is **excluded** from consideration of the fact finder; if the objection is **overruled**, the evidence is **received and considered** by the fact finder. [25]

B. RULINGS ON ADMISSIBILITY OF EVIDENCE AT TRIAL LEVEL

- 1. **Role of Court and Jury**
 - a. **Court:** The **admissibility** of evidence is determined only by the trial judge [26]
 - b. **Jury:** The jury determines the **weight** and **credibility** of evidence [27]
- 2. **Where No Objection Made:** Unless an objection is made, almost any evidence may be received. Failure to object is considered to be a **waiver** of any existing ground for objection, and the evidence is usually admitted [29]
- 3. **Loss of Right to Object by Reason of Own Evidence (“Opening the Door”):** A party may be held to have waived the right to object as a consequence of her own tactics in presenting evidence. [30]
 - a. **Example—introducing part of transaction:** When P introduces evidence as to part of a conversation or event, she waives the right to object to D's cross-examination or introduction of rebuttal evidence as to any other part of the same transaction necessary to make it fully understandable . . . [31]
 - b. **Effect of introducing inadmissible evidence:** P is precluded from objecting to the admissibility of evidence offered by D to rebut evidence offered by P and wrongly admitted [33]

C. APPELLATE REVIEW OF TRIAL COURT RULINGS ON ADMISSIBILITY

- 1. **Grounds for Reversal for Evidence Erroneously Admitted:** There must have been: [34]
 - a. A **specific** objection;
 - b. **Timely** made;
 - c. On a **valid ground** for objecting; and
 - d. Error in admitting the evidence that was **prejudicial**.
- 2. **Grounds for Reversal for Evidence Erroneously Excluded:** It must be established that: [46]
 - a. There is **no valid ground** for objection;
 - b. An **offer of proof** was made; and
 - c. The error in excluding the evidence was **prejudicial**.

D. PRELIMINARY DETERMINATIONS CONCERNING ADMISSIBILITY

- 1. **Burden of Proof of Preliminary Fact:** The proponent of the evidence or the claimant of a privilege has the burden of proof as to preliminary facts (e.g., whether the witness is qualified to testify; whether the witness is privileged not to testify; or whether the confession was voluntary) [56]
- 2. **Preliminary Facts About Which Judge Makes Ultimate Decision:** Where