

This outline was created for the July 2006 Oregon bar exam. The law changes over time, so use with caution. If you would like an editable version of this outline, go to www.barexammind.com/outlines.

Evidence Notes

I. Essay Tips

- a. Make as many arguments as possible for admissibility OR
- b. Raise as many objections as possible for excluding evidence
- c. In other words, coverage on the essay need to be broad but shallow

II. RELEVANCE

- a. Essay questions: talk about relevance of every item of evidence. This is the starting point of analysis
- b. Definitions:
 - i. **Logical relevance:** if evidence has *any tendency* to make the existence of any fact that is of consequence to the determination of the action *more or less probable* than it would be without the evidence
 - 1. what is relevant depends on substantive law applicable
 - ii. **Legal relevance:** if logically relevant, court still has discretion to exclude if *probative value* is *substantially outweighed by*
 - 1. unfair prejudice,
 - a. u.p. = arises most often where evidence causes an emotional reaction [NB: surprise evidence not u.p.]
 - 2. confusion, or
 - 3. waste of time [waste of time not basis for exclusion in **Oregon**]
- c. Exclusions of relevant evidence by POLICY:
 - i. *Liability insurance* is inadmissible to prove culpable conduct or ability to pay
 - 1. admissible to prove anything else that is relevant, BUT court may balance against the u.p. of the improper purpose for which the evidence might be used and exclude
 - ii. *Subsequent remedial measures or repairs* are inadmissible to prove culpable conduct.
 - 1. also extends to products liability actions (ie, subsequent redesign of product can't be used to show original design was defective)
 - 2. admissible to prove anything else
 - iii. *Settlements, offers to settle, and pleas* are inadmissible to prove liability or fault (civil) or guilt (in criminal: pleas of guilty or nolo contendere).
 - 1. excludes not only the offer/plea, but also *anything said* in the negotiation for settlement/plea.
 - 2. EXCEPTIONS:
 - a. Settlement offer admissible if claim not yet asserted (or not yet threatened, implied)
 - b. Settlement offer admissible if claim is undisputed

- iv. *Payment or offers to pay medical expenses* are inadmissible when offered to prove liability for the injuries in question.

- 1. NB: look for severable statements (see OICW p. 4)
 - 2. compare OICW pp. 4-5 #4a vs. 4b. HUGE

d. **Similar Occurrences Evidence**

- i. Similar occurrences *sometimes admissible to prove causation*
 - 1. eg, 2 people eating same food and both get food poisoning
- ii. *Prior accidents or claims usually inadmissible*
 - 1. inadmissible b/c prior accident usually tell us nothing about what caused THIS accident
 - 2. EXCEPTIONS:
 - a. Prior claims show a pattern of fraud
 - b. Prior claim shows a preexisting condition
- iii. *Previous similar acts admissible to prove intent*
 - 1. eg, all 100 other qualified women not offered jobs tends to prove gender discrimination (“pattern of conduct”)
- iv. Similar occurrence evidence *admissible to rebut a defense of impossibility*
 - 1. D must FIRST assert impossibility
- v. *Comparable sales admissible to establish value*
 - 1. similar property, sold at same time
- vi. *Habit admissible to show the person acted in accordance with the habit on the occasion in question [must happen a lot: “always”]*
 - 1. **PROBLEM:** distinguish from character evidence
 - a. **Character evidence:** tends to be generalized statement and conveys a moral judgment (eg, he is a careful driver)
 - b. **Habit evidence:** tends to be more detailed and specific as to conduct in a specific situation (eg, he always stops behind the line and uses his blinker)
- vii. *Routine business practice* is admissible to show *conduct of the entity was in conformity* with that practice on the occasion
- viii. *Industrial custom evidence* admissible to prove *standard of care*

III. CHARACTER EVIDENCE

- a. Use a 4 question approach:
 - i. What is the purpose for which the character evidence is offered? 3 possibilities:
 - 1. evidence is offered to prove character b/c *character is an issue in the case* [rare]
 - 2. evidence is offered to prove character as *circumstantial evidence of person’s conduct* on the occasion in question [often]
 - 3. evidence is offered to *impeach or support* the credibility of a witness [often]
 - ii. What method or technique is used to prove character?
 - 1. specific acts of conduct?
 - 2. opinion
 - 3. reputation
 - iii. Is it a civil or criminal case?

- iv. Does the evidence prove a pertinent character trait?
- b. Character evidence offered in **civil cases**
 - i. RULE: inadmissible to prove conduct
 - 1. EXCEPTIONS:
 - a. **FRE only**: case arises out of sex assault, prior acts of sex assault or child molestation admissible
 - b. **ORE only**: in civil assault and battery where self-defense pleaded, evidence of D's or P's violent character is admissible
 - ii. RULE: character evidence is admissible where *character itself is an issue*
 - 1. eg, defamation case where D claims P is dishonest; therefore, dishonesty is at issue
 - 2. actions: defamation (character of P); fitness for child custody (character of parent); negligent entrustment (character of entrustee)
- c. Character evidence offered in **criminal cases**
 - i. Can only be offered to prove **Defendant's** conduct
 - 1. RULE: Evidence of D's character: prosecution cannot be the first to offer such evidence,
 - a. cases of sex assault or child molestation [**FRE**]; or
 - b. where court has admitted evidence of victim's character by accused, prosecution evidence that accused has same character trait is admissible [**FRE**]
 - 2. RULE: Defense can be first to offer character evidence.
 - a. THEN, Prosecution can offer pertinent character evidence to rebut
 - 3. RULE: On direct examination, D's witnesses can testify to
 - a. reputation and opinion,
 - b. but NOT specific instances
 - 4. RULE: On cross examination, Prosecution can ask about
 - a. specific instances, reputation and opinion
 - ii. Admissibility of evidence to prove **victim's** character.
 - 1. the 4 rules above apply, (replace D with victim)
 - a. **ORE Exception**: where D claim's self-defense, prosecution can offer evidence of the victim's non-violent character
 - iii. OVERRIDING RULE: if evidence could be used for something other than to prove character, it can come in if relevant and not excluded by some other rule
 - iv. Special Rules:
 - 1. Rape or Sexual Assault:
 - a. Victim's alleged conduct can only be admissible to prove:
 - i. 3rd party is source of semen or injury; or
 - ii. prior acts of consensual intercourse between D and alleged victim
 - 2. Specific instances of D's bad conduct may be admitted to prove *anything other than character* that is relevant.

- a. MIMIC: motive, intent, mistake (absence of), identity, common plan or scheme [see examples. Pp. 12-13]
 - i. Identity must have: similarity and uniqueness
 - ii. Common plan or scheme: prior act is part of single plan (conspiracy) to commit the crime
- b. NB: judge always retains discretion to exclude on the probative vs. u.p. balancing test

IV. TESTIMONIAL EVIDENCE: regulate evidence coming from witness' mouth

- a. Competency: Four requirements:
 - i. **Personal knowledge:** ie, testimony based on perceptions (can be limited or defective, but problems also admissible and go to *weight* of testimony)
 - 1. **MBE: personal knowledge vs. hearsay**
 - a. Lack of personal knowledge: if D did not perceive fact with her own senses, then this is proper objection
 - b. Hearsay: if D says "He told me that," then person has personal knowledge of what was told, but the statement is hearsay
 - ii. **Present recollection:** must testify from present recollection (see below)
 - iii. **Communication:** witness must be able to communicate perception
 - iv. **Sincerity:** must recognize obligation to tell truth
 - v. Other info:
 - 1. **Oregon:**
 - a. Child witnesses: testimony can be given in a remote location via A-V hook up, IF there is substantial likelihood the child would suffer emotional harm if required to testify in open court
 - 2. Dead Man's Act (generally abolished)
 - a. Disqualifies party/interested person from testifying to a convo with deceased when that testimony is offered in a civil case against interests of deceased's estate or successors in interest
 - b. **Oregon:** no DMA, but to prove claim against estate, testimony of claimant is *not sufficient*
- b. Form of testimony and questions: **timely** and **specific**, or else WAIVED
 - i. Types of objections:
 - 1. "calls for a narrative": ie, not specific enough
 - 2. "answers must be responsive": move to strike
 - 3. Leading questions:
 - a. Def: a question that suggests the answer
 - b. Not permitted on direct examination, UNLESS
 - i. Adverse witness (ie, D); witness closely connected to D; hostile witness; witness needs help (child, oldster)
 - c. Permitted on cross-examination
 - 4. Assuming facts not in evidence
 - 5. Argumentative: ie, not really a question at all

6. compound: ie, two questions in one
- c. Witness use of documents during testimony
 - i. **Refreshing recollection:** hand document (or *anything*) to witness, reads it silently, and then testifies to what they recall
 1. must then show item to opponent who MAY offer it into evidence if he wishes
 - ii. **Recorded recollection exception to hearsay:** recollection cannot be refreshed, so need to meet FIVE elements:
 1. witness once had personal knowledge of facts
 2. document was made by the witness or under the witness' direction or was adopted by witness
 3. document was written or adopted at a time when facts were fresh in witness' memory
 4. document was accurate when made
 5. witness now has insufficient recollection to testify as to the matters contained in the document
- d. Opinion testimony
 - i. General RULE: normally inadmissible b/c personal knowledge requirement
 - ii. EXCEPTIONS:
 1. **Lay opinion** RULE: to be admissible, must be *rationally based* on witnesses *perceptions* and helpful to trier of fact
 - a. **FRE:** can't be based on scientific or other specialized knowledge
 - b. "helpful" gives more info than perception alone
 2. **Expert opinion** RULE: to be admissible, must meet FIVE elements:
 - a. Helpful to jury
 - i. Helpful = helps jury figure out something they couldn't do on their own
 - b. Witness must be qualified
 - i. Academic or life experience
 - c. Witness must believe in opinion to a reasonable degree of certainty
 - d. Opinion must be supported by a proper factual basis:
 - i. Admitted evidence
 1. *hypothetical question:* all facts must be in evidence
 - ii. Expert's own personal knowledge
 - iii. Inadmissible evidence reasonably/customarily relied upon
 - e. Opinion must be based on reliable principles that were reliably applied to the facts
 - i. Published, low error rate, subject to retesting, and has a reasonable level of acceptance
 3. **Learned treatise** exception to expert opinion:

- a. **FRE only**: read from book when examining expert witness and get expert to admit book is an accepted authority
 - b. **ORE**: no learned treatise exception, but learned treatise may be used to *impeach*, but not for substantive purposes
- e. Attacking and Supporting Credibility
 - i. Sources:
 - 1. cross-examination of the witness
 - 2. ANYTHING else (ie, extrinsic evidence)
 - ii. **Cross-examination**
 - 1. party has absolute right to cross-examine witnesses against party
 - a. if failure of this opportunity: move to strike, dismiss
 - b. must stay within scope of direct examination, or else need to ask court, “may I take witness on direct?”
 - iii. **Evidence supporting credibility inadmissible UNLESS credibility attacked first**
 - 1. however, prior consistent statement admissible if made *before* bribe or inconsistent statement
 - a. ie, prior consistent statement not considered hearsay
 - b. ie, we receive the statement into evidence ONLY where statement logically rehabilitates witness
 - iv. **Impeachment**
 - 1. checklist:
 - a. is source extrinsic evidence or cross of witness being impeached?
 - b. If extrinsic, is it admissible given the technique of impeachment being used?
 - c. Any other foundation requirements?
 - 2. **Contradiction**
 - a. Extrinsic evidence *inadmissible* to contradict a witness on a collateral matter
 - i. Collateral matter = fact not material to issues & says nothing re: credibility other than contradiction
 - 3. **Prior inconsistent statement**
 - a. Prior statement offered is always hearsay [EXAM], but
 - b. Prior statements are not hearsay if given under oath
 - c. Extrinsic evidence inadmissible to impeach on a collateral matter
 - d. Foundation requirement: extrinsic evidence is admissible if witness has opportunity to *explain or deny* the prior inconsistent statement
 - 4. **Bias, interest, motive**
 - a. Foundation requirement: extrinsic evidence admissible if opportunity to *explain or deny*
 - b. ORE: extrinsic evidence of bias is inadmissible if witness admits to the bias

- i. Bias evidence requires a foundation describing the time, place, and persons present at events evidencing bias
 - ii. In examining the witness concerning a statement revealing bias, it need not be shown to the witness, but **MUST**, on request, be shown to opposing party
- 5. **Prior Convictions** (a form of character evidence: not admissible to prove conduct)
 - a. All convictions for crimes of *false statement* are admissible
 - i. **FRE**: balancing test for old conviction
 - b. Crimes of *non-false statement*:
 - i. Misdemeanor: inadmissible
 - ii. Felony: admissible, but **FRE** may exclude for u.p.
 - c. *Extrinsic evidence of convictions* admissible
 - i. **FRE**: any extrinsic evidence
 - ii. **ORE**: must use certified copy of judgment
 - d. *Age of conviction* matters:
 - i. **FRE**: over 10 years, inadmissible unless probative value outweighs prejudice
 - ii. **ORE**: over 15 years old always inadmissible
- 6. **Misconduct evidence** (form of character evidence)
 - a. Admissible only under **FRE** if probative of truthfulness
 - i. Eg, lying on license application
 - ii. Arrests: **NO**, this is evidence of police conduct, not witness conduct
 - b. *Extrinsic evidence* is inadmissible.
 - c. **ORE**: witness can't be impeached by misconduct not resulting in a conviction
 - i. **BUT**, if a character witness testifies to reputation or character for truthfulness of *another witness*, the char witness can be cross-examined about specific instances of conduct of other witness (**FRE** & **ORE**)
- 7. **Reputation and Opinion evidence regarding truthfulness**
 - a. Always admissible and
 - b. **NO LIMIT** on *extrinsic evidence*

V. HEARSAY

- a. Def: out of court statement offered in court for the truth of the matter asserted
- b. Analytical approach:
 - i. Find the statement
 - ii. Ask what it is offered to prove:
 - 1. given in question; who is offering it and what relevant purpose would it serve?
 - iii. Given what it is offered to prove, will jury be misled if speaker lying or mistaken? If yes = hearsay
- c. Statements that are **NOT HEARSAY**:
 - i. Independent legal significance (legally operative language)

1. eg, I heard Bob say, "I accept your offer"; P offers in a defamation action, "D said 'P fucks parrots.'"
- ii. Shows effect on the listener
 1. IIED: "You are pregnant!", to show distress
 2. Negligence: sign says "bridge out," to show notice of condition
 3. Threats
- iii. Shows knowledge
 1. facts offered to show D knew someone or something, not whether the facts are true
- iv. Circumstantial evidence of state of mind
 1. eg, "I am Dracula," offered to prove insanity, but "I feel like killing someone," offered in a homicide prosecution is hearsay
- d. Exceptions and Exemptions from Hearsay Rule
 - i. Admission of Party Opponent = Not Hearsay
 1. admission = statement by party, or someone whose statement is attributable to a party, offered by a party opponent
 2. party admissions *not subject to*
 - a. personal knowledge requirement or
 - b. legal opinion rule
 3. vicarious party admissions admissible where
 - a. concerns matter within scope of employment; and
 - b. made during employment
 - c. includes:
 - i. adoptive admission
 - ii. co-conspirator statement
 - ii. Not hearsay if declarant testifies at trial:
 1. prior inconsistent statements under oath;
 2. prior consistent statements offered to rebut charge of recent fabrication, improper influence, or motive;
 3. statement of identification of a person made after perceiving the person
 - iii. Former testimony exception = hearsay, but excepted
 1. testimony given in earlier proceeding by person now *unavailable* is admissible if:
 - a. party **against whom** is offered had, during earlier proceeding, *opportunity* to examine that person and *motive* to conduct exam similar to motive it has now; OR
 - b. in **civil case**, party against whom testimony is offered is *successor in interest* to party in earlier proceeding who had opportunity and similar motive to examine
 - i. eg, negligence P is 2nd case against same D as 1st case for same reasons (see p. 29, 2c)
 2. Unavailable =
 - a. Court exempts from testimony
 - b. Declarant refuses to testify
 - c. Memory fails

- d. Dead or sick
 - e. Can't procure declarant's presence by process of other reasonable means
- iv. Declaration against interest = hearsay, but excepted
 - 1. unavailable declarant's statement is admissible if:
 - a. it was against financial interest of declarant; or
 - b. would have subjected declarant to criminal liability
 - 2. cf. party admission:
 - a. PA need not be against interest
 - b. PA must be made by party only; DAI made by anyone
- v. Dying Declaration = hearsay, but excepted
 - 1. thinks he's about to die, **and** *describes circumstances of his death*
 - 2. civil action = admissible if declarant is unavailable
 - 3. homicide case = admissible if declarant is unavailable
 - 4. **ORE**: exception applies in ALL criminal and civil cases
- vi. State of Mind Exceptions = hearsay, but excepted
 - 1. no need to show unavailability for all
 - 2. excited utterance
 - a. statement relating to startling event or condition
 - b. made while declarant still under stress of excitement caused by event or condition
 - c. NB: timing not crucial issue, excitement is
 - 3. present sense impression (not in **ORE**)
 - a. describing or explaining an event or condition *while*
 - b. declarant was perceiving the event or condition or immediately thereafter
 - c. NB: timing is critical issue
 - 4. declaration of then existing physical or mental condition
 - a. is admissible to show the condition or state of mind,
 - b. BUT, a statement of memory or belief is not admissible to prove the (*external*) fact remembered or believed
 - i. NB: we can *infer* an ACT logically flowing from an *intention* in declarant's state of mind
 - 5. statement of past or present mental or physical condition
 - a. admissible if made for medical diagnosis or treatment
 - b. NB: not limited to doctor-patient statements (eg, parent could speak symptoms of child)
- vii. Business records exception = hearsay, but excepted
 - 1. kept in course of regularly conducted business activity
 - 2. admissible if
 - a. made at or near time of event described
 - b. by a person with knowledge; and
 - c. was regular practice of business to make such record
 - 3. NB: if non-employee contributes info, then not admissible under this exception
- viii. Catchall exception = hearsay, but excepted

1. where no other exception works. Need:
 - a. evidence is trustworthy
 - b. goes to material fact
 - c. more probative on that fact than other available evidence
- ix. **ORE** only exceptions
 1. Unavailable: admissible if statement made at or near the time of a transaction by a person
 - a. in a position to know the facts and
 - b. acting in professional capacity and
 - c. in ordinary course of business
 2. complaint of sexual misconduct made by witness after commission of the alleged misconduct (admissible to show complaint was made, but not the details thereof)
 3. statement of sexual misconduct made by victim who is a child or developmentally disabled:
 - a. whole statement, not just complaint, admissible
 - b. BUT declarant must:
 - i. Either be subject to cross-examination; or
 - ii. If under 12, be unavailable with indicia of reliability
 4. statement purporting to describe incident of domestic violence
 - a. made by victim within 24 hours of incident
 - b. either in writing; or
 - c. to a peace officer; and
 - d. has indicia of reliability

VI. WRITINGS

- a. Authentication: every item of non-testimonial (ie, tangible) evidence must be authenticated (but could still be other objections like hearsay)
 - i. Def: proving that the evidence is what the proponent of the evidence claims it to be
 - ii. Signatures
 1. admission
 2. eyewitness testimony
 3. expert opinion
 4. lay opinion: seen D sign name elsewhere
 5. circumstantial evidence
 - a. also, ancient documents rule:
 - i. doc is 20+ years old;
 - ii. regular on its face; and
 - iii. found in a place of natural custody
 6. a genuine exemplar (and jury decides)
 7. NB: if authentication made, but still disputed, evidence comes in, because BOP on authentication is “sufficient to support a finding,” which is lower than POE
 - iii. Self-authenticating writings
 1. certified copies of public documents
 2. acknowledged documents (notarized)

3. official publications
4. trade inscriptions
 - a. def: tag or label which purports to have been attached in course of business and indicates ownership, control or origin
5. newspapers and periodicals
6. (FRE only) business records
7. ORE: documents are self-authenticating if containing data recorded by OSP or date from an OSP computer
- iv. Photos [often on MBE]
 1. KEY: look at question asked of what the photograph is supposed to depict. [review p. 35]
 2. “fair and accurate depiction” = witness can authenticate
 3. “a photo of intersection” = photographer must authenticate
- v. Non-unique items [often o MBE]
 1. items that are **facially indistinguishable** from other like items
 2. to authenticate, must lay *chain of custody* demonstrating that this is *THE* item proponent claims it to be
 3. When chain is broken:
 - a. Small break, still admissible since BOP is low
 - b. Big break, not admissible
 4. Facially indistinguishable items
 - a. Can be rendered unique by putting a mark on it, therefore, no need for chain of custody
- b. Best Evidence Rule
 - i. Applies where evidence offered to prove the *contents of a writing*
 - ii. Writing = any tangible collection of data (CD, computer disk, x-ray, etc)
 - iii. When is evidence being offered to prove contents of writing? Examples:
 1. case turns on contents of legal document
 2. knowledge testified to is really obtained from writing
 3. EXCEPTION:
 - a. *voluminous documents*: when docs are so numerous that not practical to offer originals into evidence, then a witness may *summarize* the contents
 - iv. Assuming BE applies, *how* may contents of writing be proven?
 1. offer originals or certified copy of public documents
 2. duplicates usually also admissible
 - a. duplicate = copy made by a machine or same impression that created original (eg, carbon copy or photocopy)
 - b. not admissible where *genuine question as to authenticity of original*
 3. Testimony may be admissible where original lost or destroyed,
 - a. UNLESS bad faith by proponent

VII. PRIVILEGES

- a. Attorney-client privilege
 - i. Communication between atty and client OR their representatives;

- ii. Intended [objective std] by client to be confidential; and
- iii. Made to facilitate rendition of legal services
- iv. Is privileged UNLESS waived by client
- v. Corporation: privileged *if authorized* by corp to make communication to lawyer
 - 1. NB: **ORE**: corporate communications privileged *even if NOT authorized*, so long as provided to lawyer was acquired during course of or result of relationship with corporation
- vi. EXCEPTIONS:
 - 1. does not apply where services sought to
 - a. further *crime or fraud* OR
 - b. where two or more parties consult an atty on *a matter of common interest* AND communication offered by one party against another
- b. Doctor-patient; psychotherapist-patient privilege
 - i. Patient has privilege to prevent disclosure of
 - 1. information *confidentially* conveyed to Dr for
 - 2. purpose of *obtaining diagnosis or treatment*
 - a. ie, only communications *pertinent* to medical treatment are protected
 - 3. NB: **ORE**: applies even to statements not made by patient if made by another person participating in patient's treatment, as in family member
 - 4. EXCEPTION: Does not apply in
 - a. Criminal cases
 - b. Malpractice suits
 - c. Patient puts physical condition at issue (eg, personal injury suit)
 - 5. **ORE**:
 - a. Psychotherapist-patient privilege applies in both criminal and civil cases
 - i. Exception to this where disclosure of intent to injure someone or reveal child was a victim
 - b. Social worker communications privileged
 - c. Communications to nurses, in civil cases
- c. Spousal privilege
 - i. A *testimonial privilege* applies only in criminal cases and permits witness to refuse to testify against spouse as to anything
 - 1. Witness spouse holds the privilege and may waive over objections of defendant spouse
 - 2. Must have a valid marriage:
 - a. under **FRE**, subsequent-to-event-marriage creates privilege
 - b. under **ORE**, privilege applies only to matters occurring *during the marriage*
 - 3. Does not apply where:
 - a. spouse suing each other

- b. in criminal case where spouse accused of crime against spouse of their children
- ii. Spousal *communication privilege* may apply in any case and protects confidential spousal communications *during marriage*
 - 1. Divorce does NOT destroy
 - 2. Both parties hold privilege, so either one can stop disclosure

VIII. JUDICIAL NOTICE

- a. Def.: establishing facts without presenting evidence
- b. Two issues:
 - i. What facts appropriate for judicial notice?
 - 1. fact not subject to reasonable dispute b/c
 - 2. either *generally known* within territorial jurisdiction; or
 - 3. capable of *accurate and ready determination* by resort to sources whose accuracy cannot reasonably be questioned
 - ii. What is procedure for taking JN?
 - 1. party must request to compel judicial notice
 - 2. court also has discretion to take notice
 - a. civil case: jury must accept fact
 - b. criminal case: jury may accept fact
 - 3. JN can occur on appeal

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