

## Evidence – Relevance

I. EVIDENCE: that which tends to prove or disprove a fact. Examples include all documents (i.e. reports), tangible items (i.e. photographs, weapons, fingerprints), and live witness testimony. Not all evidence is admissible.

- a) **Circumstantial evidence** – Evidence which can be used to “figure out” a situation from circumstances, although the situation is not witnessed “directly.” Example – if you go to bed and there is no snow on the ground, it is circumstantial evidence that it snowed while you were asleep. However, you did not directly witness it snowing.
- b) **Direct evidence** – Generally eyewitness testimony about an event or crime actually happening. Direct evidence may also be a videotape of an event, someone listening to an event or any evidence which captures the event “directly.” Both circumstantial and direct evidence may be admissible and can be equally important to win a case.\

II. ADMISSIBILITY: A jury may not consider evidence unless it is “admissible”, meaning it is approved by the Court. Admissible evidence does not mean the evidence is true. It simply means that there are no valid objections to keeping the evidence out. In order to be admissible, evidence must be:

- a) **Relevant** – Important to at least one issue in the case.
- b) **Reliable** – Trustworthy. For instance, a witness must have personal knowledge, a document cannot be forged, a photograph cannot be touched up or show a different accident scene, etc.
- c) **Not Unfairly Prejudicial** – Unfairly prejudicial is when the relevant value of a piece of evidence is outweighed by the prejudicial effect it may have with the jury.
- d) **Not Privileged** – That is, confidential between attorney and client or between teacher and student.

III. FOUNDATION: “Laying a foundation” means that the attorney establishes the basic reasons why an item of evidence is reliable before the evidence is admissible.

- a) **Witnesses** – Attorneys must ask witnesses who they are, who they know, where they were, and when they were there before witnesses’ other testimony is admissible.
- b) **Reports, Photographs, Weapons, Etc.** – Attorneys must establish where and when these items were produced and/or found and who produced them or found them before these items are admissible.

**\*\* Laying a Foundation will be covered more in depth during the Questioning Witnesses Class**

### IV. INTRODUCING EXHIBITS

1. All evidence will be pre-marked as exhibits.
2. Ask for permission to approach the bench. Show the presiding judge the marked exhibit. “Your honor, may I approach the bench to show you what has been marked as Exhibit No. \_\_\_?”
3. Show the exhibit to opposing counsel.
4. Ask for permission to approach the witness. Give the exhibit to the witness.
5. “I now hand you what has been marked as Exhibit No. \_\_\_ for identification.”
6. Ask the witness to identify the exhibit. “Would you identify it please?”
7. Witness answers with identification only.
8. Offer the exhibit into evidence. “Your Honor, we offer Exhibit No. \_\_\_ into evidence at this time. The authenticity of this exhibit has been stipulated.”
9. Court: “Is there an objection?” (If opposing counsel believes a proper foundation has not been laid, the attorney should be prepared to object at this time.)

10. Opposing Counsel: “No, your Honor”, or “Yes, your Honor”. If the response is “yes”, the objection will be stated on the record. Court: “Is there any response to the objection?”

11. Court: “Exhibit No. \_\_\_ is/is not admitted.”

Taken from: *The Rules of the National High School Mock Trial Competition*

**V. WITNESSES:** In order to be allowed to testify, witnesses must:

- a) **Swear to tell the truth.**
- b) **Be competent** – old enough, proper mental capacity, can speak and be understood, etc.
- c) **Have personal knowledge of events** to which they are going to testify.

**VI. IMPEACHMENT:** Making a witness’s testimony seem less believable to a jury; undermining credibility.

Four forms of impeachment include:

- a) **Sensory Perception** – Demonstrating that a witness’s eyesight, hearing or vantage point is off.
- b) **Prior Inconsistent Statement** – Demonstrating that a witness made a prior statement which is inconsistent with or contradicts his/her current testimony.
- c) **Bias, Motive, Hostility** – Demonstrating that a witness has something personal to gain by giving testimony or that a witness does not like one of the parties in the case.
- d) **Prior Bad Act** – Demonstrating that a witness participated in a prior act of dishonesty which reflects on the witness’s credibility; demonstrating the witness is a liar.

**VII. CHARACTER OF WITNESS:** What a person is like (i.e. a bully, straight “A” student)

- a) **Defendant’s Character** – Defendant’s bad character is not admissible unless the defense attorney brings in evidence of the defendant’s good character.
- b) **All Other Witnesses’ Character** – any other witnesses’ character, good or bad, is generally not admissible unless it directly proves that the witness is a liar.

## **VIII. PREDICATE FOR ADMITTING PHOTOGRAPHS**

### **Form No. 1 – Photographs, Generally**

1. I hand you State’s Exhibit Number 1 for identification. What is it?
2. Do you or do you not recognize it?
3. Does this photograph marked as State’s Exhibit Number 1 for identification fairly and accurately depict the subject matter therein? (on the date and time in question).
4. Ask question number 3 immediately above.
5. Your Honor, the State moves that State’s Exhibit Number 1 for identification be admitted into evidence.

## **IX. QUALIFICATION OF NARCOTICS PARAPHERNALIA EXPERT:**

1. Name
2. Occupation
  - a) How long?
3. Department
  - a) How long?
4. Narcotics Division
  - a) How long?
5. Have special training in field of narcotics?
6. What did training consist of (I.D. of Drugs; paraphernalia)?
7. How long attend course?
8. How many hours in course?

9. Ever participate in investigation of illegal narcotics activities?
10. How many times?
11. Ever make arrests of persons engaged in illegal narcotics activities.
12. How many times?
13. Occasion to speak with individuals engaged in illegal narcotics activities.
14. How many times?
15. Occasion to speak with these people with regard to the identification of and use of narcotics paraphernalia.
16. Ever been called upon by other members of law enforcement to examine and render opinion as to whether certain article was in fact narcotics paraphernalia.
17. How many times?
18. Occasion to be qualified as expert in Criminal Court in (\_\_\_\_\_) County in field of narcotics paraphernalia.
19. How many times?
20. Did you actually testify?

**Optional:**

1. Occasion to conduct courses in identification of narcotics, narcotic-type drugs and narcotic paraphernalia.
2. Pursuant to arrests of persons for illegal narcotics activities have occasion to seize narcotics, narcotic type drugs and narcotics paraphernalia.
3. How many times?
4. Ever participate in execution of S/W pertaining to narcotics or narcotic-type drugs?
5. How many times?
6. During occasion of arrests and execution of S/W have opportunity to view and familiarize self with narcotics, narcotic-type drugs and paraphernalia used by those engaged in illegal narcotics use.
7. How many times?
8. Occasion to conduct tests to determine narcotic content of substances.
9. What test used?
10. How many times?
11. How much training in conducting such test?

**X. PREDICATE QUESTIONS FOR REFRESHING MEMORY (PRESENT RECOLLECTION REFRESHED OR PAST RECOLLECTION RECORDED):**

1. Can you recall the individual items you packed? (No.)
2. Do you know of anything that will refresh your recollections? (Shipping Ticket.)
3. I will show you State's Exhibit \_\_\_\_\_ and ask you if that is the shipping ticket you have referred to.
4. Who prepared the ticket? (The witness).
5. Was it written up by you?
6. Was it true and correct at the time you wrote it?
7. Was it made in the ordinary course of business?
8. And at the time you shipped these items?
9. Would a reference to the shipping ticket help you to refresh your recollection?
10. Please read State's Exhibit \_\_\_\_\_ and tell me whether it refreshes your independent recollection of the items you shipped.
- a) If the document does refresh the present recollection of the witness, ask the next question.
11. What do you recall?

a) IF the present recollection of the witness is not refreshed by the exhibit, the exhibit must be introduced into evidence after the witness has testified:

1. The exhibit was true and correct when made;
  2. The exhibit was made in the ordinary course of business; and
  3. The exhibit was prepared at the time of the transaction it records.
12. Please read the contents of the exhibit (or the pertinent part thereof) to the jury.
- a) Once the exhibit is admitted it becomes the proof itself of the past recollection recorded.

#### **XI. TRIAL – IMPEACHMENT WITH PRIOR INCONSISTENT UNSWORN STATEMENT:**

1. Mr. (witness), do you recall talking with/giving Mr. \_\_\_\_\_ a statement on (time, date, place).
2. The answers/statements you gave to Mr. \_\_\_\_\_ on (time, date, place) were all true, were they not?
3. Do you recall in your statement (either oral or in writing) that Mr. \_\_\_\_\_ asked you the following (state question) or do you recall writing the following words (state what witness wrote)?  
In the event it was an oral question, then do you recall giving Mr. \_\_\_\_\_ the following answer (state answer)?
4. Mr. (witness), isn't your response today different than what it was on (time, date, place)?
5. Which statement (oral or written), Mr. (witness) is true, that one you've given today on direct examination or the one you gave on (date)?

**XII. HEARSAY:** A statement, either verbal or written, made outside the courtroom, which a witness or attorney refers to in order to prove that the statement is true. The out-of-court statement may have been made by another person as in example A or even by the witness himself at some earlier time as in example B.

#### **Example A**

Attorney: "Wally Witness, did you see Steve steal the watch?"

Wally: "Brenda told me she saw Steve steal it."

(LESSON: Wally's testimony is inadmissible and you must call Brenda or another reliable witness to the stand.)

#### **Example B**

Attorney: "Wally Witness, does this letter that you wrote two weeks ago explain everything that you want to say in court today?"

Wally: "Yes, everything that I witnessed is in that letter."

(LESSON: The letter is inadmissible. Wally must explain live in Court what he witnessed. If Wally genuinely does not remember a fact, he may be shown the letter by an attorney to "refresh" his memory. However, the actual letter is still not "admitted" to the jury.)

#### **XIII. HEARSAY EXCEPTIONS**

- a) **Police radio transmissions** – for purposes of the TBP program.
- b) **Work of collective officers** – for purposes of the TBP program.
- c) **Do not need all police officers present in court**, which were involved in evidence collection and/or narcotics identification – for purposes of the TBP program.
- d) **Prior inconsistent statement** – if you are trying to "impeach" a witness, a prior verbal or written statement which contradicts the witness's current testimony is generally admissible
- e) **Admissions** – A statement made by a party to the action that amounts to an admission regarding the matter at court.
- f) **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.

- g) **Declaration of Bodily Symptoms/Conditions** – A statement made indicating a person’s own bodily condition such as “I feel great,” or “My stomach hurts.”
- h) **Declaration of State of Mind** – A statement in regard to the knowledge and intent of the person who is making the statement. For example, a person who says, “I am so mad. I am going to go over and beat up Joe.” This has nothing to do with sanity.
- i) **Declaration of Present Sense of Impression** – A statement made immediately before or during an event. For example, a person exclaiming, “Look at that car going so fast!”.
- j) **Other exceptions** – there are numerous other exceptions to the hearsay rule which you will probably not encounter in this program. However, if you believe that you have an out-of-court statement (written or verbal), which is reliable and should be admitted to the jury, you should discuss this matter with your Senior Attorney.

## Introducing Exhibits

What can be an exhibit? - Anything other than testimony, which can be perceived by the senses and be presented in the courtroom **Ex. Photographs, videotapes, charts, maps (only limited to relevance of the case and YOUR imagination)**

### Why use exhibits?

1. They become the center of attention
2. They make an immediate lasting impression
3. They are more reliable than mere testimony

### Procedure

- Pre-mark the exhibit for identification
- Show to opposing counsel
- Ask for permission to approach
- Show it to witness
- Lay the foundation (competence, authentication, relevance)
- Move for the admission of the exhibit into evidence
- Publish the exhibit to the jury

Exhibits are used to convey the theory of the case

1. Do not use too many or they become repetitive and boring

### Foundation:

Every exhibit must meet three basic requirements

1. Qualifying witness must be competent
2. Must have some firsthand knowledge about the case
3. Either has seen the exhibit before or knows the facts underlying the exhibit

### Relevance

Every exhibit must be relevant

1. The exhibit must be relevant to the issues in the case. A pretty picture is not good enough. Ask yourself is it probative of an issue in the case and make sure you can explain to the court why it is relevant

Real Evidence: (actual tangible object involved)

- Admissible if it is what it purports to be
- The witness must testify that the exhibit is the actual one and NOT a substitute and is in the same state as found at time of the crime.
- Chain of custody

If an object has

1. No identifying markings
2. Is too small to mark or
3. Fungible and can't be marked, you must establish the chain of custody

Two methods of showing chain:

1. One person's continuous exclusive possession
2. Marked and secured and unopened

Demonstrative Evidence:

Not the actual exhibit but is evidence that represents or illustrates the real things.

**For example: photos, maps, diagrams, and models.**

- Basis of knowledge before: Where do you go to school? How long? If I showed you a photo could you identify it?
- Basis of knowledge after: What is this picture? How do you know it? How long have you been in school? "Will this diagram ASSIST you in your testimony?"  
"Is it a fair and accurate depiction of \_\_\_\_\_ as far as you know it? Would it assist you in providing testimony here today?" (If yes to both=Move for inclusion)
- Ask the judge w/ regards to diagrams preference of whether to mark it up first then move in, or move in then mark it up)

Admissible if:

1. Fairly and accurately represents the real thing; AND
2. Helps to explain the facts of the case

Writings:

1. Documents having legal significance
2. Must establish a foundation to avoid hearsay objections. Admissible if they are in fact executed by the person they appear to have been signed by
3. The signatures must be identified as being genuine before the writings are admissible
4. Must also deal with the best evidence rule

## **FOUNDATION AND AUTHENTICATION**

In order to present physical evidence at trial, you must first "authenticate" the evidence by having a witness identify it and verify that it is either the object in question or an accurate representation. If your opponent does not properly authenticate an item you object that there has been no foundation.

In order for a witness to testify regarding specific matters, the attorney must ask questions first that demonstrate that the witness has personal knowledge and is competent to give testimony. If your opponent does not properly lay foundation to demonstrate that the witness can provide testimony, then object that there is a lack of foundation.

Demonstrating that a witness can give relevant testimony= Foundation

Demonstrating that an object/document is relevant evidence= Authentication

## **HOW TO PROPERLY INTRODUCE PHYSICAL EVIDENCE**

Ask the following questions for each piece of evidence you intend to introduce:

1. Do you recognize this item?
2. Can you describe it to the court?
3. How are you familiar with this item?
4. Does it appear to be in the same condition as it was on the day of the incident?
5. I ask the Court to acknowledge that the witness has identified this object as \_\_\_\_\_ and that it be admitted into evidence.

\*Now you can ask the witness to testify regarding the object and what significance it has on your case.

You may also request to publish the object to the jury

Ask the following questions for each photograph you intend to introduce as evidence:

1. Do you recognize this?
2. Can you tell the Court what this is?
3. How are you familiar with this?
4. Does it accurately reflect the conditions as you remember them on the day of the incident?
5. I ask the Court to acknowledge that the witness has identified this photograph and that it be admitted into evidence.

\*Now you can ask the witness to testify regarding the significance of the photograph and publish to the jury.

\*\*\***Remember:** the person authenticating the photograph DOES NOT have to be the person who took the photograph, they just must have personal knowledge of what the picture shows in order to confirm that the picture is an accurate depiction.

\*\*\* IF your opponent has objected to **your** introduction of evidence, or questioning of a witness for lack of foundation, then, relax, take a breath, back up your thought process and ask questions such as “what, when, why, where, how” to get your foundation established.