

TEXAS YOUNG LAWYERS ASSOCIATION

EVIDENCE

GUIDE

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Disclaimer: This guide is intended as an overview & not as a substitute to reading the actual rules or case law regarding the Texas Rules of Evidence, Texas Rules of Civil Procedure, & the Local Rules. This guide does not cover all materials, just some of the most common a young attorney is likely to encounter. As always, attorneys should read & interpret the applicable rules & case law to ensure complete compliance.

OBJECTIONS CHEAT SHEET

SUBSTANTIVE OBJECTIONS

- **RELEVANCE (401 & 402):** Does not make any fact of consequence more or less probable.
- **UNFAIR PREJUDICE (403):** Probative value is outweighed by the danger of unfair prejudice.
- **LACK OF FOUNDATION:** Cannot admit or elicit evidence without first demonstrating the factual or legal basis for admissibility. See Predicates Section.
- **HEARSAY (801):** An out of court statement offered to prove the truth of the matter asserted in the statement.
 - **COMMON HEARSAY EXCEPTIONS (803-804):**
 - Present Sense Impression
 - Excited Utterance
 - State of Mind
 - Medical Diagnosis/Treatment
 - Recollection Recorded
 - Business & Public Records (or absence of)
 - Reputation as to Character
 - Statement Against Interest
 - Prior Testimony (Witness (W) Unavailable)
 - Dying Declaration (W Unavailable)
 - **NOT HEARSAY (801):**
 - Depositions
 - Opposing Party Statements
- **IMPROPER CHARACTER EVIDENCE (404):** Evidence of a person's character or trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait, except certain bad acts (404), convictions (609), & truthfulness (608).
- **LACK OF PERSONAL KNOWLEDGE (602)**
- **IMPROPER LAY OPINION (701):** Lay Ws can't testify as to opinions, conclusions or inferences
- **AUTHENTICITY (901):** Exhibits must be authenticated before they may be admitted.
 - **SELF-AUTHENTICATING DOCUMENTS (902)**
 - Deposition Transcripts.
 - Business Records Accompanied by Affidavit
 - Certified Public Records
 - Newspapers, Periodicals, Trade Materials, & Official Publications
- **BEST EVIDENCE (1001-1003):** Copies, or secondary evidence of writings, cannot be admitted into evidence unless the absence of the original can be explained (duplicates that accurately reproduce the original are acceptable)
- **PRIVILEGES (501-13):** Absent an exception or waiver, excludes otherwise admissible evidence because of a special relationship.

○ COMMON PRIVILEGES:

- Attorney-Client (503)
- Attorney Work Product (TRCP 192.5)
- Self-Incrimination (U.S. Const. V)
- Physician-Patient (509 & TOC Ch. 159)
- Mental Health Information (510 & THSC Ch. 611)
- Alternative Dispute Resolution/Mediations (408, Gov't Code § 2009.054(b)(1))
- Spousal Privilege (504) & Clergy Privilege (505)
- Law Enforcement (Tex. Gov't Code § 552.108(c))

PROOF OF NEGLIGENCE/LIABILITY: Cannot offer the following as proof a person acted negligently: Liability Insurance (411); Subsequent Remedial Measures (407); or, Settlement Offers (408).

OBJECTIONS TO FORM OF QUESTION (Q) (611)

- **LEADING:** Made on direct examination, Q suggests its own A (esp. a Q that can be answered Y/N or asking W to agree with a statement).
- **COMPOUND:** A question that asks more than one thing.
- **VAGUE:** Q is imprecise, incomprehensible, or ambiguous.
- **ARGUMENTATIVE:** Q asks the W to accept the examiner's summary, argument, inference, or conclusion rather than a fact.
- **NARRATIVE:** Q asks W to tell a story rather than state specific facts (e.g. "what happened on X day?").
- **ASKED & ANSWERED:** Q has been previously asked & answered.
- **CUMULATIVE/REPETITIOUS:** Subject has already been covered by previous Q & A.
- **ASSUMES FACTS NOT IN EVIDENCE:** Q contains statements of fact that have not been presented by a W or document.
- **SPECULATION:** Q asks W to speculate or guess about something outside of their personal knowledge (e.g. "what do you think happened/what was ___ thinking?").
- **BEYOND SCOPE OF RE-CROSS/RE-DIRECT:** Applies after direct & cross-examination.

OBJECTIONS TO FORM OF A (611)

- **NON-RESPONSIVE:** A does not respond to the Q.
- **NARRATIVE:** A goes on at length in the absence of a Q.

RELAXED RULES (GOV'T CODE § 2001.081)

- In proceedings subject to the Administrative Practice Act, evidence that is otherwise inadmissible may still be admitted if it is: (1) necessary to ascertain facts not reasonably susceptible of proof under the rules of evidence; (2) not precluded by statute; & (3) of a type on which a reasonably prudent person commonly relies in the conduct of the person's affairs.

EVIDENCE GUIDE

MAKING AN OBJECTION

- You need to make objections at the time evidence is offered, not after it is received. Consider whether the proffered evidence hurts your case, helps it, or does neither before objecting.
- Stand
 - Stand. The J will tell you not to stand if the court does not require it. Remember, the point is to stop the proceeding when making an objection, which is why standing is very effective. You should do anything within reason to draw attention to yourself when objecting so a W doesn't A the Q before the J recognizes you, such as standing and projecting loudly.
- Object (e.g. "Objection, hearsay!")
 - You must state the basis of your objection. Provide enough information for the judge to rule, but no more (which would be an improper "speaking objection"). (E.g., "Objection, leading!").
- Wait
 - J may follow up with a Q, ask OC to respond, or immediately rule.
- Ruling
 - You **MUST** get a ruling from J either sustaining or denying the objection to preserve error. If J refuses to rule, you must object to the refusal to rule.
 - If your objection is denied, go to Preserving Error.
 - If your objection is sustained & no objectionable information made it into the record, then you are finished.
 - Additional steps must be taken if your objection was not made fast enough & a W gave an A or OC made objectionable statements (e.g. "Your honor, this exhibit is an anonymous online review that states my client is always respectful & would never harass female coworker. Is it inadmissible? Maybe. But, I think it's important for the Jury to hear the truth about my client. Let me read it aloud...").
- You need to "move to strike" A or OC's statement, & if there is a Jury that heard it then you also need to ask J to "instruct the Jury to disregard" the A or OC's statement".
- Wait for J to rule on your request and, as applicable, instruct the Jury to disregard the objectionable information.

RESPONDING TO AN OBJECTION

- Ask J for permission to respond when OC finishes objection.
- If response permitted:
 - RESPONSES
- Argue: Explain why the Q, A, or evidence is subject to an exception or does not meet the objection criteria (e.g. "prior statements by an opposing party are not hearsay.").

- Limited Admissibility: Tell J the precise purpose of the admission & why it is therefore not subject to the objection (e.g. "we are only offering this for __ purpose, not __ purpose, which would be objectionable").
- Conditional Offer: Ask J to conditionally admit the evidence because you will be offering additional evidence later at the trial/hearing that will make it admissible at that time.
- Rephrase: Tell J you will rephrase the Q.
 - If you win, proceed.
 - If you lose, see Preserving Error.

PRESERVING ERROR (103)

- If a ruling admits evidence, then you've preserved error by making a timely objection. Do not make an offer of proof.
- If a ruling excludes evidence, then you need to make an "offer of proof" with the excluded evidence.
 - Ask J to allow you to make an "offer of proof" when the next break comes or before you leave for the day; specify if asking to make an informal offer of proof (J needs to agree to informal offer).
 - Don't let your W leave before you make the offer of proof.
 - Formal Offer of Proof
- When time comes for you to make your offer of proof, you'll be able to make a record of the excluded evidence.
- You can ask a W Qs you were prevented from asking, ask a W Q's about an exhibit you were prevented from introducing, etc.
- OC will get to cross-examine W about excluded evidence.
- Make sure court reporter adds the excluded exhibits to the offer of proof record, if applicable.
- When finished, ask J to reconsider prior ruling excluding the evidence.
- If J allows the evidence, ask J to allow the offer of proof to be added to the record so you don't have to do it again & then keep going.
- If J doesn't allow it, you've preserved error. The "offer of proof" transcript & records will be separate from the main record.
 - Informal Offer of Proof
- Same as formal, except instead of calling W for Q-and-A, you explain in detail the substance of the excluded documents/testimony & what it would have shown. Make sure court reporter adds excluded exhibit to the "offer of proof" record.

REFRESHING A W'S RECOLLECTION (613)

- You can refresh a W's memory with a writing, such as a deposition transcript. OC has the right to inspect what you are using to refresh recollection, cross-examine the W about it, & introduce any portion that relates to the testimony.
 - Example:
- When did __ happen? (W gives wrong A or can't remember)
- Do you remember writing a statement on the day __ happened?
- Did you sign & date that statement?
- Would reviewing the date on that statement be helpful to you to remember when __ happened?
- I'm showing you the statement you wrote the day ____ happened, please read the date at the top silently to yourself.
- Does that refresh your recollection?
- When did __ happen?

IMPEACHING A W

- Impeaching a W means introducing testimonial or documentary evidence that challenges a W's credibility.
- Common Methods of Impeachment
 - Bias & Interest (613): Something that could cause a W to slant, unconsciously or otherwise, their testimony for or against a party.
- You must tell the W about the circumstances or statements that show bias or interest.
- When relying on an oral or written statement, you must tell the W: (1) the contents of statement; (2) the time & place of statement; and, (3) to whom the statement was made. You do NOT have to show W the statement upon request, but you DO have to show it to OC.
- W must be given opportunity to explain or deny circumstances or statement showing bias or interest.
- You can introduce extrinsic evidence, such as a copy of the statement, only after the W is examined & "fails to unequivocally admit it."
- You cannot use a W's religious beliefs or opinions to attack credibility (610).
- Examples: Compensation (esp. expert W), hostility or animosity toward a party, W is suing a party, W took a settlement or a plea bargain, etc.
 - Impairment (Mental or Sensory): Impairment is the quality, state, or condition of the senses being damaged, weakened, or diminished.
- You can impeach a W by showing that they experienced either a mental or sensory deficiency that could impact their ability to perceive or recall facts, such as weather conditions, drugs (prescription or otherwise), alcohol, a health condition (e.g. partial blindness, etc.), a mental state (e.g. tunnel vision, panic, anger, etc.), weather conditions (e.g. dark, rain, etc.), noise, distractions, etc.

- Lack of Personal Knowledge (602): A W must have personal knowledge of the matter they are testifying about, unless they are an expert W.
- Ask the J to let you Q the W on Voir dire if you have reason to believe W lacks personal knowledge about the subject they are testifying about, or asked to testify about. After the Jury leaves (if applicable), whomever has the W when you went into Voir dire will need to establish whether the W has personal knowledge, with OC having an opportunity to Q the W as well. If successful & W is found to lack personal knowledge about a matter, ask J to strike any testimony W gave about it prior to going into Voir dire & instruct the Jury to disregard it (if applicable).
 - Contradiction & Prior Inconsistent Statements: A W can be impeached by their prior written or oral statement.
- Nonparty W (613 & 801): When relying on an oral or written statement, you must tell the W: (1) the contents of statement; (2) the time & place of statement; and, (3) to whom the statement was made. You do NOT have to show W the statement upon request, but you DO have to show it to OC. W must be given opportunity to explain or deny circumstances or statement showing bias or interest.
- Unsworn Statements (613): You can introduce extrinsic evidence, such as a copy of the statement, only after the W is examined & "fails to unequivocally admit it."
- Sworn Statements (801): You can admit the affidavit or deposition testimony regardless of whether W denied the prior inconsistent statement.
- Party W (613, 801, & 813): You do not have to give party W an opportunity to explain or deny the prior statement (OC needs to do that). The prior statements do not have to be under oath, & can be made not only by the party, but also their authorized representative or agents, coconspirators, if even just a statement that the party manifested that they adopted or believed to be true.
 - Character for Untruthfulness (608): W can testify about reputation or opinion of another W for truthfulness; however, this opens the door to evidence that a W is truthful by OC. You can't use specific instances, except certain criminal convictions, to attack a W's character for truthfulness.
 - Criminal Convictions (609): W can be impeached with a criminal conviction if: (1) the crime was a felony or involved moral turpitude, regardless of punishment; (2) the probative value outweighs the prejudicial effect to a party; (3) and, it is elicited from the W or established by a public record. If more than ten years have passed since the conviction or release from confinement, whichever is later, the evidence is only admissible if the probative value substantially outweighs the prejudicial effect. You cannot use a conviction that is on direct appeal.



BE AN UNCOMMON LEADER.®

EXPERT W's (702)

- A W can testify as an expert if the following factors are present: (1) the W must be qualified in the area of expertise for which the evidence is proffered; (2) the W's testimony must be grounded in the scientific, technical, or other specialized knowledge in that particular area of expertise; and, (3) the W's testimony must assist the trier of fact.
- Admitting an Expert W:
 - Establish Predicate.
- See e.g., Common Predicates – Physician Expert.
 - Proffer
- Tell the J that you are proffering the W as an expert on ___ topics.
 - Wait
- J will ask OC if they have any objections.
- OC may object or ask to take W on Voir dire (705).
 - Respond
- Respond to any objections. See Responding to an Objection.
- If the objection relates to predicate, make OC state with specificity what information is missing, then ask J to ask additional Qs to cure, if applicable.
 - Ruling
- You must obtain a ruling prior to the W giving expert testimony.
- If excluded, see Preserving Error.
- If admitted, proceed with expert testimony.
- Challenging an Expert W: you should file a pretrial motion to strike the expert if they were designated prior to the proceeding.
 - Object if W starts giving expert testimony without being proffered & a determination by the J that they are admitted as an expert W.; otherwise, ask J to respond when OC proffers the W as an expert.
- Voir Dire: Ask to take the W on Voir dire (705) to determine whether they meet the expert W requirements in 702. OC will also get to ask Qs while on Voir dire.
- Testimony: You need to elicit testimony during Voir dire from the W showing they are unqualified (training/experience), unreliable (see e.g. Bias & Interest), or that the W's expert testimony would be irrelevant.
- Irrelevant in the context of expert W means it will not “actually assist the factfinder in deciding the case.”
- Argue: The W should not be deemed an expert on ___ because they: (1) lack sufficient qualification; (2) their testimony is unreliable; and, (3) their testimony is irrelevant.
- Ruling
- Whether a W is an expert does not “go to the weight of their testimony.”

- A determination must be made then & there whether the W qualifies as an expert BEFORE they give expert testimony (you cannot put the genie back in the bottle).
- Always get a ruling.

INTRODUCING AN EXHIBIT

- Mark
 - Give the exhibit to the Court reporter to mark with an exhibit sticker or pre-mark exhibits before trial.
- Show OC
 - Give a copy of the exhibit or hand the original to OC to inspect.
- Approach
 - Ask & obtain permission from J to approach W.
- Establish predicate
 - Show W exhibit.
- Ask predicate Qs. See Predicates.
- Offer
 - “I'm offering what is marked as exhibit ___ into evidence”
- Wait
 - J will ask OC if they have any objections.
 - OC may object or ask to take W on Voir dire. See Voir Dire.
- Respond
 - Respond to any objections. See Responding to an Objection.
 - Make sure OC states with specificity what is deficient if they object on predicate (foundation) grounds.
- If inadequate predicate, ask permission from J to ask additional predicate Q to cure.
- Ruling (see Get a Ruling)
 - If excluded, see Preserving Error.
 - If admitted, ask J for permission to “publish” the exhibit to the Jury.
- Publishing an exhibit means showing it to the Jury or J. You can do this by projecting it on a screen, showing a poster size version of the exhibit, handing it to the J or Jury, etc.
- Give exhibit back to W & proceed with Qs.

DEMONSTRATIVE EXHIBITS

- You can use objects, diagrams, maps, drawings, graphs, lists, etc., at trial that are similar to the original object or layout.
- Demonstrative exhibits are admitted for the limited purpose of assisting the (J or Jury) in understanding the relevance of the original object or layout.