

# EVIDENCE

by Brock C. Akers

## CHAPTER 1

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## CHAPTER 2

### LAW

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|                      |               |                |                |
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| Alabama              | Illinois      | Montana        | Rhode Island   |
| Alaska               | Indiana       | Nebraska       | South Carolina |
| Arizona              | Iowa          | Nevada         | South Dakota   |
| Arkansas             | Kansas        | New Hampshire  | Tennessee      |
| California           | Kentucky      | New Jersey     | Texas          |
| Colorado             | Louisiana     | New Mexico     | Utah           |
| Connecticut          | Maine         | New York       | Vermont        |
| Delaware             | Maryland      | North Carolina | Virginia       |
| District of Columbia | Massachusetts | North Dakota   | Washington     |
| Florida              | Michigan      | Ohio           | West Virginia  |
| Georgia              | Minnesota     | Oklahoma       | Wisconsin      |
| Hawaii               | Mississippi   | Oregon         | Wyoming        |
| Idaho                | Missouri      | Pennsylvania   |                |

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Federal Rule 803(6). Hearsay Exceptions: Records of Regularly Conducted Activity

- A. General Discussion
- B. Records May Be Entered by Certification
- C. Personal Knowledge Requirement
- D. Computer Records
- E. Medical Records
- F. Hospital Laboratory Records
- G. Proof by Affidavit
- H. Personnel Records
- I. Highway Department Automobile Accident File
- J. Multiple Hearsay
- K. Proving Absence of Record

#### § 2.3 CHARTS, DIAGRAMS, AND TRIAL AIDS

- A. General Discussion
- B. Charts to Jury Room
- C. Models
- D. X-rays

#### § 2.4 COMPETENCY OF WITNESSES

Federal Rule 601. General Rule of Competency

- A. General Discussion
- B. Insane Persons
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- D. Dead Man's Rule

#### § 2.5 CUSTOM AND PRACTICE

Federal Rule 406. Habit; Routine Practice

- A. General Discussion
- B. Number of Instances
- C. Trade Standards
- D. Conformity to Custom or Habit

## § 2.6 DEPOSITIONS AND DISCOVERY EVIDENCE

- A. Depositions
- B. Answers to Interrogatories
- C. Responses to Requests for Admissions
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- A. Offering the Witness
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  - 2. Competency. Fed. R. Evid. 601
  - 3. Personal Knowledge. Fed. R. Evid. 602
  - 4. Relevancy of Testimony. Fed. R. Evid. 104(b), 401, 402
  - 5. Limited Admissibility. Fed. R. Evid. 105
  - 6. Hearsay. Fed. R. Evid. 801-807
  - 7. Objections to Witness or Testimony Offered
- B. Direct Examination
  - 1. Leading Questions—General Rule. Fed. R. Evid. 611(c)
  - 2. Leading Questions—Hostile Witness. Fed. R. Evid. 611(c)
  - 3. Leading Questions—Adverse Party or Witness Identified with Adverse Party. Fed. R. Evid. 611(c)
  - 4. Leading Questions—Court’s Discretion. Fed. R. Evid. 611(a), 611(e)
  - 5. Lay Opinion Testimony. Fed. R. Evid. 701
  - 6. Interest or Bias. Fed. R. Evid. 104(e)
  - 7. Credibility. Fed. R. Evid. 104(e), 607
  - 8. Refreshing a Witness’s Memory Fed. R. Evid. 612
  - 9. Hypothetical Questions. Fed. R. Evid. 703
  - 10. Nonresponsive Answers
  - 11. Impeachment of Own Witness. Fed. R. Evid. 607
  - 12. Repetitious Question/Question Asked and Answered
  - 13. Narrative Evidence
  - 14. Explanation of Answer
  - 15. “Yes” or “No” Answer
  - 16. Confusing/Misleading/Ambiguous and Unintelligible Question
  - 17. Confusing/Misleading/Ambiguous and Unintelligible Answer
  - 18. Assuming Facts not in Evidence
  - 19. Argumentative Question
  - 20. Inadmissible Hearsay. Fed. R. Evid. 801-807
  - 21. Voir Dire Examination of Witness
  - 22. Question Calling for Speculative Answer
- C. Cross-Examination
  - 1. Scope of Cross-Examination. Fed. R. Evid. 611(b)
  - 2. Leading Questions—General Rule. Fed. R. Evid. 611(c)
  - 3. Lay Opinion Testimony. Fed. R. Evid. 701
  - 4. Interest or Bias. Fed. R. Evid. 104(e)
  - 5. Credibility. Fed. R. Evid. 104(e), 607
  - 6. Hypothetical Questions. Fed. R. Evid. 703
  - 7. Nonresponsive Answers
  - 8. Impeachment of Own Witness. Fed. R. Evid. 607
  - 9. Repetitious Questions/Question Asked and Answered
  - 10. Explanation of Answer
  - 11. “Yes” or “No” Answer
  - 12. Confusing/Misleading/Ambiguous and Unintelligible Question
  - 13. Confusing/Misleading/Ambiguous and Unintelligible Answer
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- 15. Harassing the Witness. Fed. R. Evid. 611(a)
- 16. Argumentative Question
- 17. Inadmissible Hearsay. Fed. R. Evid. 801-807
- 18. Voir Dire Examination of Witness
- 19. Question Calling for Speculative Answer
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- B. Limitations on Expert Witness Testimony
- C. Analysis of the Rules
  - 1. Specific Analysis of Fed. R. Evid. 701, 702, and 703
  - 2. Specific Analysis of Fed. R. Evid. 704 (Opinion on Ultimate Issue)
  - 3. Expert Testimony as Conclusive Proof
- D. Some Particular Types of Expert Witness Testimony
  - 1. Police Officer as Accident Reconstruction Expert
  - 2. Examples of Accident Investigation Report Opinions
  - 3. Police Officer as an Expert Witness—Generally
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  - 5. Experts Available Concerning Economic Damages
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- A. Opinions as to Genuineness
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- A. What is a Statement?
- B. Who is a Declarant?
- C. What is the Truth of the Matter Asserted?
- D. Exclusion from Hearsay Rule
- E. Attacking and Supporting Credibility of Declarant. Fed. R. Evid. 806
- F. Hearsay Exceptions (Federal)
- G. Residual Exception to Hearsay Rule (Federal)

## § 2.11 IMPEACHMENT OF WITNESSES

- A. Alcoholism
- B. Bias and Prejudice
- C. Character
- D. Crimes
- E. Habit
- F. Juvenile Criminal Adjudications
- G. Interest in Litigation
- H. Religious Beliefs or Opinions
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## § 2.12 JUDICIAL ADMISSIONS

- A. Current Proceedings
- B. Prior Pleadings

**§ 2.13 JUDICIAL NOTICE**

- A. General Discussion
- B. Judicial Notice—Fed. R. Evid. 201

**§ 2.14 LAY WITNESS OPINIONS**

- A. Admissible Lay Opinion
- B. Inadmissible Lay Opinion
- C. Factors Involving Lay Witness Opinion

**§ 2.15 NOTICES REQUIRED BY THE EVIDENCE RULES**

- A. Admissibility of Duplicates
- B. Business Records Accompanied by Affidavit
- C. Foreign Public Documents
- D. Hearsay Rules, Other Exceptions
- E. Impeachment
- F. Criminal Convictions
- G. Judicial Notice
- H. Summaries

**§ 2.16 OFFICIAL RECORDS AND REPORTS (PUBLIC RECORDS)**

- Federal Rule 803(8). Public Records and Reports
- A. Exception to Hearsay
  - B. Authentication
  - C. Investigative Reports
  - D. Certified Documents from the Consumer Product Safety Commission

**§ 2.17 OPTIONAL COMPLETENESS RULE**

Federal Rule 106. Remainder of or Related Writing or Recorded Statements

**§ 2.18 PHOTOGRAPHS, MOVIES, AND VIDEOTAPES**

- A. Photographs
- B. Videotapes and Movies

**§ 2.19 PRESUMPTIONS**

Federal Rules

**§ 2.20 PRIVILEGES**

- A. Clergy-Penitent Privilege
- B. Psychotherapist-Patient Privilege
- C. Doctor-Patient Privilege
- D. Deliberative Process Privilege
- E. Executive and Governmental Privileges
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**§ 2.21 SPOILIATION OF EVIDENCE**

- A. General Discussion
- B. Factors Involved in Spoliation Sanctions
- C. Examples of Spoliation Sanctions
- D. Electronic Evidence
- E. Case Decisions Regarding Various Spoliation Issues

**§ 2.22 SUBSEQUENT REMEDIAL MEASURES**

- Federal Rule 407. Subsequent Remedial Measures
- A. Interpretation of Federal Rule of Evidence 407

- B. Feasibility of Design
- C. Condition at Time of Accident
- D. Strict Liability Cases

**§ 2.23 TESTS, EXPERIMENTS, AND DEMONSTRATIONS**

- A. Automobile Rollover Cases
- B. Other Applicable Cases

**§ 2.24 TRUSTWORTHINESS**

**CHAPTER 3**

**CHECKLISTS**

**§ 3.1 FOUNDATION CHECKLISTS**

- Charts, Diagrams, and Maps
- Child Competency to Testify
- Computer Records
- “Day in the Life” Film
- ELMO Images
- Enlargements
- Excited Utterances
- Exhibition of Injury
- Experiments
- Expert Opinion Federal Practice (5th Cir.)
- Handwriting Exemplars
- HGN (Horizontal Gaze Nystagmus) Test
- Impeachment by Prior Inconsistent Statement
- Judicial Admissions
- Learned Treatises
- Medical Expenses—Proof by Oral Testimony
- Medical Opinion on Causation and Future Prognosis
- Models
- Official Records and Reports (Public Records)
- Past Recollection Recorded
- Personnel Records—Proof by Written Deposition
- Photographs
- Post-Accident Changes
- Prior Consistent Statement
- Standard of Care—Medical Malpractice Case
- Summaries of Voluminous Records
- Tape Recordings
- Testimony from Previous Trial or Proceeding (Establishing Unavailability of the Witness)
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**§ 3.2 CHECKLIST OF EXPERT WITNESSES**

- Accident Reconstruction Expert
- Aerodynamics
- Allopath
- Anesthesiologist
- Appraiser
- Architect
- Arson Expert
- Attorney
- Aviation Expert
- Automotive Design Engineer
- Bank Expert
- Biomechanics Expert

Biophysics Expert  
Certified Public Accountant  
Chemical Engineer  
Chemist  
Chiropractor  
Coroner  
Credibility Expert  
Design Engineer  
Economist  
Engineer  
Farmer  
Fire Expert  
Fire Inspector  
Fire Marshall  
General Contractor  
Geotechnical Expert  
Grief Expert  
Handwriting Expert  
Heart Attack Causation Expert  
HGN (Horizontal Gaze Nystagmus) Test Expert  
Human Factors Engineering (or Ergonomics) Expert  
Insurance Adjuster  
Internist  
Jewelry Designer  
Media Expert  
Mechanic (Auto)  
Mechanical Engineer  
Medical Examiner  
Medical Malpractice Expert  
Nurse  
Orthopedic Surgeon  
Osteopath  
Parasitologist  
Pharmacist  
Plant Pathologist  
Podiatrist  
Police Officer  
Professor of Finance  
Psychiatrist  
Psychologist  
Radiologist  
Real Estate Agent  
Safety Engineer  
Statistician  
Structural Engineer  
Survey  
Swimming Pool Expert  
Teacher (English)  
Tire Defect Expert  
Toxicologist  
Vocational Rehabilitation Expert  
Voiceprint Expert

**§ 3.3 CHECKLIST OF MOTION IN LIMINE ITEMS**

General Matters  
Damages

Automobiles  
Medical Malpractice  
Products Liability  
Will Contest  
Workers' Compensation

**§ 3.4 HEARSAY EXCEPTIONS CHECKLIST**

**§ 3.5 OBJECTIONS CHECKLIST**

**CHAPTER 4**

**FORMS**

**§ 4.1 AFFIDAVITS AND COUNTER-AFFIDAVITS**

Doctor's Services & Charges—Affidavit by Doctor  
Medical Services & Charges—Affidavit by Custodian  
Counter Affidavit  
Doctor Records—Affidavit by Doctor  
Doctor Records—Affidavit by Custodian  
Hospital Records—Affidavit by Medical Records Librarian  
Radiologist's Records  
Funeral Home Services & Charges

**§ 4.2 MOTION AND ORDERS**

Sample Motion to Admit Official Records and Reports  
Sample Motion to Rule on Expert's Qualifications  
Order—Qualifying Retired Doctor as Expert  
Sample Plaintiff's Motion in Limine  
Order on Plaintiff's Motion in Limine  
Motion for Withdrawal of Trial Exhibits  
Order Permitting Withdrawal of Exhibits  
Motion to Suppress Deposition  
Order on Motion to Suppress Deposition  
Motion to Admit Evidence Pretrial  
Order on Motion to Admit Evidence Pretrial

**§ 4.3 STIPULATIONS**

Stipulation of Fact  
Stipulation of Testimony

**§ 4.4 WRITTEN QUESTIONS FOR WRITTEN DEPOSITIONS**

Written Questions to Custodian of Medical Records  
Written Questions to Custodian of Hospital Records  
Written Questions to Custodian of Personnel Records  
Written Questions to Doctor Regarding Medical Expenses  
Written Questions to Custodian of Medical Expenses Records  
Cross-Questions to Custodian of Hospital Records  
Cross-Questions to Custodian of Doctor's Records

**CHAPTER 5**

**RULES OF EVIDENCE**

Recent Amendments  
Federal Rules of Evidence