

Minnesota Evidence Rules Summary Guide™

Trial Objections Evidence Basics

8th Edition

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Minnesota Evidence Rules Summary

General Provisions

Rules apply in **all court proceedings** (Rule 101) except preliminary matters, grand jury hearings, ancillary criminal proceedings, and summary contempt proceedings (Rule 1101).

Rules construed to achieve **fairness** and **avoid expense or delay** (Rule 102).

Once court makes (1) a definite ruling; (2) on the record; (3) before or during trial or hearing, no additional objection or offer of proof is required (Rule 103(a)).

Judge determines preliminary issues of admissibility. Rules of evidence do not govern judge's assessment of **foundation** (Rule 104).

Judge may **conditionally receive** exhibit (Rule 104) or receive for **limited purpose** (Rule 105).

Judge may require offering party to offer at that time additional parts of documents or related documents (Rule 106).

Judicial Notice

Notice may be taken of indisputable fact generally known within the jurisdiction or established from accurate, unquestionable sources. The court can take notice whether or not requested to do so (Rule 201).

Notice must be taken of fact if supplied with necessary information (Rule 201(d)).

Party opposing notice should be heard (Rule 201(e)).

Fact judicially noticed conclusive only in civil action (Rule 201(a)).

Presumptions

In civil actions, presumptions shift burden of going forward only. No shift in burden of proof (Rule 301).

Relevance

Evidence is **relevant** if it tends to make a consequential fact to be proven more or less likely (Rule 401).

Relevant evidence is admissible; irrelevant evidence is not (Rule 402).

Even relevant evidence is excluded if probative value **outweighed by prejudice**, delay, confusion or repetition (Rule 403).

Character not admissible to prove an act unless put in issue by criminal defendant (Rule 404(a)).

Other crimes/bad acts admissible only for limited, specific purposes (plan, notice, identity) and if notice is given (Rule 404(b)).

Character is proven by reputation or opinion; **specific acts** admissible only on cross-exam or when directly in issue (Rule 405).

Habit or routine practice admissible to prove conduct in conformity (1) regardless of corroboration and (2) even if eyewitnesses available (Rule 406).

Subsequent remedial measures inadmissible to prove culpability or defect (but may be admissible to show ownership, feasibility, control) (Rule 407).

Statements in **settlement discussions** (at any time) are inadmissible (except to prove bias or explain delay) (Rule 408).

Payment of **medical expenses** not admissible to prove liability (but may be received for other relevant purpose) (Rule 409).

Offers to plead, **pleas**, and withdrawals of pleas not admissible (Rule 410).

Evidence of **insurance** not admissible to show liability or fault (may be allowed to show ownership, control, agency, bias, or other facts) (Rule 411).

Past conduct of sex offense victim generally not admissible; detailed limitations on exceptions to general rule contained in Rule 412.

Privilege

Statutory and Common Law define privileges recognized in Minnesota.

Rule 501 merely carries forward existing privileges, without expanding or limiting them.

Rule 502 discusses waiver and inadvertent disclosure of communications or information covered by the attorney-client privilege or work product doctrine.

Specific Privileges

Self-incrimination	U.S. Const., Amend. V & Minn. Const., Art. I, §6
Marital testimony and marital communications	Minn. Stat. § 595.02, subd. 1(a)
Attorney-client	Minn. Stat. § 595.02, subd. 1(b)
Priest-penitent/("clergy")	Minn. Stat. § 595.02, subd. 1(c)
Doctor-patient	Minn. Stat. § 595.02, subd. 1(d)
Public officer	Minn. Stat. § 595.02, subd. 1(e)
Nurse-patient	Minn. Stat. § 595.02, subd. 1(g)
Psychotherapist-patient	Minn. Stat. § 595.02, subd. 1(g)
Interpreters	Minn. Stat. § 595.02, subd. 1(h)
Chemical dependency counselors	Minn. Stat. § 595.02, subd. 1(i)
Parent-child	Minn. Stat. § 595.02, subd. 1(j)
Sexual assault counselors	Minn. Stat. § 595.02, subd. 1(k)
Mediation/ADR	Minn. Stat. § 595.02, subd. 1a
Reporters/news gatherers	Minn. Stat. § 595.021-025
"Informers"	<u>State v. Wiley</u> , 205 N.W.2d 667 (Minn. 1973)

Accountant-client privilege not recognized.

Comment on exercise of privilege is generally not permitted, but it may be as to particular privileges or in certain circumstances where comment would not circumvent privilege or otherwise be unfair.

Witnesses

Competency determined by law (statute) (Rule 601). See Minn. Stat. ch. 595.

Personal knowledge is required of all witnesses (Rule 602).

An **oath** (or affirmation) is required of all witnesses (Rule 603).

Interpreters must qualify as experts and work under oath (Rule 604).

A **judge** may not be a witness in a case assigned to that judge (Rule 605).

Jurors may not testify at trial; verdicts may be impeached only by showing extraneous influences or false answers provided during voir dire (Rule 606).

Any party may impeach a witness' credibility, even party calling witness (Rule 607).

Credibility can be challenged by opinion or reputation for truthfulness, not specific acts (other than similar crimes or perjury) (court can allow on cross) but only upon notice in criminal cases (Rule 608).

Conviction of a crime admissible if (1) felony or involved dishonesty, and (2) if less than 10 years old (Rule 609).

Religious beliefs/practices inadmissible to impeach or enhance credibility (Rule 610).

Court controls examination; **cross is limited** to scope of direct; hostile witnesses may be cross-examined (Rule 611).

Documents used to refresh witness' recollection must be produced, may be admissible or admissible in part (Rule 612).

Prior statements may be used without disclosing to witness; extrinsic proof of prior statements not admissible unless witness given chance to explain (Rule 613).

Court may call witnesses but may not question in criminal cases (Rule 614).

Court may exclude (**sequester**) witnesses (Rule 615).

Bias, prejudice, or interest evidence admissible to attack credibility (Rule 616).

Party or interested persons not precluded from proving **conversations with dead person** (Rule 617). [Replacement for "Dead Man's Statute"]

Opinion/Experts

Lay opinion admissible if (1) based on first-hand knowledge, (2) helpful to finder of fact, and (3) not based on scientific, technical, or specialized knowledge (Rule 701). Examples of lay opinion evidence include appearance of intoxication, handwriting, speed of vehicle.

Expert opinion admissible if it assists fact-finder and has foundational reliability. Scientific evidence must be generally accepted (Rule 702).

Expert may qualify to give opinion by knowledge, skill, experience, training or education (Rule 702).

Expert opinion may be based on admissible facts or facts generally relied on by experts in field (Rule 703). Underlying data must be independently admissible to be admitted on direct examination (Rule 703(b)).

Opinion may be offered on **ultimate issue**, if otherwise proper (Rule 704). Note: **Learned treatises** covered by Rule 803(18).

Facts underlying expert's opinion need not be presented, but may be, and may be subject of cross examination in either event. Rule makes **hypothetical questions optional**, but only when basis for opinion previously disclosed (Rule 705).

Court may appoint experts and direct their compensation. Court may disclose fact of court appointment to jury (Rule 706).

Hearsay

Hearsay is defined: "a statement, other than one made by the declarant while testifying at the trial or **hearing**, offered in evidence to prove the truth of the matter asserted" (Rule 801).

"Statements" include **acts** only if **intended as statements** by declarant (Rule 801).

Not hearsay:

- (1) Statement not offered to prove truth of statement.
- (2) Out-of-court statement of witness.
- (3) A party's admissions.

Hearsay is inadmissible unless an exception exists (by rule or statute) (Rule 802).

Some **hearsay exceptions** apply whether the declarant is available or not (Rule 803):

- (1) [Not used]
- (2) **Excited utterance** "relating to" a startling event and made under the stress of the event, made by anyone.
- (3) **Present mental state** or physical condition, including intent or plan, and physical condition and feeling of pain.
- (4) Statements for medical treatment (including **history, symptoms and pain**).
- (5) **Recorded recollection**. Allows use of document memorializing earlier knowledge of witness. If admitted, document may be read to the jury, but not received as exhibit (except if offered on cross-examination).
- (6) **"Business" records** (can be records regularly kept by other entities); Document can be received if (1) introduced through person with knowledge (custodian of records or other qualified witness), (2) regularly prepared by business and in course of business, and (3) regularly maintained.
- (7) **Absence of entry** in "business" records in Rule 803(6) can be testified to if information of kind normally in records (unless there is evidence of lack of trustworthiness). [See 803(10) for absence in public records]
- (8) **Public records or reports**. State or federal records, showing activities of agency, or observed by agency, if required to by law where there is a duty to report (Limited use in criminal cases).
- (9) **Records of vital statistics** (e.g., birth, marriages, deaths). Admissible if report to office required by law.
- (10) **Absence of public records or entry**. Can be shown by certification pursuant to Rule 902.
- (11) **Records of a religious organizations**. Records of birth, death, marriage, etc. only, and then only if regularly kept.
- (12) Marriage and baptismal **certificates**.
- (13) **Family records** (e.g., Bibles, entries in genealogies, tombstones).
- (14) Documents affecting **property interests**. Applies to recorded documents if a statute allows recording of similar documents.
- (15) Statements in Rule 803(14) documents (see above).
- (16) Statements in **ancient documents** (document must be 20 years or older and must be authenticated).

- (17) **Market reports**, commercial publications (of types relied upon by public or professionals), if trustworthy (or in the absence of dispute over trustworthiness).
- (18) **Learned treatises** (if relied on in direct or called to an expert's attention on cross). If shown by testimony or judicial notice to be reliable authority, may be read into evidence but may not be received as exhibits.
- (19) **Reputation concerning family history**. Family members, associates or members of community may testify to these matters.
- (20) **Reputation concerning boundaries or historical matters**. Reputation must be established at time before dispute arose.
- (21) **Reputation as to character**.
- (22) **Judgments of conviction**. Following trial or guilty plea; appeal does not prevent admissibility.
- (23) **Judgments as to boundaries** or family history.

Hearsay exceptions applicable only if declarant is unavailable (Rule 804(b)):

- (1) **Former testimony** if substantial identity of parties and issues. (In civil case a predecessor in interest had opportunity and motive to direct or cross. In a criminal retrial, testimony or deposition from first trial admissible.)
- (2) **Dying declarations**, if declarant believed death imminent (only in homicide and civil cases).
- (3) **Statements against interest** (pecuniary, proprietary or penal).
- (4) Statements of **personal or family history**.
- (5) [not used]
- (6) **Forfeiture by wrongdoing**: Statements offered against a party who caused the declarant's unavailability.

Declarant is unavailable if dead or too ill to testify, outside subpoena power, disobeys subpoena, cannot remember, or is exempt due to privilege (Rule 804(a)). Witness may be available, however, if deposition can be taken.

Hearsay within hearsay must be excluded unless exception exists at each "level" (Rule 805).

If hearsay is admitted, **credibility of declarant may be attacked** and then supported (Rule 806).

Residual exception. Court may admit statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, if it determines that 1) fact to be proved is material, 2) statement is more probative on the point than any other evidence the proponent can reasonably procure, and 3) purposes of rules and interests of justice will be served by admission. This exception not available unless proponent makes known in advance of trial the intention to use the statement and its particulars (Rule 807).

Authentication

Requires showing that matter in question is what it purports to be (or what party offering it says it is) (Rule 901).

Self-authenticating documents need no further proof to authenticate (Rule 902).

Self-authenticating documents include:

- (1) Domestic public documents under seal.
- (2) Certified copies of domestic public documents not under seal.
- (3) Foreign public documents signed and certified by consular or diplomatic official.
- (4) Certified copies of public records.
- (5) Official publications.
- (6) Newspapers and periodicals.
- (7) Trade inscriptions (tags, labels).
- (8) Documents with certificates of acknowledgment.
- (9) Commercial paper.
- (10) Matters declared presumptively authentic by legislative act (Rule 902).

Signer not required to testify (unless state law requires) (Rule 903).

Example of limited exception: wills in limited circumstances (Minn. Stat. § 524.3-406).

Contents of Documents; Requirements of Original

Original and duplicate defined (Rule 1001).

Original generally required to prove its contents (Rule 1002).

Duplicates admissible as originals unless (1) genuine question exists as to authenticity or (2) it would be unfair to receive duplicate (Rule 1003).

If original **lost or destroyed** (innocently), not available, in possession of and not available from opponent, or relates only to collateral matters, then original not required (Rule 1004).

Public records may be proven by certified copy if obtainable, otherwise by other methods (Rule 1005).

Summaries may be received of voluminous documents; originals must be available (Rule 1006).

Testimony or written admissions of a party may be proven without original (Rule 1007).

Court decides admissibility, but **jury** determines (1) whether original ever existed, (2) which of two exhibits is an original, and (3) whether secondary evidence of the contents reflects the contents (Rule 1008).

Trial Objections

■ Objections to Questions

Form of Questions (Court controls examination – Rule 611).

Leading (Vice is that lawyer is testifying).

- May be permitted on direct for preliminary matters or hostile/adverse witness; always allowed on cross.
- Rule 611 and also Minn. R. Civ. P. 43.02 govern.

Narrative (No question pending or seeks a narrative answer).

Repetitious ("Asked & Answered") (Rules 403 & 611).

Multiple/compound (Two or more questions at once; cured by breaking into separate questions).

Argumentative

Ambiguous

Vague (unclear what is sought; can usually be cured by rephrasing question in plainer language).

Assumes facts not in evidence.

Misquotes prior testimony (either of that witness or of other witnesses).

Misinterprets exhibit.

Reading from an exhibit not in evidence.

Calls for speculation.

Cumulative (Rule 611 or 403).

Overbroad

Non-responsive (Rule 611).

- Really an objection to the answer, objection may be made by attorney asking question.

Beyond Scope of Cross

- Cross is limited to direct exam areas and credibility (Rule 611(b)).
- Generally, redirect and re-cross are limited in same way, with ever-narrowing scope allowed.

Substantive/Exclusionary Objections

Irrelevant/Unduly prejudicial (See Rules 401–411).

- Either without probative value or probative value outweighed by unfair prejudice.
- Immaterial.
- Evidence excludable under specific rules (Rules 404–412).

Privilege (set forth under Rule 501).

Witness not competent to testify.

- Statute or rule disallows testimony (witness is child, mentally incompetent, etc.).
- Did not observe, etc. (Rule 602 requires personal knowledge).

Inadequate foundation

- Necessary prerequisite to admissibility of evidence not yet provided.
- E.g., witness not yet qualified as an expert.

Hearsay objections.

- Evidence of non-witness (i.e. out-of-court) statement offered to prove truth of statement.
- If not offered to prove truth, it is not hearsay.
- Party admissions and prior statements not hearsay (Rule 801(d)).
- Numerous hearsay exceptions; Rule 803 & 804 enumerate (see Evidence Rules Summary).

Constitutional protections may exclude evidence.

- In criminal cases, improper seizure of evidence or interrogation of witness may require exclusion of testimony.
- Right to confrontation, compulsory process, or due process may require some exculpatory evidence to be admitted.

■ Objections to Exhibits

Relevance

- Irrelevant (no probative value) (Rule 401).
- Unfairly prejudicial (prejudice exceeds proper probative value Rule 403).
- Cumulative (unnecessarily burdens record; repeats another exhibit).
- Irrelevant under any of the specific grounds set forth in Rules 404–411 (e.g., contains settlement offers, subsequent remedial measures, etc.).

Rule of Completeness: Rule 106 allows court to require parts of document not offered by proponent to be introduced at same time if fairness requires.

Privilege

- Rule 501; specific privileges set forth in Evidence Rules Summary.

Hearsay

- Documents contain statements that are hearsay.

Foundation

- Witness has not established what document is or that exhibit is authentic.

Authenticity

- Proof required that exhibit is genuine and is what proponent claims it is (Rule 901).
- Exhibit can be authenticated by stipulation, testimony of author or witness to creation of exhibit, or other means.
- Expert or lay testimony regarding handwriting may authenticate.
- Some documents are self-authenticating (Rule 902; specific categories listed under rule).

Not original document

- Original required to prove contents of document (Rule 1002).
- Original not required if terms of exhibit not in issue and it is offered for some other purpose.
- Duplicates are admissible as originals unless genuine issues exist as to authenticity of original (Rule 1003).
- Original not required and other evidence admissible, if original (1) lost or destroyed, (2) not obtainable, (3) in possession of opponent, or (4) relates to collateral matters only (Rule 1004).

Note: Rule does not require the "best" evidence. Also doctrine relates only to exhibits; testimony can be received without regard to original document.

Exhibits may be received for limited purpose

- May be allowed if document admissible for one purpose but not another or for or against one party, but not for or against another.
- Parties entitled to limiting instruction to jury (Rule 105).

■ Motions to Strike

Counsel should make a specific, timely objection. (Attorney should not wait to see if answer is favorable before objection).

Any time witness answers question despite objection, counsel should move to strike answer if objection sustained (unless counsel likes answer, in which case counsel should withdraw objection).

Court may also be asked to give curative instruction to jury to disregard answer (and probably should be asked to do so).

Evidence Basics

Steps for Refreshing a Witness' Recollection

1. Establish witness has insufficient current recollection;
2. Show witness document to refresh, have witness review;
3. Ask witness if the document refreshes the witness' recollection, and if so;
4. Ask what the recollection is (have original question answered).

NOTE: This method allows the testimony; the document used does not become admissible by this use (of course it may be admitted on other grounds). Rule 612 requires production of documents, allows receipt in evidence in some cases.

Impeachment of Witness and Rehabilitation

Impeachment includes any attempt to diminish the credibility of a witness.

Any party may impeach, including party calling witness (Rule 607).

Methods of attack include: (1) show witness did not have opportunity to know subject of testimony, (2) show bias, prejudice, or interest (financial or otherwise) in outcome of action; (3) show prior inconsistent statement; or (4) attack character for truthfulness by opinion or reputation testimony or by showing witness has committed certain crimes or prior acts involving dishonesty.

Rehabilitation not allowed until credibility attacked; once impeached, rehabilitation can rebut impeachment inference. Rehabilitation can be by showing prior consistent statement in any case (Rule 801(d)(1)(B)).

Use of Depositions and Discovery Material at Trial

Rule 804(b)(1) allows a deposition to be read into evidence (with same effect as live testimony) if:

- (1) witness is unavailable and
- (2) parties and issues are identical or substantially the same and parties at the deposition have same motive to cross-examine.

Unavailability determined by Minn. R. Civ. P. 32.01(c).

Depositions may also be used to

- (1) refresh a witness's recollection;
- (2) impeach a witness;
- (3) provide past recollection recorded; or
- (4) provide admissions of a party.

Continuing Objections

Where an objection is made and overruled, ask court for continuing objection (on same grounds) for entire line or area of questioning.

Make sure scope of objection and court's ruling are clear on record.

Illustrative Exhibits

Are not "admitted" into evidence, but court may allow use in front of jury to aid witness in testimony.

Illustrative exhibits do not go to jury room.

Exhibits are marked to identify and maintain record of what is shown to jury.

Offers of Proof

Necessary to make record for appellate review. (Rule 103(a)).

May be useful as well to show judge why evidence would be relevant or probative.

Two primary methods of making offer:

1. Explain to judge what witness would say (on the record).
2. Conduct actual examination outside hearing of jury (on the record).

For both methods, counsel should also explain to court the purpose for the evidence to overcome any objections.

A written summary of testimony or portion of deposition testimony may also be used to show what proffered testimony would be.

Use of Pleadings

Statements in pleadings are judicial admissions; can be used to impeach or may be admitted as substantive evidence.

Amendment of pleading does not remove admission in earlier pleading (although amended pleading may be admitted also).

Manner of Objecting

"Objection, (ground)," e.g., "Objection, hearsay" or

"Your Honor, I object to (exhibit or question) on the grounds it is hearsay." Further argument should be made only outside hearing of jury.

Do not interrupt question to object, but object as soon as possible after question is completed.

Voir Dire of Witness For Objection

"Your Honor, may I examine the witness for the purpose of laying foundation for an objection?"

Can be used when adversary offers an exhibit, or during examination to develop objection as to further examination.

If allowed, examination will be interrupted to permit this limited examination.

Can be used to show that witness' knowledge is hearsay, that witness is not competent, that there is inadequate foundation to allow witness to discuss document, or to establish any defect that would warrant interrupting testimony.

Sequestering Witnesses

Allowed by Rule 615, court has discretion to determine if witnesses are sequestered. *See also* Minn. R. Crim. P. 26.03, subd. 7.

Courts may sequester parties to action only in extreme circumstances.

Witnesses May Be Excluded

1. If not competent (Rule 601);
2. If mere appearance would be too prejudicial (Rule 403);
3. If not disclosed in discovery or pursuant to pretrial order.

Lawyer is Entitled to Know Basis for Ruling Finding Lack of Foundation

Following a ruling sustaining a foundation objection, counsel may ask (if unclear):

"Your Honor, may I ask how foundation is lacking?" or a similar question.

The court is required to provide this information if asked. *See Adelman v. Elk River Lumber Co.*, 65 N.W.2d 661 (Minn. 1954).

Inquiry and court's response should be on record.

Method of Introducing Exhibits

1. Have exhibit marked (or pre-mark it before trial).
2. Have copy of exhibit available for judge during laying of foundation.
3. Establish witness knows about exhibit; have witness identify exhibit.
4. Establish that exhibit is authentic.
5. Show that exhibit is relevant to issues in action.
6. Offer exhibit into evidence.
7. Show to adversary.
8. Obtain ruling on offer, and objections if any.
9. Show exhibit to jury, after court admits the exhibit and grants leave to publish to jury.

Preserving Evidentiary Issues for Appeal

1. Object in timely fashion and on the record.
2. State specific grounds; and state all proper grounds for objection.
3. Insist on a ruling from judge, again, on the record.
4. If ruling is to exclude evidence, make an offer of proof (required by Rule 103(a)(2)).
If ruling admits evidence over objection, request curative, limiting or other instruction.
5. Include evidentiary ruling errors in motion for new trial.
6. Raise the evidentiary issues specifically on appeal.
Consider moving court for mistrial if evidence is extremely prejudicial (but only if you want the motion to be granted!).