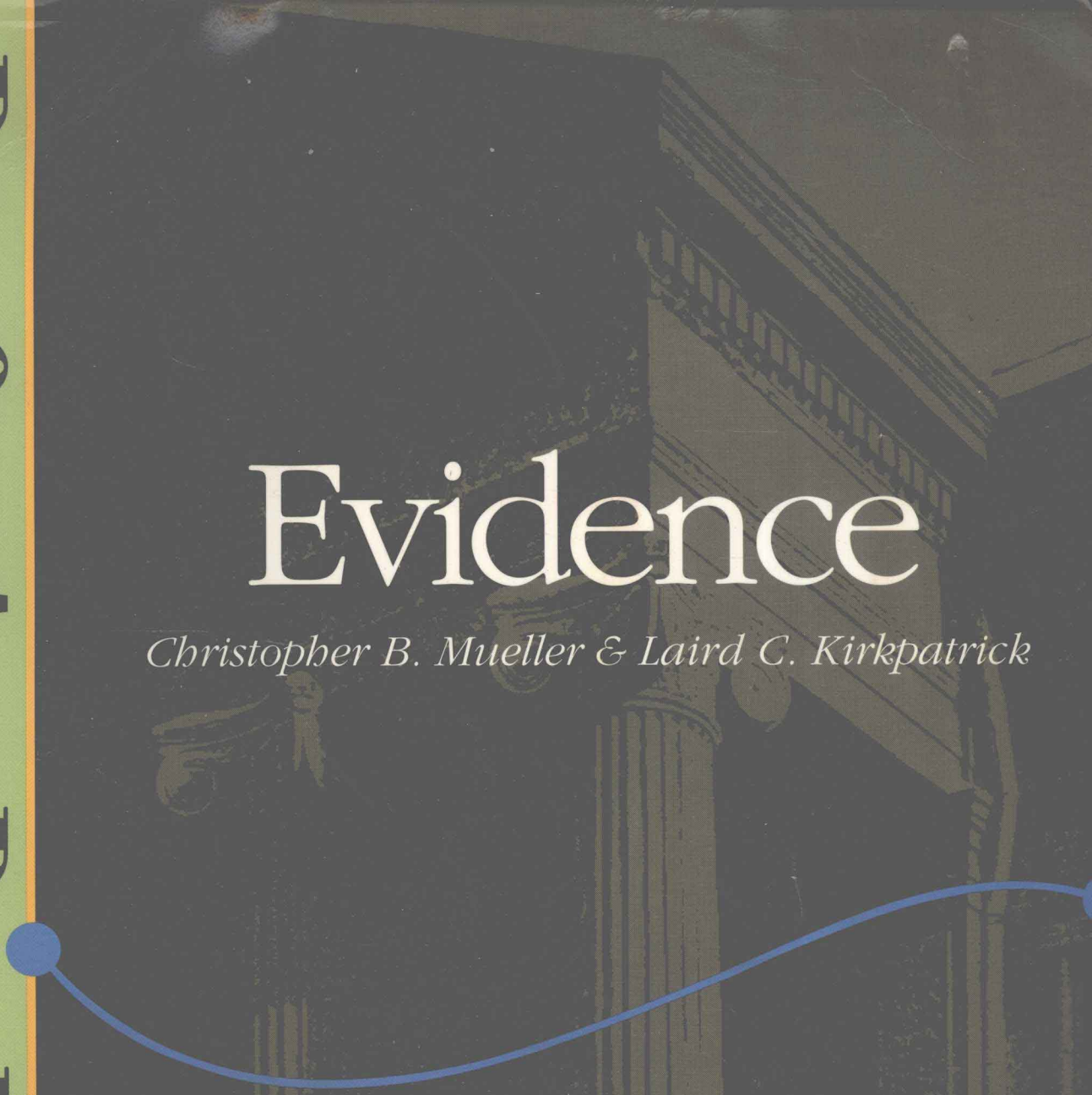
ROADMAP

Evidence

Christopher B. Mueller & Laird C. Kirkpatrick



LAW COURSE OUTLINES

Evidence

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CASEBOOK CORRELATION

Aspen RoadMap	Green, Nesson, **Problems, Cases, and Materials on Evidence** (2d ed. 1994)	Mueller, Kirkpatrick, **Evidence Under the Rules** (3d ed. 1996)	Waltz, Park, **Cases and Materials on Evidence** (8th ed. 1995)	Weinstein, Mansfield, Abrams, Berger, **Cases and Materials on Evidence** (9th ed. 1997)
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RESOURCES FOR STUDYING EVIDENCE

Single-Volume Treatises

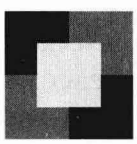
G. Lilly, *An Introduction to the Law of Evidence,* 3d ed.
M. Graham, *Handbook of Federal Evidence,* 4th ed.
McCormick on Evidence, 4th ed.
C. Mueller & L. Kirkpatrick, *Evidence* (Student Edition)
C. Mueller & L. Kirkpatrick, *Modern Evidence* (Practitioner's Edition)
S. Saltzburg, M. Martin, & D. Capra, *Federal Rules of Evidence Manual,* 6th ed.,

Multi-Volume Treatises

C. Mueller & L. Kirkpatrick, *Federal Evidence,* 2nd ed., 5 vols.
J. Weinstein & M. Berber, *Weinstein's Evidence,* 8 vols
C. Wright, K. Graham, & V. Gold, *Federal Practice and Procedure,* vols 21-28

CAPSULE SUMMARY

This Capsule Summary is intended for review at the end of the semester. Reading it is not a substitute for mastering the material in the main outline. Numbers in brackets refer to the sections in the main outline where the topic is discussed.



PRELIMINARY MATTERS

A. PRELIMINARY MATTERS

Although evidence law originally developed out of appellate review of trial court rulings, the rules of evidence have now been codified in most jurisdictions. Evidence law has multiple purposes, including regulating juries, furthering accurate fact-finding, controlling the scope and duration of trials, favoring or disfavoring certain litigants or claims, protecting private relationships, furthering substantive policies unrelated to the litigation, and insuring a perception of fairness about the trial process. **[See Ch. 1, Sec. A]**

1. Codification

The predominant evidence law in the United States is set forth in the Federal Rules of Evidence, which were promulgated by the Supreme Court in 1972 and ultimately enacted by Congress in 1975. Approximately three fourths of the states have now adopted evidence codes modeled after the Federal Rules of Evidence. **[See Ch. 1, Sec. B]**

2. Proceedings Governed by the Federal Rules of Evidence

The FRE apply to both civil and criminal proceedings, subject to a very limited number of exceptions. The FRE do not apply to grand jury proceed-

ings, preliminary hearings, bail release hearings, sentencing or revocation hearings, the issuance of search or arrest warrants, and extradition proceedings. **[See Ch. 1, Sec. C]**

3. Preliminary Questions

Sometimes "minitrials" are necessary to resolve preliminary questions affecting the admissibility of evidence. For example, before certain categories of hearsay are admissible the person making the out-of-court statement must be shown to be unavailable. The judge must resolve in a hearing under FRE 104(a) whether the person is unavailable before admitting the hearsay statement. For some preliminary questions, the judge plays only a screening role and decides whether there is evidence **sufficient to support a jury finding** of the preliminary fact that is necessary to make the evidence relevant. **[See Ch. 1, Sec. E]**

4. Making a Record

In order to preserve an erroneous evidentiary ruling for purposes of appeal, the party claming error must make a proper record. In the case of erroneous admission of evidence, a proper objection must have been made that is timely and states a specific and correct ground for the objection. In the case of erroneous exclusion of evidence, a proper offer of proof must have been made. This means putting into the record (outside the presence of the jury) a statement as to the nature of the excluded evidence (or the actual testimony itself) so that an appellate court can determine whether its exclusion was prejudicial. If a proper objection or offer of proof is not made, any error in the ruling of the trial judge is normally considered to be waived. **[See Ch. 1, Sec. F]**

5. Limited Admissibility

Often evidence is admissible for some purposes and not others, or against some parties but not others. In such cases, the proponent can be required to specify the purpose for which it is being offered. Where evidence is inadmissible for some purposes, the opponent upon request is entitled to a limiting instruction under FRE 105 whereby the court "restrict[s] the evidence to its proper scope and instruct[s] the jury accordingly." **[See Ch. 1, Sec. G]**

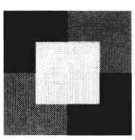
6. Rule of Completeness

When a party offers part of a writing or recorded statement, FRE 106 allows an adverse party to require the introduction at that time of any other part or any other writing or recorded statement which "ought in fairness" to be considered at the same time. This rule prevents a party from unfairly presenting part of a writing taken out of context. **[See Ch. 1, Sec. H]**

7. Appellate Review

Evidentiary error will be a basis for reversal on appeal only if it is shown to affect the substantial rights of the appellant. Error that does affect the

substantial rights of a party is known as prejudicial or reversible error. Error not affecting the substantial rights of a party is considered harmless error. Courts may affirm where evidence was excluded on the wrong ground provided it was excludable on some other ground or where it was admitted on the wrong theory provided it was admissible on some other theory. Courts may also refuse to reverse where the error was "invited" by the appellant, or where the appellant "opened the door" to such evidence by offering inadmissible evidence to which the challenged evidence is a fair response. Interlocutory appeals of evidentiary rulings are generally not allowed. **[See Ch. 1, Sec. I]**



RELEVANCY

B. RELEVANCY

The most fundamental principle of evidence law is that evidence must be relevant to be admissible.

1. Logical Relevance

Under FRE 401, relevance means any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. Thus evidence having only the slightest probative value qualifies. The relevance of evidence can only be determined in context. It depends on the issues raised by the pleadings, the applicable substantive law, and what other evidence has been introduced. FRE 401 merges the concept of materiality with the definition of relevance by providing that the fact to be proved must be "of consequence" to the determination of the act, which essentially means the same thing as "material." **[See Ch. 2, Sec. B]**

2. Judge Decides Most Relevancy Questions

Most of the time the judge alone decides the **relevancy** of evidence. Only if the judge determines it to be relevant does the jury get to hear it. During deliberations the jury decides what **weight** if any, to give to the evidence. **[See Ch. 2, Sec. D1]**

3. Jury Decides Preliminary Questions Affecting Relevancy

Sometimes the relevancy of evidence depends on a preliminary question of fact, such as whether a document is genuine or was written by a party. If the document is a forgery or was written by someone else, it may have no relevance in the case. Such cases are said to involve issues of **conditional relevancy.** Here the judge does not resolve the preliminary question

(genuineness of the document), but decides only whether there is **sufficient** evidence to support a jury finding of genuineness. If there is, the judge must submit the document to the jury to make the ultimate determination of whether it is genuine. If the jury finds the document to be a forgery, it is instructed to disregard it as irrelevant. If the jury finds the document to be genuine (hence relevant), the jury can properly consider it and give the document whatever weight it deems appropriate. **[See Ch. 2, Sec. D2]**

4. "Connecting Up"

The judge has discretion to admit the document before evidence has been offered on the preliminary question (e.g., genuineness) "subject to" later introduction of such evidence, a process referred to as "connecting up." If the proponent later reneges on his promise to offer sufficient evidence to establish genuineness, then the opposing party can move to have the document removed from evidence (and in cases of extreme prejudice ask for a mistrial). **[See Ch. 2, Sec. D2c]**

5. Pragmatic Relevance

To offset the broad definition of relevance in FRE 401, FRE 403 grants trial judges discretion to exclude relevant evidence where its probative value is substantially outweighed by the dangers of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Appellate courts give substantial deference to rulings of trial judges under FRE 403 and generally reverse only for clear abuse of discretion. Since credibility determinations are for the jury, evidence may not be excluded under FRE 403 merely because the judge does not find the evidence to be credible. **[See Ch. 2, Secs. F & G]**

THE DEFINITION OF HEARSAY

C. THE DEFINITION OF HEARSAY

1. The Hearsay Doctrine

One of the most important exclusionary doctrines is the rule against hearsay. Under FRE 802, hearsay is inadmissible except as otherwise provided by rule or statute. FRE 803 contains 24 exceptions to the hearsay rule that apply regardless whether the declarant is unavailable, and FRE 804 lists five more that apply where the declarant is shown to be unavailable. In addition, FRE 801(d) lists eight types of out-of-court statements that are

simply **defined** as "not hearsay" (even though they otherwise fit the definition of hearsay), and hence are not subject to exclusion by the hearsay doctrine.

a. **Hearsay defined.** Under FRE 801(a) and (c), hearsay is defined as an out-of-court verbal or nonverbal assertion offered to prove the truth of the matter asserted. **[See Ch. 3, Sec. A]**

b. **A narrower definition.** Some authorities define hearsay as an assertion by an **out-of-court declarant** offered to prove the matter asserted. This definition is narrower than the federal definition because it does not classify statements as hearsay, even if made out-of-court, if the declarant is in court subject to cross-examination.

c. **A broader definition.** Some authorities define hearsay as evidence of words or conduct outside of court, assertive or nonassertive, offered to prove the truth of the facts stated or implied therein, or that the declarant believed them to be true. This definition is broader than the federal definition because it classifies nonassertive conduct that demonstrates the actor's belief as hearsay.

2. Rationale for Rule Against Hearsay

There are several traditional policy justifications for the rule against hearsay. Perhaps most importantly, the rule protects the right of cross-examination. To the extent that the hearsay rule forces or encourages live testimony, it adds the safeguard of an oath to statements by a witness and allows the jury to see and assess the witness's demeanor. In criminal cases, the hearsay doctrine has constitutional underpinnings. The confrontation clause of the Sixth Amendment guarantees criminal defendants the right to confront the witnesses against them, which includes the right of cross-examination. **[See Ch. 3, Sec. B]**

3. Hearsay Dangers

There are four testimonial dangers connected with all testimony: **perception, memory, narration, and veracity.** The witness may have misperceived the event, misremembered her perceptions narrated them to the fact-finder in an ambiguous or inaccurate way, or simply been untruthful. When testimony is presented by a live witness, these dangers can be tested and explored by cross-examination. When hearsay is introduced, these dangers become much more serious because the hearsay declarant is normally not present to cross-examine. Thus they are often described as the "hearsay dangers." **[See Ch. 3, Sec. C]**

4. Hearsay v. Personal Knowledge

An objection based on hearsay may overlap with an objection based on lack of personal knowledge under FRE 602. A witness who did not perceive

an event and only heard about it from others lacks personal knowledge. If the witness does not quote the statements of others, often the most appropriate objection is lack of personal knowledge. If the witness does quote the statements, the most appropriate objection is hearsay. Often it is proper to make **both** a hearsay and lack of personal knowledge objection to the same testimony. **[See Ch. 3, C5]**

5. Verbal Expressions as Hearsay

A verbal expression is hearsay if it contains an assertion and is offered to prove the truth of that assertion. Most verbal expressions contain an assertion, regardless of their grammatical form, and often contain more than one assertion. Assertions are not limited to declarative sentences; even requests, questions, and commands can contain assertions. Whether something is an assertion depends on the intent of the maker. Under the FRE, a verbal assertion is any **intentional** expression or communication of ideas or information using words. Some verbal expressions, such as saying "hello" or singing a song, are normally not intended by the declarant to make assertions, hence are not hearsay. **[See Ch. 3, Sec. D1]**

6. Conduct as Hearsay

a. Assertive conduct. Out-of-court conduct **that is intended to be assertive** is hearsay if offered to prove its truth (although like verbal hearsay it can sometimes be admitted under an exception). Assertive conduct, such as pointing or nodding one's head to signal agreement, is simply a communicative substitute for words. **[See Ch. 3, Sec. D2]**

b. Nonassertive conduct. Nonassertive conduct is conduct that was not intended by the actor to make an assertion. Sometimes evidence of such conduct is offered to support a two-step inference that (1) since the actor engaged in certain conduct (putting up an umbrella) he must have had a certain belief (that it was raining); (2) since he had the belief, the fact believed (it was raining) must be true. When nonassertive conduct is offered for this purpose (to prove what the actor believed and the truth of that belief), hearsay dangers arise. The actor may have misperceived the event, or misremembered it. Or his behavior may be an ambiguous or misleading indicator of his actual belief. Apparently because of these parallels to the hearsay risks, the leading common law case of *Wright v. Doe d. Tatham* held that nonassertive conduct is hearsay when offered to support this two-step inference. The Federal Rules and modern evidence codes take the opposite view: nonassertive conduct is **not** hearsay, because there is less danger of inaccuracy (and at least no danger of lying) if the actor did not **intend** to make an assertion. **[See Ch. 3, Sec. D3]**

c. Distinguishing assertive conduct from nonassertive conduct. FRE 801 requires attorneys and courts to distinguish between assertive and