

# Chapter 7: Foundations of Evidence & Procedure

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## Chapter Outline:

- ✓ § 7.1 The Facts and the Law
- ✓ § 7.2 Introduction to Evidence
- ✓ § 7.3 Evidence and Procedure
- ✓ § 7.4 Court Rules
- ✓ § 7.5 Hearsay
- ✓ § 7.6 Privileges

### § 7.1 THE FACTS AND THE LAW

Two elements make up the fabric of litigation: Facts and law. Ultimately, the court will decide how the law applies to the facts. The attorney and paralegal must try to anticipate the relevant legal issues and persuade the court through research and subsequent legal arguments. Legal research will aid a lawyer in anticipating what law could apply to the facts. We will discuss legal research extensively in Volume II. Before the applicable law can be researched, the relevant facts (to which the law will eventually apply) must be ascertained. When we are talking about facts, we are talking about evidence. Because when facts are presented at court in support of a client's position, those facts become evidence. Evidence is information that tends to prove or disprove a fact in question. Even after finding evidence, many questions must be answered before trial. How much weight will a given piece of evidence carry? What is the difference between direct and circumstantial evidence? Which evidence would be admissible? All of these questions involve a very important aspect of the law: procedure. Evidence and procedure are close relations.

There are very specific procedures for civil cases, criminal cases, and even subject matter cases, such as bankruptcy, domestic relations, and probate. A paralegal with a foundational understanding of evidence, and evidentiary procedure, will be a more valuable employee.

## **§ 7.2 INTRODUCTION TO EVIDENCE**

Evidence is that which tends to prove or disprove a fact in issue. Not all evidence is admissible. As an investigator, however, do not concern yourself with admissibility. Your job is to find evidence. Let the lawyer worry about admissibility.

For almost every piece of evidence the following question will be asked: Is the evidence *direct* or *circumstantial*? Think of these two types of evidence together. Both are valid types of evidence and, assuming the evidence is admissible, may be presented to, and considered by, a jury or judge.

*direct evidence*

evidence (generally from personal observation) that tends to establish a fact without the need of an inference

*circumstantial evidence*

evidence of one fact requiring an inference to establish another fact

Evidence is also either *oral* or *physical*. Typically, if the evidence can be touched, it is physical. If the evidence involves testimony under oath, it is oral.

*physical evidence*

evidence that can be touched; also called *tangible* or *demonstrative* evidence

*oral evidence*

evidence given verbally; also called *testimonial* evidence

A single piece of evidence can be both *direct* and *circumstantial*. This may sound confusing at first, but it is really quite simple. It depends on the perspective of the question being asked. In other words, a single piece of evidence can be *direct* as to one question, and *circumstantial* as to another.

*Example*

Your client, Randy, has been charged with robbing a bank. There is a photograph taken by a surveillance camera that shows him entering the bank, walking toward a teller named Melissa. He displayed no gun or note.

As to the question, "Was Randy at the bank on the day of the robbery?"

- *The picture would be direct evidence that Randy was at the bank.*

As to the question, "Did Randy rob the bank?"

- *The picture would be circumstantial evidence that he robbed the bank.*

The picture itself would also be considered *physical evidence*, and the testimony of the teller, Melissa, identifying the man in the picture as Randy, would be considered *oral evidence*.

Thus, as mentioned above, a single item can be multiple kinds of evidence, depending on the perspective of the question being asked.

**Exercise § 7.2 | Direct or Circumstantial?**

1. Phil is charged with robbery. A witness at the scene wants to testify that Phil was in the store on the day in question. As it relates to the robbery, what kind of evidence would the witness' testimony be?

- direct       circumstantial

2. Carol witnessed a car accident. She was stopped at a red light when a blue car ran the same light and collided with a bus. What kind of evidence about the accident would Carol's testimony be?

- direct       circumstantial

3. Ella is in trouble. Her fingerprints were discovered on the handle of a kitchen knife found in the back of her boyfriend. She claims innocence. What kind of evidence are the fingerprints as to the murder?

- direct       circumstantial

4. Steve is a bricklayer who is being sued for using substandard materials in his work. Last week, a house on which he was working collapsed. A subsequent investigation determined that the mortar used in the house was of sub-standard quality. What kind of evidence would the mortar report be in terms of the question of sub-standard materials?

- direct                       circumstantial

5. In a rape case, semen from your client, David, was found inside the vagina of the alleged victim. As to the rape, what kind of evidence would the semen be?

- direct                       circumstantial

### **§ 7.3 EVIDENCE AND PROCEDURE**

When an attorney discusses procedure in relation to litigation, it is almost certain that the attorney is talking about court rules.

Courts rely on procedure. Evidence must be presented in a procedurally-correct manner and must not violate court rules. Documents must be created in a specific manner, filed within a specific amount of time, and responded to appropriately. The procedures that litigants are expected to follow are found in the *Rules of Court*. Every court has local rules, as well as general rules for the jurisdiction covered by that court. Court rules are usually very similar, varying only in slight, but highly pertinent, ways. There are many kinds of rules.

#### *local rules*

All courts, from the highest to the lowest, have procedures that must be followed. The term "local" does not mean "lower" or "lesser." It means rules for that specific court (in addition to any other rules that may apply). For example, if a civil matter is in a state court, that state's *Rules of Civil Procedures* apply. Those rules dictate, among other things, how long response times for pleadings and motions are, general discovery rules, and requirements for every stage of the trial.

Local rules for that specific court may apply as well. Those local rules are much shorter than the state rules of procedure and may deal with items more specific to that court, such as a requirement that filings must be made prior to 4:30 pm, whether that court accepts electronic filings, and so forth.

As a general rule, local courts are allowed to broaden rights of the parties but may not further restrict the rights of parties. For example, if the state *Rules of Civil Procedure* allow a maximum of forty interrogatories to be sent to opposing parties, the local court rules may expand that to more (such as fifty), but they may not lessen the amount. If the state *Rules of Civil Procedure* allow twenty days to respond to a summons, the local rules may expand the amount of time, but may not lessen it.

#### *state rules*

Statewide court rules supersede local court rules when there is a conflict. These rules are the basic procedural guidelines for trials. There are separate rules for civil trials and criminal trials. Typically those rules are called the *Rules of Civil Procedure*, and the *Rules of Criminal Procedure*. Most states publish both civil and criminal rules in their own publications. However, a few states publish the civil rules in their own publications, but the criminal rules are statutory, meaning that they are part of state statutes. For a paralegal the practical result is that, instead of citing a court rule (i.e. Fla. R. Crim. P. 3.850), the citation would be to a statute (N.R.S. §169.015). (As we will see later, a citation is a legal address.) Finally, some states publish the cases in the statutes, but still assign Rule numbers instead of statutory section numbers. For instance, Title 29 of the Colorado Revised Statutes contain the *Colorado Rules of Criminal Procedure*. The citation, however, is not to the statutes, but instead has been assigned a rule number: Crim. P. 60.

#### *federal rules*

The *Federal Rules of Civil Procedure* (Fed. R. Civ. P. or F.R.C.P.) and the *Federal Rules of Criminal Procedure* (Fed. R. Crim. P.) are the rules for trials in federal trial courts. Also, every federal court has its own local rules.

#### *federal appellate rules*

The *Federal Rules of Appellate Procedure* (Fed. R. App. P.) provides the requirements for appeals in the federal court system.

#### *subject matter rules*

Certain courts of "limited jurisdiction," such as bankruptcy courts and courts of military justice, have rules specific to the procedures in those courts. Many jurisdictions have subject matter rules, such as *rules of ethics* and *arbitration rules*.

In addition to the law library, *Westlaw*, and *Lexis*, all court rules can be found online with a simple *Google* search: *state (court rules) your state*. Keep in mind that court rules are the foundation of evidentiary procedure. For evidence to be admitted, the rules must be followed.

## § 7.4 COURT RULES

A paralegal must be able to research quickly and accurately the rules of court for the jurisdiction in which an action is being litigated. In the law library, the court rules are usually found alongside the corresponding state statutes. There are usually several sets of rules within a single volume (often soft bound). Begin your research in the rules index.

If you prefer to research the following questions online you may use *Lexis*, *Westlaw*, or conduct a *Google* search for your court rules. [Sample Google search: *your state* rules of civil procedure] If you use online rules in a standard web site, you will need to be flexible. The index that would typically be used in a law library set of the rules will most likely not exist online. Thus, you will need to use whatever search mechanism the site provides.

### Exercise § 7.4 | Rules of Court

Locate the *Rules of Civil Procedure* for your state and provide the rule that applies to the following questions and a brief answer to the question.

1. *How is a civil action commenced?*

Rule:

Answer:

2. *How long does one have to respond to requests for admissions?*

Rule:

Answer:

3. *What happens if one fails to respond within the designated time to the above requests for admissions?*

Rule:

Answer:

4. *How long does a defendant have to answer a complaint?*

Rule:

Answer:

5. *May a deposition be videotaped? If yes, is a written transcript required?*

Rule:

Answer:

6. Do the rules require that a motion for summary judgment be accompanied by supporting affidavits?

Rule:

Answer:

7. May damages requested in a counterclaim exceed damages claimed in the complaint?

Rule:

Answer:

8. Do the rules set time limits for filing a proof of service once personal service has been effectuated? If yes, what are those time limits?

Rule:

Answer:

9. What may happen if a party fails to comply with an order compelling discovery?

Rule:

Answer:

10. How many affirmative defenses are allowed, according to the rules?

Rule:

Answer:

## § 7.5 HEARSAY

Court rules and other forms of enacted law, such as statutes, can be complex and confusing. There is a skill, however, that makes using and applying rules much more efficient and accurate. We will refer to this skill as *elementization*.

*"Elementization" is discussed more thoroughly in Volume II of the Essential Skills Manuals.*

Elementization means breaking a rule into elements, then applying each element individually to a legal issue. There is no better rule with which to practice this technique than the *Hearsay Rule*, one of the most confusing rules in law.

All state and federal courts recognize some form of the hearsay rule. Hearsay is generally defined as:

*In-court testimony of an out-of-court statement made by someone other than the in-court witness, offered to establish the truth of matters asserted. In establishing hearsay, the question of credibility lies with the out-of-court asserter.*

An example of hearsay might be: John hears Anna say, "I'm going to shoot Kate." The next day, Kate is found dead and Anna is charged with the murder. The prosecution wants John to testify about Anna's statement. The testimony would be hearsay.

The hearsay rule exists because testimony from one person about what another person said is inherently unreliable. Even if the witness is telling the truth about the out-of-court statement (which may be an issue), there is still the possibility that the statement was taken out of context, the tone of the statement was misinterpreted, the statement was misunderstood, etc. The general rule is that hearsay should *not* be admissible, unless there is a special exception that would allow it to be admitted. For a paralegal, understanding the hearsay rule will help determine the value of statements made by witnesses or clients during interviews or the investigative process.

**Exercise § 7.5(a) | Elementization**

Using a separate sheet of paper, break the hearsay rule into individual elements.

**Exceptions to the Hearsay Rule**

If an objection is made to a question in court because the answer would constitute hearsay, the party asking the question may argue that the answer may be hearsay, but it should be admissible because it falls under an exception to the *Hearsay Rule*. There are 24 federal exceptions to the *Hearsay Rule* and each state determines for itself which exceptions will be recognized by its courts. Of the 24 exceptions, eight constitute the majority of all acceptable hearsay exceptions. They are:

1. *admissions (by a party to the action)*

Statements made by a party to the action that amount to an admission regarding the matter at court.

2. *declaration against interest*

Think of this as the same as an admission, except it's by a nonparty to the action.

3. *business entries*

Records kept in the normal course of business by the person whose job it is to keep such records are considered hearsay but are admissible under this exception. Even though the "testimony" is actually a document, think of the entry itself as a statement.



4. *dying declaration*  
A statement made by someone who believes that his own death is imminent. Some states do not consider dying declarations hearsay; therefore, no exception is needed to make the statement admissible.
5. *declaration of bodily symptoms and conditions*  
A statement made indicating a person's own bodily condition, such as "I feel great," or "My stomach hurts."
6. *declaration of state of mind*  
This is a statement regarding the knowledge and intent of the person making the statement. For instance, a person may say, "I'm so mad, I'm going to go over and beat up Joe." This exception has nothing to do with a person's sanity.
7. *declaration of present sense impression*  
A statement made immediately before or during an event. "Look at that speeding car!"
8. *excited utterance*  
A statement made immediately after an exciting event, about that event. Also referred to as *spontaneous declaration*.

**Exercise § 7.5(b) | Applying the Hearsay Rule**

Using a separate sheet of paper, break the hearsay rule into individual elements and then apply each element to the following fact patterns.

**Hearsay is:**

*In-court testimony of an out-of-court statement made by someone other than the in-court witness, offered to establish the truth of matters asserted. In establishing hearsay, the question of credibility lies with the out-of-court asserter.*

1. *Joe was walking down the street when his girlfriend Jill ran up to him and said, "Bill just tried to attack me." Bill is being tried for attempted rape and the prosecution wants Jill to testify.*

Is it hearsay?

Is it admissible?

2. *Carl has been charged with armed robbery. His attorneys wish to enter into evidence attendance records from his high school, which they claim will establish that Carl was at school the day of the robbery.*

Is it hearsay?

Is it admissible?

3. *Sue and John are divorced. During their separation, Sue asked John whether he had fixed the brakes on her car, as he had agreed. He said, "I'll do it today." The brakes failed, causing Sue to crash. Sue wants to testify to John's statement.*

Is it hearsay?

Is it admissible?

4. *Gail was at a bar one night when she overheard a conversation between two people concerning fraudulent workmen's compensation claims. A state agency wants Gail to testify at an agency hearing about what she heard.*

Is it hearsay?

Is it admissible?

5. *Harold was at a football game with Ted. During the game, Ted told Harold he had committed a series of burglaries. Ted was killed three weeks later in an accident. The police have charged Kip with the burglaries. Harold wants to testify at Kip's trial.*

Is it hearsay?

Is it admissible?

6. *Paul and Carol were walking down the street. Suddenly, Carol exclaimed, "Boy, that guy is so ugly he'd make my dog vomit!" The man she was referring to, Gilbert, is suing for mental cruelty. Gilbert's attorney wants Carol to testify.*

Is it hearsay?

Is it admissible?

7. *Ned and Nora are standing on a corner. When a plane flies over, Ned exclaims, "That plane sure is flying low." The plane eventually crashes into a house and a suit is commenced against the estate of the pilot. Nora is called to testify about the statement made by Ned.*

Is it hearsay?

Is it admissible?

8. *Rita and Frank were driving in their car when a rabbit ran out in front of the car. Frank swerved to avoid the rabbit. He ran head-on into another car and is being sued. Rita is asked to testify to the fact that Frank "jerked the steering wheel to the left."*

Is it hearsay?

Is it admissible?

9. *Eudora was talking to Felix on the phone. Suddenly, Felix cried out, "Please don't shoot me, Gladys!" Gladys has been charged with murder and the prosecutor wants to call Eudora to testify about the telephone conversation.*

Is it hearsay?

Is it admissible?

10. *Victor has been charged with murder. He needs to establish an alibi. Victor's attorneys want to enter into evidence at trial the book of reservations from a French restaurant, Chez Maggot.*

Is it hearsay?

Is it admissible?

11. *Henry was walking with Kathy on the beach when Lou grabbed Henry's beach bag and started to run. When Kathy tackled Lou, he said, "All I wanted was some money to get something to eat." Lou now claims he is innocent. The prosecution wants Kathy to testify about Lou's statement.*

Is it hearsay?

Is it admissible?

12. *Teri heard Ihabod declare, "I'm going to treat myself to a chocolate sundae!" Weight Watchers now wants Teri to recount this conversation at a meeting.*

Is it hearsay?

Is it admissible?

## § 7.6 PRIVILEGES

A privilege is the right to refuse to testify, or to prevent someone else from testifying, in court. Very few privileges are recognized by the court. Privileges are usually statutory, although many were recognized and applied by the courts or within the Constitution before being codified into statutes.

All privileges involve private communication that remains private. If the communication becomes public knowledge through no fault of the privileged parties, the privilege remains intact. If the communication was not private, or if the privileged parties disclose the communications, the privilege may be waived. Some of the recognized privileges include:

- *attorney-client privilege*

A client can refuse to testify about private communications between his attorney and himself and prevent the attorney from testifying. This privilege extends to staff working for the attorney.

- *doctor-patient privilege*

A patient can refuse to testify about private communication with her physician. The client may also prevent the doctor from testifying or releasing confidential information against the client's wishes. If a client sues for damages due to personal injuries, however, the defendant has a right to view records relevant to the litigation.
- *privilege against self-incrimination*

A person has a right, protected by the Fifth Amendment, to refuse to testify against his own interests. Once a defendant chooses to testify, however, he cannot pick and choose those questions he wants to answer.
- *governmental information*

Certain government records, such as tax returns, are privileged, except in matters regarding the fraudulent preparation of such documents.
- *clergy-penitent privilege*

Often referred to as the "priestly privilege," this privilege applies to private communication between any member of the clergy, acting in the capacity of spiritual counselor, and an individual seeking spiritual counseling.
- *spousal communications privilege*

Private communications between a husband and wife are usually privileged. The privilege does not apply to litigation between spouses, such as an assault and battery case, or to matters involving the well-being of a child.

Many people assume that privileges exist where there is no such protection. For instance, the following privileges do not exist or only exist in limited jurisdictions or legal matters:

- *parent-child privilege*
- *employer-employee privilege*
- *accountant-client privilege*

In all privileges, the communication must take place in private and remain confidential. Otherwise, the privilege is considered to be waived.

## CHAPTER 7 WRAP-UP

### WHAT YOU SHOULD KNOW...

After reading this chapter you should know the following:

- The definition of evidence
- The differences between direct and circumstantial evidence
- How to break rules into elements, and why to do it
- The concept of procedure, and how courts implement procedures
- The function of court rules and how they are best accessed

### ASSIGNMENTS

There are no assignments for this chapter.

