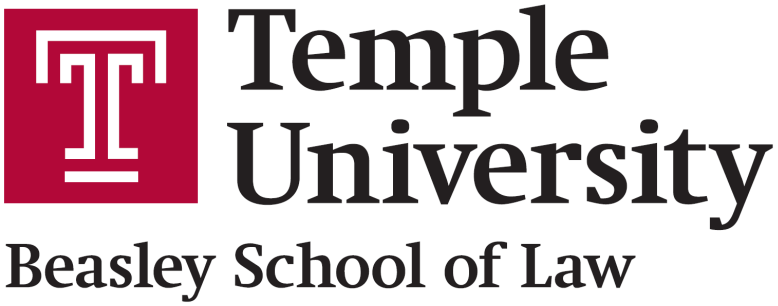
That Evidence Thing:

A Guide For The New Evidence Student



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The purpose is to offer students a primer on Evidence law as they begin their trial advocacy and Evidence education.

It begins with one word but two meanings:

EVIDENCE

In ordinary conversations we use the word "evidence" synonymously with "proof." "Where's the evidence?" "Is that all the evidence they have?" But for litigators, "evidence" has a radically different definition – a set of rules for

- what categories or forms of proof are or are not admissible;
- how may that proof be used [argued] if it is deemed admissible; and
- what foundation [supporting] information must be provided before the item of proof is ruled admissible.

What does this mean? Lots.

- The rules determine what proof the jury will hear, see, smell, taste or touch. It does not – except in the rarest of cases – make that proof believable. A judge may let the jury see a note allegedly written by the defendant but the jury may decide someone else wrote it or they can't tell who wrote it and then disregard it.
- For each item of proof [a note, a torn shirt, a car manual, an email message], you have to search for the rule that will let it in or keep it out.
- For each item of proof that is admitted, you must make sure that if the rules admit the proof for one purpose the proponent may not argue that the proof serves other purposes. This means that even after proof is admitted, you have to avoid misusing or overusing it, and you must listen and object if your opponent misuses or overuses it.

So, where do I find these Rules?

There are more than 50 sets of rules, one for federal courts and one for each state. But all you need are the federal rules.

- The various state rules are largely (just not entirely) consistent with the federal version.

You can download a free copy from various sources. It will be useful for you to get a pamphlet sized version to reference.

Are The Rules Organized?

The Rules have a table of contents that make them easy to follow. The below descriptions are a guide to help you know, right off, what rule(s) to look for. Where it says "skip for now" it means that as a beginner in trial competitions the chapters have little or no application.

- Table of Contents
- Article I – General Provisions **This is where the rules are about how to object and how a judge decides objections**
- Article II – Judicial Notice **skip for now**
- Article III – Presumptions in Civil Cases **skip for now**
- Article IV – Relevance and its Limits **This chapter has the rules about what facts that help to prove or disprove a charge or claim are admissible**
- Article V – Privileges **skip for now**
- Article VI – Witnesses **This chapter has rules about what facts are relevant *about a witness* to decide whether the jury should or should not accept their testimony**
- Article VII – Opinions and Expert Testimony **This chapter has rules about when people – lay or expert – may give opinions**
- Article VIII – Hearsay **This chapter covers, in its simplest terms, what may be repeated in a courtroom**
- Article IX – Authentication and Identification **This chapter has the tools for when 'things' are brought into court – photos, maps, guns, drugs – and how we show that they are pertinent to this trial**
- Article X – Contents of Writings, Recordings, and Photographs **This chapter is narrow, focusing on when an actual document, photo or recording must be brought into court instead of having someone just describe it**
- Article XI – Miscellaneous Rules **skip for now**

Where do I begin (1)?

[THIS NEXT SECTION IS WRITTEN FOR TRIAL COMPETITION STUDENTS. ONE WAY TO BEGIN AN EVIDENCE ANALYSIS IS WITH THE PARTICULAR CASE FILE. FOR AN EVIDENCE CLASS, UNTIL THERE IS A CASE FILE THE ANALYSIS JUST STARTS WITH AN UNDERSTANDING OF THE RULES. *SEE* NEXT SECTION.]

The first (yes, there are two) place to begin is with the jury instructions and verdict sheet. They will tell you what must be proved/disproved to win the trial. Once you grasp these elements you then read the entire file and make a list of every fact – testimony or exhibit - that helps your case and a similar list of every fact that hurts your case. Also list the source. A list may look like this (here, in a criminal prosecution with the defense of self-defense):

Good Fact	**Source(s)**	**Applicable Rule(s) of Evidence**
Victim had 3 prior assault convictions	Detective's investigation; and exhibit 9, criminal record	
Client [Jay] is smaller than victim	Police arrest report of client; medical chart of victim from emergency room	
Victim had been drinking heavily	EMT report; eyewitness claim that victim appeared drunk	
Victim had told people before the assault that "I'm	Victim's spouse said this in police interview	

going out looking to hurt Jay"		

A similar chart must be created for every bad fact. After you learn the pertinent Rules of Evidence you will complete column 3 – "Applicable Rule(s) of Evidence."

One last note. Column 3 refers to the applicable rule *or rules.* Sometimes an item of proof is inadmissible under one rule but is admissible under another, *i.e.*, it is inadmissible for purpose A but admissible for purpose B. You will want to check multiple rules to search for some way to get the proof in.

Where do I begin (2)?

The second beginning in analyzing a case file from an Evidence perspective is to learn the major categories of Evidence issues found at trials. Once you learn the categories and their meaning and scope you can assess which proof is more likely to be admitted and which is more likely to be ruled inadmissible. As you read a case file you should be marking proof that hits one or more of these categories.

Note the words "more likely." Some Evidence issues are crystal clear but many are debatable and within a Judge's discretion to admit, exclude or 'tone down" [limit in some way]. Here are the major categories - and each is elaborated on in the following pages:

1. Proof of the **character** of either party. "Character" in its simplest form is how a person generally is – careful, reckless, attentive, violent, kind.
2. Proof of **other acts/actions**. Whether a case involves a single act – a drug sale, a car crash, a medical error – or a series of acts such as a months-long period of workplace harassment or repeated thefts from a victim's trust account, issues arise if the jury is going to be told about any other conduct that occurred before, concurrent with or after the charged conduct.
3. Is someone expressing an **opinion**? "They looked drunk to me." "It seemed accidental." "Jules must have written that note – I've seen their handwriting before." "The bullet recovered from the victim's body came from the gun found in the defendant's house." Any statement that seems beyond an express statement of fact must be assessed under the **lay** and **expert opinion** rules.
4. Proof of the **witness' credibility** or lack thereof. Most of this is common sense – has the witness told different stories; is the witness known as a dishonest person; is there bias

towards/against one side of the case; or does the witness have a criminal record?

5. Proof of words said/written out of court, a.k.a. **hearsay**. The hearsay rules are complicated – they apply only to some words, not all; they apply depending on how the party offering the words wants to use them; and although the rule bans hearsay it has more than 30 exemptions or exceptions allowing the words to be used *for their truth*, a concept explained below. For now, highlight or otherwise note every instance where words are being repeated in a witness' statement or testimony or in a document.

There is one further screening tool. A piece of proof might be admissible under a rule or rules but raise problems of being unfairly prejudicial (*e.g.* leading to a highly emotional response), misleading or confusing. This is a **Rule 403** assessment. Keep in mind how items of proof might raise such concerns.

1. Character

The concept of "character" comes up twice in the law of Evidence

- Does the character of one of the actors [for example, the defendant in a civil or criminal case] help prove how the person acted on the day that is the subject of the case?
- Does the character of a witness help us tell whether that person is or is not telling the truth?

Here, we are talking about the first kind of character – as proof of how people behaved. For example, in a car accident case where the claim is negligent or reckless driving on the part of the defendant, may the jury hear that the defendant is in general a careful person [using that character trait to support the defense] or is in general a careless or reckless person [using that character trait to prove that the defendant did drive poorly and thus caused the accident].

So watch out for testimony that "person X is *really careful*" or "person Y *gets angry easily*" or "person Z is *so kind*." The *italicized* words are describing how the person is in general. Highlight or underline each instance.

What's the rule regarding character. In its simplest form it is as follows:

- No character evidence in a civil case, for the plaintiff or the defendant, to try and show how they acted on the day of the event.
- *Some* character is allowed in criminal cases, generally offered by the defense to show that they are not the kind of person who would commit such a crime. In a murder case, the defense may call witnesses to say that this accused "is peaceful" or "is nonviolent.

There is one more essential aspect to understanding character. In addition to character being described in express terms ["Ms. Thomas is a very peaceful person"] character may be inferred when we hear about an act other than the one on trial that tells us about the person. If Ms. Thomas is charged with an assault and a witness says "I have seen Ms. Thomas break up fights and walk away from fights," the conduct [acts] being described carry the message that Ms. Thomas is a very peaceful person.

What are the character takeaways?

- The rules we are discussing are Rule 404(a) (no character in civil and some character in criminal cases) and 404(b) (no testimony about an act where its message is the person's character or propensity)
- Your job is to go through any Evidence problem and look for any express statements of character *and* for any acts that might be used to let the jury infer the person's character
- Later you will learn how to present or challenge character testimony when it is allowed
- Finally, we will return to the word "character" when we talk about witnesses and credibility

2. Other acts/actions

A trial is about a finite set of acts. You can visualize it as a box:

For example, the case involves an accident at a particular location, on a particular day and at a particular time, with specific individuals. Yet case files and Evidence problems are filled with references to other acts, ones that occurred before or after the event 'inside the box.' In the auto accident case, maybe there is proof that one driver had a prior accident, or that the injured person used drugs one week earlier.

Here, the task of reviewing a case file is relatively easy. Highlight every act/action that is not 'inside the box' and not within the pleadings.

And the law?

- If the other act/action only proves that this is the kind of person who would or would not do the act on trial today, it is inadmissible. This is what was talked about under "character." For example, in an auto accident lawsuit, the fact that the driver was caught speeding six months earlier, or had been in a different accident on a different day, has the only message that "this person is a bad driver." It is a sort of 'did it once, did it again' message. That is not permitted. That is the ban on propensity.

- Sometimes another act – even if it has that character/propensity message – has an additional and separate significance. It might show a person's motive for the case on trial. It might show identity – if we can prove this person did the earlier act, it might prove that this person did the act on trial. For example, in a murder case the jury should not hear that six months before the murder the accused hurt a different person – the only message the prior assault sends is that this defendant tends to be a violent person. But if the murder defendant gave drugs to a person six months before the killing *and that person never paid for the drugs* that drug selling and loss of money might give a motive for the murder.

So now, the job is more complex. Find the other act(s) in the case. See if each is excludable because it only shows propensity or if, instead, it has a clearer link to the conduct on trial. Rule 404(b) has an illustrative list of such links, called non-character [non-propensity] purposes:

- Motive
- Knowledge
- Intent
- Part of a broader plan
- Identity
- Opportunity

If you find there is an argument that the other act has that non-character purpose there will be one final step. There will have to be a balancing – what is the utility or benefit of the jury learning of this other act versus what is the harm. This involves applying one more rule – Rule 403.

What are the "other act/actions" takeaways?

- Find all acts or actions by your client or the opposing party that are not part of the conduct at issue in the case.
- Look at each one and ask yourself whether that other act has a propensity message – does it tell the jury what kind of a person the doer is (kind, aggressive, criminal-minded, etc.). If "yes," there is an argument for exclusion.
- Ask also if that act has a non-character purpose, a real link to help tell the story and prove the allegation(s) in your case. Does it show motive? Intent?
- If it has some legitimate non-character purpose, conduct a cost-benefit analysis: how important is it, how bad is the propensity message that it sends.

An illustration: Person X is charged with murder. No eyewitness saw the face of the murderer, but all eyewitnesses saw that the murderer used a knife with a curved blade and a handle that was purple with a diamond insert. Such knives are rare. Now consider these prior acts:

2 years earlier, X robbed someone	Propensity – X likes to commit crimes
2 years earlier, X robbed someone with a knife	Still propensity – X likes to commit crimes and may be a violent person. And having a knife is too common to prove much related to this case
2 years earlier, X stabbed someone with a knife	Still propensity – this becomes the 'did it once, did it again' propensity approach that is not allowed
2 years earlier, X stabbed someone using a knife that had a	Now we have another act that still shows propensity – X is violent –

curved blade and a purple handle with a diamond insert	but also shows something that is not about propensity but links directly to this case. Having a purple knife with a curved blade and a diamond insert tends to help identify X as the murderer; and it shows that X had the ”opportunity” [here, the particular type of weapon] needed to commit the murder

3. Opinions

The Rules of Evidence actually tolerate use of a lot of opinion testimony, both lay [ordinary experience] and expert [specialized experience].

Why?

First, for lay witnesses sometimes the line between a statement of fact and a statement of opinion is a little blurry (consider the words "the person was tall" as an example) and it is simply too hard to draw a line; and second, sometimes an opinion has some real value (consider the opinion of your close friend that something has your handwriting on it, an opinion that might have great value if they have seen tens or hundreds of letters written by you).

So for lay witnesses, read the competition file and highlight what seems to be an opinion – a statement that veers away from hard facts or incorporates a bundle of facts into a conclusion. Examples might be:

- They looked angry
- It seems to me that they were tired
- The driver sure was reckless
- They sure were drunk

If you see statements that seem less strictly factual in nature, there are three questions to ask:

1. Is the content relevant to the case?
2. Is there some basis for the witness to give the opinion, which means do they have enough experience to give the opinion and is it based on rational, first-hand perception?
3. Will it help the jury determine a fact of importance in the case?

If the answer to all three are "yes," then the opinion may be admissible.

How about experts? Expert opinion is tolerated, and even welcomed, because there are some topics the average juror just doesn't know enough or can't figure out without help.

In actual litigation, expert opinion has to be vetted, first, by whether the underlying science or skill is generally reliable. For example, is the field of DNA analysis proved to be reliable? In a mock trial competition, that field-reliability issue is rarely in play. What may be at issue are the following:

- Qualifications – does the witness have enough training/experience to testify about the subject matter and draw conclusions?
- Are the conclusions this expert is giving backed up by evidence in the file?
- Is the expert going beyond the data or giving opinions outside of their training/experience?
- Is the expert opinion "helpful," *i.e.*, do the jurors need that help or can they draw the conclusion on their own? Experts may testify if their opinions will help jurors understand otherwise-complicated evidence or determine one of the facts in the case.

The rest of dealing with an expert will be like dealing with any witness – finding ways to support or attack their credibility. For now, read the file and see if a witness is clearly being offered as an expert. If the answer is "yes," go opinion by opinion and check it for whether it is supported by facts [here, make a list of the supporting facts/documents], within the expert's domain, and likely "helpful."

There is one last issue in the world of opinion testimony. Assess whether the opinion being given by a witness is one that may arise from general life experience or instead only from specialized training or experience. If the latter, only an expert may give such testimony. So if a

police officer testifies to what they saw and then begins to explain about angles of how guns were fired, the latter is expert opinion testimony. This is not allowed unless there is proof that this officer has the training and experience needed to testify about such specialized knowledge. If a witness seems to be going into specialized matters, there may be a challenge to that part of their testimony unless and until they are shown to have the proper background/credentials.

What are the opinion takeaways?

- Many opinions are admissible.
- For lay witnesses, make sure they have the personal knowledge needed to give an opinion.
- For experts, make sure they have the qualifications and the underlying data *and* are not giving opinions outside of their area(s) of knowledge/specialization.
- For both lay and expert opinions, ask if they are actually helpful – necessary to assist the jury in understanding the case.

4. Credibility

In trials hundreds of years ago, the jurors knew the witnesses. Everyone was from the same town, so the jurors had enough knowledge to assess the trustworthiness of the witness. As the law transitioned and emphasized the need for impartial jurors, the jurors became strangers. Tools were needed for assessing credibility, tools beyond the impressions made by watching and listening [demeanor].

The Rules of Evidence offer a series of methods for assessing witness credibility to help the jury decide which of the following applies:

- Is the witness sincere [honest] and accurate?
- Is the witness sincere [honest] but inaccurate/mistaken?
- Is the witness insincere [dishonest] and therefore lying?

In trials, the witness takes the oath or otherwise affirms that they will be truthful and then is questioned to bring forth their testimony. Initial credibility comes from that promise to be truthful. The law then turns to how that witness' credibility is challenged as inaccurate [honest but mistaken] or deliberately wrong. The basic means of challenging credibility are:

- Bias – can it be shown that the witness might gain something personally from testifying for one side, or 'leans' toward one side or the other? There is no "bias" rule in the Rules of Evidence – the U.S. Supreme Court has classified bias under the general relevance rule, Rule 401.
    - **NOTE – bias does not always mean the witness is a liar. My bias can distort how I see things, so I am honest/sincere but mistaken.**
- Changes in one's story – called "prior inconsistent statements," this consists simply of proof that the witness has given different

versions of the event(s), either with different details or with significant details omitted. This is addressed in Rule 613.

  - **NOTE – changes in stories do not always mean the witness is a liar. It may show that, or just that the witness has uncertainty or a bad memory.**

- Proof of a criminal record – does the witness have a criminal record that might reflect some likelihood of a willingness or inclination to lie? For now, write down the criminal record of any witness who will testify; later you will learn which convictions are allowed. This is addressed in Rule 609.
- Proof that others believe this witness to be a liar/dishonest – after witness A testifies about the case, is there a witness B who will say "I know A, and in my opinion A is dishonest" or "I know lots of people who know A and they all say A is dishonest." This opinion/reputation evidence is permitted under Rule 608(a).
- Proof that the witness who is testifying has done some extremely dishonest or deceptive act in the past – this is a very limited allowable attack on credibility. So if you read a file and the witness who is testifying about an accident or a crime once stole their siblings' inheritance that fact might be allowed to use to show the witness as having a character trait of dishonesty and thus likely be lying in this case. This is addressed in Rule 608(b).
- Proof of capacity/competence limits – was the witness tired; drunk; suffering from a condition that might impact perception, memory or recall? This has no governing rule – it is again subsumed under the general relevance rule, Rule 401.
- Contrary facts – this is purely common sense. Is there a photo that shows the scene looked different than what the witness claims? A report? A more reliable witness? This has no governing

rule – it is again subsumed under the general relevance rule, Rule 401.

There is more. There are issues of how the attack is conducted – during cross-examination [this is sometimes called "intrinsic" proof] or after the witness has finished testifying [no surprise – this is called proving it "extrinsically"]. There are also issues of how the party that called the witness responds to a credibility attack. Finally, there are issues of when and how the party calling a witness may anticipatorily show the credibility issues to deflect or soften the attack. These will be taught. For now, you just need these categories of credibility challenges so you can read a competition file and spot them.

What are the credibility takeaways?

- A large part of a trial is about credibility challenges – making them and responding to them.
- There are two basic attacks – the witness is mistaken or the witness is a liar.
- For both your witnesses and the opposing witnesses you must list and be prepared to address any possible credibility attack.

5. Hearsay

Trying to grasp the rules of hearsay before having an Evidence class is difficult. It entails understanding the following:

- Which words [or gestures] are or are not hearsay?
- If words are hearsay, what types of hearsay are inadmissible and what types are allowed into evidence?

The first step is to read a competition file and highlight every possible instance of hearsay. What are you looking for?

- When a witness says “X told me…” or “I heard X say…” or “an email from X reads…” you might have hearsay. Highlight each instance.
- When there is a document that has an entry that you or your opponent wishes to read or show to the jury. Highlight each instance.
- When your witness themself made an earlier statement such as a memo, text message or diary entry that you wish to read or show to the jury. Highlight each instance.

WAIT A MINUTE. I THOUGHT HEARSAY WAS WHEN AHMAD REPEATS MARIA'S WORDS THAT "X HAPPENED."

TRUE. BUT IT MAY ALSO BE HEARSAY WHEN AHMAD READS OR TELLS THE JURY THAT "AND I TOLD MY FRIEND THAT X HAPPENED."

SAID MORE SIMPLY, THE HEARSAY RULE DISTINGUISHES BETWEEN LIVE TESTIMONY OF "THIS IS WHAT HAPPENED" OR "THIS IS WHAT I SAW" AND ANYONE STATING "BEFORE TRIAL, X SAID THIS IS WHAT HAPPENED."

HEARSAY REFERS TO "OUT OF COURT" STATEMENTS – ANY ASSERTION SOMEONE MADE OTHER THAN WHILE ON THE WITNESS STAND IN THIS TRIAL.

To get a preliminary grasp of this and to be able to begin working on a mock trial competition case file, here are some introductory notions.

- Rule 1 – Hearsay comes from people, not AI, not GPS, not from a barking dog.
- Rule 2 – Hearsay is not the repetition of all words, but of words [usually sentences] that are assertions. An assertion is a statement of a fact. You can test if a sentence is an assertion by putting the words **it is true that** in front of the sentence. If it still makes sense it is an assertion.
    - "It is raining." Assertion **it is true that it is raining**
    - "It rained the day of the murder." Assertion **it is true that it rained the day of the murder**

    - "Jules did the murder." Assertion **it is true that Jules did the murder**
    - "Sit down." NOT an assertion. [Being assertive, or bossy, is not the same as making an assertion.] **it is true that sit down – OOPS, THAT MAKES NO SENSE**
    - "Where is the kitchen?" NOT an assertion. Most questions won't be assertions. **It is true that where is the kitchen – OOPS, THAT MAKES NO SENSE**
- Rule 3 – An assertion can be hearsay whether it addresses a minor fact ["it rained the day of the murder"] or a major fact ["Jules did the murder"].
- Rule 4 – An assertion is hearsay only if we are asking the jury to believe that what was said is one of the true facts in the case. This is called using the words "for the truth of the matter asserted." In other words, we are asking the jury to treat the hearsay assertion the same as if a witness said it on the stand in person. **This gets complicated and confusing, but with practice it will become second nature.**
    - One way to imagine this is to think of your closing argument. If the hearsay was "it was raining on the day of the murder" and in your closing you will argue "and we proved – it *was* raining on the day of the murder" then you are using the assertion "for its truth."

Here are some examples:

- At a trial for murder, we are trying to prove that the accused bought a gun one week before the killing. Witness A says "B told me the defendant bought a gun one week before Johanna was shot." Buying a gun can be a step towards committing the murder.

If the closing argument includes "And you know this defendant had the means to kill – they bought a gun one week before the murder" you are using the assertion made by B to prove its truth: a gun was bought by this defendant. Therefore, the assertion "the defendant bought a gun" is hearsay.

- At a trial suing a law school for bad teaching, a witness might come to court and testify that "the professor said 'there is no such thing as hearsay.'" The words "there is no such thing as hearsay" are an assertion, but we will never argue to the jury that "there *is* no such thing as hearsay." We will just argue that the professor gave bad/inaccurate information. This is *not* hearsay.

You will learn typical/recurring forms of admissible hearsay. They will include:

- Statements made by the opposing party
- Some contents of business records
- Statements made in a state of excitement
- Statements made to get medical assistance

For now, just focus on two tasks – find all assertions that were made out of court and then ask, for each, whether you or your opponent will want to use them for their truth. Then use that list with your teammates and coaches to focus on which ones will be allowed.

What are the hearsay takeaways?

- Hearsay is not all words – it is words said or written by humans that are assertions *and* will be offered for their truth. This definition comes from Rule 801.
- The general rule is that hearsay is inadmissible, but there are more than 30 categories that are allowed. These categories are found in Rules 801(d), 803, 804 and 807.

CAN YOU FIND THE ISSUES?

One skill that must be developed and then mastered is issue-spotting—much like the task in the below picture:

On the following page is a brief case synopsis. See what Evidence issues you can find and then check your results against those on the annotated copy that follows.

Case Summary:

Highlight Any/All Evidence Issues

On August 15, **Yr-2**[1]**,** Sandra Day, 74, was admitted to the St. Jude Hospital in Waymart, Pa. Day was there for a series of maladies – heart problems, diabetes, early on-set dementia, and fluid in the lungs. She was assigned to the critical care ward.

Starting August 18, Day's nurse on the 8-4 shift was Melanie Weiss. Weiss had the option of using restraints on Day because Day's multiple conditions led her to throw her body around, risking injury. Weiss did not opt for the restraints, deciding to first observe Day by regularly checking her in the room. During the morning, there was no problem. Day was seated in an upright chair next to her bed.

After lunch on August 18, Weiss returned to the room and Day was on the floor, writhing in an apparent seizure. She was bleeding from the head. Day's daughter, Hortense Burke, came in, saw her mother, and became overwrought. Day was rushed to the E.R. After Day had been taken to the ER, the head nurse (who came on duty just after Day's fall) said to the daughter: "We are so sorry for our neglectful behavior." Another nurse, who was on duty the entire shift, told the head nurse and the daughter: "I was on and off the wing of the hospital the day this happened, but I know I saw Nurse Weiss one or two times before the fall of the patient, and I remember that Nurse Weiss seemed distracted, like something was on her mind."

Nurse Weiss, tearful, told the daughter and the head nurse: "I entered Ms. Day's room every fifteen minutes, the time required by internal hospital policy." Later that day, the head nurse found a note on Day's chart dated 8/18/Yr-2, stating: "Patient S. Day, visual checks," with times written on it. The times were "9:15 a.m., 10:20 a.m., 10:45 a.m., 10:55 a.m., 11:30 a.m., 1:20 p.m."

The head nurse went and spoke with every other elderly patient on the floor where Nurse Weiss worked. Five elderly individuals, each of whom was a patient

[1] "Yr-2" designates 2 years before the current calendar year; "Yr-4" designates 4 years before the current calendar year.

cared for by Nurse Weiss around the time of this incident, said: “No one was a more caring nurse than Nurse Weiss” or similar words.

In the meantime, Day was transported from the E.R. to another hospital that specialized in such injuries. In a coma for two weeks, Day then died.

Day’s daughter has brought suit against St. Jude Hospital and Weiss, on behalf of her mother’s estate, for wrongful death and medical malpractice. The claim is that (a) Day should have been in restraints; and (b) even with no restraints, there was a duty to monitor her every 10 minutes, and this duty was breached because Weiss did not keep to that tight a schedule; and the fall caused the coma and death. The joint defense of the hospital and Weiss is that the decision to leave Day in the chair was reasonable, especially in light of the regular checks by the nurse, and the coma was a result not of the fall but of internal bleeding in the brain [cranial bleeding] that existed when Day entered the hospital.

Discovery in the pre-trial stages revealed the following:

- Nurse Weiss was the nurse on duty 7 years earlier when a child under their care died. The death was deemed a result of a failure to properly monitor the child’s breathing, which was to be checked every hour. Weiss was disciplined but not fired.
- Since the incident with the child 7 years earlier, Weiss twice received the “Life-Saver” award at the hospital for identifying patients with critical conditions and getting them needed life-saving care.
- Day’s daughter was convicted of fraud 6 years ago, with the charges arising from the collection of Social Security disability payments while having a full-time job.
- Day had been at a nursing home in the weeks before being hospitalized, and the nursing home medical chart reported on August 12 that “Day has headache; nausea and vomiting; or sudden tingling, weakness, numbness or paralysis of face, arm or leg.”
- A neurologist retained by the hospital after Day’s death issued a report stating: “Headache; nausea and vomiting; sudden tingling, weakness, numbness or paralysis of face, arm or leg, all the symptoms documented at the nursing home, are signs of intracranial bleeding. It is therefore highly

likely that Day already had a brain injury which caused the death, not any fall from the hospital chair."

Case Summary:

Annotations of Potential Evidence Issues

On August 15, **Yr-2,** Sandra Day, 74, was admitted to the St. Jude Hospital in Waymart, Pa. Day was there for a series of maladies – heart problems, diabetes, early on-set dementia, and fluid in the lungs. She was assigned to the critical care ward.

Starting August 18, Day's nurse on the 8-4 shift was Melanie Weiss. Weiss had the option of using restraints on Day because Day's multiple conditions led her to throw her body around, risking injury. Weiss did not opt for the restraints, deciding to first observe Day by regularly checking her in the room. During the morning, there was no problem. Day was seated in an upright chair next to her bed.

After lunch on August 18, Weiss returned to the room and Day was on the floor, writhing in an apparent seizure. She was bleeding from the head. Day's daughter Hortense Burke came in, saw her mother, and became overwrought. Sandra Day was rushed to the ER. After Day had been taken to the ER, the head nurse (who came on duty just after Day's fall) said to the daughter "we are so sorry for our neglectful behavior." Another nurse who was on duty the entire shift told the head nurse and the daughter that "I was on and off the wing of the hospital the day this happened, but I know I saw Nurse Weiss one or two times before the fall of the patient, and I remember that Nurse Weiss seemed distracted, like something was on her mind."

Nurse Weiss, tearful, told the daughter and the head nurse that "I entered Ms. Day's room every fifteen minutes, the time required by internal hospital policy." Later that day the head nurse found a note on Sandra's chart dated 8/18/Yr-2, stating "Patient S. Day, visual checks" with times written on it. The times were "9:15 a.m., 10:20 a.m., 10:45 a.m., 10:55 a.m., 11:30 a.m., 1:20 p.m."

The head nurse went and spoke with every other elderly patient on the floor where Nurse Weiss worked. Five elderly individuals, each of whom was a patient cared for by Nurse Weiss around the time of this incident, said "no one was a more caring nurse than Nurse Weiss" or similar words.

In the meantime Day was transported from the E.R. to another hospital that specialized in such injuries. In a coma for two weeks, Day then died.

Day's daughter has brought suit against St. Jude Hospital and Weiss, on behalf of her mother's estate, for wrongful death and medical malpractice. The claim is that (a) Day should have been in restraints; and (b) even with no restraints, there was a duty to monitor her every 10 minutes, and this duty was breached because Weiss did not keep to that tight a schedule; and the fall caused the coma and death. The joint defense of the hospital and Weiss is that the decision to leave Day in the chair was reasonable, especially in light of the regular checks by the nurse, and the coma was a result not of the fall but of internal bleeding in the brain [cranial bleeding] that existed when the mother entered the hospital.

Discovery in the pre-trial stages revealed the following:

- Nurse Weiss was the nurse on duty 7 years earlier when a child under their care died. The death was deemed a result of a failure to properly monitor the child's breathing, which was to be checked every hour. Weiss was disciplined but not fired.
- Since the incident with the child 7 years earlier, Weiss twice received the "Life-Saver" award at the hospital for identifying patients with critical conditions and getting them needed life-saving care.
- Day's daughter was convicted of fraud 6 years ago, with the charges arising from the collection of Social Security disability payments while having a full time job.
- Day had been at a nursing home in the weeks before being hospitalized, and the nursing home medical chart reported on August 12 that "Day has headache; nausea and vomiting; or sudden tingling, weakness, numbness or paralysis of face, arm or leg."
- A neurologist retained by the hospital after Day's death issued a report stating "headache; nausea and vomiting; sudden tingling, weakness, numbness or paralysis of face, arm or leg, all the symptoms documented at the nursing home, are signs of intracranial bleeding. It is therefore highly likely that Day already had a brain injury which caused the death, not any fall from the hospital chair."