



# **Means Of Producing Evidence: Oral & Real Evidence**

# Oral Evidence

- ❖ Once the relevant and admissible facts (evidences) are identified, the next step is to produce such facts through various means; the one and the dominant mechanism is testimony of witnesses.
- ❖ Since obtaining real evidence for alleged facts is rare in most instances particularly in criminal cases, oral evidence constitutes the main mode of presentation of relevant facts.
  - What do you think about the soundness of the common law tradition where oral evidence has got more weight than real evidences?
  - Are witnesses witnesses of court or witnesses of parties? If they are courts witness, it means it is the inquisitorial system practiced by civil law countries in which case preparation of witnesses is not allowed (it is unethical); if witnesses are for the litigants, it means it is an adversarial system of common law countries where the court has no role verifying the truthfulness of the factual assertions except to make sure that rules of procedure and evidence are observed during the proceedings.
- ❖ This section deals with general concepts about oral evidence, the general competency of witnesses; and privileges granted to some group of persons not to testify.

# Oral Evidence: Definition

- ❖ Oral evidence is a solemn declaration or a statement made under oath to establish a fact under question before a court.
- ❖ A witness is the one who has a first-hand knowledge (what he has perceived in his senses directly) about the fact in issue.
  - A witness can also be one who gives his professional opinion over on the issues framed by the court (expert witness), unlike testimony on the basis of perception in case of ordinary witnesses.
- ❖ The fact presented by the witness can be a direct testimony to the fact in issue, or it may be relevant to the fact in issue.
  - In other words, the witness may give oral attestation to the fact in issue itself or another fact which is supposed to be relevant to the fact in issue.

# Competency of Witnesses

## ❖ General competency

- General competence represents the ability of a witness to testify to facts he has perceived in his senses, without forming opinion by way of inference from raw facts.
- As a rule, any person is considered to be capable to testify before the court unless proven otherwise by the other party.

## ❖ Special competency

- It refers to an opinion of a witness on the basis of the facts he has witnessed. This is a personal analysis, deduction and conclusion of a witness. Ex: opinion about age or state of intoxication.
- A witness may give his opinion on matters that every lay man can make an opinion i.e. layman opinion. This is a kind of opinion that can be formed by any person. If the opinion or conclusion to be drawn is very specialized that require an expertise on the part of the witness, this is an expert opinion that can't be testified by a layman.

# Grounds of Incompetence

- ❖ Remember that competency is a rule (presumed), and incompetence is an exception; hence the party producing witness may not be required to prove the capacity of his witnesses; the burden to prove their incompetence lies on the one who claims their incapacity. To disprove the presumption, one of the following points must be proved:
  - Mental incapacity of the witness owing to age (children), insanity and intoxication.
  - Given the principle that even a child or a person with mental defect can testify so long as they can perceive what they have observed or heard and relate it to the court, the opposing party shall prove that such person cannot correctly comprehend what they have collected in their senses and communicate it to a third person; otherwise the mere argument that a witness is a minor or mentally derange does not bar the person from standing as a witness.
  - The probative values attached to the testimony of minors or mentally infirm witnesses might not have to be the same; the truthfulness and credibility of witnesses in general shall be examined/impeached through various mechanisms including proof of prior conviction, and it has to be cross-checked by other relevant evidences.
    - If the accused becomes a witness, he can be impeached by invoking his previous conviction? No. Why?

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- ❖ How about physical incapacity, when, for instance a witness is blind? can it be a justifiable ground for incompetence?
- ❖ How about conviction of crime (legal interdiction)?
  - It can be used to impeach the witness and discredit his testimony; but it may not be a bar from standing as a witness. Why? Standing as a witness is a support for justice system, it is not to the advantage of the witness himself.
- ❖ What if the witness has interest in the outcome of the case? If a witness is a relative by consanguinity or affinity to the parties, or emotionally attached or a close friend of the litigants or a victim in criminal cases, the parties themselves?
  - This is no more a ground of incompetence. Why? What consideration has put weight in favor of accepting the testimony of close persons to the litigating persons? Presumption of ethics or pragmatic challenges i.e. absence of evidence in certain cases except those who are close?
  - But the other party can impeach the truthfulness of the testimony mentioning his interest in the case as one ground; the court has a discretion to attach whatever weight it thinks proper to the testimony; together with other evidences including demeanor.

# Hearsay Evidence

- ❖ Hearsay is an information obtained from the statements of other persons; hence it doesn't represent a fact that has been directly observed/witnessed/perceived by a witness.
- ❖ As a rule hearsay is not admissible, though relevant, save exceptions. Why? There is no way that the statement repeated by the witness before the court can be verified, i.e. it is an out-of-court statement presented before the court by a witness.
- ❖ Note that hearsay can be determined depending upon to what issue of fact it has been offered.
  - If 'what the document says' or 'what a person has said' is framed as a fact in issue or a subsidiary factual issue, can it be said that presentation of such a statement through a witness is hearsay? No.
  - If the issue raised is 'whether someone is killed by somebody' and if such is found in a document or said by a third person, presentation of such statements by the witness before the court definitely constitutes a hearsay.
  - So, the bottom-line is hearsay is relative to the framed issue; the statement of a witness can be a direct knowledge or hearsay depending upon the disputed issue.

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- ❖ The probative values attached to hearsay facts must definitely be lower than what is presented through direct knowledge or inferred from a circumstantial fact.
  - Particularly in criminal cases, the evidentiary value of hearsay is very much less in light of the criminal standard of proof, that the judge has to be convinced about the guilt of the accused beyond doubt; and hearsay by itself leaves doubt because the statement might have been fabricated by the one who said it first, or it might have been corrupted in the process of transmission due to addition or subtraction fact or misapprehension of the listener. the more the transmitters of the fact, the higher the possibility to be corrupted, and the higher the doubt it creates in the mind of a judge.
- ❖ This does not mean that hearsay shall not be presented at all in criminal cases; there is no harm if it is presented as one type of evidence; so that it can corroborate or supplement other evidences of higher evidentiary weight.
- ❖ The argument that it should not be admitted in criminal cases is not sound, in my opinion; it is just an item of evidence, it does not have the effect of prejudicing the mind of the judge as in the case of character evidence; so what is the rationale then?

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- ❖ Some hearsay evidences can obtain a higher evidentiary weight than other ordinary hearsays. These include?
  - **Dying declaration:** if a dying person tells about the cause of his death, and such statement is reported to the court in the issue regarding the cause of death of the dying person, it is hearsay, but a higher weight must be attached to this evidence. Why? The dying person is not expected to lie while facing death, with no motive for benefit. But why only about his death? How about the death of some other person or any other fact which is relevant to the issue framed?
    - This doesn't mean that it is conclusive; still there is a possibility that he might lie for the benefit of others; or miscomprehend the event.
    - The said weight is as compared to other hearsay evidences; and it doesn't in any way compare with direct knowledge; for example with the testimony of the a witness who was present at the situation that has caused the death of the person.

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- What is hearsay about statements about ordinary course of business or statements against interest or statements about custom? For what issue are they be hearsays? If the issue is about what is affirmed by the statement, their possibility if fabrication or mistake is very minimal; so how can they be hearsays? Even for other issues, if they are presented through witness, why they are hearsays?
- We look forward for further explanation of these points from the group working on hearsay evidence.

# Real Evidence

- ❖ Real evidence is any kind of evidence beside oral testimony which consists of documentary, physical objects or a (demonstrative) representing a fact which is relevant to the fact in issue.
- ❖ Real evidences may represent a direct or an indirect evidence; the former addressing the disputed issue directly; and from the latter an inference which is relevant to the issue.
  - Is it possible that real evidences can represent hearsay facts?
- ❖ Physical and demonstrative evidences
  - It includes objects, videos, audio and picture files, reconstructions, maps and drawings, scientific experiments from a fact alleged can be inferred.
  - When it is difficult for an average person to deduce from, physical objects, an expert witness would be called to explain what the object and the demonstration represents.
- ❖ Documentary evidence
  - It is a written document recording a fact which is relevant to the fact in issue framed by a court.

# Cont'd

- For a document to be accepted as valid evidence, it has to be authenticated. How a document is authenticated:
  - Through admission by the parties; that it is the same document that they have signed, this would be conclusive to authenticate the document.
  - By presenting persons who witnessed the execution of the document
    - After all, committing a transaction or an agreement, and having some persons as observers is a wise choice on the part of the engaging parties. This expands the means of authenticating the document, if it is contested.
    - Sometimes, attestation of a document by witnesses is required by the law – attestation includes witnessing the terms of the agreement reduced into writing and putting signature in document as a witness.
  - Authentication by way of comparison: an admitted or proved handwriting with or without the help of a lay witness or experts in the field.
    - If there are not admitted samples, the court may order the person to write words/figures except the accuses (why the exception? The right against self-incrimination).

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## ❖ Proof of contents of documents

- In trying to prove the issue in their favor, the parties who intend to produce relevant evidence by way of document has to provide the original document itself (best evidence rule).
- By way of exception, if the original document cannot be found (lost, destroyed or stolen), secondary evidences such as copies of the original and oral testimony can be presented.
- These rules does not affect the mandatory provisions of the law on proof of certain legal relationships by documents, taking the nature of the transaction into consideration.

## ❖ As discussed under parole evidence rule, a signed document cannot be contradicted unless it is with the same form.

- This applies both in cases where the law provides a special form or not; because an agreement reduced into writing shows seriousness of commitment and higher credibility than oral agreements.



**END OF LECTURE**




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- When it is difficult for an average person to deduce from physical objects, an expert witness would be called to explain what the object demonstrates.
- The exact representation of the evidentiary fact demonstrative evidences will be evaluated in light of the corroborating evidences.

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