"Legal research and writing".

In Section 1 of this course you will cover these topics:

- Overview Of Evidence
- Real Evidence

Topic : Overview Of Evidence

Topic Objective:

At the end of this topic student would be able to:

- Define the term evidence in law and legal studies
- Describe the forms of evidence
- Highlight the meaning of evidence in scientific research

Definition/Overview:

Evidence: Evidence in its broadest sense includes anything that is used to determine or demonstrate the truth of an assertion. Philosophically, evidence can include propositions which are presumed to be true used in support of other propositions that are presumed to be falsifiable. The term has specialized meanings when used with respect to specific fields, such as policy, scientific research, criminal investigations, and legal discourse.

Key Points:

1. Forms of Evidence

The most immediate form of evidence available to an individual is the observations of that person's own senses. For example an observer wishing for evidence that the sky is blue need only look at the sky. However this same example illustrates some of the difficulties of evidence as well:

- someone who was blue-yellow color blind, but did not know it, would have a very different perception of what color the sky was than someone who was not. Even simple sensory perceptions (qualia) ultimately are subjective; guaranteeing that the same information can be

considered somehow true in an objective sense is the main challenge of establishing standards of evidence.

- There is also the question of what is meant by 'blue', and how we measure it. (If determined by a particular wave-length of colour - then how do we actually measure this?)
- there is also the question of how evidence 'translates' e.g. is 'blau' in German universally translated as 'blue' in English: Germans may have different words for different parts of the spectrum; thus 'evidence' is a social construction

2. In scientific research evidence is accumulated through observations of phenomena that occur in the natural world, or which are created as experiments in a laboratory. Scientific evidence usually goes towards supporting or rejecting a hypothesis. When evidence is contradictory to predicted expectations, the evidence and the ways of making it are often closely scrutinized and only at the end of this process the hypothesis is rejected: this can be referred to as 'refutation of the hypothesis'. The rules for evidence used by science are collected systematically in an attempt to avoid the bias inherent to anecdotal evidence: nonetheless even anecdotal evidence is enough to reject a theory incompatible with that evidence, if there are sufficient repeated examples.

3. In criminal investigation, rather than attempting to prove an abstract or hypothetical point, the evidence gatherers are attempting to determine who is responsible for a criminal act. The focus of criminal evidence is to connect physical evidence and reports of witnesses to a specific person. Legal evidence differs from the above in the tight rules governing the presentation of facts that tend to prove or disprove the point at issue. In law, certain policies require that evidence that tends to prove or disprove an assertion or fact must nevertheless be excluded from consideration based either on indicia relating to reliability, or on broader social concerns. Testimony (which tells) and exhibits (which show) are the two main categories of evidence presented at a trial or hearing.

Topic : Real Evidence

Topic Objective:

At the end of this topic student would be able to:

- Define the term real evidence

Definition/Overview:

Real evidence: Real evidence is a type of physical evidence and consists of objects that were involved in a case or actually played a part in the incident or transaction in question.

Key Points:

1. Real evidence

Real evidence includes the written contract, the defective part or defective product, the murder weapon, the gloves used by an alleged murderer. **Traceevidence**, such as fingerprints and firearm residue, is a species of **real evidence**. **Real evidence** is usually reported upon by an expert witness with appropriate qualifications to give an opinion. This normally means a forensic scientist or one qualified in forensic engineering. Admission of **real evidence** requires authentication, a showing of relevance, and a showing that the object is in **the same or substantially the same condition** now as it was on the relevant date. An object of **real evidence** is authenticated through the senses of witnesses or by **circumstantial evidence** called chain of custody.

In Section 2 of this course you will cover these topics:
- Demonstrative Evidence
- Documentary Evidence

Topic : Demonstrative Evidence

Topic Objective:

At the end of this topic student would be able to:

- Define the term demonstrative evidence
- Point out the elements of demonstrative evidence

Definition/Overview:

Demonstrative evidence: Demonstrative evidence is evidence in the form of a representation of an object. This is, as opposed to, **real evidence**, testimony, or other forms of evidence used at trial.

Key Points:

1. **Demonstrative evidence** include photos, x-rays, videotapes, movies, sound recordings, diagrams, forensic animation, maps, drawings, graphs, animation, simulations, and models. It is useful for assisting a finder of fact (fact-finder) in establishing context among the facts presented in a case. To be admissible, a demonstrative exhibit must fairly and accurately represent the real object at the relevant time.

2. **Demonstrative evidence** includes:

- Case specific medical exhibits
- colorized diagnostic films
- general anatomy and
- surgery exhibits

These forms of **demonstrative evidence**are commonly used as a personal injury lawyer resource. **Demonstrative evidence** with dramatic impact can maximize the value of a case by effectively depicting catastrophic/traumatic injuries, complex surgical procedures, and surgical mistakes or summarize injuries suffered by an individual. These examples of **demonstrative evidence** are used for:

- settlement conferences
- arbitration
- mediation
- medical expert depositions and
- trial presentations

In American jurisprudence, **demonstrative evidence**, like any other kind of evidence must be relevant. At this point the proponent of the **demonstrativeevidence** can either try to get the evidence admitted into the official record of the case or can choose to use the evidence as merely a prop. If the proponent of the evidence wants to have the evidence included in the official record of the case, the proponent will first ask for the evidence to be marked by the court for identification purposes. After the evidence is marked for identification, the proponent of the **demonstrative evidence** must lay a foundation. It is at this time that the relevancy of the **demonstrative evidence** is usually challenged. Lying of a foundation

explains how the **demonstrativeevidence** relates to the facts of the case and establishes the evidence's authenticity. Once the foundation is laid, the proponent may ask to officially move the piece of evidence into the record where it is marked as a full exhibit. If the evidence is marked as a full exhibit the jury may refer to the evidence during deliberations and in most jurisdictions the jury may examine the evidence during deliberations. If the evidence is not marked as a full exhibit, the jury cannot do these things. As a matter of courtesy, the proponent of the **demonstrativeevidence** generally shows the piece of evidence to the opposing party before marking it for identification purposes. In criminal cases certain kinds of **demonstrative evidence**are subject to mandatory disclosure under the case law governing discovery.

Topic : Documentary Evidence

Topic Objective:

At the end of this topic student would be able to:

- define documentary evidence
- describe the importance of documentary evidence

Definition/Overview:

Documentary evidence: Documentary evidence is any evidence introduced at a trial in the form of documents. Although this term is most widely understood to mean writings on paper (such as an invoice, a contract or a will), the term actually include any media by which information can be preserved. Photographs, tape recordings, films, and printed emails are all forms of **documentary evidence**.

Key Points:

1. Documentary Evidence

A piece of evidence is not **documentary evidence** if it is presented for some purpose other than the examination of the contents of the document. For example, if a blood-spattered letter is introduced solely to show that the defendant stabbed the author of the letter from behind as it was being written, then the evidence is **physical evidence**, not **documentaryevidence**. However, a film of the murder taking place would be **documentary evidence** (just as a

written description of the event from an eyewitness). If the content of that same letter is then introduced to show the motive for the murder, then the evidence would be both physical and documentary.

Documentary evidence is subject to specific forms of authentication, usually through the testimony of an eyewitness to the execution of the document, or to the testimony of a witness able to identify the handwriting of the purported author. **Documentary evidence** is also subject to the **best evidence** rule, which requires that the original document be produced unless there is a good reason not to do so.

In Section 3 of this course you will cover these topics:
Expert Evidence

Topic : Expert Evidence

Topic Objective:

At the end of this topic student would be able to:

- Define expert witness
- Discuss the role and responsibilities of expert witness

Definition/Overview:

Expert Witness: An expert witness is a witness, who by virtue of education, training, skill, or experience, is believed to have knowledge in a particular subject beyond that of the average person, sufficient that others may officially (and legally) rely upon the witness's specialized (scientific, technical or other) opinion about an evidence or fact issue within the scope of their expertise, referred to as the expert opinion, as an assistance to the fact-finder.

Key Points:

1. **Expert witnesses** may also deliver **expert evidence** about facts from the domain of their expertise. At times, their testimony may be rebutted with a learned treatise, sometimes to the detriment of their reputations. Typically, experts are relied on for opinions on severity of injury, degree of insanity, cause of failure in a machine or other device, loss of earnings, care costs and the like. The tribunal itself, or the judge, can in some systems call

upon experts to technically evaluate a certain fact or action, in order to provide the court with a complete knowledge on the fact/action it is judging. The expertise has the legal value of an acquisition of data. The results of these experts are then compared to those by the experts of the parties.

2. The expert has heavy responsibility, especially in penal trials, and perjury by an expert is a severely punished crime in most countries. The use of expert witnesses is sometimes criticized in the United States because in civil trials, they are often used by both sides to advocate differing positions, and it is left up to a jury of laymen to decide which expert witness to believe. Sometimes one side has utilized an expert witness to provide fraudulent or junk science testimony in order to convince a jury. In Englandand Wales, under the Civil Procedure Rules 1998, an expert witness is required to be independent and address his or her report to the Court. A witness may be jointly instructed by both sides if the parties agree to this, especially in cases where the liability is relatively small.

3. Under the CPR, expert witnesses are usually instructed to produce a joint statement detailing points of agreement and disagreement to assist the court or tribunal. The meeting is held quite independently of instructing lawyers, and often assists in resolution of a case, especially if the experts review and modify their opinions. When this happens, substantial trial costs can be saved when the parties to a dispute agree to a settlement. In most systems, the trial (or the procedure) can be suspended in order to allow the experts to study the case and produce their results. More frequently, meetings of experts occur before trial. The earliest known use of an expert witness in English law came in 1782, when a court that was hearing litigation relating to the silting-up of Wells harbour in Norfolkaccepted evidence from a leading civil engineer, John Smeaton. This decision by the court to accept Smeaton's evidence is widely cited as the root of modern rules on **expert evidence**. However, it was still such an unusual feature in court that in 1957 in the Old Bailey, Lord Justice Patrick Devlin could describe the case of suspected serial killer Dr John Bodkin Adams thus: **"It is a most curious situation, perhaps unique in these courts, which the act of murder has to be proved by expert evidence."** On the other hand, **expert evidence** is often the most important component of many civil and criminal cases today. Fingerprint examination, blood analysis and DNA fingerprinting are common kinds of **expertevidence** heard in serious criminal cases. In civil cases, the work of accident analysis, forensic engineers, and forensic accountants is usually important, the

latter to assess damages and costs in long and complex cases. Intellectual property and medical negligence cases are typical example.

4. In the U.S., a party can hire experts to help him/her evaluate the case. For example, a car maker may hire an experienced mechanic to decide if its cars were built to specification. This kind of expert opinion will be protected from discovery. If the expert finds something that is against its client, the opposite party will not know it. This privilege is similar to the work product protected by the attorney/client privilege. If the witness needs to testify in court, the privilege is no longer protected. The expert witness's identity and nearly all documents used to prepare the testimony will become discoverable. Usually an experienced lawyer will advise the expert not to take notes on documents because all of the notes will be available to the other party. Although experts can testify in any case in which their expertise is relevant, criminal cases are more likely to use forensic scientists or forensic psychologists, whereas civil cases, such as personal injury, may use forensic engineers, forensic accountants, employment consultants or care experts. Senior physicians, usually consultants or their equivalents are frequently used in both the civil and criminal courts.

5. The Federal Court of Australia has issued guidelines for experts appearing in Australiacourts. This covers the format of the expert's written testimony as well as their behaviour in court. Similar procedures apply in non-court forums, such as the Australian Human Rights and Equal Opportunity Commission.

In Section 4 of this course you will cover these topics:

- Admissions And Stipulations

Topic : Admissions And Stipulations

Topic Objective:

At the end of this topic student would be able to:

- Define Admission sand stipulations
- Highlight the meanings and elements of admission and stipulations in legal terms
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Definition/Overview:

Stipulations: In USlaw, a stipulation is an agreement made between opposing parties prior to a pending hearing or trial. For example, both parties might stipulate to certain facts, and therefore not have to argue those facts in court. After the stipulation is entered into, it is presented to the judge. In other legal systems a similar concept is called different names. The term can also refer to a special rule in a professional wrestling match, which can force the loser to do something (e.g., retire), or any other edit to the basic rules of the match type.

Admission: An admission in the law of evidence is a prior statement by an adverse party which can be admitted into evidence over a hearsay objection. In general, admissions are admissible in criminal and civil cases.

Key Points:

1. At common law, admissions were admissible. A statement could only be excluded by a showing of involuntariness, unfairness, or that the circumstances under which the statement was obtained was improper or illegal. In the United States, **"Admission by a party-opponent"**is explicitly accepted from hearsay under the **Federal Rules of Evidence**. Rule 801(d) (2). Among several types of admissions, the rule notes that an admission can be the "party's own statement" or a statement in which the "party has manifested an adoption or belief in its truth." Under both common law and the Federal **Rules of Evidence**, an admission becomes legally invalid after nine years from the date of the initial admission.

2. Burden of proof (Latin, onus probandi) is the obligation to prove allegations which are presented in a legal action. Under the Latin maxim necessitas probandi incumbit ei qui agit, the ordinary rule is that **"the necessity of proof lies with he who complains."** For example, a person has to prove that someone is guilty (in a criminal case) or liable (in a civil case) depending on the allegations; a person is not required to prove his or her own innocence, it is rebuttably presumed. More colloquially, burden of proof refers to an obligation in a particular context to defend a position against a prima facie other position.

3. The law of evidence governs the use of testimony (e.g., oral or written statements, such as an affidavit) and exhibits (e.g., physical objects) or other documentary material which is

admissible (i.e., allowed to be considered by the trier of fact, such as jury) in a judicial or administrative proceeding (e.g., a court of law). In law, a foundation is sufficient **preliminaryevidence** of the authenticity and relevance for the admission of **materialevidence** in the form of exhibits or testimony of witnesses. **Material evidence** is important **evidence** that may serve to determine the outcome of a case. Exhibits include **realevidence**, **illustrative evidence**, **demonstrative evidence**, and **documentaryevidence**. The type of **preliminary evidence** necessary to lay the proper foundation depends on the form and type of **material evidence** offered.

4. Law is a system of rules, usually enforced through a set of institutions. It shapes politics, economics and society in numerous ways. Contract law regulates everything from buying a bus ticket to trading swaptions on a derivatives market. Property law defines rights and obligations related to transfer and title of personal and real property, for instance, in mortgaging or renting a home. Trust law applies to assets held for investment and financial security, such as pension funds. Tort law allows claims for compensation when someone or their property is injured or harmed. If the harm is criminalised in a penal code, criminal law offers means by which the state prosecutes and punishes the perpetrator. Constitutional law provides a framework for creating laws, protecting people's human rights, and electing political representatives. Administrative law relates to the activities of administrative agencies of government. International law regulates affairs between sovereign nation-states in everything from trade to the environment to military action. Law manifests itself throughout the community in many more ways, and serves as the foremost social mediator of relations between people. **"The rule of law"**, wrote the ancient Greek philosopher Aristotle in 350 BC, is better than the rule of any individual

5. Though all legal systems must deal with similar issues, different countries often categorise and name legal subjects in different ways. Quite common is the distinction between **"public law"** subjects, which relate closely to the state (including constitutional, administrative and criminal law), and **"private law"** subjects (including contract, tort and property). In civil law systems, contract and tort fall under a general law of obligations and trusts law is dealt with under statutory regimes or international conventions. International, constitutional and administrative law, criminal law, contract, tort, property law and trusts are regarded as the **"traditional core subjects"**, although there are many further disciplines which might be of greater practical importance. In a global economy,

law is globalising too. International law can refer to three things: public international law, private international law or conflict of laws and the law of supranational organisations.

5.1. Public international law

Public international law concerns relationships among sovereign nations. It has a special status as law because there is no international police force, and courts lack the capacity to penalise disobedience. The sources for public international law to develop are custom, practice and treaties between sovereign nations. The United Nations, founded under the UN Charter, is one of the most important international organisations. It was established after the Treaty of Versailles' failed to prevent the Second World War. International agreements, like the Geneva Conventions on the conduct of war, and international bodies such as the International Court of Justice, International Labour Organisation, the World Trade Organisation, or the International Monetary Fund, also form a growing part of public international law.

5.2. Conflict of laws

Conflict of laws (or **"private international law"** in civil law countries) concerns which jurisdiction a legal dispute between private parties should be heard in and which jurisdiction's law should be applied. Today, businesses are increasingly capable of shifting capital and labour supply chains across borders, as well as trading with overseas businesses. This increases the number of disputes outside a unified legal framework. Increasing numbers of businesses opt for commercial arbitration under the New York Convention 1958.

5.3. European Union law

European Union law is the first and thus far only example of a supranational legal framework. However, given increasing global economic integration, many regional agreements especially the Union of South American Nations are on track to follow the same model. In the EU, sovereign nations have pooled their authority through a system of courts and political institutions. They have the ability to enforce legal norms against and for member states and citizens, in a way that public international law does not. As the European Court of Justice said in 1962, European Union law constitutes **"a new**

legal order of international law" for the mutual social and economic benefit of the member states.

6. There are generally three broad types of burdens:

6.1. A**"legal burden"** or a **"burden of persuasion"** is an obligation that remains on a single party for the duration of the claim. Once the burden has been entirely discharged to the satisfaction of the trier of fact, the party carrying the burden will succeed in its claim. For example, the presumption of innocence places a legal burden upon the prosecution to prove all elements of the offence (generally beyond a reasonable doubt) and to disprove all the defences except for affirmative defenses in which the proof of nonexistence of all affirmative defence(s) is not constitutionally required of the prosecution (432 U.S. 197).

6.2. An**"evidentiary burden"** or **"burden of leading evidence"**is an obligation that shifts between parties over the course of the hearing or trial. A party may submit evidence that the court will consider prima facie proof of some state of affairs. This creates an evidentiary burden upon the opposing party to present evidence to refute the presumption.

6.3. A**"tactical burden"** is an obligation similar to an evidentiary burden. Presented with certain evidence, the Court has the discretion to infer a fact from it unless the opposing party can present evidence to the contrary.

6.4. The**"standard of proof"** is the level of proof required in a legal action to discharge the burden of proof, which is to convince the court that a given proposition is true. The degree of proof required depends on the circumstances of the proposition. Typically, most countries have two levels of proof: **"the balance of probabilities"** (BOP), called the **"preponderance of evidence"**in the U.S., (which is the lowest level, generally thought to be greater than 50%, although numeric approximations are controversial) and **"beyond a reasonable doubt"**(which is the highest level, but defies numeric approximation). In addition to these, the U.S.introduced a third standard called **"clear and convincing evidence"**, (which is the medium level of proof).

6.5. The first attempt to quantify reasonable doubt was made by Simon in 1970. In the attempt, she presented a trial to groups of students. Half of the students decided the guilt or innocence of the defendant. The other half recorded their perceived likelihood, given as a percentage, that the defendant committed the crime. She then matched the highest likelihoods of guilt with the guilty verdicts and the lowest likelihoods of guilt with the innocent verdicts. From this, she gauged that the cutoff for reasonable doubt fell somewhere between the highest likelihood of guilt matched to an innocent verdict and the lowest likelihood of guilt matched to a guilty verdict. From these samples, Simon concluded that the standard was between 0.70 and 0.74.

6.6. This is the standard required by the prosecution in most criminal cases within an adversarial system and is the highest level of burden of persuasion. This means that the proposition being presented by the government must be proven to the extent that there is no **"reasonable doubt"** in the mind of a reasonable person that the defendant is guilty. There can still be a doubt, but only to the extent that it would not affect a **"reasonable person's"** belief that the defendant is guilty. If the doubt that is raised does affect a **"reasonable person's"** belief that the defendant is guilty, the jury is not satisfied beyond a **"reasonable doubt"**. The precise meaning of words such as **"reasonable"** and **"doubt"** are usually defined within jurisprudence of the applicable country.

6.7. In the West, criminal cases usually place the burden of proof on the prosecutor (expressed in the Latin brocard ei incumbit probatio qui dicit, non que negat, **"the burden of proof rests on who asserts, not on who denies"**). This principle is known as the presumption of innocence, but is not upheld in all legal systems or jurisdictions. Where it is upheld, the accused will be found not guilty if this burden of proof is not sufficiently shown by the prosecution. For example, if the defendant (D) is charged with murder, the prosecutor (P) bears the burden of proof to show the jury that D did murder someone.

6.7.1. Burden of proof: P

- **Burden of production:** P has to show some evidence that D had committed murder. The United States Supreme Court has ruled that the Constitution

requires enough evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt. If the judge rules that such burden has been met, then of course it is up to the jury itself to decide if they are, in fact, convinced of guilty beyond a reasonable doubt. If the judge finds there is not enough evidence under the standard, the case must be dismissed (or a subsequent guilty verdict must be vacated and the charges dismissed).

- E.g. witness, **forensic evidence**, autopsy report
- Failure to meet the burden: the issue will be decided as a matter of law (the judge makes the decision), in this case, D is presumed innocent

o **Burden of persuasion:** if at the close of evidence, the jury cannot decide if P has established with relevant level of certainty that D had committed murder, the jury must find D not guilty of the crime of murder

- **Measure of proof:** P has to prove every element of the offence beyond a reasonable doubt, but not necessarily prove every single fact beyond a reasonable doubt.

6.8. In other countries, criminal law reverses the burden of proof, and there is a presumption of guilt.

o In civil law cases, the **"burden of proof"** requires the plaintiff to convince the trier of fact (whether judge or jury) of the plaintiff's entitlement to the relief sought. This means that the plaintiff must prove each element of the claim, or cause of action, in order to recover.

o The burden of proof must be distinguished from the **"burden of going forward,"**which simply refers to the sequence of proof, as between the plaintiff and defendant. The two concepts are often confused.

o The Supreme Court discussed how courts should allocate the burden of proof (i.e., the burden of persuasion) in Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49 (2005). The Supreme Court explained that if a statute is silent about the burden of persuasion, the court will **"begin with the ordinary default rule that plaintiffs**

bear the risk of failing to prove their claims." In support of this proposition, the Court cited 2 J. Strong, McCormick on **Evidence** 337, 412(5th ed. 1999), which states **"The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion."**

- At the same time, the Supreme Court also recognized **"The ordinary default rule, of course, admits of exceptions**."For example, the burden of persuasion as to certain elements of a plaintiff's claim may be shifted to defendants, when such elements can fairly be characterized as affirmative defenses or exemptions. Under some circumstances this Court has even placed the burden of persuasion over an entire claim on the defendant. Nonetheless, absent some reason to believe that Congress intended otherwise, therefore, [the Supreme Court] will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.

- In Director, Office of Workers Compensation Programs v. Greenwich Collieries, 512 U.S. 267(1994), the Supreme Court explained that **burden of proof** is ambiguous because it has historically referred to two distinct burdens: the **burden of persuasion**, and the **burden of production**."

- In Keyes v. Sch. Dist. No. 1, 413 U.S. 189(1973), the Supreme Court stated: There are no hard-and-fast standards governing the allocation of the burden of proof in every situation. The issue, rather, is merely a question of policy and fairness based on experience in the different situations.'" For support, the Court cited 9 John H. Wigmore, Evidence 2486, at 275 (3d ed. 1940)). In Keyes, the Supreme Court held that if **school authorities have been found to have practiced purposeful segregation in part of a school system**, the burden of persuassion shifts to the school to prove that it did not engaged in such discrimination in other segregated schools in the same system

In Section 5 of this course you will cover these topics:

- Motion Practice And Evidence
- Trial Evidence

Topic : Motion Practice And Evidence

Topic Objective:

At the end of this topic student would be able to:

- Define a legal motion
- Describe the rules and regulations of legal motion

Definition/Overview:

A legal motion: A legal motion is a procedural device in law to bring a limited, contested matter before a court for decision. A motion may be thought of as a request to the judge (or judges) to make a decision about the case. Motions may be made at any point in administrative, criminal or civil proceedings, although that right is regulated by court rules which vary from place to place. The party requesting the motion is called the movement.

Key Points:

1. A**"motion to dismiss"** asks the court to decide that a claim, even if true as stated, is not one for which the law offers a legal remedy. For example, a claim that the defendant failed to greet another on the street would be dismissed for failure to state a valid claim. A claim that has been presented after the statute of limitations has expired is also subject to dismissal. If granted, the claim is dismissed without any evidence being presented by the other side. A motion to dismiss has taken the place of the common law demurrer in most modern civil practice.

2. Under Rule 12 of the Federal Rules of Criminal Procedure, a party may raise by motion any defense, objection, or request that the court can determine without a trial of the general issue. Before the trial starts, the motions can be based on defects in instituting the prosecution, defects in the indictment or information (which can be challenged at any stage but are generally raised before a trial begins). Pleadings in a federal criminal trial are pleadings in a criminal proceeding are the indictment, the information, and the pleas of not guilty, guilty, and nolo contendere. A motion under Rule 14 can address the statement of the charges or the defendants. In these instances, the motion to dismiss is characterized as a **"motion to sever charges or defendants**."

3. Under Rule 907, (Rules for Courts-Martial), a motion to dismiss is a request to terminate further proceedings on one or more criminal charges and specifications on grounds capable of resolution without trial of the general issue of guilt. A motion may be based on nonwaivable grounds (e.g. lack of jurisdiction or the failure to state an offense) and/or waivable grounds (denial of a right to a speedy trial, statute of limitation, double jeopardy meaning a person has been previously tried by court-martial or federal civilian court for the same offense, pardon or grant of immunity). Specifications are sometimes referred to as 'counts' or separate instances of a particular offense which are connected to **specificfactual evidence**. A motion may seek to dismiss these specifications, especially if it is so defective it substantially misled the accused, or it is multiplicious.

4. Multiplicity also known as allied offenses of similar import is the situation where two or more allegations allege the same offense, or a situation where one defined offense necessarily includes another. A counts may also be multiplicious if two or more describe substantially the same misconduct in different ways. For example, assault and disorderly conduct may be multiplicious if facts and evidence presented at trial prove that the disorderly conduct consists solely of the assault. That is to say, if all the elements of are contained in one are all in another they are allied offenses of similar import. Discovery motions relate to the necessary exchange of information between the parties. In the common law system, these motions capture an irreducible tension in the legal system between the right of discovery and a duty to disclose information to another.

5. There are numerous practical differences between the discovery expectations and practices in civil and criminal proceedings. The local rules of many courts clarify expectations with respect to civil discovery, in part because these are often poorly understood or are abused as part of a trial strategy. As a result, civil discovery rules pertain to discretionary discovery practices and much of the argument in this respect centers on the proper definition of the scope of the parties requests. Because criminal prosecutions generally implicate a well-defined constitutional guarantee, criminal discovery is much more focused on automatic disclosure principles, which if found to be violated, will trigger the dismissal of the charges.

5.1. Rules 7.1 and 26-37 of the Federal Rules of Civil Procedure,are often cited in combination with a specific local rule to form a basis for a civil discovery motion.

5.2. Rule 16, Federal Rules of Criminal Procedure, is the basis for a criminal discovery motion. Rule 906(b)(7), Rules for Courts-Martial a variety of a **"motion for appropriate relief"** is used as a military law basis for discovery.

6. A**"motion for summary judgment"**asks the court to decide that the available evidence, even if taken in the light most favorable to the non-moving party, supports a ruling in favor of the moving party. This motion is usually only made when sufficient time for discovering all evidence has expired. For summary judgment to be granted in most jurisdictions, a two-part standard must be satisfied:

- no genuine issue of material fact can be in dispute between the parties, and
- the moving party must be entitled to judgment as a matter of law

For example, a claim that a doctor performed malpractice by prescribing a drug would be entitled to recover summary judgment if the plaintiff failed to obtain expert testimony indicating that the drug was improperly prescribed. Motions to dismiss and motions for summary judgment are types of dispositive motions.

6.1. Rule 56, Federal Rules of Civil Procedure, is the rule which explains the mechanics of a summary judgment motion. As explained in the notes to this rule, summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact. Prior to its introduction in the US in 1934, it was used in England for more than 50 years.

7. InEnglandmotions for summary judgments were used only in cases of liquidated claims, there followed a steady enlargement of the scope of the remedy until it was used in actions to recover land or chattels and in all other actions at law, for liquidated or unliquidated claims, except for a few designated torts and breach of promise of marriage. English Rules Under the Judicature Act (The Annual Practice, 1937) O. 3, r. 6; Orders 14, 14A, and 15; authorizing an application for judgment at any time upon admissions. New York was a leader in the adoption of this rule in the US and the success of the method helps account for its current importance as an almost indispensable tool in administrative actions (especially before the Equal Employment Opportunity Commission which adjudicates employment discrimination claims and the Merit Systems Protection Board which adjudicates federal employment matters).

8. The Civil Litigation Management Manual published by the US Judicial Conference directs that these motions be filed at the optimum time and warns that premature motions can be a waste of time and effort. The significant resources needed to prepare and defend against such motions isa major factor which influences litigants to use them extensively. In many cases, particularly from the defendant's (or defense) perspective, accurate or realistic estimates of the costs and risks of an actual trial are made only after a motion has been denied. Overbroad motions for summary judgment are sometimes designed (again generally by the defense) to make the opponent rehearse their case before trial.

9. Most summary judgment motions must be filed in accordance with specific rules relating to the content and quality of the information presented to the judge. Among other things, most motions for summary judgment will require or include: page limits on submissions by counsel; an instruction to state disputed issues of fact up front; an instruction to state whether there is a governing case; an instruction that all summary judgment motions be accompanied by electronic versions (on a CD-R or DVD-R), in a chambers-compatible format that includes full pinpoint citations and complete deposition and affidavit excerpts to aid in opinion preparation; an instruction that all exhibits submitted conform to specific physical characteristics (i.e. be tabbed with letters or numbers, that pages be sequentially numbered or **"Bates-stamped"**); an instruction that citations to deposition or affidavit testimony must include the appropriate page or paragraph numbers and that citations to other documents or materials must include pinpoint citations. Many judges also ask the parties to prepare form orders with brief statements of law to help the judge write the decision. A judge generally issues a tentative ruling on the submitted pleadings, and counsel will be offered an opportunity to respond in a later oral argument. Alternately, a judge may grant requests for argument in a pre-argument order which specifies what points will be discussed prior to a decision.

10. A **"motion in limine"** asks the court to decide that certain evidence may or may not be presented to the jury at the trial. A motion in limine generally addresses issues which would be prejudicial for the jury to hear in open court, even if the other side makes a timely objection which is sustained, and the judge instructs the jury to disregard the evidence. For example, the defendant may ask the court to rule that evidence of a prior conviction that occurred a long time ago should not be allowed into evidence at the trial because it would be more prejudicial than probative. If the motion is granted, then

evidence regarding the conviction could not be mentioned in front of the jury, without first approaching the judge outside of the hearing of the jury and obtaining permission. The violation of a motion in limine can result in the court declaring a mistrial.

11. There are three types of Motions in Limine:

- **Inclusionary**: A motion asking the court to have something included in the trial.
- **Exclusionary:** A motion asking the court to have something excluded in the trial.
- **Preclusionary:** A motion asking the court to have something precluded in the trial

Topic : Trial Evidence

Topic Objective:

At the end of this topic student would be able to:

- Define Exculpatory evidence
- Describe the trial evidence in detail by highlighting the related elements

Definition/Overview:

Exculpatory evidence: Exculpatory evidence is the evidence favorable to the defendant in a criminal trial, which clears or tends to clear the defendant of guilt. It is the opposite of **inculpatory evidence**, which tends to prove guilt.

Key Points:

1. In many countries such as the United States, police or prosecutor must disclose to the defendant any **exculpatory evidence** they possess. Failure to disclose can result in the dismissal of a case. In the Brady v. Maryland decision, the U.S. Supreme Court held that such a requirement follows from constitutional due process and is consistent with the prosecutor's duty to seek justice.

2. A victim is murdered by stabbing and an accused person is arrested for the murder. Evidence includes a knife covered with blood near the victim and the accused found covered in blood at the murder scene by the police. During the investigation, the police interview a witness claiming to have watched the stabbing occur. The witness makes a

statement to the police claiming the stabbing was by another unknown person, not the accused.

3. The witness' statement is **exculpatory evidence**, since it could introduce reasonable doubt as to the guilt of the accused. The police believe the witness' account is not true or the witness is unreliable and choose to not follow up on the lead.

4. The prosecutor is obliged to inform the accused and their attorney of the witness statement even if the police doubt the witness' version of events. If they fail to do so, the defendant would have grounds for appeal or for a motion to dismiss.