



Evidence: The Basics

Prof. Ted L. Field



November 20, 2019

Agenda

- › Introduction
- › Relevance
- › Witnesses
- › Hearsay
- › Q & A

Introduction

TEX. R. EVID. 102

Rule 102. Purpose

These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

Overview of the Texas Rules of Evidence

- › Rules 101-107: General Provisions
- › Rules 201-204: Judicial Notice
- › Rules 401-412: Relevance and its Limits
- › Rules 501-513: Privileges
- › Rules 601-615: Witnesses
- › Rules 701-706: Expert Testimony
- › Rules 801-806: Hearsay
- › Rules 901-903: Authentication and Identification
- › Rules 1001-1009: Contents of Writings, Recordings, and Photographs

Objections

- › Opposing party **MUST object** to the improper introduction of evidence
- › Judge then rules:
 - **SUSTAINS** the objection
 - › Judge **AGREES** with the objection
 - › The evidence **COMES IN**
 - **OVERRULES** the objection
 - › Judge **DISAGREES** with the objection
 - › The evidence **STAYS OUT**

Relevance

TEX. R. EVID. 402

Rule 402. General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States or Texas Constitution;
- a statute;
- these rules; or
- other rules prescribed under statutory authority.

Irrelevant evidence is not admissible.

TEX. R. EVID. 401

Rule 401. Test for Relevant Evidence

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

Witnesses

Order of Proceedings

- › Prosecution/Plaintiff goes first (“case in chief”)
- › Defendant follows (“case in chief”)
- › Prosecution/Plaintiff follows up (“rebuttal”)

- › NOTE: More possible in discretion of judge

Leading vs. Non-Leading Questions — Red light, green light...

- › What color was the light?
- › The light was red, wasn't it?



Leading Questions

- › What is a **leading question** as opposed to an **open-ended question** ?
 - A leading question **SUGGESTS THE ANSWER** in it, an open-ended question does not

Witness Examination

- › **Direct Examination**
 - Normally must ask open -ended (i.e., non-leading) **questions**
- › **Cross-Examination**
 - SCOPE: LIMITED to
 - › Subject matter of direct examination ~~–AND–~~
 - › Issues of credibility
 - Can (and should) ask leading questions
- › **Redirect Examination**
 - SCOPE: LIMITED to subject matter of cross-examination
 - Open-ended questions
- › **NOTE:** More examination possible in discretion of judge

TEX. R. EVID. 602

Rule 602. Need for Personal Knowledge

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

TEX. R. EVID. 603

Rule 603. Oath or Affirmation to Testify Truthfully

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

Hearsay

Hearsay Overview

- › Definition of Hearsay —Rule 801(a)–(d)
- › Exclusions—Rule 801(e)
- › Exceptions—Rules 803 & 804

Hearsay Analysis: Overview

- › Is the statement hearsay?
 - Does the statement meet the definition of hearsay (OCS/TMA)? → Rule 801(a)–(d)
 - Even if the statement meets the definition of hearsay (OCS/ TMA), is it nonetheless NOT hearsay because it is covered by an exclusion? → Rule 801(e)
- › If the statement IS hearsay (OCS/ TMA, no exclusion), does an exception apply? → Rules 803 & 804

TEX. R. EVID. 802

Rule 802. The Rule Against Hearsay

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Inadmissible hearsay admitted without objection may not be denied probative value merely because it is hearsay.

TEX. R. EVID. 801(d)

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

(d) Hearsay. “Hearsay” means a statement that:

- (1) the declarant does not make while testifying at the current trial or hearing; and
- (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

OCS/TMA

TEX. R. EVID. 801(a)–(c)

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

(a) Statement. “Statement” means a person’s oral or written verbal expression, or nonverbal conduct that a person intended as a substitute for verbal expression.

(b) Declarant. “Declarant” means the person who made the statement.

(c) Matter Asserted. “Matter asserted” means:

- (1) any matter a declarant explicitly asserts; and
- (2) any matter implied by a statement, if the probative value of the statement as offered flows from the declarant’s belief about the matter.

In-Court Testimony



- › Gary testifies IN COURT:
 - “I saw the defendant steal the money.”

Out-of-Court Testimony



- › Mary testifies IN COURT:
 - “Gary told me that he saw the defendant steal the money.”

TEX. R. EVID. 801(d)

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

(d) Hearsay. “Hearsay” means a statement that:

- (1) the declarant does not make while testifying at the current trial or hearing; and
- (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

OCS/TMA

TEX. R. EVID. 801(e)

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

* * *

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

* * *

TEX. R. EVID. 801(e)(2)(A): “Admission by a Party Opponent”

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

* * *

(2) An Opposing Party’s Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity * * *

Hearsay Exceptions

- › Rules 803 & 804
 - Rule 804: Declarant must be unavailable as defined by Rule 804(a)
 - Rule 803: Does NOT matter whether declarant is unavailable
- › For an exception to apply to a statement, the statement must meet the requirements of the exception as given in the rule

Commonly Used Hearsay Exceptions:

Rule 803 (unavailability of declarant doesn't matter)

- › Rule 803(1): Present-Sense Impression
- › Rule 803(2): Excited Utterance
- › Rule 803(3): Then-Existing Mental, Emotional, or Physical Condition
- › Rule 803(4): Statement Made for Medical Diagnosis or Treatment
- › Rule 803(6): Records of a Regularly Conducted Activity (a.k.a. "Business Records" exception)

Commonly Used Hearsay Exceptions:

Rule 804 (declarant MUST be unavailable)

- › Rule 804(b)(1): Former Testimony
- › Rule 804(b)(2): Dying Declaration

Questions?



Contact Information

Prof. Ted L. Field

tfield@stcl.edu



South Texas
COLLEGE OF LAW
— HOUSTON —

PRIVATE AND INDEPENDENT SINCE 1923