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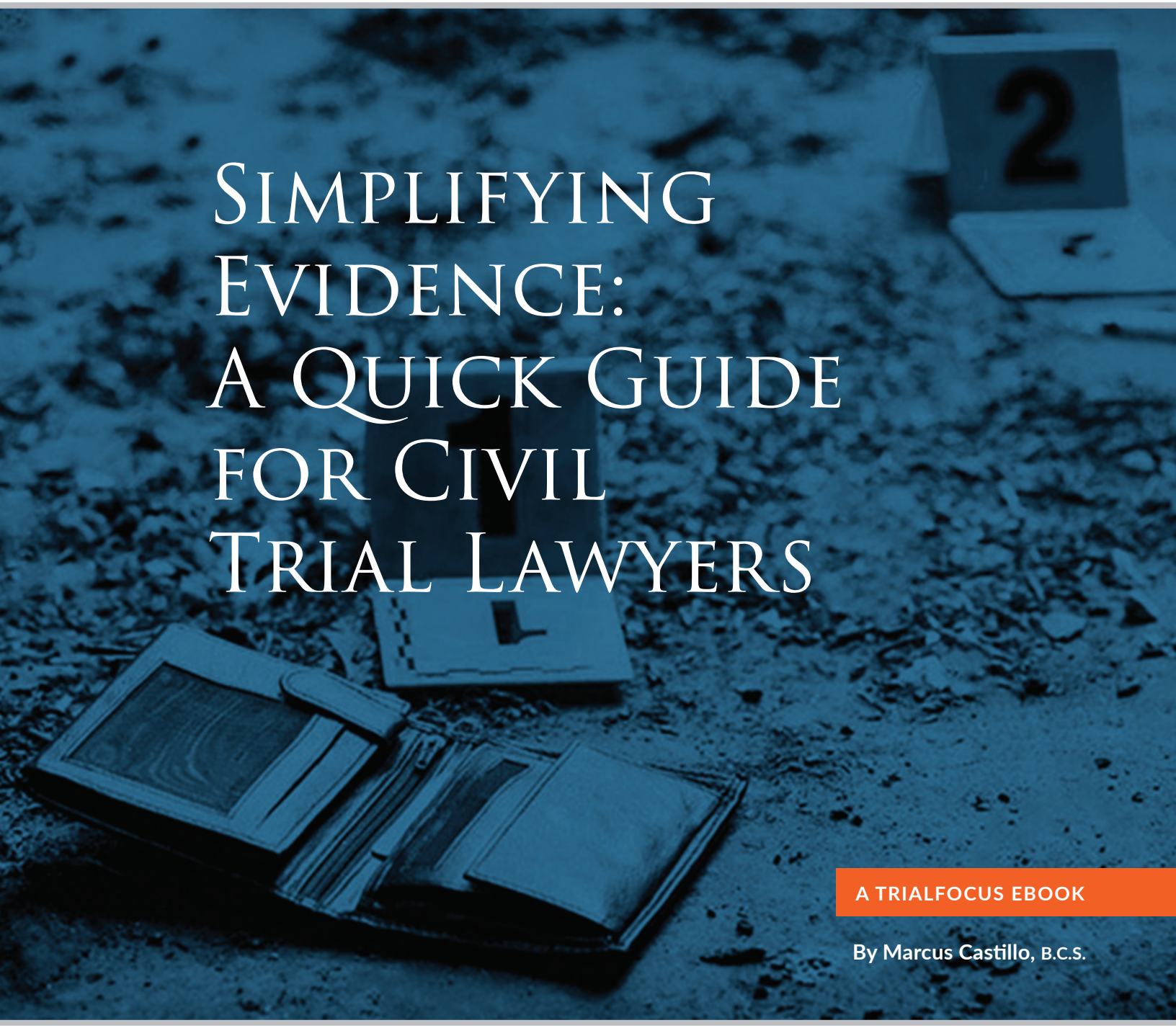


Simplifying Evidence: A Quick Guide for Civil Trial Lawyers

A TRIALFOCUS EBOOK

By Marcus Castillo, B.C.S.

INTRODUCTION

To reach your full potential as a civil litigation attorney, whether in the fields of personal injury, employment law or business litigation, you must build a trial-oriented practice. It means developing a warrior spirit and a "barrister" skill set. A warrior spirit is grounded in a passion for clients and having the resilience to work through case problems because you care for them. A barrister skill set is the tool kit to achieve victory or its settlement equivalent by overcoming those problems.

At TrialFocus we believe there are three core competencies one must master before moving on to the finer art of case storytelling. One must master civil evidence law, the law of trial and litigation procedure and the law of litigation ethics.

Those who master evidence law are a breed apart from lawyers who file cases, conduct discovery and maybe even go to the doorstep of the courthouse but no further. The problem is…evidence law, at least as taught in law school, is hard. It is usually taught without reference to the logic of introducing evidence or making objections. It's too disjointed and often too complicated: for instance, do you really understand how to apply the hearsay rule and its exceptions?

We've developed an admissibility logic that will help you deal with the vast majority of situations you'll encounter at trial. Thinking about evidence from the perspective of this logic can help you plan how to present your case and to make appropriate objections to your opponent's evidence.

The building blocks of our admissibility logic are an alliterative set of "P's":

PRELIMINARIES

Understand trial structure and the roles of the judge and the trial attorney.

PURPOSE

Recognize the purposes for introducing evidence at trial: case proof and witness credibility.

PREJUDICE/PROCRASTINATION

Filter out evidence deemed prejudicial or repetitive and wasteful (i.e. procrastinating).

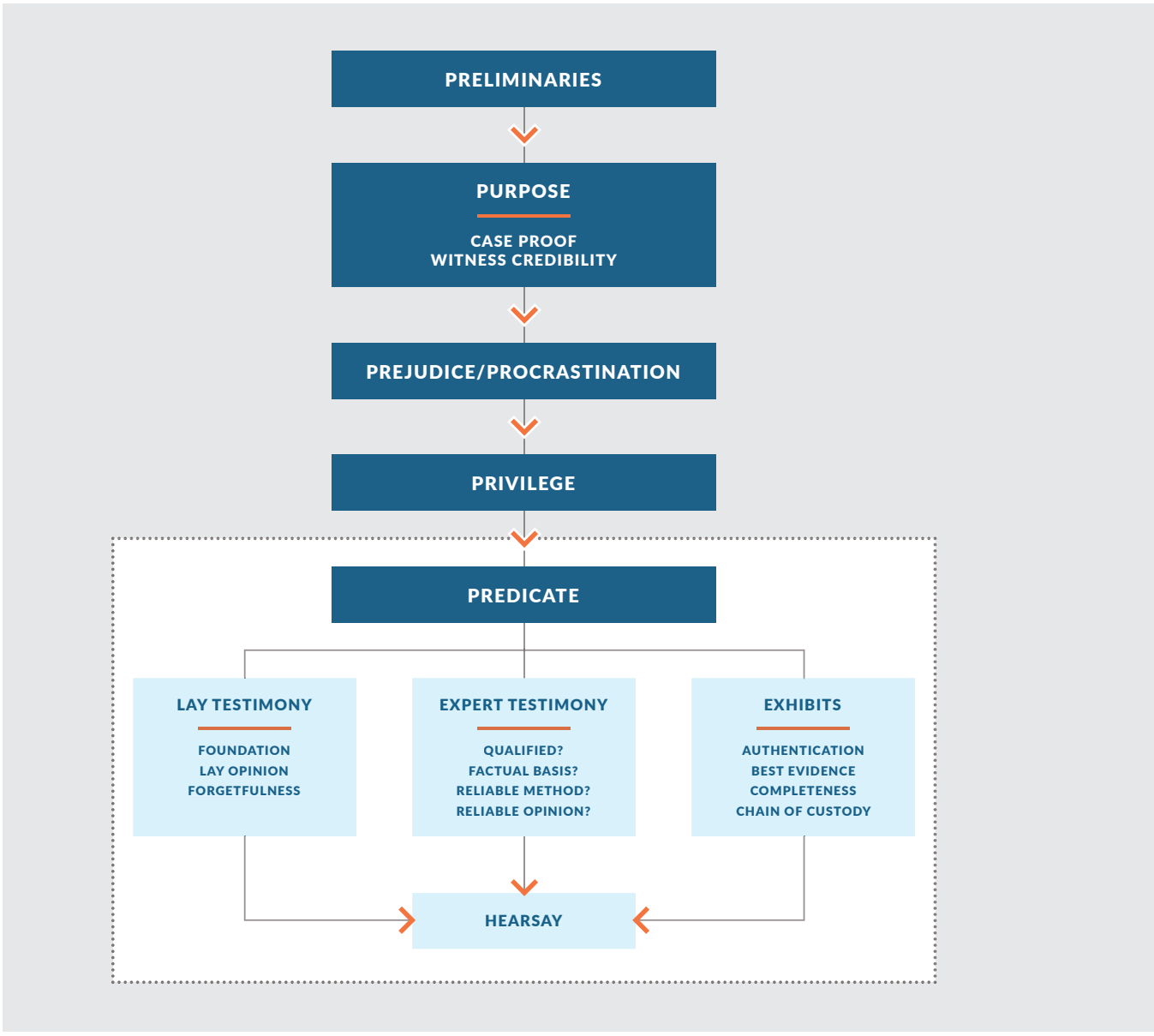
PRIVILEGE

Assert commonly recognized privileges such as the attorney-client privilege.

PREDICATE

Understand evidentiary doctrines unique to the introduction of each of the three common forms of evidence: lay witness testimony, expert witness testimony and exhibits, as well as hearsay, a doctrine common to all.

Think of these words and concepts in a sequential chain. Better yet, think of them graphically:



Let's take some time to unpack these concepts further. You'll find reference to corresponding sections of the Federal Rules of Evidence (FRE).

PRELIMINARIES

First, we have to understand trial structure and the roles of the judge and the trial attorney. The judge is the gatekeeper and referee responsible for determining the admissibility of evidence and ruling on objections. **(FRE 104)** The trial lawyer's role is to advocate. One is either the proponent or opponent of evidence. As an advocate a lawyer must make timely objections or proffers if the evidence is ruled inadmissible. **(FRE 103)**

A civil trial is organized into cases-in-chief. The plaintiff must prove his cause of action and damages and the defendant, in its own case, must disprove the plaintiff's case and prove its affirmative defenses. Since the plaintiff carries the burden of proof, he gets the last word: a rebuttal case responding to the defense case. Within each case the trial attorney seeks to introduce evidence in the form of lay or expert testimony or through the admission of an exhibit. Witness questioning is divided into direct, cross and re-direct examination. Trial structure controls the scope and form of questioning. Unless calling the adverse party, direct examination questions can't lead the witness. **(FRE 611 (c))** The witness can be lead on cross-examination but questions must be limited to the subject matter addressed on direct examination plus impeachment. **(FRE 611 (b) and (c))** Re-direct examination is limited to the scope of cross examination plus rehabilitation (i.e. undoing the impeachment). Scope and form objections are common at trial.

PURPOSE

At any point during a trial a party is either seeking to prove its own case or disapprove the opponent's case or to impeach the credibility of its opponent's witnesses or rehabilitate the credibility of its own witnesses. These are the purposes for introducing evidence at trial: case proof and witness credibility.

All relevant evidence (i.e. evidence that proves your case or disproves your opponent's case), is potentially admissible. **(FRE 401 and 402)** The rules provide several specific proof examples. For instance, one's habits may be admissible to show a person acted in accordance with them. **(FRE 406)** Character evidence may be admissible if character is a substantive issue (e.g. in a defamation case or through appropriate impeachment, see below). **(FRE 405)** Outside of those examples, character evidence is generally inadmissible but specific acts of conduct can be used to prove a defendant's underlying motive or intent. **(FRE 404(b))**

Impeachment and rehabilitation are the second twin purposes for introducing evidence. Five of the modes of impeachment are common in practice: 1) impeachment via a prior inconsistent statement **(FRE 613)**, 2) showing bias, 3) introducing proof of a felony or falsehood-related conviction **(FRE 609)**, 4) proof of character for untruthfulness via reputation or opinion **(FRE 608)** and 5) impaired mental capacity **(FRE 602)**. Rehabilitating credibility is the flipside

PURPOSE (cont.)

of impeachment (e.g. introducing prior consistent statements, showing lack of bias or contrary reputation or opinion testimony).

Mastery of impeachment and rehabilitation requires familiarity with two obscure modes of impeachment: "bad act" impeachment and "impeachment by contradiction". Specific bad acts not otherwise relevant to prove a case can be used for impeachment if sufficiently relevant to untruthfulness. **(FRE 608(b))**

Take note: you can't introduce extrinsic evidence (i.e. you are stuck with the witness' answer). Impeachment by contradiction is related. Suppose a witness makes a blanket statement about something relevant to the case (not just anything collateral) (e.g. "I have never touched anyone inappropriately" in a harassment case). Subject to overcoming prejudice objections you may be able to introduce contrary proof.

PREJUDICE/ PROCRASTINATION

Neither relevant evidence nor rule-permitted impeachment is automatically admissible. The first of the big evidence "filters" excludes evidence deemed prejudicial or repetitive and wasteful (i.e. procrastinating). **(FRE 403)** Particularly inflammatory evidence should be dealt with before trial on a motion in limine.

The rules also enumerate several specific filters blocking proof of subsequent remedial measures **(FRE 407)**, settlement offers **(FRE 408)**, payment of medical expenses **(FRE 409)**, withdrawn guilty or no contest pleas **(FRE 410)** and liability insurance **(FRE 411)** to prove fault. These are considered inherently prejudicial.

PRIVILEGE

Testimonial privileges may filter out otherwise rule-authorized evidence. **(FRE 501)** Such objections are typically handled before trial via a motion in limine or in the process of discovery via motions for protective order. The most common privilege assertion you will face is the attorney-client privilege. The privilege protects communications. The client, not the attorney, holds the privilege (although it can be asserted by the attorney on the client's behalf). The privilege can be waived. It could also be overcome by an assertion that the attorney and client are perpetrating a crime or fraud.

Other commonly recognized privileges apply to marital or psychotherapist/patient communications. Privilege law varies by state and there are differences between State and Federal practice.

PREDICATE

The word "predicate" is a way to describe the evidentiary doctrines unique to the introduction of each of the three common forms of evidence: lay witness testimony, expert witness testimony and exhibits. Here we are turning from doctrines that operate at a "30k foot level" down to the nitty gritty. Common to all types of evidence is the specter of a hearsay objection.

Lay Witnesses

Virtually all trials involve lay witness testimony. As a threshold matter, the capacity of the witness to testify must be addressed (e.g. does the witness suffer from a mental defect or have trouble expressing himself)? **(FRE 602)** Once that threshold issue is addressed, we turn to the necessity of laying an evidentiary foundation.

Lay witnesses must testify from a basis of personal knowledge. **(FRE 601)** Laying a foundation at trial means establishing through questions and answers that the witness had sufficient background knowledge regarding the subject matter. For example, you can't put a witness on the stand and go right to asking whether the light was green or red. You first have to establish that she was at the intersection, that she had a vantage point to see the light and saw it in relation to car movement. The same logic applies to any lay witness: establishing a sufficient factual background in a building block by building block manner.

Sometimes a lay witness may be incapable of expressing her thoughts factually but rather can describe events via lay opinion. Courts have discretion to allow this in some instances. **(FRE 701)**

Trial lawyers must also prepare to deal with lay witness' forgetfulness. Initially, one should attempt to refresh a witness' recollection. Virtually anything can be used to do that. Ultimately, the witness testifies from his refreshed recollection not from the document or item used to refresh it. **(FRE 612)** As a fall back, one should attempt to introduce the document or item as a "past recollection recorded." **(FRE 803(5))**

Expert Witnesses

Most civil cases require expert testimony. In personal injury cases doctors testify as to the client's diagnosis, prognosis and permanency of injury. Forensic economists testify in a variety of cases on damages. Standard of care experts are required in many tort cases (e.g. medical malpractice). The rules have boiled down the predicate for expert testimony into four elements: 1. the proposed expert is sufficiently qualified and his testimony will assist the trier of fact, 2. his opinion is based on sufficient facts or data, 3. the testimony is the product of reliable principles and methods and 4. the expert has reliably applied the principles and methods to the facts. **(FRE 702)**

PREDICATE (Expert Witnesses cont.)

Expertise doesn't have to be based on formal academic credentials. It can be based upon knowledge, skill or training and experience in the workplace. The factual basis for the expert's opinion can come from several potential sources. First, the witness can become a fact witness herself (e.g. visit the accident scene). Second, the factual basis can rest on the testimony at trial - the expert can sit in and listen to the evidence at trial. Third, the facts can be disclosed to the witness in advance of her testimony. She can rest her opinion on inadmissible hearsay if the hearsay evidence is of a type typically relied upon by her peers **(FRE 703)**.

In federal cases and the majority of state court cases, the biggest battle is over the third factor above: whether the testimony is the product of reliable principles and methods. Under the older Frye standard, still adhered to by a minority of states, the proposed expert testimony must employ a technique "generally accepted" by the scientific community. If so accepted, the opinion is admissible with little further inquiry by the court. In the Daubert case the Supreme Court held that FRE 702 mandated a multi-factor approach with an emphasis on whether the scientific technique at issue could be tested for reliability. This standard was later expanded to all expert testimony whether or not "scientific". In application, the Daubert test has proved to be more exacting and has filtered out more expert opinions than Frye.

Exhibits

The admission of relevant non-privileged, non-prejudicial exhibits is initially based on the process of authentication. Authentication requires a showing that the exhibit is what the proponent claims it to be. **(FRE 901)** Exhibits are typically introduced by witness authentication, self-authentication **(FRE 902)** or by stipulation. Keep in mind that authentication applies not only to documents but also to photographs, videos and audio recordings as well as tangible objects. In the case of tangible objects authentication may require establishment of a chain of custody.

Two other doctrines, apart from hearsay, govern exhibit admissibility. The best evidence rule expresses a weak reference for the introduction of an original document, photograph or recording to prove its contents. **(FRE 1002)** A duplicate can be used instead of an original unless a genuine question of authenticity exists. **(FRE 1003)** Note that the rule applies to the proof of contents and not to other proof (e.g. proof of a fact that has an existence independent of any writing). The rule of completeness provides that if a party introduces all or part of a writing the court may require the admission of any other part or a related writing or recorded statement as a condition of admissibility. **(FRE 106)**

The authentication of tangible items may also require authentication. If an object is not readily identifiable then establishment of the chain of custody may be required by the testimony of the persons who had possession of the exhibit.

PREDICATE (cont.)

Hearsay

Hearsay is the biggest stumbling block for most evidence students, be they law students or practicing lawyers. As taught in law school, the subject is convoluted and riddled with exceptions. The goal here is to simplify hearsay: to give you an analytical logic that will work in most situations.

We have been taught that hearsay is an out of court statement offered to prove the truth of the matter asserted. **(FRE 801 and 802)** To unpack hearsay we need to break the definition down into three parts. First, the hearsay rule applies even if the statement in question was uttered by the witness on the stand in the courtroom. The rule applies to all out of court statements. Second, "statements" include non-verbal gestures (e.g. nodding or shaking one's head or pointing in a direction). Think assertions. Third, the statement (or assertion) must be offered to prove its truth.

So how do we simplify that? Let's begin by recognizing that the hearsay rule does not apply to "pure observation" testimony (i.e. testimony about what the witness smelled, tasted, felt and, so long as assertions aren't involved, what he heard or saw). Think sensory perceptions.

Once beyond the bounds of pure observation testimony the hearsay analysis tracks in one of three ways. Possibility #1: the rule is inapplicable because the evidence is not hearsay. Possibility #2: the evidence is hearsay but is admissible under an exception to the hearsay rule. Possibility #3: The evidence is inadmissible.

Discerning whether the evidence meets the hearsay definition is the first task. Here we look to the evidence code itself which carves several key types of testimony out of the definition (whether or not the rule definitionally applies). The first carve out are party statements. Not just admissions or statements again interest. All party statements are carved out of the hearsay rule. **(FRE 801(d)(2))** Next are past inconsistent statements uttered by non-party witnesses on the stand. If unsworn, the past statement can only be used for impeachment purposes. If sworn, the past statement can be used substantively (i.e. to prove one's case or disprove the opponent's case). **(FRE 801(d)(1))** The third are what we refer to as "unavailable non-party witness statements". Here we are talking about introducing the prior statement of a witness whose trial attendance can't be obtained (e.g. by reason of death, inability to subpoena or, in some instances, an absence caused by the opponent). The rules in such instance permit the absent witness' prior sworn testimony (e.g. deposition in the case), to be admitted as long as the opponent had an opportunity to cross-examine the witness. **(FRE 804 (d)(1))** Also admissible are the unavailable non-party witness' statements against interest. **(FRE 804 (d)(3))** Note that corroboration of the statement is required in criminal cases. That requirement doesn't apply in civil practice.

The case law establishes several recurring fact patterns as other types of non-hearsay. For instance, words uttered in the context of forming a contract are considered "verbal acts" and deemed non-hearsay. Also recognized as non-hearsay is so called "mental input" testimony admitted to show the effect of an utterance on the listener (e.g. a doctor telling a mother that her child had passed away due to an accident caused by a defendant). Yet another example of non-hearsay is "mental output" testimony: a ridiculous statement offered not for its truth but rather to show that the person who uttered it was crazy at the time.

PREDICATE (Hearsay cont.)

If the testimony or assertive conduct fits the classic definition of hearsay, the analysis turns to whether one or more code-recognized exceptions apply. We believe that most of the situations you'll encounter can be simplified into three categories of exceptions. First are what we refer to as "blurt outs". These are out of court statements the rules deem admissible as reliable because of their spontaneous utterance or the circumstances. These include excited utterances **(FRE 803 (2))**, present sense impressions **(FRE 803(1))** and dying declarations **(FRE 804 (b)(2))**. Another grouping of statements are those related to a declarant's "then existing" mental, emotional or physical condition **(FRE 803(3))** including statements given in a medical context for diagnostic or treatment purposes **(FRE 803 (4))**. These can include statements like "I'm scared" or "I'm furious".

The last of the "big" exceptions to the hearsay rule are those related to documents. Many documents can fit within the business or public records exceptions. **(FRE 803(6) and FRE 803 (8) & (9))** Remember "past recollections recorded" too (from our earlier discussion about lay witness forgetfulness). Finally, remember the bar against admitting hearsay within hearsay. **(FRE 805)** If inadmissible hearsay is imbedded within an otherwise admissible document, you'll have to find an exception that fits it.

AFTERWORD

We hope you found this eBook to be a quick guide to help simplify civil evidence law for you. Use the contents as the basis for an admissibility logic that can help you script virtually any civil trial. Remember that you need to go through the entire logic chain thus you can't get bogged down on one element (e.g. focusing on getting past a documentary hearsay exception without planning how you will first authenticate the document let alone prove its relevance to your case).

Space limitations and the desire to provide a simple guide prevent us from diving deeper for now. If you thought our admissibility logic and these contents were helpful to you and you would like to dive deeper, we want to hear from you. We have developed a CLE-accredited course that unpacks this material in much greater detail. If you are interested in this course, check out the TrialFocus website where you will find updates and a link to the course when it uploads.

Want to dig deeper into this subject?

Please tell me more about TrialFocus.

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ABOUT THE AUTHOR

Marcus Castillo, B.C.S.

Marcus, a member of the Clearwater law firm **Haas & Castillo, PLLC,** is a Florida Bar board-certified labor and employment lawyer with extensive experience trying a broad spectrum of civil disputes ranging from employment discrimination to personal injury to civil rights to commercial litigation. He served for years on the Florida Bar Employment Law Trial Skills Course faculty. He has been named a Florida Superlawyer continuously since 2007. Marcus is co-founder of **TrialFocus, LLC.**

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TrialFocus was founded by lawyers who used focus groups to test the strengths and weaknesses of their own civil litigation cases.

After years of in-house trial simulations colleagues began asking Marcus and his partner Lee Haas to conduct focus groups for them. From these requests TrialFocus was born. TrialFocus is one of a handful of trial consulting enterprises in the country run and staffed by lawyers. This enables us to portray the opposition in all phases of a trial. We are equipped with video production capabilities and with access to facilities ranging from an office conference room to a mock courtroom. TrialFocus has the ability to mobilize a focus group panel that is demographically specific (or specific as to defined attitudes) on short notice.

Call or email us and we'll be happy to discuss your test drive. For updates and news about our trial consulting practice visit us online at **www.trialfocus.com.** We look forward to working with you.

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TrialFocus, LLC

Newport Square Office Building
4625 E Bay Dr #313, Clearwater FL 33764
info@trialfocus.com | (727) 524-4201
www.trialfocus.com