

I. INTRODUCTION

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II. JURY INSTRUCTIONS (*What You Need to Prove in Your Case*)

If I have learned anything about the law, it is that it begins where it ends. A jury trial begins with jury selection and ends with the jury “selecting” a just outcome. Likewise, a good trial attorney will begin where it ends: the jury instructions. Jury instructions should be the first thing a trial attorney drafts when preparing for trial. The jury instructions will provide you all the elements that you must focus on when reviewing your case with the jury before deliberation. It is their roadmap and guide.¹ [. . .]

III. BURDENS OF PROOF (*How Much You Need to Prove in Your Case*)

It is all well and good to know what you need to prove. However, what degree of conviction do you need from your jurors when going about proving it? We have all had situations in our day to day lives where we have a feeling that a conclusion is correct, or where we may even doubt our own perception. We may be positive that we saw our friend at a store last week because he was wearing a hat that he always wears, but less sure that we saw him yesterday because he had shaved and was wearing a hoodie. As the plaintiff, to win a case you must prove your elements. To prove your elements, you must persuade a jury that your theory of the case is the correct one. As the defendant, your job is to stop that from happening. The degree to which a party must persuade the

¹ They are also critical to focus on when appealing an adverse ruling. A jury could award a billion dollars to a plaintiff, but if you can argue on appeal that there were not enough facts to prove a critical element, e.g. causation, then the jury’s award becomes meaningless. Too few trial attorneys are skilled in what we call “error preservation,” which is just a fancy way of saying taking the right steps to make sure when you appeal an adverse ruling the court that reviews the case can actually consider it. Appellate courts, like most courts really, prize judicial economy. Nothing is more efficient and less open to error than deciding *not* to decide an issue.

jury to answer a question affirmatively in its favor is known as the “**burden of proof**,” or otherwise called the **standard of proof** when discussing it more abstractly as a principle of law. As the United States Supreme Court has explained, “the function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact-finding, is to instruct the factfinder concerning the degree of confidence our society thinks he or she thinks he or she should have in the correctness of factual conclusions for a particular type of adjudication.” *Addington v. Texas*, 441 U.S. 418, 423 (1979) (cleaned up).

Different kinds of cases have different burdens of proof. For the party who has the burden of proof, it is their job to persuade the jury to agree with its theory of the case and find in its favor. If the jury is left unpersuaded, the party with the burden of proof loses. That is why it is, after all, a *burden*. For our purposes, there are three relevant burdens, or standards, of proof that you will typically encounter:

Preponderance of the Evidence: This is the standard of proof in most civil trials. In the case law, it is defined as the “greater weight and degree of credible evidence.” *R & R Contractors v. Torres*, 88 S.W.3d 685, 695 n. 12 (Tex. App. Corpus Christi–Edinburg 2002). Put another way, the party with this burden must prove that their theory of the case is more likely than not.

Clear and Convincing Evidence: This is an intermediate burden of proof between the burden in most civil trials and the burden in criminal trials. It is usually found in situations where there are more serious interests at stake than a typical civil lawsuit. The most common example in Texas is a termination case where the State seeks to terminate a parent’s rights. This standard of proof “requires that the strength of the plaintiff’s proof produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations.” *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015) (citation omitted). While the proof required under this standard “must weigh heavier than merely the greater weight of the credible evidence [i.e. the proof must be greater than what is required under the preponderance

of the evidence standard], there is no requirement that the evidence be unequivocal or undisputed.” *State v. Addington*, 588 S.W.569, 570 (Tex. 1979).

Beyond a Reasonable Doubt: This is the standard of proof in criminal trials. From the lowly misdemeanor harassment charge all the way up to first-degree murder, the State’s burden is the same: it must prove its case beyond a reasonable doubt.² The Texas Court of Criminal Appeals, in *Geesa v. State*, at one point required that all jury instructions include a definition of “proof beyond a reasonable doubt” in all criminal cases. 820 S.W.2d S.W.2d 154, 162 (Tex. Crim. App. 1991). This decision was subsequently overruled in *Paulson v. State*, 28 S.W.3d 570 (Tex. Crim. App. 2000). However, the *Geesa* Court’s definition of the term is still quite useful. The relevant portions of the *Geesa* instruction reads as follows:

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. . . . The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant’s guilt after careful and impartial consideration of all the evidence in the case. . . . It is not required that the prosecution prove guilt beyond all possible doubt; it is required that the prosecution’s proof exclude all “reasonable doubt” concerning the defendant’s guilt. A “reasonable doubt” is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that would make a reasonable person hesitate to act in the most important of his [or her] own affairs. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.³

² TRIAL TIP. For this reason, you often see defense attorneys in Texas noting that the burden of proof is higher for the State to find a defendant guilty than it is to terminate parental rights. This gets across to the jury that even though a defendant may only be facing a day in jail or probation, the State has a very tough task ahead. “It is harder to deprive a defendant of his liberty than to take his child away.”

³ TRIAL TIP. You may typically see a prosecutor illustrate this burden by providing a picture of a puzzle, with most, but not all, of the puzzle pieces in place and depicting an image. The point is, you don’t need every single piece of the puzzle to figure out what the puzzle is depicting. A good defense attorney will likely be prepared to illustrate the same point, but with a critical piece of the image being on one of the missing puzzle pieces, and making the image depicted not accurate. For example, if there are various

Geesa, 820 S.W.2d at 162.

IV. **ADMITTING EVIDENCE** (*How You Need to Prove Your Case*)

Now that you know what you need to prove and by how much, how do you go about proving it? From any legal drama or popular representation of trial work, you are likely deeply familiar with a high energetic attorney slamming his fist on the table yelling “OBJECTION!” Trials are about convincing a jury by presenting them with information, but not any information will do. Some things you can’t tell a jury. Objections are a way of making sure that the jury doesn’t hear prohibited information, so that our justice system doesn’t produce unreliable results. We call information that a jury is allowed to consider when deciding a case “**admissible evidence**.” “**Inadmissible evidence**” is information that a jury is not allowed to consider when reaching a decision, for one reason or another.

A. Advocacy as Building a Model: Presuppositions

As Irving Younger explains, an attorney is a builder of models. Court cases start in the real world. A car accident, a slip and fall, or a plane crash. The courtroom is not the real world, it is an artificial world. It is the attorney’s job to reproduce or make a model of what it is that happened in the real world. How does he know what model to build? He knows what model to build by reference to the elements that must be proven to win a case. So, in our problem, we know what model we need to build because we reviewed the jury instructions and wrote out our elements neatly. That is why it is so

puzzle pieces arranged depicting a gun, a good defense attorney will be ready to show or suggest to the jury that one of the puzzle pieces missing is the orange tip of the gun, implying that the prosecution’s depiction is inaccurate. The puzzle does not depict a gun, it depicts a *toy* gun.

important to start with jury instructions when preparing for a case. The elements are the blueprint for the model that we need to build.

The law of evidence is nothing more than all the authorities (constitutional provisions, rules, statutes, customs) by which we build our model. Imagine that the courtroom is a vacuum. Nothing is there unless we put it there. What can we assume is in the courtroom before we begin to build our model? Younger identifies three categories of things that we can assume before we begin to build our model: (1) the nature of our language (think rules of grammar); (2) the data of everyday living (think of common knowledge, e.g. we don't need to put expert testimony to define what a car or a bus is during an accident case); and (3) the ordinary processes of thought.

B. Judicial Notice

We can also assume facts that have been judicially noticed. It is proper for a trial court to take **judicial notice** of a fact when the fact is: (1) by its nature indisputable, and (2) is common knowledge (3) in the area where the court sits. *See Varcoe v. Lee*, 180 Cal. 338, 340 (1919). The trial court can also take judicial notice of its own **court records**, even though such facts would fail *Varcoe*, because they are not common knowledge. We can also take judicial notice of *Almanac*-type facts. These include: calendar facts (e.g. what day of the week was a particular date); astronomical facts (e.g. the state of the moon on a particular date); and historical facts (e.g. the date Nazi Germany invaded Poland). For a case study in cross-examination by judicial notice of an Almanac-type fact, one need look no further than the famous case of *People v. Armstrong* in which Abraham Lincoln, who was then a new attorney, defended a murder suspect where the only evidence against the defendant was the eyewitness testimony

of one Charles Allen. Lincoln got the acquittal, based largely in part of the following successful cross-examination:

Q: "Did you actually see the fight?"

A: "Yes."

Q: "And you actually stood very near to them?"

A: "No, it was one-hundred fifty feet or more."

Q: "In the open field?"

A: "No, in the timber."

Q: "What kind of timber?"

A: "Beech timber."

Q: "Leaves on it rather thick in August?"

A: "It looks like it."

Q: "What time did all this take place?"

A: "Eleven o'clock at night."

Q: "Did you have a candle there?"

A: "No, what would I want a candle for?"

Q: "How could you see from a distance of one-hundred feet or more, without a candle at eleven o'clock at night?"

A: "The moon was shining real bright."

Q: "Full moon?"

A: "Yes, a full moon."

Lincoln then pulled out a copy of an almanac for the past year (some accounts have him retrieving it from a bailiff to whom it had been entrusted in advance) and, pointing to the page for the date in question at 11:00 p.m., inquired:

Q: "Does not the almanac say that on August 29th the moon was barely past the first quarter instead of being full?"

A: [Witness does not respond].

Q: "Is it not a fact that it was too dark to see anything from so far away, let alone one-fifty feet?"

A: [Witness does not respond].

Allen D. Spiegel, *A. Lincoln, Esq.* 157-158 (2002) (alterations in original).

The law of judicial notice as outlined above is embodied in **Federal Rule of Evidence 201**. This rule provides as follows:

The court may judicially notice a fact that is not subject to reasonable dispute because it:

- (1) is generally known within the trial court's territorial jurisdiction; or**
- (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.**

FED. R. EVID. 201; *see also* TEX. R. EVID. 201(b).

There is one final category of facts that can be judicially noticed, usually through appellate decisions: the scientific basis of certain techniques or technologies (think fingerprints, DNA matching, etc). For example, in a speeding case where the radar on a police car picked up that a defendant was driving 100 mph in a 30 mph zone, in a vacuum, you would have to show that the radar did in fact register the car going 100 mph, that the radar was used correctly, and that there is a scientific basis that makes the reading on the device reliable (e.g. that due to the law of optics and physics, that the car registered as going 100 mph was in fact going 100 mph, rather than the radar registering 100 mph randomly). You are likely familiar with a common example of this in the real world: the use of Standardized Field Sobriety Tests (SFSTs) by police officers when determining whether they have reason to believe that a person has been driving while intoxicated. One of these tests include the Horizontal Gaze Nystagmus (HGN) test. As officers learn during their mandatory training on SFSTs, there are six clues of intoxication for the HGN, and if you arrest 100 defendants who show a sign of at least

four of those clues, 88 of them will have a Blood Alcohol Content (BAC) at or above 0.08.⁴ In the interest of judicial economy, the Texas Court of Criminal Appeals, in *Emerson v. State*, “determine[d] the technique employed in the HGN test to be a reliable *indicator of intoxication*, and took “judicial notice of the reliability of both the theory underlying the HGN test and its technique.” 880 S.W.2d 759, 768–69 (Tex. Crim. App. 1994) (emphasis in original). Whenever dealing with a case, be sure to research and know the rules announced in relevant appellate decisions as they pertain to any technologies or techniques you rely on in proving your case. You don’t need to reinvent the wheel.

C. Competency, Relevancy, and Materiality

Judicial notice is a shortcut for building our model of a case. It allows us to put things in our model without having to use the formal rules of evidence. How do we start putting things in our model using the formal rules of evidence? The fundamental requirement of admissibility is that jurors are only allowed to consider information that is competent, relevant, and material. “**Competent evidence**” means that information you proffer to the jury is eligible to be received in evidence, and you determine that eligibility by reference to all the rest of the law of evidence. For example, although evidence may be relevant and material, which we will define later, it still may not be inadmissible because it is not eligible to be received into evidence by operation of a rule of law. Consider for example the **best-evidence rule**. The best-evidence rule traces its roots from common law. The Tenth Circuit summarizes the rule as follows:

⁴ “Based on recent research, if you observe four or more clues it is likely that the subject's BAC is at or above 0.08. Using this criterion you will be able to classify about 88% of your subjects accurately. This was determined during laboratory and field testing and helps you weigh the various Standardized Field Sobriety Tests in this battery as you make your arrest decision.”

https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/sfst_ig_refresher_manual.pdf

The best-evidence rule . . . codifies a doctrine with a “long and venerable history” rooted in English common law. Dating back to the 1700s, this foundational doctrine requires a party seeking to prove the contents of any writing, recording, or photograph to produce the originals. Stated differently, under this rule, evidence offered to prove the contents of an original writing, recording, or photograph is *not* admissible, unless the original itself is *also* admitted.

United States v. Chavez, 976 F.3d 1178, 1193–94 (10th Cir. 2020) (cleaned up) (emphasis in original). This rule is embodied in **Federal Rule of Evidence 1002** which provides that “[a]n original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.” FED. R. EVID. 1002. To see this rule in action, consider the following Texas case where the one of the fact issues was the weight of cotton:

The witness testified to the weight of each bale and to the aggregate weight of the 28 bales. He did not weigh the cotton, neither was he present when it was weighed. He testified that the cotton was weighed by different employees of plaintiffs and the weight of each bale placed upon a stub which was later recorded in a book kept for that purpose in the gin office. He did not testify that he kept the book nor that the same was correctly kept under his supervision. The book was not offered in evidence. There was no evidence that the cotton was correctly weighed. He testified that he had the weight of the 28 bales of cotton as taken from the records at the gin. Defendant objected to this testimony on the grounds that it was hearsay and that it was not shown the cotton was correctly weighed and that the weights were correctly transcribed and entered upon the books and that the original records would be the best evidence. The objections were overruled and the witness was permitted to testify as to the weight of the cotton. We believe the objections were well taken and should have been sustained. *It is well settled that if the original writing is not produced or its production accounted for, evidence of its contents is not admissible.*

Panhandle & Santa Fe Ry. Co. v. McDonald, 227 S.W.2d 601, 603 (Tex. App.—Eastland 1950, writ ref’d) (emphasis added). The best-evidence rule applies to documentary evidence (think about anything you might review on appeal that doesn’t need to be transcribed, including photos, letters, receipts, etc).

Witnesses also can be found to be incompetent, i.e. they are not eligible to provide testimony that will be received in the record. This concept is embodied in **Federal Rule of Evidence 601**, which provides that “[e]very person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness’s competency regarding a claim or defense for which state law supplies the rule of decision.” FED. R. EVID. 601. Consider the following case from the Sixth Circuit. Petitioner made a medical malpractice claim in federal court against an Ohio doctor. Under Federal Rule of Evidence 601, the law of Ohio would govern the competency of witnesses. Under Ohio law, “[t]o be competent, an expert must, among other things, have an active medical practice or instruct in an accredited school.” *Frank v. Good Samaritan Hosp. of Cincinnati, Ohio*, No. 21-3795, 2023 WL 2523297, at *3 (6th Cir. Mar. 15, 2023) (citations omitted). Because one of the expert witnesses the petitioner produced “did not have an active clinical practice or instruct in an accredited school, [he] was not competent [to testify] under Ohio law.” *Id.* The following objection would have been appropriate:

“OBJECTION! Your honor, because Ohio law provides the rule of decision as to competency for an medical expert to testify in a malpractice claim, the petitioner’s expert is not competent to testify under Federal Rule of Evidence 601, because he does not have an active clinical practice nor does he instruct at an accredited school, and is incompetent to testify under Ohio law.”

Now suppose you are the defense attorney in the case above, and want to make sure that the plaintiff’s medical expert doesn’t take the stand at all so that the jury doesn’t hear testimony that prejudices your case. How do you ask the judge to decide whether the expert is competent to testify? In the case above, how can we get the judge to decide whether the witness is allowed to testify because he has an active clinical

practice or instructs in an accredited school? The rules supply the answer. **Federal Rule of Evidence 104(a)** provides “[t]he court must decide any preliminary question about whether a witness is qualified, a privilege exists, *or evidence is admissible*. In so deciding, the court is not bound by evidence rules, except those on privilege.” FED. R. EVID. 104(a) (emphasis added). **Federal Rule of Evidence 104(c)** further allows a trial court to have a hearing on a preliminary question outside of the presence of the jury whenever “justice so requires.” *Id.* 104(c)(3).

Notice that under the rule, the rules of evidence don’t apply. Think about it this way, how is the trial court going to decide if a proposed expert has an active clinical practice or instructs in an accredited school? With the plaintiff asking the expert about his qualifications on the stand of course! But how can the expert testify if he isn’t competent to testify? That is why the rules of evidence don’t apply to such a preliminary question. The judge can, and must, listen to the expert’s testimony even though the expert ultimately is not competent to provide testimony that can be received into evidence.

Relevant evidence is information proffered by a proponent (the party offering the evidence into the record) that has some tendency in logic to prove what it is supposed to prove. **Material evidence** is relevant evidence that bears on an issue relevant to the case. Consider our own case. Suppose you wanted to prove that Gary Robinson committed suicide. You proffer as evidence an original document (so it passes the best-evidence rule) a journal entry written by the editor of Flyboy written when he was five years old. Such evidence is *irrelevant* to prove whether Gary committed suicide. Or suppose you wanted to proffer as evidence an original document (so it passes the

best-evidence rule) of a medical report that shows that Gabriella Robinson was diagnosed with a hoarding disorder. Such proffered evidence may be *relevant* to prove that she was in fact a hoarder, however, such evidence is *immaterial* to any issue presented in the problem. Whether Gabriella Robinson is a hoarder will not help the jury make a decision about the case, and has no bearing on the elements.

These basic notions of admissibility are embodied in **Federal Rule of Evidence 401** which provides as follows:

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

FED. R. EVID. 1002.

As you can see, subsection (a) is actually the definition for relevancy, and subsection (b) is the definition for materiality. However, since it is almost impossible to proffer irrelevant evidence (as you can see from our hypothetical above you would have to be trying hard to get objected to), we simply object on grounds of relevant. Accordingly, if a proponent were to proffer as evidence the medical report of Gabriella Robinson's hoarding diagnosis, you might make the following objection:

“OBJECTION! Your Honor, the proffered evidence is irrelevant under Federal Rule of Evidence 401. Mrs. Robinson's hoarding is not at issue in this case, and otherwise has no “consequence in determining the action” before us.

D. Building our Model: Categories of Materials

We have been discussing building a model of our case. We have discussed how we can assume certain things when making our model, and the basic concepts of what kind of information can be received into evidence (competency, relevancy, and materiality). Before moving forward, let us categorize the four major categories of “materials” we will use when building our model. They can be broken down as follows:

- Live oral testimony, or **viva voce evidence**, or that evidence obtained by a human being who takes the witness stand, a live witness. For example, in our problem, the direct and cross examinations of the witnesses is an example of viva voce evidence. Think about how on appeal, the appellate court would see a transcript of the exchange.
- Documents, or **documentary evidence**. Think about all the documents, e.g. letters, affidavits, etc, that an appellate court might view and which will not be found in a transcript. For example, in our problem, the bank examination report and accident report are both examples of documentary evidence. For the categories of evidence which are self-authenticating and which “require no additional evidence of authenticity in order to be admitted,” see **Federal Rule of Evidence 902**. For example, related to our problem, you might imagine the following objection and response:

[After proffering as evidence the Flyboy Magazine]

Opponent: “Objection your honor, lack of authentication!”

Proponent: “Your honor, Flyboy Magazine would qualify as a periodical under Federal Rule of Evidence 902(6) and therefore it is self-authenticating.”

- **Real evidence**, e.g. presenting the jury the gun used in a murder and having them hold it in their hands to demonstrate its weight. Evidentiary question: “Is the object the real thing?” In our problem, imagine that we were actually able to take the jury to the hangar where the plane is stored so that they could observe it. The plane itself would be real evidence.
- **Demonstrative evidence**, e.g. a model, a map, a diagram. Evidentiary question: “Does the evidence accurately represent what it is supposed to?” Suppose we had Rufus draw for us a representation of where the pump of the plane malfunctioned. If we presented it properly, the jury would be allowed to take the picture he drew with them when deliberating.⁵

⁵ TRIAL TIP. You might see a defense attorney in a sex abuse case present the victim with an outline of a body and have them draw where they alleged they were touched. This hammers down the victim’s

version of events, and allows the defense attorney to point out inconsistencies. During closing, the defense attorney will then be able to say something like, "Now, the victim said X, remember that when you deliberate, and review that diagram she drew which you will have with you, does that match up with what she said?"