

# Evidence in UI Hearings

A Presentation to the National Association of Unemployment Insurance Appeals Professionals

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Hon. Frank E. Brown, Chairman

FLORIDA REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

# Evidence in UI Hearings

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- **Evidence is Hard!**
- Very few lawyers really know the rules of evidence stone cold
- Virtually every tribunal has its own standards of evidence



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# Federal Evidence Standards

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- By design, UI appeals use a more relaxed standard of evidence than courts do.
- DOL ETA Standard 382 (Appendix B: VI. Evidence):

*“The exclusionary rules applicable to admissibility of evidence in court proceedings should not be adopted or used. Any evidence pertaining to the issues in a case should be received as a matter of course. . . . The much more important and practical question is the weight that should be given to particular evidence.”*



# DOL – Maine UI Review

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DOL expressed concerns about Maine’s handling of hearsay and documentary evidence as being too restrictive:

*“Our fact-finding suggests that DAH hearing officers regularly exclude hearsay ... that they may be excluding as inadmissible hearsay documents not subject to cross-examination (effectively instituting an absolute right to cross-examine); and, that they are discounting factors that make evidence reliable enough to be admissible.”*

Feb. 27, 2014 Letter from Regional Administrator Holly C. O’Brien



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# State UI Evidence Standards

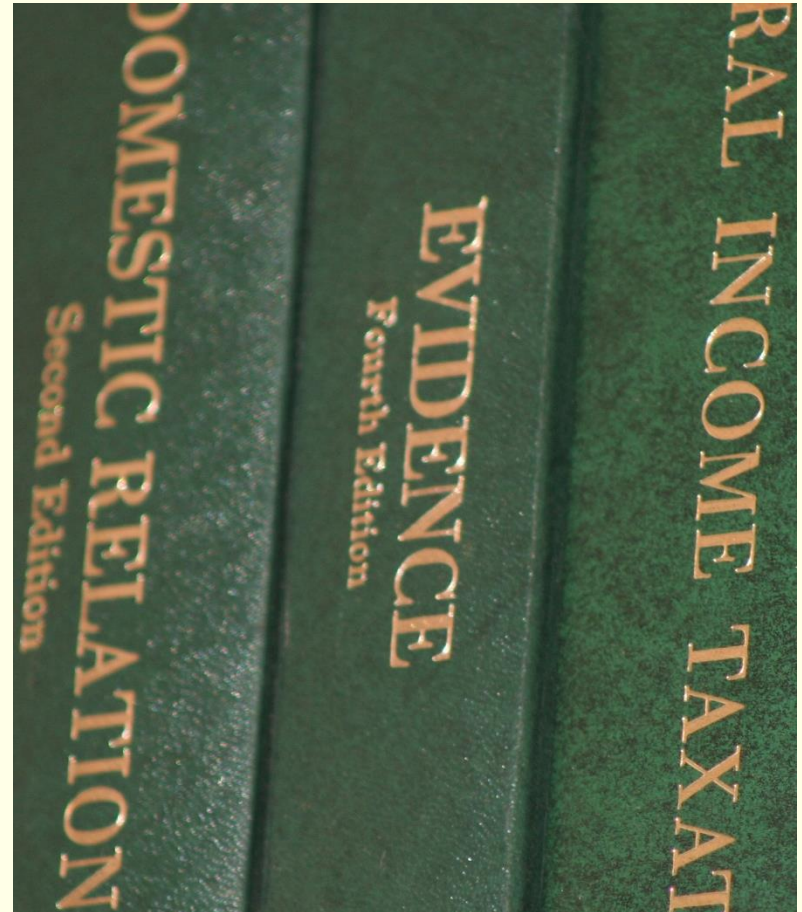
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“not be bound by common law or statutory rules of evidence or by technical rules of procedure, but ... conducted in such manner as to ascertain the substantial rights of the parties.”

“without adherence to the rules of evidence required in judicial proceedings”



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# State UI Evidence Standards

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“evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs is admissible, whether or not such evidence would be admissible in a trial in state court.”

“The proceeding shall be . . . conducted in such manner as best suited to determine the rights, duties and obligations of the parties.”

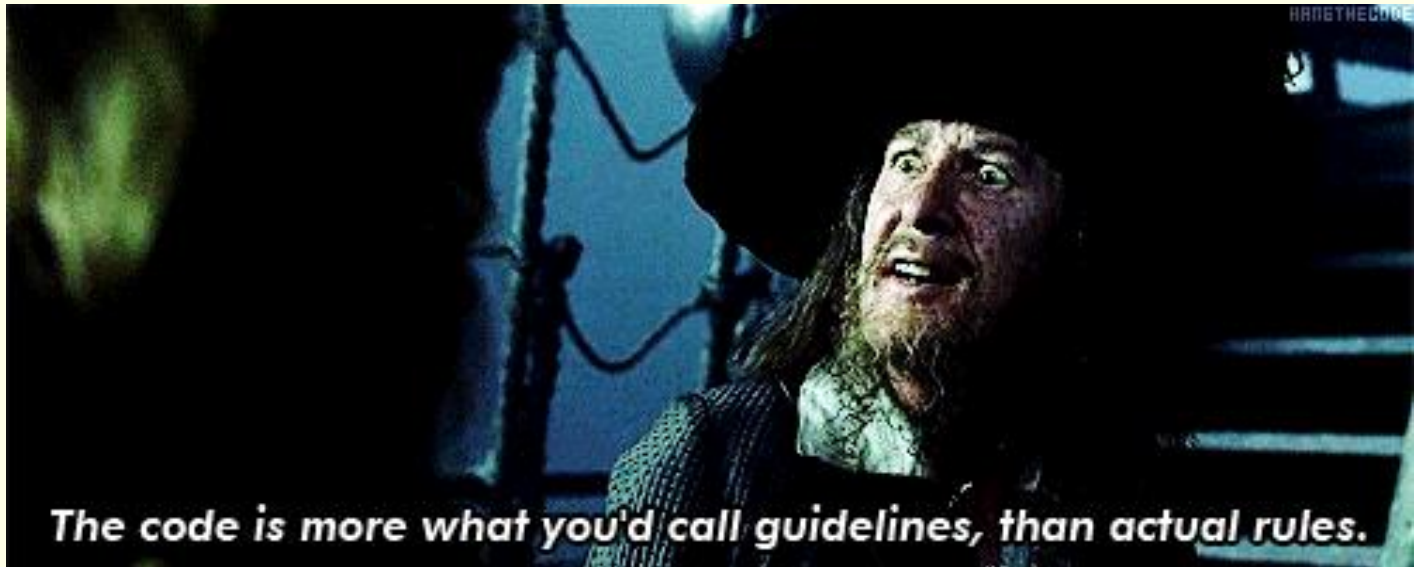




# State Evidence Codes

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Evidence Code?



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# Common UI Evidence Issues

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- Use of Hearsay
- Mistaking Evidence as Hearsay
- Requirement of Objections
- Documentary Evidence
- Administrative Notice
- Preservation of Privileges





# Hearsay as Evidence

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States differ on the value of hearsay evidence:

- At least 26 states provide that hearsay is admissible for at least some purposes.
- At least 9 additional states provide that hearsay *may* be admitted, without providing specific statutory or regulatory guidance.
- Many states differentiate uses of hearsay by whether or not it would be admissible in court
- Documentary hearsay is often treated differently than oral hearsay



# Hearsay as Evidence

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- Two-Tier Approach

- In some states, hearsay not otherwise “admissible” in court is admitted in UI hearings solely for corroborative or explanatory purposes; if admissible in court, it can support a material finding.

“admissible”  
= support material  
finding

Hearsay admitted in UI hearing  
solely for corroborative or  
explanatory purposes



# Hearsay

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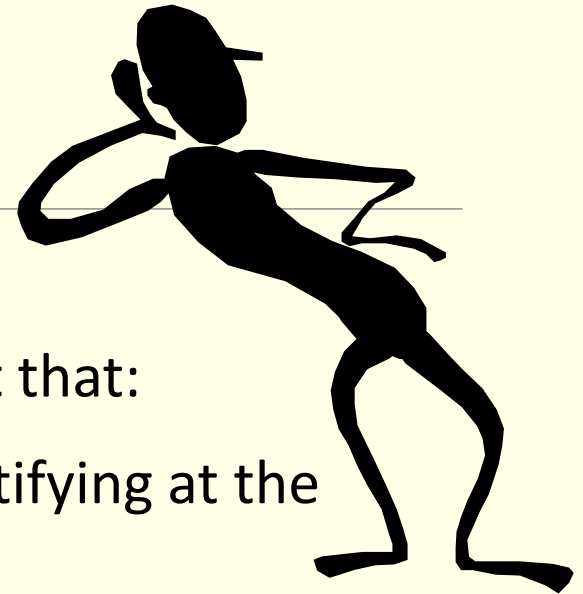
FRE 801

(c) Hearsay. “Hearsay” means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(a) Statement. “Statement” means a person’s oral *assertion*, written *assertion*, or nonverbal conduct, if the person intended it as an *assertion*.



# Statements That Are Not Hearsay

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## ***Prior Inconsistent Testimony – FRE 801(d)(1)***

*(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:*

*(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition*



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# Statements That Are Not Hearsay

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## ***Prior Testimony Offered for Credibility*** – FRE 801(d)(1)

*(B) is consistent with the declarant's testimony and is offered:*

*(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or*

*(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or*

*(C) identifies a person as someone the declarant perceived earlier.*



# Statements That Are Not Hearsay

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## ***An Opposing Party's Statement*** – FRE 801(d)(2)

*The statement is offered against an opposing party and:*

*(A) was made by the party in an individual or representative capacity;*

*(B) is one the party manifested that it adopted or believed to be true;*

*(C) was made by a person whom the party authorized to make a statement on the subject;*



# Statements That Are Not Hearsay

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## ***An Opposing Party's Statement*** – FRE 801(d)(2)

*(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or*

*(E) was made by the party's coconspirator during and in furtherance of the conspiracy.*

*The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).*





# Non-Hearsay

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- **Tangible Evidence**, such as written policies, contracts, video, photographs, provided they do not contain assertions of fact.



# Non-Hearsay

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- Statements offered for purposes **other than the truth of the matter asserted**
  - Ex. Coworker tells employer that the claimant is acting like he is drunk; the employer may offer that second-hand testimony to show that it had reasonable suspicion to send the claimant to testing, but not to prove that he was drunk.
  - Ex. Coworker calls claimant a “son of a b...h” – Statement is not hearsay if offered to show provocation or harassment



# Non-Hearsay

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- “Statements” not made by individuals, such as electronically created records.
  - Ex. Time records that are automatically created; phone logs, etc.



# Routine Practice & Habit

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- ***Routine Practice of An Organization*** – FRE 406

“Evidence of the routine practice of an organization, whether corroborated or not and **regardless of the presence of eyewitnesses**, is admissible to prove that the conduct of the organization on a particular occasion was in conformity with the routine practice.”



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# Hearsay Exceptions

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## ***Business Record Exceptions – FRE 803(6)***

- *Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:*
- *(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;*
- *(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;*
- *(C) making the record was a regular practice of that activity;*
- *(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and*
- *(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.*



# Hearsay Exceptions

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## ***Business Record Exceptions – FRE 803(7)***

- *Absence of a Record of a Regularly Conducted Activity. Evidence that a matter is not included in a record described in paragraph (6) if:*
- *(A) the evidence is admitted to prove that the matter did not occur or exist;*
- *(B) a record was regularly kept for a matter of that kind; and*
- *(C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.*



# Hearsay Exceptions

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- **Public Record Exceptions – FRE 803(8)**
  - (8) *Public Records. A record or statement of a public office if:*
    - (A) *it sets out:*
      - (i) *the office’s activities;*
      - (ii) *a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or*
      - (iii) *in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and*
    - (B) *the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.*





# Hearsay Exceptions

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- ***Residual Exceptions*** – FRE 807
- A general hearsay exception that permits acceptance of evidence not falling under a specific exception, but where the evidence has comparable indicia of reliability and the interests of justice support admission.
- Florida UI law has such a provision – §443.151(4)(b)5.c.(I)-(II)



# Objections?

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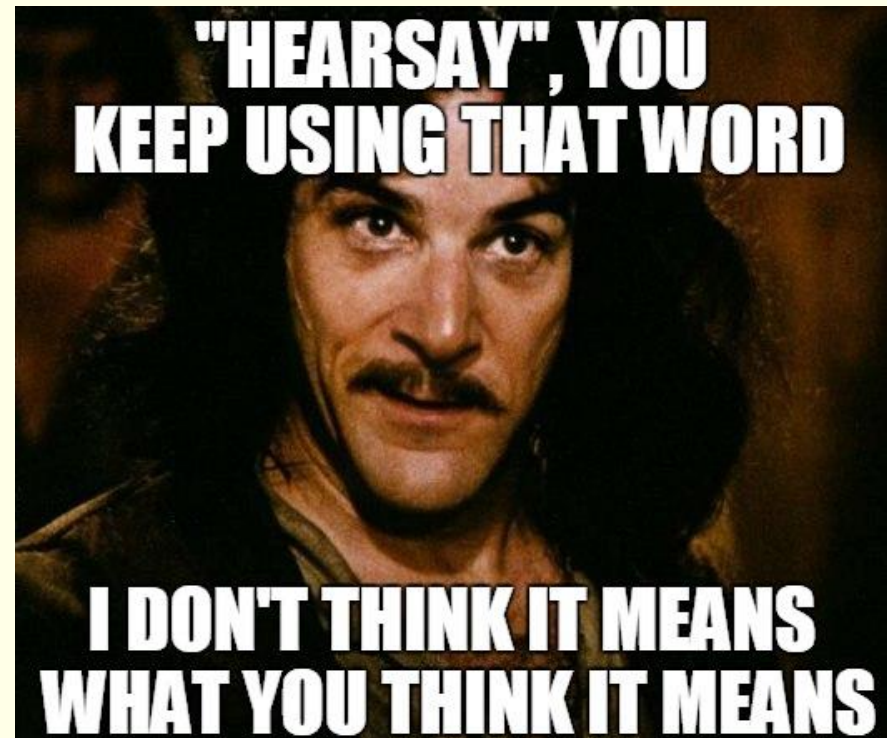
- Some states make consideration of otherwise inadmissible hearsay contingent upon objections.
- This is typically a court rule.



# Best Evidence vs. Hearsay

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- One of the most common errors in evidence in any tribunal is confusing the Best Evidence Rules with Hearsay Rules
- It's not just UI hearings – courts get it wrong too – *Yost v. UAC*, 848 So. 2d 1235 (Fla. 2d DCA 2003).



# Best Evidence vs. Hearsay

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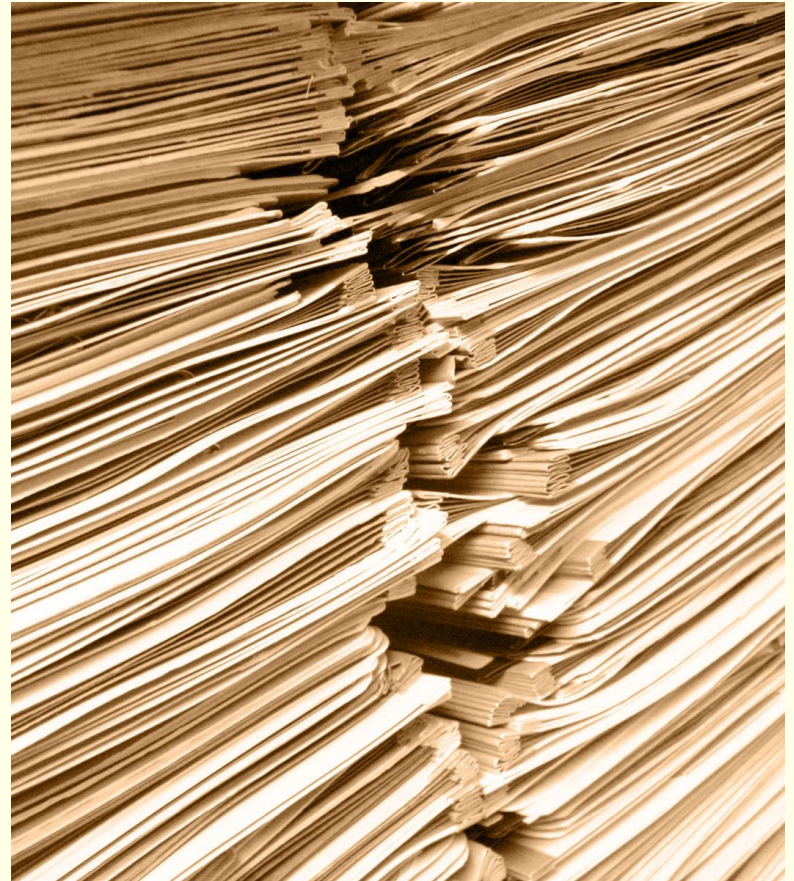
- Testimony *providing* the contents of tangible evidence is not hearsay, but might violate the best evidence rules.
- Should best evidence rules ever be used to preclude consideration of evidence, as opposed to be a factor in weighing it?



# Documentary Evidence

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- **Predicates for Consideration of Documentary Evidence**
  - Proper Service and Delivery
  - Proper Authentication
  - Evaluation of Hearsay
  - Development of Relevance to Issues in Case





# Authentication

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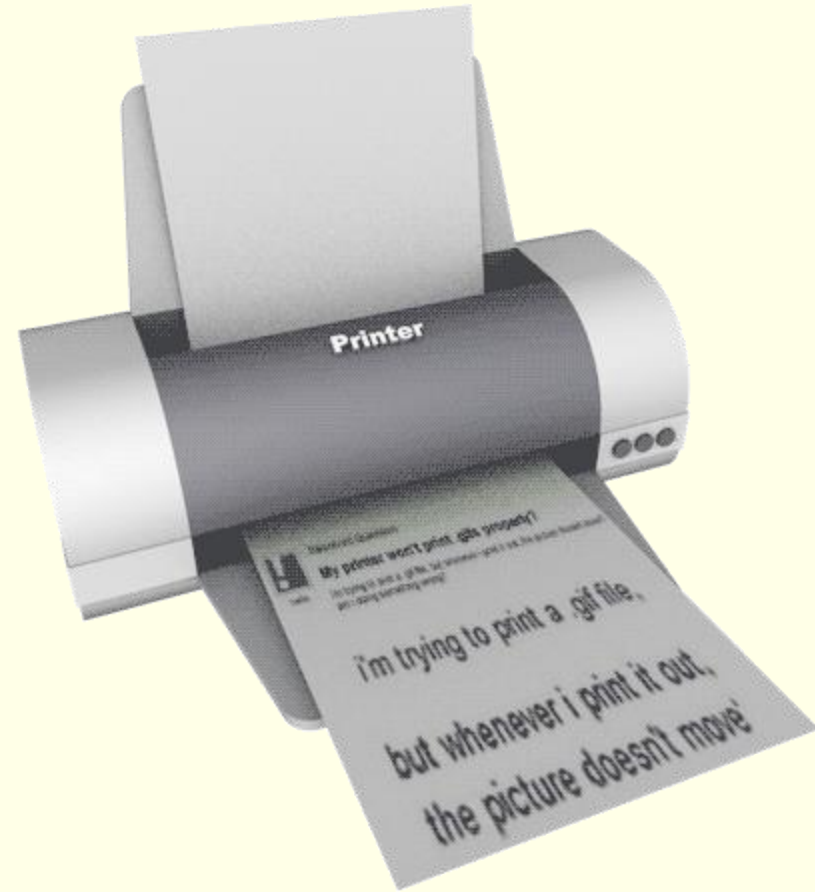
- Before acceptance into the record, tangible evidence must be authenticated.
- Generally – FRE 901(a)  
*“To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”*



# Authentication

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- Electronically or automatically created records – FRE 901(b)(9)
- ***Evidence About a Process or System.*** Evidence describing a process or system and showing that it produces an accurate result.





# Authentication

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- **Self-authentication – FRE 902(4)**

A copy of an official record — or a copy of a document that was recorded or filed in a public office as authorized by law — if the copy is certified



# Administrative Notice

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- Many states explicitly authorize agencies to take notice of administrative records
- How do you do this while protecting due process at higher authority level?



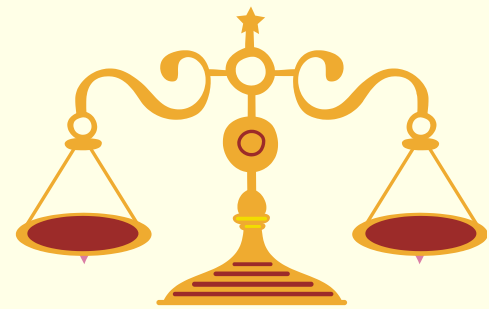
# Privileges

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- A claimant is fired for an accusation of theft. The claimant is arrested and criminal charges are pending at the time of the hearing.
- Privileges, especially Fifth Amendment, are often not evidentiary rules, but substantive rights. However, they may not preclude adverse findings.



# Weighing Evidence

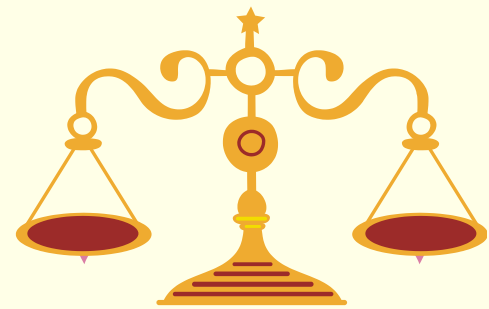


- Oral testimony re contents of documentary evidence – how complex is the information? Do you permit it to be read into the record or allow summary evidence?



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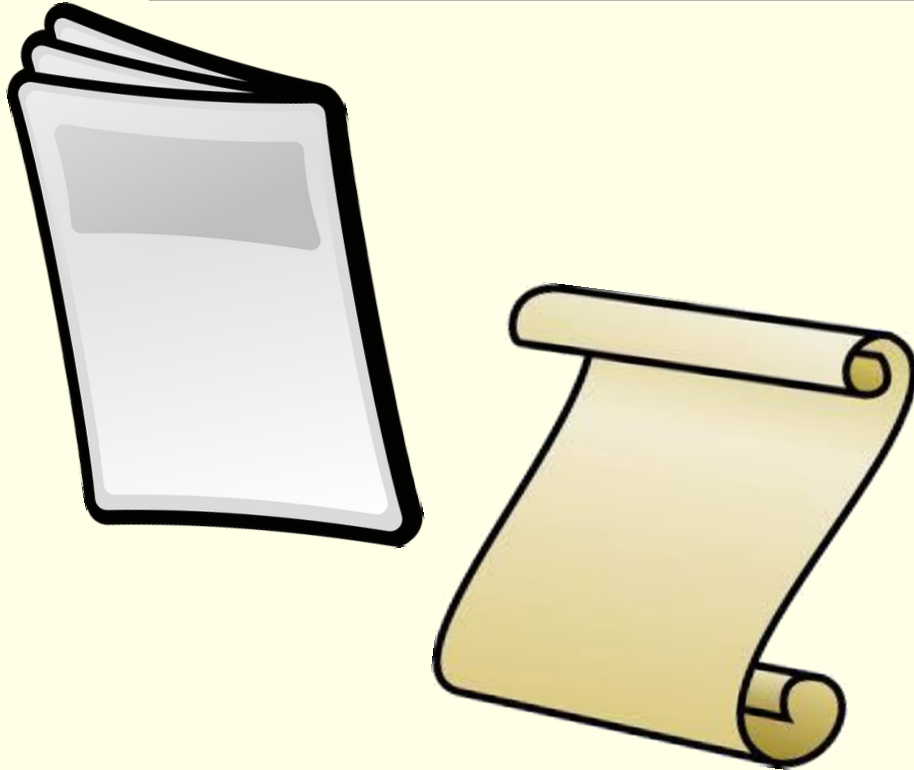
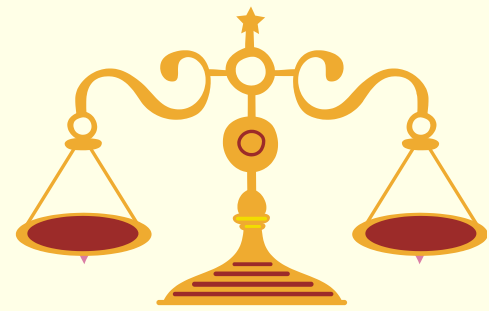
# Weighing Evidence



- Reports by Professionals
  - Police are trained to be skilled, objective recorders of information; doctors are trained at determining value of patient complaints; even lawyers may be good at obtaining reliable statements!



# Weighing Evidence



- Two halves make a whole – sometimes two weak pieces of mutually supporting evidence can together make one strong one. Consider evidence in context of the whole record, not in isolation.



# Weighing Evidence

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- *“Cross-examination is the greatest legal engine ever invented for the discovery of truth” – Prof. Wigmore*
- Even the value of statements by non-present witnesses can be inquired into by skillful questions to the other witnesses
- **Your best tool for weighing competing evidence is focusing on the quality of your examination of the witnesses.**



# Common UI Scenarios

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Let's take a look at some common issues from UI hearings and look at the evidentiary considerations.



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# Written Warnings

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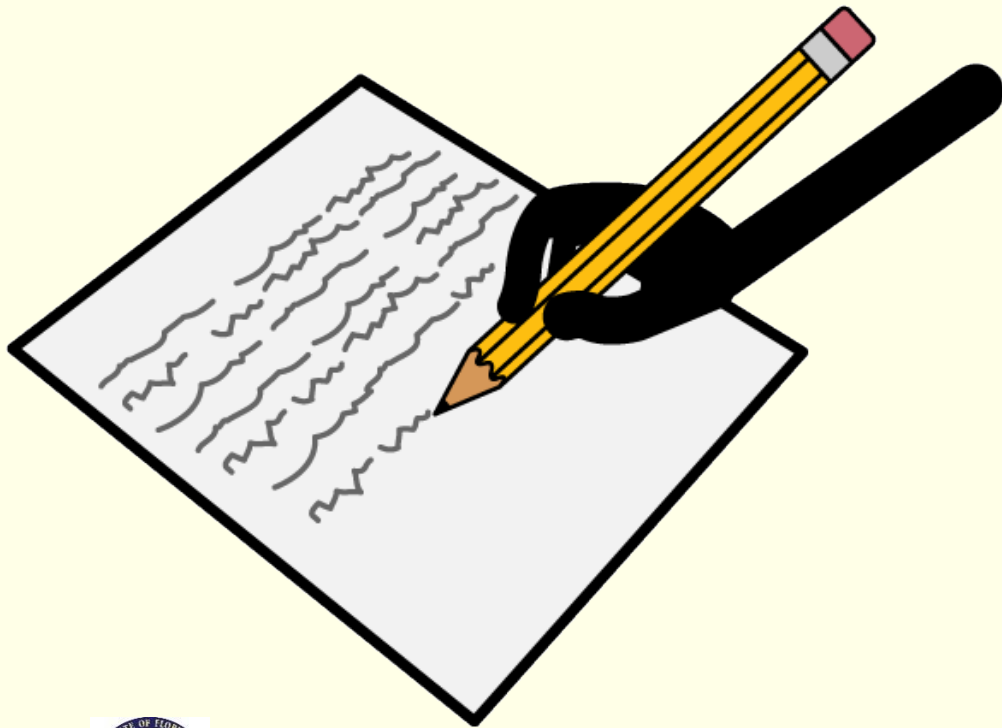


- The employer offers into evidence a written warning that accuses the claimant of doing something in the past. Is it admissible? For what purposes?



# Witness Statements

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After the claimant is fired and files a UI claim, the employer has two coworkers provide written statements about the incident.



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# Police Reports

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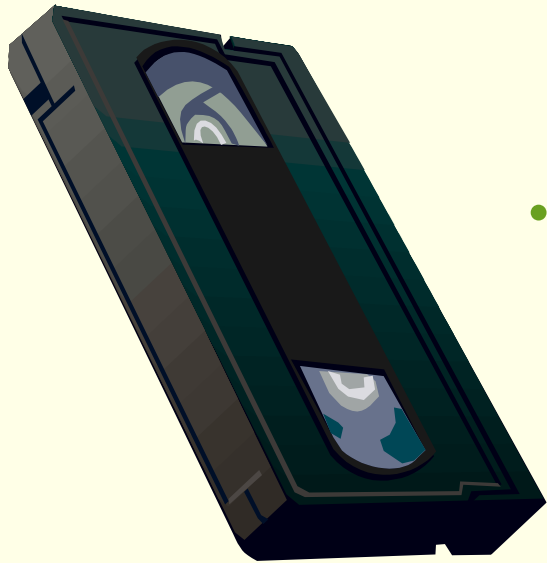


- Police Reports – Police reports are often self-authenticating if signed or certified. In considering them, you must distinguish between evidence the officer directly observed, and evidence from witness statements. The latter is hearsay within hearsay, and must be analyzed accordingly under your public records exception.



# Video Evidence

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- Video Evidence, like other tangible evidence, is admissible if properly authenticated.
- Testimony regarding the contents of video, in lieu of production of the same, is not hearsay to the extent it shows conduct rather than speech. While it would typically be excluded in court pursuant to the Best Evidence Rules, consideration can be given to weight, rather than admissibility.



# Redacted Witness Statements

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- Redacted Witness Statements – The employer offers a written statement, but the name of the author is redacted. Is the claimant deprived of a fair opportunity to confront his accuser or provide rebuttal testimony?



# Distraught Declarants

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- An individual comes to a supervisor visibly upset or shaken, and complains she has just been sexually harassed or assaulted. The witness is not available at the hearing.
- FRE 803(2) “excited utterance” exception covers this scenario.



# Overheard Comments

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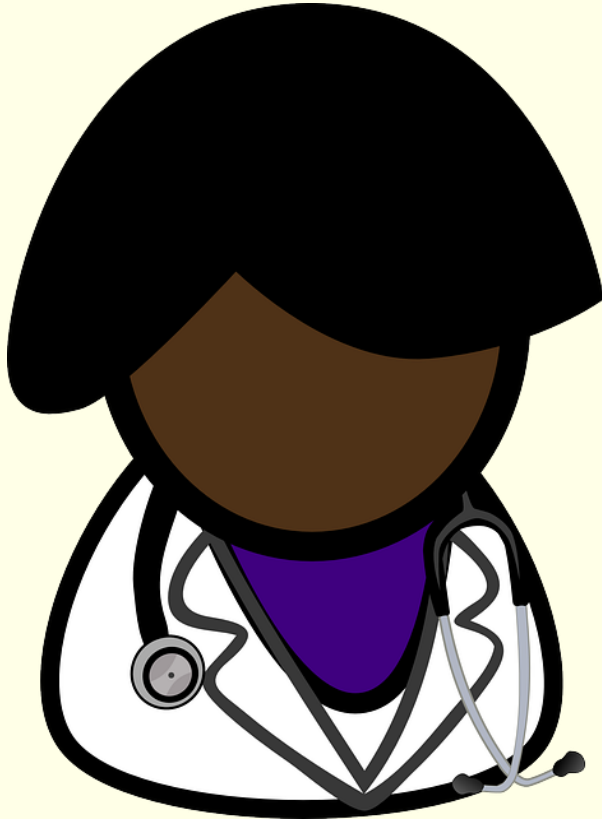
- A witness hears a coworker exclaim “I can’t believe you just threw that book at me” referring to the claimant. The witness did not see the incident.
- This evidence would be admissible under FRE 803(1) so long as it was clear that the comment immediately followed the incident.





# Medical Advice

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- In a voluntary quit case, the claimant testifies that her doctor told her she should quit her job. The claimant does not produce any pertinent medical documentation.
- FRE 803(4) does *not* apply here.



# Customer Complaints

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- The employer receives a customer complaint in writing alleging wrongdoing by an employee, who is fired as a result. The customer is not available but a written statement is.



# Sign-in Sheets

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- Claimant contends that he showed up to check for work with day staffing company. The employer provides the sheet that shows the claimant's name wasn't there.
- FRE 803(7) is the relevant rule.
- What if the employer only offered testimony about the missing name?



# New Employee Orientation

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- The employer contends that it gave the claimant a copy of its personnel manual during orientation but it does not have a signed acknowledgment or a direct witness. Or it testifies that the employer's attendance policy was covered during orientation but doesn't have the trainer available as a witness. What evidence can be offered?
- FRE 406 covers this scenario.



# Heard You Were Fired

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- The claimant missed work one day. He talks to a coworker who tells him that he heard the boss say that he was fired. The claimant wants to testify to the statement to show he was discharged.

