

Arizona Peace Officer Standards and Training

Basic Curriculum Model Lesson Plan

LESSON TITLE: RULES OF EVIDENCE 2.4

SUBJECT:	Rules of Evidence
AZ POST DESIGNATION:	2.4
HOURS:	6
COURSE CONTENT:	A delineation of the rules of evidence applicable to law enforcement, emphasizing the tests of admissibility of evidence applied by the courts. Direct and circumstantial evidence, hearsay, confessions, dying declarations, documentary evidence, competency of witnesses and privileged and non-privileged communications are defined.
PERFORMANCE OBJECTIVES:	Upon completion of this course of instruction, students using notes, handouts and other support materials as references, within the allotted time, will:
2.4.1	Identify the following minimal tests which an item of evidence must successfully pass before it may be admitted into any criminal court: <ul style="list-style-type: none">A. The evidence must be relevant to the matter in issue (Rules of Evidence 401).B. The evidence must be competently presented in court (Rules of Evidence 601).C. The evidence must have been legally obtained.
2.4.2	Identify the primary purpose of the Rules of Evidence as preventing the introduction of evidence that is irrelevant or unreliable, unfairly prejudicial or unduly time consuming to present.
2.4.3	Identify the following purposes for offering evidence in court: <ul style="list-style-type: none">A. As an item of proof.B. To impeach a witness.C. To rehabilitate a witness.

- D. To assist in determining sentences.
- 2.4.4 Identify that the burden of proof in all criminal cases is “beyond a reasonable doubt,” and that the burden of proof in most civil cases is “the preponderance of evidence.”
- 2.4.5 Identify the following exceptions to the Hearsay Rule (Rules of Evidence 803 through 804).
- A. Certain statements with inherent reliability, such as present sense impressions and excited utterances.
 - B. Admissions.
 - C. Confessions.
 - D. Dying declarations.
- 2.4.6 Identify what constitutes hearsay and what statements are, by definition, not hearsay (Rules of Evidence 801-804).
- 2.4.7 Identify the meanings of the following terms:
- A. Privileged communication.
 - B. Circumstantial evidence.
 - C. Direct evidence.
 - D. Evidence.
- 2.4.8 Identify the types of information that could prejudice the rights of an individual and/or jeopardize an investigation if furnished to the public/news media: (Previously P.O. 5.4.6).
- A. Information prohibited from disclosure by agency policy.
 - B. Statements as to the character or reputation of an accused person or prospective witness.
 - C. Admissions, confessions or alibis attributed to an accused.
 - D. Refusal of a suspect or witness to take any tests.
 - E. The believed credibility of an accused person or witness.
 - F. The probability of the accused entering a guilty plea.

G. The opinionated value of evidence against an accused.

2.4.9 Identify the exceptions to the doctor/patient privilege with regard to the disclosure of medical information for DUI and child abuse investigations, as per A.R.S. §§13-3620 and 28-1388. (Previously P.O. 5.4.8).

DATE FIRST PREPARED: January 2001

PREPARED BY: SME Committee

REVIEWED – REVISED :	Lt. Harold Brady, SME Co-Chair	DATE: July 2002
REVIEWED – REVISED :	SME Committee	DATE: January 2009
REVIEWED – REVISED:	SME Committee	DATE: November 2011
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INSTRUCTOR REFERENCES:

CLASS LEVEL: Student

TRAINING AIDS: <http://www.azleg.gov/ArizonaRevisedStatutes.asp>

INSTRUCTIONAL STRATEGY: Interactive lecture and class discussion.

SUCCESS CRITERIA: 70% or higher on a written, multiple-choice examination.

COMPUTER FILE NAME: 2.4 Rules of Evidence

DATE RELEASE TO THE SHARE FILE: May 27, 2022

I. INTRODUCTION

- A. Instructor – (self) introduction.
- B. Preview of performance objectives.

II. DEFINITIONS

- A. Evidence – anything presented to a judge or jury that is offered to prove or disprove the existence of an alleged fact. **P. O. 2.4.7D**
- B. Law of evidence – system of rules and principles regulating the burden of proof, admissibility, relevancy, weight and sufficiency of evidence in legal proceedings.

III. IMPORTANCE OF RULES

- A. Success of cases (criminal or civil) depends on the ability to introduce evidence into court to prove facts at issue.
- B. For criminal cases, understanding the Rules of Evidence will enable law enforcement officers to be more effective in gathering usable evidence at crime scenes and investigations.

IV. SOURCES FOR THE RULES OF EVIDENCE

- A. Arizona Rules of Evidence are found in Arizona Rules of Evidence.
- B. Federal Rules of Evidence are found in Federal Rules of Evidence.
- C. Statutes (state and federal). **INSTRUCTOR NOTE:** *E.g. ARS 13-4062 and 12-2231 and following.*
- D. Court decisions (state and federal).

V. PURPOSES AND USES OF EVIDENTIARY RULES**P. O. 2.4.2**

- A. Purposes: (Rule 102)
 - 1. Preventing the introduction of evidence which is irrelevant or unreliable.
 - 2. Preventing the introduction of evidence which is unfairly prejudicial.
 - 3. Preventing the introduction of evidence that is unduly time consuming to present.

- B. Uses: **P. O. 2.4.3**

- 1. As an item of proof (something which tends to prove a fact at issue). **P. O. 2.4.3A**
- 2. To impeach a witness (prior inconsistent statements). **P. O. 2.4.3B**

- a. Example: Witness testified at trial that she has never met the defendant, but told police in an earlier interview that she had dated the defendant.
- 3. To rehabilitate a witness (prior consistent statements). **P. O. 2.4.3C**
 - a. Example: Defense alleges that a witness is lying about seeing a certain vehicle near a robbery scene in order to frame the defendant. An earlier statement given by the witness describing the same vehicle prior to knowing it belonged to the defendant can be introduced.
- 4. To assist in determining sentences (facts or circumstances which might aggravate or mitigate the situation). **P. O. 2.4.3D**
 - a. Example: Evidence showing that the victim begged for his/her life, or that the crime was committed in a particularly cruel manner.

VI. TYPES OF EVIDENCE ***INSTRUCTOR NOTE:** This is a good area to discuss various types of recordings to include body worn cameras, surveillance video and cell phone video captured by citizens.*

- A. Direct – Evidence based on personal knowledge or observation. **P. O. 2.4.7C**
 - 1. Example: An eyewitness identification.
- B. Circumstantial – Evidence based on inference and not on personal knowledge or observation. **P. O. 2.4.7B**
 - 1. Example: A witness saw the defendant’s car leave the scene of a shooting.
- C. Physical – evidence furnished by things themselves by view or inspection (as opposed to a description of them by a witness).
 - 1. Example: A gun or bloody knife used in a homicide. Clothing worn by the defendant (the “bloody glove”).
- D. Testimonial – evidence given in an oral form, usually under oath, in a judicial setting.
 - 1. Example: Victim takes the stand and recounts the details of the crime.
- E. Documentary – written materials admitted at trial.
 - 1. Examples: Phone records or bank statements, certified copy of MVD record showing a driver’s license suspension.
- F. Demonstrative - Evidence that can be seen or inspected as in a chart or map.
 - 1. Examples: Aerial maps, crime scene diagrams, composite sketches, photographs, tapes, video recordings, etc.

VII. OBLIGATION TO DOCUMENT EVIDENCE

- A. Good investigative techniques require the documentation of all evidence that may be used to prove the defendant's guilt or innocence.
 - 1. Example: The name of a witness who identifies a different person as the suspect, or alibi information, or that a witness was made promises in exchange for testimony (plea agreement).
- B. Exculpatory evidence is evidence that tends to prove the innocence of the suspect/defendant.
 - 1. Officers have an obligation under the due process clause of the Constitution to document all exculpatory evidence and provide it to the prosecution.
 - a. Examples: That the witness has previously demonstrated bias, or untruthfulness, or been convicted of a felony or misdemeanor involving moral turpitude.
 - 2. The prosecution has an obligation to disclose all exculpatory evidence to the defense (Rule 15).
 - a. Example: This includes the officer's prior conduct, even when unrelated to the case (such as, previous discipline for lying in an internal investigation).
- C. Inculpatory evidence is evidence that tends to prove the guilt of the suspect/defendant.

VIII. BURDEN OF PROOF

- A. Definitions:
 - 1. Proof – the establishment of a fact by evidence.
 - a. Example: A witness testifies he/she saw the defendant shoot the victim.
 - 2. Burden of proof – The obligation of a party to establish a fact or issue in dispute by producing evidence which persuades the trier of fact as to its existence.
 - a. Example: The state has the burden of proof in criminal trials.

P. O. 2.4.4
- B. Standards:
 - 1. Criminal – beyond a reasonable doubt.
 - a. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every doubt.

2. Civil – preponderance of the evidence.
 - a. Based on evidence and witness testimony presented, there is a greater than 50 percent likelihood that the defendant caused the damage or other wrong.

XI. GENERAL CRITERIA FOR ADMISSION OF EVIDENCE IN COURT (ADMISSIBILITY)**P. O. 2.4.1A**

- A. Relevance (see Rules of Evidence 401) – evidence having any tendency to make the existence of any material fact more or less probable than it would be without such evidence.
 1. Example: The temperature in India is not relevant to the issue of a person’s blood alcohol in an Arizona DUI case; the scientific analysis of the person’s blood alcohol would be relevant.
 - a. Materiality – strong relation between evidence and case issue.
 - i. Example: The name of the bank clerk is immaterial to the issue of the amount of money taken in a bank robbery; the computer reconciliation of the cash drawer would be material.
 - b. Probative Value – tendency of the evidence to establish the proposition that it is offered to prove.
 - i. Example: The testimony of a drunken eyewitness to a crime might be material, but not very probative (because testimony was not believable).

- B. Competency To Be A Witness (see below)(Rule 601)

P. O. 2.4.1B

- C. Legally Obtained/Maintained Evidence.

1. Exclusionary rule – evidence illegally obtained cannot be used at trial. (Mapp V. Ohio, 1961)
 - a. Example: Narcotics seized in violation of the 4th Amendment may not be used as evidence at trial.
2. Fruit of the poisonous tree – evidence which flows from illegally obtained evidence may not be used at trial (another exclusionary rule doctrine). (Wong Sun v. U.S.)
 - a. Example: Phone numbers taken from an illegally seized cell phone may not be used as investigative leads to gather incriminating evidence.
3. Willits instruction – if the state destroys or loses evidence in a criminal case, the defense is entitled to have a jury instruction that tells the jury that the evidence may be considered favorable to the defense. (Arizona v. Willits, 1964, Arizona v. Hernandez, 2019)

- D. If a witness (including the victim) is unavailable to testify, their statement will not be admissible, except in very limited circumstances. (Unavailability means that the defendant does not have and has not had the opportunity to cross-examine the witness). **INSTRUCTOR NOTE:** *Stress the importance of gathering all evidence (photos, etc,) and/or witness statements to provide additional sources for the information.*

X. WITNESS EVIDENCE

A. Definitions:

1. Witness – generally a person who has knowledge of a matter.
 - a. Personal Knowledge. (Rule 602)
 - i. Example: The testimony of a victim.
 - b. Lay Witness Opinion Testimony. (Rule 701)
 - i. Example: The testimony of an eyewitness about the speed of the defendant’s car.
 - c. Expert Witness Testimony. (Rule 702)
 - i. Example: The testimony of an expert witness or scientist about DNA and what can be inferred from DNA testing.
2. Subpoena – a process to cause witnesses to appear to give testimony.
3. Subpoena which requests documents or other evidence be produced by the person subpoenaed.

B. Standards:

1. Relevance. (Rule 401)
2. Competence – legally fit and qualified to give testimony (in a criminal case, all persons are competent to be witness except the following individuals): (Rule 605)
 - a. A judge presiding at the trial may not testify (is not competent to testify) in that trial as a witness. (Rule 606)
 - b. A member of the jury may not testify (is not competent to testify) as a witness before that jury.
 - c. In civil cases, witnesses under the age of 10 or with mental impairments may be precluded from testifying.

C. The Hearsay Rule.**P. O. 2.4.6****1. Definitions:****a. Statement.**

- i. An oral or written assertion.

Example: A police report that has statements concluding the defendant committed the crime.

- ii. Non-verbal conduct of a person if it is intended by the person as an assertion:

Example: Pointing a finger at someone to identify him/her in response to a question.

b. Declarant – Person who makes a statement.

- i. Example: May be the author of a written document.

c. Hearsay – An out-of-court statement offered in evidence to prove the truth of the matter asserted.

- i. Example: A witness testifies that his/her neighbor told him/her that the defendant committed a robbery.

- ii. If the statement is offered only to prove that the neighbor was with the witness at that moment (not to prove the defendant committed the robbery), it is not hearsay.

d. Non-Hearsay – Some out-of-court statements are not considered hearsay under Rule 801.**P. O. 2.4.5B & C**

- i. Example: An admission or confession made by a defendant or a statement by a co-conspirator made in furtherance of a conspiracy is not hearsay.

- ii. Prior statements made by a witness are not hearsay if used to either impeach or rehabilitate the witness while testifying.

2. The Rule – hearsay is not admissible except as provided by applicable constitutional provisions, statutes and rules. (Rule 802)**3. Exceptions to Hearsay (these types of hearsay statements can be used regardless of whether the person who made the out-of-court statement is available to testify at trial):**

(Rule 803)

P. O. 2.4.5

- a. Present Sense Impression – statement describing or explaining an event or condition made while the person was perceiving the event or condition, or immediately after. (Rule 803(1))
 - i. Example: Just before a vehicle hits a pedestrian, a witness states to another witness, “That car isn’t going to stop.”
 - ii. The witness hearing that statement may testify regarding the statement made by the other witness.
- b. Excited Utterance – statement relating to a startling event or condition made while the person was under the stress of excitement caused by the event or condition. (Rule 803 (2))
 - i. Example: After the vehicle strikes the pedestrian and flees, one (1) witness screams, “Oh my god, that guy in the gray truck just killed someone!”
 - ii. Others hearing that statement may testify regarding it.
- c. Recorded Recollections. (Rule 803(5))
 - i. Example: A letter about the details of a commercial transaction written by one (1) party to the other; the recipient (adverse party) could have it received into evidence, but the author will not be able to get it admitted over the recipient’s objection.
- d. Public Records and Reports – includes records, reports, statements or data compilations, in any form, of public offices or agencies, but excludes police reports. (Rule 803(8))
 - i. Example: Weather bureau data such as amount of precipitation, high/low temperatures, etc.
- e. Records of Vital Statistics – records or data compilations, in any form, of births, fetal deaths, deaths or marriages, if the report thereof was made to a public office pursuant to requirements of law. (Rule 803(9))
- f. Judgments of Previous Convictions. (Rule 803 (22))
 - i. Example: Previous DUI convictions.
- g. Learned Treatises: (Rule 803(18))
 - i. Example: Expert witness relies upon statements contained from a

textbook on the subject.

- h. Other exceptions under Rule 803 (important issue is whether the exception provides circumstantial guarantees of trustworthiness). (Rule 803)
4. Exceptions under Rule 804 (to introduce the following types of hearsay statements in court, the person who made the out-of-court statement must be unavailable to testify at trial). (Rule 804)
- a. Statement under belief of impending death (dying declarations).– In homicide prosecution, a statement made by a person believing his/her death was imminent concerning the cause or circumstances of what the person believed to be his/her impending death. (Rule 804(b)(2)) **P. O. 2.4.5D**
 - i. Example: Immediately after being shot, the victim states she believes she is dying and the defendant shot her.
 - b. Statement against interests– statement which, at the time it is made, is so contrary to the interests of the person making the statement, that a reasonable person would not have made the statement unless believing it to be true. (Rule 804(b)(3))
 - i. Example: In a lawsuit by smokers with cancer, a tobacco company executive told a friend that he had covered up evidence linking smoking and cancer. The friend is called into court to testify about the statement against interest.
- D. Privileges. **P. O. 2.4.7A**
- 1. Purpose – The protection of interest and relationships that are, regarded of sufficient social importance to preclude the admissibility of evidence.
 - 2. Common Law and Statutory. **INSTRUCTOR NOTE:** *ARS 13-4062(1), 12-2231 and 12-2232. These are called the Marital Privilege and the Anti-Marital Fact Privilege. There are a few, but significant, statutory exceptions to allowing the testimony of a spouse such as in a criminal action when one spouse is a victim and the other is the defendant.*
 - a. Marital Communications – there are really two (2) privileges:
 - i. What one (1) spouse says to their spouse is privileged unless the privilege is waived by mutual consent of husband and wife (even after marriage is over, spouse cannot testify about private communications during the marriage).
 - ii. One (1) spouse cannot be called to testify against the other spouse while they are married.

- b. Attorney-Client – communications between lawyer and client are privileged unless waived by the client. (ARS 13-4062(2) and 12-2234)
 - c. Physician-Patient – communications between a patient and his/her physician are privileged unless waived by the patient. (ARS 13-4062(4) and 12-2235)
 - d. Clergy-Penitent – communications between a clergyman or priest and a person making a confession are privileged unless waived by the confessor. (ARS 13-4062(3) and 12-2233)
 - e. Reporter-Source – a reporter does not have to disclose his/her source of information. (ARS 12-2237)
 - f. Psychologist Client – Communications are confidential to the same extent as attorney-client communications. (ARS 32-2085)
 - g. Crime Victim Advocate – Conversations between the crime victim advocate and the victim are privileged except for compensation or restitution information. (ARS 13-4430 and 12-2240)
3. Constitutional.
- a. No self-incrimination.
 - b. Miranda Rule.
 - c. Prohibition against use of improperly obtained evidence.
4. Exceptions to privilege.
- a. Child Abuse – various persons (including physicians, psychologists and clergy members) are required to report situations where they reasonably believe a minor is the victim of physical injury, abuse or neglect to law enforcement or DCS. (ARS 13-3620)
 - i. Failure to do so is criminal.
 - ii. The information must contain the names and addresses of the child and parents, the child’s age and the nature and extent of injuries, and any other information helpful in establishing the cause of injury or neglect.
 - b. Physicians or attendants treating certain wounds – medical personnel who treat gunshot, knife, or wounds that appear to be the result of a fight or other illegal activity are required to immediately notify law enforcement. Failure to do so is criminal. (ARS 13-3806)

- c. DUI Investigation. (ARS 28-1388(E))
 - i. If a sample of blood or other bodily substance is taken from a person whom an officer has probable cause to believe has violated 28-1321, a portion of the sample sufficient for testing must be provided to the officer. **INSTRUCTOR NOTE:** *Diaz v. Honorable Van Wie, 426 P.3d 1214 (Ariz App. 2018) held that this statute implicates the Fourth Amendment and thus an officer cannot get the blood or test results from the hospital absent a search warrant or an exigency other than the dissipation of alcohol in the bloodstream. (ARS 28-1390)*
 - ii. Hospital personnel are required to provide law enforcement with a copy of any written or electronic BAC results if requested by the officer.

XI. RELEASE OF INFORMATION/EVIDENCE TO THE PUBLIC

- A. Certain types of information, if released to the public during an investigation, or prior to trial, can jeopardize the investigation and/or prejudice the rights of the suspect/arrestee.
 - 1. Information prohibited from disclosure by agency policy. **P. O. 2.4.8A**
 - 2. Statements as to the character or reputation of an accused person or prospective witness. **P. O. 2.4.8B**
 - 3. Admissions, confessions or alibi evidence attributed to an accused. **P. O. 2.4.8C**
 - 4. Refusal of a suspect or witness to take any tests. **P. O. 2.4.8D**
 - 5. The believed credibility of an accused person or witness. **P. O. 2.4.8E**
 - 6. The probability of the accused entering a guilty plea. **P. O. 2.4.8F**
 - 7. The opinionated value of evidence against an accused. **P. O. 2.4.8G**

XII. INFORMATION OBTAINED FROM MEDICAL SOURCES IN DUI CHILD ABUSE CASES AND CERTAIN TYPES OF WOUNDS

- A. A.R.S. §13-3620 outlines the requirements for the release of such medical information to a peace officer or CPS worker when the information concerns the suspected abuse of a child. **INSTRUCTOR NOTE:** *Stress "Peace Officer" or DCS/OCWI worker". See above under "privileges" for more information on this. Any person having control of medical records of such a minor shall make those records available upon written request. (ARS 13-3620)*
 - 1. This is an exception to the doctor/patient privilege.
 - 2. The information shall contain the following:

- a. The names and addresses of the child and his/her parents or person(s) having custody of the child.
 - b. The minor's age and the nature and extent of his/her injuries or physical neglect, including any record of previous similar cases involving the same child.
 - c. Any information that such a person believes might be helpful in establishing the cause of the physical injury.
- B. DUI cases A.R.S. §28-1388.
- 1. Only a doctor, nurse or other qualified person may draw blood which is to be used for determining alcohol concentration.
 - 2. If a law enforcement officer has probable cause to believe that the suspect is in violation of the impaired driving law and blood or other bodily substance is taken for any purpose by medical personnel, a portion of that sample shall be provided to law enforcement upon request.
 - 3. The sample must be sufficient enough for testing purposes.
 - 4. Refusal to do so is a misdemeanor.

XIII. CONCLUSION

- A. Review of performance objectives.
- B. Final questions and answers.
- C. Instructor closing comment(s).