



EVIDENCE

EVIDENCE

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EVIDENCE

I. GENERAL CONSIDERATIONS

A. DEFINING EVIDENCE LAW

The law of evidence is a system of rules and standards by which the admission of proof at the trial of a lawsuit is regulated. The material facts in the controversy are determined by proof that is filtered through the applicable rules of evidence. This proof includes testimony, writings, physical objects, and anything else presented to the senses of the jury.

B. SOURCES OF EVIDENCE LAW

In some states, evidence law is derived from a blend of common law rules and miscellaneous statutes. However, today, most jurisdictions have enacted modern evidence codes, which form a comprehensive set of statutes or rules covering all major areas of evidence law. The most important codification is the Federal Rules of Evidence. The Federal Rules govern on the Multistate Bar Examination.

C. FEDERAL RULES OF EVIDENCE

The Federal Rules of Evidence are applicable in all **civil and criminal** cases in the United States courts of appeal, district courts, Court of Claims, bankruptcy courts, admiralty courts, and in proceedings before United States magistrates. [Fed. R. Evid. 101 and 1101] For the most part, the Federal Rules have codified well-established principles of evidence law. Where the Federal Rules depart from the traditional rules of evidence, the adopted Federal Rule is likely to represent an important modern trend, which the states are likely to follow as they revise and codify existing law.

1. Not Applicable in Certain Proceedings

Except for rules relating to privilege, the Federal Rules of Evidence do not apply in:

- a. The court's determination on a preliminary question of fact governing admissibility (see VIII.C.3.b.5)a), *infra*);
- b. Grand jury proceedings; or
- c. Certain other miscellaneous proceedings, including those involving sentencing, extradition, bail, and probation.

D. THRESHOLD ADMISSIBILITY ISSUES

A shorthand summary of evidence law might be stated in one sentence: **Material** and **relevant** evidence is admissible if **competent**.

1. Materiality: The Proposition to Be Proved

Materiality exists when the proffered evidence relates to one of the substantive legal issues in the case. The key questions to ask regarding materiality are: What issue is

the evidence offered to prove? Is that legal issue material to the substantive cause of action or defense in the case? The answer to these questions and the determination of materiality depend upon the substantive legal issues framed by the pleadings. Thus, evidence is immaterial if the proposition for which it is offered as proof is not a legal issue in the case.

EXAMPLE

In a workers' compensation proceeding, evidence of the claimant's contributory negligence would be immaterial since the workers' compensation statute abrogates it as a defense.

2. Relevance: Probative Value—The Link Between Proof and Proposition

Probative value embraces the test of materiality and something more. Probative evidence **contributes to proving or disproving** a material issue. Assuming that the issue the evidence is offered to prove is a material one, is the evidence logically probative of that issue? Does the evidence tend to prove that issue? Does the evidence tend to make the material proposition (issue) more probably true or untrue than it would be without the evidence?

EXAMPLE

Evidence that the defendant drove recklessly on a prior occasion is material because it speaks to the question of his negligence. However, it is not sufficiently probative of the issue of negligence on this particular occasion, and is therefore not relevant.

3. Federal Rules—Materiality and Probative Value Combined

In the Federal Rules of Evidence, as in most modern codes, the requirements of materiality and probative value are combined into a single definition of relevance. Thus, Federal Rule 401 provides that "relevant evidence" means evidence tending to make the existence of any fact of consequence to the determination of the action (materiality) more probable or less probable than it would be without the evidence (probative value). You should watch for both aspects of the relevance problem. Ask yourself (1) whether the fact sought to be proved is itself in issue under the pleadings and the substantive law, and also (2) whether the evidence helps to prove the fact for which it is offered.

4. Competence

As mentioned above, material and relevant evidence is admissible if competent. Evidence is competent if it **does not violate an exclusionary rule**. Basically, then, if evidence is material and relevant, the only reason such evidence would not be admitted is if it is prohibited by a special exclusionary rule of evidence. Exclusionary rules that prevent admissibility of relevant and material evidence are founded upon one or more of the following:

a. **Policies Related to Truth-Seeking**

The need to ensure the reliability and authenticity of evidence is a truth-seeking policy. Examples of exclusionary rules that perform this truth-seeking function are the hearsay rule, the best evidence rule, and Dead Man statutes.

b. **Policies External to Litigation**

The need to protect extrajudicial interests of society is an external policy goal. Rules granting testimonial privileges, for example, admittedly hamper the in-court search for truth.

E. EVIDENCE CLASSIFICATIONS

1. Direct or Circumstantial

a. **Direct Evidence Relies on Actual Knowledge**

Direct evidence goes directly to a material issue without intervention of an inferential process. Evidence is direct when the very facts in dispute are communicated by those who have actual knowledge by means of their senses.

EXAMPLE

On the issue of whether anyone had recently crossed a snow-covered bridge, the testimony of a witness that he saw a man crossing would be direct evidence.

b. **Circumstantial Evidence Relies on Inference**

Circumstantial evidence is indirect and relies on inference. It is evidence of a subsidiary or collateral fact from which, alone or in conjunction with a cluster of other facts, the existence of the material issue can be inferred.

EXAMPLE

On the issue of whether anyone had recently crossed a snow-covered bridge, the testimony of a witness that he saw human footprints in the snow on the bridge would be circumstantial evidence.

2. Testimonial, Documentary, or Real

- a. **Testimonial** evidence is oral evidence given under oath. The witness responds to the questions of the attorneys.
- b. **Documentary** evidence is evidence in the form of a writing, such as a contract or a confession.
- c. **Real** evidence is the term applied to evidence consisting of things as distinguished from assertions of witnesses about things. Real evidence includes

anything conveying a firsthand sense impression to the trier of fact, such as knives, jewelry, maps, or tape recordings.

F. LIMITED ADMISSIBILITY

1. Admissible for One Purpose But Not Another

The use of admissible evidence is a frequently encountered problem. It often happens that evidence is admissible for one purpose but is not admissible for another purpose.

EXAMPLE

At the trial of the accused for assault, defendant's prior conviction for robbery may be shown by the prosecution to impeach the credibility of testimony given by the accused as a witness. The prior conviction is not admissible on the issue of defendant's guilt on the assault charge.

2. Admissible Against One Party But Not Another

It is also possible that the evidence is admissible against one party but is not admissible against another party.

EXAMPLE

A post-accident admission of a negligent employee truck driver may be admissible against the truck driver in an action for negligence. However, under certain circumstances it may not be admissible against a defendant employer who owned the truck.

3. Jury Must Be Properly Instructed

As a general rule, if evidence is admissible for one purpose, it is not excluded merely because of the danger that the jury may also consider it for another incompetent purpose. When evidence that is admissible as to one party or for one purpose but is not admissible as to another party or for another purpose is admitted, the court must, upon timely request, restrict the evidence to its proper scope and instruct the jury accordingly. [Fed. R. Evid. 105] If the court determines that even with a limiting instruction, the probative value of the evidence with respect to its legitimate purpose would be substantially outweighed by danger of unfair prejudice with respect to its incompetent purpose, the evidence may still be excluded (see II.C., *infra*).

II. RELEVANCE

A. INTRODUCTION

Relevance, in the sense of probativeness, has to do with the tendency of evidence to **prove or disprove a material issue**, to render it more probably true, or untrue, than it would have been without the particular evidence. Relevance is concerned with the

substance or content of the evidence, not with the form or manner in which it is offered (e.g., hearsay rule, best evidence rule). It can be stated, as a general proposition, that all relevant evidence is admissible if it is offered in an unobjectionable form and manner. (As usual, there are some exceptions to this generalization, since some perfectly relevant evidence that is in the proper form is excluded for policy reasons.)

B. DETERMINING RELEVANCE

Relevant evidence is evidence having **any** tendency to make the existence of any fact that is of consequence to the determination of an action more or less probable than it would be without the evidence. [Fed. R. Evid. 401] Note that this definition of relevance includes materiality, since it requires that the disputed fact be of consequence to the determination of the action. The basic questions to ask regarding relevancy are: "What proposition is the evidence being used to prove? Is this a material issue in the case? Is the evidence probative of that proposition?" This type of relevance is sometimes called "logical relevance."

1. General Rule—Must Relate to Time, Event, or Person in Controversy

Whenever testimony or exhibit evidence that relates to a time, event, or person other than the time, event, or person directly involved in the controversy being litigated is offered, the relevance of that evidence is suspect and should be examined more carefully. In most cases, a previous similar occurrence proves little or nothing about the one in issue. In addition, the risk of confusion and unfair prejudice usually outweighs the helpfulness of this type of evidence (see C., *infra*). Note that when considering the relevance of such evidence, one of the important factors to consider is its proximity in time to the current events. A circumstance that would be relevant had it occurred in close time proximity to the event in question is irrelevant if, instead, it was very remote.

EXAMPLES

- 1) Defendant is alleged to have run a red light and hit a pedestrian in the crosswalk. Proof that defendant ran other red lights in the past has little probative value in proving the occurrence in question. The probative value of such proof is outweighed by the confusion and unfair prejudice that would result from its admission.
- 2) On the issue of the fair market value of property in a condemnation action, the relevance of the sale price of other property depends on how comparable the other property is to the property being condemned, how close it is geographically, and how recent that sale was. Sale of a neighbor's comparable property six months ago is probably relevant, but the sale of the same property five years ago probably is not relevant.
- 3) In a murder prosecution, evidence that the accused had threatened the alleged victim the day before the killing may be very relevant. But compare a threat a week before; a month before; a year before; 10 years before.

2. Exceptions—Certain Similar Occurrences Are Relevant

Despite the above rule, previous similar happenings and transactions of the parties and others similarly situated may be relevant if they are probative of the material issue involved, and if that probative value outweighs the risk that the evidence will confuse the jury or result in unfair prejudice. Of course, whenever a similar occurrence is offered to establish an inference about the subject occurrence, the quality of the inference depends on the similarity between the other happening and the one in issue. The following are examples of relevant similar occurrences.

a. Causation

Complicated issues of causation may often be established by evidence that concerns other times, events, or persons. For example, evidence that other homes in the same area were damaged by defendant's blasting operations is some evidence that the damage to plaintiff's home was caused by defendant's activities.

b. Prior False Claims or Same Bodily Injury

Evidence that a person has previously filed similar **tort claims** or has been involved in **prior accidents** is **generally inadmissible** to show the invalidity of the present claim. At best, such evidence indicates plaintiff's tendency toward litigation or accident-proneness. In either case, the probative value is outweighed by the risk of confusion of issues and undue prejudice.

But if evidence is introduced that the party has made previous similar **false** claims, such evidence is usually relevant, under a common scheme or plan theory, to prove that the present claim is likely to be false. Likewise, where the prior claim was for an injury to the **same portion of plaintiff's body** that she claims was injured in the present case, evidence of the prior claim or injury may be relevant to prove that her present claim is false or exaggerated.

c. Similar Accidents or Injuries Caused by Same Event or Condition

Where similar accidents or injuries were caused by the same event or condition, evidence of those prior accidents or injuries is **admissible to prove**:

- (i) That a defect or dangerous **condition existed**;
- (ii) That the defendant had **knowledge** of the defect or dangerous condition; and
- (iii) That the defect or dangerous condition was the **cause** of the present injury.

EXAMPLE

In an action for dust damage from a mill, it may be proper to introduce evidence that plaintiff's neighbors have previously suffered similar dust damage, in order to prove that the mill created dust, that the mill owners knew of the dust, and that the dust caused plaintiff's damage.

1) Absence of Similar Accidents

Many courts are reluctant to admit evidence of the absence of similar accidents to show absence of negligence or lack of a defect. However, where a structural condition is involved and that condition is unchanged, the court has discretion to admit evidence of absence of other complaints to show lack of a defect. Evidence of prior safety history and absence of complaints is admissible to show **defendant's lack of knowledge** of any danger.

d. Previous Similar Acts Admissible to Prove Intent

Similar conduct previously committed by a party may be introduced to prove the party's present motive or intent when such elements are relevant.

EXAMPLE

In an action against a school board for excluding a black child from school, similar exclusions of black children will be admissible into evidence to show intent.

e. Rebutting Claim of Impossibility

The requirement that prior occurrences be similar to the litigated act may be relaxed when used to rebut a claim or defense of impossibility. For example, if defendant denies negligent speeding on the ground that his automobile could never go above 50 m.p.h., plaintiff may rebut by showing that on other occasions, even under different circumstances, the vehicle was traveling at 75 m.p.h.

f. Sales of Similar Property

Evidence of sales of similar personal or real property that are not too remote in time is **admissible to prove value**. However, unlike commonly sold items of personal property, each parcel of real property is considered unique. Thus, the problem of producing evidence of other transactions requires a preliminary finding that the character, usage, proximity, date of sale, etc., are sufficiently similar to the property in issue. Evidence of prices quoted in mere **offers** is **not admissible** because to determine the sincerity of these offers would lead to collateral disputes. However, offers by a party to the present action to buy or sell the property may be admissible.

g. Habit

Habit describes one's **regular** response to a **specific** set of circumstances (e.g., "she always takes a staircase two steps at a time"). In contrast, character describes one's disposition in respect to general traits (e.g., "she's always in a hurry"). Since habits are more specific and particularized, evidence of habit is relevant and can be introduced in circumstances when it is not permissible to introduce evidence of character. Thus, under Federal Rule 406, evidence of a person's habit may be admitted to prove that on a particular occasion the person acted in accordance with the habit.

EXAMPLE

Evidence could be introduced to show that a driver habitually failed to stop at a certain stop sign as circumstantial evidence that she failed to stop at the time in question. In contrast, evidence cannot be introduced to show that a person is a careless driver since that is closer to character than habit.

Many states either do not admit evidence of habit to show that a particular act occurred, or else limit admissibility to those cases where there are no eyewitnesses. Federal Rule 406 admits habit evidence freely and abandons the “no eyewitness” requirement. Even where admissible, however, the habit must be shown to be a regular response to a repeated specific situation.

h. Industrial or Business Routine

Just as evidence of personal habit is relevant to show conduct, evidence that a business or firm had an established business routine is relevant as tending to show that a particular event occurred.

EXAMPLE

Evidence of a regular mailing procedure, such as a custom of picking up letters from a certain table and mailing them, would be relevant as evidence to show that a particular letter left on the table was duly mailed.

i. Industrial Custom as Evidence of Standard of Care**1) Industrial Custom Distinguished from Business Routine**

Custom of the industry should be distinguished from business routine. In the latter case, the particular conduct and habit of a party are being offered to show that the party acted in the same manner on the occasion in question. Custom of the industry is offered to prove the actions of other persons in the same industry in an attempt to show adherence to or deviance from an industry-wide standard of care.

2) Relevant to Standard of Care But Not Conclusive

When one of the issues in dispute is negligence arising out of inadequate safety devices or precautions, evidence of general custom or usage in the same kind of business under the same circumstances may be introduced by either party as tending to establish a standard by which reasonable or ordinary care may be judged. Although custom of the trade or business is admissible on the standard of care to be exercised, it is not conclusive.

C. DISCRETIONARY EXCLUSION OF RELEVANT EVIDENCE (PRAGMATIC RELEVANCE)

A trial judge has broad discretion to exclude relevant evidence if its probative value is **substantially** outweighed by the danger of **unfair prejudice, confusion of the issues,**

misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. [Fed. R. Evid. 403] “***Unfair surprise***” is listed as an additional basis for exclusion under some state rules, but it was omitted under the Federal Rules on the theory that surprise can be prevented by discovery and pretrial conference or mitigated by granting a continuance.

Certain items of evidence may be directed to a material issue in the case and may be very probative of that issue, but they are excluded because of predictable policies designed to ensure an orderly and efficient proceeding and to encourage certain public policy solutions to legal problems. For example, inflammatory matter, which may be very probative of the issues, will not be admitted because of the potential prejudicial effect on the jury.

D. EXCLUSION OF RELEVANT EVIDENCE FOR PUBLIC POLICY REASONS (POLICY-BASED RELEVANCE)

Certain evidence of questionable relevance is excluded by the Federal Rules because public policy favors the behavior involved. For example, the law encourages the repair of defective premises that cause injury, and consequently, evidence of the subsequent repair may not be admitted to prove antecedent negligence, even though it may be probative of the issue. Evidence excluded for public policy reasons is set forth below.

1. Liability Insurance

a. Inadmissible to Show Fault

Evidence that a person was or was not insured against liability is ***not admissible*** upon the issue of whether she ***acted negligently*** or otherwise wrongfully. [Fed. R. Evid. 411]

b. When Admissible

Proof that a person carried liability insurance may be admissible and relevant for other purposes. Issue identification is important in these cases, since proof of the fact that the defendant maintained insurance ***may be used***:

1) To Prove Ownership or Control

Evidence that the defendant maintained insurance may be admitted for the limited purpose of proving the defendant’s ownership or control when ownership or control is disputed.

EXAMPLE

P sues D and alleges that D owned the building in which P fell on a defective staircase, further alleging a cause of action for negligence. D denies all allegations, and thereby puts in issue the question of ownership of the premises. P may show that D had insured the premises as evidence of ownership, but the evidence will only be used for the limited purpose of proving that issue.

2) For Purposes of Impeachment

Evidence that the defendant is insured may be used for the limited purpose of impeaching a witness.

EXAMPLE

An investigator testifies on behalf of defendant. Plaintiff may demonstrate the bias or interest of this witness by showing that she is employed by defendant's liability insurance company.

3) As Part of Admission

An admission of liability may be so coupled with a reference to insurance coverage that the reference to insurance cannot be severed without lessening its value as an admission of liability.

EXAMPLE

"Don't worry; my insurance company will pay off."

2. Subsequent Remedial Measures

a. Inadmissible to Prove Negligence or Culpable Conduct

Evidence of repairs or other precautionary measures made following an injury is inadmissible to prove negligence, culpable conduct, a defect in a product or its design, or a need for a warning or instruction. [Fed. R. Evid. 407] The purpose of the rule is to encourage people to make such repairs.

b. When Admissible

Although evidence of subsequent repairs is not admissible to prove negligence, etc., this evidence may still be admissible for other purposes. Some of these purposes are:

1) To Prove Ownership or Control

Evidence of subsequent repairs performed by the defendant may be introduced to prove ownership or control, since a stranger would hardly make repairs.

2) To Rebut Claim that Precaution Was Not Feasible

Evidence of repairs or other precautionary measures made following an accident is admissible to establish the feasibility of precautionary measures when such feasibility is disputed.

3) To Prove Destruction of Evidence

Evidence of subsequent remedial measures may be admitted to prove that the opposing party has destroyed evidence; e.g., repainting a fender to cover up evidence of a collision (spoliation).

3. Settlement Offers—Negotiations Not Admissible

Evidence of compromises or offers to compromise is inadmissible to prove or disprove the validity or amount of a disputed claim. Such evidence is also inadmissible to impeach through a prior inconsistent statement or a contradiction. [Fed. R. Evid. 408] *Rationale:* Public policy favors the settlement of disputes without litigation, and settlement would be discouraged if either side were deterred from making offers by the fear that they would be admitted in evidence.

The Federal Rules also exclude conduct or statements made in the course of negotiating a compromise, as well as the offer to compromise itself; therefore, admissions of fact made during compromise negotiations are inadmissible. This position encourages settlements by allowing complete candor between the parties in negotiations. However, conduct or statements made during compromise negotiations regarding a civil dispute with a governmental regulatory, investigative, or enforcement authority are not excluded when offered ***in a criminal case.*** [Fed. R. Evid. 408] Note that Rule 408 does not protect preexisting information simply because it is presented to one's opponent during compromise negotiations; e.g., one may not immunize otherwise admissible information under the guise of disclosing it during compromise negotiations.

a. Must Be a Claim

Although the filing of a suit is not a prerequisite for this exclusionary rule, there must be some indication, express or implied, that a party is going to make some kind of claim. Thus, a party's volunteered admission of fact accompanying an offer to settle immediately following the incident is usually admissible because there has not been time for the other party to indicate an intent to make a claim.

b. Claim Must Be Disputed as to Liability or Amount

To trigger the exclusionary feature of Rule 408, the claim must be disputed as to liability or amount. Thus, if a party admits liability and the amount of liability but offers to settle (rather than litigate) for a lesser amount, every statement made in connection with that offer is admissible.

4. Payment of Medical Expenses Not Admissible

Similarly, evidence that a party paid (or offered to pay) the injured party's medical expenses is ***not admissible to prove liability*** for the injury. [Fed. R. Evid. 409] This rule is based upon the concern that such payment might be prompted solely by "humanitarian motives." However, unlike the situation with compromise negotiation (3., *supra*), ***admissions of fact*** accompanying offers to pay medical expenses ***are admissible.***

5. Withdrawn Guilty Pleas, Offers to Plead Guilty, and No Contest Pleas

Under the Federal Rules neither withdrawn guilty pleas, effective or withdrawn pleas of nolo contendere (no contest), offers to plead guilty, nor evidence of statements

made in negotiating such pleas are admissible in any proceeding against the defendant who made the plea or participated in the plea discussions. [Fed. R. Evid. 410] Most jurisdictions concur. The **evidentiary value** of a withdrawn plea of guilty as an admission is deemed **offset by the prejudicial effect** of the evidence. Moreover, it is felt that the judge who permitted the withdrawal of the guilty plea must have decided that there was a good reason to withdraw it and, under these circumstances, the significance of the initial plea is minimal. Most courts exclude offers to plead guilty on reasoning similar to that advanced for not admitting offers to compromise as proof of liability in civil cases.

a. Waiver

The protection of Rule 410 for plea negotiations may be validly waived unless there is an affirmative indication that the defendant entered the waiver agreement unknowingly or involuntarily. [United States v. Mezzanatto, 513 U.S. 196 (1995)]

EXAMPLE

Defendant, who was charged with a drug offense, wished to arrange a deal with the government in exchange for his cooperation. As a prerequisite to this discussion, Prosecutor required that Defendant (1) be completely truthful and (2) agree that any statements made by him in the course of the plea negotiations could be used to impeach him if he testified in a contrary fashion at trial. Defendant agreed. If at some point thereafter the discussion breaks off and Defendant is tried on the charges, Prosecutor may use statements made in the plea negotiations to impeach Defendant. [United States v. Mezzanatto, *supra*]

E. CHARACTER EVIDENCE—A SPECIAL RELEVANCE PROBLEM

The rules regarding use of character evidence are affected by three major concerns. These are: (1) the purpose for which evidence of character is offered; (2) the method to be used to prove character; and (3) the kind of case, civil or criminal.

1. Purposes for Offer of Character Evidence

a. To Prove Character When Character Itself Is Ultimate Issue in Case

When a person's character itself is the ultimate issue in the case, character evidence must be admitted. Cases where character is itself one of the material propositions in issue are confined mostly to civil litigation and are rare even among civil actions.

b. To Serve as Circumstantial Evidence of How a Person Probably Acted

It is the use of character as circumstantial evidence of how a person probably acted that raises the most difficult problems of relevance, especially in criminal cases.

c. **To Impeach Credibility of Witness**

The discussion of the use of character evidence to impeach the credibility of a witness is postponed for later discussion under the heading of "Credibility—Impeachment." (See VI.E., *infra*.)

2. Means of Proving Character

Depending upon the jurisdiction, the purpose of the offer, and the nature of the case, the following types of evidence may be used to prove character:

a. **Evidence of Specific Acts as Demonstrating Character**

Evidence of specific acts of the person in question as demonstrating that person's character is permitted only in a few instances, such as where character is itself one of the ultimate issues in the case. Note, however, that specific acts may be admissible if relevant for some other purpose (see 6.a., *infra*).

b. **Opinion Testimony**

Witnesses who know the person may testify regarding their opinions about the person's character.

c. **Testimony as to Person's General Reputation in Community**

Testimony by witnesses as to a person's general reputation in the community is in some sense hearsay, since reputation is really what people say about a person. On the other hand, because reputation is a general indication of character, and because it involves fewer side issues than either of the above methods, it is the most common means of showing character.

3. Generally Not Admissible in Civil Cases

Evidence of character to prove the conduct of a person in the litigated event is generally not admissible in a civil case. [Fed. R. Evid. 404(a)] The reasons given are that the slight probative value of character is outweighed by the danger of prejudice, the possible distraction of the jury from the main question in issue, and the possible waste of time required by examination of collateral issues.

EXAMPLES

1) Defendant may not introduce evidence that she is generally a cautious driver to prove that she was not negligent on the day in question.

2) Plaintiff may not introduce evidence that the defendant is usually a reckless driver to prove that she was negligent on the day in question.

Such circumstantial use of prior behavior patterns for the purpose of drawing the inference that, at the time and place in question, the actor probably acted in accord with her prior behavior pattern is not permitted. A person's **general behavior patterns** (as distinguished from her habits and business routines) are **irrelevant** and inadmissible in evidence.

a. Exception—When Character Is Directly in Issue

When proof of a person's character, as a matter of substantive law, is an essential element of a claim or defense in a civil action, it is said that character is "directly in issue." Although character is rarely an essential issue in a civil case, character evidence is admissible in such circumstances.

EXAMPLES

- 1) In a defamation action, when D is being sued for calling P a thief and pleads as an affirmative defense that she spoke the truth (i.e., that P is indeed a thief), P's character is clearly in issue.
- 2) When an employer is charged with negligently retaining an employee "of unstable and violent disposition," the character of the employee is also in issue.

COMPARE

In a civil action for damages based on assault or battery, the defendant's claim that he acted in self-defense does not put either the plaintiff-victim's or the defendant's character for violence or peacefulness into issue. On the issue of who struck first, the substantive law does not require proof of either party's character.

When character is directly in issue, almost all courts will admit evidence of specific acts that show this character (e.g., in Example 1) above, D may offer evidence that on different occasions P has stolen things to show that he is a thief). Under the Federal Rules, any of the types of evidence (**reputation, opinion, or specific acts**) may be used to prove character when character is directly in issue. [Fed. R. Evid. 405(b)]

4. Accused in a Criminal Case—Prosecution Cannot Initiate, But Accused Can

The general rule is that the prosecution cannot initiate evidence of the bad character of the defendant merely to show that she is more likely to have committed the crime of which she is accused. However, the accused may introduce evidence of her good character to show her innocence of the alleged crime.

The rationale is that even though the evidence is of some relevance, the prosecution should not be permitted to show that the defendant is a bad person, since the jury might then decide to convict her regardless of her guilt of the crime charged. However, since the life or liberty of the defendant is at stake, she should be allowed to introduce evidence of her good character since it may have a tendency to show that she did not commit the crime charged.

a. How Defendant Proves Character

1) Reputation and Personal Opinion Testimony

A defendant puts her character in issue by calling a qualified witness to

testify to the defendant's good reputation (or that he has heard nothing bad) **for the trait involved** in the case. Under Federal Rule 405, the witness may also give his personal opinion concerning that trait of the defendant. However, the witness may **not** testify to **specific acts of conduct** of the defendant to prove the trait in issue.

2) Testifying Places Defendant's Credibility—Not Character—In Issue

A defendant does not put her character in issue merely by taking the stand and giving testimony on the facts of the controversy. However, if the defendant takes the stand, she puts her credibility in issue and is subject to impeachment. (See "Credibility—Impeachment," VI.E., *infra*.)

b. How Prosecution Rebutts Defendant's Character Evidence

If the defendant puts her character in issue by having a character witness testify as to his opinion of the defendant or the defendant's reputation, the prosecution may rebut in the following manner:

1) Cross-Examination

The prosecution may test the character witness by cross-examination regarding the basis for his opinion or knowledge of the reputation that he has testified about. In most jurisdictions, one is allowed to inquire on cross-examination whether the reputation witness has **heard** of particular instances of the defendant's misconduct pertinent to the trait in question. The rationale is that since the reputation witness relates what he has heard, the inquiry tests the accuracy of his hearing and reporting. Since the character witness may now testify in the form of opinion as well as by reputation, it follows that the basis of the opinion can be exposed. Thus, under Federal Rule 405(a), cross-examination inquiry is allowable as to whether the opinion witness **knows** of, as well as whether he has **heard** of, specific instances of misconduct. The distinction in form between "Have you heard" and "Do you know" is eliminated by the statement in Rule 405(a), which provides that "on cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct." Note that if the witness denies knowledge of these specific instances of conduct, the prosecutor **may not** prove them by extrinsic evidence; he is limited to inquiry on cross-examination.

2) Testimony of Other Witnesses as to Defendant's Bad Character

The prosecution may rebut the defendant's character evidence by calling its own character witnesses to testify to the defendant's bad reputation or their opinion of the defendant's character for the particular trait involved.

5. Victim in Criminal Case

a. Defendant's Initiative

The defendant may introduce reputation or opinion evidence of a bad character trait of the alleged crime victim when it is relevant to show the defendant's innocence. However, by specific exception, this rule does not extend to showing the bad character of rape victims.

EXAMPLE

In an assault or murder prosecution where the defendant claims self-defense, she may introduce evidence of the victim's violent character as tending to show that the victim was the aggressor.

b. Prosecution Rebuttal

Once the defendant has introduced evidence of the alleged victim's bad character for a pertinent trait, the prosecution may counter with reputation or opinion evidence of (1) the **victim's good character** for the **same trait**, or (2) the **defendant's bad character** for the **same trait**. [Fed. R. Evid. 404(a)]

EXAMPLE

Defendant is charged with the murder of Victim. Defendant pleads self-defense and offers evidence that Victim was a violent person. Prosecutor can rebut such evidence with evidence that Victim was a nonviolent person and/or with evidence that Defendant is a violent person.

c. Homicide Cases—Victim's Character for Peacefulness to Rebut Self-Defense Claim

In a **homicide case** in which the defendant pleads **self-defense**, evidence of any kind that the victim was the first aggressor (e.g., eyewitness testimony that the victim struck first) opens the door to evidence that the victim had a good character for peacefulness. [Fed. R. Evid. 404(a)(2)] This evidence can be introduced regardless of whether the defendant has introduced character evidence of the victim's generally violent propensity. The rationale behind this rule is that the victim's death deprives the prosecution of the victim's testimony as to the identity of the first aggressor.

d. Rape Cases—Victim's Past Behavior Inadmissible

In any civil or criminal proceeding involving alleged sexual misconduct, evidence offered to prove the sexual behavior or sexual disposition of the alleged victim is generally inadmissible. [Fed. R. Evid. 412(a)]

1) Exceptions in Criminal Cases

In a criminal case, evidence of specific instances of sexual behavior by the victim offered to prove that a person other than the accused was the

source of semen, injury, or other physical evidence is admissible. Also, specific instances of sexual behavior between the victim and the accused are admissible by the prosecution, or by the defense to prove **consent**. Evidence of a victim's sexual behavior is also admissible when its exclusion would violate the defendant's constitutional rights. [Fed. R. Evid. 412(b)(1)]

2) Exceptions in Civil Cases

In civil cases, evidence offered to prove the sexual disposition or behavior of the alleged victim is admissible if it is otherwise admissible under the Federal Rules and its probative value substantially outweighs the danger of harm to the victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the victim. [Fed. R. Evid. 412(b)(2)]

3) Procedure

To offer evidence under the above exceptions, the party must file a motion 14 days before trial describing the evidence and its purpose, and must serve the motion on all parties and notify the victim. Before admitting the evidence, the court must conduct an in camera hearing and afford the victim and the parties a right to be heard. [Fed. R. Evid. 412(c)]

6. Specific Acts of Misconduct Generally Inadmissible

The basic rule is that when a person is charged with one crime, extrinsic evidence of her other crimes or misconduct is inadmissible if such evidence is offered solely to establish a criminal disposition. Thus, this statement of Federal Rule 404(b) is merely another way of saying that the prosecution may not show the accused's bad character to imply criminal disposition. The danger again is that the jury may convict the defendant because of past crimes rather than because of her guilt of the offense charged.

a. Admissible If Independently Relevant

Evidence of other crimes or misconduct is admissible if these acts are relevant to some issue other than the defendant's character or propensity to commit the crime charged. While acknowledging that prior acts or crimes are not admissible to show conformity or to imply bad character, Federal Rule 404(b) goes on to say that such prior acts or crimes may be admissible for non-propensity purposes (e.g., to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident) whenever these issues are relevant in either a **criminal or a civil case**.

EXAMPLE

Husband is on trial for the alleged shooting murder of Wife. Husband claims an accident occurred as he was cleaning the gun. Prosecution may prove that six months ago Husband tried to stab Wife. This evidence is not offered to show

that the defendant is the kind of violent man likely to have murdered his wife (i.e., general bad character or violent disposition); rather, it is offered to show absence of mistake, that the killing was probably not an accident.

1) Examples of Relevant Misconduct

a) Motive

The commission of a prior crime may be evidence of a motive to commit the crime for which the defendant is accused.

b) Intent

In many crimes, such as forgery, passing counterfeit money, larceny by trick, and receiving stolen property, intent is the gravamen of the crime. Evidence that defendant committed prior, similar wrongful acts is admissible to establish guilty knowledge and to negate good faith.

c) Absence of Mistake or Accident

There are cases in which the defense of accident or mistake may be anticipated. In these situations prosecution evidence of similar misconduct by the defendant is admissible to negate the possibility of mistake or accident. (See example above.)

d) Identity

Evidence, including misconduct, that connects this defendant to the crime (e.g., theft of gun used in later crime) is admissible. Similarly, evidence that the accused committed prior criminal acts that are so distinctive as to operate as a “signature” may be introduced to prove that the accused committed the act in question (modus operandi).

e) Common Plan or Scheme—Preparation

Evidence that the defendant recently stole some burglar tools is probative of the fact that she committed the burglary for which she is accused.

f) Other

Similar acts or related misconduct may be used to prove opportunity, knowledge, or any relevant fact other than the accused's general bad character or criminal disposition.

2) Quantum of Proof for Independently Relevant Acts of Misconduct

Under Federal Rule 404(b), independently relevant uncharged misconduct by the defendant will be admissible, without a preliminary ruling, as long as (1) there is **sufficient evidence to support a jury finding** that the defendant committed the prior act (i.e., the standard of Federal Rule 104); and (2) its

probative value on the issue of motive, intent, identity, or other independently relevant proposition is not substantially outweighed by the danger of unfair prejudice (i.e., the test of Federal Rule 403). [Huddleston v. United States, 485 U.S. 681 (1988)]

3) Notice Requirement in Criminal Cases

In a criminal case, the prosecutor must provide reasonable notice of any evidence of this type that the prosecutor intends to offer at trial. The notice must articulate the non-propensity purpose for which the evidence will be offered and the reasoning that supports the purpose. Generally, the notice must be provided in writing and sufficiently ahead of trial to give the defendant a fair opportunity to meet the evidence. However, the notice may be provided in any form during trial if the court, for good cause, excuses lack of pretrial notice.

b. Prior Acts of Sexual Assault or Child Molestation

Evidence of a defendant's prior acts of sexual assault or child molestation is admissible in a civil or criminal case where the defendant is accused of committing an act of sexual assault or child molestation. The party who intends to offer this evidence must disclose the evidence to the defendant 15 days before trial (or later with good cause). [Fed. R. Evid. 413 - 415]

III. JUDICIAL NOTICE

A. JUDICIAL NOTICE OF FACT

Judicial notice is the ***recognition of a fact as true without formal presentation of evidence***. In most instances the costly, time-consuming, and cumbersome process of formal proof is required to ensure fact-finding accuracy. However, self-evident propositions need not be subjected to this process, but instead may be judicially noticed. Judicial notice, like the presumption, is a judicial shortcut, a substitute for proof. The underlying policy considerations include expediting the trial and avoiding judicial disrepute where the lack of evidence might result in a conclusion contrary to well-known facts. For example, requiring proof that Washington, D.C., is the capital of the United States would require unnecessary time in a situation where a contrary conclusion would be ridiculous.

1. Facts Appropriate for Judicial Notice

The Federal Rule conforms to the existing state rules governing judicial notice.

Federal Rule 201(b) defines a fact that may be noticed as one "not subject to reasonable dispute" because it (1) "is generally known within the trial court's territorial jurisdiction" (notorious facts); or (2) "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned" (manifest facts). Judicial notice may be taken of such facts ***at any time***, whether or not requested, and such notice is mandatory if a party requests and supplies the court with the necessary

information. A party is entitled to be heard on the propriety of taking judicial notice and the tenor of the matter noted.

a. Matters of Common Knowledge in the Community—Notorious Facts

Judicial notice will be taken of the body of facts that well-informed persons generally know and accept. Though usually facts of common knowledge are known everywhere, it is sufficient for judicial notice if they are known in the community where the court is sitting.

EXAMPLES

A court sitting in New York City will take judicial notice that:

- 1) The streets in Manhattan are numbered east and west from Fifth Avenue and that the odd numbers are on the north side of the street.
 - 2) Many people are subject to low blood pressure and poor circulation.
 - 3) The ordinary period of human gestation is 280 days.
-

b. Facts Capable of Certain Verification—Manifest Facts

Some facts, while not generally known and accepted, are easily verified by resorting to easily accessible, well-established sources.

EXAMPLES

- 1) Judicial notice will be taken of the time of the rising or setting of the sun and moon on a particular day since this fact, although not commonly known, can be estimated quickly and accurately by reference to an almanac.
 - 2) The court will accept without proof that February 14, 1999, was a Sunday by reference to a calendar.
-

c. Judicial Notice of Scientific Principles

1) Judicial Notice of Scientific Basis of Test Results

Trial courts have increasingly taken judicial notice of scientific principles as a type of manifest fact. Once a particular scientific test or principle has become sufficiently well-established (i.e., generally accepted among the scientific community), courts no longer require proof (expert testimony) of the underlying basis of the test. The results of such a test are therefore admissible into evidence.

EXAMPLE

A trial court will take judicial notice of the reliability of radar speed tests, ballistics tests, and paternity blood tests, and will admit the results of these tests into evidence upon a showing that the tests were properly conducted.

2) Conclusiveness of Test Results

Some scientific tests have achieved such universal acceptance that not only are the test results admissible into evidence, but the results are binding on the finder of fact in civil cases.

EXAMPLE

Where a blood test indicates that the accused father could not have been the parent of the child, that result is conclusive on the issue of paternity, and other evidence on that issue will be excluded.

d. Judge's Personal Knowledge

What a judge knows personally is not the same as what he may judicially notice. A judge may have to ignore facts that he knows as a private person if those facts are neither commonly known in the community nor capable of certain verification by resort to easily accessible sources of indisputable accuracy.

2. Procedural Aspects of Judicial Notice**a. Requirement of a Request**

In instances where the court does not take judicial notice of a fact on its own accord, the general rule is that a party must formally request (e.g., through pleadings or an oral motion) that notice be taken.

b. Judicial Notice by Appellate Court

Judicial notice may be taken for the first time on appeal. A reviewing court is required to take judicial notice of any matter that the trial court properly noticed or was obliged to notice.

c. Conclusiveness of Judicial Notice

Federal Rule 201(f) provides that a judicially noticed fact is conclusive in a civil case but not in a criminal case. The Federal Rule states that in a civil case, the court shall instruct the jury to accept as conclusive any fact judicially noticed; in a criminal case, on the other hand, the jury is instructed that it may, but is not required to, accept as conclusive any fact judicially noticed.

3. "Adjudicative" and "Legislative" Facts

The Federal Rules govern **only judicial notice of "adjudicative" facts** (i.e., facts that relate to the parties in a particular case), not "legislative" facts (i.e., policy facts that relate to legal reasoning and the lawmaking process). The drafters of Federal Rule 201 reasoned that "legislative" facts are a necessary part of the judicial reasoning process, so that a rule imposing a requirement of indisputability and a formal procedure for taking judicial notice of these matters would destroy the concept of judge-made law. [Advisory Committee Note to Rule 201] Therefore, "legislative" facts need

not meet the requirements of Rule 201 that facts must be either of common knowledge or capable of indisputable verification to be judicially noticed.

B. JUDICIAL NOTICE OF LAW—MANDATORY OR PERMISSIVE

The judge's task of finding applicable law is accomplished by informal investigation of legal source materials. This process, unmentioned in the Federal Rules of Evidence, has been traditionally described in terms of the judge taking judicial notice of the law applicable to the case.

1. Classification Depends on Accessibility of Source Materials

Judicial notice of law is mandatory in some instances and permissive in others. This mandatory-permissive classification is explainable in terms of the likely accessibility of source materials for different types of laws. State public law is easily available in reported volumes and, therefore, it is reasonable to require the court to be aware of and to notice it. Descriptions of foreign law or private acts are usually less available and, therefore, the court is permitted—but not required—to judicially notice such laws. In some cases, the contents of such laws may have to be established by proof to the satisfaction of the judge.

2. Mandatory Judicial Notice

Most courts must take judicial notice without request of:

- a. **Federal public law**—the United States Constitution, federal treaties, public acts of Congress, and federal case law.
- b. **State public law**—the constitution, public statutes, and common law of the states.
- c. **Official regulations**—the official compilation of codes and rules and regulations of the forum state and the federal government, except those relating to internal organization or management of a state agency.

3. Permissive Judicial Notice

Most courts may, upon being supplied with sufficient information, take judicial notice of municipal ordinances and private acts or resolutions of Congress and of the local state legislature. Similarly, the laws of foreign countries may be judicially noticed.

IV. REAL EVIDENCE

A. IN GENERAL

1. Addressed Directly to Trier of Fact

Real or demonstrative evidence is addressed directly to the trier of fact. The object in issue is presented for **inspection by the trier of fact**. Ordinarily the evidence is addressed to the sense of sight (e.g., exhibition of injured arm to jury to demonstrate

extent of injury), but it may be directed to other senses as well (e.g., sound recording of factory noise played during a nuisance trial).

2. Special Problems

This form of proof, which allows the triers of fact to reach conclusions based upon their own perceptions rather than relying upon those of witnesses, frequently involves special problems. Often there is concern regarding **proper authentication** of the “object.” Additionally, the possibility exists that physical production of the thing may be too **burdensome** or may inspire **prejudicial emotions** outweighing its probative value to the litigation.

B. TYPES OF REAL EVIDENCE

1. Direct

Real evidence may be direct evidence; i.e., it may be offered to prove the facts about the object as an end in itself. For example, in a personal injury case, evidence of a permanent injury could be introduced by an exhibition of the injury itself to the trier of fact.

2. Circumstantial

Real evidence may also be circumstantial; i.e., facts about the object are proved as a basis for an inference that other facts are true. For example, in a paternity case, the trier of fact may be shown the child for the purpose of showing that she is of the same race as the alleged father. In this case, the trier of fact is being asked to draw an inference that, since the child and alleged father are of the same race, the paternal relationship exists.

3. Original

Real evidence may be original; i.e., it may have had some connection with the transaction that is in question at the trial. An example of this kind of evidence would be an alleged murder weapon.

4. Prepared

Real evidence may also be prepared; e.g., sketches or models may be made to be shown to the trier of fact. This category of real evidence is called “**demonstrative evidence**.”

C. GENERAL CONDITIONS OF ADMISSIBILITY

Real evidence, like all other forms of evidence, must be **relevant** to the proposition in issue. The admissibility of real proof also depends on additional legal requirements, such as those that follow.

1. Authentication

The object must first be identified as being what the proponent claims it to be. The proof must be sufficient to support a jury finding of genuineness (meaning, a

reasonable juror could conclude that the object is what the proponent claims it to be). Real evidence is commonly authenticated by recognition testimony or by establishing a chain of custody.

a. Recognition Testimony

If the object has significant features that make it identifiable upon inspection, a witness may authenticate the object by testifying that the object is what the proponent claims it is.

EXAMPLES

- 1) If a prosecutor offers a knife into evidence and claims that the knife is the very weapon used in the murder, the object may be authenticated by a witness who testifies that he can identify the knife as the one found next to the deceased.
 - 2) If a prosecutor offers a knife into evidence and claims that it is *similar* to the knife used in the murder, it may be authenticated by a witness who testifies that the offered knife is indeed similar to the one found next to the deceased.
 - 3) A witness can testify that a photograph is a fair and accurate representation of that which it is purported to depict.
-

b. Chain of Custody

If the evidence is of a type that is likely to be confused or can be easily tampered with, the proponent of the object must present evidence of chain of custody. The proponent of the evidence must show that the object has been held in a substantially *unbroken chain of possession*. The proponent need not negate all possibilities of substitution or tampering, but must show adherence to some system of identification and custody.

EXAMPLE

A custodial chain—from the taking, to the testing, to the exhibiting of the sample—must be established before evidence of a blood alcohol test will be admitted.

2. Condition of Object; Useful Probative

If the condition of the object is significant, it must be shown to be in substantially the *same condition at the trial*. Moreover, the object must be logically helpful or reliable in tending to prove the proposition in issue.

EXAMPLE

Would it be helpful in a paternity proceeding to present the baby so that the trier of fact can ascertain physical resemblance to the alleged father?

3. Legal Relevance

Assuming the object has been properly identified and is probative, the discretion of the trial judge is called upon to decide whether some auxiliary policy or principle outweighs the need to admit the real evidence. Such policies limiting the use of real evidence frequently concern:

- a. **Physical inconvenience** of bringing the object into the courtroom;
- b. **Indecency or impropriety**; or
- c. **Undue prejudice** where the probative value of the object or exhibit is outweighed by the danger of unfair prejudice.

D. PARTICULAR TYPES OF REAL PROOF

1. Reproductions and Explanatory Real Evidence

When properly authenticated, relevant photographs, movies, diagrams, maps, sketches, or other **reproductions are admissible** if their value is not outweighed by the danger of unfair prejudice. On the other hand, items used entirely for **explanatory purposes** (such as skeletons, anatomy charts, etc.) are permitted at a trial, but are usually **not admitted into evidence** and are not given to the jury during its deliberations. These items are not represented to be reproductions of the real thing, but are merely used as aids to testimony.

EXAMPLE

A doctor may use a model of an average male skeleton to explain his testimony. The skeleton may be marked for identification in order to preserve the record, but it is not admitted into evidence.

COMPARE

If the skeleton was offered as a reproduction of the bone structure of the deceased, assuming there is no undue prejudice, it may be admitted into evidence on a showing that it accurately represents the bone structure of the deceased.

2. Maps, Charts, Models, Etc.

Maps, charts, models, etc., are usually admissible for the purpose of illustrating testimony. Since these are all reproductions, they must be authenticated by testimonial evidence showing that they are **faithful reproductions** of the object or thing depicted. As with other real evidence, introduction of these items is within the discretion of the court, and they may be excluded where they would be wasteful of time or where they would unduly impress the trier of fact with the importance of the material.

3. **Exhibition of Child in Paternity Suits**

Almost all courts permit exhibition of the child for the purpose of showing whether she is of the race of the putative father. The courts are divided with respect to the propriety of exhibiting the child in order to prove physical resemblance to the putative father, but a growing majority of courts refuse to permit exhibition of the child.

4. **Exhibition of Injuries**

The exhibition of injuries in a personal injury or criminal case is generally permitted, but the court has discretion to exclude this evidence if the exhibition would result in unfair prejudice.

5. **Jury View of the Scene**

Closely related to real and demonstrative evidence is the matter of jury views of premises and places at issue in the case. In the trial court's discretion, they are permitted, sparingly, in both civil and criminal cases. The importance of information that could be obtained by a view, and the ease with which photographs, diagrams, or maps could be substituted for such a view, will be pivotal considerations to the trial judge. Any significant changes of condition in the premises that are to be viewed will also affect the decision. The trial judge usually need not be present during a jury view. The parties and their attorneys are usually permitted to attend, but the view will be conducted by a disinterested court attaché and neither counsel nor the parties will be permitted to engage in any commentary.

6. **Demonstrations**

The court, in its discretion, may permit experiments or demonstrations to be performed in the courtroom.

a. **Demonstrations Showing Effect of Bodily Injury**

Demonstrations to show the effect of bodily injury are usually excluded where the exhibition would reveal hideous wounds, elicit cries of pain, or otherwise unduly dramatize the injury and inflame the minds of the jurors.

b. **Demonstrations Under Sole Control of Witness Are Excluded**

Demonstrations may also be excluded where they are under the sole control of the witness and thus not subject to effective cross-examination. For example, an injured plaintiff might attempt to demonstrate lack of locomotion by showing that he cannot move a limb. The demonstration itself cannot be effectively cross-examined. However, if testimony is given to the same effect, it may be impeached by contradictory evidence.

c. **Scientific Experiments**

The judge may permit scientific experiments to be performed in the courtroom provided:

- 1) The conditions are ***substantially similar*** to those that attended the original event, and
- 2) The experiment will ***not result in undue waste of time or confusion*** of the issues.

V. DOCUMENTARY EVIDENCE

A. IN GENERAL

Documentary evidence, like other kinds of evidence, ***must be relevant*** in order to be admissible. In the case of writings, the authenticity of the document is one aspect of its relevancy. Of course, documentary evidence, even if fully authenticated and relevant, ***may be excluded if it violates a rule of competency*** such as the best evidence or hearsay rule. Whenever any problem or question concerns a document, you should consider three separate and distinct possible barriers to admissibility (authentication, best evidence, and hearsay).

B. AUTHENTICATION

Before a writing or any secondary evidence of its content may be received in evidence, the writing must be authenticated by proof showing that the writing is what the proponent claims it is. The writing is usually not self-authenticating. It needs a testimonial sponsor or shepherding angel to prove that the writing was made, signed, or adopted by the particular relevant person. [Fed. R. Evid. 901 - 903]

1. Quantum of Proof of Authenticity

Authentication of documentary or, for that matter, real evidence requires only enough evidence to support a finding that the matter is what its proponent claims it is. It is not required that the proponent establish its genuineness by a preponderance of the evidence as a condition to admissibility. All that is necessary under Federal Rules 104(b) and 901 is proof ***sufficient to support a jury finding*** of genuineness.

2. Authentication by Pleadings or Stipulation

The genuineness of a document may be admitted through the discovery process, through stipulation at pretrial conference, or by a failure to deny an allegation in a pleading.

3. Evidence of Authenticity

In general, a writing may be authenticated by any evidence that serves to establish its authenticity. The Federal Rules do not limit the methods of authentication, but rather list several examples of proper authentication. [Fed. R. Evid. 901]

a. Admissions

A writing may be authenticated by evidence that the party against whom the

writing is offered has either **admitted** its authenticity or **acted upon** the writing as authentic.

b. Testimony of Eyewitness

A writing may be authenticated by testimony of one who **sees it executed** or **hears it acknowledged**. Modern statutes eliminate the common law necessity of producing a subscribing witness, unless specifically required by statute. [Fed. R. Evid. 903] If testimony of a subscribing witness is required (e.g., in authenticating a will), his denial or failure to recollect the execution of the writing does not preclude authentication by other evidence.

c. Handwriting Verifications

A writing may also be authenticated by evidence of the genuineness of the handwriting of the maker.

1) Nonexpert Opinion

A lay witness who has personal knowledge of the handwriting of the supposed writer may state his opinion as to whether the document is in that person's handwriting. (This is an exception to the opinion rule, see VI.C.1., *infra*.) Note, however, that a nonexpert cannot become familiar with the handwriting merely for the purpose of testifying.

2) Comparison of Writings

An expert witness or the trier of fact (e.g., jury) can determine the genuineness of a writing by comparing the questioned writing with another writing proved to be genuine. (Note that authentication by comparison is not limited to handwriting. Fingerprints, blood, hair, clothing fibers, and numerous other things can be authenticated by comparison with authenticated specimens.)

d. Ancient Documents

Under the Federal Rules, a document may be authenticated by evidence that it:

- (i) Is at least **20 years old**;
- (ii) Is in such condition as to be **free from suspicion** concerning its authenticity; and
- (iii) Was **found in a place** where such writing, if authentic, would likely be kept.

[Fed. R. Evid. 901(b)(8)] Note that while documents may be authenticated if they are at least 20 years old, the related **hearsay exception** for ancient documents will only apply if the document was prepared before 1998 (see VII.D.8., *infra*).

1) Federal Rules Distinguished from Majority of Jurisdictions

The Federal Rules apply to **all writings**. However, most jurisdictions limit

the ancient documents rule to **dispositive instruments** (e.g., deeds, wills, etc.). In addition, most courts require that such documents be over **30 years old**.

e. Reply Letter Doctrine

A writing may be authenticated by evidence that it was written in response to a communication sent to the claimed author. The content of the letter must make it unlikely that it was written by anyone other than the claimed author of the writing.

f. Circumstantial Evidence in General

The rules for ancient documents and reply letters, above, involve authentication by circumstantial evidence. A complete list of ways to authenticate by circumstantial evidence would be impossible. Any proof tending in reason to **establish genuineness** is sufficient. For example, authentication may be established by the content of the writing and a showing that it contains information known only to the purported author. Alternatively it may be demonstrated that the author had the disputed writing in his custody at a prior time under circumstances evidencing his belief in its genuineness.

g. Photographs and Videos

As a general rule, photographs and videos are admissible only if identified by a witness as a portrayal of certain facts relevant to the issue and verified by the witness as a correct representation of those facts. It suffices if the witness who identifies the photograph or video is familiar with the scene, object, or person that is depicted. In general, it is **not necessary to call the photographer** to authenticate the photograph or video.

1) Unattended Camera—Proper Operation of Camera

In some situations, a photograph or video will portray an event that was observed **only** by the camera (i.e., there is no witness who can testify to the relevant scene to authenticate the photograph). For example, an unmanned surveillance camera may produce a photograph of a burglar taken at a time when no other person was on the premises. Such a photograph may be admitted upon a showing that the camera was properly operating at the relevant time and that the photograph was downloaded from that camera or developed from film obtained from that camera.

h. X-Ray Pictures, Electrocardiograms, Etc.

Unlike photographs, an X-ray picture cannot be authenticated by testimony of a witness that it is a correct representation of the facts. Therefore, a different procedure of authentication is necessary. First, it must be shown that the **process used is accurate** (as to X-rays, the court will usually take judicial notice of this). Then it must be shown that the **machine itself was in working order**

and the **operator was qualified** to operate it. Finally, a **custodial chain** must be established to forestall the danger that the evidence has been substituted or tampered with.

4. Compare—Authentication of Oral Statements

Oral statements often require authentication as to the **identity of the speaker**.

Although this is technically a “relevance” topic, the rules are the same as those that apply to the authenticity of documents.

a. When Necessary

Not all oral statements need to be authenticated; only where the identity of the speaker is important (e.g., an opposing party’s statement) is authentication required.

b. Methods of Authentication

1) Voice Identification

A voice, whether heard firsthand or through a device (e.g., a tape recording) may be identified by the opinion of anyone who has heard the voice at **any time**. Thus, in contrast to the rule for handwriting verification, a person can become familiar with a voice after litigation has begun and for the sole purpose of testifying.

2) Telephone Conversations

Statements made during a telephone conversation may be authenticated by one of the parties to the call who testifies to one of the following:

- a) He recognized the other party’s voice.
- b) The speaker has knowledge of certain facts that only a particular person would have.
- c) He called, for example, Mr. A’s telephone number, and a voice answered, “This is Mr. A” or “This is the A residence.” This authenticates the conversation as being with Mr. A or his agent.
- d) He called the person’s business establishment and talked with the person answering the phone about matters relevant to the business. This is sufficient to show that the person answering the phone held a position in the business.

5. Self-Authenticating Documents

Contrary to the general rule, which requires testimonial sponsorship, there are certain writings that are said to “prove themselves” or to be “self-identifying” on their face. Federal Rule 902 specifically provides that extrinsic evidence of authenticity is not required as to the following:

- a. **Domestic public documents** that are signed and sealed;
- b. **Foreign public documents** signed by a person authorized by the laws of that country;
- c. **Certified copies of public records** (i.e., records, reports, and recorded documents);
- d. **Official publications** (i.e., books, pamphlets, or other publications purporting to be issued by a public authority);
- e. Printed materials purporting to be **newspapers or periodicals**;
- f. **Trade inscriptions**, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin;
- g. **Documents accompanied by a certificate of acknowledgment** executed in the manner provided by law by a **notary public** or other officer authorized by law to take acknowledgments;
- h. **Commercial paper**, signatures thereon, and documents relating thereto, to the extent provided by general commercial law; and
- i. **Business records**, records **generated by an electronic process**, and **data copied from an electronic device**, provided that:
 - 1) The record is **certified** by a custodian or other qualified person; and
 - 2) The offering party gives the adverse party **reasonable written notice** and makes the record and certification available for inspection so the adverse party has a fair opportunity to challenge them.

C. BEST EVIDENCE RULE

The best evidence rule is more accurately called the “**original document rule**.” It may be stated as follows: In proving the terms of a writing (recording, photograph, video, or X-ray), where the terms are material, the original writing must be produced. Secondary evidence of the writing, such as oral testimony regarding the writing’s contents, is permitted only after it has been shown that the original is unavailable for some reason other than the serious misconduct of the proponent. [Fed. R. Evid. 1002]

1. Rule Expresses Preference for Originals

Simply stated, the rule applies to writings and expresses a preference for originals. It reflects the belief that the exact words of a writing, particularly in the case of operative or dispositive instruments such as contracts, deeds, or wills, should be presented to the court; that there is a hazard of inaccuracy in common methods of

approximating the contents of a writing; and that oral testimony based on memory of the terms of the writing presents greater risk of error than oral testimony concerning other situations.

2. Applicability of the Rule

For the most part, the rule applies to two classes of situations: (1) where the writing is a **legally operative or dispositive instrument** such as a contract, deed, will, or divorce decree; or (2) where the **knowledge of a witness** concerning a fact results from having **read** it in the document.

EXAMPLES

- 1) Witness may not testify about the content of a written deed unless sufficient reason is given for not producing the original deed.
- 2) Witness who memorized mileage recorded on car sticker for a certain date, and who had no other source of knowledge on this significant litigated issue, may not testify as to the mileage without establishing a reason for the unavailability of the writing.

3. Nonapplicability of the Rule

a. Fact to Be Proved Exists Independently of Any Writing

Where the fact to be proved has an existence independent of any writing, the best evidence rule does not apply. Therefore, the rule does not apply to all events that happen to have been memorialized by documents. There are many writings that the substantive law does not regard as essential repositories of the facts recorded. These writings happen to record details of essentially nonwritten transactions. As to these, oral testimony may be given without production of, or explanation for the absence of, the original writings.

EXAMPLES

- 1) Witness may testify orally that he paid for goods received without producing the receipt that was given.
- 2) Facts such as birth, marriage, age, and death may be proved orally, although certificates evidencing these facts are in existence. However, since a divorce is effective only by a judicial decree, the best evidence rule requires that the fact of divorce be proved by the decree itself.
- 3) Testimony heard at a prior trial may be testified to in another case without production of the stenographic transcript of the prior testimony. One who heard the prior testimony can repeat it.
- 4) Admissions or confessions of a party may be testified to orally by anyone who heard them, even though the admissions or confessions were later reduced to writing.

The above examples are in contrast to those writings that are considered as essential repositories of the facts recorded. Written contracts, deeds, wills, and judgments are viewed as such repositories—they are considered written transactions—and as such are within the rule.

b. Writing Is Collateral to Litigated Issue

Any narration by a witness is likely to include references to transactions consisting partly of written communications. The best evidence rule does not apply to writings of minor importance (i.e., ones that are collateral) to the matter in controversy. [Fed. R. Evid. 1004(d)] For example, an expert witness testifying on the value of a car is allowed to establish his status as a car dealer without production of his dealer's license. The test of "collateralness" is likely to take into account:

- 1) **Centrality** of the writing to the major issues of a litigation;
- 2) **Complexity** of the relevant features of the writing; and
- 3) Existence of a **genuine dispute** as to the contents of the writing.

c. Summaries of Voluminous Records

When it would be inconvenient to examine a voluminous collection of writings, recordings, or photographs in court, the proponent may present their contents in the form of a chart, summary, or calculation. [Fed. R. Evid. 1006] However, the originals or duplicates (see 4.c., *infra*) must be made available for examination and copying, and the judge may order them to be produced in court.

d. Public Records

The best evidence rule is modified so that a proponent may offer into evidence a copy of an official record or a copy of a document that has been recorded and filed. Such a copy must be **certified as correct** by the custodian of the document or other person authorized to do so, or **testified to be correct** by a person who compared it to the original. [Fed. R. Evid. 1005] The purpose of this exception is to prevent the loss or absence of public documents due to litigation.

4. Definitions of "Writings," "Original," and "Duplicate"

a. Writings, Recordings, and Photographs

The Federal Rules govern writings, recordings, and photographs. Writings and recordings are defined broadly as "letters, words, numbers, or their equivalent set down in any form." A photograph is defined as "a photographic image or its equivalent stored in any form," and includes videotapes. [Fed. R. Evid. 1001]

b. "Original"

An original is the writing or recording itself or any counterpart intended by the

person executing it to have the same effect as an original. With respect to a photograph, “original” includes the negative or any print from it. For computer-stored data, the original is any printout or other output readable by sight.

EXAMPLE

D types a letter to P that is defamatory of P. D sends the letter to P himself and a photocopy of the letter to the newspaper. In P’s defamation action, the document legally operative to create tort liability is the “published” photocopy, not the letter sent to P.

c. Admissibility of Duplicates

The Federal Rules define a duplicate as “a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.” [Fed. R. Evid. 1001(e)] A duplicate is thus an **exact copy of an original** (e.g., a carbon copy or photocopy) made by mechanical means. Duplicates are **admissible** to the same extent as originals in federal courts, **unless** (1) a genuine question is raised about the original’s authenticity, or (2) under the circumstances, it would be unfair to admit the duplicate in place of the original. [Fed. R. Evid. 1003] The rationale for admitting duplicates under such a relaxed standard is that by definition these documents are exact copies of the original, and therefore their introduction into evidence would be objectionable only if some question existed as to the genuineness of the original.

5. Admissibility of Secondary Evidence of Contents

If the proponent cannot produce the original writing or recording in court, he may offer secondary evidence of its contents in the form of copies (e.g., handwritten copies, which would not be considered duplicates because they are not exact copies), notes, or oral testimony about the contents of the original if a satisfactory explanation is given for the nonproduction of the original.

a. Satisfactory Foundation

A valid excuse justifying the admissibility of secondary evidence would include:

1) Loss or Destruction of Original

A proper foundation for the admissibility of secondary evidence is laid by a showing that the original has been lost and cannot be found despite diligent search, or was destroyed in good faith.

2) Original Outside Jurisdiction and Unobtainable

If the document is within the jurisdiction, it must be subpoenaed. If not, some reasonable effort or request to the third party for production must be shown before secondary evidence will be admitted. A proper foundation is laid, however, if it is shown that the original is (1) in the possession of a third party, (2) outside the jurisdiction, and (3) unobtainable.

3) Original in Possession of Adversary Who, After Notice, Fails to Produce

If the opponent has custody of the original, a showing of his custody, service of a timely notice to produce, and his failure to produce it in court will justify the admissibility of secondary evidence. Where the pleadings give notice to the opposite party that he will be charged with possession of the writing, service of the notice to produce is unnecessary.

b. No Degrees of Secondary Evidence

The Federal Rules recognize no degrees of secondary evidence. Once a satisfactory explanation for nonproduction of the original is established, the party seeking to prove the contents of a writing, photograph, or recording may do so by any kind of secondary evidence ranging from handwritten copies to oral testimony. This abolition of degrees of secondary evidence is a departure from the rule existing in most American jurisdictions. [Fed. R. Evid. 1004]

c. Testimony or Written Admission of Party

A proponent may prove the contents of a writing, recording, or photograph through the testimony, deposition, or written admission of the party against whom it is offered, and need not account for the nonproduction of the original. [Fed. R. Evid. 1007] However, it is also generally held that the **contents** of a writing, photograph, etc., **cannot be proved simply by out-of-court oral admissions** of the party against whom such evidence is offered (unless of course the original is otherwise accounted for).

EXAMPLE

Witness testifies, "I heard D say that the telegram he received stated . . ." D's oral admissions outside court are inadmissible to prove the contents of the telegram. [Fed. R. Evid. 1007]

6. Functions of Court and Jury

Ordinarily, it is for the court to make the determinations of fact that determine the admissibility of duplicates, other copies, and oral testimony as to the contents of an original. However, the Federal Rules specifically reserve three questions of **preliminary fact for the jury**:

- a. Whether the original ever existed;
- b. Whether a writing, recording, or photograph produced at trial is an original; and
- c. Whether the evidence offered correctly reflects the contents of the original.

[Fed. R. Evid. 1008]

VI. TESTIMONIAL EVIDENCE

A. COMPETENCY OF WITNESSES

Witnesses are not “authenticated” in the same sense as real or documentary evidence. However, they too must pass tests of basic reliability to establish their competence to give testimony. Unlike the authentication situation pertaining to real or documentary proof, witnesses are generally **presumed to be competent** until the contrary is demonstrated.

1. Basic Testimonial Qualifications

There are four basic testimonial attributes that every witness must have to some degree. These are the capacity to observe, to recollect, to communicate, and to appreciate the obligation to speak truthfully. These, along with sincerity, are the qualities at which the cross-examiner directs his skill.

A diminution of any of these capacities usually goes only to the weight of the testimony and serves to make the witness less persuasive. However, a witness can be so deficient in one or more of these basic qualifications that she will be deemed incompetent to testify at all. The problem of infancy is a good example for all aspects of the basic qualifications. A witness may be too young **at the time of the event** to be able to accurately perceive what happened or to be able to remember at the time of the trial. The witness may also be too young **at the time of the trial** to effectively relate or communicate or appreciate the obligation to tell the truth.

a. Ability to Observe—Perception

The issue of a witness's ability to observe may arise in the following manner: W testifies on direct to details of how an intersection automobile collision occurred. On cross-examination, W admits that her attention was directed to the intersection by the sound of the crash. The direct testimony regarding details of the accident occurring before the collision will be stricken.

b. Ability to Remember—Memory

An example of a witness incompetent for this reason would be one who is suffering from senility or amnesia.

c. Ability to Relate—Communication

The ability to relate concerns the ability of the witness to communicate effectively with the trier of fact.

d. Appreciation of Oath Obligation

The witness must have sufficient intelligence and character to know and desire to tell the truth. The witness may be sworn by oath or affirmation. However, unsworn testimony may be permissible if the witness (e.g., a child) appreciates the obligation to tell the truth.

2. Federal Rules of Competency

a. Personal Knowledge and Oath Required

Federal Rule 601 provides that “[e]very person is competent to be a witness unless these rules provide otherwise.” The rules do not specify any mental or moral qualifications for witness testimony beyond these two limitations:

- 1) ***The witness must have personal knowledge*** of the matter he is to testify about (i.e., must have observed the matter and must have a present recollection of his observation). This requirement is met if there is evidence “sufficient to support a finding” that the witness is speaking on the basis of personal knowledge. Proof of personal knowledge may consist of the witness’s own testimony. [Fed. R. Evid. 602]
- 2) ***The witness must declare he will testify truthfully***, by oath or affirmation. [Fed. R. Evid. 603]

b. Use of Interpreter

If a witness requires an interpreter, the interpreter must be qualified and take an oath to make a true translation. [Fed. R. Evid. 604]

c. Applicability of State Rules in Diversity Cases

Federal Rule 601 provides that the competency of a witness shall be determined by state law in civil actions “regarding a claim or defense for which state law supplies the rule of decision.”

3. Modern Modifications of Common Law Disqualifications

At common law there were several grounds upon which a person could be disqualified from giving testimony. Persons were incompetent to testify if they had a financial interest in the suit, if they were the spouse of a party, if they lacked religious belief, if they had been convicted of a crime, or if they lacked mental capacity. These common law disqualifications have been almost entirely removed under the Federal Rules and in the vast majority of American jurisdictions.

a. Lack of Religious Belief

Lack of religious belief is no longer a basis for excluding a witness. Not only are a person’s religious convictions irrelevant in determining the competence of a witness, but they may also not be shown or commented upon for the purpose of affecting the credibility of a witness.

b. Infancy

There is ***no precise age*** at which an infant is deemed competent or incompetent to testify under oath. The competence of an infant depends on the capacity and intelligence of the particular child. This test is an individual one, to be determined by the trial judge upon preliminary examination.

c. Insanity

An insane person, even one who has been adjudicated incompetent, **may testify**, provided he understands the obligation to speak truthfully and possesses the capacity to give a correct account of what he has perceived in reference to the issue in dispute.

d. Conviction of Crime

The common law disqualification of felons has been removed by statute in most states. However, conviction of a crime may be shown to **affect the credibility** of the competent witness.

e. Interest

The common law disqualification of parties or interested persons has been abolished in most states. The only remaining vestiges of this disqualification are the so-called Dead Man Acts, discussed later.

f. Judge as Witness

Federal Rule 605 provides that the presiding judge **may not testify as a witness** in the proceeding, and that no objection need be made to preserve the point. The basis for this disqualification is that when the judge is called as a witness, her role as a witness is inconsistent with her role as presiding judge, which requires her to maintain impartiality.

g. Juror as Witness

1) Cannot Testify During Case

Jurors are incompetent to testify before the jury in which they are sitting. [Fed. R. Evid. 606(a)] The rationale is that a juror-witness cannot impartially weigh her own testimony and cannot be thoroughly cross-examined for fear of creating antagonism.

2) Inquiry into Verdict or Indictment—Generally Cannot Testify

During an inquiry into the validity of a verdict or indictment, a juror is generally prohibited from testifying as to: (1) anything that occurred during the jury's deliberations; (2) the effect of anything on that juror's or another juror's vote; or (3) any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters. [Fed. R. Evid. 606(b)(1)]

a) Exceptions—Permitted Topics

A juror may testify as to:

- (1) Whether any **extraneous prejudicial information** was improperly brought to the jury's attention;

- (2) Whether any **outside influence** was improperly brought to bear on any juror;
- (3) Whether there is a **mistake on the verdict form** (e.g., wrong damages amount or other clerical error); or
- (4) Whether any juror made a **clear** statement that he **relied on racial stereotypes or animus** to convict a **criminal defendant**. The rationale for allowing this evidence is to permit the court to determine whether the defendant's Sixth Amendment right to a jury trial was violated. Not every comment indicating racial bias will qualify; there must be a showing that racial animus was a **significant motivating factor** in the juror's vote to convict. Whether that threshold showing has been satisfied is a matter committed to the discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the evidence.

[Fed. R. Evid. 606(b)(2); Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (2017)—following discharge of the jury, two jurors told defense counsel that during deliberations a specific juror had expressed anti-Hispanic bias toward the defendant and the defendant's alibi witness]

4. Dead Man Acts

The last remaining vestige of true incompetency of a witness appears in the Dead Man Acts. These statutes exist in most jurisdictions and their provisions vary from state to state. Although there is **no Dead Man Act in the Federal Rules of Evidence**, state Dead Man Acts operate to disqualify witnesses in federal cases where state law provides the rule of decision (most diversity cases). For bar examination purposes, only generalized comments are appropriate, and there are common provisions to most Dead Man Acts that could appear in a multistate bar exam question.

a. Rationale

The Dead Man Acts generally provide that a party or person interested in the event, or his predecessor in interest, is incompetent to testify to a **personal transaction or communication with a deceased**, when such testimony is offered against the representative or successors in interest of the deceased. The rationale of the statute is to **protect estates from perjured claims**. The assumption is that the survivor claimant may lie, since the deceased cannot talk back. Because death has silenced one party, the statute closes the mouth of the living person who, being interested in the litigation's outcome, wishes to testify on her own behalf against someone who is suing or defending in a representative capacity (e.g., executor, administrator, heir, legatee, devisee).

b. Common Elements

Most Dead Man Acts have the following common elements and applications:

1) Applicable to Civil Cases Only

The bar to competency created by a Dead Man Act applies only to civil cases and has no application in criminal cases.

2) Protected Parties

The statute is designed to protect those who claim directly under the decedent. They usually include an executor, administrator, heir, legatee, and devisee. If a protected party is on either side of the lawsuit (suing or defending), the statute applies to prevent an interested person from testifying on his own behalf.

EXAMPLES

- 1) Plaintiff sues the executor of the estate for a debt owed by the decedent. The executor is a protected party and the act applies.
- 2) Executor sues defendant for negligence in causing the death of the decedent. Executor is a protected party and the act applies.
- 3) Heir sues executor, legatees, and devisees in a will contest. Heir is a protected party, as are the adverse parties. The act applies.

3) Interested Person

A person is “interested in the event” if he stands to gain or lose by the direct and immediate operation of the judgment, or if the judgment may be used for or against him in a subsequent action. Thus, in states where a spouse has an inchoate right in the other spouse’s property, both spouses may be interested and incompetent to testify. Similarly, a shareholder of a corporation and the co-maker of a note may be disqualified under the rule.

a) Predecessor in Interest

Most Dead Man Acts disqualify not only the person interested, but also the predecessor in interest.

EXAMPLE

If A assigns to B a claim against Decedent, and B sues the estate, both A and B are incompetent. B is interested in the event; A is the person from, through, or under whom B derived his interest.

b) Party Adverse to Protected Party

As a short rule of thumb, a party adverse to the protected party is

always an interested person who will be rendered incompetent by the Dead Man Act. For other nonparty witnesses, ask whether the witness has a **pecuniary interest in the outcome of the case** or is a predecessor in interest with the adverse party.

4) Exceptions and Waiver of the Act

There are numerous situations where the Dead Man Act either will not apply against an interested person or the protected party may waive its effect. Of course, if an exception applies or the statute is waived, the interested person is competent to testify. The following are common to most jurisdictions:

a) Facts Occurring After Death

An interested person may always testify to facts that occurred **after** the death of the deceased, since the protection of the rule is not needed.

b) “Door Openers”

The estate representatives and those claiming under the decedent may **waive the protection** of the statute. Common provisions for waiver include:

- (1) If the protected party calls the interested person to testify about the transaction, the interested person may explain all matters about which he is examined.
- (2) Where the testimony of the deceased given at a former trial or at a deposition is read in evidence, the interested person may explain all matters about which he is examined.
- (3) Where there is a failure to make timely and proper objection. Objection is to the incompetency of the witness, not to the incompetency of the testimony.
- (4) If the protected party or an agent of the deceased testifies to a transaction with an interested person, the interested person may testify about the same transaction.

B. FORM OF EXAMINATION OF WITNESS

The **judge may exercise reasonable control** over the examination of witnesses in order to aid the effective ascertainment of truth, to avoid wasting time, and to protect witnesses from harassment or undue embarrassment. [Fed. R. Evid. 611(a)] Questions that frequently arise concerning the form of examination of witnesses are: when may leading questions be used, what other types of questions are objectionable, and when and how may a witness use memoranda.

1. Leading Questions

a. Generally Objectionable

A question is leading and generally objectionable on direct examination when it suggests to the witness the fact that the examiner expects and wants to have confirmed. Questions calling for “yes” or “no” answers and questions **framed to suggest the answer desired** are usually leading.

EXAMPLE

On direct examination plaintiff is asked, “Is it true or not that at the time in question, you were driving well within the speed limit?” The question is leading.

b. When Permitted

Leading questions are permitted on **cross-examination**. Trial judges will usually allow leading questions on **direct examination** in noncrucial areas **if no objection is made:**

- 1) If used to elicit **preliminary or introductory matter**;
- 2) When the witness **needs aid to respond** because of loss of memory, immaturity, or physical or mental weakness; or
- 3) When the witness is **hostile** and improperly uncooperative, an **adverse party**, or a person **identified with an adverse party**.

[Fed. R. Evid. 611(c)]

2. Improper Questions and Answers

The following types of questions are improper and are not permitted:

a. Misleading

A question is misleading and thus is not permitted if it is one that cannot be answered without making an unintended admission.

EXAMPLE

“Do you still beat your wife?”

b. Compound

Questions that require a single answer to more than one question are not permitted.

EXAMPLE

“Did you see and hear the intruder?”

c. Argumentative

Argumentative questions, which are leading questions that reflect the examiner's interpretation of the facts, are improper.

EXAMPLE

"Why were you driving so recklessly?"

d. Conclusionary

A question that calls for an opinion or conclusion that the witness is not qualified or permitted to make is improper.

EXAMPLE

"What did your friend think about that?" The witness could not know his friend's thoughts, and is not permitted to give his opinion as to his friend's thoughts.

e. Assuming Facts Not in Evidence

An attorney is not allowed to ask a question that assumes a disputed fact is true when it has not been established in the case.

EXAMPLE

In a case where there is no evidence that Defendant had been drinking, the following question is improper: "After Defendant finished his fifth beer, he got up and went to his car, didn't he?"

f. Cumulative

An attorney is generally not permitted to ask a question that has already been asked and answered. More repetition is allowed on cross-examination than on direct, but if it is apparent that the cross-examiner is not moving forward, the judge may disallow the question.

g. Harassing or Embarrassing

The trial judge, in her discretion, may disallow cross-examination that is unduly harassing or embarrassing.

h. Calls for a Narrative Answer

Some courts generally prohibit questions calling for a narrative answer, i.e., a question allowing a witness to answer by recounting relevant facts, rather than a series of specific questions requiring specific answers.

EXAMPLE

Tell me what you did on the evening of September 22.

i. **Calls for Speculation**

An examining attorney may not ask a witness to speculate, i.e., theorize, as to a fact, because such testimony is not based on the witness's personal knowledge.

EXAMPLE

Where decedent expressed a desire to become an engineer but did not do so, it was speculation for a witness to testify regarding decedent's lost income based on an engineer's salary.

j. **Lack of Foundation**

A witness must have personal knowledge as to the facts of his testimony. Insufficient personal knowledge may subject testimony to an objection for lack of foundation. Additionally, a party may object on the basis of lack of foundation for real evidence if the proponent has not shown that the evidence is what he purports it to be. (See IV.C.1., *supra*.)

k. **Nonresponsive Answer**

A witness's response must address only the specific question asked by the examining attorney; otherwise the testimony is subject to being stricken for nonresponsiveness.

EXAMPLE

Q. Did you leave your house on September 22?

A. I went to the dentist and then to the grocery store. This answer is nonresponsive, as the question calls for a "yes" or "no" response.

3. Use of Memoranda by Witness

A witness cannot read her testimony from a prepared memorandum. However, a memorandum may be used in certain circumstances to refresh the recollection of the witness, to substitute for the witness's forgotten testimony upon authentication of the memorandum, or in cross-examination of the witness.

a. **Present Recollection Revived—Refreshing Recollection**

A witness may use any writing or thing for the purpose of refreshing her present recollection. She usually may not read from the writing while she actually testifies, since the writing is **not authenticated**, is **not in evidence**, and may be used solely to refresh her recollection. The writing is intended to help her to recall by jogging her memory. The sworn testimony must demonstrate a **present** recollection.

1) **Inspection and Use in Cross-Examination**

Under Federal Rule 612, whenever a witness has used a writing to refresh

her memory **while on the stand**, an adverse party is entitled to have the writing produced at trial, inspect it, cross-examine the witness thereon, and introduce into evidence those portions that relate to the witness's testimony. If the witness has refreshed her memory **before trial** by looking at the writing, it is within the court's discretion to require production of the document and to permit inspection, cross-examination, and introduction of pertinent excerpts.

a) **Failure to Produce or Deliver Writing**

In a criminal case, if the **prosecution** fails to produce or deliver a writing as ordered, the judge **must strike** the witness's testimony—and, if justice requires, declare a mistrial. (When the defense or a party in a civil case fails to comply, the judge has more discretion and can issue "any appropriate order.")

b. **Past Recollection Recorded—Recorded Recollection**

Where a witness states that she has insufficient recollection of an event to enable her to testify fully and accurately, even after she has consulted a memorandum or other record given to her on the stand, the **record itself may be read into evidence** if a proper foundation is laid for its admissibility. The foundation for receipt of the record into evidence must include proof that:

- 1) The witness at one time had **personal knowledge** of the facts recited in the record;
- 2) The record was **made by the witness** or made **under her direction** or it was **adopted by the witness**;
- 3) The record was **timely made** when the matter was fresh in the mind of the witness;
- 4) The record **accurately reflects the witness's knowledge** (i.e., the witness must indicate that the record was accurate when it was made); and
- 5) The witness has **insufficient recollection** to testify fully and accurately.

Records that meet these requirements are admissible under an **exception to the hearsay rule** (see VII.D.6., *infra*). Remember that, under the Federal Rule, if admitted, the record may be read into evidence and heard by the jury, but **the document itself is not received** as an exhibit unless offered by the adverse party. [Fed. R. Evid. 803(5)]

C. OPINION TESTIMONY

The word "opinion" used in this context includes all opinions, inferences, conclusions, and other subjective statements made by a witness. A basic premise of our legal system is that,

in general, witnesses should testify as to facts within their personal knowledge and that the trier of fact should draw any conclusions therefrom. Therefore, the general policy of the law is to restrict the admissibility of opinion evidence, except in cases where the courts are sure that it will be necessary, or at least helpful. Of course, the difference between “fact” and “opinion” is a matter of degree. Therefore, there cannot be any clear-cut opinion rule.

1. Opinion Testimony by Lay Witnesses

a. General Rule of Inadmissibility

Opinions by lay witnesses are generally inadmissible. However, there are many cases where, from the nature of the subject matter, no better evidence can be obtained. In these cases, where the event is likely to be perceived as a whole impression (e.g., intoxication, speed) rather than as more specific components, opinions by lay witnesses are generally admitted.

b. When Admissible

In most jurisdictions and under the Federal Rules, opinion testimony by lay witnesses is admissible when:

- 1) It is rationally **based on the perception of the witness**;
- 2) It is **helpful to a clear understanding** of her testimony or to the determination of a fact in issue; and
- 3) It is **not based on scientific, technical, or other specialized knowledge** (if so based, the witness's testimony would need to meet the requirements for expert testimony stated in Rule 702, see 2.a., *infra*).

[Fed. R. Evid. 701]

EXAMPLE

Think how much easier and clearer it is for a witness to say someone looked “drunk” than it is to describe her gait, speech, eyes, diction, breath, and manner. All these things can also be brought out, but the term “drunk” may be more meaningful than any of them.

Some jurisdictions are stricter and allow lay opinion testimony only in cases of “necessity” when it is difficult for the witness to express her perception in any form other than opinion.

c. Procedure

Unless waived by a failure to object, a proper foundation must be laid by showing that the witness had the opportunity to observe the event that forms the basis of her opinion. Additionally, the court in its discretion may require a witness to state the facts observed before stating her opinion.

d. Situations Where Opinions of Lay Witnesses Are Admissible

1) General Appearance or Condition of a Person

Testimony that a person was “elderly,” “about 60 years old,” “strong,” “weak,” or “ill” would be admissible, but testimony that a person is suffering from specific diseases or specific injuries—usually requiring knowledge of an expert—would not.

2) State of Emotion

A witness would be permitted to testify that a person appeared “angry,” “was joking,” or that two persons were “in love” or appeared to have a strong affection for each other.

3) Matters Involving Sense Recognition

A witness would be permitted to testify that an object was “heavy,” “red,” “bulky,” or that a certain beverage tasted like whiskey.

4) Voice or Handwriting Identification

Lay opinion is permissible and often essential to identify telephone voices and handwriting. In these instances a foundation must first be laid to show familiarity with the voice or handwriting.

5) Speed of Moving Object

A witness may estimate in miles per hour the speed of a moving object but must first show some experience in observing the rate of speed of moving objects. Characterization that a vehicle was going “fast” or “very fast” has been permitted.

6) Value of Own Services

A witness may give her opinion as to the value of her own services.

7) Rational or Irrational Nature of Another’s Conduct (Sanity)

In many jurisdictions, a witness is permitted to state her opinion as to the sanity of another person. Some states limit these opinions to testimony describing the acts of a person whose sanity is in question and allow the witness to state only whether those acts impressed her at the time as rational or irrational (e.g., “She acted like a madwoman”).

8) Intoxication

A witness who has seen a person and is able to describe that person’s actions, words, or conduct may express an opinion as to whether that person was or was not intoxicated. In many states, the details of the person’s appearance must be given as a foundation for the opinion.

EXAMPLE

In Defendant's trial on a charge of driving while intoxicated, Witness testifies for the prosecution that Defendant "smelled of alcohol, his speech was incoherent, his eyes glassy and bloodshot, he could not stand or walk without assistance, he was slumped over the wheel of his vehicle," and, finally, that he "was intoxicated."

e. Situations Where Opinions of Lay Witnesses Are Not Admissible**1) Agency or Authorization**

When agency or authorization is in issue, the witness generally may not state a conclusion as to her authorization. Rather, she must be asked by whom she was employed and the nature, terms, and surrounding circumstances of her employment.

2) Contract or Agreement

When the existence of an express contract is in issue, a witness generally may not state her opinion that an agreement was made. Rather, she must be asked about the facts, the existence or nonexistence of which establish whether a contract existed.

2. Opinion Testimony by Expert Witnesses**a. Requirements of Expert Testimony**

The expert may state an opinion or conclusion, provided the following conditions are satisfied:

1) Relevance and Reliability

Expert testimony is admissible if: (1) the subject matter is one where scientific, technical, or other specialized knowledge would **help the trier of fact** understand the evidence or determine a fact in issue; (2) the opinion is **based on sufficient facts** or data; (3) the opinion is the product of **reliable principles and methods**; and (4) the expert has **reliably applied** the principles and methods to the facts of the case. [Fed. R. Evid. 702]

a) Determining Reliability—Court's Gatekeeping Role

Federal courts act as gatekeepers and determine the reliability of all expert testimony, scientific or otherwise. In making this determination, courts take a flexible, case-specific approach and have discretion to consider a wide variety of factors. Although by no means an exhaustive list, the traditional *Daubert* factors include: (1) whether the expert's theory or methodology has been tested; (2) whether it has been subject to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its

operation; and (5) whether it is generally accepted in the relevant field. [See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)]

2) Witness Must Be Qualified as an Expert

To testify as an expert, a person must have special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. [Fed. R. Evid. 702]

3) Expert Must Possess Reasonable Probability Regarding His Opinion

The expert must possess reasonable certainty or probability regarding his opinion. If the opinion of the expert is a mere guess or speculation, it is inadmissible.

EXAMPLE

It would be error to permit plaintiff's medical expert to testify that plaintiff's symptoms "suggested" diabetes and "indicated" that the disease was caused by the accident.

4) Opinion Must Be Supported by Proper Factual Basis

The expert's opinion may be based upon one or more of these three possible sources of information: (1) facts that the expert knows from his own observation; (2) facts presented in evidence at the trial and submitted to the expert, usually by hypothetical question; or (3) facts not in evidence that were supplied to the expert out of court, and which are of a type reasonably relied upon by experts in the particular field in forming opinions on the subject. Note that the expert may give opinion testimony on direct examination without disclosing the basis of the opinion, unless the court orders otherwise. However, the expert may be required to disclose such information on cross-examination. [Fed. R. Evid. 705]

a) Personal Observation

If the expert has examined the person or thing about which he is testifying, he may relate those facts observed by him and upon which he bases his opinion. [Fed. R. Evid. 703]

EXAMPLE

An expert may testify that he examined plaintiff's leg following the accident, and in his opinion the plaintiff sustained a compound fracture.

b) Facts Made Known to Expert at Trial

The expert's opinion may be based upon the evidence introduced at the trial. The expert may *listen to testimony* at trial, or counsel may

relate the facts to the expert in the form of a ***hypothetical question***. The hypothetical question may be based on facts derived from any of the three sources of information noted above.

c) **Facts Made Known to Expert Outside Court**

Under Federal Rule 703, the expert may base an opinion upon facts not known personally but supplied to him outside the courtroom (e.g., reports of nurses, technicians, or consultants). The Federal Rule further provides that such facts ***need not be in evidence or even of a type admissible*** in evidence, as long as the facts are of a kind ***reasonably relied upon*** by experts in the particular field. However, if the facts are of a type inadmissible in evidence, the proponent of the expert opinion must ***not*** disclose those facts to the jury unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion ***substantially*** outweighs their prejudicial effect.

EXAMPLE

A physician bases his expert opinion upon (1) a personal examination of the patient, (2) statements by the patient as to her medical history, and (3) medically germane statements by the patient's relatives. The results of the personal examination are admissible and may therefore be relied upon by the physician because they are relevant, material, based on personal knowledge, and not subject to any exclusionary rule. The statements of the patient are admissible through an exception to the hearsay rule. The statements by the relatives, though inadmissible hearsay, may properly form a basis for a physician's expert opinion testimony because they are the facts reasonably relied upon by physicians in making a diagnosis; however, these statements should not be disclosed to the jury without the court first finding that their probative value substantially outweighs prejudice.

b. **Opinion May Embrace Ultimate Issue**

Federal Rule 704(a) and the modern trend repudiate the traditional prohibition on opinions embracing the ultimate issue in the case. The rule provides: "An opinion is not objectionable just because it embraces an ultimate issue." Note, however, that to be admissible under the Federal Rules, the expert opinion must "help the trier of fact" to understand the evidence or determine a fact in issue. Thus, an expert's conclusion that "X had testamentary capacity" is still inadmissible because it is not helpful to the jury.

1) **Exception—Criminal Defendant's Mental State**

The Federal Rules ***prohibit*** ultimate issue testimony in one situation: In a criminal case in which the defendant's mental state constitutes an element of

the crime or defense, an expert may not state an opinion as to whether the accused did or did not have the mental state in issue. [Fed. R. Evid. 704(b)]

c. Authoritative Texts and Treatises

An expert may be cross-examined concerning statements contained in any scientific publication, as long as the publication is established as reliable authority. For example, the witness may be asked, “Doesn’t Dr. Killum, in his book on diseases of the pancreas, disagree with your conclusion here?” A publication may be established as reliable by: (1) the direct testimony or cross-examination admission of the expert, (2) the testimony of another expert, or (3) judicial notice. Thus, even if the expert refuses to recognize the text as authoritative, it can be used on cross-examination if its reliability is established by one of the other methods.

The Federal Rules have expanded the admissibility of learned texts and treatises beyond impeachment of experts. Statements from an established treatise may be read into the record as substantive evidence, and may even be introduced on direct examination of a party’s own expert. [Fed. R. Evid. 803(18)—exception to hearsay rule; see VII.D.10., *infra*] There are two important limitations: (1) an expert must be on the stand when a statement from a treatise is read into evidence; and (2) the relevant portion is read into evidence but is not received as an exhibit (i.e., the jury never sees it).

d. Court-Appointed Experts

The court has broad discretion to appoint expert witnesses. Note that this does not limit any party’s right to call its own experts. [Fed. R. Evid. 706]

1) Appointment Process

On a party’s motion or its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations for expert witnesses. The court may then appoint any expert, as long as the expert consents to act.

2) Expert’s Role

The court must inform the expert of her duties, either: (1) in writing (with a copy filed with the clerk); or (2) orally at a conference in which the parties have an opportunity to participate. The expert must advise the parties of any findings she makes, and may be deposed, called to testify, and cross-examined by any party.

3) Compensation

The expert is entitled to a reasonable compensation, as set by the court. In a criminal case or a civil condemnation case, the compensation is payable from any funds that are provided by law. In all other civil cases,

the compensation is payable by the parties in the proportion and at the time that the court directs.

4) Disclosing Appointment to Jury

The court may authorize disclosure to the jury that the court appointed the expert.

D. CROSS-EXAMINATION

1. Necessity for Cross-Examination

Cross-examination of adverse witnesses is a matter of right in every trial of a disputed issue of fact. It is recognized as the ***most efficacious truth-discovering device***. The principal basis for excluding hearsay is that the declarant whose testimony is offered cannot be subjected to the test of cross-examination. If adequate cross-examination is prevented by the death, illness, or refusal of a witness to testify on cross-examination, the direct examination is rendered incompetent and will be stricken.

2. Scope of Cross-Examination

Although a party is entitled as of right to some cross-examination, the extent or scope of cross-examination, like the order of calling witnesses, is frequently a matter of judicial discretion. Cross-examination is hedged about by far fewer rules than is direct examination. On cross-examination, leading questions are permissible, as are, obviously, efforts at impeachment. The most significant restriction is that the scope of cross-examination cannot range beyond the subject matter of the direct examination. This restriction does not apply to inquiries directed toward impeachment of the witness.

a. Restrictions on Scope

Under Federal Rule 611(b) and in the majority of American jurisdictions, ***cross-examination is limited to***: (1) matters brought out on ***direct examination*** and the inferences naturally drawn from those matters, and (2) matters affecting the ***credibility of the witness***.

b. Significance of Restrictions

The question of the proper scope of cross-examination is important since it affects the ***right to use leading questions***. And, in jurisdictions that do not allow a party to impeach his own witness, going beyond the scope of direct examination means that you have made the witness “your own witness” and therefore cannot impeach his testimony. Further, if the party placing a witness on the stand is the holder of a privilege, the court may hold it waived to the extent that the other party may engage in cross-examination; therefore, the scope of cross-examination permitted may determine to what extent the cross-examining party may inquire into privileged material.

c. Collateral Matters

The general rule is that the cross-examiner is **bound by the answers of the witness** to questions concerning collateral matters. Thus, the cross-examiner cannot refute the response of the witness by producing extrinsic evidence. Indeed, some federal courts resolve the matter under Rule 403 by treating the evidence on the collateral matter as being substantially outweighed by time considerations and the danger of confusion of the issues. Certain matters of impeachment, however, are recognized as sufficiently important to merit development by extrinsic evidence (e.g., bias or interest of the witness may be shown by other evidence, even if denied by the witness on cross-examination). Other matters of impeachment are limited solely to inquiry on cross-examination (e.g., prior misconduct of the witness not resulting in conviction but affecting the witness's credibility). Once beyond recognized impeachment techniques, the test as to what is "collateral" is sufficiently vague to permit a wide exercise of discretion by the trial judge.

E. CREDIBILITY—IMPEACHMENT

Impeachment means the casting of an adverse reflection on the veracity of the witness. The primary method of impeachment is by cross-examination of the witness under attack, although witnesses are often impeached by extrinsic proof that casts doubt on credibility. In terms of relevance, any matter that tends to prove or disprove the credibility of the witness should be admitted here.

1. Accrediting or Bolstering

a. General Rule—No Bolstering Until Witness Impeached

A party may not bolster or accredit the testimony of his witness until the witness has been impeached.

EXAMPLE

A prior statement made by W at the time of the event that is consistent with W's in-court testimony would not be admissible to show that W's memory of the event is excellent or that he told the same story twice and therefore is especially worthy of belief.

b. Exceptions

The rule against accrediting is subject to exception where timeliness may raise an inference on the substantive issues of the case.

1) Timely Complaint

In certain cases a party may prove that the witness made a timely complaint, in order to bolster the party's credibility.

EXAMPLES

- 1) Evidence of a prompt complaint of a rape victim is admissible to bolster the complainant's credibility in a subsequent criminal prosecution.
- 2) Where a defendant in a criminal trial claims that a confession offered against him was obtained by coercion, he may show that he complained of mistreatment at the first suitable opportunity.

2) Prior Identification

Evidence of any prior statement of identification made by a witness is admissible not only to bolster the witness's testimony, but also as substantive evidence that the identification was correct. [Fed. R. Evid. 801(d)(1)(C); *and see VII.B.1., infra*]

2. Any Party May Impeach

Contrary to the traditional rule, under which a party could not impeach his own witness, the Federal Rules provide that the credibility of a witness may be attacked by any party, ***including the party calling him***. [Fed. R. Evid. 607] Even under the traditional rule, however, a party could impeach his own witness if the witness: (1) was an adverse party, (2) was hostile, (3) was one required to be called by law, or (4) gave damaging surprise testimony.

3. Impeachment Methods—Cross-Examination and Extrinsic Evidence

A witness may be impeached either by ***cross-examination*** (by eliciting facts from the witness that discredit his own testimony) or by ***extrinsic evidence*** (by calling other witnesses or introducing documents that prove the impeaching facts).

Note: In the discussion that follows, “cross-examination” also includes a party impeaching his own witness on direct examination.

There are certain well-recognized, often-used impeachment methods. These traditional impeachment devices include: the use of prior inconsistent statements; a showing of bias or interest in the litigation; an attack on the character of the witness by showing convictions of crime, prior acts of misconduct, or poor reputation for veracity; a showing of sensory deficiencies; and proof of contradictory facts. The basic questions for each of these methods are: Is the examiner limited to impeachment by cross-examination alone, or may he produce extrinsic evidence? If extrinsic evidence is permissible, must a foundation first be laid by inquiry on cross-examination?

a. Prior Inconsistent Statements

For the purpose of impeaching the credibility of a witness, a party may show that the witness has, on another occasion, made statements that are inconsistent with some material part of his present testimony. Under the Federal Rules, an

inconsistent statement may be proved by either cross-examination or extrinsic evidence. To prove the statement by extrinsic evidence, certain requirements must first be met: (1) a **proper foundation** must be laid; and (2) the statement must be **relevant** to some issue in the case, i.e., it cannot be a “collateral matter.”

1) Meaning of “Inconsistent”

Most prior inconsistent statements clearly contradict the witness’s in-court testimony. In less obvious situations, the court makes a case-by-case determination as to whether there is an inconsistency. A witness’s present inability to remember a fact is generally not inconsistent with a prior statement relating that fact; however, the court may find an inconsistency where the witness’s memory loss appears to be feigned. Additionally, the court is likely to find an inconsistency if the prior statement omits a fact asserted in the current testimony and it would have been natural for the witness to include that fact in the prior statement if she believed it to be true.

2) Laying a Foundation for Extrinsic Evidence

Generally, extrinsic evidence of the witness’s prior inconsistent statement is admissible only if: (1) the **witness** is, at some point, given an **opportunity to explain or deny** the allegedly inconsistent statement; and (2) the **adverse party** is, at some point, given an **opportunity to examine the witness** about the statement. (These opportunities need not come before introduction of the statement under the Federal Rules.) This foundation requirement may be dispensed with, however, where “justice so requires” (as where the witness has left the stand and is not available when his prior inconsistent statement is discovered). Furthermore, this foundation is **not** required when the prior inconsistent statement qualifies as an opposing party’s statement (see VII.B.2., *infra*). [Fed. R. Evid. 613(b)] Also, the courts generally agree that inconsistent statements by a hearsay declarant may be used to impeach the declarant despite the lack of a foundation (obviously, where the declarant is not a witness no foundation could be laid anyway); see 5., below, for further discussion. [Fed. R. Evid. 806]

3) Evidentiary Effect of Prior Inconsistent Statements

In most cases, prior inconsistent statements are hearsay, admissible only to impeach the witness. However, where the statement was made **under oath at a prior trial, hearing, or other proceeding, or in a deposition, it is admissible nonhearsay** (i.e., it may be considered as substantive proof of the facts stated!). (See VII.B.1., *infra*.)

b. Bias or Interest

Evidence that a witness is biased or has an interest in the outcome of a suit tends to show that the witness has a **motive to lie**. A witness may usually be impeached by extrinsic evidence of bias or interest, provided a proper

foundation is laid. Note that evidence that is substantively inadmissible may be admitted for impeachment purposes if relevant to show bias or interest.

EXAMPLES

- 1) It may be shown that a witness is being paid to testify, that a witness is financing the case, or that he otherwise has a financial interest in the outcome of the litigation.
 - 2) Inferences of bias may be shown by evidence of family or other relationship, business relationship, or by conduct or expressions of the witness demonstrating a friendship toward a party.
 - 3) In a criminal case, it is proper for the defense to ask a prosecution witness whether he has been promised immunity from punishment for testifying, whether an indictment is pending against him, or whether he is on parole. This evidence may show a motive for the witness to curry the favor of the state.
 - 4) Hostility toward a party may be shown by adverse statements against the party, or by the fact that the witness had a fight or quarrel with him or has a lawsuit pending against him.
-

1) Foundation

Most courts require that before a witness can be impeached by extrinsic evidence of bias or interest, he must first be asked about the facts that show bias or interest on cross-examination. If the witness on cross-examination admits the facts claimed to show bias or interest, it is within the trial judge's discretion to decide whether extrinsic evidence may be introduced as further proof of bias or interest.

2) Justification for Bias

Even though it is shown that a witness is biased, no evidence may be admitted to show that he was justified in his bias. This might make him look more reasonable, but is not very relevant to whether his bias might make him less credible.

c. Conviction of Crime

Under certain circumstances, a witness may be impeached by proof of conviction of a crime. [Fed. R. Evid. 609] The fact that the witness (including a defendant who testifies in a criminal case) has been convicted of a crime may usually be proved by either eliciting an admission on direct or cross-examination or by the record of conviction.

1) Actual Conviction Required

This type of impeachment requires an actual conviction of a crime. The fact that the witness has been arrested or indicted may not be elicited here.

2) Type of Crime

a) Crime Involving Dishonesty or False Statement

Under the Federal Rules, a witness's character for truthfulness may be attacked (or impeached) by **any crime** (felony or misdemeanor) if it can be readily determined that conviction of the crime required proof or admission of an act of **dishonesty** or **false statement**. Federal courts interpret this category **narrowly** to encompass only offenses in the nature of crimen falsi (e.g., perjury, false statement, criminal fraud, embezzlement, false pretense). In most cases, the statutory elements will indicate whether an act of dishonesty or false statement was required. An indictment, statement of admitted facts, or jury instructions may also be used to show that the crime required proof of such an act. The trial court has **no discretion**—not even under Federal Rule 403—to disallow impeachment by such crimes.

b) Felony Not Involving Dishonesty or False Statement

A witness's character for truthfulness may also be attacked, under the Federal Rules, by **any felony** whether or not it involves dishonesty or a false statement. However, if the felony is one that does not involve dishonesty or false statement, the trial court may exercise discretion to exclude it under one of the following standards.

(1) Accused in Criminal Case

If, in a criminal case, the witness being impeached is the accused, the felony conviction will be admitted only if the government shows that its probative value as impeachment evidence outweighs its prejudicial effect.

(2) Witness Other than Accused in Criminal Case

In the case of any witness other than the accused in a criminal case, any felony conviction is admissible, but the court retains discretion under Rule 403 to exclude it if its probative value as impeachment evidence is **substantially outweighed** by the danger of unfair prejudice.

(3) Compare the Balancing Tests

Note that under Federal Rule 609, different balancing tests apply for the exercise of discretion. If the felony conviction is offered to impeach the accused in a criminal case, the discretionary standard (*supra*) favors exclusion, since the probative value of the felony (not involving dishonesty or false statement) must outweigh prejudice. In the case of **all** other witnesses, the balancing test favors admission, since the conviction will be excluded only if the danger of prejudice substantially outweighs its probative value.

3) Must Not Be Too Remote

Under the **Federal Rules**, a conviction is usually too remote and inadmissible if **more than 10 years** have elapsed since the date of **conviction** or the date of **release** from the confinement imposed for the conviction, whichever is the later date. [Fed. R. Evid. 609(b)]

a) Admissible in Court's Discretion

In extraordinary circumstances, older convictions can be admitted, but only if: (1) the trial judge determines that the probative value of the conviction **substantially** outweighs its prejudicial effect (a very difficult balancing test that strongly favors exclusion), and (2) the adverse party is given reasonable written notice that the conviction is to be used as impeachment.

4) Juvenile Adjudication Generally Not Admissible

Juvenile offenses are generally not admissible for impeachment purposes. However, under the Federal Rules, a judge has the discretion in a criminal case to admit evidence of a juvenile offense committed by a witness other than the accused if the evidence would be admissible to attack the credibility of an adult and if the evidence is necessary to a determination of the accused's guilt or innocence. [Fed. R. Evid. 609(d); Davis v. Alaska, 415 U.S. 308 (1974)]

5) Effect of Pardon Depends on Basis

In most states, a conviction may be shown even though the witness has subsequently been pardoned. Under the Federal Rules, however, the conviction may not be shown if the pardon was based on innocence or if the person pardoned has not been convicted of a subsequent crime punishable by death or imprisonment in excess of one year. [Fed. R. Evid. 609(c)]

6) Pending Appeal Does Not Affect Admissibility

In most jurisdictions and under the Federal Rules, a conviction may be used to impeach even though an appeal is pending, though the pendency of the appeal may also be shown. [Fed. R. Evid. 609(e)]

7) Constitutionally Defective Conviction Invalid for All Purposes

Where the prior felony conviction was obtained in violation of the defendant's Sixth Amendment rights (e.g., to have counsel, to confront witness, etc.), the conviction is generally invalid for all purposes—including impeachment.

8) Means of Proof—Extrinsic Evidence Permitted

A prior conviction is usually shown by either an admission on **direct** or **cross-examination** of the witness or by **introducing a record** of the

judgment, although the court may permit other methods of proof (e.g., testimony of witnesses, other documents, judicial notice). **No foundation need be laid.** Note, however, that when a witness is being cross-examined about previous convictions, the questions must be asked in good faith (i.e., with a reasonable belief as to the existence of the conviction). Improper questioning may be grounds for a mistrial.

a) Appealing Admission of Prior Conviction Evidence

While a party as a general rule may appeal the erroneous admission of evidence of a prior conviction, she may not do so if she introduced evidence of the conviction herself.

EXAMPLE

After a defendant's motion to exclude prior conviction evidence was erroneously denied, the defendant introduced evidence of the conviction during her case-in-chief to take the sting out of her impeachment on cross-examination. She will not be permitted to claim on appeal that it was error to admit evidence of the prior conviction. [Ohler v. U.S., 529 U.S. 753 (2000)]

d. Specific Instances of Misconduct—Bad Acts

1) General Rule—Interrogation Permitted

The traditional majority view is that, subject to discretionary control of the trial judge, a witness may be interrogated upon cross-examination with respect to any immoral, vicious, or criminal act of his life that may **affect his character** and show him to be **unworthy of belief**. Inquiry into "bad acts" is permitted even though the witness was never convicted. Federal Rule 608 permits such inquiry, in the discretion of the court, only if the act of misconduct is **probative of truthfulness** (i.e., is an act of deceit or lying).

2) Counsel Must Inquire in Good Faith

The cross-examiner must act in good faith with some reasonable basis for believing that the witness may have committed the "bad act" inquired about.

EXAMPLE

It would be error for the prosecution to inquire about an act when the prosecutor knows that the witness has been tried for the act and acquitted.

3) Extrinsic Evidence Not Permitted

Extrinsic evidence of "bad acts" is not permitted. A specific act of misconduct, offered to attack the witness's character for truthfulness, can be

elicited **only on cross-examination** of the witness. If the witness denies the act, the cross-examiner cannot refute the answer by calling other witnesses or producing other evidence. It is not usually improper for the cross-examiner, acting in good faith, to continue the cross-examination after a denial in the hope that the witness will change his answer.

4) Cannot Reference Consequences of Bad Act

Federal Rule 608(b) bars any reference during interrogation to consequences (e.g., termination of employment, discipline) the witness may have suffered as a result of his prior bad act. *Rationale:* The Advisory Note to Rule 608 explains that such a consequence is, in essence, a third person's opinion that the witness committed the act. Therefore, asking the witness about the consequence on examination is the equivalent of presenting extrinsic evidence of the act (see above).

EXAMPLE

An attorney cannot impeach a witness with the witness's prior act of embezzlement by asking, "Weren't you fired from your last job for embezzling money?" (However, the attorney may ask, "Didn't you embezzle money from your last employer?")

e. Opinion or Reputation Evidence of Untruthfulness

1) By Proof of Reputation

A witness may be impeached by showing that she has a poor reputation for truthfulness. The usual method of impeachment is to ask other witnesses about her general reputation for truth and veracity in the community in which she lives. The modern view is to allow evidence of reputation in business circles as well as in the community in which the witness resides.

2) By Opinion Evidence

Most states do not allow the impeaching witness to state her opinion as to the character of a witness for truth and veracity. However, the **Federal Rules allow** an impeaching witness to state her personal opinions, based upon acquaintance, as to the truthfulness of the witness sought to be impeached. [Fed. R. Evid. 608(a)]

f. Sensory Deficiencies

A witness may be impeached by showing that he had no knowledge of the facts to which he testified, or that his faculties of perception and recollection were so impaired as to make it doubtful that he could have perceived those facts. Such a showing can be made either **on cross-examination or by the use of extrinsic evidence.**

1) Defects of Capacity**a) Perceptive Disabilities**

It is, of course, proper to show deficiencies of the senses, such as deafness or color blindness, that would have substantially impaired the witness's ability to perceive the facts to which he testifies. It may also be shown that at the time the witness observed the events his perception was temporarily diminished (e.g., that he was sleepy or under the influence of alcohol or drugs).

b) Lack of Memory

A witness can be impeached by showing that he has a poor memory of the events about which he testifies. This is usually done on cross-examination by asking the witness about other related matters to suggest the inference that if his memory of related matters is poor, his recollection of the events to which he is testifying is doubtful.

c) Mental Disorders

Psychiatric evidence of a mental disorder that would affect a witness's credibility has been admitted by some courts (particularly in sex offense cases).

2) Lack of Knowledge**a) Expert Witnesses**

The credibility of an expert witness may be attacked by cross-examining him as to (1) his general knowledge of the field in which he is claiming to be an expert, and (2) his particular knowledge of the facts upon which his opinion is based.

b) Opinion Witnesses

The credibility of an opinion witness may be attacked by showing lack of knowledge. For example, a witness who gives opinion evidence on the value of land may be cross-examined regarding her knowledge of land values and may be asked about sales of other land.

c) Character Witnesses

As discussed earlier, when a character witness testifies to the good character of another (e.g., a defendant), the witness may be cross-examined regarding the basis of his statement that the defendant's character is good. In other words, the testimony of the character witness may be discredited by asking him about specific criminal or immoral acts committed by the defendant, on the theory that if the witness has no knowledge of these acts, he does not really know the defendant's character. [Fed. R. Evid. 405(a)]

In most courts, a character witness may testify only as to **reputation**. Therefore, on cross-examination, the only acceptable form of question is: “Have you **heard** that the defendant . . . ?” However, under the Federal Rules and in modern jurisdictions that permit character witnesses to testify as to their **opinions** of character, questions in the form, “Do you **know** . . . ?” would be proper.

g. Contradictory Facts

Extrinsic evidence of facts that contradict a witness’s testimony may sometimes be admitted to suggest that a witness’s mistake or lie on one point indicates erroneous or false testimony as to the whole. Extrinsic evidence of contradictory facts to impeach is permitted: (1) where the witness’s testimony on a particular fact is a **material issue** in the case, (2) where the testimony on a particular fact is **significant on the issue of credibility**, or (3) where the witness volunteers testimony about a **subject as to which the opposing party would otherwise be precluded from offering** evidence. However, as discussed in 4., below, extrinsic evidence is not permitted to prove contradictory facts that are **collateral**, i.e., not relevant to any material issue in the case or insignificant on the issue of credibility.

EXAMPLE

A defendant charged with cocaine possession testifies that he has never in his life handled or come into contact with illegal narcotics of any kind. The defendant could be impeached with extrinsic evidence that he was seen purchasing marijuana on two occasions prior to the cocaine incident.

4. Impeachment on Collateral Matter

Where a witness makes a statement not directly relevant to the issues in the case, the rule against impeachment (other than by cross-examination) on a collateral matter applies to bar the opponent from proving the statement untrue either by extrinsic contradictory facts or by a prior inconsistent statement. The purpose of the rule is to avoid the possibility of unfair surprise, confusion of issues, and undue consumption of time resulting from the attempt to prove and disprove facts that are not directly relevant.

EXAMPLE

Plaintiff’s witness testifies, “I saw the defendant run a red light on the way home from a video arcade.” The witness could be impeached with extrinsic evidence that the defendant had a green light, but it would be “collateral” for the defendant to show that the witness was on his way home from a pool hall rather than a video arcade. It would not be “collateral,” however, to show that the witness was on his way home from a dinner at the plaintiff’s house, because that suggests **bias**, which is a separate basis for impeachment (see 3.b., *supra*).

5. Impeachment of Hearsay Declarant

Out-of-court statements are often admitted into evidence by means of exceptions and limitations to the general rule excluding hearsay, even though the person who made the statement (the declarant) does not testify at the trial. The party against whom the statement has been admitted may wish to impeach the credibility of the declarant so that the jury will discount or assign less probative value to the statement. The credibility of a declarant may be attacked (and if attacked, may be supported) by evidence that would be admissible if the declarant had testified as a witness. Of course, the declarant need not be given the opportunity to explain or deny prior inconsistent statements. In addition, the party against whom the out-of-court statement was offered may call the declarant as a witness and cross-examine him about the statement. For purposes of this rule, a “declarant” means a person whose statement has been admitted into evidence: (1) under an exception to the hearsay rule, or (2) as a vicarious statement of an opposing party (see VII.B.2.b., *infra*). [Fed. R. Evid. 806]

6. Rehabilitation

A witness who has been impeached may be rehabilitated on redirect examination or by extrinsic evidence.

a. Explanation on Redirect

For purposes of rehabilitation, the witness on redirect examination may explain or clarify facts brought out on cross-examination.

EXAMPLE

A witness testifying for the prosecution in an organized crime murder trial admitted to making a prior inconsistent statement. On redirect, the witness is permitted to explain that he gave a prior untruthful statement favoring the defendant out of fear of being killed by the defendant's gang.

b. Good Reputation for Truthfulness

When the witness's general character for truthfulness and veracity has been attacked, the party for whom the impeached witness has testified may call other witnesses to testify to the good reputation for truthfulness of the impeached witness or to give their opinion as to the truthfulness of the impeached witness.

c. Prior Consistent Statement

1) Generally Not Permitted

A party may not ordinarily rehabilitate a witness by showing a prior consistent statement because it seldom enhances credibility.

2) Exceptions

a) To Rebut Charge of Fabrication Based on Improper Motive

Where the opposing counsel has impeached the credibility of a witness by making an express or an implied charge that the witness is lying or exaggerating because of some improper motive, counsel may introduce into evidence a prior consistent statement made by the witness **before** the onset of the alleged motive.

EXAMPLE

Defense attorney intimated on cross-examination that the prosecution witness was biased against his client because of a fight they recently had. The prosecutor may introduce evidence of a statement the witness made, consistent with his testimony, before the fight occurred.

b) When Witness Impeached on Other Non-Character Ground

Where the opposing counsel has impeached the credibility of a witness on some non-character ground **other** than a charge of recent motive to lie or exaggerate (e.g., an alleged inconsistency or sensory deficiency), counsel may introduce into evidence a prior consistent statement made by the witness if, under the circumstances, it has a special tendency to rehabilitate the witness's credibility. Note, however, that a prior consistent statement cannot be used to rehabilitate a witness whose general character for truthfulness has been impeached (i.e., by criminal convictions, acts of misconduct, or reputation or opinion testimony regarding the witness's untruthfulness).

EXAMPLES

1) On direct examination, a police officer testified that she was able to single out the defendant because of a prominent scar on the defendant's forehead. On cross-examination, defense counsel intimated that the officer's testimony was not credible because she made no mention of the scar in a handwritten report made immediately after the defendant's arrest. The prosecutor may introduce evidence that three days after the arrest, the officer included a statement about the scar in her formal typewritten report, because this tends to demonstrate that the omission in the handwritten report—the alleged inconsistency—was an insignificant oversight.

2) On direct examination, a witness testified that the defendant's car ran the red light. On cross-examination, defense counsel intimated that the witness's memory was faulty because, one year after the accident, the witness began treatment for a mental disorder that can affect one's memory. To rebut the insinuation of faulty memory, the plaintiff's coun-

sel may introduce evidence that the witness told the police a few days after the accident that the defendant's car ran the red light.

3) Also Admissible as Substantive Evidence

Under Federal Rule of Evidence 801(d)(1)(B), a prior consistent statement that is admissible to rehabilitate a witness's credibility (as described in 2), above) is also admissible as substantive evidence of the truth of its contents. (See VII.B.1.b., *infra*.)

F. OBJECTIONS, EXCEPTIONS, OFFERS OF PROOF

1. Objections

Unless an objection is made by opposing counsel, almost any kind of evidence will be admitted. Failure to object is deemed a **waiver** of any ground for objection. The trial judge need not raise grounds for objection on her own, but may take notice of plain errors affecting substantial rights (e.g., admission of coerced confession not objected to by defense).

a. Objections to Trial Testimony

Objections should be made after the question, but before the answer, if it is apparent that the question calls for inadmissible matter (e.g., hearsay) or that the question is in improper form (e.g., leading). Otherwise, a motion to strike must be made as soon as the witness's answer emerges as inadmissible (e.g., "Q: What color was the automobile? A: My sister told me it was gray.").

b. Objections to Deposition Testimony

Objections to the **form** of a question (e.g., leading) are waived unless made during the deposition, thereby affording counsel an opportunity to correct the form of his question. An objection based on a **testimonial privilege** should also be made then, lest it be deemed waived. However, objections going to the substance of a question or answer (e.g., relevance, hearsay) can be postponed until the deposition is offered in evidence.

c. Specificity of Objections

An objection may be either **general** ("I object") or **specific** ("Object, hearsay"). The Federal Rules call for a specific objection unless the ground for the objection was apparent from the context. [Fed. R. Evid. 103(a)] However, general objections are still common in federal courts. The importance of whether an objection is general or specific lies in the extent to which each type preserves the evidentiary issue on appeal. The following rules apply:

1) General Objection Sustained

If a general objection is sustained and the evidence excluded, the ruling will be upheld on appeal if there was **any ground** for the objection. In the

absence of specificity in the trial court, it will be assumed that the ruling was placed upon the right ground.

2) General Objection Overruled

If a general objection is overruled and the evidence admitted, the objection is not available on appeal unless the evidence was ***not admissible under any circumstances*** for any purpose.

3) Specific Objection Sustained

If a specific objection is sustained and the evidence is excluded, the ruling will be upheld on appeal only if the ground stated was the correct one, unless the evidence excluded was not competent and could not be made so.

d. “Opening the Door”

One who introduces evidence on a particular subject thereby asserts its relevance and cannot complain, except on grounds other than relevance, if his adversary thereafter offers evidence on the same subject. And counsel need not “stand” on his overruled relevance objection; he can offer counterevidence without thereby abandoning his relevance objection.

e. Rule of Completeness—Writings and Recorded Statements

Where a party introduces part or all of a writing or recorded statement, an adverse party may require the introduction of ***any other part—or any related writing or recorded statement***—that in fairness ought to be considered at the same time. [Fed. R. Evid. 106] The party who introduced the original writing or recorded statement cannot object to the introduction of the additional evidence on the ground of lack of competency or hearsay, etc.

f. Motion to Strike—Unresponsive Answers

Unresponsive answers are subject to a motion to strike by examining counsel, but not by opposing counsel. Examining counsel, in other words, can “adopt” an unresponsive answer if it is not objectionable on some other ground.

2. Exceptions

The common law rule requiring a party to “except” from an adverse trial court ruling in order to preserve the issue for appeal has been abolished in most jurisdictions. In some states, however, a written motion for a new trial, specifying the grounds, may be required.

3. Offers of Proof

On some occasions, error cannot be based on exclusion of evidence unless there has been an “offer of proof” that discloses the nature, purpose, and admissibility of the rejected evidence. There are three types of “offers of proof.”

a. **Witness Offer**

Subsequent to a sustained objection by opposing counsel, the examining counsel proceeds with his examination of a witness on the stand, out of the jury's hearing, thus making his record by the question-and-answer method. Federal Rule 103(a) provides that the court may require an offer of proof to be in this form.

b. **Lawyer Offer**

Counsel himself states, in narrative form, what the witness would have testified had he been permitted to do so. The "witness offer" is generally preferred to the "lawyer offer" and can be required by the trial court, especially if opposing counsel denies that the witness would testify as narrated.

c. **Tangible Offer**

A marked, authenticated, and offered item of tangible evidence is its own offer of proof.

4. Party Need Not Renew Claim After Ruling

Once the court rules definitively on the record (either before trial or after trial), the party does not need to renew an objection or offer of proof to preserve a claim of error for appeal. [Fed. R. Evid. 103(b)]

G. TESTIMONIAL PRIVILEGES

Testimonial privileges, which permit one to refuse to disclose and prohibit others from disclosing certain sorts of confidential information in judicial proceedings, have two basic reasons for their existence: (1) **practicality**, and (2) society's desire to **encourage certain relationships** by ensuring their confidentiality, even at the high price of losing valuable information.

Some of the testimonial privileges are frankly grounded on hardheaded practicality. The particular kind of disclosure could not be obtained, as a practical matter, even if there were no privilege. Many priests, even when confronted by a contempt of court citation, would refuse to breach the priest-penitent relationship. Society values some relationships sufficiently that it is willing to protect their confidential nature even at the expense of the loss of information relevant to the issues of a lawsuit. These relationships will be encouraged if confidentiality, when desired, is assured. To put it more concretely, persons might forgo needed medical attention or be less than candid with legal counsel were there no guarantee that communications made during the physician-patient and attorney-client relationships would be accorded confidential status in legal proceedings.

1. Federal Common Law Privileges

The Federal Rules have no specific privilege provisions. Federal Rule 501 provides that the privilege of a witness or person shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. Federal courts currently recognize:

- a. The **attorney-client** privilege;
- b. **Spousal immunity**;
- c. The privilege for **confidential marital communications**;
- d. The **psychotherapist/social worker-client** privilege;
- e. The **clergy-penitent** privilege; and
- f. **Governmental** privileges.

Note, however, that in civil actions when state law supplies the rule of decision as to an element of a claim or defense, the state law applies with respect to testimonial privileges as well. Thus, in **diversity** cases, the **state law of privilege applies**. Other privileges (e.g., physician-patient privilege, accountant-client privilege, professional journalist privilege) are only recognized by certain states.

2. General Considerations

a. Persons Who May Assert a Privilege

A privilege is personal, and may be asserted only by the party whose interest is sought to be protected or by someone authorized to assert it on the holder's behalf (e.g., guardian of incompetent holder). If the privilege is held by more than one person, each of them can claim the privilege. In certain cases, the person with whom the confidence was shared may claim it on the holder's behalf.

b. Confidentiality

To be privileged, a communication must be shown to have been made in confidence. Many states, however, recognize a presumption that any disclosures made in the course of a relationship for which a privilege exists were made in confidence.

c. Comment on Privilege Forbidden

No inference should be drawn from the fact that a witness has claimed a privilege. Thus, counsel for the parties and the judge are not permitted to make any comment or argument based on a claim of privilege.

d. Waiver

All types of privileges are waived by the following:

- 1) **Failure to claim the privilege** by the holder herself or failure to object when privileged testimony is offered;
- 2) **Voluntary disclosure** of the privileged matter by the holder (or someone else with the holder's consent) unless the disclosure is also privileged; or

- 3) A ***contractual provision*** waiving in advance the right to claim a privilege.

A privilege is not waived where someone wrongfully disclosed information without the holder's consent. Similarly, a waiver of the privilege by one joint holder does not affect the right of another joint holder to claim the privilege.

e. **Eavesdroppers**

A privilege based on confidential communications is not abrogated because the communication is overheard by someone whose presence is unknown to the parties; i.e., the privilege still applies to the parties to the confidential communication. There is some question, however, as to whether the eavesdropper may testify. The traditional view is that the eavesdropper may testify to what he has overheard. But a significant number of modern cases and statutes assert that as long as the holder of the privilege was not negligent, there is no waiver of the privilege, and the eavesdropper is also prohibited from testifying.

3. Attorney-Client Privilege

The first testimonial privilege ever established was the attorney-client privilege. It is a common law privilege, although in some jurisdictions it has now been codified by statute. It carries with it fewer exceptions than any other privilege.

Essentially, communications between an attorney and client, made during professional consultation, are privileged from disclosure. In other words, a client has a privilege to refuse to disclose, and to prevent others from disclosing, confidential communications between herself (or her representative) and her attorney (or her attorney's representative). Objects and preexisting documents are not protected.

a. **Attorney-Client Relationship**

The attorney-client privilege requires that the attorney-client relationship exist at the time of the communications. The client, or her representative, must be seeking the professional services of the attorney at the crucial time. But note that retainer negotiations, involving disclosures made before the attorney has decided to accept or decline the case, are covered if the other requirements of the privilege are present.

1) **Client**

A "client," in the context of the typical formulation of the attorney-client privilege, can be an individual private citizen, a public officer, a corporation, or any other organization or entity, public or private, seeking professional legal services.

2) **Representative of Client**

A "representative of a client" is one having the ***authority to obtain legal services or to act on advice*** rendered by an attorney, on behalf of the client.

3) Attorney

An “attorney” is any person who is authorized or, in many jurisdictions, who is **reasonably believed** by the client to be authorized, to practice law in any state or nation.

4) Representative of Attorney

A “representative of an attorney” is one employed by the attorney to assist in the rendition of professional services, e.g., a clerk or secretary.

5) Corporation as Client

A corporation, as indicated above, can be a “client” within the meaning of the attorney-client privilege. The statements of **any corporate officials or employees** made to the attorney are protected if they were authorized or directed by the corporation to make such statements.

b. Confidential Communication

A communication is “confidential” if it was not intended to be disclosed to third persons, other than those to whom disclosure would be in furtherance of the rendition of legal services to the client or those who are necessary for the transmission of the communication. Communications made in the known presence and hearing of a stranger are not privileged.

1) Communications Through Agents

Communications made to third persons are confidential, and thus covered by the attorney-client privilege, if necessary to transmit information between the attorney and client. Examples include: communications by the client to the attorney’s secretary or messenger; information (not documents) given to the attorney by the client’s accountant; communications between the client’s liability insurer and the attorney; and communications through an interpreter.

a) Examination by Doctor

When a client is examined by a doctor at the attorney’s request, the communications involved between the client and doctor (and the doctor and attorney) are not covered by the physician-patient privilege because no treatment is contemplated. These communications are, however, covered by the attorney-client privilege because the examination is necessary to help the client communicate her condition to the attorney. Note that this privilege would be waived if the doctor were later called as an expert witness by the same client.

EXAMPLE

P, a pedestrian, was struck by a car driven by D. P employs Attorney to bring a negligence suit against D to recover for the physical injuries

P suffered in the accident. Attorney sends P to Dr. Z for an evaluation of the extent and permanence of P's injuries. Attorney does not intend to call Dr. Z as an expert witness at trial. At trial, D's attorney, believing that P may have admitted to some negligence of his own when describing his injury, calls Dr. Z to testify to his examination of P. If P objects, claiming attorney-client privilege, he may prevent Dr. Z from testifying.

2) No Privilege Where Attorney Acts for Both Parties

Where an attorney acts for both parties to a transaction, no privilege can be invoked in a lawsuit between the two parties (they obviously did not desire and could not expect confidentiality as between themselves in a joint consultation), but the **privilege can be claimed** in a suit between either or both of the two parties and **third persons** (multiple parties can desire and expect confidentiality as against the outside world).

c. Client as Holder of Privilege

The privilege, if it exists, can be claimed by the client, her guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, etc. The person who was the attorney at the time of the communication can claim the privilege, but only on behalf of the client. The attorney's authority to do this is presumed in the absence of any evidence to the contrary.

d. Duration of Privilege

The attorney-client privilege applies indefinitely. Termination of the attorney-client **relationship** does not terminate the privilege. The privilege even continues to apply after the client's death. *Rationale:* Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with her attorney. [Swidler & Berlin v. United States, 524 U.S. 399 (1998)]

e. Nonapplicability of the Privilege

There are four significant exceptions to the application of the attorney-client privilege:

1) Legal Advice in Aid of Future Wrongdoing

There is no privilege if the services of the attorney were sought or obtained as an aid in the planning or actual commission of something that the **client knew, or should have known, was a crime or a fraud.**

2) Claimants Through Same Deceased Client

There is no privilege regarding a communication relevant to an issue between parties, all of whom claim through the same deceased

client—regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

3) Dispute Between Attorney and Client

There is no privilege for a communication that is relevant to an issue of **breach of duty** by the attorney to his client (malpractice) or by the client to her attorney (e.g., client's failure to pay her attorney's fee for professional services).

4) Client Puts Legal Advice in Issue

There is no privilege where the client asserts a claim or defense that puts the legal services at issue in the case. For example, a defendant who argues that she is not liable because she was following her attorney's advice must disclose the advice.

f. Waiver of the Privilege

The privilege belongs solely to the client and she alone can waive it. If the client chooses to waive the privilege, her attorney may be compelled to testify.

g. Attorney's Work Product

Documents prepared by an attorney for his **own use** in prosecuting his client's case are not protected by the attorney-client privilege. However, they may be protected by the attorney's "work product" rule. In *Hickman v. Taylor*, 329 U.S. 495 (1947), the United States Supreme Court held that the work product of a lawyer—in that case, statements of interviews with potential witnesses—is not subject to discovery except in cases of necessity.

h. Limitations on Waiver of Attorney-Client Privilege and Work Product Rule

Federal Rule of Evidence 502 allows parties to disclose privileged material without risking waiver of the attorney-client privilege and work product rule as to undisclosed material. Additionally, the rule protects against waiver when the disclosure is the result of an innocent mistake. Note that in diversity cases, the state law of privilege governs whether the material is privileged or protected by the work product rule in the first place, but issues of waiver are governed by Federal Rule 502. [Fed. R. Evid. 502(f)]

1) Disclosure in Federal Proceeding

A voluntary disclosure of privileged material made in a federal proceeding operates as a waiver of the attorney-client privilege or work product protection **only with respect to the disclosed material**. The waiver **does not** extend to undisclosed privileged material **unless**: (1) the waiver is **intentional**, (2) both the disclosed and undisclosed material concern the **same subject matter**, and (3) fairness dictates that all the material should be considered together **to avoid a misleading presentation of evidence**. [Fed. R. Evid. 502(a)] If the disclosure was **inadvertent** and the holder

took reasonable steps to prevent disclosure and rectify the error (e.g., attempting to retrieve the mistakenly disclosed material), then there is **no waiver**. [Fed. R. Evid. 502(a), (b)]

2) Disclosure in State Proceeding

A disclosure of privileged material made in a state proceeding is not an effective waiver in a subsequent federal proceeding if: (1) the disclosure would not operate as a waiver if it had been made in a federal proceeding, or (2) the disclosure is not a waiver under that state's law. [Fed. R. Evid. 502(c)]

3) Federal Court Order Controls in All Proceedings

A federal court may order that the attorney-client privilege or work product protection is not waived by a disclosure connected with the litigation pending before the court. If the court so rules, the disclosure is **also not a waiver in any other federal or state proceeding**. [Fed. R. Evid. 502(d)] In other words, the court's order controls in the current proceeding and in all other proceedings.

4) Effect of Parties' Agreement

The parties may make their own agreement on the effect of disclosure in a federal proceeding (for example, if one party disclosed privileged material, the parties may agree that the disclosure will not constitute a waiver of privilege). Such an agreement is binding as to the parties to the agreement, but it is **not binding as to third parties unless it is incorporated into a court order**. [Fed. R. Evid. 502(e)]

4. Physician-Patient Privilege

The physician-patient privilege is a statutory privilege, which has not been adopted in all jurisdictions. However, in a substantial number of jurisdictions, a physician (and, in some jurisdictions, a dentist or nurse) is foreclosed from divulging in judicial proceedings information that he acquired while attending a patient in a professional capacity, which information was necessary to enable the physician to act in his professional capacity.

a. Elements of Physician-Patient Privilege

1) Professional Member of Relationship Must Be Present

If the professional member of the relationship is not present for purposes of treatment, and that fact is known to the patient, the relationship does not exist and no privilege attaches.

2) Information Must Be Acquired While Attending Patient

The information must be acquired while attending the patient in the course of treatment; the privilege does not apply to information obtained by the professional in some other way.

3) Information Must Be Necessary for Treatment

If information given by the patient deals with a nonmedical matter (e.g., details of an accident), the information is not privileged. Physicians have also been held competent to testify regarding facts that a lay witness might observe which are not induced by the professional relationship, such as the observable fact that the patient was ill, dates of treatment, or description of clothing worn by the patient.

EXAMPLE

A treating physician who removed the clothing of an unconscious accident victim will be permitted to testify that a heroin packet fell out of the patient's right sock.

b. Nonapplicability of the Privilege

There are many exceptions and implied waivers of the physician-patient privilege, and the privilege is of little importance as a result. The privilege does not apply (or is impliedly waived) in the following situations:

1) Patient Puts Physical Condition in Issue

The physician-patient privilege is not applicable in those situations creating the largest number of litigated cases, since a person cannot invoke the privilege where he himself has put his physical condition in issue, e.g., where he sues for personal injuries.

2) In Aid of Wrongdoing

Like the attorney-client privilege, there is no privilege if the physician's services were sought or obtained in aid of the planning or commission of a crime or tort, or to escape detection or apprehension after the commission of a crime or tort.

3) Dispute Between Physician and Patient

There is no privilege regarding a communication relevant to an issue of breach, by the physician or by the patient, of a duty arising out of the physician-patient relationship, e.g., malpractice, failure to pay one's bill.

4) Agreement to Waive the Privilege

The patient may agree by contract (e.g., life insurance policy) to waive the privilege.

5) Federal Cases Applying Federal Law of Privilege

In cases where state law does not supply the rule of privilege (i.e., most federal question cases), the federal courts **do not recognize** any physician-patient privilege. They do, however, recognize a psychotherapist-client privilege (see below).

c. **Criminal Proceedings**

There is a split of authority as to the applicability of the physician-patient privilege in criminal proceedings. In some states, the privilege applies in both civil and criminal cases. In a number of others, it cannot be invoked in criminal cases generally. In still other states, the privilege is denied in felony cases, and in a few states, it is denied only in homicide cases. Note that where a psychiatrist is involved, however, the applicable privilege is the psychotherapist-client privilege (below), which is more widely accepted in all proceedings than the physician-patient privilege.

d. **Patient Holds the Privilege**

The privilege belongs to the patient, and he may decide to claim or waive it.

5. Psychotherapist/Social Worker-Client Privilege

The United States Supreme Court recognizes a federal privilege for communications between a psychotherapist (psychiatrist or psychologist) or licensed social worker and his client. [Jaffee v. Redmond, 518 U.S. 1 (1996)—confidential communications between police officer and licensed social worker following a shooting were privileged] Thus, the federal courts and virtually all of the states recognize a privilege for this type of confidential communication. In most particulars, this privilege operates in the same manner as the attorney-client privilege (*supra*).

6. Privileges Related to Marriage

Under the early rule, spouses were absolutely incompetent to testify for or against each other during the period of marriage, and this incompetency had the same effect as the Dead Man Acts—neither spouse could speak out in court if the other spouse was a party. The prohibition against spousal testimony in favor of the party-spouse has been abandoned. However, there remains a rule of spousal immunity whereby a married person may not be compelled to testify **against** her spouse in a criminal case. Apart from this rule, a separate privilege exists in most jurisdictions that protects confidential communications during marriage. Thus, there are two separate privileges as follows: (1) the privilege not to testify against a spouse in a criminal case—spousal immunity, and (2) the privilege for confidential marital communications.

a. **Spousal Immunity—Privilege Not to Testify in Criminal Cases**

When the privilege of spousal immunity is invoked, a married person whose spouse is the defendant in a criminal case **may not be called as a witness by the prosecution**, and a married person **may not be compelled to testify** against his spouse in **any** criminal proceeding. (This second part of the privilege exists even where the spouse is not a defendant, such as in grand jury proceedings.) The purpose of this immunity is to protect the marital relationship from the disruption that would follow from allowing one spouse to testify against the other.

1) Federal Courts—Privilege Belongs to Witness-Spouse

In federal courts, only the witness-spouse may invoke the privilege against adverse spousal testimony. Thus, one spouse **may** testify against the other in criminal cases, with or without the consent of the party-spouse, but the witness-spouse may not be compelled to testify, nor may she be foreclosed from testifying (except as to confidential communications, *infra*). [See *Trammel v. United States*, 445 U.S. 40 (1980)] Some states (e.g., California) follow the federal view.

2) Some State Courts—Privilege Belongs to Party-Spouse

In some state courts, the privilege belongs to the party-spouse. Thus the witness-spouse may not be compelled to testify, and she may be foreclosed from testifying if the party-spouse asserts the privilege.

3) Valid Marriage Required

There must be a valid marriage for the privilege to exist. No privilege exists if the marriage is void (e.g., because it is incestuous, bigamous, or a sham).

4) Immunity May Be Asserted Only During Marriage

The privilege lasts only during the marriage and terminates upon divorce or annulment. If a marriage exists, the privilege can be asserted even as to matters that took place **before** the marriage. Remember, however, that in federal court the privilege belongs to the witness. Therefore, an accused cannot use marriage to silence a federal court witness.

b. Privilege for Confidential Marital Communications

In any civil or criminal case, either spouse, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication made between the spouses while they were married. The rationale is to encourage open communication and trust and confidence between spouses.

1) Both Spouses Hold Privilege

Both spouses jointly hold this privilege, and either can refuse to disclose the communication or prevent any other person from disclosing the confidential communication.

2) Elements of the Privilege**a) Marital Relationship**

The communication must be made during a valid marriage. Divorce will **not** terminate the privilege retroactively, but communications after divorce are not privileged.

b) Reliance upon Intimacy

The communication must be made in reliance upon the intimacy of the marital relationship. Routine exchanges of a business nature, abusive language, and misconduct directed to the spouse are not privileged. If the communication was made in the **known** presence of a stranger, it is not privileged. The confidential communication need not be spoken but may be made by conduct intended as a communication.

c. Nonapplicability of Privileges

Neither the spousal immunity nor the confidential marital communications privilege applies in legal actions between the spouses; in cases involving crimes against the testifying spouse or either spouse's children (e.g., assault and battery, incest, bigamy, child abuse, etc.); or to communications in furtherance of a joint crime or fraud.

7. Privilege Against Self-Incrimination

Under the Fifth Amendment of the United States Constitution, a witness cannot be compelled to testify against himself. (For full discussion, see Criminal Procedure outline.) Thus, any witness may refuse to answer any question whose answer might incriminate him, and a criminal defendant may use the privilege to refuse to take the witness stand at all. The privilege belongs to the witness; a party cannot assert it on the witness's behalf.

a. “Incriminating” Defined

Testimony is incriminating if it ties the witness to the commission of a **crime** or would furnish a lead to evidence tying the witness to a crime; the testimony need not prove guilt. [Hoffman v. United States, 341 U.S. 479 (1951)] A witness cannot refuse to answer because of exposure to civil liability; it must be to avoid **criminal** liability.

b. When Privilege Applies

The privilege can be claimed at any state or federal proceeding, whether civil or criminal, at which the witness's appearance and testimony are compelled (e.g., by subpoena). The privilege can be invoked only by natural persons, not corporations or associations.

8. Clergy-Penitent Privilege

A person has a privilege to refuse to disclose, and to prevent others from disclosing, a confidential communication by the person to a member of the clergy in the clergy member's capacity as a spiritual adviser. A member of the clergy can be a minister, priest, rabbi, or other similar functionary of a religious organization, or reasonably believed to be so by the person consulting him. This common law privilege is very similar in its operation to the attorney-client privilege, *supra*.

9. Accountant-Client Privilege

This is a statutory privilege, found in a number of states, which is similar to the attorney-client privilege, *supra*. There is no federal accountant-client privilege (apart from a very limited statutory privilege for certain advice given by federally authorized tax providers).

10. Professional Journalist Privilege

Whether a journalist may be forced to divulge her sources of information has been a much-litigated question and the subject of a trend of statutory authority. The Supreme Court has held that there is no constitutional protection for a journalist's source of information, so the existence of the privilege is ***limited to individual state statutes***, which have been recently growing in number.

Less than half of the states have enacted statutes protecting the journalist's source of information, and the protection ranges from an absolute privilege to one qualified by the need for disclosure in the public interest.

11. Governmental Privileges

a. Identity of Informer

The federal government, or a state or subdivision of a state, generally has a privilege to refuse to disclose the identity of a person who has furnished to a law enforcement officer information purporting to reveal the commission of a crime.

1) Privilege Claimed by Government

The privilege can be claimed by an appropriate representative of the government, such as a prosecutor.

2) No Privilege If Identity Otherwise Voluntarily Disclosed

No privilege exists if the identity of the informer or his interest in the subject matter of his communication has been voluntarily disclosed by a holder of the privilege, such as a prosecutor, or if the informer appears as a witness in the case.

3) Judge May Dismiss If Informer's Testimony Crucial

If the government elects not to disclose the identity of an informer and there is a reasonable probability that the informer could provide testimony necessary to the fair determination of guilt or innocence, the judge, on his own motion or that of the accused, must dismiss the proceedings.

b. Official Information

This is a general catch-all privilege that attaches to certain communications made ***by or to public officials***. Official information has been defined as information not open to the public, relating to the internal affairs of the government or

its subdivisions. It applies to some fairly low-level communications made by or to officials (e.g., a judge's communications to his law clerk).

H. EXCLUSION AND SEQUESTRATION OF WITNESSES

Upon a party's request, the trial judge **must** order witnesses excluded from the courtroom so they cannot listen to the testimony of other witnesses. [Fed. R. Evid. 615] The trial judge may also do this on his own motion. However, Federal Rule 615 prohibits the exclusion of: (1) a **party** or a designated officer or employee of a party, (2) a person whose **presence is essential** to the presentation of a party's claim or defense, or (3) a person **statutorily authorized** to be present.

I. WITNESSES EXAMINED OR CALLED BY THE COURT

The court may examine any witness called by any party. Furthermore, the court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the court's witness. **A party may object** to the court's examining or calling a witness either at that time or at the next opportunity when the jury is not present (to spare counsel the potential embarrassment of objecting to the judge's questions in front of the jury). [Fed. R. Evid. 614]

VII. THE HEARSAY RULE

A. STATEMENT OF THE RULE

The Federal Rules define hearsay as a statement, other than one made by the declarant while testifying at the current trial or hearing, offered in evidence to prove the truth of the matter asserted. [Fed. R. Evid. 801(c)] The rule against hearsay is probably the most important exclusionary rule of evidence. If a statement is hearsay, and no exception to the rule is applicable, the evidence must be excluded upon appropriate objection to its admission. [Fed. R. Evid. 802]

1. Reason for Excluding Hearsay

The reason for excluding hearsay is that the adverse party was **denied the opportunity to cross-examine the declarant**; i.e., the party had no chance to test the declarant's perception (how well did she observe the event she purported to describe), her memory (did she really remember the details she related), her sincerity (was she deliberately falsifying), and her ability to relate (did she really mean to say what now appears to be the thrust of her statement).

a. Cross-Examination of Declarant

Note that it is the declarant who made the statement that the adverse party was not able to cross-examine. Of course, the adverse party can cross-examine the witness who repeats the statement, but this does not help much where all the witness does is repeat a statement as to which the party needs to cross-examine the original declarant.

If W (witness on the stand) testifies as to what D (declarant making out-of-court statement) said about an event, and D's statement is **offered for its truth**, then the opportunity to cross-examine W is not enough. The party against whom W testifies has **no opportunity to test** the perception, the memory, the articulateness, or the veracity of D, the very witness whose account of the event the jury is being asked to believe. Of course, W is available for cross-examination, but W is only repeating what D said, and W is of little help in the attempt to question the accuracy of D's version.

b. Cross-Examination at Time Statement Made

Note too that the **declarant and witness can be the same person**. For example, a witness might state, "I don't remember anything about the accident, but I do remember that later that day I said to my wife, 'the black car went through the red light.'" Since the adverse party could not cross-examine the witness-declarant as to his perception, memory, sincerity, or ability to relate at the time the statement was made, the statement is hearsay. It is **contemporaneous** cross-examination that is required.

2. "Statement"

For purposes of the hearsay rule, a "statement" is a person's (1) oral or written assertion, or (2) nonverbal conduct intended as an assertion. [Fed. R. Evid. 801(a)]

a. Oral Statements

"Statement" includes oral statements (i.e., where the witness testifies that somebody said "...").

b. Writings

Any written document that is offered in evidence constitutes a "statement" for hearsay purposes.

c. Assertive Conduct

Conduct intended by the actor to be a substitute for words (e.g., the nod of the declarant's head indicating yes) is a "statement" within the meaning of the hearsay rule.

d. Nonassertive Conduct

Under the traditional common law definition of hearsay, "statement" included nonassertive conduct—sometimes called "Morgan hearsay." Nonassertive conduct is conduct the declarant **did not intend as an assertion** but which is being offered as an assertion. However, under modern codes and the Federal Rules, evidence of nonassertive conduct is not hearsay. The rationale is that the likelihood of fabrication is less with nonassertive conduct than with assertive or verbal conduct.

EXAMPLES

- 1) Consider the conduct of a deceased sea captain who, after examining every part of a ship, embarked on it with his family, when his conduct is being introduced on the question of the seaworthiness of the vessel. Although the sea captain did not intend his embarking on the vessel to serve as an assertion of anything, his conduct can be used to imply that he thought the ship was seaworthy and, since he knew his business, that the ship was in fact seaworthy.
 - 2) Similarly, the fact that a doctor treated a person for plague is nonassertive conduct by the doctor that could be used to show that the person had plague.
-

3. “Offered to Prove the Truth of the Matter”

This is the most crucial component of the hearsay rule. The basic reason for rejecting hearsay evidence is that a statement offered to prove that which it asserts is true may not be trustworthy without the guarantees of cross-examination. However, where the out-of-court statement is introduced for any purpose other than to prove the truth of the matter asserted, there is no need to cross-examine the declarant, and so the statement is not hearsay.

EXAMPLE

The witness on the stand testifies, “On April 2, Decla said to me, ‘Yesterday I was in Buffalo.’” If the issue is whether Decla was in Buffalo on April 1, the testimony is hearsay. It is **not** hearsay if the issue is whether on April 2, Decla was capable of talking. On the latter issue, it is enough to cross-examine the witness.

The following are other examples of out-of-court statements that are not hearsay.

a. Verbal Acts or Legally Operative Facts

There are certain utterances to which the law attaches legal significance (e.g., words of contract, defamation, bribery, cancellation, permission). Evidence of such statements (sometimes called “legally operative facts”) is not hearsay because the issue is simply whether the statements were made.

EXAMPLES

- 1) In an action on a **contract**, words that constitute the offer, acceptance, rejection, etc., are not hearsay because they are offered only to prove what was said, and not that it was true.
 - 2) Similarly, in a **defamation** action, the statement alleged to be a slander or libel may be admissible as nonhearsay. Thus if D said, “X is a thief,” X will introduce D’s statement not to show its truth—that he himself is a thief—but merely to show that the actionable statement was made.
-

b. Statements Offered to Show Effect on Listener or Reader

A statement that is inadmissible hearsay to prove the truth of the statement may nevertheless be admitted to show the statement's effect on the listener or reader.

EXAMPLES

1) In a **negligence case** where knowledge of a danger is the issue, a third person's statement of warning is admissible for the limited purpose of showing **knowledge or notice** on the part of a listener. Thus, a statement to the defendant driver, "Your tire is about to burst," is admissible to show that the defendant had notice of the possible danger. Of course, it is inadmissible hearsay to show that the statement was true—i.e., that there was in fact a defect or dangerous condition.

2) H is on trial for the stabbing murder of W. H claims the killing was done by a bushy-haired, one-armed man whom H saw fleeing the scene. Policeman, P, testifies for the prosecution that H was arrested immediately after the killing and that a letter was found in H's possession. The letter states, "Your wife has been having an affair with your neighbor, Mr. Gigolo, for the last five years. Wise up!" The letter was signed, "A friend." Prosecutor offers this letter to establish H's motive for killing W. Is the letter hearsay? No! True, the letter is an out-of-court statement of "friend." But it is not offered to prove the truth of its contents. The letter is relevant to the issue of **motive** and would still be relevant to motive if, in fact, W had been faithful. The letter, true or not, is offered to show the probable effect it had on H when he read it.

c. Statements Offered as Circumstantial Evidence of Declarant's State of Mind

Statements by a declarant that serve as circumstantial evidence of the declarant's state of mind are not hearsay. Such statements are not offered to prove the truth of the matters asserted but only that the declarant **believed** them to be true. The most common examples of this type of nonhearsay are evidence of **insanity** and evidence of **knowledge**.

EXAMPLES

1) In a proceeding where the declarant's sanity is in issue, evidence is offered to show that the declarant had stated out of court, "I am John the Baptist." This statement would not be introduced as proof of its truth, but rather as circumstantial evidence of the declarant's insanity.

2) Evidence that before an accident an automobile driver stated, "My brakes are defective," is not admissible to prove that the brakes were defective, but is admissible to show that the declarant believed the brakes were defective but drove the car anyway.

1) **Compare—State of Mind Exception**

Statements that reflect directly (rather than circumstantially) on the declarant's state of mind are **hearsay but are admissible** under an exception to the hearsay rule (see D.3., *infra*). Many courts have used this "state of mind exception" to admit all declarations that reflect on the declarant's state of mind without regard to the fact that many could simply be admitted as nonhearsay. Although the ability to distinguish the two may be helpful for exam purposes, as a practical matter, the distinction makes little difference because the result (admissibility of the statements) is the same.

4. Nonhuman Declarations

There is no such thing as animal or machine hearsay. Hearsay involves an out-of-court statement by a **person**. Therefore, a witness who testifies to the time of day (what the clock says) or to radar readings (what the machine says) is not testifying to hearsay. Data that is generated completely electronically is not hearsay. Similarly, the behavior of a drug-sniffing dog in identifying a suspect is not hearsay. The issues presented by these examples are ones of relevance or reliability of the mechanism or animal. For example, a witness may testify to the actions of a drug-sniffing dog in identifying a suspect if there is a foundation showing that the dog was properly trained and is reliable in identifying drug carriers.

5. Illustrations of Hearsay and Nonhearsay

The following are specific examples of the application of the hearsay definition.

a. Hearsay

- 1) On the issue of whether the traffic light was red or green, the witness testifies that he was told by Decla that the light was green. (**Oral** hearsay.)
- 2) On the issue of whether a glassine envelope contained heroin, the prosecution offers a crime laboratory report that the envelope contained heroin. (**Written** hearsay.)
- 3) On the issue of whether Spano had been a resident of New York for one year prior to commencing his lawsuit, Spano offers the affidavit of Decla that Spano had lived in Buffalo for 10 years. (**Written** hearsay; under oath, but hearsay nonetheless.)
- 4) On the issue of whether Yuckl was the child molester, a police officer testifies that when he asked the child-victim whether the perpetrator had a beard, the child nodded his head. (Hearsay by **assertive conduct**; nodding, which translates, "Yes, the man had a beard.")

- 5) On the issue of whether the painting sold to Harvey was actually a genuine Picasso, there is offered a dealer's bill of sale describing the painting as a Picasso. (**Written** hearsay.)

b. Nonhearsay

- 1) In a contract action, the written, executed contract is offered. (Although an extra-judicial writing, it is not offered to prove the truth of matters asserted in it; **legally operative fact**.)
- 2) In an action for fraud, on the issue of defendant's good faith in representing to plaintiff that a painting was a genuine Picasso, defendant offers a bill of sale from his art dealer describing the painting as a Picasso. (Offered to prove **defendant's good faith** in repeating a representation; not offered to prove that the painting was in fact a Picasso. The evidence, in other words, was offered to show the impact of the dealer's representation on the defendant's state of mind, i.e., his belief.)
- 3) On the issue of whether landlord knew about a defective stair, a witness testifies that he heard Decla say to the landlord, "The stair is broken." (Offered to prove **notice**, not that the stair was in fact broken.)
- 4) On the issue of whether the complaining witness had a venereal disease, Grutz testifies for the prosecution that the complaining witness had not been placed in the venereal disease ward upon her admission to the girls' reformatory. (Nonhearsay under the Federal Rules, since it is **nonassertive conduct**.)
- 5) On the issue of whether a transfer of a share of stock from Decla to Bushmat was a sale or a gift, Bushmat testifies that Decla made a statement at the time of the transfer: "I'm giving you this share of stock as a birthday present." (**Legally operative** words of gift.)
- 6) Action for personal injuries by a guest in an automobile against its owner. On the issues of contributory negligence and assumption of risk, a witness testifies that an hour before the accident a mechanic said to the owner in the presence of the guest, "The tread on that left front tire is paper-thin. You're likely to have a blowout." (**Notice, knowledge**; not offered to establish that in truth the tread was thin.)
- 7) Action of P against D. Witness No. 1 testifies for P that D's car was going "over 70 miles an hour." To impeach Witness No. 1, D offers the testimony of Witness No. 2 that Witness No. 1 said a day after the accident that D was going "slowly." (Used solely to cast **doubt on credibility**; not offered to establish the truth of the assertion.)

6. Hearsay Within Hearsay

An out-of-court statement that incorporates other hearsay within it is known as “hearsay within hearsay.” Hearsay within hearsay is admissible only if both the outer hearsay statement **and** the inner hearsay statement fall within an exception to the hearsay rule. [Fed. R. Evid. 805] Note that in the context of the hearsay within hearsay rule, a statement categorized as a hearsay exclusion (e.g., an opposing party’s statement) functions as a hearsay exception.

EXAMPLES

- 1) The prosecution in a homicide case introduces the following statement from Victim, made when she knew she was about to die: “Defendant did this to me. He said he used an undetectable poison.” Victim’s outer statement is admissible as a dying declaration (see C.4., *infra*), and Defendant’s incorporated statement is admissible as a statement of an opposing party (see B.2., *infra*). Thus, Victim’s statement is admissible.
- 2) The manager of a grocery store drafts a standard incident report after a customer, Bob, falls and injures himself. At trial, the store offers a portion of the report that says, “An hour later, I interviewed Anne, a shopper who witnessed Bob’s fall. She said that Bob was running at high speed and tripped over his own feet.” The report itself likely qualifies as a business record (see D.5., *infra*), but Anne’s incorporated statement does not fall within any hearsay exception. Thus, the report is inadmissible.

B. STATEMENTS THAT ARE NONHEARSAY UNDER THE FEDERAL RULES

Federal Rule 801(d) removes from the definition of hearsay certain statements that would be hearsay under the common law definition. Since the following types of statements are **not hearsay**, they are admissible as substantive evidence (unless excluded for some independent reason). These statements are often called hearsay “exclusions” or “exemptions.”

1. Prior Statements by Witness

Certain statements by a person who testifies at the trial or hearing, and is **subject to cross-examination** about the statements, are not hearsay. A witness is generally “subject to cross-examination” when she is placed on the stand, is under oath, and responds willingly to questions.

a. Prior Inconsistent Statement

A witness’s prior inconsistent statement is not hearsay if it was made **under penalty of perjury** at a prior trial or proceeding, or in a deposition. [Fed. R. Evid. 801(d)(1)(A)] For example, a statement made by the witness during grand jury testimony, if inconsistent with her in-court testimony, would be admissible not only to impeach her credibility (VI.E.3.a., *supra*) but also as substantive proof.

b. Prior Consistent Statement

A prior consistent statement, regardless of whether made under oath, is not

hearsay if it is offered under either of the following circumstances: (1) to rebut an express or implied charge that the witness is lying or exaggerating because of some motive, provided the prior consistent statement was made **before** the onset of the alleged motive to lie or exaggerate [Tome v. United States, 513 U.S. 150 (1995)]; or (2) to rehabilitate a witness whose credibility has been impeached on some non-character ground **other** than a charge of recent motivation to lie or exaggerate, such as an alleged inconsistency or sensory deficiency. [Fed. R. Evid. 801(d)(1)(B); see VI.E.6.c., *supra*, for further discussion and examples]

c. Prior Statement of Identification

A witness's prior statement identifying a person as someone he perceived earlier is not hearsay. [Fed. R. Evid. 801(d)(1)(C)] This is true even if the witness currently lacks memory and cannot testify as to the basis of the prior identification. [United States v. Owens, 484 U.S. 554 (1988)] Photo identifications are within the scope of this rule. Note that the prior identification need not have been made at a formal proceeding or under oath, and its admissibility is not limited to rehabilitation of the witness.

2. Statements by or Attributable to Opposing Party (Admissions by Party-Opponent)

Under the Federal Rules, a statement by an opposing party (traditionally known as an "admission by a party-opponent") is not hearsay. Simply put, any statement **made by a party** and **offered against that party** is not hearsay. The party who made the prior statement can hardly complain about not having had the opportunity to cross-examine himself. He said it. He is stuck with it. Let him explain it if he can.

Note: Although an opposing party's statement will fall within this hearsay exclusion even if it does not "admit" anything, these statements are still commonly referred to as "admissions" by some courts and commentators.

a. In General

A statement need not have been against interest at the time it was made to qualify as an opposing party's statement (compare the statement against interest exception, C.3., *infra*). The statement may even be in the form of an opinion. Note that some states admit these statements under an exception to the hearsay rule.

1) Personal Knowledge Not Required

Lack of personal knowledge **does not necessarily disqualify** a party's statement (e.g., president of defendant company said, "My company has investigated the matter thoroughly and the reports indicate that we were negligent"). In fact, an opposing party's statement may be predicated on hearsay.

2) Judicial and Extrajudicial Statements

Formal judicial statements (in pleadings, responses to requests to admit, stipulations) are **conclusive**; informal judicial statements made during testimony **can be explained**; extrajudicial (evidentiary) statements are **not conclusive and can be explained**. A formal judicial statement in one proceeding may be admissible as an extrajudicial or evidentiary statement in another proceeding. (Plea of guilty to traffic infraction admissible in civil action on same facts.) A formal judicial statement that is withdrawn may in that same action become an informal statement (statements in original answer admissible though superseded by amendment). A withdrawn plea of guilty in a criminal case is not, however, admissible against a defendant in any civil or criminal proceeding. [Fed. R. Evid. 410]

3) Adoptive Statements

A party may expressly or impliedly adopt someone else's statement as his own, thus giving rise to an adoptive statement. [Fed. R. Evid. 801(d)(2)(B)]

EXAMPLE

Where Plaintiff claims an orthopedic abnormality in a suit against Defendant, Defendant may properly offer against Plaintiff Plaintiff's prior application for a chauffeur's license, which included a doctor's certificate stating that Plaintiff had "no orthopedic abnormality."

a) Silence

If a party fails to respond to accusatory statements where a reasonable person would have spoken up, his silence may be considered an implied statement. For silence to qualify as an opposing party's statement, the following requirements must be met:

- (1) The party must have **heard and understood** the statement;
- (2) The party must have been **physically and mentally capable of denying** the statement; and
- (3) A **reasonable person would have denied** the accusation under the same circumstances.

Note that failure to reply to an accusation or statement made by the police in a criminal case can **almost never** be used as an implied admission of a criminal act.

b. Vicarious Statements

A declarant's statement may be attributable to a party because of the

relationship between them. The question that remains is—what relationship must exist between the declarant and the party to make the former's statement admissible against the latter?

1) Co-Parties—Insufficient Relationship

Statements of a party are ***not receivable against her co-plaintiffs or co-defendants*** merely because they happen to be joined as parties to the action. If there are two or more parties, the statement of one is receivable against her but, in the absence of authority, not against her co-party.

2) Authorized Spokesperson

The statement of a person ***authorized by a party to speak on its behalf*** (e.g., statement by company's press agent) can be admitted against the party. [Fed. R. Evid. 801(d)(2)(C)]

3) Agents and Employees

Statements by an agent or employee concerning any matter ***within the scope of her agency or employment***, made ***during the existence of the agency or employment relationship***, are admissible against the principal. [Fed. R. Evid. 801(d)(2)(D)] Therefore, if a truck driver-employee has an accident while on the job and admits that she was negligent, this statement may be introduced against her employer even if she was not authorized to speak for the employer.

4) Partners

After a partnership is shown to exist, a statement of one partner, relating to matters ***within the scope of the partnership business***, is binding upon her co-partners since, as to such matters, each partner is deemed the agent of the others.

5) Co-Conspirators

The Supreme Court has held that statements of one conspirator, made to a third party ***in furtherance of a conspiracy*** to commit a crime or a civil wrong, at a time when the declarant was participating in the conspiracy, are admissible against co-conspirators. [United States v. Inadi, 475 U.S. 387 (1986)] The thought is that a conspiracy is analogous to a partnership—"partners in crime." The government need not demonstrate the unavailability of a non-testifying co-conspirator as a prerequisite to admission of the co-conspirator's out-of-court statements. For the statement to be admissible, the court must determine the existence of a conspiracy, and the participation of the declarant and party in that conspiracy, by a preponderance of the evidence standard (meaning, "more probably true than not true"). [Bourjaily v. U.S., 483 U.S. 171 (1987)] The court must use the co-conspirator's statement itself, together with other evidence, to

determine whether the statement is admissible. [Fed. R. Evid. 801(d)(2)] In other words, the proponent is not required to establish the existence of the conspiracy, and the participation of the declarant and party, with evidence that is entirely independent of the statement itself. (See 7), below.)

6) Privies in Title and Joint Tenants—State Courts Only

Where one person succeeds to the same property rights formerly enjoyed by another, there is often such privity that the rights of the present owner may be affected by statements of the former owner made before the owner parted with her interest. In most state courts, statements of each joint owner are admissible against the other, and statements of a former owner of real property made at the time she held title are **admissible against those claiming under** her (grantees, heirs, devisees, or otherwise). These statements do not qualify as opposing party statements under the Federal Rules, although they may be admissible under one of the hearsay exceptions (e.g., as a statement against interest).

7) Preliminary Determination of Agency or Conspiracy—Court Must Consider Contents of Hearsay Statement

Before an out-of-court statement is admissible as a vicarious statement of an opposing party, the court must make a preliminary determination of the declarant's relationship with the party against whom the statement is being offered. When making a determination of (1) the declarant's authority to make the statement, (2) the existence and scope of an agency relationship, or (3) the existence of a conspiracy and participation by the declarant and the party, the **court must consider the contents of the offered statement**, but the statement alone is **not sufficient** to establish the required relationship or authority. [Fed. R. Evid. 801(d)(2)]

C. HEARSAY EXCEPTIONS—DECLARANT UNAVAILABLE

Certain kinds of hearsay are considered to have special guarantees of trustworthiness and are recognized exceptions to the hearsay exclusion. The Federal Rules treat the exceptions in two groups—those that require the declarant be unavailable, and those under which the declarant's availability is immaterial. This section covers the five important exceptions requiring the declarant's unavailability: (1) former testimony, (2) statements against interest, (3) dying declarations, (4) statements of personal or family history, and (5) statements offered against party procuring declarant's unavailability.

1. “Unavailability” Defined

A declarant is unavailable if:

- a. He is **exempted** from testifying because the court rules that a **privilege applies**;
- b. He **refuses to testify** concerning the statement despite a court order to do so;

- c. He testifies to **not remembering** the subject matter;
- d. He is **unable** to be present or testify because of **death or physical or mental illness**; or
- e. He is **absent** (e.g., beyond the reach of the trial court's subpoena) and the statement's **proponent** has been **unable to procure** his **attendance or testimony** by process or other reasonable means. If the declarant cannot attend the trial or hearing but is able to give deposition testimony, he is considered to be an available witness, except with respect to the "former testimony" and "forfeiture by wrongdoing" exceptions discussed in 2. and 6., below.

[Fed. R. Evid. 804(a)(1) - (5)] Note that a declarant is not unavailable if his "unavailability" was procured by the proponent of the statement or if the statement's proponent did not attempt to procure the declarant's attendance.

2. Former Testimony

The testimony of a now-unavailable witness given at a trial, hearing, or in a deposition taken in accordance with law is admissible in a subsequent trial as long as there is a sufficient similarity of parties and issues so that the opportunity to develop testimony or cross-examine at the prior hearing was meaningful. [Fed. R. Evid. 804(b) (1)] This exception is the clearest example of hearsay with special guarantees of trustworthiness, since the former testimony was given during formal proceedings and under oath by a witness subject to cross-examination.

a. Identity of Parties

The requirement of identity of parties does not mean that parties on both sides of the controversies must be identical. It requires only that the party **against whom** the testimony is offered or, in civil cases, the party's predecessor in interest was a **party in the former action**. "Predecessor in interest" includes one in a privity relationship with the party, such as grantor-grantee, testator-executor, life tenant-remainderman, and joint tenants. The requirement of identity of parties is intended merely to ensure that the party against whom the testimony is offered (or a predecessor in interest in a civil case) had an adequate opportunity and motive to cross-examine the witness.

b. Identity of Subject Matter

The former testimony is admissible upon any trial in the same or another action of the same subject matter. Again, the sole purpose of this requirement is to ensure that the party against whom the transcript of testimony is offered had an adequate opportunity to cross-examine the unavailable witness on the relevant issue. Obviously, the "cause of action" in both proceedings need not be identical. It is enough if the "subject matter" of the testimony is the same. In other words, the party against whom the testimony is offered must have had an opportunity and similar motive to develop declarant's testimony at the prior hearing.

c. **Opportunity to Develop Testimony at Prior Hearing**

The party against whom the former testimony is offered (or a predecessor in civil cases) must have had the opportunity to develop the testimony at the prior proceeding by direct, cross, or redirect examination of the declarant. Thus, the **grand jury testimony** of an unavailable declarant is **not admissible** as former testimony **against the accused** at trial. This is because grand jury proceedings do not provide the accused with the opportunity for cross-examination.

d. **Under Oath**

The former testimony must have been given under oath or sworn affirmation.

e. **Use in Criminal Proceedings**

It has been argued that the use in a criminal proceeding of former testimony from some prior trial violates the defendant's constitutional **right to confront and cross-examine** all adverse witnesses. However, the Supreme Court has rejected this argument, holding that there is **no violation** of an accused's right of confrontation, as long as:

- 1) The accused or his attorney was present and **had the opportunity to cross-examine** at the time the testimony was given (e.g., at a preliminary examination or a former trial for the same offense); **and**
- 2) The witness, whose former testimony is sought to be used, is now **unavailable**, despite bona fide efforts by the prosecution to produce him. [California v. Green, 399 U.S. 149 (1970)] *Note:* A greater showing of "unavailability" is required in criminal cases than in civil cases. For example, a mere showing that a witness is incarcerated in a prison outside the state has been held insufficient to establish "unavailability" (because no showing that he could not be produced by prosecution). [Barber v. Page, 390 U.S. 719 (1968)]

3. Statements Against Interest

A statement of a person, now unavailable as a witness, may be admissible if it was against that person's pecuniary, proprietary, or penal interest when made. To be admissible under the statement against interest exception, the statement must have been so against the declarant's pecuniary or proprietary interest, or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability, that a reasonable person in the declarant's position would have made the statement only if she believed it to be true. [Fed. R. Evid. 804(b)(3)] The statement against interest differs most significantly from an opposing party's statement in that, under the statement against interest exception, the statement **must be against interest when made**, and the declarant whose statement is admitted may be a stranger to the litigation rather than a party.

a. Requirements of the Statement

To qualify as an exception to the hearsay rule, a statement against interest must meet the following requirements:

- 1) The statement must have been ***against pecuniary, proprietary, or penal interest when made***, such that a ***reasonable person*** in the declarant's position would have made it only if she believed it to be true.
- 2) Declarant must have had ***personal knowledge of the facts***.
- 3) Declarant must have been ***aware that the statement is against her interest*** and she must have had ***no motive to misrepresent*** when she made the statement.
- 4) Declarant must be ***unavailable as a witness***.

b. Risk of Civil Liability

Under the Federal Rules, statements subjecting the declarant to civil liability are specifically admissible. [Fed. R. Evid. 804(b)(3)]

c. Risk of Criminal Liability

Many courts have been reluctant to admit evidence of statements that subject the declarant to penal liability for fear of opening a door to a flood of perjured testimony. The modern trend and the Federal Rules permit statements against penal interest. However, in ***criminal cases***, the Federal Rules require that there be ***corroborating circumstances*** indicating the trustworthiness of such statements. [Fed. R. Evid. 804(b)(3)]

1) Third-Party Confession Allowed

States that do not allow statements against penal interest may not exclude the confession of a third party where to do so would deprive the accused of a ***fair trial***. [Chambers v. Mississippi, 410 U.S. 284 (1973)]

2) Co-Defendant's Confession May Not Be Admissible

The confession of a co-defendant ***implicating herself and the accused*** may not be admissible because of ***confrontation*** problems. (See F.1., *infra*.)

d. "Statement" Means Single Remark

A "statement" against interest for purposes of the exception means a single self-inculpatory remark, not an extended declaration. Thus, if a person makes a declaration containing statements that are against his interest and statements that are not, the statements that are not against interest are not admissible, even though they are part of a broader narrative that is on the whole against the declarant's interest. [Williamson v. United States, 512 U.S. 594 (1994)]

EXAMPLE

X confessed to receiving and transporting drugs, but in so doing implicated Y as the owner of the drugs. The statements implicating Y did not contain any information against X's interest, although the confession as a whole was clearly against X's penal interest. X refused to testify at Y's trial. X's statements implicating Y are not within the scope of the hearsay exception for statements against interest and are thus inadmissible. The exception covers only those remarks that inculpate the declarant, not the extended declaration. [See *Williamson v. United States, supra*]

4. Dying Declarations—Statements Under Belief of Impending Death

In a prosecution for ***homicide or a civil action***, a statement made by the now-unavailable declarant while ***believing his death was imminent*** that concerns the ***cause or circumstances*** of what he believed to be his impending death is admissible. [Fed. R. Evid. 804(b)(2)] The declarant need not actually die, but he must be unavailable (see 1., *supra*) at the time the statement is offered.

Note that under the traditional view, still followed by some states, the statement was admissible only in homicide prosecutions (not civil actions), and then only if the declarant actually died.

a. Firsthand Knowledge Required

To fall within the dying declaration exception, the statement must be based on the declarant's firsthand knowledge of what happened. As under the general rule for lay opinion testimony, a statement framed as an opinion is not admissible unless based on the declarant's perceptions (e.g., unsupported speculation as to the assailant's identity or motive would not qualify). [See Advisory Committee Note to Rule 804]

5. Statements of Personal or Family History

Statements concerning birth, marriage, divorce, death, relationship, etc., are admissible under an exception to the hearsay rule. Hearsay statements concerning family history are often necessary to prove the facts of people's everyday lives. For example, most people rely on the hearsay statements of others for the knowledge of where they were born, who their relatives are, etc.

a. Statement Need Not Have Been Made Before Controversy

In most jurisdictions, the statement must have been made at a time when no controversy existed as to the matters stated—to ensure their reliability. However, the Federal Rules have dropped this requirement on the theory that the time at which the statement was made affects its weight rather than its admissibility. [Fed. R. Evid. 804(b)(4)]

b. Usually Declarant Must Be a Family Member

The now-unavailable declarant must be a member of the family in question or

otherwise intimately associated with the family. Most jurisdictions require that the declarant be related by blood or marriage to the family whose history is involved. Some jurisdictions, and the Federal Rules, have extended this requirement to admit statements by declarants who are so intimately associated with the family that they are likely to have accurate information concerning the matters declared (e.g., the family doctor). [Fed. R. Evid. 804(b)(4)]

c. Personal Knowledge Required

The declarant's statements may be based either on her own personal knowledge of the facts involved or on her knowledge of family reputation.

d. Other Ways to Prove Pedigree

Personal and family history may be proven by use of other exceptions to the hearsay rule. For example, it may be proven by: vital statistics [Fed. R. Evid. 803(9)]; records of religious organizations [Fed. R. Evid. 803(11)]; marriage certificates and other certificates [Fed. R. Evid. 803(12)]; family records [Fed. R. Evid. 803(13)]; statements in property documents [Fed. R. Evid. 803(15)]; reputation [Fed. R. Evid. 803(19)]; and judgments [Fed. R. Evid. 803(23)]. For these exceptions, the declarant's availability is immaterial.

6. Statements Offered Against Party Procuring Declarant's Unavailability

The statements of a person (now unavailable as a witness) are admissible when offered against a party who has engaged or acquiesced in wrongdoing that procured the declarant's unavailability as a witness, if the party **intended to cause that result**. [Fed. R. Evid. 804(b)(6)] In effect, a party forfeits his right to object on hearsay grounds to the admission of an unavailable declarant's statements when the party's deliberate wrongdoing procured the unavailability of the declarant as a witness.

D. HEARSAY EXCEPTIONS—DECLARANT'S AVAILABILITY IMMATERIAL

The following exceptions do not require that the declarant be unavailable. The admissibility of these declarations proceeds upon the theory that the out-of-court declarations were made under circumstances that make them more reliable and therefore preferable to the actual in-court testimony of the declarant. Included in this group of exceptions are the following:

1. Excited Utterances

A declaration made by a declarant during or soon after a startling event is admissible. The declaration must be made under the stress of excitement produced by the startling event. The declaration must relate to the startling occurrence. [Fed. R. Evid. 803(2)] The spontaneousness of such a declaration and the consequent lack of opportunity for reflection and deliberate fabrication provide an adequate guarantee of its trustworthiness.

a. **Startling Event Required**

There must have been some occurrence startling enough to produce a nervous excitement and thus render the declaration an unreflective and sincere expression of the declarant's impression. The declaration **must relate to the startling event.**

b. **Declaration Must Be Made While Under Stress of Excitement**

The declaration must have been made while the declarant was under the stress of the excitement (i.e., **before the declarant had time to reflect** upon it). The time element is the most important factor in determining whether the declaration was made under the stress of the excitement. If a declaration is made while the event is still in progress, it is easy to find that the excitement prompted the utterance. Declarations made shortly after the event have sometimes been excluded as mere narrative of past events. But when the declaration is made so near to the time of the occurrence as to negate any probability of fabrication, it is usually admissible.

2. Present Sense Impressions

A present sense impression is a statement that **describes or explains** an event or condition, and is made **while** or **immediately after** the declarant perceives the event or condition. A present sense impression is admissible as an exception to the hearsay rule.

a. **Safeguards**

Such a comment regarding a situation then before the declarant, i.e., the statement of a present sense impression, does not have the supposed safeguards of impulse, emotion, or excitement, but there are other safeguards of reliability. Statements of present sense impression are **safe from defects in memory**. There is usually little or **no time for calculated misstatement**. The statement will usually have been made to another person—the very witness who reports it—who would have **equal opportunity to observe** and to contradict or correct a misstatement.

EXAMPLE

Decla said to N, "Look at that car go." W may testify that Decla made the statement in order to prove that the car was speeding.

3. Present State of Mind

A statement of the declarant's then-existing state of mind (e.g., motive, intent, or plan) or emotional, sensory, or physical condition is admissible. [Fed. R. Evid. 803(3)] The exception is based on the need to obtain evidence as to the declarant's internal state of mind or emotion. It must usually be made under circumstances of apparent sincerity. The statement is often offered to establish the **intent** of a person, either as

a direct fact to be proved as such (domicile, criminal intent) or as a basis for a circumstantial inference that the intent was probably carried out.

Note: The operation of this exception for a declarant's statement of present physical condition is discussed separately in 4.a., below.

a. Rationale

The rationale is that (1) insofar as the declarant knows her own state of mind, there is no need to check her perception; (2) since the statement is of present state of mind, there is no need to check her memory; and (3) since state of mind is in issue, it must be shown some way—and very often, the declarant's own statement is the only way.

b. When Admissible

1) State of Mind Directly in Issue and Material to the Controversy

Declarations of existing state of mind are admissible when the declarant's state of mind is directly in issue and material to the controversy.

EXAMPLE

In a case where the domicile of Edwina is material, Edwina's statement that "I plan to live in Colorado for the rest of my life" is admissible.

2) Offered to Show Subsequent Acts of Declarant

Declarations of existing state of mind are also admissible when the declarant's state of mind is not directly in issue—if they are declarations of intent offered to show subsequent acts of the declarant; i.e., a declaration of intent to do something in the future is admitted as circumstantial evidence tending to show that the intent was carried out. In *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285 (1892), a hearsay written statement was admitted into evidence to prove the declarant did what he said he intended to do.

EXAMPLES

1) The location of X on May 15 is relevant. W may testify that she heard X say on May 8 that "I intend to go to Denver next week."

2) In a prosecution of a husband for murder of his wife, the wife's prior statements that she intended to commit suicide are admissible.

c. Statements of Memory or Belief Generally Not Admissible

The hearsay statement is **not admissible** if it expresses a memory or belief of the declarant, and the statement is offered for the purpose of proving the **truth of the fact remembered or believed**.

EXAMPLE

Declarant's out-of-court statement, "I think I left the keys in the car," may not be introduced for the purpose of proving that he left the keys in the car.

Statements of memory or belief are **admissible**, however, to prove facts remembered or believed concerning the validity or terms of **declarant's will**.

4. Declarations of Physical Condition

There are two hearsay exceptions involving statements of physical condition: (1) statements of **the declarant's present physical condition, regardless of the purpose** for which the statement is made; and (2) **statements made for the purpose of obtaining medical diagnosis or treatment**. Thus, whether a declarant's statement will fall within one or the other of these exceptions depends on the purpose for which it was made.

a. Statement of Declarant's Present Bodily Condition

Generally, declarations of present bodily condition are admissible as an exception to the hearsay rule, even though they are not made to a physician. They may be made to a spouse, relative, friend, or any other person. Of course, declarations made to a physician are admissible. [Fed. R. Evid. 803(3)] Such declarations relate to symptoms, including the existence of pain. Because they are contemporaneous with the symptoms, they are more reliable than present testimony based upon recollection.

EXAMPLE

Victim tells friend, "My ankle hurts so much it must be broken." The statement is admissible as a declaration of present pain, although it is not to be used to prove the ankle was in fact broken.

b. Statement Made for Medical Diagnosis or Treatment—Includes Past Conditions

A statement that describes a person's **medical history, past or present symptoms**, or their **inception or general cause** is admissible as an exception to the hearsay rule if it was made for—and was **reasonably pertinent** to—medical diagnosis or treatment. [Fed. R. Evid. 803(4)] The rationale for this exception is that a declarant has a strong motive to tell the truth when seeking medical assistance.

1) Cause or Source of Injury—Must Be Pertinent

Remember that the cause or source of the injury must be reasonably pertinent to diagnosis or treatment to be admissible under this exception. Statements assigning fault or identifying a perpetrator are generally not pertinent.

EXAMPLE

The statement, “Doctor, I was hit by a truck” would likely be admitted under this exception, but “Doctor, the blue truck ran the red light” would not be admitted.

a) Special Treatment for Statements by Child Abuse Victims

In child abuse cases, many federal courts will admit statements in which a child identifies his abuser in the course of medical treatment. The rationale is that the identity of the abuser is often critical to treating the child’s psychological or emotional injuries (e.g., removing the abuser from the child’s household). [See *United States v. Renville*, 779 F.2d 430 (8th Cir. 1985)]

2) Declarant Seeking Help for Someone Else

Usually, the declarant is the patient and is seeking help for herself, but this is not required. Statements by family members and bystanders may be admitted under this exception as long as the statements were clearly made to obtain a diagnosis or treatment for the patient. (Note that the court may exclude the statement if there are concerns about its reliability.)

3) Need Not Be Made to Physician

Although such statements are usually made to a doctor or nurse, this is not required. Statements to ambulance drivers, hospital staff, and even the declarant’s own family members may be admitted under the exception as long as they are made for, and reasonably pertinent to, medical diagnosis or treatment.

4) Statements Made to Doctor Employed to Testify—Admissible Under Federal Rules

Contrary to the majority state view, Rule 803(4) permits statements made to a doctor employed to testify in the case.

5. Records of a Regularly Conducted Activity—Business Records

Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, event, condition, opinion, or diagnosis is admissible in evidence as proof of that act, event, condition, opinion, or diagnosis if made in the regular course of any business; and if it was the regular course of such business to make it at the time of the act, event, condition, opinion, or diagnosis or within a reasonable time thereafter.

a. Rationale

The rationale for this exception lies in the belief that special reliability is provided by the **regularity** with which business records are kept, their **use and importance** in the business, and the **incentive** of employees **to keep accurate records** or

risk employment penalties. If a record qualifies as a business record, it may be admitted without calling the author of the record or the employee with personal knowledge of the recorded event. It makes no difference that the record is self-serving and offered in evidence by the party whose business made the record.

b. Elements of Business Records Exception

Under the Federal Rules and modern statutes, the main requirements for admissibility of a business record are as follows:

1) “Business”

Although traditionally called a “business record,” the exception applies to records kept by any “business, organization, occupation, or calling, whether or not for profit.” Thus, the definition would include records made by churches, hospitals, schools, etc. [Fed. R. Evid. 803(6)]

2) Entry Made in Regular Course of Business

It must also appear that the record was made in the course of a regularly conducted business activity, and that it was customary to make the type of entry involved (i.e., that the entrant had a duty to make the entry).

a) Business Activity

The record must have been maintained in conjunction with a business activity.

(1) Hospital Records

Entries in hospital records are generally admissible to the extent that they are **related to the medical diagnosis or treatment** of the patient (the primary business of the hospital). For example, a patient’s statement that she was injured on X’s property would probably be inadmissible because whether she was injured on X’s property or someone else’s is unrelated to her medical treatment.

(2) Police Reports

Police reports may qualify as business records in civil cases. Generally, police reports are not admissible against a criminal defendant under the business records exception. However, some jurisdictions admit police reports if they contain only routine information rather than observations or opinions of officers.

(3) The Rule of *Palmer v. Hoffman*—Records Prepared for Litigation

A similar aspect of the “business activity” requirement was raised in the case of *Palmer v. Hoffman*, 318 U.S. 109 (1943). In that case, railroad personnel, in accordance with their regular practice,

prepared a report concerning an accident in which the railroad was involved. The United States Supreme Court held that the report was not admissible at trial because it was prepared in anticipation of litigation, and railroading, not litigating, was the railroad's primary business.

(a) Narrow Interpretation

Many courts have interpreted the rule of *Palmer v. Hoffman* narrowly. These courts have generally **excluded** such a self-serving employee accident report only when the report was prepared **primarily** for litigation and the author of the report had a strong motive to misrepresent.

(b) Federal Rules—Court's Discretion

The Federal Rules have dealt with the problem of *Palmer v. Hoffman* by granting the trial court discretion to exclude any business record if the opponent makes a showing that the **source of information or methods or circumstances of preparation** indicate the record lacks trustworthiness. [Fed. R. Evid. 803(6)]

b) Entrant Under Duty to Record

For a record to have been made in the regular course of a business activity, the entrant must have had some duty to make the entry as part of her employment (i.e., records kept as a hobby do not qualify). This duty may be either public (statutory, etc.) or private (contractual—including duties imposed by an employer).

3) Personal Knowledge

The business record must consist of matters within the personal knowledge of the entrant **or** within the personal knowledge of someone with a business duty to transmit such matters to the entrant.

a) Recorder Need Not Have Personal Knowledge of Event

Most business records statutes do not require that the person making the entries have personal knowledge of the event. Indeed, where the one who has personal knowledge of the transaction (informant) and the one making the record (recorder) are both employees of the business, there is no problem. Once established as a business record, it is admissible without calling either the informant or the recorder, even though the recorder lacked personal knowledge. The integrity of the special reliability assumption is maintained because the informant was under a **business duty to report** accurately and the recorder was under a **business duty to properly record** the information.

b) Informant Must Be Under Business Duty to Convey Information

A problem arises, however, when the informant with personal knowledge is an outsider, having little or no connection with the business whose records are being offered in evidence. The well-known case of *Johnson v. Lutz*, 253 N.Y. 124 (1930), engrafted a limitation on the business records exception. It holds that an entry is admissible as a business record only when the record was made by the employee recorder on information obtained directly by him or imparted to him by an informant who was under a business duty to convey such information. Thus, a police report entry by a police officer was held inadmissible where the informant was a third person who was under no “business” duty to convey information (the “business” being law enforcement). The statutory business records exception, in other words, was not intended to permit receipt in evidence of hearsay statements made by third persons not engaged in the business in question or under any duty in connection with it. Thus, the rationale is that the assumed reliability justifying the hearsay exception cannot be maintained if the information in the record was supplied by an outsider who had no business incentive to report accurately.

c) Recorded Statement May Be Admissible Under Other Exceptions

If, as in *Johnson v. Lutz*, the record-maker and the informant are not business related, the recorded statement of the informant may nonetheless be receivable with the help of some other exceptions to the hearsay rule. This involves a two-phase process. The business records exception serves as a vehicle for demonstrating the bare fact that the **statement was made** (i.e., it allows the paper record to substitute for the in-court testimony of the employees who received the information); the second phase involves reference to some **independent ground of admissibility** of the statement to establish the **truth** of assertions contained in it. A police report entry is receivable where the informant was a party and his statement would be admissible as an **opposing party's statement**. Note too that certain police reports may be admissible under the public records exception (see 7.a., *infra*).

4) Entry Made Near Time of Event

The entry must have been made at or near the time of the transaction while the entrant's knowledge of the facts was still fresh.

5) Authentication

The authenticity of the record must be established. The usual method of authentication is to have the custodian or other qualified witness testify to the identity of the record and the mode of its preparation. However, a foundation witness is not necessary to authenticate the record (i.e., the

record will be self-authenticating) if the custodian or other qualified person certifies in writing that the record meets the requirements of the business records exception and the adverse party receives reasonable written notice (see V.B.5.i., *supra*). [Fed. R. Evid. 803(6), 902(11)]

Normally, the original or first permanent record of the transaction must be introduced, but where the records to be introduced are voluminous, summaries or compilations may be admitted.

6) Entrant Need Not Be Unavailable

For the business record to be admissible, the person who made the entry need not be unavailable as a witness.

7) May Be Excluded If Not Trustworthy—Burden on Opponent

The court may exclude an otherwise qualifying business record if the opponent makes a showing that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

c. Use of Business Records as Evidence of No Transaction

At common law, business records were admitted only to prove the facts contained therein. They were not admissible for negative purposes—i.e., to show that no transaction had taken place. However, the modern trend allows business records to be used to prove the nonoccurrence or the nonexistence of a matter if it was the regular practice of the business to record all such matters. [Fed. R. Evid. 803(7)] For example, the lack of any entry showing payment in a business record may be evidence that in fact no payment was made.

6. Recorded Recollection

Witnesses are permitted to refresh their memories by looking at almost anything—either before or while testifying. This is called **present recollection revived** (see VI.B.3.a., *supra*). However, if the witness's memory cannot be revived, a party may wish to introduce a memorandum that the witness made or adopted at or near the time of the event. Use of the record to prove the facts contained therein raises a hearsay problem; but if a proper foundation can be laid, the contents of the record may be introduced into evidence under the **recorded recollection** exception to the hearsay rule. The rationale is that a record made by an observer when the facts were still fresh in her mind is probably more reliable than her testimony on the stand—despite the fact that cross-examination is curtailed. For admissibility requirements, see VI.B.3.b., *supra*.

7. Official Records and Other Official Writings

a. Public Records and Reports

The exception for public records and reports is necessary to avoid having public

officers leave their jobs constantly to appear in court and testify to acts done in their official capacity, especially since the entrant could probably add nothing to the record. Also, such records are presumed to be trustworthy because officials are under a duty to record properly that which they do.

1) What May Be Admitted

Records, reports, statements, or data compilations, in any form, of a public office or agency are admissible to the extent that they set forth:

- a) The activities of the office or agency;
- b) Matters observed pursuant to a duty imposed by law (excluding police observations in criminal cases); or
- c) In civil actions and proceedings and against the government in criminal cases, factual findings (including opinions and conclusions) resulting from an investigation made pursuant to authority granted by law.

[Fed. R. Evid. 803(8); Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988)]

EXAMPLES

1) A manual prepared by the office that processes Medicare claims, explaining which claims are properly payable under Medicare, is admissible against the defendant in a Medicare fraud case under Federal Rule 803(8)(A).

2) A police officer arrives at the scene of the accident. Several witnesses tell him that Dan drove through a stop sign and hit Vic, who was riding a bicycle. The police officer has had many years' experience in evaluating accident scenes. From the tire marks, he decides that Dan did indeed run the stop sign. In his report he includes the statements of the witnesses and his evaluation of the scene, including his conclusion that Dan ran the stop sign. Everything except the witnesses' statements can be admitted under Federal Rule 803(8)(C), including the officer's conclusion. The witnesses' statements can be admitted only if they fall within some other exception. Remember that the investigative report is admissible only in civil cases and only **against the government** in criminal cases. The report could not be offered against Dan in a criminal prosecution.

3) An Equal Employment Opportunity Commission investigator's report would be admissible in an action against an employer alleging discriminatory employment practices. As with the officer's report above, any hearsay statements will be excised unless they fall within an exception, but the investigator's conclusions and opinions are admissible.

2) Requirements for Admissibility**a) Duty to Record**

The writing must have been made by, and within the scope of duty of, the public employee.

b) Entry Near Time of Event

The writing must have been made at or near the time of the act, condition, or event.

c) May Be Excluded If Not Trustworthy—Burden on Opponent

The court may exclude an otherwise qualifying public record if the opponent makes a showing that the source of information or other circumstances indicate a lack of trustworthiness.

b. Records of Vital Statistics

Records of births, deaths, and marriages are admissible if reported to a public office in accordance with a legal duty. [Fed. R. Evid. 803(9)]

c. Statement of Absence of Public Record

Evidence in the form of testimony or a certification from the custodian of public records (or any other qualified person) that she has diligently searched and failed to find a record is admissible to prove that a matter was not recorded, or, inferentially, that a matter did not occur. [Fed. R. Evid. 803(10)]

1) Limitation on Certifications in Criminal Cases

Because a criminal defendant has a right to confront and cross-examine the witnesses against him (see F., *infra*), he may demand the presence of the custodian or other official who prepared the certification. Thus, this type of testimonial certificate is admissible only if the prosecutor provides the defendant with written notice at least 14 days before trial and the defendant does not object in writing within seven days of receiving the notice (unless the court sets a different timeline).

d. Judgments

A certified copy of a judgment is always admissible proof that such judgment has been entered. The problem is to what extent the facts adjudicated in the former proceeding can be introduced to prove facts in the present case.

1) Prior Criminal Conviction—Felony Conviction Admissible

The traditional view, still followed by most state courts, is that a judgment of conviction is inadmissible. First, it is merely the “opinion” of the jury, and second, it is hearsay as proof of the fact asserted, i.e., the guilt of the defendant. Of course, under certain circumstances the conviction may be used for impeachment. The Federal Rules, however, specifically provide

that a judgment of a felony conviction is ***admissible as an exception to the hearsay rule in both criminal and civil actions to prove any fact essential to the judgment***. For example, if a defendant was convicted of a felony assault, the injured party could use the judgment of conviction in a later civil suit against the same defendant to prove the happening of the assault. In the Rules, felony convictions are defined as crimes punishable by death or imprisonment in excess of one year. [Fed. R. Evid. 803(22)] The convictions that may be used are limited to felonies because persons may choose not to defend misdemeanor charges (e.g., traffic violations).

a) Admissible to Prove Fact Only Against Accused

In a criminal case, the government may use a prior conviction for this purpose only against the accused. Against persons ***other than the accused***, the government may use prior convictions ***only for impeachment***.

b) Rules Barring Character Evidence Still Apply

The hearsay exception for judgments of prior felony convictions is subject to the general rule that prohibits the admissibility of convictions as character evidence. (See II.E., *supra*.) The hearsay exception merely provides a means of proving the facts upon which a conviction is based when such facts are independently admissible either to prove specific acts of misconduct on the issue of a person's motive, intent, absence of mistake, etc., or as proof of prior acts of sexual assault or child molestation in cases alleging sexual assault or child molestation.

2) Prior Criminal Acquittal—Excluded

The exclusionary rule is still applied to records of prior acquittals. The reason is that a criminal acquittal may establish only that the state did not prove the defendant guilty beyond a reasonable doubt, whereas the evidentiary standard is lower in civil cases.

3) Judgment in Former Civil Case

a) Inadmissible in Criminal Proceeding

A civil judgment is clearly inadmissible in a subsequent criminal proceeding because of the differing standards of proof.

b) Generally Inadmissible in Civil Proceeding

The general rule is that civil judgments are also inadmissible in subsequent civil proceedings. However, there are certain statutory ***exceptions*** to the rule of inadmissibility. For example, under the Federal Rules, a prior civil judgment is admissible as proof of matters of personal, family, or general history, or boundaries of land, if it would be provable by

reputation evidence (e.g., X may prove her citizenship by a judgment establishing that X's parents were citizens). [Fed. R. Evid. 803(23)]

8. Ancient Documents

Under the Federal Rules, statements in **any** authenticated document **prepared before January 1, 1998**, are admissible. [Fed. R. Evid. 803(16)]

9. Documents Affecting Property Interests

A statement in a document affecting an interest in property (e.g., deed, will, etc.) is admissible as a hearsay exception if the statement is relevant to the document's purpose. However, the exception will not apply if later dealings with the property are inconsistent with the truth of the statement asserted or the intent of the document. [Fed. R. Evid. 803(15)]

10. Learned Treatises

Many courts do not admit statements from standard scientific treatises or authoritative works as substantive proof, limiting admissibility to use as impeachment of the qualifications of the expert witness. The Federal Rules recognize an exception to the hearsay rule for learned treatises. Federal Rule 803(18) provides for the substantive admissibility of a learned treatise if the treatise is:

- a. Called to the attention of the expert witness upon cross-examination or relied upon by her during direct examination; and
- b. Established as reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice.

Even under the Federal Rules, however, the relevant portion of the treatise is not actually shown to the jury; it is admissible by being read into the record.

11. Reputation

In addition to reputation testimony concerning a person's character [Fed. R. Evid. 803(21)], reputation evidence concerning someone's personal or family history [Fed. R. Evid. 803(19)] or concerning land boundaries or the community's general history [Fed. R. Evid. 803(20)] is admissible hearsay.

12. Family Records

Statements of fact concerning personal or family history contained in family Bibles, genealogies, jewelry engravings, engravings on urns or burial markers, or the like are admissible hearsay. [Fed. R. Evid. 803(13)]

13. Market Reports

Market reports and other published compilations (lists, directories, etc.) are admissible if generally used and relied upon by the public or by persons in a particular occupation. [Fed. R. Evid. 803(17)]

E. RESIDUAL “CATCH-ALL” EXCEPTION OF FEDERAL RULES

The Federal Rules provide a general catch-all exception for hearsay statements not admissible under specific exceptions. [Fed. R. Evid. 807] There are three requirements for a statement to be admitted under the catch-all exception:

1. “Trustworthiness” Factor

First of all, the statement must be supported by “sufficient guarantees of trustworthiness.” In making this determination, the court must consider: (1) the **totality of circumstances** under which it was made, and (2) any **evidence that corroborates the statement** (although the existence or lack of corroborating evidence is not dispositive).

2. “Necessity” Factor

The statement must be **more probative** as to the fact for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

3. Notice to Adversary

Finally, the proponent must give reasonable notice to the adverse party of their intent to offer the statement so that the adversary has a fair opportunity to meet it. The notice must include (1) the **substance of the statement** and (2) the **name of the declarant**.

a. Timing

As a general rule, the notice must be **in writing** and given **before the trial or hearing**. However, it may be given in any form during the trial or hearing if the court, for “good cause,” excuses a lack of earlier notice (e.g., where a witness suddenly becomes unavailable during trial, or where the proponent does not become aware of the existence of the hearsay statement until after the trial begins).

F. CONSTITUTIONAL ISSUES

1. The Confrontation Clause

In criminal cases, it may be argued that the use of hearsay evidence violates the accused’s **right to “confront” and cross-examine** the witnesses against him. Note, however, that there generally is no Confrontation Clause problem if the hearsay declarant is present at the trial and is subject to cross-examination at that time.

a. Prior Testimonial Statement of Unavailable Witness

Under the Confrontation Clause, a hearsay statement will **not** be admitted (even if it falls within a hearsay exception) when:

- (i) The statement is offered **against the accused in a criminal case**;
- (ii) The declarant is **unavailable**;

- (iii) The statement was “**testimonial**” in nature; **and**
- (iv) The accused had **no opportunity to cross-examine** the declarant’s “testimonial” statement prior to trial.

[Crawford v. Washington, 541 U.S. 36 (2004)] Note, however, that the statement may be admitted if the prosecution demonstrates that the defendant forfeited his Confrontation Clause objection by wrongdoing that prevented the declarant from testifying at trial (see b., below).

1) “Testimonial” Statement

The definition of a “testimonial” statement is still evolving, but the following applications have been established.

a) Statements Made in the Course of Police Interrogation

Whether a statement made in response to police interrogation is testimonial depends on its **primary purpose**. In making this determination, courts objectively evaluate the circumstances of the encounter between the declarant and the police.

(1) To Aid in Ongoing Emergency—Not Testimonial

If the primary purpose of police interrogation is to enable the police to help in an ongoing emergency, statements made in the course of the interrogation are nontestimonial (e.g., statements made during a 911 call describing the circumstances and perpetrator of an ongoing incident of domestic violence). In determining whether an “ongoing emergency” existed at the time of the interrogation, courts consider various factors, including: (1) the nature of the dispute (public vs. private); (2) whether the perpetrator is still at large; (3) the scope of the threat to the victim and to the public; and (4) the type of weapon involved. [Michigan v. Bryant, 562 U.S. 344 (2010)]

(2) To Establish or Prove Events for Later Prosecution—Testimonial

When the primary purpose of the interrogation is to establish or prove past events potentially relevant to a later criminal prosecution, statements are testimonial (e.g., statements made by victim to police shortly after a domestic violence incident, setting forth details of the incident). [Davis v. Washington, 547 U.S. 813 (2006)] On the other hand, statements by a young child abuse victim to a school teacher about the abuse are not testimonial—even though the teacher has a statutory duty to report the abuse to law enforcement authorities—because the primary purpose of the conversation is protection of the child, not prosecution of the perpetrator. [Ohio v. Clark, 135 S. Ct. 2173 (2015)]

b) Affidavits or Written Reports of Forensic Analysis

Affidavits, certificates, or other written reports that summarize the findings of forensic analysis and have the effect of accusing a targeted individual of criminal conduct (e.g., identifying narcotics seized from a suspect or matching a suspect to blood test results) are testimonial and thus may not be admitted into evidence unless the defendant has had an opportunity to cross-examine the author of the report. [Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009)] A confrontation violation cannot be avoided by offering the results of the analyst's report through the testimony of the analyst's supervisor who played no role in conducting the tests. [Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011)] However, reports by a nontestifying analyst may be used for a nonhearsay purpose rather than to prove the truth of the report's contents. Specifically, no confrontation violation occurs if a forensic expert, while testifying as to her independent analysis of data, makes only a general reference to a nontestifying analyst's report (without reading the report to the jury) for the limited purpose of showing a partial basis for her opinion (see VI.C.2.a.4)c), *supra*). [Williams v. Illinois, 132 S. Ct. 2221 (2012)—expert referenced a nontestifying private analyst's profile of the defendant's DNA only to indicate that it **matched** a state analyst's profile of DNA found at the crime scene]

b. Confrontation Clause Rights May Be Forfeited by Wrongdoing

A defendant forfeits his Sixth Amendment right of confrontation by committing a wrongful act that was **intended to keep the witness from testifying** at trial. [Giles v. California, 554 U.S. 353 (2008)—unless the defendant killed the victim with the intent to make her unavailable to testify, he did not forfeit his confrontation rights with respect to allegations of domestic violence made by the victim to the police three weeks before he killed her]

c. The Right to Physically Face Witnesses

The Sixth Amendment guarantee of confrontation includes not only the right to cross-examine witnesses, but also the right to physically face them at trial. The Supreme Court held that right to be violated at a child sex abuse trial because a screen was erected in court between the defendant and two youthful complainants so they could not see the defendant as they testified. [Coy v. Iowa, 487 U.S. 1012 (1988)] However, the Court has also held that the right of confrontation is not absolute. A child witness in a sexual abuse case may testify via one-way closed circuit television without violating the defendant's confrontation rights **if the trial judge makes individual findings of probable trauma to the child** from testifying in the defendant's presence. [Maryland v. Craig, 497 U.S. 836 (1990)]

2. Due Process Rights

In addition, the Court has held that state hearsay rules and other exclusionary rules cannot be applied where the effect would be to deprive an accused of her Fourteenth Amendment due process right to a *fair trial* [Chambers v. Mississippi, 410 U.S. 284 (1973)], or deny her right to compulsory process [Rock v. Arkansas, 483 U.S. 44 (1987)].

VIII. PROCEDURAL CONSIDERATIONS

A. BURDENS OF PROOF

The term “burden of proof,” as used by judges and lawyers at trial, encompasses two separate meanings or burdens. Thus, burden of proof can mean:

1. Burden of Producing or Going Forward with Evidence

a. Produce Sufficient Evidence to Raise Fact Question for Jury

This defines the burden of one party to introduce sufficient evidence to avoid judgment against her as a matter of law. It is the burden of producing sufficient evidence to create a fact question of the issue involved, so that the issue may appropriately reach the jury. The burden of producing evidence is a critical mechanism for judicial control of the trial. Although the burden is usually cast upon the party who has pleaded the existence of the fact, the burden as to this fact may shift to the adversary when the pleader has discharged her initial duty.

b. Prima Facie Case May Shift Burden of Production

Consider *Plaintiff v. Defendant* in a negligence action. Plaintiff offers evidence in her case-in-chief of Defendant’s negligence. Defendant’s motion for a nonsuit, made at the conclusion of Plaintiff’s case, is denied. This denial reflects a judicial ruling that Plaintiff has made out a *prima facie* case of Defendant’s negligence. Put another way, it means that Plaintiff has met her burden of going forward with evidence on the negligence issue.

Now assume that Defendant rests immediately after Plaintiff’s case-in-chief without producing any rebuttal evidence. Plaintiff then moves for a directed verdict in her favor, claiming that Defendant was negligent as a matter of law. If this motion were granted, it would mean that (1) Plaintiff’s evidence was sufficiently persuasive, (2) the burden shifted to Defendant, and (3) Defendant failed to meet his newly imposed burden of producing evidence of no negligence. If Plaintiff’s motion were denied, it would mean only that Plaintiff met her initial burden but that it did not shift to Defendant; and, therefore, the burden of production having dropped out of the case, the matter is now for the jury. Once in the hands of the jury, the question is whether Plaintiff has met her burden of persuasion.

2. Burden of Persuasion (Proof)

a. **Determined by Jury After All Evidence Is In**

This is what is usually meant when the term “burden of proof” is used. This burden becomes a crucial factor only if the parties have sustained their burdens of production and only when all the evidence is in. When the time of decision comes, the jury must be instructed how to decide the issue if their minds remain in doubt. There are no tie games in the litigation process. Either the plaintiff or the defendant must win. If, after all the proof is in, the issue is equally balanced in the minds of the jury, then the party with the burden of persuasion must lose.

b. **Jury Instructed as to Which Party Has Burden of Persuasion**

The burden of persuasion does not shift from party to party during the course of the trial simply because it need not be allocated until it is time for a decision by the trier of fact. The jury will be told which party has the burden of persuasion and what the quantum of proof should be. The jury is never told anything about the burden of going forward with evidence because that burden is a matter for the judge alone.

c. **Quantum or Measure of Proof**

The trier of fact must be persuaded of the truth of disputed facts by one of the following standards, depending upon the nature of the action:

1) **Preponderance of the Evidence**

The preponderance of the evidence standard applies in most civil cases. This standard has been defined as meaning that the fact finder must be persuaded by the party to whom the burden on the issue has been allocated that the fact is ***more probably true than not true***.

2) **Clear and Convincing Proof**

Some civil cases (an oral contract to make a will or issues of fraud) often require proof by “clear and convincing evidence.” This standard requires the trier of fact to be persuaded that there is a ***high probability*** that the fact in question exists.

3) **Beyond a Reasonable Doubt**

This is the ***highest standard*** and applies to criminal cases. In a criminal prosecution, the guilt of the defendant must be established beyond a reasonable doubt.

B. PRESUMPTIONS

A presumption is a rule that requires that a particular inference be drawn from an ascertained set of facts. It is a form of substitute proof or evidentiary shortcut, in that proof of the presumed fact is rendered unnecessary once evidence has been introduced of the basic fact that gives rise to the presumption. Presumptions are established for a wide variety of overlapping policy reasons. In some cases, the presumption serves to correct

an imbalance resulting from one party's superior access to the proof on a particular issue. In others, the presumption was created as a timesaver to eliminate the need for proof of a fact that is highly probable in any event. In other words, the inference from the basic fact to the presumed fact is so probable and logical that it is sensible to assume the presumed fact upon proof of the basic fact. In still other situations, the presumption serves as a social or economic policy device. It operates to favor one contention by giving it the benefit of a presumption and to correspondingly handicap the disfavored adversary.

EXAMPLE

A common presumption is that the driver of a vehicle is the owner's agent. When plaintiff has been injured by the negligent operation of a vehicle, the nondriving owner-defendant will be liable for the negligence of the driver if the driver is the owner's agent. Plaintiff's burden of proving that the driver was the agent of the owner is aided by a presumption of agency that arises upon proof of ownership. The justification of this presumption of agency from ownership may be explained in terms of **fairness** in light of defendant's superior access to the evidence; in terms of **probability**, since it is unlikely that defendant's car was stolen by the driver; or in terms of a **social policy** of promoting safety or increasing available compensation for traffic victims by widening the responsibility of owners.

1. Effect-Shift Burden of Production

Federal Rule 301 provides that a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut the presumption. However, this rule does not shift the burden of persuasion, which remains throughout the trial upon the party who had it originally.

EXAMPLE

Plaintiff has the burden of going forward and the burden of persuasion on the issue of Edwina's death. Plaintiff introduces evidence sufficient to support the fact that Edwina has been absent without tidings for a period of seven years. The proof of this basic fact causes a presumption of the presumed fact—Edwina's death. Plaintiff has made out a *prima facie* case on Edwina's death. More than that, if the defendant is silent and fails to offer proof in rebuttal (either of the presumed fact of death, or the basic fact of absence for a period of seven years), the jury will be instructed that they **must** find Edwina is dead if they believe the absence has been for seven years.

2. Rebutting a Presumption

A presumption is overcome or destroyed when the adversary produces some evidence contradicting the presumed fact. In other words, the **presumption is of no force or effect** when sufficient contrary evidence is admitted. This is the federal view adopted by Federal Rule 301, except where state law provides the rule of decision (see 6., *infra*).

EXAMPLE

Plaintiff-victim of automobile driver's negligence sues owner. Plaintiff proves ownership, thus giving rise to the presumption that the driver was the agent of the owner. Defendant-owner testifies that the driver was not his agent, and his evidence could justify a jury finding that the driver was without authority from the owner. At this point, plaintiff's presumption is gone. He will have to sustain the burden of proving by a preponderance of the evidence that the driver was the agent of the owner, or his case will fail.

a. Amount of Contrary Evidence Necessary

The amount of contrary evidence that must be introduced to overcome the presumption has never been clearly articulated. Some cases require "enough evidence to support a finding of the nonexistence of the presumed fact." Others simply require "substantial evidence."

3. Distinguish True Presumptions from Inferences and Substantive Law

The true presumption with its mandatory rebuttable inference should not be confused with inferences and rules of substantive law.

a. Permissible Inferences

The permissible inference (*prima facie* case, or sometimes erroneously called "presumption of fact") will allow a party to meet the burden of production but **will not shift the burden** to the adversary. Examples of situations giving rise to permissible inferences are:

1) Res Ipsa Loquitur

A permissible inference of negligence arises where this type of accident ordinarily occurs because of the negligence of someone in the defendant's position.

2) Spoliation or Withholding Evidence

The intentional destruction or mutilation of relevant evidence may give rise to an inference that the destroyed evidence is unfavorable to the spoliator. An unfavorable inference may also arise when a party fails to produce evidence or witnesses within his control which he is naturally expected to produce.

3) Undue Influence

Where the attorney who drafted a will is its principal beneficiary to the exclusion of the natural objects of the testator's bounty, an inference of undue influence may be found.

b. "Presumptions" in Criminal Cases**1) Accused Is Presumptively Innocent**

The accused in a criminal case is presumptively innocent until the

prosecution proves every element of the offense beyond a reasonable doubt. Accordingly, it is clear that in criminal cases “presumptions” do not shift to the accused the burden of producing evidence, nor of persuading the fact finder. A “presumption” in a criminal case is truly nothing more than a ***permissible inference***.

2) Judge’s Instructions on Presumed Facts Against Accused

The trial judge in a criminal case is not free to charge the jury that it ***must*** find a “presumed” fact against the accused. When the existence of a presumed fact is submitted to the jury, the judge shall instruct the jury that it ***may*** regard the basic facts as sufficient evidence of the presumed fact, but that it is not required by law to do so. If the presumed fact establishes guilt, is an element of the offense, or negates a defense, its existence must be found (proved) beyond a reasonable doubt.

c. Conclusive Presumptions

This form of inference goes beyond the true presumption since it ***cannot be rebutted*** by contrary evidence. A “conclusive” presumption is really a rule of substantive law.

EXAMPLE

In some states, it is conclusively presumed that a child under a certain age (e.g., seven years old) cannot commit a crime. No evidence to the contrary can rebut this presumption, and part of the proof of the case requires a showing that the accused is over the minimum age.

4. Specific Presumptions

The following are common rebuttable presumptions:

a. Presumption of Legitimacy

The law presumes that every person is legitimate. The presumption applies to all cases where legitimacy is in dispute. The mere fact of birth gives rise to the presumption. The presumption is destroyed by evidence of illegitimacy that is “clear and convincing.” For example, the presumption is overcome by proof of a husband’s impotency, proof of lack of access, or the negative result of a properly conducted blood grouping test.

b. Presumption Against Suicide

When the cause of death is in dispute, a presumption arises in ***civil*** (not criminal) cases that the death was not a suicide.

c. Presumption of Sanity

Every person is presumed sane until the contrary is shown. The presumption of sanity applies in ***criminal as well as civil*** cases.

d. Presumption of Death from Absence

A person is presumed dead in any action involving the property of such person, the contractual or property right contingent upon his death, or the administration of his estate, if:

- 1) The person is inexplicably absent for a continuous period of **seven years** (death is deemed to have occurred on the last day of the seven-year period); and
- 2) He **has not been heard from**, or of, by those with whom he would normally be expected to communicate.

e. Presumption from Ownership of Car-Agent Driver

Proof of ownership of a motor vehicle gives rise to the presumption that the owner was the driver or that the driver was the owner's agent.

f. Presumption of Chastity

There is a presumption that every person is chaste and virtuous.

g. Presumption of Regularity

The general presumption is that no official or person acting under an oath of office will do anything contrary to his official duty, or omit anything that his official duty requires to be done.

h. Presumption of Continuance

Proof of the existence of a person, an object, a condition, or a tendency at a given time raises a presumption that it continued for as long as is usual with things of that nature.

i. Presumption of Mail Delivery

A letter shown to have been properly addressed, stamped, and mailed is presumed to have been delivered in the due course of mail. The presumption is said to be based upon the probability that officers of the government will perform their duty.

j. Presumption of Solvency

A person is presumed solvent, and every debt is presumed collectible.

k. Presumption of Bailee's Negligence

Upon proof of delivery of goods in good condition to a bailee and failure of the bailee to return the goods in the same condition, there is a presumption that the bailee was negligent.

l. Presumption of Marriage

Upon proof that a marriage ceremony was performed, it is presumed to have

been legally performed and that the marriage is valid. A presumption of marriage also arises from cohabitation.

5. **Conflicting Presumptions**

If two or more conflicting presumptions arise, the judge shall apply the presumption that is founded on the weightier considerations of policy and logic. For example, where the validity of a later marriage is attacked by evidence of a prior valid marriage, the presumption of the validity of the later marriage is deemed to prevail over the presumption of the continuance of the first marriage.

6. **Choice of Law Regarding Presumptions in Civil Actions**

Under the Federal Rules, the effect of a presumption respecting a fact that is an element of a claim or defense as to which the rule of decision is supplied by state law is also governed by state law.

C. RELATIONSHIP OF PARTIES, JUDGE, AND JURY

1. **Party Responsibility**

Ours is an adversarial adjudicative process, and so the focus is on party responsibility or, perhaps what is more to the point, on lawyer responsibility. Very little happens in the litigation process unless some lawyer makes it happen by filing pleadings and motions, by initiating discovery, by entering into stipulations, by calling witnesses and offering exhibits at trial, or by interposing objections to the admission of evidence. In other words, the parties, through their lawyers, frame the issues in a litigation by making allegations, admissions, and denials in their pleadings, and by entering into binding stipulations. They assume the burden of proving the issues they have raised. And then, by deciding which witnesses to call to the stand and what tangible exhibits to introduce (and by deciding to what they will object), they control the flow of evidence. But the parties and their lawyers are not the only ones to be allocated important responsibilities in the adversary trial process.

2. **Court-Jury Responsibility**

Under our system, the trial court is more umpire than advocate. The trial judge's primary responsibility is to fairly superintend the trial; the judge is not permitted to become a partisan in it. As a general rule, questions of law are for the trial court to deal with, and questions of fact determination are for the jury, although trial judges frequently encounter the necessity of making preliminary fact determinations in connection with such matters as the admission or exclusion of evidence. (Of course, both types of questions—legal and factual—are for the trial court in a nonjury case.)

3. **Preliminary Determination of Admissibility**

In most cases, the existence of some preliminary or foundational fact is an essential condition to the admissibility of proffered evidence. Thus, before a written contract may be received in evidence, it must be shown that the contract is genuine; and

before testimony as to an alleged dying declaration may be admitted into evidence, it must be shown that the declaration was made under a sense of impending death. In some cases, the existence or nonexistence of the preliminary fact is determined by the jury, with the judge merely deciding whether the evidence of the foundational fact is sufficient to allow the jury to find its existence. In other cases, the question of the preliminary fact must be decided by the judge alone—in which case the evidence will not even be heard by the jury unless the judge first finds the preliminary or foundational fact.

a. Preliminary Facts Decided by Jury

The Federal Rules of Evidence distinguish preliminary facts to be decided by the jury from those to be decided by the judge, on the ground that the former questions involve the **relevancy** of the proffered evidence, while the latter questions involve the **competency** of evidence that is relevant. Rule 104(b) of the Federal Rules of Evidence defines preliminary facts to be decided by the jury as those where the answer to the preliminary question determines whether the proffered evidence is relevant at all. For example, if a statement is proffered to show notice to X, the jury must decide whether X heard it. If X did not, the statement is irrelevant for that purpose; but the decision is left ultimately to the jury, because if the jury does not believe X heard it, they will not use it anyway.

1) Role of the Judge

Before the judge allows the proffered evidence to go to the jury, she must find that the proponent of the proffered evidence has introduced evidence sufficient to sustain a finding of the existence of the preliminary fact. The court may **instruct the jury** to determine whether the preliminary fact exists and to disregard the proffered evidence if the jury finds that the preliminary fact does not exist. Such an instruction may be desirable if the trier of fact would otherwise be confused, but with most questions of conditional relevancy the instruction will be unnecessary, since a rational jury will disregard these types of evidence anyway unless they believe in the existence of the foundational fact. If the judge allows the introduction of evidence and then subsequently determines that a jury could not reasonably find that the preliminary fact exists, she must instruct the jury to disregard that evidence.

2) Examples of Preliminary Facts Decided by Jury

a) Agency

If plaintiff sues defendant upon an alleged contract, evidence of negotiations with a third party is inadmissible because it is irrelevant unless the third party is shown to be defendant's agent. However, the evidence of the negotiations with the third party is admissible if there is evidence sufficient to sustain a finding of the agency.

b) Authenticity of a Document

If there is a dispute about whether a note was signed by the defendant (as opposed to a forger), the authenticity of the document is to be left for the jury. In a sense this is merely an issue of relevancy, since the note, if forged, is irrelevant to the liability of the defendant.

c) Credibility

When a conviction of a crime is offered to attack the credibility of a witness, the judge must admit the evidence and allow the jury to determine the witness's credibility if there is evidence sufficient to identify the witness as the person convicted.

d) Personal Knowledge

The question of whether a witness had personal knowledge can go to the jury if there is sufficient evidence to sustain a finding that the witness had personal knowledge.

b. Preliminary Facts Decided by Judge**1) Facts Affecting Competency of Evidence**

The question of the existence or nonexistence of all preliminary facts other than those of conditional relevance must be determined by the court. In most cases, the questions which must be decided by the judge involve the competency of the evidence or the existence of a privilege. These questions are withheld from the jury because it is felt that, once the jury hears the disputed evidence, the damage will have been done and the instruction to disregard the evidence, if the preliminary fact is not found, will be ineffective.

2) Requirements for Privilege

Preliminary facts to establish the existence of a privilege must be determined by the court. This must be so, or else a privilege might be ignored merely because there was sufficient evidence (and this might not be a great deal) for a jury to find it did not exist. Whether or not the jury believed that the facts giving rise to the privilege existed, they would still have heard the privileged evidence, subject only perhaps to a most unrealistic instruction to disregard it if they found the privilege to exist.

3) Requirements for Hearsay Exceptions

All preliminary fact questions involving the standards of trustworthiness of alleged exceptions to the hearsay rule must also be determined by the court. For example, the court must decide whether a statement offered as a dying declaration was made under a sense of impending death, or whether a purported business record was made in the regular course of business. The reason for this is that, otherwise, the jury will hear the

hearsay evidence where the judge's finding is not that it fell within an exception to the hearsay rule, but only that there was enough evidence for the jury to so find. The jurors, however, once they have heard the hearsay evidence, might ignore the judge's instruction to disregard it unless they found the preliminary fact.

4) Others

The above two cases are the most important where the judge must first determine the existence of a foundational fact. However, there are several other major categories.

- a) The judge must determine whether a witness is disqualified for ***lack of mental capacity***.
- b) The judge must rule on the qualifications of a witness as ***an expert***.
- c) If a conviction of a crime is offered to attack credibility and the disputed preliminary fact is whether a ***pardon*** has been granted to the witness so convicted (the pardon rendering the impeaching conviction inadmissible), the judge must make the determination.
- d) The judge must determine whether a witness is sufficiently acquainted with a person whose sanity is in question in order for him to be ***qualified to express an opinion*** as to that person's sanity.
- e) The judge is required to determine the preliminary facts necessary to warrant reception of ***secondary evidence of a writing*** (e.g., whether original writing was lost or destroyed).
- f) The judge is required to determine the ***voluntariness of a confession*** before he allows the jury to hear it. This is a rule of constitutional law. The theory is that otherwise the jury might hear involuntary confessions but rely on them anyway because the jury felt that they were nonetheless trustworthy.

5) Procedure for Preliminary Fact Determinations by Judge

a) What Evidence May Be Considered

Federal Rule 104(a) permits the trial judge to consider any (nonprivileged) ***relevant evidence***, even though not otherwise admissible under the rules of evidence. Thus, the trial judge may consider affidavits or hearsay in ruling on preliminary fact questions. Most state courts, however, hold that the rules of evidence apply in preliminary fact determinations as much as in any other phase of the trial; thus, only admissible evidence may be considered.

b) Presence of Jury

Whether the jury should be excused during the preliminary fact determination is generally within the discretion of the trial judge. However, because of the potential for prejudice to the accused in a criminal trial, the jury **must** be excused during hearings on the admissibility of the accused's confession, or whenever the accused testifies during the preliminary fact hearing and requests that the jury be excused. [Fed. R. Evid. 104(c)]

c. Testimony by Accused Does Not Waive Privilege Against Self-Incrimination

An accused may testify as to any preliminary matter (e.g., circumstances surrounding allegedly illegal search) without subjecting herself to having to testify generally at the trial. Furthermore, while testifying upon a preliminary matter, an accused is not subject to cross-examination on other issues in the case. [Fed. R. Evid. 104(d)]

d. Judicial Power to Comment upon Evidence

The trial judge is expected to marshal or summarize the evidence when necessary. However, in most state courts, the trial judge may not comment upon the weight of the evidence or the credibility of witnesses. In federal court, the trial judge has traditionally been permitted to comment on the weight of the evidence and the credibility of witnesses.

e. Power to Call Witnesses

The judge may call witnesses upon her own initiative and may interrogate any witnesses who testify, but may not demonstrate partisanship for one side of the controversy.

f. Rulings

A trial judge has an obligation to rule promptly on counsel's evidentiary objections and, when requested to do so by counsel, to state the grounds for her rulings.

g. Preventing Jury from Hearing Inadmissible Evidence

To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means. [Fed. R. Evid. 103(d)]

h. Instructions on Limited Admissibility of Evidence

When evidence that is admissible as to one party or for one purpose, but inadmissible as to another party or for another purpose, is admitted, the trial judge, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly, e.g., "Ladies and gentlemen of the jury, the testimony that you have just heard is receivable against the defendant Bushmat only and will in no way be considered by you as bearing on the guilt or innocence of the co-defendant Lishniss." [Fed. R. Evid. 105]

EVIDENCE MULTIPLE CHOICE QUESTIONS

INTRODUCTORY NOTE

You can use the sample multiple choice questions below to review the law and practice your understanding of important concepts that you will likely see on your law school exam. More questions are available through the 1L and 2L/3L Mastery programs on the BARBRI website.

Question 1

In a personal injury action, a doctor sat in court and listened to all of the evidence regarding the plaintiff's injuries. The defense subsequently calls that doctor to testify as to his opinion about whether the plaintiff's injuries will prevent the plaintiff from ever working again.

May the doctor testify to this?

- (A) No, because he has not examined the plaintiff.
- (B) No, because whether the plaintiff will work again is an issue for the jury.
- (C) Yes, because an expert's opinion can be based on facts made known to him at the trial.
- (D) Yes, because the doctor is not testifying as an expert because he has not examined the plaintiff.

Question 2

In a tort case involving personal injury, a hospital orderly is called to the stand. There is some dispute as to whether the plaintiff ever lost consciousness. The plaintiff's attorney wishes to have the orderly, who was working in the hospital emergency room when the plaintiff was brought in, testify that the plaintiff was unconscious at the time she entered the emergency room.

Would such testimony be admissible over the defendant's objection?

- (A) No, because the orderly is not an expert witness.
- (B) No, because it impermissibly intrudes upon the province of the jury.
- (C) Yes, because it is the best evidence.
- (D) Yes, because it is proper opinion testimony by a lay witness.

2. EVIDENCE MULTIPLE CHOICE QUESTIONS



Question 3

At the defendant's trial for armed robbery, the prosecutor offers indisputable evidence tending to show that the defendant committed two other armed robberies in the year preceding the present offense, and that he committed all three robberies to obtain money for his heroin habit. The defendant has no prior convictions and has chosen not to take the stand in his defense.

Assuming all notice requirements have been met, should the court admit this evidence over the defendant's objection?

- (A) No, because the defendant was not convicted of the other robberies.
- (B) No, because the defendant has not testified at his trial.
- (C) Yes, unless the court determines that the probative value of the evidence is substantially outweighed by its prejudicial effect.
- (D) Yes, because the prosecution can establish by clear and convincing evidence that the defendant committed the robberies.

Question 4

A plaintiff has brought an action for personal injuries against a store, in connection with an incident in which he slipped and fell after the store's linoleum floors had been mopped. A major issue at trial is the degree of moisture that remained on the floor, because it had been mopped 45 minutes before the plaintiff walked on it. The store offers the testimony of an expert, who will testify about an experiment he conducted measuring the amount of time necessary for a linoleum floor to dry completely after having been mopped.

Under what condition should the court admit this testimony?

- (A) A representative of the plaintiff was present when the experiment was conducted.
- (B) It is shown that the conditions of the expert's experiment were substantially similar to the conditions of the store's floor when the plaintiff slipped.
- (C) The plaintiff was given an opportunity to conduct his own experiment with the same type of linoleum used by the expert.
- (D) It is shown that the expert is not an employee or otherwise related in interest to the store.

Question 5

The plaintiff brought a breach of contract suit against the defendant, alleging that the defendant paid for only 25 cases of baseball cards even though the order was for 50. The defendant claimed that only 25 cases were delivered to his store. The plaintiff then introduced a shipping bill from a freight company showing that pickup had been made from the plaintiff on 50 cases.

May the defendant now compel the plaintiff to introduce the remainder of the record, showing that the freight company had only 25 cases of baseball cards on its truck?

- (A) Yes, after a proper foundation is laid.
- (B) Yes, because fairness dictates that it should be considered contemporaneously with what the plaintiff is offering.
- (C) No, because the information is irrelevant to the case.
- (D) No, because the record would constitute inadmissible hearsay.

Question 6

The plaintiff sued the defendant for injuries resulting from a car accident. At trial, the plaintiff's witness testified that the defendant ran a red light and then hit the plaintiff's car.

Which of the following is the court most likely to allow to impeach the credibility of the witness?

- (A) A record of a juvenile offense.
- (B) A question on cross-examination asking whether the witness lied on a recent job application.
- (C) A certified copy of a conviction for robbery five years ago for which the witness has since been proved innocent and pardoned.
- (D) A record of an arrest one week ago for criminal trespass.

4. EVIDENCE MULTIPLE CHOICE QUESTIONS



Question 7

A driver drove into an intersection and struck a pedestrian. The driver immediately left his car and ran to the pedestrian. Before the ambulance arrived, the driver said to the pedestrian, “It was all my fault; I’m sorry I ran a red light.” The driver then said, “I’ll pay for all your medical expenses.” The pedestrian sued the driver for his injuries and, at the resulting trial, the pedestrian wished to testify to the two statements made by the driver. The defense objected.

How should the court rule?

- (A) Both of the driver’s statements are admissible.
- (B) The driver’s statement acknowledging that he ran a red light is admissible, but his promise to pay the pedestrian’s medical expenses is inadmissible.
- (C) The driver’s statement acknowledging that he ran a red light is inadmissible, but his promise to pay the pedestrian’s medical expenses is admissible.
- (D) Neither of the driver’s statements is admissible.

Question 8

At a homicide trial, the prosecution presented evidence that, on the day of the fatal shooting, the defendant and several members of his gang engaged in a running gun battle with the victim and members of his gang. The prosecution additionally presented evidence tending to prove that the defendant had been seen at the scene of the shooting around the time that the victim was killed. In his defense, the defendant proffered testimony of a witness that, one day before the victim’s death, the defendant had said to him, “I’m flying to the state capital tonight for a two-day visit.”

Should the witness’s testimony be admitted over the objection of the prosecution?

- (A) Yes, because it is not being offered for the truth of the matter asserted.
- (B) Yes, because it tends to prove that the defendant was in the state capital at the time the charged crime was committed.
- (C) No, because it is inadmissible hearsay.
- (D) No, because it violates the propensity rule.

Question 9

Following their divorce, the plaintiff and defendant were engaged in a bitter custody battle over their two children. The plaintiff is seeking to testify as to statements made by the defendant prior to the divorce in which she had told him that she did not feel that she could properly care for the children by herself. The defendant objects, alleging that the statements are privileged as a confidential communication made during the marriage.

Should the court admit the statements?

- (A) Yes, because the privilege does not apply.
- (B) Yes, because the privilege terminates on divorce.
- (C) No, because the plaintiff has a motive to lie.
- (D) No, because the statements were confidential and made during the marriage.

Question 10

A large delivery truck collided with a car. At the time of the accident, the driver of the truck said to the car driver, "The accident was my fault; I wasn't paying any attention. Don't worry, my company will make it right." The delivery company had not authorized the truck driver to make that statement. The subsequent investigation of the accident by the delivery company revealed that the truck driver had been drinking on the day of the accident. He was fired. The car driver brings an appropriate action against the delivery company for damages resulting from the accident. The truck driver has disappeared. The car driver now seeks to testify as to what the truck driver said at the time of the accident.

Is the evidence admissible?

- (A) Yes, as a statement attributable to the defendant.
- (B) Yes, as an excited utterance.
- (C) No, because the truck driver is no longer employed by the delivery company.
- (D) No, because the delivery company had not authorized the truck driver to speak on its behalf.

6. EVIDENCE MULTIPLE CHOICE QUESTIONS



Question 11

A defendant is charged with having been one of two men who robbed a bar and its patrons at gunpoint at 5:30 p.m. on December 16. The defendant calls a witness in his defense who testifies that she drove to the defendant's home at 10 a.m. on December 16 and picked up the defendant and his wife, then took them to a birthday party that lasted until 7 p.m. The prosecutor asks on cross-examination, "What is your relationship to the defendant's wife?" Defense counsel objects.

How should the court respond?

- (A) Overrule the objection, because the question attacks the witness's truth and veracity.
- (B) Overrule the objection, because the question is directed at discovering possible bias in the witness.
- (C) Sustain the objection, because the question seeks to elicit irrelevant information.
- (D) Sustain the objection, because the answer to the question would create prejudice that would outweigh its probative value.

Question 12

A woman is suing a fast-food restaurant for injuries she suffered when she fell after slipping on a wet spot on the floor of the restaurant. At trial, the woman introduced evidence that someone had spilled a drink on the floor and that an employee had just finished mopping up the spill before she walked over the wet spot and fell, injuring her back. The woman then calls the restaurant's manager, as a hostile witness, and attempts to elicit testimony that, after her fall, the restaurant instituted a policy requiring that bright yellow signs with red warnings be placed after mopping the floor.

Will this evidence be permitted?

- (A) Yes, to establish that the restaurant was negligent in not warning customers that the floor was wet.
- (B) Yes, to show that the restaurant was aware that a wet floor creates a hazardous condition.
- (C) No, because its admission would discourage other tortfeasors from taking remedial measures.
- (D) No, because it is not a proper form of impeachment.

ANSWERS TO MULTIPLE CHOICE QUESTIONS

Question 1

- (C) The doctor may testify. An expert's opinion may be based on one or more of the following sources of information: (i) facts that he knows from his own observation, (ii) facts presented in evidence at the trial and submitted to the expert, or (iii) facts not in evidence that were supplied to the expert out of court and which are of a type reasonably relied upon by experts in the particular field in forming opinions on the subject. Here, the doctor's testimony will be based on facts presented in evidence at the trial. Thus, (C) is correct. (A) is incorrect because personal examination by the doctor is not required in order to provide expert testimony as to the plaintiff's injuries. (B) is incorrect because whether the plaintiff's injuries will prevent her from ever working again is an issue that requires specialized knowledge to assist the jury in its determination; it is not an issue left for the jury to ultimately decide. (D) is incorrect because the doctor's qualification as an expert is based on his specialized knowledge, skill, experience, etc. Personal examination of the plaintiff is not a prerequisite to testifying as an expert.

Question 2

- (D) The orderly's testimony should be admitted because it is proper opinion testimony by a lay witness. Where an event is likely to be perceived as a whole impression, rather than as more specific components, opinions by lay witnesses are generally admitted. Lay opinion testimony is admissible when: (i) it is rationally based on the perception of the witness; (ii) it is helpful to a clear understanding of his testimony or to the determination of a fact in issue; and (iii) it is not based on scientific, technical, or other specialized knowledge. [Fed. R. Evid. 701] One matter about which a lay witness may testify is the general appearance or condition of a person. In contrast, expert opinion testimony is called for when the subject matter is such that technical or other specialized knowledge will assist the jury in understanding the evidence or determining a fact in issue. Here, the orderly is not being asked to describe specific injuries that may have been incurred by the plaintiff; that would more appropriately be left to the specialized knowledge of an expert. Rather, he is being asked to testify as to the plaintiff's general condition (i.e., whether she was conscious or unconscious). Having been on duty in the emergency room when the plaintiff was brought in, the orderly had the opportunity to observe the plaintiff. Thus, he is in a position to offer an opinion as to the plaintiff's unconscious condition based on his own perception. It is easier for the orderly to express his testimony this way than to go into detail about specific manifestations of the plaintiff's condition. Also, this opinion aids in the determination of a disputed factual issue (i.e., whether the plaintiff ever lost consciousness). Therefore, the orderly's testimony is admissible as proper lay opinion testimony. (A) is wrong because, as noted above, this testimony does not relate to a matter the understanding of which requires resort to specialized knowledge. Status as an expert is not necessary to be able to state whether a person was conscious. Therefore, the orderly's status as a nonexpert constitutes no basis for the exclusion of his testimony. (B) is wrong because, if anything, the testimony will assist the jury, rather than intrude upon its province. Generally, the jury is to make fact determinations. The orderly's opinion testimony is helpful to the determination of a disputed fact. The jury relies on such testimony to enable it to reach a conclusion as to whether the plaintiff was unconscious. (C) is wrong because the best evidence rule does not apply to these facts. In proving the terms of a writing, where its terms are material, the best evidence rule requires that the original writing be produced. This question does not involve a writing of any type. The orderly would simply be testifying to what he personally observed. Thus, the best evidence rule does not come into play.

8. ANSWERS TO MULTIPLE CHOICE QUESTIONS



Question 3

- (C) This choice states the critical factor for admitting evidence of other crimes or misconduct to show motive, while the other choices raise issues that are relevant only when other crimes evidence is being offered for impeachment purposes. *It is essential that you keep the impeachment rules distinct from the rules for admitting other crimes evidence when the evidence is independently relevant—the bar examiners will often mix these issues in the answer choices for this type of question.* One of the most important areas where recurring relevance questions have developed into established rules is the use of character evidence. The well-settled rule is that extrinsic evidence of other crimes is not admissible to show a criminal disposition or conduct in conformity with the other crimes. On the other hand, Federal Rule 404(b) permits this evidence to be introduced for other purposes, such as to show motive, opportunity, intent, or identity, whenever these issues are relevant in the case. Because of the potential for unfair prejudice of this type of evidence, the balancing test of Federal Rule 403 (paraphrased in choice (C)) is particularly important. Even though evidence of the other robberies is relevant to show motive, the court may find that its probative value is substantially outweighed by the danger of unfair prejudice, especially because the other crimes are of the same type as the crime charged. (A) is incorrect because a conviction is not required for other crimes evidence used for this purpose. Only when extrinsic evidence of another crime is being used to impeach a testifying defendant is an actual conviction required. (B) is incorrect because whether the defendant has testified is relevant only when the other crimes evidence is being used for impeachment, since a defendant only puts his credibility at issue if he takes the witness stand; it is irrelevant when the other crimes evidence is used to show motive. (D) is incorrect. For independently relevant uncharged misconduct by the defendant to be admissible, there need only be sufficient evidence to support a jury finding that the defendant committed the prior act; clear and convincing evidence is not required.

Question 4

- (B) The expert's testimony is only relevant if the conditions of the experiment were substantially similar to the conditions at the time and place of the accident. Evidence of pretrial experiments that does not require expert testimony is treated no differently under the Federal Rules from other evidence. It will be admissible if it is relevant (i.e., if it has any tendency to prove or disprove a fact that is of consequence to the action) and if it is not barred by a specific exclusionary rule or the general balancing test of Rule 403. To the extent that the conditions of the expert's experiment replicated the conditions of the accident, the experiment is relevant because whether the expert's linoleum was wet after 45 minutes tends to establish whether the store's floor was wet when the plaintiff walked on it, and this fact is of major consequence to the plaintiff's personal injury action. To the extent that the conditions of the expert's experiment are not similar, the minimal probative value of his testimony probably would be outweighed under Rule 403 by considerations of unfair prejudice or waste of time. (A) is incorrect because the Federal Rules do not require a representative of the adverse party to be present at the experiment; the plaintiff's attorney can subject the conditions of the experiment to scrutiny through cross-examination of the expert. (C) is incorrect for the same reason: the plaintiff's attorney can effectively cross-examine the expert even without having conducted his own experiments. (D) is incorrect because the person conducting the experiment need not be an independent observer. If the expert is an employee, his potential bias can be elicited on cross-examination.

Question 5

- (B) The defendant may compel the plaintiff to introduce the remainder of the record. When part of an act, conversation, or writing is introduced into evidence, the Federal Rules provide that the

adverse party may compel the proponent of the evidence to introduce any part thereof that ought, in fairness, to be considered at the same time. Here, the remainder of the shipping record that supports the defendant's position should be introduced at the same time as the part introduced by the plaintiff. (A) is incorrect because no foundation need be laid for another part of a record that has already been introduced. (C) is incorrect because Federal Rule 106 does not require proof of relevance. The standard is fairness. In any case, the remainder of the record appears to be relevant to the defendant's claim. (D) is incorrect because, although it is hearsay, a shipping record from a freight company very likely falls within the business records exception to the hearsay rule.

Question 6

- (B) The question on cross-examination regarding the witness's honesty is an appropriate impeachment method. A witness may be interrogated on cross-examination with respect to any act of misconduct that is probative of truthfulness (i.e., demonstrates dishonesty). Lying on a job application would be such an act. Thus, (B) is a proper method of impeaching the witness's credibility. (A) is incorrect because juvenile offenses are generally not admissible for impeachment purposes in civil cases. (C) is incorrect because a conviction cannot be used to impeach a witness if he has been pardoned based on innocence. (D) is incorrect because a record of an arrest cannot be used to impeach a witness—an actual conviction is required.

Question 7

- (B) The court should rule that the driver's statement acknowledging that he ran a red light is admissible, but his promise to pay the pedestrian's medical expenses is inadmissible. The driver's statement acknowledging that he ran a red light is admissible as a statement by an opposing party (i.e., a statement made by a party and offered against that party), while his promise to the pedestrian is inadmissible as an offer to pay medical expenses. The Federal Rules of Evidence treat statements by an opposing party as nonhearsay. In his first statement, the driver acknowledges that he ran the red light, and that the accident resulting in the pedestrian's injuries was his fault. This statement qualifies as a statement by a party-opponent. Evidence that a party paid (or offered to pay) an injured party's medical bills is not admissible to prove liability for the injuries. Such payment (or offer to pay) might be prompted solely by humanitarian motives. The driver's second statement is clearly an offer to pay the medical bills of the pedestrian, an injured party. Thus, the statement is not admissible to prove liability for the pedestrian's injuries (and proving liability appears to be the only reason the pedestrian has for attempting to introduce the statement into evidence). Note that had this been a single statement, the outcome would have been the same, because an admission of fact accompanying offers to pay medical expenses is admissible. (A) is wrong because, as explained above, the driver's second statement is inadmissible. (C) is wrong as to both statements because the statement about running the red light is admissible and the offer to pay is inadmissible. (D) is wrong because the statement about running the red light is admissible evidence.

Question 8

- (B) The testimony should be admitted. When analyzing questions involving the admissibility of hearsay evidence, ask two things: (i) Is the proffered evidence hearsay (i.e., an out-of-court statement by a declarant, being offered to prove the truth of the matter asserted in the statement)? (ii) If hearsay, is the proffered evidence nevertheless admissible because it fits within an exception to the hearsay rule? The witness's proffered testimony is hearsay because it matters whether the defendant's statement is true or false. If his statement is true (if the defendant actually intended to go to the state capital, as stated), then the likelihood that he actually went there is increased.

10. ANSWERS TO MULTIPLE CHOICE QUESTIONS



(This is because people tend to act in a manner consistent with their previously stated intentions.) Since the witness's testimony would be used for the purpose of establishing the truth of the defendant's statement, it is hearsay evidence. However, the testimony fits within a hearsay exception. A declarant's statement of present intention to take an action in the future fits within the "state of mind" exception contained in Federal Rule of Evidence 803(3). One's intent is a part of one's state of mind. Thus, the testimony should be admitted. This two-step analysis of hearsay evidence also makes clear that (A) and (C) are incorrect. (A) states that the witness's testimony is not being offered for the truth of the matter asserted, but, as stated above, it is offered for its truth. (C) correctly characterizes the testimony as hearsay but incorrectly states that the evidence is inadmissible; it is admissible under the state-of-mind exception. (D) is a nonsensical answer. The witness's testimony does not pertain in any way to the defendant's character. Thus, the propensity rule, which states that evidence of a person's character trait is generally inadmissible to prove that the person acted in conformity with the trait on a particular occasion, is not implicated by this question.

Question 9

- (A) The court should find that the statements are admissible. The privilege for confidential marital communications provides that a party has a privilege to refuse to disclose, and to prevent another from disclosing, confidential communications made between spouses during the marriage. However, the privilege does not apply in actions between the spouses. Because this is an action between the spouses, the privilege does not apply and the testimony is admissible. Thus, (A) is correct and (D) is incorrect. (C) is incorrect. The plaintiff would have to be cross-examined as to any potential bias or motive to lie; the mere possibility of such a motive does not automatically preclude his testimony. (B) is incorrect because the privilege survives divorce. Here, the statements were made during the marriage and the privilege would apply even though the parties are now divorced.

Question 10

- (A) The evidence is admissible. This question raises the issue of whether an employee's out-of-court statement will be attributed to the employer, and thus considered a vicarious statement of an opposing party. The statement can be attributed to the employer, provided (i) it was made while the person was employed by the employer (not before or after the period of employment) and (ii) the statement related to the employment. Thus (A) is correct. The truck driver's statement was made while he was employed by the delivery company, and it related to his employment since it pertained to an accident that occurred when he was driving a company truck, presumably in the course of employment. Thus, (C) is incorrect. That the truck driver is no longer employed by the delivery company does not bear on the admissibility of his statement; what counts is that he was employed at the time he made the statement. (D) is also incorrect. That the delivery company did not authorize the truck driver to make the statement does not preclude it from being admissible. Although one basis for attributing an employee's statement to the employer is the employer's authorization for the employee to speak on its behalf about the matter, that is not the only one. (B) is incorrect because there is little reason to conclude that the truck driver's statement was an "excited utterance" within the meaning of that hearsay exception. The question does not indicate that the truck driver spoke in an excited manner or that he was agitated. That the truck driver spoke shortly after the accident would not alone be sufficient to make his statement an "excited utterance."

Question 11

- (B) The prosecutor's question is aimed at discovering bias, which tends to show that the witness has a motive to lie. Impeachment involves the casting of an adverse reflection on the veracity of a witness, and it may take several forms. Evidence that a witness is biased tends to show that she has a motive to lie, and is thus a well-recognized method of impeachment. Inferences of bias may be shown by evidence of family or other relationship. Here, the prosecutor is attempting to show that, due to a family relationship or friendship with the defendant's wife, the witness may be biased and would thus have a motive to lie on behalf of the defendant. Therefore, the prosecutor is engaging in an accepted method of impeachment. (A) correctly states that the prosecutor's question attacks the witness's truth and veracity. However, not all methods of attacking a witness's truth and veracity are admissible. (B) is a better answer than (A) because it identifies the specific method of impeachment that the cross-examiner is using. (C) is incorrect because evidence that tends to prove or disprove the credibility of a witness is relevant. The information sought to be elicited by the prosecutor's question will reflect on a possible motive that the witness may have to lie. Therefore, such information is relevant. (D) incorrectly states that the answer to the prosecutor's question would create prejudice that would outweigh its probative value. Under Federal Rule 403, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. While any material evidence introduced by a party will probably be prejudicial to the adverse party's case, it is only *unfair* prejudice (i.e., suggesting a decision on an improper basis) that may be excluded under this rule. Here, the answer to the prosecutor's question would clarify the matter of whether the witness had a motive to lie. This would not be unfairly prejudicial because it would tend to make the witness's testimony as to the defendant's whereabouts at the time of the alleged crime more or less believable, which is the proper basis on which the trier of fact should accept or reject her testimony.

Question 12

- (C) The evidence should not be admitted. Under the Federal Rules of Evidence, evidence of subsequent remedial measures is inadmissible to show negligence. This is based on the public policy of safety. The law wants to encourage people to make repairs or take other remedial measures after an accident without being held back by a fear of liability. Thus, (A) and (B) are incorrect. (D) is wrong because the woman is not trying to impeach the manager or anyone else.

APPROACH TO EXAMS EVIDENCE

IN A NUTSHELL: The law of evidence is a system of rules and standards governing the admissibility of proof (testimony, writings, objects, etc.) at the trial of a civil or criminal action. A good rule of thumb is that all relevant evidence is admissible if competent, i.e., does not violate some exclusionary rule. These exclusionary rules serve as a gateway, and are meant to ensure that evidence is reliable and authentic (e.g., the hearsay rule, the best evidence rule, Dead Man Statutes), or to protect certain societal interests outside of the courtroom (e.g., testimonial privileges).

I. IS THE EVIDENCE RELEVANT?

A. Explain Why Each Item of Evidence Is Relevant

1. Does it tend to make the existence of any fact of consequence to the determination of the action (materiality) more or less probable than it would be without the evidence (probative value)?
2. Generally, relevant evidence relates to the time, person, or event at issue, but there are exceptions for certain similar occurrences, e.g.:
 - a. To prove causation
 - b. Prior false claims
 - c. Similar accidents caused by the same condition
 - d. Rebutting a claim of impossibility
 - e. Habit
 - 1) Distinguish from character evidence (which is more general and often inadmissible)—e.g., “Charlie never stops at the stop sign at Main and Oak” (habit) vs. “Charlie is a careless driver” (character)
 - f. Business routine and industrial custom

B. Policy-based Relevance—Evidence Excluded for Social Policy Reasons

1. Think about the general rule, the rationale behind the rule, and its exceptions/limitations
2. Liability insurance
 - a. Inadmissible to prove—negligence or other wrongful conduct
 - b. Admissible to prove—ownership or control, impeachment, or as part of an admission of liability
3. Subsequent remedial measures
 - a. Inadmissible to prove—negligence, culpable conduct, or defect
 - b. Admissible to prove—ownership or control, feasibility of the repair, or destruction of evidence
4. Settlement offers and accompanying admissions of fact

2. APPROACH TO EVIDENCE

- a. Inadmissible to prove or disprove validity or amount of disputed claim, or to impeach by prior inconsistent statement or contradiction
- b. Exception—preexisting information not protected
- 5. Payments or offers to pay medical expenses
 - a. Inadmissible to prove liability
 - b. *But note:* Accompanying statements of fact are admissible (unlike rule for settlement negotiations)
- 6. Withdrawn guilty pleas and accompanying statements—generally inadmissible

C. Discretionary Relevance—Rule 403 Balancing Test

- 1. Judge has broad discretion to exclude relevant evidence if its probative value is substantially outweighed by:
 - a. Unfair prejudice
 - b. Confusion of issues
 - c. Misleading the jury
 - d. Undue consumption of time

D. Character Evidence—Special Relevance Problem

- 1. Determine its purpose—substantive or impeachment evidence? (For character evidence offered to impeach a witness, see VI., *infra*.)
- 2. Which methods are permitted?
 - a. Reputation testimony (“Mary has a good reputation for honesty in our community”)
 - b. Opinion testimony (“I think Mary is a very honest person”)
 - c. Specific acts—usually not permitted, unless character is directly at issue in the case (rare); sexual assault or child molestation cases; or when the act is independently relevant (i.e., relevant to an issue other than defendant’s character)—“MIMIC”:
 - 1) Motive
 - 2) Intent
 - 3) Mistake (absence of)
 - 4) Identity
 - 5) Common plan or scheme
- 3. What type of case is it?
 - a. Criminal cases—determine who can initiate and under what circumstances
 - 1) Defendant may introduce evidence of his own good character to show innocence
 - 2) When prosecution may introduce defendant’s bad character
 - a) As rebuttal when defendant “opens the door”
 - b) Specific acts that are independently relevant (“MIMIC”)
 - c) Specific similar acts by defendant in sexual assault or child molestation case (admissible for any relevant purpose, including propensity)
 - 3) Character of the victim

- a) Defendant may introduce if relevant to his innocence (generally in self-defense cases)
 - (1) Exception in rape cases—victim's past behavior inadmissible except in limited circumstances
 - b) Prosecution may rebut with:
 - (1) Defendant's bad character for the same trait
 - (2) Victim's good character for the same trait
- b. Civil cases—character evidence generally not admitted
- 1) Exceptions—when character is directly in issue (e.g., defamation, negligent hiring); similar specific acts in a sexual assault or child molestation case; or specific acts that are independently relevant ("MIMIC")

II. REAL EVIDENCE

A. Generally

- 1. Object is presented directly to the trier of fact for inspection
- 2. Allows the trier of fact to reach conclusions based upon its own perceptions rather than relying upon those of witnesses

B. Types and Examples

- 1. Direct
 - a. Offered to prove the facts about the object as an end in itself
 - b. Example—evidence of a permanent injury can be shown by the injury itself
- 2. Circumstantial
 - a. Facts about the object are proved as a basis for an inference that other facts are true
 - b. Example—in a paternity case, the child can be shown to the jury to demonstrate the child is the same race as the alleged father
- 3. Original
 - a. Has some connection with the transaction that is in question at the trial
 - b. Example—the alleged murder weapon in a murder case
- 4. Prepared
 - a. Also called "demonstrative" evidence
 - b. Examples—sketches, models, jury view of scene

C. Must Be Authenticated

- 1. Recognition testimony by witness—if item has recognizable features
- 2. Chain of custody—if evidence is a type likely to be confused or if it can be easily tampered with:
 - a. Proponent must show that the object has been held in a substantially unbroken chain of possession
 - b. Need not negate all possibilities of substitution or tampering, but must show adherence to some system of identification and custody

III. DOCUMENTARY EVIDENCE—COMMON ISSUES

A. Has It Been Authenticated?

1. Writings must be authenticated by proof showing they are what the proponent claims they are (unless self-authenticating such as newspapers, commercial paper, etc.)
2. Authenticated by stipulation, evidence of authenticity, etc.
3. Oral statements—only when important

B. Best Evidence Rule (“Original Document Rule”)

1. In proving the terms of a writing (including a recording, photograph, or X-ray), where the terms are material, the original writing must be produced
 - a. Secondary evidence is allowed only if the original is unavailable for some reason other than the serious misconduct of the proponent
2. Rule applies only in certain situations
 - a. When the writing is a legally operative or dispositive instrument (e.g., contract, deed, will, divorce decree)
 - b. When the witness’s knowledge of a fact comes from having read it in the document
 - 1) If the fact exists independently of a writing, the best evidence rule does **not** apply

IV. IS THE WITNESS COMPETENT TO TESTIFY?

A. Requirements for All Witnesses (Federal Rules)

1. Personal knowledge of the subject matter
2. Sworn oath or affirmation that witness will testify truthfully
3. All witnesses presumed competent under the Federal Rules until the contrary is demonstrated (no age requirement)

B. Does a Dead Man Act Apply?

1. Not recognized by Federal Rules; statutes vary by state
2. May bar an interested person from testifying in a civil case as to a communication with a deceased, if such testimony is offered against the representative of the deceased (e.g., executor)
3. Many exceptions to act and “door-openers”

V. IS OPINION TESTIMONY APPROPRIATE?

A. Lay Opinion Testimony

1. Requirements—rationally based on the witness’s perception, helpful to the jury, and **not** based on scientific or technical knowledge

2. Common examples
 - a. General appearance or condition of a person
 - b. State of emotion
 - c. Speed of moving object
 - d. Intoxication
 - e. Sanity
 - f. Voice or handwriting identification

B. Expert Opinion Testimony

1. Is the subject matter one where expert testimony would assist the trier of fact?
2. Is the expert qualified on the subject?
3. Does the expert possess reasonable probability regarding her opinion?
4. Is the opinion supported by a proper factual basis (personal observation, facts made known to her at trial, or facts supplied outside courtroom and of a type reasonably relied upon by experts in field)?

VI. CAN THE CREDIBILITY OF THE WITNESS BE IMPEACHED?

A. Any Party May Attack the Credibility of Any Witness (Even Its Own)

B. Common Methods

Impeachment by cross-examination and (some methods) extrinsic evidence

1. Prior inconsistent statement
2. Bias
3. Prior conviction of crime
 - a. Any crime involving dishonesty or false statement
 - b. Any other felony
 - c. Limitations on remoteness (10-year rule)
4. Prior bad acts
 - a. Must be probative of truthfulness (i.e., an act of deceit)
 - b. Cross-examination only; no extrinsic evidence
5. Opinion or reputation evidence of untruthfulness
6. Sensory deficiencies
7. Contradictory facts

VII. IS THE TESTIMONY PRIVILEGED?

A. General Approach

1. Identify the privilege, its scope, and its holder
2. Are there any exceptions, waivers, or limitations?
3. Applicability in federal court
 - a. Federal courts currently recognize:

- 1) Attorney-client privilege
 - 2) Spousal immunity
 - 3) Marital communications privilege
 - 4) Psychotherapist/social worker-client privilege
 - 5) Clergy-penitent privilege
 - 6) Governmental privileges
- b. If not one of those, does state law apply with respect to privileges (i.e., is it a diversity case)?

B. Privileges

1. Attorney-client
 - a. Client must be seeking attorney's services at the time of the communications
 - b. Communication must be confidential (not intended to be disclosed to third parties)
 - c. Termination of attorney-client relationship does not terminate privilege; it even survives death
 - d. Special rules for corporate clients
 - e. Nonapplicability
 - 1) Where client seeks legal advice in aid of crime or fraud
 - 2) Parties claiming through the same deceased client
 - 3) Dispute between attorney and client (e.g., malpractice)
 - 4) Client puts legal services at issue
2. Physician-patient
 - a. Information must be acquired while professional relationship exists, while attending patient, and information must be necessary for treatment
 - b. Nonapplicability
 - 1) Dispute between physician and patient (e.g., malpractice)
 - 2) Patient puts physical condition at issue (e.g., personal injury lawsuit)
3. Psychotherapist/social worker-client
 - a. Similar in operation to the attorney-client privilege
4. Privileges related to marriage
 - a. Spousal immunity (privilege not to testify in a criminal case)
 - 1) Applies in criminal cases only
 - 2) Privilege belongs to witness-spouse under Federal Rules
 - 3) Can only be asserted during marriage, although the matters at issue may have occurred prior to the marriage
 - b. Confidential marital communications privilege (protects communications only; not observations, etc.)
 - 1) Applies in both civil and criminal cases
 - 2) Privilege belongs to both spouses
 - 3) Communication must have been made during a valid marriage, but divorce will not terminate the privilege retroactively
 - c. Exceptions—neither privilege applies in:

- 1) Legal actions between the spouses
- 2) Cases involving crimes against the testifying spouse or either spouse's children
- 3) In furtherance of joint crime or fraud
5. Privilege against self-incrimination
6. Clergy-penitent
7. Accountant-client
8. Professional journalist
9. Governmental privileges

VIII. IS A STATEMENT BARRED BY THE HEARSAY RULE?

A. Is the Statement Hearsay by Definition?

1. Was there an out-of-court "statement" (i.e., oral or written assertion, or nonverbal conduct intended as an assertion)?
2. Is it being offered for its truth or for some other purpose?
 - a. If offered for its truth, it is hearsay
 - b. If not offered for its truth, it is not hearsay, such as:
 - 1) Legally operative facts (e.g., words of contract or defamation)
 - 2) Offered to prove effect on reader or listener (e.g., notice)
 - 3) Circumstantial evidence of declarant's state of mind
3. Nonhuman declarations are not hearsay; there is no such thing as animal or machine hearsay
4. Hearsay within hearsay—both inner and outer hearsay statements must fall within an exception

B. If the Statement Falls Under the Hearsay Definition, Is It Nonetheless Categorized as "Nonhearsay" Under the Federal Rules?

1. Statement by an opposing party (also called "admission" of a party-opponent)
 - a. A statement by or attributable to a party, offered against that party (need not be against interest)
 - b. Adoptive admissions (e.g., party's silence in the face of an accusation)
 - c. Vicarious admissions (i.e., made by the party's authorized spokesperson, agent, etc.)
2. Prior inconsistent statement of testifying witness—when made under oath at a prior proceeding or deposition
3. Prior consistent statement of testifying witness—in certain circumstances when offered to rehabilitate an impeached witness
4. Prior statement of identification of testifying witness (e.g., photo identifications)

C. If the Statement Is Hearsay, Does It Fall Within a Hearsay Exception?

1. Exceptions where the declarant must be unavailable to testify

- a. Former testimony—under oath
 - 1) The party against whom the testimony is offered (or his predecessor in interest in civil cases) must have been a party in the former action
- b. Statement against interest
 - 1) Declarant must have known that the statement was against her pecuniary, proprietary, or penal interest when made
- c. Dying declarations—belief that death is imminent, concerning cause or circumstances of death
 - 1) Homicide and civil cases only
 - 2) Declarant need not have actually died
- d. Statement of personal or family history
 - 1) Declarant must be a member of the family in question or intimately associated with the family
- e. Statement against party procuring unavailability
 - 1) The unavailable declarant's hearsay statements are admissible against the party who procured her unavailability by deliberate wrongdoing
- 2. Common exceptions where the declarant's unavailability is immaterial
 - a. Excited utterance—made under stress of exciting event
 - b. Present sense impression
 - 1) Statement must be made during or immediately after the event or condition
 - c. Then-existing state of mind, emotion, sensation
 - 1) State of mind directly at issue in case (e.g., domicile)
 - 2) To prove subsequent acts of declarant
 - d. Exceptions relating to bodily conditions
 - 1) Statement of own present condition—admissible even if not made to physician
 - 2) Statement of past condition made for medical diagnosis or treatment—includes past conditions
 - a) Includes cause or source of injury if pertinent to diagnosis or treatment
 - e. Business records
 - 1) Record must be made in regular course of business
 - 2) Matters must be within the personal knowledge of the entrant or someone with a business duty to transmit such matters to the entrant
 - f. Recorded recollection—document not admissible, but may be read to jury
 - 1) Various foundational requirements must be met (witness must not be able to remember the facts; must have been made or adopted by witness when the events were fresh in her mind, etc.)
 - g. Official records
 - h. Ancient documents—statements in authenticated documents prepared before 1998
 - i. Learned treatises—if used during examination of expert and established as reliable
 - j. Statements in documents affecting an interest in property

- k. Catch-all exception—if not covered by specific exception but (1) guarantees of trustworthiness, (2) statement is strictly necessary, and (3) notice given to adversary

D. Are There Any Confrontation Clause Issues (Criminal Cases Only)?

- 1. A hearsay statement offered against the accused in a criminal case is barred by the Confrontation Clause (even if it falls within a hearsay exception) if:
 - a. The declarant is unavailable;
 - b. The statement was “testimonial” in nature; and
 - c. The accused had no opportunity to cross-examine the testimonial statement prior to trial
- 2. What is a “testimonial” statement?
 - a. Statements made in the course of a police investigation when the primary purpose is to establish facts potentially relevant to a later criminal prosecution
 - 1) Statements made to assist police in an ongoing emergency are nontestimonial
 - b. Affidavits or written reports of forensic analysis
- 3. Confrontation Clause rights may be forfeited if the defendant commits a wrongful act intended to keep the witness from testifying at trial

ESSAY EXAM QUESTIONS

INTRODUCTORY NOTE

The essay questions that follow have been selected to provide you with an opportunity to experience how the substantive law you have been reviewing may be tested in the hypothetical essay examination question context. These sample essay questions are a valuable self-diagnostic tool designed to enable you to enhance your issue-spotting ability and practice your exam writing skills.

It is suggested that you approach each question as though under actual examination conditions. The time allowed for each question is 45 minutes. You should spend 10-15 minutes spotting issues, underlining key facts and phrases, jotting notes in the margins, and outlining your answer. **If** you organize your thoughts well, about 30 minutes will be more than adequate for writing them down. Should you prefer to forgo the actual writing involved on these questions, be sure to give yourself no more time for issue-spotting than you would on the actual examination.

The BARBRI technique for writing a well-organized essay answer is to (i) spot the issues in a question and then (ii) analyze and discuss each issue using the “CIRAC” method:

- C** — State your **conclusion** first. (In other words, you must think through your answer **before** you start writing.)
- I** — State the **issue** involved.
- R** — Give the **rule(s)** of law involved.
- A** — **Apply** the rule(s) of law to the facts.
- C** — Finally, restate your **conclusion**.

After completing (or outlining) your own analysis of each question, compare it with the BARBRI model answer provided herein. A passing answer does **not** have to match the model one, but it should cover most of the issues presented and the law discussed and should **apply the law to the facts** of the question. Use of the CIRAC method results in the best answer you can write.

EXAM QUESTION NO. 1

After performing routine liposuction surgery on Bob Boyd, Dr. Ann Adams was distressed to discover that the surgery did not achieve the anticipated result. In fact, there were unforeseen complications that resulted in emergency surgery to remove a blood clot. Fortunately, Boyd made a full recovery, but not before enduring a 10-day hospital stay, incurring significant medical bills, and missing two weeks of work.

After the surgery and during Boyd's recuperation, Dr. Adams, who is a very conscientious, compassionate physician, continually met with Boyd and his family; on at least two of these occasions she expressed her sympathy for the situation and her regret that the surgery had not yielded the anticipated result.

Dr. Adams, who remained haunted by Boyd's surgery, spoke on several occasions with her husband about her concern that she may have in some way contributed to Boyd's surgical problems as she had performed the surgery early in the morning, following a night of partying, when she had a severe headache, possibly the result of a hangover. Her husband attempted to reassure Dr. Adams, telling her that all doctors make mistakes and advising her that under no circumstances should she admit any liability. She similarly confided her concerns to her personal physician, whom she consulted when she continued to suffer from severe headaches.

Prior to Boyd's full recovery, Dr. Adams met with her accountant to discuss how she might set up some sort of trust or annuity for Boyd's family in the event he did not recover. Because Boyd fortunately did make a full recovery, Dr. Adams did not pursue this idea any further.

After his recovery, Boyd filed a medical malpractice suit against Dr. Adams in Clarke County superior court, alleging that she was negligent in performing the liposuction surgery that resulted in his complications. Among other things, he sought loss of income for the two weeks of work he missed.

Upon being served with the lawsuit, Dr. Adams put her malpractice carrier on notice. Dr. Adams then called her personal lawyer, Lou Lawyer, who agreed to meet with her the very next day, on New Year's Day. Dr. Adams, who was visibly upset about the lawsuit, took her sister Karen (who has always been her best friend and confidante), with her to sit in on the meeting to provide moral support.

The insurance carrier has retained you to represent Dr. Adams in the medical malpractice litigation. You receive a call from Lou Lawyer, who tells you that she is Dr. Adams's personal lawyer and that she, Lawyer, will represent Dr. Adams's personal interests because the interests of Dr. Adams and her malpractice carrier may not always coincide. When you meet with Dr. Adams, she confides her concerns about having conducted the surgery while suffering from a severe headache. Before Dr. Adams leaves your office, she entrusts to your safekeeping her entire personal file on Boyd and his surgery, which contains Boyd's medical charts and related information created on the day of the surgery.

Prior to the date of trial, Boyd's counsel sends you the plaintiff's portion of the pretrial order in which he is required to identify all witnesses, with a brief summary of their anticipated testimony. In this pleading, Boyd's counsel indicates that he intends to call the following witnesses at trial:

Witness: Summary of Testimony

1. Dr. Adams's physician: Any statements regarding the Boyd surgery which Dr. Adams may have made to her physician.
2. Dr. Adams's husband: Any statements regarding the Boyd surgery which Dr. Adams may have made to her husband.
3. Dr. Adams's accountant: Any statements regarding the Boyd surgery which Dr. Adams may have made to her accountant.

4. Karen: Any statements regarding the Boyd surgery which Dr. Adams may have made to Lou Lawyer during the New Year's Day conference and any advice which Lou Lawyer may have given Dr. Adams during that conference.
5. Dr. Adams:
 - (a) Prior malpractice complaints filed against her.
 - (b) Any statements of sympathy, regret, or like statements which Dr. Adams may have made to Boyd or his family after the surgery.
 - (c) The existence and extent of her medical malpractice insurance.
 - (d) The contents of her file on Boyd and his surgery.

You now must prepare your portion of the pretrial order in which you are required to indicate what objections, if any, you have to each witness identified and the proposed subject(s) of testimony.

(1) For each witness listed above, please specify what objections, if any, should be made. In each instance, explain your reason(s) for each objection, or your reason(s) for determining that no objection is appropriate. Please direct your response only to the indicated subject matter of testimony.

(2) Assume that you indicate in your portion of the pretrial order that you intend to introduce evidence of Boyd's insurance policies that provide him with compensation for loss of work (income replacement) in this situation. What objections, if any, do you anticipate from your opposing counsel?

EXAM QUESTION NO. 2

Big, Inc. (“Big”) has its corporate headquarters exactly in the middle of a park owned and maintained by Big. The park has an eight-foot-wide asphalt walkway weaving in and out among the trees, flower gardens, park benches, and statues on the park grounds. Big has known that the public uses the walkway and park extensively, and Big has never objected.

One of the trees growing close to the walkway to the south of the corporate building has a tree root under the walkway. Over the years, the root caused the surface of the asphalt to rise up about three inches at the walkway edge nearest the tree and about two inches at the walkway edge farthest from the tree. Kelly has a habit of making at least three circuits of the walkway every day between noon and 1 p.m. according to Pat, who has habitually eaten lunch on a particular park bench every day. This park bench was located to the north of the corporate building. Kelly and Pat are acquainted with each other because of an old and bitter lawsuit between them.

Kelly stumbled over the raised asphalt and fell. The corporate building was located between the bench where Pat sat and the place where Kelly fell, making it impossible for Pat to see Kelly fall. An unknown person called for an ambulance to take Kelly to the local hospital. After the fall, Big removed the tree root and resurfaced that part of the walkway. Also, Big paid for Kelly’s ambulance and hospital bills.

After six months, Big received a letter from Kelly’s attorney, which claimed that Kelly received a serious knee injury and made a demand for \$500,000. The insurance adjuster for Big’s insurance company tried to negotiate a settlement with Kelly’s attorney both by phone calls and letters, but was unsuccessful. Kelly filed suit against Big in a jurisdiction that follows the Federal Rules of Evidence. In its answer, Big admitted that it owned and controlled the park and the walkway. Answer the following questions:

- (1) At the trial, Kelly’s attorney wants to introduce evidence that Big paid for the medical bills to show that Big is liable for Kelly’s injuries. Big’s attorney objects. How should the judge rule and why?
- (2) At the trial, Kelly’s attorney wants to introduce evidence that Big removed the tree root and resurfaced the walkway after Kelly’s fall:
 - (a) To show that it was a dangerous condition. Big’s attorney objects. How should the judge rule and why?
 - (b) To show that Big owned and controlled the park and walkway surrounding the corporate headquarters. Big’s attorney objects. How should the judge rule and why?
- (3) At the trial, Kelly’s attorney wants to introduce evidence that Big had made several offers to settle Kelly’s claim. Big’s attorney objects. How should the judge rule and why?
- (4) At the trial, Big’s attorney wants to introduce evidence that Kelly has a habit of walking over the walkway at least three times a day to show that Kelly knew or should have known of the existence of the raised surface of the asphalt at the spot where Kelly fell. Kelly’s attorney objects. How should the judge rule and why?
- (5) At the trial, Big’s attorney wants to introduce evidence about how unreasonable and unkind Kelly was about the events leading up to the old, bitter lawsuit between Pat and Kelly. Kelly’s attorney objects. How should the judge rule and why?

EXAM QUESTION NO. 3

Johnson, a longtime farmer, had grown beans for more than 20 years. His large operation, during an average year, yielded annual returns of more than \$350,000. The 700 acres that he maintained used all of the latest techniques for fertilizing, planting, and harvesting the crops.

The neighboring farm was operated by the Harolds. They had been in business less than five years and believed cotton grew best on that type of land. However, their inexperience made their farming operations marginal at best.

The Harolds solicited the services of Plane-O, an out-of-state crop dusting company. Plane-O's aircraft was fitted with a unique video camera that would actually film crops as they were being sprayed. Using several of his best pilots, Plane-O sprayed the Harolds' farm for an entire week. They did so following the strict instructions and mapping directions of the Harolds. But less than two days after being given their instructions, the pilots followed their own maps and surveys.

During an inspection of his fields in April of that year, Johnson noticed unusual leaf and stem damage to his beans. He believed that the damage to his crops was caused by the spraying residue that had been blown from his neighbor's fields. The nearest agricultural agent lived 50 miles away and would not come to inspect the crops. Johnson had a grandson who was visiting for the summer. The grandson took several pictures of the plants. These were mailed to the agricultural agent. The agent thought the photographs of the bean field were just like any other pictures. Weeks later, the damage had grown worse, with 80% of the beans affected.

One year later, Johnson has sued the Harolds and Plane-O for his crop loss. Plane-O has refused to come to the state and allow its airplane film or its pilots to be used. They want to settle their claim out of court. Johnson wants the agricultural agent to testify about the crops by using the airplane film and the photographs. The judge has requested a pretrial memorandum as to the evidence in this case. Relying on the Federal Rules of Evidence, please prepare the document for presentation to the court.

EXAM QUESTION NO. 4

Ann was driving towards a stoplight. As she entered the intersection, she was struck from the right by Dan Defendant. Riding in the front seat with Ann was Sally Plaintiff.

After the impact, Wilbert came up to Ann's car to ask if the two ladies were all right. Ann looked at Wilbert and said, "But, the other guy (Dan) ran the light." Wilbert looked back and said, "Yes, I know, because I saw him run the light, also."

George, Wilbert's friend, came up to the car just in time to hear Wilbert make his statement. Wilbert left to go check on Dan while George stayed to talk to the ladies. George told the ladies that he was looking away until after he heard the impact, and he did not see the light. George watched Ann calm Sally down and heard Ann say three or four times, "You'll be OK, Sally, he ran the light and we can sue him." George also heard Sally moan, "My knees hurt so bad!"

In a few minutes Wilbert came back and told Ann, Sally, and George that Dan had told him (Wilbert) that he (Dan) was talking on his cell phone and because he was not looking at the light as he approached the intersection, he (Dan) had no idea what color the light was. Wilbert also said that Dan said that he (Dan) was driving home after celebrating with friends at the Beer Bust Bar. A blood alcohol test did not reveal any alcohol in Dan's blood.

When the police came to investigate, Dan told the police that his light was green and that there was nothing distracting him as he approached the light. This is what the police put in the police report. The police also included George as a witness but failed to include Wilbert as a witness.

At the hospital, Sally told the triage nurse that her neck, back, and knees were hurting. This was put into the medical records, resulting in diagnostic procedures and treatment for Sally's neck, back, and knees.

(1) Sally sues Dan for personal injuries in a jurisdiction that follows the Federal Rules of Evidence. Sally wants to have George and Wilbert testify about Dan's celebration at the Beer Bust Bar. Dan objects. State whether or not the objection will succeed with each witness and why.

(2) Sally wants to have George and Wilbert testify that Dan said he was talking on his cell phone and was not looking at the light as Dan approached the intersection. Dan objects. State whether or not the objection will succeed with each witness and why.

(3) Sally wants to have George and Wilbert testify that Dan ran the red light. Dan objects. State whether or not the objection will succeed with each witness and why.

(4) In her deposition, Sally said that immediately after the impact her neck, back, and knees were hurting badly. Dan wants to have Ann and George testify that Sally did not complain of pain in her neck and back at the scene of the impact. Sally objects. State whether or not the objection will succeed with each witness and why.

(5) In her lawsuit, Sally sues for injuries to her ankles. Dan wants to introduce the triage nurse's notes to show that there was no complaint of ankle injury to the triage nurse. Sally objects. State whether or not the objection will succeed and why.

ANSWERS TO ESSAY EXAM QUESTIONS

ANSWER TO EXAM QUESTION NO. 1

(1) Hearsay would **not** be an appropriate objection to any testimony regarding Dr. Adams's statements. The issue is whether any of the offered testimony is hearsay or otherwise inadmissible. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Statements by an opposing party are admissible nonhearsay. Thus, any statements made by Dr. Adams are admissible.

Dr. Adams's physician: No objection should be made to the testimony by Dr. Adams's physician. The physician-patient privilege prohibits physicians from releasing any medical information concerning a patient. Here, however, statements Dr. Adams made regarding the surgery she performed on Boyd would probably not be considered "medical information" and, therefore, would be admissible.

Dr. Adams's husband: An objection to the testimony of Dr. Adams's husband should be made based on the privilege for confidential marital communications. Communications between spouses are excluded on public policy grounds. For this privilege to apply, the communication must be made during a valid marriage, and the communication must be made in reliance upon the intimacy of the marital relationship. Here, Dr. and Mr. Adams are married, and Dr. Adams expressed her concerns about Boyd to her husband in reliance upon the intimacy of their relationship. Therefore, these statements are privileged and inadmissible.

Dr. Adams's accountant: An objection to the testimony of Dr. Adams's accountant should be made based on the accountant-client privilege if the jurisdiction recognizes this privilege. Communications between an accountant and a client are privileged if they are made in a professional capacity and are within the scope of the representation. Here, Dr. Adams talked to her accountant about potentially setting up a trust or annuity for Boyd's family. She met with the accountant for the purpose of discussing this, so the communications were made in a professional capacity. Setting up a trust or annuity is also within the scope of the accountant's representation of Dr. Adams, and a court would likely find that explaining why she wants to set up such a trust or annuity is also within the scope. Dr. Adams's failure to pursue the matter does not destroy the privilege. Therefore, any statements Dr. Adams made to her accountant regarding Boyd are inadmissible if the jurisdiction recognizes the accountant-client privilege.

Karen: No objection should be made to Karen testifying about statements Dr. Adams made to Lou Lawyer. Confidential communications between an attorney and client, made during professional consultation, are privileged from disclosure. Communications are "confidential" if they were not intended to be disclosed to third persons, other than those to whom disclosure would be in furtherance of the rendition of legal services to the client or those who are necessary for the transmission of the communication (e.g., an interpreter). Communications made in the known presence and hearing of any other third person are not privileged. Here, although Karen attended Dr. Adams's conference with Lou Lawyer to provide moral support, her presence was not necessary to the rendition of legal services or the transmission of communications. Thus, Karen may testify to Dr. Adams's statements made during the New Year's Day conference.

However, an objection to Karen's testimony about any advice which Lawyer may have given during the conference should be made based on hearsay. As discussed above, hearsay is generally inadmissible unless it falls under one of the exceptions to the hearsay rule. Here, Lawyer's unprivileged communications do not fall under any such exceptions and, therefore, are inadmissible.

Dr. Adams: (a) An objection that any prior malpractice claims against Dr. Adams are irrelevant should be made. Evidence of similar occurrences involving the same instrumentality is only admissible if those occurrences happened under the same or similar circumstances, are probative of the material issue involved, and have a probative value that outweighs the risk that the evidence will confuse the

jury or result in unfair prejudice. Here, the facts do not indicate what the other malpractice claims are about, so it is unclear whether they occurred under the same or similar circumstances. If they did not occur under similar circumstances, they are irrelevant and inadmissible. However, if the court finds that the prior claims are similar, then an objection should be made that the probative value of any prior malpractice claims against Dr. Adams are substantially outweighed by their prejudicial effect. Here, because evidence of other similar malpractice claims could cause the jury to confuse them with the Boyd claim, it should be excluded.

(b) No objection should be made regarding the statements made by Dr. Adams to Boyd and his family. Statements by an opposing party (i.e., statements made by a party and offered against that party) are admissible nonhearsay. Here, the statements made by Dr. Adams regarding her regret that the surgery did not achieve the anticipated result have been offered against her at trial and are therefore admissible as an opposing party's statements.

(c) An objection that the existence and extent of Dr. Adams's malpractice insurance is inadmissible should be made. Evidence that a person was or was not insured against liability is not admissible to show that she acted negligently or otherwise wrongfully. Therefore, opposing counsel cannot ask Dr. Adams about her malpractice insurance.

(d) No objection should be made to Dr. Adams's testimony regarding the contents of her file on Boyd and his surgery. The file is admissible under the business records exception to the hearsay rule, which allows admission of any writing or record made in the regular course of business as proof of the recorded act, event, condition, opinion, or diagnosis. Note that the physician-patient privilege would not prohibit Dr. Adams's testimony because Boyd would likely provide his written authorization.

(2) Opposing counsel will likely object to the introduction of evidence of Boyd's insurance policies under the collateral source rule. The collateral source rule states that damages are not reduced or mitigated by benefits that a plaintiff receives from another source, such as insurance. Defendants may not introduce evidence relating to any such financial aid from other sources. Therefore, Dr. Adams will not be able to introduce evidence that Boyd's insurance will compensate him for loss of work because his insurance is a collateral source and cannot be considered.

ANSWER TO EXAM QUESTION NO. 2

(1) The judge should sustain Big's objection. As a general rule, evidence is admissible if it is relevant (i.e., it has a tendency to prove or disprove a material issue), its probative value is not substantially outweighed by unfair prejudice or confusion, and admission would not violate public policy. Evidence that a party paid (or offered to pay) the injured party's medical expenses is not admissible to prove liability for the injury. This rule is based on the public policy concern that such payment might be prompted solely by "humanitarian motives." Therefore, the evidence that Big paid Kelly's medical expenses is inadmissible.

(2)(a) The judge should sustain Big's objection. Big's actions after Kelly's fall (i.e., removing the tree root and resurfacing the walkway) constitute subsequent remedial measures. As a matter of public policy, subsequent remedial measures are inadmissible to prove negligence or culpable conduct. Here, Kelly is introducing the evidence to show that a dangerous condition existed, which is essential to her negligence claim against Big. Therefore, the subsequent remedial measures are inadmissible.

(b) The judge should sustain Big's objection. Subsequent remedial measures are admissible for certain purposes other than to prove culpability, such as to show ownership and control. However, Big already admitted in its answer that it owned and controlled the park and walkway, so that is not an issue in dispute. Therefore, the subsequent remedial measures should not be admitted.

(3) The judge's ruling will depend on the purpose for which Kelly is offering the evidence of Big's settlement offers. In civil cases, per public policy, evidence of offers to compromise is inadmissible

to prove or disprove the validity or amount of a disputed claim. However, such evidence is not necessarily inadmissible when offered for another purpose, such as proving bias or prejudice of a witness, responding to a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. It is likely that Kelly is offering this evidence to show that Big is liable; however, the facts do not specifically indicate that this is the case. Therefore, Big's objection certainly will be sustained if Kelly is introducing the settlement offers to prove liability, but it may be overruled if Kelly is introducing them for another purpose.

(4) The judge should overrule Kelly's objection. As noted above, evidence is admissible only if relevant. Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of an action more probable or less probable than it would be without the evidence. Often, evidence of similar prior acts is not relevant. However, here, evidence of Kelly's frequent walks *is* relevant to prove her knowledge of the defect in the walkway, which is at issue in the case. (Habit evidence also is admissible to prove that a person's conduct on an occasion was in conformity with that habit; however, it is uncontested that Kelly was walking on the walkway that day.) Therefore, the judge should admit the evidence of Kelly's frequent walks.

(5) The judge should sustain Kelly's objection. Evidence of character to prove the conduct of a person in the litigated event is generally not admissible in a civil case. The reasons given are that the slight probative value of character is outweighed by the danger of prejudice, the possible distraction of the jury from the main question in issue, and the possible waste of time required by examination of collateral issues. Kelly's conduct regarding a prior lawsuit is utterly irrelevant and immaterial in the present lawsuit.

ANSWER TO EXAM QUESTION NO. 3

The evidence in this case consists of the agricultural agent's testimony based on the airplane film and the grandson's photographs. Under the Federal Rules of Evidence, an expert may testify if the subject matter is one where scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or determining a fact in issue. In this case, if the agricultural agent's testimony will concern the cause and extent of the bean field damage, one can argue that it is scientific/specialized knowledge that will assist the trier of fact in making a determination as to the Harolds' and Plane-O's liability. Thus, the agricultural agent would be permitted to testify as an expert.

Here, Johnson wants the agricultural agent to base her opinion on the airplane film and his grandson's photographs. An expert may base her opinion on facts inadmissible in evidence if the facts are of a type reasonably relied upon by experts in the particular field. Therefore, the agricultural agent could base an opinion on the airplane film and the photographs and not admit them into evidence if other experts in the field would rely upon them in basing an opinion. Although the facts indicate that Plane-O refuses to allow its film to be used, if Plane-O is subject to the court's jurisdiction, Johnson can obtain the airplane film through discovery. The agricultural agent could then examine the airplane film and the photographs and provide testimony in court.

The airplane film and photographs also could be admitted into evidence if authenticated. Film/photographs are authenticated if identified by a witness as a portrayal of certain facts relevant to the issue and verified by the witness as a correct representation of those facts. The witness need not be the photographer so long as he is familiar with the scene depicted. Consequently, in order for the photographs to be admitted in evidence, Johnson or his grandson would have to testify. In order for the airplane film to be admitted, one of the pilots would probably have to testify. If Plane-O is subject to the court's jurisdiction, his pilots could possibly be subpoenaed to testify about the film. An argument might be made that Johnson could authenticate the film. However, he would have to be familiar with all the scenes depicted in the film, and not just his bean field.

ANSWER TO EXAM QUESTION NO. 4

(1) The objection will be sustained as to both George and Wilbert because the evidence is irrelevant. Relevant evidence is evidence that has a tendency to make the existence of any fact that is of consequence more or less probable than it would be without the evidence. Here, evidence that Dan was at the Beer Bust Bar prior to the accident is irrelevant. Such a proposition might be relevant to prove that Dan had been drinking alcohol prior to the accident; however, the blood alcohol test that was performed did not reveal any alcohol in Dan's blood. Thus, neither George nor Wilbert can be called to testify that Dan was celebrating at the Beer Bust Bar. [Note that if the evidence was relevant for other purposes, Wilbert could testify as to Dan's statement about his celebration because it is an opposing party's statement, but George could not because it is hearsay within hearsay.]

(2) The objection will be overruled as to Wilbert, but will be sustained as to George.

Wilbert can testify as to Dan's statement because it is an opposing party's statement, which is admissible nonhearsay. A statement made by a party and offered against that party is not hearsay. Here, Dan told Wilbur that he was talking on his cell phone and was not looking at the light. Dan's statement is now being offered against him and concerns a relevant fact in the case, i.e., the color of the light. Thus, the statement is admissible as an opposing party's statement.

George cannot testify as to what Dan told Wilbert because the statement is hearsay within hearsay. Hearsay within hearsay is admissible only if both the outer hearsay and the inner hearsay statements fall within an exception to the hearsay rule. As stated above, the statement from Dan to Wilbert is admissible. However, the statement from Wilbert to George recounting Dan's statement does not fall within any hearsay exception. Thus, George cannot testify as to Dan's statement to Wilbert.

(3) The objection will be overruled as to Wilbert, but will be sustained as to George.

Wilbert can testify as to whether Dan ran the red light because the evidence is relevant and because he is a competent witness. As stated above, relevant evidence is evidence that has a tendency to make the existence of any fact that is of consequence more or less probable than it would be without the evidence. Here, the evidence is relevant to prove Dan's liability. A witness is competent if he has personal knowledge of the matter and he declares that he will testify truthfully. Wilbert is competent because he has personal knowledge as to whether Dan ran the red light—he saw the accident happen. Additionally, if he testifies he will be under oath to tell the truth. Thus, the objection will be overruled as to Wilbert.

George cannot testify as to whether Dan ran the red light because he did not see the accident happen and therefore has no personal knowledge. He is relying on the statement made by Wilbert, which is hearsay not within any exception. Thus, the objection will be sustained as to George.

(4) The objection will be overruled as to both Ann and George. The purpose of the testimony would be to impeach Sally's credibility as a witness. To impeach a witness, a party can show that the witness has previously made statements that are inconsistent with some material part of her testimony. Here, Ann and George can both be questioned as to whether Sally failed to complain of pain in her back and neck at the scene of the accident. If Sally testifies in accordance with her deposition testimony (that her back and neck did hurt), the testimony of Ann and George can be used to impeach her.

(5) The objection will be overruled. The triage nurse's notes are admissible under the business records exception to the hearsay rule. Any writing or record made as a memorandum or record of any event is admissible in evidence if made in the regular course of any business. Entries in hospital records qualify under this exception to the extent they are related to the medical diagnosis or treatment of the patient. Additionally, business records can be used to prove the nonoccurrence or the nonexistence of a matter if it was the regular practice of the business to record all such matters. Here, the notes are admissible because they were made by the nurse in the ordinary course of her business—providing patients with medical care. Furthermore, it was likely the hospital's regular practice to record all of the patient's injuries. The document can be authenticated by having the custodian or other qualified witness testify to the identity of the record or by certifying in writing that the document meets the requirements of the business records exception. Thus, the objection will be overruled and the notes are admissible.