

EVERYTHING YOU EVER WANTED TO KNOW ABOUT EVIDENCE

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A. GENERAL PRINCIPLES

- (1) Rules of Evidence come from several sources:
 - The predominant source is the codified Federal Rules of Evidence (FRE), adopted in federal courts and 40 states. The Rules are numbered 101 through 1101.
 - If the FRE do not address a subject, it is controlled by case law.
 - If a Federal Rule is vague, it has probably been interpreted by case law.
 - Some statutes also address evidence issues, but they are not very important.

- (2) The trial judge has a lot of power and discretion. The judge's ruling is the final word on the admissibility of evidence.

- (3) Each trial judge interprets the rules slightly differently from other judges and some interpretations will be downright screwy. Accept it.

B. COMMON OBJECTIONS

<i>Evidence you don't like</i>	<i>Rule</i>	<i>What to say in your objection</i>
Emotional evidence	403 - Prejudicial evidence	The evidence is of little relevance and is unfairly prejudicial
Bad behavior by your client on other occasions	404 - Character evidence	This is inadmissible character evidence.
Questions about prior events sort of like the one at issue	Similar events (case law)	Evidence of other events is irrelevant without proof of substantial similarity of conditions
Repairs, improvements taken after an accident	407 - Safety measures	Evidence of remedial measures is irrelevant to show fault
Insurance or lack of insurance	411 - Insurance	Evidence of insurance is inadmissible
General question whether a witness has a criminal record	609 - Prior convictions	No general inquiry into criminal record is permitted. Counsel must ask about specific individual convictions.
Questions about arrests or juvenile delinquency	609 - Prior convictions	Only adult criminal convictions are admissible to impeach
A witness was convicted of misdemeanor drug, assault, sex or traffic offenses	609- Prior convictions	Only convictions for felonies or crimes of dishonesty are admissible to impeach
Police reports and other second-hand reports that somebody has accused your client	802 - Hearsay	This is hearsay.
Speculation concerning your client's motives or feelings	602 - Personal knowledge rule	The witness lacks personal knowledge of my client's feelings
Opinions that your client is or is not guilty, liable, honest	701 - Opinion rule	These are legal conclusions.
Witnesses conducting demonstrations	Demonstrations (case law)	The conditions here in the courtroom are not similar to the actual conditions of the event.
Questions on direct that tell the witness what to say	611 - Leading	The question is leading and tells the witness what to say.
Questions on cross that are rhetorical or contain comments on the evidence	Argumentative (customary law)	The question is argumentative.

C. COMMON RESPONSES TO OBJECTIONS

<i>Objection</i>	<i>What to Say in Your Response</i>
The evidence is PREJUDICIAL.	The prejudice does not substantially outweigh the probative value of the evidence because: a) It goes to prove one of our main issues [explain]; or b) The prejudice is minimal because the jury is already aware of it
CHARACTER evidence	a) Rule 404 says defendant may prove his own or the victim's character b) Adverse party opened the door. c) Under Rule 404(b), we may prove the defendant's involvement in other crimes to show: 1) Intent or knowledge, which the defendant has denied 2) That the motive for the present crime was related to the prior ones 3) The defendant's identity because these crimes are so unique as to be like a signature
Irrelevant SIMILAR EVENT	Prior events that happened under similar conditions are admissible to show notice, dangerousness, or causation.
REMEDIAL MEASURES	Under Rule 407, evidence the defendant instituted remedial measures helps prove he owns or controls the property.
Evidence of INSURANCE	Under Rule 411, evidence of insurance is admissible to show a) that the defendant owned the insured property b) the bias of a witness hired by the insurance company.
Prior conflict witness and party is irrelevant	This evidence shows bias by the witness which is admissible to impeach
HEARSAY	a) 801. Not hearsay because not for truth (specify purpose) b) 801. Not assertion, but a question, command, or threat c) 801(d). Admission of opposing party d) 803(2). Excited utterance e) 803(3). Present physical or mental condition f) 803(6). Regularly kept business record g) 803(8). Official record h) 804(b)(3). Witness unavailable and declaration against interest i) 804(b)(1). Witness unavailable and former testimony under oath
OPINION	The opinion is rationally based on the witness's personal observations
Legal Opinion	Opinions on ultimate issues admissible under Rule 704
Chart inaccurate	Minor inaccuracies go only to weight, not admissibility.
LEADING	a) 611(c). Permitted on cross-examination or for hostile witnesses b) 104. Preliminary matters and foundations c) Leading permitted to refresh recollection

D. DETAILED OUTLINE OF IMPORTANT RULES OF EVIDENCE

1. Relevancy (R. 401-02)

DEFINITION. Evidence is relevant if it helps prove a contested issue as defined in the pleadings.

RULE. Relevant evidence is admissible, however small the relevance, unless another rule (e.g., hearsay) excludes it.

BASIC PRINCIPLES. 1. When in doubt, let it in -- presumption in favor of admitting evidence
2. Trial judge has broad discretion

2. Prejudicial Effect (R. 403)

DEFINITION. Evidence is prejudicial if it raises a substantial danger of:

1. *Unfair prejudice* -- arousing jurors' emotions, biases, or prejudices
2. *Confusion of the issues* -- confusing or misleading jury about facts or law
3. *Waste of time*

RULE. *Unimportant* relevant evidence may be excluded if probative value is *substantially* outweighed by a prejudicial effect.

BASIC PRINCIPLES. 1. If evidence is important, it is admissible regardless of prejudice.
2. Substantial judicial discretion in ruling.

3. Character Evidence (R. 404-405)

DEFINITION: Evidence that tends to show a person's good or bad qualities. The most common kind is evidence of a criminal record.

RULE: Character evidence is generally not admissible

EXCEPTIONS: 1. *Impeachment*. Character for untruthfulness and specific criminal acts are admissible to impeach (R. 608-609).

2. *Defense option in criminal cases*. The accused in a criminal case may place a relevant trait of his or the victim's character in issue, and the state may then respond with contrary evidence (more character witnesses or evidence of specific acts inconsistent with character trait testified to).

3. *Prosecution option*. If the issue is genuinely disputed, the prosecution may prove that the defendant committed a criminal act *if they gave advance notice* to show:

- a. *Identity*: Evidence strongly connecting the defendant to a prior similar crime admissible if the crimes are sufficiently distinctive to qualify as "signature crimes."
- b. *Motive*: One crime provides a specific motive for the crime charged, e.g., defendant's desire to avoid prosecution on burglary charge was the motive for bribing a potential witness.
- c. *Mens rea*: Intent, Knowledge, Absence of mistake
- d. *Continuous criminal transaction*: Not mentioned in 404b, but courts have always

admitted evidence of other crimes near in time and place to the crime charged which complete the story of the events in issue.

4. Similar Events (case law)

RULE. Evidence of substantially similar events involving other people are not admissible..

EXCEPTIONS (must be genuinely disputed)

1. *Dangerousness* -- similar accidents or near-accidents to show dangerous conditions
2. *Notice* -- other similar accidents to show that defendant had notice of unsafe conditions
3. *Value* -- sales of similar property to establish the value of property in issue.
4. *Causation* -- similar events in which the cause was known to show cause in the present case

5. Habit and Routine Practices (R. 406).

DEFINITION. An activity that is *always* done the same way under a given set of conditions..

RULE. Evidence of a person's habit, or an organization's routine practice, is admissible to prove they did the routine thing at the time in question.

FOUNDATION (generally proved by opinion testimony):

1. The witness has personal knowledge of the person or organization whose conduct is at issue.
2. The witness has observed a large number of situations similar to the one at issue.
3. The person or organization has *always* responded to the situation in a particular way. It is not enough that the person or organization *usually* acts in a certain way.

6. Subsequent Remedial Measure (R. 407)

DEFINITION. Conduct by a tort defendant after an accident designed to reduce the possibility that a similar accident will happen in the future (repairs, replacements, upgrades)

RULE: Not admissible against the defendant in negligence action.

EXCEPTIONS (must be genuinely disputed)

1. To prove ownership or control
2. To prove the feasibility of safety measures
3. To show causation if after the remedy the effect disappears

CAVEAT. Courts are split over whether the Rule applies in products liability cases.

7. Offers of Compromise -- Civil Cases (R. 408)

DEFINITION. Offers to settle, completed settlements, and statements made during negotiations

RULE: Not admissible.

BASIC PRINCIPLE. A lawsuit need not be pending, but the controversy must be genuine, and must be "disputed as to either validity or amount."

EXCEPTION. To show bias of witness who agreed to testify as part of settlement.

8. Insurance (R. 411)

RULE. You can't talk about insurance at all -- not admissible to prove fault, ability to pay, or to influence amount of damages.

9. Rape Victim's Prior Sexual Conduct (R. 412)

RULE. Evidence about the prior sexual activity or reputation of a sex crime victim is not admissible.

EXCEPTIONS: Five categories of evidence are admissible if the proponent gives advance notice and the judge finds the evidence material and not unduly prejudicial at a hearing.

1. A pattern of consensual activity between the victim and defendant when the defendant claims consent.
2. To show that another man committed the act that the defendant is charged with.
3. To show that someone other than the defendant is responsible for the victim's pregnancy (if visible to the jury) unless the state so concedes and the judge instructs the jury.
4. Proof that the victim has brought prior *false* rape accusations (bringing a false charge is not sexual activity).
5. When constitutionally required (Compulsory Process Clause) to enable the defendant to present a defense (e.g., defendant claimed rape charge was made to cover up white victim's affair with another black man).

10. Privilege

DEFINITION. Confidential communications between any of the following people are not admissible:

1. Attorney and client
2. Doctor and patient
3. Therapist and patient
4. Husband and wife
5. Accountant and client
6. Cleric and member of congregation

RULES.

1. The client/patient owns the privilege and must personally assert it.
2. Once asserted, no witness may testify to the content of the privileged communications.
3. The court must permit a privilege to be claimed outside the hearing of the jury.

FOUNDATION.

1. The client must have intended the communication to be confidential at the time it was made.
2. The communication must have been confidential and not heard by unauthorized persons.

EXCEPTIONS.

1. No privilege for communications in furtherance of a crime or fraud.
2. No privilege in lawsuits between parties to the privileged communication.
3. Physical evidence, fees, and the identity of client not privileged.

11. Personal Knowledge Rule (R. 602)

RULE. Witnesses may testify only to matters about which they have personal knowledge.

FOUNDATION:

1. If a witness testifies to what s/he personally did or thought, no foundation is required.
2. Before a witness may testify to what other people did or said, you must prove either:
 - a. Direct testimony from the witness that he or she was present and saw or heard what happened.
 - b. Circumstantial evidence based on the witness's overall testimony that it is obvious the witness has personal knowledge.
3. Before a witness may describe a building, landscape or object, a foundation is required that the witness saw that item at the time of the event.

BASIC PRINCIPLES.

1. A witness may not testify about someone else was thinking or feeling, because no foundation is possible -- witnesses cannot know what is inside another's head.
2. A witness does not have personal knowledge as to a matter recalled only during or after hypnosis.

EXCEPTIONS:

1. Experts may testify based on second-hand knowledge.
2. Properly conducted public opinion polls are admissible/
3. Matters of family history, even if some of those matters happened before the witness's birth.

12 Impeachment of Witness for Past Acts of Fraud or falsity (R. 608)

RULE. A witnesses may be impeached on cross-examination by asking them to admit to past acts of dishonesty and fraud.

FOUNDATION -- Direct witness's attention to time, place and circumstances of prior act with sufficient particularity so that witness knows what you are referring to, and the judge realizes the incident is one involving dishonesty..

CAVEAT: Evidence of specific acts of untruthfulness (e.g., falsifying a job application) may not be proved by extrinsic evidence.

13. Impeachment of Witness for Prior Criminal Convictions (R. 609)

RULE. A witness may be impeached on cross-examination by asking them to admit that they have been previously convicted of crimes falling into 2 categories:

1. For a felony.

2. For a crime of dishonesty, untruthfulness, or false statement (e.g., escape from prison by giving false information).

FOUNDATION.

1. The witness's attention must be directed to a particular date *within the last ten years* (the date of conviction/release).
2. The witness's attention should be directed to the place of conviction or confinement.
3. The attorney asks if the witness was convicted of a specific crime, supplying the name of the offense.

EXTRINSIC EVIDENCE ADMISSIBLE If the witness denies or does not remember the conviction, counsel may offer into evidence a certified copy of the judgment of conviction.

BASIC PRINCIPLES.

1. The conviction (or release from prison) must be within 10 years.
2. Details of the crime are inadmissible
3. Although the Rule says that the probative value of felonies must be weighed against their prejudicial effect, in practice felonies are almost always admitted.
4. No juvenile crimes.

14. Impeachment of Witness for a Prior Inconsistent Statement (case law & R. 613)

RULE. A witness may be impeached on cross-examination by asking them to admit that they have previously said something different than what they have testified to today.

FOUNDATION.

1. The witness must give direct examination testimony.
2. Direct the attention of the witness to the time and place where, and the person to whom the inconsistent statement was made.
3. The statement being referred must be the witness's own, not the statement of any third party.
4. The substance of the statement should be disclosed to the witness with sufficient specificity to allow the witness to recall it. However, the statement need not be shown to the witness.
5. The witness is then asked to admit making the statement.
6. If the witness denies or does not remember making the statement, and if the statement is on a material issue, then the cross-examiner may introduce the statement itself.

15. Impeachment for Bias, Interest, or Motive (case law)

RULE. A witness may be impeached on cross-examination by asking them to admit to any fact tending to show that they have a bias for or against a party, an interest in the outcome, or any other motive to testify falsely. Events that demonstrate bias directly (e.g., witness once attacked plaintiff with knife) or raise a circumstantial likelihood of bias (e.g., plaintiff once attacked witness) are both provable.

FOUNDATION. Direct witness's attention to time, place and circumstances of an event.

BASIC PRINCIPLES.

1. Evidence that the defendant and a witness have a friendship based on illegal or immoral conduct (e.g., were cell-mates in prison) is admissible, despite the prejudicial danger. However, lurid details of the relationship are not admissible.
2. Extrinsic evidence admissible (bias never collateral).
3. Bias may also be proved by showing witness's general feelings or status relationship.

16. Form of Questions and Testimony [case law & R 611(a)]

RULE. The trial judge has broad discretion to control the process of interrogating witnesses and presenting evidence. The judge is expected to conduct the trial in a manner that furthers three goals: facilitate truth-determination, avoid needless waste of time, and protect witnesses from harassment.

COMMON APPLICATIONS (all "rules" completely discretionary with judge).

1. *Ambiguous questions*-- Incoherent, vague or ambiguous questions likely to confuse the witness or jury are improper.
2. *Compound questions* that contain 2 or more factual inquiries are improper.
3. *Asked & answered*. It is improper for an attorney to repeat the same question several times during a single direct examination after the witness has fully answered it. Does not apply to cross-examination unless the repetition constitutes harassment.
4. *Assuming facts not in evidence*. If a question assumes facts that are not in evidence or misstates a witness's previous testimony, it is improper. These include questions that begin, "Would it surprise you to learn that ..."
5. *Argumentative questions* are prohibited during cross-examination. An argumentative question is one where the attorney is using a question not to elicit evidence, but to comment upon it -- summarizing testimony, injecting irrelevant or prejudicial material, arousing emotions, or insinuating that a witness is guilty of impropriety.
6. *Narrative testimony* -- The attorney is supposed to ask questions and select relevant topics for testimony; if the witness rambles on for a long time without being asked specific questions, the testimony constitutes an improper narrative
7. *Unresponsive testimony* and evasive answers are improper if they bear *no* relation to the question asked, and may be stricken on motion of the attorney who asked the question.

17. Leading Questions [R. 611(c)]

DEFINITION. A question that suggests particular words, phrases, or ideas should constitute the correct answer -- it contains a specific factual assertion and asks the witness to adopt the attorney's suggestion simply by saying "Yes." .

RULE. Leading questions are prohibited on direct examination; allowed on cross-examination.

BASIC PRINCIPLE. The trial judge has discretion to permit leading questions whenever they appear necessary to elicit truthful testimony.

COMMON APPLICATIONS: Leading on direct examination is often permitted in following situations:

1. Unwilling, hostile, or adverse witnesses.
2. Young children or weak-minded adults.
3. Refreshing the memory of a witness, even if the witness is friendly.
4. Preliminary or background matters
5. Directing a witness's attention to a particular topic
6. Laying evidentiary foundations
7. On redirect examination, to save time.
8. When inquiring into "delicate" (i.e., sexual) matters.

18. Separation of Witnesses (R. 615).

RULE. At the request of a party, the judge must order witnesses excluded from the courtroom so they cannot hear the testimony of others. The order should include a prohibition against discussing testimony with other witnesses outside the courtroom. All attorneys automatically request that witnesses be excluded.

EXCEPTIONS.

1. Parties may remain in the courtroom.
2. If a party is an organization, it may designate one representative to remain in the courtroom.
3. The judge has discretion to permit other witnesses to remain in the courtroom if their presence is essential to the presentation of a party's case.

19. Opinion Rule (R. 701)

RULE. Lay witnesses may testify to opinions which are rationally based on their personal observations and will be helpful to the jury.

FOUNDATION.

1. The witness has personal knowledge of facts.
2. The opinion is rationally based on that personal knowledge. No specific testimony is required; this is a decision for the court based on the circumstances.
3. The opinion will help the jury understand a witness's testimony or determine a fact in issue. This is a matter of relevancy for the judge's discretion.
4. If the opinion concerns a person's mental condition, the value of goods or services, or the identity of a person or object based on comparison, the witness must demonstrate specialized knowledge gained over time.

PROHIBITED OPINIONS.

1. Legal conclusions prohibited
2. Opinions on witness credibility prohibited
3. Opinions on what another person thinks, feels or believes.

PERMISSIBLE OPINIONS. Lay witness opinions are routinely permitted on:

1. Physical appearance: identity, resemblance, bodily condition, intoxication, state of health, hostile appearance and age.
2. The mental condition of a family member or close friend.
3. Value of property of services.
4. Speed and distances.

20. Expert Opinions (R. 702-05)

DEFINITION. An expert is a person who has specialized knowledge of a particular subject acquired through formal training and education, or practical experience.

RULE. Opinions from experts are admissible whenever their specialized knowledge will assist the jury in understanding the evidence or deciding one of the issues..

FOUNDATION.

1. Prove expert's credentials. Only minimal training required.
2. Establish that opinion is based on facts and data, not speculation. However, *personal knowledge* of the underlying facts is not required. Facts may have been either observed or learned from others.

EXCEPTION. *No legal opinions*. Experts may give opinions that embrace the ultimate issues, but may not give purely legal conclusions, e.g., that the defendant is guilty, insane, etc.

BASIC PRINCIPLES.

1. Broad judicial discretion
2. Opinions may be based on inadmissible evidence (hearsay) if it is a type reasonably relied on by experts in the field.

PROCEDURE.

1. Direct examination. No specific procedure is required. An expert may testify to the facts first, and then give an opinion, or the opinion first and then the underlying facts. A hypothetical question summarizing the important facts may be used, but is not required.
2. Cross-Examination. The scope of cross-examination of experts is broader than that permitted for other witnesses. They may be impeached, asked detailed questions about the facts, and may be asked hypothetical questions using other facts. You may test the reliability of the opinion by referring to contrary passages in books or articles on the subject.

21. Scientific Evidence (case law & R 702)

DEFINITION. Evidence concerning scientific theories, procedures, tests, technology and equipment. "Science" is broadly defined to cover almost any academic discipline, including social science and economics, that operates on the principles of scientific method.

RULE. Admissible only if the judge is satisfied that the scientific principles upon which the evidence it is based are reliable. There is no requirement of "general acceptance" in the scientific community.

COMMON APPLICATIONS:

1. *Old science*: theories and procedures that have been around a long time are usually well known to be either reliable or unreliable. The court may take judicial notice or hear testimony about it.
2. *New science*. To establish the reliability of new scientific evidence, the judge will normally have to hold a hearing to determine whether the scientific techniques at issue are based on reliable scientific principles. The following facts are relevant:
 - a. Whether law review articles and scientific publications accept or criticize the technique.
 - b. Whether courts in other jurisdictions have admitted such evidence.
 - c. Whether the evidence is derived from scientific methodology, i.e., has been subjected to empirical testing and was conducted under proper laboratory conditions and protocols.
 - d. Whether the theory or technique has been subjected to peer review and publication in scientific journals.
 - e. How large the potential rate of error is.
3. *DNA analysis*. Generally admissible.
5. *Polygraph tests*. Not admissible.
6. *Post-traumatic stress disorder* and rape-trauma syndrome are admissible

22. Hearsay Rule (R. 801-02)

DEFINITION. Hearsay is a statement which was made before trial, asserts facts, and is now offered in court to prove the truth of the facts asserted. It may have been oral, written, or even nonverbal.

RULE. Hearsay is not admissible unless the proponent can lay the foundation for one of the exceptions.

BASIC PRINCIPLE: 95% of all hearsay is admissible. The only time to object is to a police report containing accusations of wrongdoing against your client.

THINGS THAT LOOK LIKE HEARSAY BUT AREN'T

1. Questions
2. Commands and requests.
3. Threats and promises
4. Statements that cause a reaction, if it is the reaction which is important.
5. Prior inconsistent statements used to impeach
6. Prior consistent statements offered to rebut a charge of recent fabrication or improper influence
7. Words with legal significance (e.g., contracts, deeds)
8. Words of identification (e.g., street signs, identification of defendant)
9. The remainder of a statement after the other side has introduced part of it.
10. Testimony that a sex-crime victim made a prompt complaint.

23. Hearsay Exceptions

- A. *Admissions* -- Statements made by the opposing party or his authorized agent. [R. 801(d)]
- B. *Co-conspirator admissions* -- Statements made by co-conspirators offered against a defendant. [R. 801(d)]
- C. *Excited utterances* [R. 803(2)] -- A statement relating to a startling event made by any person under the excitement of the event
- D. *State of mind* -- Statements expressing a then-existing state of mind of the speaker -- e.g., emotional feelings, intentions and motives. [R. 803(3)]
- E. *Statements of Present Physical Condition* [R. 803(3)] -- Spontaneous statements of pain or other physical condition made contemporaneously with the feeling..
- F. *Statements of Past Condition for Medical Purposes* [R. 803(4)] -- Statements made to medical personnel in the course of obtaining medical help which describe present or past condition and are pertinent to diagnosis or treatment
- G. *Recorded Recollection* [R. 803(5)] -- Written records about a matter since forgotten, made by the witness at a time when the matter was fresh in the witness's mind. The record may be read by the witness or attorney, but may not be introduced into evidence as a full exhibit
- H. *Business Records* [R. 803(6-7)] -- Records made in the course of business routine, at or near the time of the event, based on personal knowledge of an employee, and then maintained by the business as a permanent record. The term "business" includes every business, institution, association, occupation, and calling of any kind, whether or not conducted for profit. The record may *not* include statements from people outside the business.
- I. *Official Records* [R. 803(8-10)] -- Properly certified records from public offices are usually admissible, but must not contain statement of non-officials. Police reports are not admissible because they contain statements of witnesses and bystanders. This is a complicated rule -- read the full FRE carefully.
- J. *Commercial Directories And Market Reports* [R. 803(17)] -- Commercially published and generally circulated directories, reference tables, lists, and reports that are generally used and relied on by the public or by persons in a particular occupation (e.g, telephone directories, stock market reports, used car price guides, and weekly television schedules).

24. Hearsay Exceptions that may be used only if the Declarant is Unavailable.

- A. *Former Testimony* [R 804(b)(1)] -- The testimony of an unavailable person given at a former trial, hearing, or deposition at which the opposing party had an opportunity and similar motive to develop the testimony by direct or cross-examination. The preferred method of proving former testimony is to use an official transcript. The attorney may read it, introduce it as an exhibit, or play the videotape.
- B. *Statements Against Interest* [R. 804(b)(3)] -- Statements that were contrary to the declarant's pecuniary, proprietary, penal, or legal interest at the time they were made, if a reasonable person would not have made the statement unless it were true.

25. Telephone Conversations (case law and R. 901)

RULE. Before a witness may testify to the substance of a telephone conversation, the speaker must be authenticated by proving the identity of the unseen person whose statements are being offered.

FOUNDATION: It must be shown by direct or indirect evidence that the voice heard over the telephone was actually the voice of the particular person it is claimed to be. This can be done in any of the following ways:

1. Testimony by a witness that he or she is familiar with and recognized the voice.
2. Testimony that the witness met the caller after the conversation and recognized his or her voice.
3. By circumstantial evidence that a speaker possessed knowledge of facts only a particular person would be likely to know.
4. Testimony that a witness called the number listed in a telephone book, the person who answered claimed to be the person listed for that number, and circumstances corroborate the speaker's identity. Testimony that the witness received a call from an unknown person claiming to be a particular person is not sufficient.